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## NEWSLETTER 29.12. 2020

Novelization of the Business Corporation Act 2021

## **NOVELIZATION OF THE BUSINESS CORPORATION ACT**

**As of 1<sup>st</sup> January 2021, the major novelization of the Business Corporation Act (Act No. 33/2020 Coll., amending Act No. 90/2012 Coll., on Business Corporations and Cooperatives, and other related laws) becomes effective.**

**THE MOST IMPORTANT CHANGES include, in particular, the following:**

**(i) New rules for profit distribution**

The new legislation explicitly specifies that **a business corporation may distribute the profit** and newly also the share in other own resources **on the basis of ordinary or extraordinary financial statements** approved by the supreme body of a business corporation (i.e. by the General Meeting) **until the end of the accounting term** following the accounting term, for which the financial statements were prepared.

Thus, it is newly stipulated that the share in other own resources can be determined on the basis of ordinary or extraordinary financial statements, and further that the decision on profit distribution may be adopted by the General Meeting of a business corporation at any time during the entire accounting term following the accounting term, for which the financial statements were prepared (currently it was possible only within 6 months from the end of the respective accounting term).

**(ii) Rules for advance payments for the profit share**

The new legislation allows only **advance payments for the profit share**, not advance payments for share in other own resources.

An advance payment for the profit share may be paid out during the current accounting term only **on the basis of interim financial statements** clearly showing that the business corporation has sufficient funds for the profit distribution. The advance payments paid out must reflect the economic situation of the business corporation for a longer period of time (with respect to its economic results of previous years), not just the current economic result, which may be temporary.

The novelization also lays rules for **return of advance payments**, within 3 months from the date on which ordinary or extraordinary financial statements were or should have been approved, for example, in a situation where the profit is not distributed at all or is distributed in a lower amount than the received advance payments.

**Pursuant to the relevant transitional provision**, the abovementioned rules will apply for the first time to advance payments for the profit share paid out in the accounting term commencing after the effective date of the above stated novelization (i.e. in 2021).

**(iii) A new obligation of legal entities appointed as a member of a statutory or other elected body**

If a member of a statutory or other elected body of a company or a cooperative is **a legal entity**, it **is obliged to appoint** (without undue delay) **an individual**, who meets statutory requirements for the performance of the relevant office, **as the representative of such legal entity in the relevant body**.

The appointed individual representative has to be registered in the Commercial Register. **Without the parallel registration of its appointed representative**, the legal entity will not be registered in the Commercial Register as the member of the elected body.

If the legal entity does not authorize its representative and she/he is not registered in the Commercial Register within 3 months from the day when the legal entity was appointed as a member of the statutory or other elected body, **its office will terminate by virtue of law**.

**According to the relevant transitional provision**, a legal entity that is a member of an elected body of a company or a cooperative as of the effective date of the new legislation (i.e. as of 1<sup>st</sup> January 2021) is obliged to appoint an above mentioned individual as its representative and to register her/him in the Commercial Register **within 3 months from the effective date of the novelization (i.e. until 31<sup>st</sup> March 2021)**, otherwise the office of the legal entity will terminate.

**(iv) Modification concerning the Executive Service Agreement (the “Agreement”)**

An Executive Service Agreement in a company has to be made in writing and approved, including its amendments, by the supreme body of the company (i.e. by the General Meeting). The law newly specifies **the consequences of a failure to approve the Agreement by the supreme body of the company**. Accordingly, **such an Agreement will not become effective**.

A duly approved Agreement shall become **effective as of the date of its execution or as of the date of the commencement of the office**, whichever occurs later. However, the supreme body of the company may decide otherwise.

In case that the Agreement or its part concerning the **remuneration** is invalid for reasons attributed to the company, or due to force majeure, the remuneration is determined as **usual remuneration** at the time of execution of the Agreement, or commencement of the office. In order to avoid possible future disputes it is advisable that the written Agreements are executed and they include clear rules for remuneration, or statement that the performance of the office is not remunerated.

If there is a **conflict between the Agreement and the constitutional document of the company (i.e. Memorandum or Articles of Association)**, the constitutional document shall prevail. Nevertheless, if the Agreement has been approved by the majority vote required for the amendment of the Memorandum of Association/the Articles of Association, the Agreement shall prevail.

**Pursuant to the transitional provision**, in case of a conflict between the Memorandum of Association / the Articles of Association and the Agreement approved prior to 1<sup>st</sup> January 2021, the existing provisions of the Business Corporation Act effective until 31<sup>st</sup> December 2020, shall apply.

**(v) Payment of a monetary contribution in a low capital limited liability company**

It is newly possible to pay a **monetary contribution to a limited liability company also in another way (i.e. also in cash)**, provided that the amount of all cash contributions **does not exceed a total of CZK 20,000**. As of now all monetary contributions had to be wired to the company's bank account. Therefore, if the amount of all contributions is in such lower amounts there is no obligation to open a bank account designated for administration of such contributions.

**(vi) Presence of a third party at the General Meeting of the company**

According to the current legislation, only a shareholder may attend the General Meeting, personally or represented by another person. The novelization allows a shareholder to take **one other person** (e.g. a lawyer) with him to the General Meeting, whereas the presence of more than one person may be allowed and other rules may be specified by the Memorandum of Association / the Articles of Association. However, the third party must always be bound by at least the same confidentiality obligation as the shareholder.

**(vii) Shares with the right to appoint and recall one or more executives/members of the Board of Directors (Supervisory Board)**

The novelization incorporates a new possibility for limited liability companies and joint stock companies to determine in their constitutional documents that their shares are carrying **the right to appoint and recall one or more executive directors or members of the Board of Directors.**

In addition, the Articles of Association of a joint stock company can also state that a **share is associated with the right to appoint one or more members of the Supervisory Board and to recall them.**

Nevertheless, the total number of such appointed executive directors in a limited liability company may not exceed the number of executives appointed by the General Meeting of the company and the total number of such appointed members of the Board of Directors in a joint stock company may not exceed the number of the Board of Directors appointed by the General Meeting, or Supervisory Board of the company. Accordingly, for example, in a Board of Directors consisting of 3 members, 1 member may be appointed by a shareholder and 2 members shall be appointed by the General Meeting, or the Supervisory Board.

**(viii) Changes in the monistic corporate governance of a joint stock company**

**The monistic system will newly consist only of the Administrative Board, which will be the company's statutory body.** The novelization no longer regulates the position of the Statutory Manager (Director).

The only mandatory body of a joint stock company with a monistic system will thus be **the Administrative Board**, which will be responsible for **business management and supervision of the company's activities**.

The Administrative Board will also **procure for proper bookkeeping, submit** to the General Meeting **for approval the financial statements** and proposals for profit distribution and other own resources or payment of losses.

The Administrative Board shall consist of three members, unless provided otherwise in the Articles of Association (i.e. the Administrative Board may also consist only of one member, if so provided by the Articles of Association). The term of office of members the Administrative Board shall be three years, unless provided otherwise in the Articles of Association or in the Executive Service Agreement.

The members of the Administrative Board will be appointed and recalled by the General Meeting, unless it is determined in the Articles of Association that the right to appoint one or more members of the Administrative Board and to recall them is associated with the share (see above).

**(ix) Transitional provisions**

Business corporations will be obliged **to adapt and file their constitutional documents with a registration court within the transition period of 1 year from the effective date of the novelization (i.e. until 1<sup>st</sup> January 2022)**. However, at the same time there is a basic rule stipulating that if any provision of the Memorandum of Association / the Articles of Association is in conflict with the mandatory provisions of the amended law, it is being terminated by virtue of law already as of the date of effectiveness of the novelization, i.e. as of 1<sup>st</sup> January 2021 (this shall apply, for example, to: (i) rules for profit distribution and other own resources distribution, (ii) rules for the advance payments, or (iii) the rule that a limited liability company must have at least one share with attached voting rights, etc.).

**Within 6 months** from the effective date of the novelization (i.e. until 30<sup>th</sup> June 2021), business corporations will be obliged to **registered in the Commercial Register** information that has not yet been registered in the Commercial Register (e.g. (i) in case of a joint stock company, in addition to the amount of the registered capital also the extent of its payment, (ii) other rights in rem relating to a share in a business corporation – e.g. pre-emption right, (iii) in case of a limited liability company,

the designation of a share, if the shareholder may own more than one share, (iv) commencement of insolvency proceedings or other similar proceedings concerning a foreign person, etc.) **and to deliver to the Collection of Deeds** the documents which have not yet been filed, unless the law provides otherwise (e.g. a proposal for the distribution of other own resources, a report on business activities and the state of its assets in case of a joint stock company, which does not prepare an annual report under the Accounting Act, an expert opinion reviewing the report on relations).

**An obligation of a legal entity** (which was a member of a statutory or other elected body of a company or a cooperative prior to 1<sup>st</sup> January, 2021) **to appoint and register an individual as its representative** must be fulfilled, as mentioned above, **until 31<sup>st</sup> March 2021**, otherwise the office of the legal entity will terminate.

We hope the above summary will ease your orientation in the new legislation. We are available for any of your additional requests or information or legal assistance in this area.

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