

## AMENDMENT TO THE CAPITAL MARKETS ACT AND ITS IMPACT ON CORPORATE GOVERNANCE OF CZECH LISTED COMPANIES

On 1 October 2019, an amendment to Act No. 256/2004 Coll., the Capital Markets Act, came into force and was published in the Collection of Laws as Act No. 204/2019 amending certain laws in relation to the exercise of the shareholders' rights (the "**Amendment**"). The Amendment transposes Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 (the "**Directive**") and introduces new obligations for companies with registered office in the Czech Republic whose shares (but not debt instruments) are traded on a European regulated market as well as for companies located outside the Czech Republic which have chosen the Czech Republic as reference Member State (i.e. whose shares are traded on the Czech regulated market) (the "**listed companies**").

The Amendment introduces two important obligations for the listed companies: (i) **the obligation to approve and disclose material transactions made between a listed company and its related party**, and (ii) **the obligation to prepare, approve and disclose a remuneration policy for governing and supervisory bodies of the listed companies**.

### MATERIAL RELATED-PARTY TRANSACTIONS

From the effective date of the Amendment, any material transaction made between a listed company and its related party must be approved by the general meeting. A material transaction means a contract or an agreement under which a listed company sells or acquires assets with a value in excess of 10% of the listed company's assets as reported in the latest financial statements, or which involves an increase in the listed company's debt by more than 10% of the listed company's assets as reported in the latest financial statements. The values of all transactions made with the same related party in a single accounting period are aggregated for the purposes of this obligation.

The Amendment does not define the "related party", it only refers to paragraph 9 of International Accounting Standard IAS 24 – *Related Party Disclosures*, which forms an annex to Commission Regulation (EC) No. 1126/2008 of 3 November 2008, adopting certain international accounting standards in accordance with Regulation (EC) No. 1606/2002 of the European Parliament and of the Council. It is therefore necessary to consult the directly applicable Regulation when interpreting the Amendment. Under the aforementioned

#### Key issues

- New obligations for companies whose shares are traded on a European regulated market and companies controlled by them
- Obligation to obtain the general meeting's approval for material transactions made with related parties
- A material transaction corresponds to a value of more than 10% of the assets reported in the latest financial statements
- Obligation to disclose material transactions on the website
- Obligation to prepare a remuneration policy
- Obligation to prepare an audited annual report on remuneration
- Obligation to disclose the remuneration policy and report on remuneration on the website

paragraph 9, a related party of a listed company is a person or entity that (i) has control or joint control over the listed company, (ii) is controlled by the listed company or is under common control with the listed company, (iii) has significant influence over the listed company, (iv) is an associate or joint venture in which the listed company has a shareholding interest, or (v) is a member of the key management personnel of the listed company or of the parent of the listed company.

The Amendment is silent on and thus contains no explicit prohibition against approval of a material transaction being obtained from the general meeting after the material transaction has been entered into. However, we assume that any such transactions will be approved in practice before they are made, as the management of a listed company will try to avoid the situation where a listed company would enter into a material transaction but the general meeting would subsequently refuse to approve it.

The Amendment does not stipulate any minimum number of votes required for the material transaction to be approved or the required quorum for the general meeting. Therefore, the general rules laid down in the Business Corporations Act apply: (i) under Section 412, the general meeting is quorate if attended by the shareholders who hold shares whose nominal value or amount exceed 30% of the registered capital, and (ii) under Section 415, the general meeting adopts decisions by a majority of votes of the attending shareholders, unless the Articles of Association require otherwise.

The original government bill envisaged that a shareholder with whom a material transaction is to be made may not participate in the voting on the approval of this material transaction. However, the effective text of the Amendment does not contain such a provision. Therefore, even a shareholder with whom a material transaction is to be made may participate in the voting on the approval of the relevant material transaction.

Listed companies are also obligated to disclose information about material related-party transactions on their website no later than on the date on which a particular material transaction is made. The obligations imposed by the Amendment on listed companies include the obligation to disclose the name of the related party, information about the nature of the related party relationship, value of the transaction as well as any other information necessary to assess whether or not a material transaction is fair and reasonable from the perspective of the listed company and of the shareholders who are not a related party.

The obligations described above do not apply to transactions made in the ordinary course of business and under arm's length conditions and to transactions between a listed company and its wholly owned subsidiary or between a listed company and a company controlled by it provided that the shareholder of the controlled company is not a party related to the listed company. The latter exception applies to the banking sector or, more precisely, to transactions made by a bank on the basis of a decision or measure of general scope intended at protecting its stability which was issued by the Czech National Bank or on the basis of a decision or measure of general scope issued under the Act on Recovery and Resolution in the Financial Market.

The duty to disclose as described above also indirectly affects companies controlled by a listed company. Although controlled companies are not required to obtain approval of the general meeting in order to enter into a material transaction with a listed company's related party, they are required to disclose

such a transaction without undue delay. Listed companies are then required to publish the information about the transaction without undue delay on their website. Listed companies are thus obliged to also disclose information about material transactions to which they are not direct parties if such transactions are entered into between a company controlled by and a party related to a listed company.

A question arises as to whether the controlled companies' duty to disclose should also apply to companies existing under foreign laws. Nothing in the text of the Amendment or the Directive seems to point to that. However, it is then not clear whether listed companies are obliged to actively seek information about material transactions from foreign companies controlled by them.

## **REMUNERATION POLICY**

In addition, the Amendment introduces an obligation for listed companies to prepare a remuneration policy which defines the basic rules for remuneration of members of the board of directors and supervisory board or administrative board and the governing director as well as individuals who report directly to the company's governing body and who are responsible for day-to-day management (typically a COO, CFO, etc. unless they are members of the governing body) and, where applicable, deputies to these persons (the "**directors**").

The board of directors or administrative board of a listed company is required to submit the remuneration policy for approval no later than at the first general meeting which is to approve the financial statements and which is held after the lapse of ninety days from the effective date of the Amendment, i.e. after 30 December 2019. In the case of newly listed companies, the remuneration policy must be submitted for approval no later than at the first general meeting which is to approve the financial statements and which is held after the lapse of ninety days from the date on which the shares were accepted for trading on a European regulated market. If the board of directors or administrative board fail to do so, the members of these bodies will perform their respective offices for no consideration until such time as the respective body submits the remuneration policy to the general meeting for approval.

The remuneration policy must be submitted to the general meeting for approval upon every material change or at least every four years. According to the explanatory memorandum to the Amendment, the Directive does not provide any guidance as to what change is considered to be material; it can be inferred, however, that for instance a change in the amount or range of the remuneration would be considered material. Once approved, the remuneration policy must be published on the listed company's website as long as it is applicable.

The remuneration policy must be understandable and it should contribute to the listed company's business strategy, long-term interests and sustainability. It must also explain how it does so. In relation to the directors, it must describe all fixed and variable components of their remuneration, including bonuses and other benefits provided in whatever form. Where a variable remuneration component is provided, this part must be clearly and comprehensively described, including the specification of the listed company's key performance indicators, methods to be applied to determine to which extent the performance indicators have been fulfilled and an explanation how they contribute to the

fulfilment of the objectives as to understandability, contribution to business strategy and the listed company's long-term interests.

If there is a conflict between the remuneration policy and an agreement on performance of office or a listed company's internal regulation on remuneration provided to directors, the relevant agreement on performance of office or, where applicable, the internal regulation ceases to be effective to the extent to which it contradicts the remuneration policy.

## **REPORT ON REMUNERATION**

The Amendment further places an obligation on listed companies to prepare an annual report on remuneration that provides a comprehensive overview of all forms of remuneration, including any benefits, provided or payable to the directors during the most recent accounting period. An auditor must check whether the report on remuneration contains all information required by law. Additionally, the report on remuneration must not contain special categories of personal data (sensitive information) and personal data that refer to the family situation of directors.

The report on remuneration must also be submitted by the board of directors or administrative board for approval no later than at the general meeting which is to approve the financial statements for the period for which the report on remuneration has been prepared.

Following the general meeting at which the report on remuneration was submitted for approval, the report on remuneration must be published on the listed company's website along with information as to whether or not it was approved by the general meeting, and must remain to be so published for ten years.

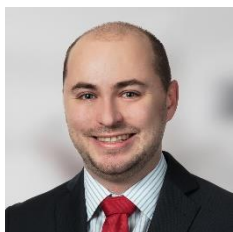
## **INCREASED COSTS**

The new obligation to obtain approval for material transactions as introduced by the Amendment may result in a significant increase in transaction costs because listed companies will be required to convene general meetings to approve material transactions. This procedure may also extend the length of business negotiations of the relevant transactions. In extreme cases, it may even prevent the completion of such transaction, which is an issue that the parties must bear in mind from the very beginning when structuring the transaction.

The obligation to prepare and publish the remuneration policy and the annual report on remuneration will lead not only to increased administrative costs for the listed company but also to increased transparency of the methods employed by these companies for remuneration of their management personnel.

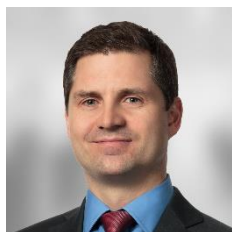
It is clear that in both cases the new regulation introduces additional costs for financing by means of public share markets from the perspective of listed companies.

## KEY CONTACTS



**Jakub Veselý**  
Associate

**T** +420 222 555 239  
**E** jakub.vesely  
@cliffordchance.com



**Michal Jašek**  
Counsel

**T** +420 222 555 229  
**E** michal.jasek  
@cliffordchance.com



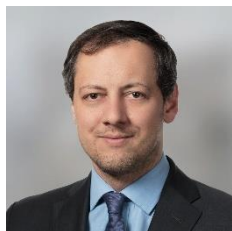
**Miloš Felgr**  
Partner

**T** +420 222 555 209  
**E** milos.felgr  
@cliffordchance.com



**Tomáš Richter**  
Of Counsel

**T** +420 222 555 214  
**E** tomas.richter  
@cliffordchance.com



**Vladimír Rýlich**  
Senior associate

**T** +420 222 555 210  
**E** vladimir.rych  
@cliffordchance.com

This publication does not necessarily address every important topic or cover every aspect of the topics addressed. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Jungmannova Plaza,  
Jungmannova 24, 110 00 Prague 1, Czech  
Republic

© Clifford Chance 2019

Abu Dhabi • Amsterdam • Barcelona • Beijing •  
Brussels • Bucharest • Casablanca • Dubai •  
Düsseldorf • Frankfurt • Hong Kong • Istanbul •  
London • Luxembourg • Madrid • Milan •  
Moscow • Munich • Newcastle • New York •  
Paris • Perth • Prague • Rome • São Paulo •  
Seoul • Shanghai • Singapore • Sydney •  
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement  
with Abuhimed Alsheikh Alhagbani Law Firm  
in Riyadh.

Clifford Chance has a best friends relationship  
with Redcliffe Partners in Ukraine.