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Topical comments on the distribution of profit in capital companies – an interpretation shift

As the deadline to complete financial statements is drawing closer (for most companies) it is time to recall the legislative conditions for possible considerations on the distribution of profit and other equity funds. From the tax perspective, most distributions of dividends among capital companies are exempt from income tax; however, the interpretation of the legal framework, which limited the deadline to make a decision on profit distribution, has shifted.

Recently, there has been a significant shift in the interpretation of the rules for the distribution of equity funds of capital companies. There was a change in the use of the regular financial statements for making a decision on the distribution of profit after the expiry of the six-month deadline for the approval of the financial statements by the General Meeting from the end of the reporting period as stipulated by law. There is a new interpretation that distribution based on regular financial statements may also take place after more than six months after the expiry of the reporting period.

The above-specified approach has never resulted from the wording of law; it was inferred in judicature in the period of the then-effective Commercial Code. The Supreme Court[1] inferred that the deadline to call the regular General Meeting to approve the regular financial statements is also the deadline within which the financial statements may give a true and fair view of accounting and within which thus shareholders can make qualified decisions on profit distribution. This conclusion, albeit criticised, was enforced in practice.

After the effective date of the new Civil Code and the Act on Business Corporations, it was still unclear whether the above-mentioned court interpretation would be adopted in respect of the new law. Similarly as a number of other unclear issues, this matter was discussed for quite a long time, however, the professional legal public has come to the conclusion[2] that under the new law this approach will not be implemented. The key argument is the expansion of rules to pay out equity to include the insolvency test, which was not required by the Commercial Code.

In addition to the limits for the equity distribution contained in the provisions for a limited liability company and a joint-stock company[3], the Act on Business Corporations also stipulated a "golden" rule with respect to the payment, which is fully within the competence of the statutory bodies. The rule is the above insolvency test. The Act refers to the definition of bankruptcy under the Insolvency Act. In practice, it means that a statutory body should make an economic consideration and a corresponding calculation before funds are provided to shareholders.

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[1] Decision file no. NS 29 Cdo 4284/2007 of 30 September 2009

[2] Štenglová, I., Havel, B., Cileček, F., Kuhn, P., Šuk, P.: Act on Business Corporations. Comments. 2nd issue. Prague: C. H. Beck, 2017, p. 688. *"Under the Commercial Code regime, the Supreme Court has inferred that the deadline to call the General Meeting... is logically... the deadline within which the results of the financial statements to be used for the discussion of the regular General Meeting may be considered to be those that may give shareholders a true and fair view of accounting of a joint-stock company based on which they may make a qualified decision on profit distribution" (NS* 29 Cdo 4284/2007). *Although the Act on Business Corporations also determines that "a profit share is determined based on regular or extraordinary financial statements approved by the highest body of the business corporation" (Section 34 (1)) and, at the same time, it provides for the deadline to discuss regular financial statements of a joint-stock company we believe that the above-mentioned conclusions will no longer be implemented. It is because that the new Act – as opposed to the Commercial Code – explicitly determines the 'insolvency test' (Section 40 (1)), which should be sufficient to achieve the goal pursued by the above-quoted decision (ie to prevent from paying profit shares "at the expense" of a company's creditors). Moreover, in companies that have issued shares with a fixed profit share (refer to Section 276 (3) and Section 348 (4) and comments thereon), an opposite conclusion would cause inequality between shareholders holding this type of shares and other shareholders; as the right for a fixed profit share for the previous reporting period arises as of the first day of the following reporting period (if profit was generated in the previous reporting period) whereby Section 348 (4) only provides for the due date, the shareholders (as opposed to other shareholders) would receive a fixed profit share even if the General Meeting fails to decide on profit distribution within six months."*

[3] Sections 161 (4) and 361 (1) and (2) of Act no. 90/2012 Coll., on Business Corporations and Cooperatives (the Act on Business Corporations), as amended

The GDPR is Round the Corner. Is your HR Prepared?

Do you collect or otherwise process personal data of employees? Do you know how you should protect information, which data may be disclosed and which sanctions may be imposed upon you if you are not compliant with the new General Data Protection Regulation ("GDPR")? Listed below are answers to five fundamental questions.

Which measures need to be taken to ensure accurate data protection?

It is especially important to set appropriate technical and organisational measures, such as preparation of an internal personal data protection policy, introducing appropriate security measures, ie a hierarchy of authorised employees' access to personal data, password-protected access to databases, automatic logout, lock-up premises etc.

It is also important to maintain records on personal data processing and assess impacts on personal data protection. Furthermore, it will be necessary to revise relationships with contractual partners processing personal data for the employer as part of the provision of services. Among other things, the GDPR places new requirements in terms of the content of processing agreements.

Main recommendation: What is the ideal manner of setting measures in line with the GDPR?

Make sure that personal data are processed by the HR department on a legitimate basis, ie based on determined legal bases, and that the rights of data subjects are observed as appropriate and exercised by employers if necessary.

What the date 25 May 2018 entails: certainly a nice spring day but predominantly the date on which the **General Data Protection Regulation (GDPR) becomes effective**, defining:

- Legal bases for personal data processing;
- Rights of data subjects;
- Duties of controllers and processors;
- Data protection officer (DPO).

Failure to comply with all statutory requirements may result in supervision by authorities and sanctions: the **Personal Data Protection Office** may impose a fine of up to EUR 20 million, or 4% of the total worldwide turnover. Aside from that, compliance with statutory duties may also be supervised by **labour inspectorates** controlling whether the employee's privacy has not been invaded at workplace. This involves, for example, e-mail monitoring, use of CCTVs etc. Penalties of up to CZK 1 million may be imposed due to violation.

What is the major point of focus for HR departments?

With respect to the GDPR, employers must ensure that the HR department only processes personal data in the necessary scope in line with determined legal bases and for a specific purpose. Concurrently, we recommend that personal data processing primarily takes place on legal bases other than a consent.

How will the new regulation affect sharing personal contact information among colleagues, such as the date of birth because of a birthday party?

This will usually depend on how the information was obtained by the respective colleague. That is whether the date of birth was disclosed to the colleague for employment purposes and whether the relevant employee gave their consent to disclosing such data within the organisation, such as on the intranet.

Failure to comply with the rules is subject to potential sanctions. How will compliance with the GDPR be controlled?

The existing draft of the so-called "Adaptation Act" assumes that the Personal Data Protection Office (the "Office") will proceed under the existing Control Rules. We believe that after the GDPR and the Adaptation Act have taken effect, inspections by the Personal Data Protection Office should not substantially differ from the current practice. It may also be assumed that the Office will make inspections on a random basis as well as based on complaints, as has been the common practice so far.

Nevertheless, as the Office's restructuring is planned due to the GDPR as part of the Adaptation Act, it is now impossible to accurately determine how inspections will be realised. The current wording of the Adaptation Act no longer includes the function of inspectors. The Office's structure will newly include the Chairman and two Vice-chairmen. The current inspectors should complete their term of office under the existing legislation with subsequent inspections being realised by the Office's public servants with appropriate qualifications.

Contacts

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