

Proposed amendments to legal framework of beneficial owners in the Czech Republic

Since 1 January 2018, the majority of legal persons in the Czech Republic have been required to register their beneficial owners in a register that is not publicly accessible. Generally speaking, a beneficial owner is a natural person (or persons) at the end of the ownership structure that exercises ultimate control over the activities of a business corporation or benefits from its activities. Such obligation applies to companies registered in the commercial register, i.e. limited liability companies ("společnosti s ručením omezeným"), joint-stock companies ("akciové společnosti"), etc. Companies registered in a public register other than the commercial register (e.g., associations ("spolky"), foundations ("nadace"), institutes ("ústavy"), trusts ("svěřenské fondy") must register such data by 1 January 2021 at the latest. This legal framework has its basis in European legislation aimed at preventing money laundering, combating the financing of terrorism and securing transparency with regard to company ownership structures, in particular, Directive (EU) 2015/849 dated 20 May 2015 (the so-called 4th AML Directive) and Directive (EU) 2018/843 adopted on 30 May 2018, which amended the 4th AML Directive (i.e. it is the 5th AML Directive) and should have been transposed by Member States on 10 January 2020. A draft of the Czech act that is intended to transpose the 5th AML Directive into Czech law is currently being discussed and it is expected to become effective on 1 December 2020 ("Draft Act").

Possible extension of range of beneficial owners

Pursuant to the Draft Act, a beneficial owner is a natural person that is **the final recipient** or that exercises **ultimate control** over the respective legal person. The Draft Act also establishes two presumptions for identification of a person of a beneficial owner. Pursuant to the Draft Act, it is presumed that **the final recipient** is a natural person that has a direct or indirect right to a profit share, to another own capital share or to a liquidation share of the company in an amount higher than 25 %. Furthermore, it is presumed that **the person exercising ultimate control** is a person that is considered a controlling person under the respective presumption set by the Czech Business Corporations Act (e.g. the ability to appoint or revoke the majority of persons that are members of a statutory body). It is further presumed that a beneficial owner is a person with more than a 25 % share of voting rights or registered capital in the company. Both of the aforementioned presumptions, i.e. the final recipient as well as the person exercising ultimate control, are rebuttable presumptions. For this reason, it is possible that another person may be identified as a beneficial owner on a different basis.

In the case that a beneficial owner cannot be identified, the Act Draft establishes a legal fiction that **the natural person working in top management of the respective legal person** is considered the beneficial owner. Therefore, besides the members of statutory bodies, also other top employees of the company securing day-to-day or regular management of activities of such company may meet the definition of the beneficial owner. For example, such definition may be met by a CEO, security director or a CFO. If this interpretation (that also appears in an explanatory



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memorandum to the Draft Act) applies, the range of beneficial owner will be extended by other employees of a company working in its top management.

What is also new is that if a beneficial owner cannot be identified and it may be presumed, based on the aforementioned, that the beneficial owner is a person in the top management of **the company that is located in the top tier structure of the concern** (currently, other interpretation pursuant to which only members of statutory body of such company that is subject to identification of the beneficial owner, i.e. in the lowest tier of structure of the concern, applies).

Cooperation to be provided by parent companies

The Draft Act stipulates that beneficial owners are obliged to give the companies, of which they are beneficial owners, the cooperation needed, and this includes the obligation to inform the company in question of the existence of this obligation. Typically, parent companies will be obliged to provide information and the necessary documentation for identifying the beneficial owner(s). If they fail to fulfil this obligation, they may be fined up to approximately EUR 20,000.

Limiting administrative burden and publicity of the register

The Draft Act establishes the **automatic registration of data** of beneficial owners from other public registers, e.g. commercial register. It applies in the case of legal persons whose beneficial owners may be identified on the basis of data already recorded in other registers. Typically, it is a sole shareholder of a limited liability company. Therefore, it will not be necessary to file a motion and pay the fee. An application for registration of the data in the register may now also be made by

a **notary**. The intention to transfer this task to a notary is obvious from the Draft Act since, for example, registration by a notary is faster than registration by the courts (up to 3 business days following the delivery of a motion) or the registration made by notary should be subject to a lower fee. The Draft Act also **establishes cooperation between the Czech register and the registers of other Member States through BRIS** (the Business Registers Interconnection System). A significant novelty is also the fact that the information on beneficial owners is publicly available with a few exceptions, unlike under the current regulations.

Dealing with discrepancies and penalties for failure to comply with obligations

Unlike the current regulation, the Draft Act also contains a relatively detailed description of the process of registering a beneficial owner by the courts or a notary. The Draft Act further contains a description of the **process of dealing with discrepancies**, i.e. in case there are reasonable doubts about the data relating to the beneficial owner recorded in the register. Such a process may be initiated by the court ex officio or on the initiative of a third person. In case such a discrepancy is found, the court will order the erasure of incorrect data and have correct data registered. A fine may also be imposed.

Sanctions for failure to register a beneficial owner or for incorrectly identifying the beneficial owner are also new. For example, the Draft Act states **that rights and obligations arising from a legal act concealing the identity of the beneficial owner established during the period in which the beneficial owner is not registered may not be executed**, regardless of what jurisdiction these rights and obligations are governed by (e.g. rights and obligations arising

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from agent agreements ("*komisionářské smlouvy*") or cooperation agreements ("*smlouvy o spolupráci*"). This sanction is intended to serve as a means of preventing the establishment of fictitious beneficial owners that enables the abuse of legal obligations or facilitates property crimes. Also, the Draft Act includes other sanctions as **prohibition of profit share payment and prohibition of voting rights execution** of beneficial owners who are not registered in the respective registration. The same sanctions also apply to a legal person of which these persons are beneficial owners and to legal persons with respect to which no beneficial owner is registered. Finally, the Draft Act also **sets a penalty of up to EUR 20,000 for a failure to register a beneficial owner or for a failure to provide up-to-date and accurate data.**

After the adoption of this legal framework, legal persons will be forced to reflect carefully on their obligations arising from the Draft Act and the associated identification of beneficial owners, in particular, taking into account significant sanctions that may be imposed for the breach of these obligations. This is also supported by the fact that the information regarding a beneficial owner will be publicly available. Therefore, the range of persons able to draw attention to such a discrepancy will become wider. In our opinion, (international) cooperation among companies within concerns will also be strengthened as these companies will

jointly consult, verify and share information on beneficial owners. In particular, this will apply when taking into account the fact that EU Member States share the fundamental rules set forth in the 5th AML Directive and, therefore, an indicator for identification of a beneficial owner may also be the registration of such a person with regard to sister companies in registers maintained by other EU Member States if these have the same ownership structure. Such a cooperation obligation may also be explicitly derived from the Draft Act. For the sake of completeness, it should be noted that the Draft Act is currently subject to legislative process and thus some amendments may be made. We are monitoring all developments carefully and we will provide an update once the legislation has been finalised.

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