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CHANGES IN CORPORATE LAW RESULTING FROM AN AMENDMENT TO THE COMMERCIAL CODE

At the end of April 2015 the National Council of the Slovak Republic adopted Act No. 87/2015 Coll., which amends and supplements Act No. 513/1991 Coll. Commercial Code, as amended, and also amends and supplements certain acts (the Amendment). The Amendment will significantly affect the content of the corporate law in Slovakia.

The Amendment was approved in priority legislative proceedings relating to the so-called Váhostav-SK case. Its main purpose is to prevent preferential treatment of creditors to the detriment of shareholders of companies, who, for obvious reasons, strive to minimize their financial losses.

It also introduces several new legal institutes such as the "register of disqualifications" or the term "company in crisis". Compared with the original plan from the end of 2014, the provisions introducing the so-called "€1 limited liability company" – the aim of which was to make business more accessible for starting entrepreneurs – were not included in the Amendment.

The Amendment will come into effect gradually. Part of its provisions came into force on 29 April 2015 and 1 July 2015, but its most important provisions will come into force as late as 1 January 2016.

Here we provide an overview of the most important changes in corporate law resulting from the Amendment and point out specific portions that will affect the everyday dealings of businesses in the Slovak Republic.

Prohibition to Perform the Office

The Amendment specifically provides that it is possible to disqualify a natural person, by a respective judicial decision, from performance of the office of a statutory body, member of supervisory body, head of organizational unit of an enterprise, head of enterprise of a foreign person, head of organizational unit of enterprise of a foreign person or "procurist". This is known as a decision on exclusion. The prohibition to perform the office will apply for a period specified in the decision on exclusion or for three years from the effectiveness of the decision on exclusion.

Under the Amendment, only a decision expressly stipulated by law can serve as a decision on exclusion. Currently, only two types of judicial decisions serve as decisions on exclusion, namely (i) a judicial decision on violation of the obligation of the statutory body to file in a timely manner a bankruptcy petition (Section 74a (6) of Act No. 7/2005 Coll. on Bankruptcy and Restructuring) and (ii) a decision issued in criminal proceedings prohibiting to undertake the activity to perform the office (Section 61 (10) of Act No. 300/2005 Coll. Criminal Act). Individual petitions for exclusion are inadmissible.

A natural person affected by the decision on exclusion (the excluded representative) is obliged to notify its issuance to all affected companies in which this person holds one of the offices described above. Upon effectiveness of the decision on exclusion the excluded representative automatically ceases by law to hold all specified offices even if it fails to notify all companies or cooperatives.

To preserve the legal certainty of third parties entering into legal relationships with a company that is represented by the excluded person, the person acting as the excluded representative will become liable for the obligations resulting from all legal acts performed by it as the excluded representative.

The change will come into force on 1 January 2016.

Register of Disqualifications

As to the above-mentioned competence of courts to decide on exclusion of persons from the performance of the office of a member, the Amendment introduces also a register of disqualifications. It will record data on natural persons which, by judicial decision, may not hold the above-mentioned offices.

The court that will issue a first-instance decision serving as a decision on exclusion will also be obliged to issue a so-called disqualification letter and send this, together with a copy of the decision on exclusion, to the District Court Žilina. This court will maintain the register of disqualifications for the entire territory of the Slovak Republic. The data from the disqualification letter will be subsequently recorded in the register of disqualifications and an extract from this register will be sent by the District Court Žilina to relevant courts that maintain the commercial register. The registry court will then, even without an application, make a deletion of the excluded person from the commercial register.

The register of disqualifications will be a non-public register but, subject to a fee, applicants will be able to retrieve information showing whether or not the register of disqualifications contains a record about them.

The change will come into force on 1 January 2016.

Paying Up the Registered Capital

The Amendment also brings one practical change relating to establishing companies. The Amendment cancels the obligation to make the monetary contributions to a special account established in a bank, as well as the obligation to attach to the application for the company's registration in the commercial register a bank statement showing that the monetary contribution has been paid. Sufficient proof of payment of contributions when filing an application for the company's registration in the commercial register will be, as it was in the past, a written declaration of the contributions administrator confirming that the contribution has been paid.

The change will come into force on 1 January 2016.

Resignation from the Office

Under the Amendment, resignation from the office of a member of a statutory body or supervisory body of a company must be in writing. The deed of resignation requires the individual's own signature in the presence of a notary public or its authorized employee. This will not apply if such person waives the office directly at the session of a corporate body which is entitled to appoint or elect a new member of the body.

In the case of a limited liability company, the Amendment also explicitly stipulates that if a member of the corporate body waives his or her office directly at the session of a general meeting, the signature of the chairman of the general meeting on the minutes of general meeting must be officially verified.

The change came into force on 29 April 2015.

Non-Cash Loan from Shareholder

If a limited liability company is being provided with a loan, or similar payment that is its economic equivalent, by its shareholder or person under Section 67c (2) of the Commercial Code, then under the Amendment such loan or similar payment "can only be provided in a manner other than in cash." In other words, shareholders or designated related parties can provide loans in a non-cash form only.

The change came into force on 29 April 2015.

Acquisition of Property from the Founder or Shareholder

The Amendment limits the scope of application with respect to acquisition of property by a company through a contract with its founder or shareholder (or their close persons, controlling or controlled persons, etc.) where the consideration is at least 10% of the registered capital (Section 59a of the Commercial Code). This rule will now apply exclusively to joint stock companies. As these provisions will not apply to limited liability companies, it should facilitate doing business for many entrepreneurs.

The provisions relate to situations where the value of the subject matter of the contract must be determined by expert opinion. Such contract may not become effective earlier than on its deposition, together with the expert opinion, in the collection of deeds. Should this transaction be made without meeting the statutory requirements, it would be considered unjustified enrichment by the acquirer, and the payment must be returned to the company.

The Amendment also states that members of the statutory body who performed their office at the time of provision of the payment will be held liable for its return, jointly and severally. Apart from them, members who performed the office of statutory body when the company did not claim the return of the payment and knew of this obligation, or could have known about it considering all circumstances, will also be held liable.

The change will come into force on 1 January 2016. The provisions regarding liability came into force on 1 July 2015.

Prohibition to Return the Contribution

The Amendment extends the existing legal regulation regarding prohibition to return contributions applicable on the relevant companies and cooperatives.

The new statutory wording prohibits not only the return of the property value contributed by a shareholder as the contribution to a company, but also any other payment provided by the company without adequate consideration based on a legal act agreed (i) with the shareholder or (ii) in its favor regardless of the form of arrangement or validity. In practice it will involve any transactions that are consummated to the detriment of a company in favor of a shareholder under conditions not usual in the ordinary course of business (for example, a donation or free-of-interest loan from the company to shareholders).

The Amendment specifies that the shareholder, for these purposes, can be (i) a former shareholder, if such payment was made within two years of when it ceased to be a shareholder, or (ii) a person that has become a shareholder within two years since such payment. The Amendment also stipulates when the payment is considered to be payment provided in favor of a shareholder.

The value of contribution returned in conflict with law must be paid back to the company, which is a joint and several liability of those members of the statutory body (i) who performed the office at the time of returning the contribution in conflict with law, as well as (ii) those who performed the office in the period during which the company did not claim the return of the contribution and knew about their obligation or could have known about it considering all circumstances.

The Amendment further states that, when assessing whether consideration is adequate, we should assess mainly the ability of the other party to provide it, the usual price at the market and the price for which the company usually provides similar payments in the ordinary course of business with other persons.

The change came into force on 1 July 2015, though the scope relating to liability and recovery of payment will come into force on 1 January 2016.

Company in Crisis

The Amendment introduces a new definition of a "company in crisis" and lays down special rules for the management of certain internal and external resources of financing.

A company achieves the status of "company in crisis" if (i) it is already bankrupt (pursuant to Act No. 7/2005 Coll. on Bankruptcy and Restructuring) or (ii) is under threat of bankruptcy. Under the Amendment, a company is "under a threat of bankruptcy" if the proportion of its equity and liabilities is smaller than 4/100. However, this proportion only applies to 2016. In the following years the regulation will be stricter. In 2017 the proportion will change to 6/100 and from 2018 the proportion will become 8/100. It follows that companies will have to monitor not only whether they are bankrupt but also whether they are in a situation which will put them under threat of bankruptcy.

Determining whether a company is in crisis is essential for the purposes of assessing the making of so-called payments replacing own resources of financing that, pursuant to the Amendment, cannot be refunded during a crisis. Under the Amendment these payments can be a loan or similar payment being its economic equivalent provided by persons defined in Section 67c (2) of the Commercial Code during a crisis or before a crisis if its maturity was, during a crisis, postponed or extended. The Amendment also explicitly states the cases which are not considered as such payment.

The fact that a company is "in crisis" will affect the paying of the profit share (dividend). The company must, prior to payment of the dividends, assess whether the payment might result in crisis. If so, it may either not pay the dividend or only pay up to the amount which would allow its equity to remain higher than liabilities.

The change will come into force on 1 January 2016.

Sole Shareholder in Limited Liability Company

The Amendment expressly specifies that where a limited liability company has a sole shareholder, that shareholder may not seek termination of its participation in the company. Also, declaration of bankruptcy over the property of the sole shareholder or dismissal of bankruptcy petition due to insufficient property of the sole shareholder will not effect a termination of its participation in the company. Similarly, where there is enforcement proceeding over the ownership interest of the sole shareholder, delivery of the enforcement order will not effect a termination of its participation in the company.

The change came into force on 29 April 2015.

The Amendment has introduced several new restrictions and obligations to be observed by companies. It has made the requirements imposed on statutory bodies stricter and introduced personal liability for unlawfully made payments. This mainly applies to payments to shareholders and other related persons and members of the bodies made during a crisis of a company or without adequate consideration. We recommend that company statutory bodies thoroughly review all new restrictions and obligations and consider how these will affect their companies in their daily functioning.

Should you need our assistance, please do not hesitate to contact us at any time.

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