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Upcoming changes in the Commercial Code | September 2017

After partial modification and revision of the former proposal of the amendment of the Commercial Code (Act No. 513/1991 Coll., the Commercial Code as amended) a governmental proposal of an amendment of the Commercial Code and other related legislation (“Amendment”) is currently in the Parliament. The anticipated date of effectiveness of the amendment is 1 January 2018



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The upcoming Amendment will be focused mainly on the following:

- (a) Extension of liability of statutory representatives and shareholders of companies;
- (b) The fight against forged mergers of companies; and
- (c) Introduction of rules concerning the creation and distribution of company's capital funds.

1. Extension of the liability of statutory representatives, liquidators and shareholders

(a) The proposed changes expand the liability of statutory representatives, members of statutory bodies, liquidators or other statutory representatives (“Representative”) of the companies in the event of a failure to timely file a petition for a bankruptcy, in which case:

- Representative, liquidator, or statutory representative of a company is liable for any damages which is caused to the creditors as a consequence of a breach of this obligation. If no other amount of damages is proven, it is assumed that the total amount of damages is equal to the frustrated claim.
- It is considered a failure to timely file a petition for bankruptcy even if bankruptcy was not declared or execution or similar proceedings involving the company in question were halted because of insufficient assets.
- A decision of a court on compensation according to this article is a decision on discharge (prohibiting a natural person to carry out the function of a Representative or a supervisory body in a business company or a cooperative for the period disclosed in the judgment of the court, or otherwise for the period of three years.)

(b) The Amendment revises the obligations of the former Representatives even in the event of cessation of their capacity:

- to provide for cooperation requested by court, tax administrator, bankruptcy trustee, or executor, Social insurance company or insurance company in the ambit within which it is safe to assume that the cooperation can contribute to further clarification of the enquiries, to which the current cooperation pertains; and
- within 30 days, to file a petition for winding-up of a company if the only Representative of a company is not registered in the Commercial Register within 60 days after the cessation of the capacity of the previous Representative.

(c) The amendment further prescribes that the obligations of a Representative (including the duty to act with professional care and in accordance with the interests of the company and its partners) are also imposed on a person which in fact carries out the scope of activities of the Representative, without being appointed as such.

(d) The amendment further introduces liability of a controlling person (i.e. a person directly or indirectly holding a controlling ownership interest with the most voting rights attached to it) to the creditors of the subsidiary for any damages

- caused by insolvency of the subsidiary or

- if it significantly contributed to insolvency of the subsidiary

For the purposes of this article, the controlling person is insolvent even in the event that bankruptcy was not filed or was cancelled, or the execution or similar proceedings against this company was cancelled because of insufficient assets.

The controlling person is liable for damages, which were caused by a breach of this obligation to the creditors. If no other amount of damages is proven, it is assumed that the total amount of damages is equal to the frustrated claim.

2. Restrictions on mergers (mergers or split) of companies

With regard to mergers of companies, the Amendment introduces several new obligations and constraints, in particular:

- Prohibition of a merger, if, at the effective date of the merger:
 - (a) the amount of successor's company own equity is negative - obligations which are connected to the obligation of subordination,
 - (b) the merging companies are in liquidation, or bankruptcy is effective against them or are in a process of restructuring, or
 - (c) the court proceeding on dissolution of the merging companies has been initiated;
- The obligation to prepare an audit report certifying that the value of the successor's equity will not be negative at the effective date of the merger;
- For mandatorily non-audited companies, the obligation of the dissolving companies to draw up an auditor's report certifying that the receivables and liabilities of the dissolving company correspond to the economic reality on the day preceding the effective date of the merger;
- Obligation to file a petition for registration of the merger in the commercial register not later than 30 days as of the date of approval of the merger agreement or demerger project;
- The obligation of members of corporate bodies to withhold from action which would lead to a merger of a company, if it can be assumed that the conditions under which a fusion is prohibited are satisfied. The members of corporate bodies are liable to the creditors for any damages caused by a breach of this obligation.

At the same time, the Amendment specifies, that the decisive date for tax and accounting purposes might be determined retrospectively to the first day of the accounting period, in which the draft of the merger agreement or the project of demerger is devised at earliest, under the condition that the statement of finance written for the date preceding this date is yet to be confirmed with the appropriate corporate body.

3. Capital funds

The Amendment finally introduces the concept of a capital fund of a company, which consists of contributions of shareholders/partners of a limited liability company or a joint stock company ("contribution").

The legislature pertaining to stocks is used for payment of the contributions. The contribution is considered a capital fund in the moment of its payment.

The Commercial Code in the proposed wording expressly provides for the possibility not only to create but also to use capital funds for:

- (a) apportionment between the shareholders or
- (b) increase of registered capital of the corporation.

The contribution cannot be divided between the shareholders if the company is in crisis or if such apportionment of the contributions would result in a crisis. In the event of division of the capital funds between the shareholders, the announcement of the total amount of each part has to be published within 60 days.

4. Other important changes

The amendment also alters other areas, for example:

- Extensive revision of the Institute for Trade Secrets, the conditions of violation of trade secrets and means of protection in the case of violation of trade secrets;

- Further limitations in the case of transfer of ownership share in a limited liability company (restriction of transfer if there are proceedings to wind-up the company, if the company is wound-up by a court or on the basis of a decision of a court, or the effects of a decision to declare bankruptcy or to allow restructuring have an impact on the company);
- Indirectly amends the Criminal Code (Act No. 300/2005 Coll. Criminal Code as amended) and establishes key facts of a crime of unfair liquidation.

This alert does not contain an exhaustive overview of all proposed changes. Its aim is to provide an approximate summary of the nature and extent of legislative changes that can be expected in the nearest future.

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