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News No. 3/2012
Recodification of Czech Private Law – Part 3

Limited Liability Company after recodification of private law

In the News No 2/2011 and 6/2011 we informed you of negotiations regarding the new Civil Code and some changes this recodification shall bring. The path of the bills through the legislative process was completed with President of the Republic's signature on 20 February 2012.

The Chamber of Deputies of the Czech Republic definitively decided that laws concerning recodification of private law shall become effective on 1st January 2014. There is less than two years left to prepare for the new legal regulation. In this issue of the News we bring you information on some changes the recodification shall bring with regard to limited liability companies.
As we have informed you before, recodification does not involve only the new Civil Code but, i.a. also the completely new Business Corporations Act (NBCA). As it follows from its title, this Act will regulate part of the present Commercial Code regarding business companies.

The Business Corporations Act will preserve the basic types of current business corporations. There will be four types of business companies, cooperative and, of course, also reference to the legal regulation of corporations according to European regulations (e.g. the European Company/Societas Europeae).

Nature of a limited liability company

The limited liability company shall remain a capital company. This is not only expressed in the wording that designates a limited liability company and joint-stock company, but above all by the fact that this type of company fulfils the basic elements of a capital company, i.e. limitation or even absence of the liability of members for the Company's debts, separation of its property from the members' property, which prevents members from easy access to the Company's property, and the possibility to charge persons other than the company members with the management of the company. These elements will remain unchanged.

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Registered capital

By contrast the regulation of the registered capital will change. The threshold for the contribution will be CZK 1; therefore, also the registered capital, or the aggregate of the individual contributions, may amount to only 1 CZK. This measure is related to a deflection from the protection of creditors by means of the registered capital, which proved highly ineffective. The creditor protection shall be ensured by modified obligations of members of statutory bodies as well as the obligation not to make payments from the company (including distribution of profits) if this would cause the bankruptcy of the company.

Abolition of the ban on chaining

Liberalization of the legal regulation also abolishes the maximum number of fifty members and abolishes the ban on so-called chaining, i.e. when a limited liability company with a sole member is the sole member of another limited liability company. With respect to the publicity of data on members in the Commercial Register it shall be left to the discretion of the creditors or possible prospective business partners of the company to consider the risks against which the ban on chaining as well as the restriction on the maximum number of members shall protect them.

Types of business shares

Under the new legislation, there will be the option to define in the memorandum of association other types of business share besides the common business share; those business shares will be connected only with some rights, e.g. with the right to the dividend. One member will be allowed to hold more business shares, also of the same type.

Equity certificate

In accordance with the new Business Corporation Act, members will have the option to stipulate in the memorandum of association that rights connected with business shares shall be incorporated into a so-called equity certificate that will be a security transferable to order. Hereby, the transferability of business shares shall become easier since an equity certificate may be transferred by endorsement. Equity certificates cannot be, however, issued in dematerialized form and are not negotiable on the European regulated or other public market.

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Limited Liability Company in Germany

By way of comparison of the above-mentioned information regarding the new Czech regulation of the limited liability company we would like to present a view of the German regulation of this company type (German Gesellschaft mit beschränkter Haftung, abbreviated as GmbH).

Types of business companies in Germany

Companies may be divided into personal and capital companies.

Civil law company (German Gesellschaft bürgerlichen Rechts, abbreviated as GbR) ranks as the most important of the personal companies, being the basic form of the personal company, unlimited liability company (German offene Handelsgesellschaft, abbreviated as oHG) and limited partnership company (German Kommanditgesellschaft, abbreviated as KG). Further personal companies are silent partnership (German stille Gesellschaft), European economic interest grouping (German europäische wirtschaftliche Interessenvereinigung, abbreviated as EWIV) and partnership. A special form of a limited partnership company is corporate partnership (GmbH & Co. KG) and most open corporations (Publikumsgesellschaften).

The most important capital companies are the union, which is the basic form of capital companies, the limited liability company (German Gesellschaft mit beschränkter Haftung, abbreviated as GmbH) and the joint stock company (Aktiengesellschaft, abbreviated as AG). Other capital companies are partnership company limited by shares (German Kommanditgesellschaft auf Aktien, abbreviated as KGaA), which is regulated in sec. 278 – 290 Joint Stock Companies Act, cooperative (German Genossenschaft, abbreviated as eG), regulated by the Cooperatives Act, and European Joint Stock Company (German Europäische Aktiengesellschaft), regulated by the Council Regulation (EC) No 2157/2001, European Company Introduction Act (SEEG) and European Company Implementation Act (SEAG).

Limited Liability Company

A limited liability company is a capital company. Guaranteed capital is referred to as the registered capital. Therefore, the company is independent of its members.

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Nature and incorporation of a limited liability company

A limited liability company is a business company. It may be founded for any purpose. As a legal entity, the limited liability company has own legal personality. It can acquire ownership, may be a party to legal proceedings and may become member of other companies (e.g. may be the general partner in a limited partnership company having the form of GmbH & Co. KG).

A limited liability company is founded upon subscription to the memorandum of association (bylaws), which must be certified by notary. If a limited liability company is formed by a sole member, the company is founded upon the letter of incorporation.

The memorandum of association must contain:
Trade name and registered office,
Subject of business,
Amount of the registered capital,
Contribution of each member.

A limited liability company must have registered capital of a minimum amount of 25,000 EUR. Registered capital consists of contributions of the individual members. The business share of each member, which is determined according to the amount of its contribution, is decisive for voting rights and distribution of profits.

The legal existence of a limited liability company as a legal entity commences upon its incorporation (registration in the Commercial Register). In the time between approval of the bylaws and the registration in the Commercial Register the company exists as a so-called future GmbH. If legal acts are made on behalf of the company, members are personally liable.

Bodies of a limited liability company

As with all capital companies, the company bodies are responsible for the business management of the company and act on its behalf; the bodies need not be members of the company (bodies outside the company).
The bodies of a limited liability company are the managing director who acts on behalf of the company and manages the company, the general meeting which is the ultimate body of the company, and the company may establish a board of supervisors.

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Liability

The company is liable for its obligations against its creditors with its entire property.
For the company's liability for the harmful conduct of its bodies the provisions of the Civil Code regarding liability for the bodies shall apply mutatis mutandis.
In case of breach of the duty to act with due care and diligence, the managing directors are liable for the damage incurred jointly and severally.

Dissolution of a limited liability company
The company terminates its legal existence upon dissolution and liquidation. Grounds for dissolution are regulated in the Limited Liability Companies Act.

The Supreme Court's position on property disposals between related companies

On 8 February 2012 the Supreme Court of the Czech Republic issued in case file number 31 Cdo 3986/2009 a judicial decision on most discussed issue.
The Great Senate of Civil and Commercial Division of the Supreme Court adjudicated the validity of a contract on the transfer of immovables between related companies to which sec. 196a (3) Commercial Code shall apply. Before transferring the property no mandatory opinion had been prepared by a court-appointed expert to set the price in this particular case. The expert had conveyed the normal price in advance only verbally to the transferor ; the immovables were sold at this price. An expert opinion stating the same price was prepared by the court-appointed expert at a later date.

In the new judgment, the Great Senate derogated from its previous decisions (and a strict interpretation of the relevant provision) according to which failure to submit an expert opinion always caused absolute invalidity of the contract of transfer of property which is subject to sec. 196a (3) Commercial Code. According to the corrected interpretation the absence of an expert opinion should not be the only premise that will lead to the annulment of a legal act. From now on, it should be examined whether the agreed price is less advantageous for the company the property of which shall be protected by the above-mentioned provision than the normal price for the given location and time.

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The Supreme Court declared that if the price agreed in the contract of transfer of property corresponds to the normal price or is even more advantageous, the absence of an expert opinion does not cause absolute invalidity of such contract of transfer of property.

Tendencies against a strict interpretation of sec. 196a Commercial Codewhich causes significant application difficulties in the expert and the lay public, are welcome indeed. However, it remains under question how the price should be agreed in practice so that the risk of possible absolute invalidity of legal acts is always prevented with certainty. Accordingly, it is recommendable that the parties to such transfers comply with the present provision and obtain a court-appointed expert's opinion regarding the property transfer in each case.

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