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New law on the Evidence of Ultimate Beneficial Owners - Czech Republic

Last week on 22 January 2021, the Czech President signed a long-awaited and extensively-discussed Act on the Evidence of Ultimate Beneficial Owners ("**UBO Act**"). The UBO Act sets out a revised framework for ultimate beneficiary ownership in line with the requirements of the 5MLD¹ and provides many changes to the existing law such as a revised definition of an ultimate beneficial owner ("**UBO**"), wider access to the UBO Registry, stricter sanctions and an automatic transcript of information about the UBO in certain cases.

It is expected that after its publication in the Czech Collection of Laws, the UBO Act should become effective during the first half of 2021. Below is a summary of the major points introduced by the UBO Act.

Revised definition of an Ultimate Beneficial Owner

The UBO Act introduces a revised definition of a UBO. A UBO is newly defined as a natural person who is a (i) final beneficiary or (ii) a person with final influence over a legal entity.

This revised definition has the potential to widen the list of possible UBOs. In relation to a business corporation, such as a Czech limited liability company, a UBO would be a person who is either (i) a recipient of at least 25% of the company's profit, or (ii) a person with a controlling interest in the company, (this would apply if a person controls more than 25% of the voting rights).

In addition, a UBO can also be determined by indirect means. Indirect means can lead to the identification of a UBO in the case of legal arrangements which enable the UBO to indirectly acquire profit or exercise control of a company. This indirect control can be exercised by means of exercising influence through several legal entities which are shareholders of the same company or by other means of layered ownership or control.

¹ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU.

It can thus be expected that identification of a UBO in the case of holding structures or foreign structures can be difficult and sometimes even impossible (some foreign jurisdictions may not even provide proper identification of UBOs). For these reasons, the UBO Act provides a legal presumption that in the case of an "inability" to determine the UBO, each person in the executive function of the company is regarded as a UBO². This rule is further modified in the case of structured ownerships.

UBO Registry

Under the UBO Act, the UBO registry will be administered by the Czech Ministry of Justice and Czech courts. Although the UBO registry is not deemed to be a public registry, the Czech Ministry of Justice will provide access to the public to a limited extent (the public will be entitled to access a limited amount of data about all UBOs). This is a significant change compared to the current UBO legislation which only allows access to the UBO registry to selected entities³. Based on the new UBO Act, full and complete access to the information about a UBO will be granted to the UBO itself, the person who has registered the UBO and to a certain closed list of designated entities⁴.

In relation to the UBO Registry, the UBO Act also establishes a so-called "automatic transcript" of information about UBOs. This automatic transcript will be carried out by public authorities themselves. Typically, an automatic transcript will be possible in the case of registering a sole shareholder of a Czech joint stock company to a Czech Commercial Register. This sole shareholder would be regarded as a UBO and this UBO would be automatically transcribed to the UBO Registry based on information which was provided to the Czech Commercial Registry.

Sanctions and consequences of non-compliance

Unlike the current legislation which was criticised for a lack of direct sanctions, the UBO Act provides direct sanctions for failing to comply with its requirements. Maximum fines for non-compliance are 500 000 CZK (approx. 20 000 EUR).

In addition to these sanctions and potentially more severe, the UBO Act stipulates that in the case of not registering a UBO, the company will not be allowed to distribute profits either a) to the UBO or b) to a legal entity in which the person is a UBO. The company will also not be allowed to distribute profits to other legal entities which have not registered their UBOs.

Furthermore, if a UBO is not registered, the UBO will not be entitled to exercise voting rights at general meetings or as a sole shareholder acting within the powers of the general meeting. This will apply also in the case that voting rights or the power of the sole shareholder is pursued by a legal entity with an unregistered UBO. Resolutions which would be adopted contrary to this requirement could be challenged.

² According to the UBO Act, a person in an executive function is typically a member of a statutory or a similar body or a person who is directly subordinated to a statutory body.

³ Such as the police or judicial authorities.

⁴ This will include the police, judicial authorities and other governmental bodies.

As a result, statutory bodies of legal entities should carefully note the requirements of the UBO Act also from the perspective of an obligation to act with due care as set out by the Czech Civil Code. Non-compliance with UBO Act obligations can be regarded as a failure to act with due care (especially if this non-compliance leads to sanctions and/or the inability to distribute profits or exercise voting rights in the company).

Non-compliance with the UBO Act can thus open doors to potential claims on behalf of the company which could be directed to members of a statutory body who have not registered a UBO or who have not complied with other obligations under the UBO Act.

What steps should be taken to comply with the UBO Act?

As it is expected that the UBO Act will likely come into force during the first half of 2021, companies have approximately 4 months to assess if their registration of UBOs is in line and up-to-date with the revised legal framework.

Although in certain cases it might be possible to register a member of a statutory body or other "executive person" as a UBO, this could be perceived as a way to avoid an obligation to identify and register a UBO. Companies should consider this "exception" from the general rule of registering a UBO carefully, and companies should always identify and register UBOs to the maximum possible extent.

Since the adoption of the UBO Act in the Czech Republic was accompanied by prolonged discussions centred especially around the definition of UBOs and the UBO Act was subject to an unusually detailed scrutiny in the Czech Parliament, we expect that further discussions and interpretations of the UBO Act will materialise on its way to becoming effective in 2021⁵. We advise companies to monitor the development of these interpretations and follow the latest regulatory practice.

⁵ We expect that interpretative opinions relating to the UBO Act will be published by Czech regulatory bodies such as the Czech Financial Analytical Office or the Czech National Bank in relation to financial institutions.

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