

VK&t

NEWSLETTER

2/2015

COMMERCIAL REGISTER IN 2015 – WHAT CANNOT BE MISSED!

Table of contents:

- I. Introduction
- II. New legal framework
- III. Commercial Register – definition, registered persons and registered data
- IV. Fundamental principles of existing legal framework
- V. Consequences of breach of obligation to file documentation
- VI. Registration by Notaries
- VII. Closing word

As of 1st May, 2015 new legislation affecting the area of the Commercial Register (the registration process) came into the force. This new legislation is brought by the Act No. **303/2013 Coll., on amendments of certain legal acts due to recodification of civil law**, which, *inter alia*, supplements missing statutory provisions specifying the fees for registration of entries in the Commercial Register executed by Notaries.

As of 1st May, 2015 the theoretical possibility to register a new entry in the Commercial Register by a Notary came into life.

As we find this novelty quite exiting, we feel it may be good to take a closer look at the new legal framework given for the Commercial Register. The aim of this Newsletter is to provide a short comparison of the old and new regulation principles and highlight to you the fundamental principles of the new framework with emphasis on the most important changes and emerging risks from this new regulation framework.

As of 1st January, 2014 the Commercial Register is regulated by a new single **Act No. 304/2013 Coll., on public register of legal entities and individuals (the “Public Registers’ Act”)**.

The Public Registers’ Act unites the fragmented legal regulation of all different types of public registers, so now we can apply the Public Registers’ Act not only to Commercial Register, but also to all different types of public registers such as associations, trusts, foundations, etc. registers¹.

With respect to the Commercial Register, the new legal framework replaces the legal framework given by the Act No. 513/1991 Coll., the Commercial Code, which was replaced as of 1st January, 2014 by the new Civil Code (Act No. 89/2012 Coll.) in the civil law recodification process in the Czech Republic². New legal regulation of the Commercial Register in many aspects follows the original regulation, however, it also introduces a number of different aspects and, as said above, we aim to bring these up to your notice.

1 Section 1 (1) Act No. 304/2013 Coll., on public register of legal entities and individuals

2 Section 3080 point 72 Act No. 89/2012 Coll., Civil Code

The legal definition of the Commercial Register remains unchanged under the Public Registers' Act³; it only represents one register from number of different types of public registers, which altogether represent the term “public register”.

As before, the Commercial Register mandatorily registers all business corporations and cooperatives, which fall under the regulation of the Act No. 90/2012 Coll., on Business Corporations and Cooperatives (the “**Business Corporation Act**”)⁴. Registered corporations therefore are public business corporations, special limited partnerships, limited liability companies, joint-stock companies and cooperatives. All of the above entities are considered to be entrepreneurs⁵.

Individuals (entrepreneurs) are divided by the Public Registers' Act into different groups⁶ and their incorporation is still based on the principle of voluntariness⁷, unless they meet statutory criteria prescribed upon the fulfilment of which the incorporation into the Commercial Register becomes mandatory. This will apply to any individual carrying out business activities on the territory of the

3 Section 42 and following of Act No. 304/2013 Coll., on public register of legal entities and individuals

4 Section 42 (a) Act No. 304/2013, on public register of legal entities and individuals

5 Section 421 (1) 1 Act No. 89/2012 Coll., Civil Code

6 Section 43 Act No. 304/2013 Coll., on public register of legal entities and individuals

7 Section 42 (b) Act No. 304/2013 Coll., on public register of legal entities and individuals

Czech Republic whose profit or income decreased by collected VAT, will reach or exceed during two immediately following accounting terms the sum of CZK 120,000,000. For such individual registration in the Commercial Register is mandatory⁸.

Commercial Register also lists other entities for which the registration is prescribed by law, such as state owned corporations⁹.

With respect to data entered in the Commercial Register¹⁰, these are in general adopted from the old legislation and supplemented by requirements given by the Business Corporation Act. This, for example, is the requirement to register the exact number of members of statutory body of a corporation or information concerning procurator proxy granted for individual branch and information whether the corporation formally opted-in for the regime of the new law (Business Corporation Act).

8 Section 45 Act No. 304/2013 Coll., on public register of legal entities and individuals

9 Section 42 (c) Act No. 304/2013 Coll., on public register of legal entities and individuals

10 Sections 25 and Sections 48–51 Act No. 304/2013 Coll., on public register of legal entities and individuals

Formal publicity principle

The new legislation is based on the formal publicity principle for all entries registered in the Commercial Register¹¹. This means public access to such entries by all, regardless whether the entity/individual whose data it concerns agrees to such publicity. General consent is presumed by the registration and the filing of the actual application for registration.

The formal publicity principle is reflected in the Public Registers' Act by the obligation of the Commercial Register to publish data about the registered entity (as well as documentation deposited in the Collection of Deeds), by means that allows distant access. In practice this means by internet database of the public register¹².

The formal publicity principle is not affected by the limitation of the right to publish birth number of an individual. The birth number gets still registered in the Commercial Register, but is not publicised or listed on the actual extract from the Commercial Register. The Commercial Register database is divided into two parts—public part and part opened only to authorised users within the court that administers the Commercial Register or other state authorities.

11 Sections 3–7 Act No. 304/2013 Coll., on public register of legal entities and individuals

12 Hampel, P. and Walder, I.: Sections 3–7 Formal publicity principle. Commentary on the Act on public register of legal entities and individuals (No. 304/2013 Coll.), ASPI

Material publicity principle

As in the previous legislation, the Public Registers' Act imbeds the material publicity principle for the Commercial Register (i.e. principle of good faith or public confidence in registered data)¹³.

This principle expresses the rule that all entries shown in Commercial Register reflect legally effective reality with respect to the registered entities and as such is recognised unless the relevant party know that the registered entry do not correspond to the factual status of the entity (for example a seat of the company differs from the address of the seat of the company registered in the Commercial Register).

The material publicity principle means that all entries registered in the Commercial Register (as well as content of any documents deposited in the Collection of Deeds) are effective *vis-à-vis* third parties as of the day of their publications. The above rule will not apply in situations when the registered entity is able to prove that a third party knew the registered information at an earlier date. The burden of proof lies with the registered entity in this case.

13 Sections 8–10 Act. No. 304/2013 Coll., on public register of legal entities and individuals

Possibility for exemption from the above material publicity principle is given during first 16 days from registration (publication in Commercial Register). During this period a party may prove that it had not been able to see the data registered. The burden of proof lies this time with the third party claiming the exemption from the material publicity principle¹⁴.

¹⁴ Hampel, P. and Walder, I.: Sections 8–10 Material publicity principle. Commentary on the Act on public register of legal entities and individuals (No. 304/2013 Coll.), ASPI

Collection of Deeds (*sbírka listin*) remains a part of the Commercial Register¹⁵. The Public Registers' Act sets which documents must be mandatorily deposited in the Collection of Deeds¹⁶ and imposes statutory obligations for the registered entities to deposit such documentation without any delay after the decisive day¹⁷.

Documents which must be deposited in the Collection of Deeds include namely: constitutional and foundation documentation and any amendments thereof, articles of associations, corporate decisions on the recall/appointment of statutory bodies, annual reports, closing of accounts statements, decisions regarding profit distribution, auditor reports, etc.

The obligation to deposit certain documentation in the Collection of Deeds is not new and had been implemented also in the old legislation, including the possibility of the court administering the Commercial Register to impose sanctions for breaches of the obligation. However the effect

15 Sections 66–74 Act No. 304/2013 Coll., on public register of legal entities and individuals

16 Sections 66–71 Act No. 304/2013 Coll., on public register of legal entities and individuals

17 Section 72 Act No. 304/2013 Coll., on public register of legal entities and individuals

of the original legislation had not been so good as it shows that vast majority of entrepreneurs simply ignores this obligation and does not file any documentation (for example in 2010 81 % of all registered entities did not file their financial statements and annual reports)¹⁸.

The aim of the new legislation is therefore to make the registered entities to comply with the statutory obligations for filing documentation in Collection of Deeds and to achieve this is by **tightening up**¹⁹ the possible sanctions, which may be applied.

Possible sanctions:

- **Financial fine²⁰ up to the amount of CZK 100,000**, (prior legislation had a limit up to CZK 20,000). The court may impose the fine if the registered entity will not file the mandatory documents even if it had been invited to do so by the court. The financial fine can be imposed repeatedly. On the other hand, the court also has an authority to remit the sanction at a later date.

18 Hampel, P. and Walder, I: Section 1 Public registers. Commentary on the Act on public register of legal entities and individuals (No. 304/2013 Coll.), ASPI

19 Švéda, M.: *Nezakládáte dokumenty do sbírky listin? Sankce zpřísněny*

20 Section 104 Act No. 304/2013 Coll., on public register of legal entities and individuals

- **Commencement of liquidation process of the registered entity**²¹, by means of court decision, in case the registered entity does not comply with obligations (notification for remedy) prescribed by Section 104 of the Public Registers' Act repeatedly or if breach of such obligations can result in serious consequences to third parties and such party proves its legal interest in the liquidation. The court must notify the entity concerned prior to the decision on liquidation and must provide it with remedy period. As breach of notification with serious consequences to third parties is considered failure to deposit documentation listed in the Public Registers' Act which include, inter alia, constitutional documentation, closing of accounts and annual reports of the registered entity²².
- The Public Registers' Act sets also a legal premise by which a member of statutory body of an entity, which does not comply with the obligations prescribed by the Public Registers' Act is in breach with his statutory **duty to act with care of diligent manager**²³. This can result in the obligation of the member of the statutory body to compensation of damages²⁴, or his recall from the office²⁵. This premise can be refuted by the member of the statutory body who will bear the burden of proof in this case.

21 Section 105 Act No. 304/2013 Coll., on public register of legal entities and individuals

22 Section 106 (1) Act No. 304/2013 Coll., on public register of legal entities and individuals

23 Section 106 (2) Act No. 304/2013 Coll., on public register of legal entities and individuals; Section § 159 (1) Act. No. 89/2012 Coll., Civil Code

24 Section 53 Act No. 90/2012 Coll., on Business Corporations and Cooperatives

25 Section 65 Act No. 90/2012 Coll., on Business Corporations and Cooperatives

- The breach of the filing obligation is also considered to be **administrative offence**²⁶ pursuant to the Act No. 200/1990 Coll., Administrative Offence Act, for which the responsible individual may be awarded a **financial sanction** up to CZK 50,000 or may be granted a restrictive order by which he will be **forbidden to carry out activities** for a period up to one year.
- Failure to publish the financial statements and closing of accounts report is also considered to be **administrative tort** pursuant to the Act No. 563/1991 Coll., Accounting Act²⁷. For such tort the authorities may grant a **financial fine** up to the amount of 3 % of the value of active part of the assets, which may have significant effect.
- The most painful (although probably the least common) sanction can be imposed for the commitment of actual **criminal offence** falsification of data concerning the economical standings pursuant to the Act No. 40/2009 Coll., Criminal Code²⁸, for which the liable party may **face imprisonment up to 2 years or ban on activities**. For criminal liability the law requires a wilful conduct, which shows to be very difficult in practice to actually be able to prove. Also the breach must result in some limitation or threat to third party rights. The criminal liability lies with the members of the statutory body of the corporation.

26 Section 24 (1) (c) point 2 Act No. 200/199 Coll., Administrative offence Act

27 Section 37a) (1) (h) Act. No. 563/1991 Coll., Accounting Act; Tichý, L. and Hrabánková, M.: *Povinnost založit účetní závěrku do sbírky listin po 1. 1. 2014*

28 Section 254 (2) Act No. 40/2009 Coll., Criminal Code

- Last, but not least, the entrepreneurs may also face **criminal liability of the legal entity** pursuant to the Act No. 418/2011 Coll., on the criminal liability of legal entities, as it refers to Section 254 of the Criminal Code²⁹ and classifies the above action (falsification of data concerning the economical standings) as criminal conduct of persons acting on behalf of the relevant legal entity (members of statutory and controlling bodies, employees, etc.)³⁰. This may result in liquidation of the legal entity, monetary sanctions with daily rate between CZK 1,000 and CZK 2,000,000 or ban of activities for a period between 1 to 20 years or other sanctions such as ban from public tenders, ban from receiving subventions or subsidies, etc.

The new legislation undoubtedly reflects the demands for bigger transparency of entities registered in the Commercial Register, which the aim for the Commercial Register (together with its Collection of Deeds) is to serve as information system of public administration, source of information of creditors, shareholders and general public. Therefore it is desirable that up-to-date information and data can be found there.

29 Section 7 Act. No. 418/2011 Coll., on the criminal liability of legal entities

30 Section 8 Act No. 418/2011 Coll., on the criminal liability of legal entities; Hampel, P. and Walder, I.: Sections 1–129. Commentary on the Act on public register of legal entities and individuals (No. 304/2013 Coll.), ASPI

Registration of new entries in the Commercial Register (and other registers) will be possible to be executed by Notaries as a result of the new legislation³¹.

As of 1st January, 2014 the Public Registers' Act authorises the Notaries to register entries in the public registers if requested by the authorised entity and if statutory requirements for the registration are met. Option to decide whether the registration will be carried out by the Notary or if the applicant will proceed via the court channel is given to the actual applicant.

If requested by the applicant, the Notary can make the registration of a new entry under the following conditions:

- The registered data have foundation in the notarial deed (**foundation notarial deed**),
- The foundation notarial deed includes **express declaration of the Notary** that the content of the legal acts is in compliance with the applicable legislation and constitutional documentation of the entity concerned and/or that any other necessary formalities have been met,
- The Notary **has received any and all documents**, which are required for the registration or for the depositing in the Collection of Deeds³².

31 Sections 108–118 Act No. 304/2013 Coll., on public register of legal entities and individuals

32 Section 108 Act No. 304/2013 Coll., on public register of legal entities and individuals

The registration will be always carried out by the Notary, which executes the relevant notarial deed³³.

As said above, the legislation had a legal framework for the registration process by Notaries since 1st January, 2014. Unfortunately, in practice this had been impossible due to the fact that the legislation did not prescribe the rate of the actual registration fees and also the relevant software system had not been working³⁴.

As of 1st May, 2015, thanks to the Act No. 303/2013 Coll., and the implementation of the necessary software system, there are no more obstacles preventing this and the Notaries may proceed with the registration.

Notarial Registration Fees will be following:

- first registration of a new joint stock company CZK 8,000 (CZK 12,000 if registered via court),
- first registration of a new entity (save for a joint stock company) CZK 2,700 (CZK 6,000 if registered via court) and
- registration of a change of an entry CZK 1,000 (CZK 2,000 if registered via court)³⁵.

33 Section 110 Act No. 304/2013 Coll., on public register of legal entities and individuals

34 Neubauer, R.: *Zápis do veřejného rejstříku prováděný notářem*

35 Act No. 549/1991 Coll., Court-fees Act (Tariff No. 39 and No. 11)

On top of the set Notarial registration fees, the applicant will also be obliged to pay additional fees as Notarial remuneration for the registration and drawing up the relevant notarial deed.

The new legislation should decrease the entrepreneurs' costs relating to the obligatory registration in the Commercial Register and also speed up the registration process. The new legislation aims also to decrease the workload of the courts which have been administering the Commercial Register until now and therefore cut down the cost of the administrative force³⁶.

36 Neubauer, R.: Zápis do veřejného rejstříku prováděný notářem, and Nevrkla, L.: Přímé zápisy do obchodního rejstříku notáři

To summarise we can say that the legislation introduced by the Public Registers' Act in most aspects follows up to the previous legislation, but also introduces number of novelties, which the business public should take into consideration to protect itself against any unwanted surprises and consequences which may arise if the statutory obligations are not complied with. At the same time the new law also allows the entrepreneurs to cut down their administrative costs and opt for the faster registration process with the support of Notaries.

We believe that the above summary will allow you better orientation in the new law. We are available for all your requests for any additional information.

Editor: JUDr. Magda Stárková, advocate, email: starkova@akvk.cz

Our newsletters are prepared in order to provide general guidance on relevant matter and cannot be considered as exhaustive professional advice. We are not able and cannot address any specific circumstances or needs in this newsletter. We do not recommend acting upon the information contained therein without obtaining independent professional advice first which we will be glad to provide at your request. No representation or warranty is given as to the accuracy or completeness of the information contained in this publication.