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CZECH REPUBLIC & SLOVAKIA

Newsletter 2/23

General Interest

Who Pays the Bill for Anti-Covid Measures?

by Ondřej Rathouský

The Supreme Court of the Czech Republic opens the way for those who have been damaged by measures during the pandemic to claim compensation from the state. A retailer brought an action against the Czech Republic for compensation for profits lost as the Czech Government restricted and then completely prohibited retail sales. The applicant argued that, pursuant to the provisions of the Crisis Act, the State is liable for the damage caused by the crisis measures adopted, irrespective of whether their adoption was correct or not.

The court of the first instance dismissed the action and the appellate court upheld the decision dismissing the action.

The appellate court based its decision on two arguments. Firstly, the provisions of the Crisis Act do not establish the State's liability for damage caused by the adoption of the crisis measures. The measures themselves have the legal nature of a generally binding legal act, are a source of general legal regulation affecting an indefinite and individually undetermined circle of persons to whom they impose legal obligations. The State is not generally liable for the creation of rules and for the damage caused to persons by fulfilling legal obligations established by a legal regulation. Secondly, the State is to be held liable under the Crisis Act only for damage caused by its activities in the implementation of specific crisis measures.

Based on the extraordinary appeal brought by the applicant, the Supreme Court first addressed the question whether the Crisis Act makes a distinction between crisis measures which operate throughout the territory of the Czech Republic and those which are directed against a specific person or a specifically defined group of persons. The Supreme Court found that it did not. A crisis measure is an organisational or technical measure intended to deal with a crisis situation and to eliminate its consequences, including measures which interfere with the rights and obligations of persons. It does not follow from the language that the range of persons whose rights and obligations are affected by the crisis measure must be specifically defined or limited.

Next, the Supreme Court dealt with the question whether such a distinction is the result of the will of the original historical legislator. However, according to the Supreme Court, neither the original wording of the government's draft crisis law nor the explanatory memorandum show that the historical legislator intended

to limit the state's obligation to compensate for damage to individually targeted crisis measures.

The Supreme Court also rejected the Court of Appeal's conclusion that the State is not liable for damage caused by crisis measures, which by their nature are the product of legislative activity. The Supreme Court is of the opinion that the State has assumed such liability.

Last but not least, the Supreme Court disagreed with the appellate court's conclusion that the State is only liable for damage caused by its activities in the implementation of specific crisis measures, i.e., that the mere issuance of a crisis measure by the Government cannot be considered its implementation. In this regard, the Supreme Court has held that the obligation of the State to compensate for damage caused by crisis measures arises at the moment when the effects of the crisis measure are such as to lead to the occurrence of damage. A contrary conclusion would lead to the absurd conclusion that a retailer who did not comply with the crisis measure and against whom the crisis measure had to be 'carried out' by force, for example by the police, would, in accordance with the appellate court's reasoning, be entitled to compensation whereas the claimant, who had acted in accordance with the law, would not.

On the basis of the foregoing, the Supreme Court set aside the decision of the appellate court and remitted the case back to it for further proceedings on the basis that, once the legal question of the State's liability for damages had been resolved, the appellate court had to deal with the actual damage caused to the applicant.

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The Future of the Constitutional Court Depends on the Past of Its Judges

by Marie Zámečníková

Newly elected President Peter Pavel faces both a major challenge and a unique opportunity to shape on important part of the legal system. The terms of seven of the Czech Constitutional Court's fifteen judges expire this year and four more need to be appointed next year. They include former President Pavel Rychetský, who stepped down in August after 20 years at the court, and both vice-presidents. The establishment of the new Constitutional Court will inherently alter the course of Czech law for the next decade. Moreover, the whole process seems to be more complicated and uncertain than expected. Despite President Pavel's best efforts to increase the efficiency and transparency of the entire process, he has faced criticism and difficulties. In light of the previous widespread discussion and concerns that the appointment procedures of the previous two presidents were questionable and lacked transparency, Mr. Pavel established a constitutional committee of highly respected experts in the field to assist in the selection of potential candidates for the office, and asked relevant institutions in the country, such as higher courts, bar and other professional associations, and universities, to send him their lists of potential candidates.

The candidates proposed by the President must be approved by the Czech Senate, the upper chamber of the Czech Parliament. So far, five new judges have been appointed through this process, including Josef Baxa, a highly respected former president of the Czech Supreme Administrative Court, who now succeeds Pavel Rychetský as president of the Czech Constitutional Court. However, some of the proposed candidates gave rise to very emotional discussions not only in the Czech Senate but also in the public. The most controversial was Robert Fremr, a former vice-president of the International Court of Justice in The Hague, a judge at the International Criminal Tribunal for Rwanda and a former criminal judge at the Czech Supreme Court. However, his integrity was questioned after his past in the communist judicial system came to light. Historians found that Fremr had already judged the "Olšanské hřbitovy" case in 1988, which turned out to be a political trial manipulated by the StB (former Czechoslovak State Security Agency), as well as several other cases closely related to the politics of the time. Fremr's nomination was approved by the Senate despite the controversy, although some members of the chamber strongly opposed the candidacy. As more information surfaced, particularly about Fremr's convictions for illegal emigration in the 1980s, President Pavel decided to put Fremr's nomination on hold. Fremr himself withdrew his nomination in mid-August, citing his inability to overcome the distrust of the Czech public and the intolerable pressure of the media. This dispute reopened the discussion of whether and under what circumstances the Czech Republic had properly dealt with its past by allowing most of the pre-1989 judges to remain in office and establish, often a highly respected, career after the revolution. Many commentators have

also suggested that all decisions of judges who become candidates for the judiciary should be reviewed and controlled, which could be very dangerous for the principle of the independence of judges.

In early September, another nomination was submitted to the Senate by Pavel's committee - Judge of the Czech Supreme Court Pavel Simon, who is also considered one of the best experts among local lawyers and judges. However, his nomination is also subject of a debate among the members of the Senate. During his time on the Supreme Court, the Constitutional Court overturned several of his rulings (as it does in many cases), which disqualifies him as a suitable candidate for some senators. The biggest critic of Simon's work, however, is Senator Hana Marvanová Kordová, a lawyer who represented the (unsuccessful) plaintiffs in some of these cases and thus may not be completely impartial. His personal interests are also a matter of contention, particularly his interest in Qigong courses, a traditional Chinese training that is considered "inappropriate" and "unscientific". In the end, Pavel Simon was the first nominee of the president Pavel who was directly declined by the Czech Senate and thus will not become the justice of the Constitutional Court. Therefore, President Pavel has to keep looking for other candidates.

The appointment of judges to the Czech Constitutional Court is one of the strongest powers of the Czech President. Despite President Pavel's strong efforts to make this process as transparent and fair as possible, it is again a broadly discussed topic that is not always focused on relevant issues and questions. Nevertheless, the Czech Constitutional Court will have to face many important and relevant decisions and challenges, as many political issues are expected to be dealt with by it, given the unstable social and economic situation. Let us hope that the President and the Senate will find suitable experts and good judges who will be able to face the challenging times ahead.

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Czech Legal News

Whistle-Blowers' Protection
Is Your Company Prepared?

by Jan Valíček

The Czech Republic has finally joined most other EU countries and fulfilled its obligation to implement an EU directive on the protection of persons reporting breaches of Union law (also known as whistle-blowers) into the Czech legal system. Based on this act, reporting persons shall obtain an adequate protection against any retaliation in a work-related context.

Duties for the companies resulting from the above-mentioned act vary and depend, inter alia, on the number of employees companies have. Larger companies from the private sector (i.e. with 250 and more employees) have to establish and operate special internal reporting channels. They must designate person(s) who shall process, investigate and assess the reports and, as a follow-up, recommend respective measures to the employer. Smaller companies (i.e. companies having between 50 and 249 employees) shall also comply with these obligations, however, the legislator has provided more time for their preparation as they have to establish internal reporting channels by December 15, 2023.

Reported breaches include e.g. crimes, serious offences and breaches of national or EU law in certain areas such as financial services, income tax of legal entities, consumer protection, environmental protection, public procurement etc. To obtain protection against retaliation, reports cannot be disclosed anonymously. Furthermore, a knowingly false report does not provide any protection and it might be fined up to CZK 50,000.

No internal reporting channel introduced? Besides the fact that it is a breach of law connected with certain fines, whistle-blowers still have other options to report, especially via an external channel provided by the Ministry of Justice of the Czech Republic. However, it seems to be considerably favourable for the employer to manage breaches internally. Internal investigations and measures shall, to the extent permitted by law, lead to elimination or at least reduction of adverse effects to companies caused by potential public knowledge of such breach.

Plenty of IT solutions for internal reporting channels have popped up on Czech and neighbouring markets. Obliged entities might choose from many different front-end as well as back-end solutions providing catchy design and instruments. However, be aware that your chosen IT solution is in full compliance with the applicable laws. In this respect, do not hesitate to reach out to us to receive a professional and reliable advice in full compliance with the applicable legal framework for the protection of the whistle-blowers.

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Changes in the Labour Code

What Still Needs to be Adjusted

by Dagmar Junková

After a long period of preparation and discussion,the Labour Code has finally been amended. We bring you the most important changes that employers have to apply from 1 October 2023.

The Amendment will affect both employment contracts and agreements for work performed outside the employment relationship (known in Czech as DPP and DPČ). There are also new regulations on home office and delivery in the Labour Code. We bring you the most important changes that employers will have to apply.

WHAT DO EMPLOYERS HAVE TO CHANGE?

I. Employer's information obligation

With regard to employment contracts, the Amendment broadens the information that employers must provide to employees in the context of their employment relationship. Employers are now required to inform employees about various aspects, including professional development opportunities, the termination procedure, and the specific social security entity to which social security contributions are paid.

The period within which employees must be informed has also been reduced from 30 days to 7 days from the start of employment.

As regards agreements for work performed, the Amendment has expanded the employer's obligations as well. Employers who hire employees under Agreements for Work Performed (DPP/DPČ) are now required to provide the employee with information about the employment relationship within the same time-frame. The scope of this information is essentially identical as that required for employment agreements.

In view of the shortened time limit, **we therefore recommend that all existing employment agreements and internal regulations be reviewed and, if the new information has not been included, the missing information should be added.**

II. Agreements for Work Performed (DPP and DPČ)

Employers are required to create a written working time schedule for their employees in advance and provide the employee with this schedule or any changes to it at least 3 days in advance. This requirement applies unless employer and employee mutually agree on a different notification period or the employee schedules their own working hours. If the working time has been agreed upon on a 'fixed' basis, the employer must also inform the employee whether the working hours are spread evenly or unevenly.

For this reason, **it will also be necessary to amend the wording of the agreement.**

The Amendment now provides for an employee to **request in writing to be employed** in an employment relationship if the employee has worked for at least 180 days in the previous 12 months. If the employee makes a written request, the employer must provide a reasoned written reply within one month at the latest.

Additionally, the Amendment has established the right of an employee to request a written justification for the termination of their employment. This right can be exercised if the employee believes that the termination was based on their assertion of rights to information, requests related to the employment relationship, or requests for changes in working conditions, including situations involving maternity, paternity, or parental leave.

There is also a new obligation to pay employees **extra pay/extra time off** - e.g. for working on public holidays, night work, etc.

As of 1 January 2024, employees who work under one of the Agreements for Work Performed are entitled to holiday if they have worked the required number of hours.

III. Home Office regulation

The Amendment stipulates that the agreement to work from home must be **concluded in writing. If work from home is agreed only verbally, a written agreement must be concluded.**

The Amendment establishes rules for determining compensation for work from home, but also allows the employee to agree not to be compensated.

The Amendment also introduces regulations regarding the termination of remote work arrangements. According to the law, terminating remote work is now permitted for any reason or no reason at all, with a 15-day notice period from the day of delivery (unless otherwise agreed upon). Additionally, the employer has the right to require the employee to work from home for a period strictly necessary in the event a public authority requests this.

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Charges for Early Mortgage Repayment Unlawful

by Radek Werich

This is what the Prague Municipal Court, acting as an appellate court found with final legal force (The reimbursement of interest costs charged by a bank for early repayment of a mortgage was illegal and constituted unjust enrichment). The respective reimbursement costs are very significant and typically amount to tens of thousands of crowns.

According to the court's decision, the bank may only charge reasonable costs in connection with the early repayment of a mortgage loan.

The court thus confirmed the opinion expressed by the Czech National Bank (CNB) in respect of the consumer credit agreements for residential property under the Consumer Credit Act. It establishes the consumer's right to early repayment of a mortgage loan. In such cases, only costs that are justified can be considered reasonable. These costs must also be directly linked to the consumer's early repayment of the loan. They cannot therefore be costs already incurred in connection with the granting of the credit itself, even though they may not have been fully covered due to the early repayment. At the same time, there can be no loss of profit charged to the borrower, since loss of profit is not a cost that is reasonably incurred. The CNB's position applies to loans granted after 1 December 2016 or for which a new interest rate fixation period started after that date.

The CNB's practice has resulted in most banks on the Czech market charging the borrower-consumer only administrative fees of up to CZK 1,000 in the event of early repayment (including refinancing of the loan by another bank).

Nevertheless, there were several large banks that rejected the CNB's position as incorrect and unlawful and continued to charge their customers high fees. Amidst a wave of refinancing of loans in 2017-2021 due to falling interest rates, banks did not want to give up tens to hundreds of millions of profit per year generated by these charges.

The CNB imposed several fines in this context, but the fined banks challenged the penalties in the administrative courts and continued to charge their customers. In other cases, borrowers who had been charged when they repaid their loans early sued the banks to recover the amounts.

The court has now finally ruled on the first (or first publicly known) case in which a customer sought to recover from a bank the amount charged as unjust enrichment.

In this case, the bank calculated the interest costs at more than CZK 44,000. This was the amount the bank would have received as interest under the mortgage loan agreement until the end of the lock-in/fixed interest period. The bank argued that its costs were spread over the entire fixed term and were covered by interest payments during the regular repayment period. In the event of early repayment, where the client only paid interest on the loan until the date of early repayment, the bank would incur a loss. But the courts disagreed.

"The defendant itself stated that this was a kind of compensation for lost profits and not a duly incurred expense. As a business entity, the defendant bears the commercial risk of loss. Theoretically, it could have even made a 'profit' on the early repayment and was therefore not entitled to interest costs," the court ruled.

The issue of early repayment is currently being addressed by the lawmakers. A pending bill includes a new rule on early repayment of mortgages. It would allow banks to charge customers up to two per cent of the outstanding principal for early repayment.

The argument for the new regulation is based on the banks' fear that if interest rates fall again, there will be another mass effort by mortgage borrowers to change banks to take advantage of the lower interest rates. Banks may then tend to recoup their interest losses through higher interest rates for all their customers, including those who do not take advantage of early repayment.

However, the proposed amendment to the law has also run into opposition from some members of the ruling coalition. Many of them do not see it as politically viable to promote the interests of banks at the expense of ordinary consumers. The fate of the amendment is therefore uncertain, but the maximum amount of the fee will almost certainly be reduced, probably to around 1 per cent of the outstanding principal.

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Attorney Escrows

New Rules

by Jaroslava Novotná

In certain projects such as, real estate transactions it can be in the best interests of clients to use an escrow mechanism. There are different types of escrows, whereas an attorney escrow is one of them. The provision of such services is subject to specific regulation by the Czech Bar Association (the "CBA"). It aims to ensure maximum transparency and provide a high level of protection of the clients' financial means. Recently new rules that should further help to achieve this goal were introduced.

Besides additional reporting

obligations towards the CBA for attorneys, a new interesting tool has been introduced. Before an attorney accepts financial means into an escrow account he/she has to inform the client in writing about possibility of monitoring movements and balances on the escrow account in accordance with the options of the bank holding the escrow account. This enables clients to perform their own control over the escrow account. If the respective bank offers such notification service and the client wishes so, the attorney will arrange for this service and will grant the bank a necessary consent that cannot be cancelled during the whole escrow period.

Further, the attorney may provide the CBA with an email address of the client. The CBA will then inform the client on whether the attorney fulfilled his/her obligation to inform the CBA about receipt of the financial means into the escrow and subsequently about disbursement of the financial means from the escrow.

All the above should improve the position of clients and contribute to even more transparent and safe attorney escrows.

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Act on Preventive Restructuring Finally There!!!

by Ondřej Rathouský

The all new act on preventive restructuring allows an entrepreneur (a legal person) to conclude an agreement with its creditors (all or some of them) in the form of a restructuring plan on how to resolve its financial difficulties.

A restructuring plan may include various measures such as, in particular, asset restructuring, restructuring of liabilities, restructuring of equity or operational changes. However, preventive restructuring is only permissible if the entrepreneur is not insolvent and, taking into account all the circumstances, it can reasonably be expected that the failure to adopt restructuring measures would lead to insolvency. At the same time, the entrepreneur must have a good faith belief that the measures taken will lead to the maintenance or restoration of the viability of its production.

The restructuring plan is drawn up by the entrepreneur and submitted to the creditors affected by the restructuring plan for approval. The position of other creditors shall remain unaffected by the restructuring plan. The creditors shall vote on the adoption of the restructuring plan in groups consisting of creditors with identical legal status and economic interests. A group of creditors shall accept the restructuring plan if a 3/4 majority of votes is in favour of acceptance. The restructuring plan shall be approved if all creditor groups have accepted it. However, confirmation by the restructuring court is still required for the restructuring plan to take effect. The court may also confirm a restructuring plan that has not been accepted by the creditors concerned.

In the period from the commencement of the restructuring proceedings until the restructuring plan becomes effective, the entrepreneur may request that the court orders a moratorium (against all or only some creditors), during which time, in particular, insolvency proceedings cannot be commenced against the entrepreneur at the proposal of the creditor, execution cannot be conducted and the time limits for the exercise of creditors' rights against the entrepreneur do not run. The insolvency court may appoint a restructuring trustee to control the course of restructuring and the performance of other tasks under the conditions set out by law. Preventive restructuring ends in particular if the restructuring plan is fulfilled or not fulfilled, by the legal force of the decision on the insolvency of the entrepreneur or the cancellation of the restructuring plan by the court.

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Public Auctions in a New Guise

by Denisa Molnár

Since the current act is already outdated half of all auctions are conducted without any rules at all, as the statistics show. But now after more than 20 years of effectiveness of the current legislation, a new act on public auctions has been adopted, which shall enter into force in January 2025.

The main goal of the new act is to finally harmonize the rules for conduct of auctions with the legal regulation contained in the Civil Code. The new act is intended to unify the respective legal concepts and to simplify the rules for conduct of public auctions. It modernizes the legal regulation of public auctions and eliminates unnecessary paperwork, which

will simplify the whole process and also make it cheaper.

The new act also introduces detailed rules for electronic auctions and a simplified auction regime for movable things with a bidding price under CZK 300,000.

Under the current act a sanction for breach of auctioneer's obligations doesn´t exist, which leads to deliberate breach of the auctioneer's duties. From 2025 it will be possible to impose a penalty of up to a million-crowns for violation of substantial statutory obligations.

Newly, a publicly accessible Central register of auctions to be administered by the Ministry of Regional Development shall allow the auctioneers, instead of sending documents in paper form, to enter relevant information online into the register. It will be linked to the register of residents, register of persons, which will secure automatic continuous data update.

The new legislation brings with it also changes in other related acts, e.g. the trades licensing act. Public auctions initiated by the owner shall be moved from the current concession regime to a more relaxed regime of a regulated trade titled "Conducting of public auctions other than involuntary auctions". Involuntary auctions will remain in the most restrictive concession regime.

As with any new law, there are voices for and against its new wording. Only time and practice will tell what its flaws really are.

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Slovak Legal News

Green Light for Renewable Energy in Slovakia

by Veronika Kvašňovská

The production of green energy in Slovakia is steadily growing and keeping pace with other European countries. This provides investors with more opportunities. The share of gross consumption of electricity generated from renewable sources in our country in 2021 was approximately 19 % The European Parliament has recently approved a new target for 2030 of 42.5 %.

Operating a business in the renewable energy sector in Slovakia is paying off a lot more today. The Slovak government has approved higher purchase prices for electricity produced by burning biomass, biogas, waste and bioliquids. This support of green electricity is a response to significantly increased input costs that green energy producers had to bear. The government has thus given a helping hand to producers who had been forced to downsize their production due to financial difficulties.

The production of alternative energy is currently being boosted by the Recovery Plan investments, which supports the construction of new infrastructure for the production of energy from renewable sources. According to the Slovak Ministry of Economy, the renewable energy auction mechanism shall be open to a wide range of technologies such as solar, wind, geothermal, biomass, biogas, landfill gas and sewage gas.

Furthermore, the European Parliament adopted new rules concerning the infrastructure necessary to make recharging stations more accessible. There should be electric charging pools for cars at least once every 60 kilometres along main EU network routes (pan-European corridors) by 2026 and charging stations for trucks and buses once every 120 kilometres by 2028. No subscription will be required at these stations. The drivers of alternative fuel vehicles will be able to pay simply using a bank card. This demand is also met by the Slovak Recovery Plan, which includes a number of measures intended challenges to support the construction of ultra-fast charging network.

Business in the Slovak energy sector can be conducted on the basis of a permit or by a simple notification

either depending on various conditions. One of the conditions for obtaining this permit is registration in the Register of Public Sector Partners. Although the EU urges the member states to accelerate the process of permits to install renewable energy equipment, the whole process can be time-consuming due to its complexity and the number of requirements. Therefore, contacting legal professionals with experience in this area is recommendable.

EU funding is gradually redirecting its course and switching from natural gas projects towards support of various means of green energy production, storage and consumption. The transition to green energy is also driven by the need to reduce the EU's dependence on Russian fossil fuels. However, the future of renewable electricity production in Slovakia will largely depend on the newly appointed Slovak government.

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Further activities of Giese & Partner lawyers

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Giese & Partner News

Martin Holler as Session Co-Chair at the IBA Annual Conference in Paris 2023

"Inflation, recession and other scary things. Will the Mona Lisa still be smiling? What has happened in the last twelve months and where are we headed?"

Martin Holler, partner at Giese & Partner will co-chair this session at the International Bar Association's Annual Conference in Paris. The panelists Samuli Koskela (Lexia Attorneys), Nina Grunow-Jensen (P+ Pension Fund for Academics), Jürgen Necker, (Helaba) and Elena Otero (McDermott Will & Emery) will discuss these questions from the perspectives of investors, bankers and lawyers.

Download the full conference schedule here >>

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