

SURVEY PAPERS

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NEW INSTRUMENTS OF CORPORATE GOVERNANCE IN THE CZECH HOSPITALITY BUSINESS

***Abstract:** The goal of this article is to investigate potential future effects of significant change of the legal framework of enterprising affecting the business environment in the Czech Republic in relation to the hospitality business. New tools of corporate governance provided by new legislation can be utilized in adjusting the organizational structure of corporations to the specific needs of the hospitality business. Especially liberalization of the principles of corporate structures, strengthened liability of directors and protection of the family business are the main new instruments for more efficient long term planning and control of enterprising reaching the international standards.*

***Key words:** contract, corporate governance, family business, liability, shareholder*

***JEL Classification:** K22 ,G34, M14*

Introduction

The hotel and hospitality business represents a specific form of enterprising exposed to a variety of international and multicultural influence. This characteristic will apply not only to the customer relationships, but at the same time to the fundamental issues concerning the basic questions of the structures and forms of enterprising, strategic planning, forms and guarantees of contractual relationships among suppliers, labor issues, responsibility of managers and many other related issues which are to a large extent dependent on the particular business environment. The quality of business environment not only in this sector of enterprising is considered to be one of the leading factors for success.

Cultural and regional specifics of the business environment are significantly affected by numerous forms of state regulation among which the law of business is considered to be of dominant importance. The legal framework of enterprising in the hotel business is reflecting the cultural specifics of the particular country or region and at the same time is subject to the normative harmonization especially in the European context. Development and adaptation of this normative system is continuously based on the application of cultural standards in the process of application of law mostly through the interpretation of law being integral part of the decision making process (Tomášek, 2010). Development of the

normative system in the form of change of written law itself represents a significant change of the normative framework affecting the social environment to a large extent. Effects of such change, however, will depend in some areas on public awareness of existence of the new rules and on the practical implementation of the new tools provided by the new legislation. This is namely characteristic for civil and business law. In the sphere of public law, entrepreneurs and other subjects are strictly required to get acquainted with changes of the legal regulations (e.g. taxation, hygiene norms, trade licensing, etc.) and follow the new legal requirements under the threat of sanctions. In civil and business law, however, a significant part of new legislation is providing a set of new tools and possibilities utilization of which is dependent on the free will of subjects involved. Not only the sole existence, but awareness, knowledge and practical implementation of such tools can therefore substantially affect the whole character of business environment in such cases.

A business-friendly legal framework is generally characterized by reduction of state restrictions and granted level of contractual freedom on one side and efficiency of institutionalized enforcement of individual rights and duties mostly incorporated in contracts on the other side. While the first mentioned element is guaranteed by reduction of direct state influence over the free will of entrepreneurs expressed in their contracts, the second mentioned element requires strong and efficient state support in the process of enforcement of individual claims of entrepreneurs. Contractual freedom together with a well-functioning court system therefore creates vital elements of a successful business environment. An optimal balance of state inderence in this respect represents therefore an integral parameter of every legislative consideration concerning the modification of the existing legislative framework of business. This parameter is also considered to be one of the key elements of the business environment and as such is subject to dynamic change reflecting the social dynamic.

Materials and Methods

The legislative framework of business in the Czech Republic has been significantly modified by adoption of a large body of legislation effective January 1st 2014. Re-codification efforts of previous decades have been successfully accomplished mainly by introducing pair of new comprehensive acts of large importance: New Civil Code No. 89/2012 Coll. (NCC) and Business Corporation Act No. 90/2012 Coll. (BCA).

Most of the relevant studies in relation to the hotel and hospitality business so far were focused on the new rules of NCC concerning the law of contracts and especially the new principles of reimbursement for damage caused to clients by rendering defective services or by the cancelations. These parts of legislation are also the most widely discussed tourism business related norms. New legislation is, however, providing for many other new instruments of high importance applicable to the hotel and tourism business among which

undoubtedly rules governing the setup of business entities, corporate structures, responsibility of managers and related issues are of the main importance.

The main goal of this article is to analyze new instruments of corporate governance provided by NCC and BCA regulation and determine possibilities of its practical implementation in the process of structuring company startups and at the same time to provide practical recommendation for desirable reshaping of existing corporate schemas in order to achieve the highest possible efficiency of performance of the hotel and hospitality business corporate management.

Based on this goal, this article is exploiting static and dynamic analysis of the legislative framework of enterprising consisting mainly of review of legislative texts together with analysis of leading decisions used in the process of interpretation of the new rules. In evaluation of the current trends in corporate law, the comparative method was used with respect to normative harmonization within the European Union together with the historical comparative method. Recent history in development of civil law mainly in Slovakia, Italy or Canada is considered to be of importance being inspiration for current Czech legislative changes in many respects.

This article is due to its limited extent not explicitly dealing with empirical case studies. Practical recommendations, however, are based on author's practical international experience with existing corporate structures in the hospitality business.

Results

Business companies are the most popular form of the hospitality business together with self-employed entrepreneurs often involving family members to their enterprising (Růčková, 2008). Business corporations and especially capital companies are traditional forms of corporate governance in domestic environment legally recognized and regulated since the principal changes of sociopolitical situation in the Czech society by adoption of Business Code in 1991. According to recent statistics approx. 350,000 enterprising entities were registered in the form of business corporations.

Recent significant changes in legislation effective from 2014 provided especially for a simplified procedure of company setup, desirable variety of capital involvement, possibility of meeting individual needs by redesign of corporate ownership and decision making structures. New legislation gives more rights to shareholders to individually set for rules of business providing large room for possibility of individual setups different in many respects from the so far rigid statutory rules. New tools of corporate governance are making business companies more attractive especially for long-term corporate planning, transparency and control. The above-mentioned principal changes together with

implementation of legal recognition and protection of family business are able potentially bring to the hospitality business a new set of tools representing a new impulse for business startups or reshaping and modification of existing structures of corporate governance (Brčáková, 2014).

Desirable liberalization of rules of corporate governance is balanced by implementation of new rules concerning responsibilities of managers both toward the shareholders and contractual partners providing for internationally accepted standards in this area following not only the EU legislation but also the broader international corporate paradigm.

Hotel and restaurant enterprising is specific by the nature of business but also by management schemes utilizing specific business standards of behavior, habits, customs and other socio-cultural internal norms. New legislation is providing for implementation of such standards by explicit recognition of their binding nature by NCC in large extent. Existing professional standards should be considered as legally binding if not in contrary to the law. This general rule opens the room for custom-made individualized relationships and rules utilizing the tradition and best practice of the each particular type of the hospitality business.

Family Business in Hotel and Restaurant Enterprising

A hotel and restaurant small and mid-size business is frequently run in the form of a family business. This phenomenon has a long historical tradition and the importance of the family business in this segment of enterprising is conditioned by socio-cultural and historical factors among which the tradition of ownership structures, continuity and long-term social stability are of main significance (Bainbridge, 2012). From this perspective the overall share of the Czech family business at the country's economic wealth is not reaching the West European standards. The continuing tradition of the family business was interrupted by more than 40 years of state-controlled economy, which destroyed not only the ownership structures but also the culture of enterprising both of large traditional family firms and the mid size and small enterprising (Klipper, 1995). Apart from historical reasons the lack of appropriate legislation regulating and protecting family enterprising could be seen as one of the leading limiting factors of larger utilization of informal structures of this type after 1989. New regulation of family business meeting international standards and inspired in large extent by Italian experience (Codice Civil, 2013) provides for a set of rules which can be considered to be specific corporate governance tools. This will apply in broader sense despite the fact that a family business does represent a legal entity.

In the hotel and hospitality business especially the lack of transparent principles of family businesses in the past resulted in many controversies, legal disputes and gave rise to general negative impact on family interpersonal relationships which must be considered to be a vital prerequisite for this form of enterprising. Fair remuneration of the participating family

members, participation in strategic decision making and lack of guaranties in the process of transfer of family businesses to new owners were most frequent objects of controversy. Legal recognition of family businesses and a set of rules adopted by new legislation were for above reasons eagerly awaited.

Specific importance of protection of the participating family members is needed mainly in common situation of the lack of formal contractual relationship among cooperating parties (e.g. labor contracts, contracts for work, executive contracts, articles of association, shareholders agreements, silent partnership agreements, etc.). NCC is providing for rules for family businesses applying automatically without the necessity of execution of any formal legal act, such as contract or similar. New rules for family businesses apply if the business is owned by one family member and run with the participation of at least one another close family member. A business run by spouses, however, will be primarily governed by the statutory proprietary rules for marriage. New rules provide protection not only to family members actively working in a family business but also working generally for the good of a family. This concept will apply in domestic environment mainly to the wife taking care of children and household. Even if not involved in family business enterprising the wife is in such cases considered to be a member of a family business and fully protected by this new set of important rights and guaranties.

All family business participants have right to profit share corresponding to amount and type of work performed as well as the right to their corresponding share at the assets owned by the particular family business. The new rules also provide for strong position of family members in their control over the enterprise. This influence is strong especially in the decision making involving cases exceeding day to day business decisions when majority vote of all family business members is required by new law. This rule is applicable mainly to decisions concerning new investments, strategic planning, distribution of profit, changes of basic strategy of business, excessive loans or mortgages and also to future transfers of the business share outside the family.

Protection of family business members in the case of business takeovers is guaranteed by a supplementary safeguarding set of rules establishing pre-emptive rights to the existing family business members. Pre-emptive rights in favor of family business members will also apply in the case of inheritance. In the case of termination of participation in a family business the leaving member is entitled to full pay-out of share. In daily hospitality business, however, strict application of this rule may result in the cash flow crisis of the enterprise. In order to prevent such negative financial impact new rules provide for possibility to use payment calendar for such pay-out. Lack of consent in this matter can be solved by court proceedings in which members of family business can seek protection against negative impact of pay-out to the current financial situation of enterprise. Court may order a pay-out calendar against the will of leaving family business member in such cases.

Recognition of the family business form by Czech law has a significant impact on labor law issues. Regarding the fact that the involvement in a family business is not based on the formal written agreements or other documentation state labor controls can no longer penalize family members for working at the hotel, restaurants or another premises of hospitality enterprise without formal documentation. The same principle will apply to trade licensing requirements – family business members are not required anymore to apply for a trade license. Lack of formal legal contracts and licenses among family business members cannot be sanctioned. This change will substantially affect general environment of enterprising in the hospitality business providing for desirable flexibility and liberalization to the organization of enterprise. New flexibility will make not only permanent cooperation of family members possible but also provides for tools of short-term necessary solutions. In the hotel and restaurant business it represents especially new flexibility of coping with characteristic seasonal problems in hotel business, peak hours in restaurants and similar differences of workload in this segment of enterprising. According to new legislation family members can be present and work at the enterprise premises anytime without need of existence and need of proof of any formal documentation.

Limited Liability Company

Limited Liability Company (LLC, *společnost s ručením omezeným, s.r.o.*) is the most popular form of corporation in the Czech hospitality business. The recent reform of legislation introduced new model of LLC governance making this form of enterprising even more attractive. Among all new rules governing the setup and governance of LLC new flexibility of different forms of shareholders participation in LLC together with the possibility to own more than one share in the company is considered to be the most appreciated change according to recent surveys within the Czech business community (Brčáková, 2014).

The most apparent and widely discussed modification of LLC principles is the change of registered capital rules. Capitalization of LLCs is according to new legislation no more based on misleading concept of "registered capital" set originally at minimum of CZK 200,000 (USD 8,500 approx.). The present LLCs can be founded with the minimum required capital of symbolic CZK 1. This change of whole paradigm is bringing more attention of the business community to real net assets value of the corporations not relying on the merely formal misleading registered capital requirements.

Overall liberalization of the corporate LLC governance principles is significantly supported by lifting restrictions concerning limited participation of a sole shareholder in "one man companies". According to the new rules a single person or a company can be only shareholder of unlimited amount of LLC corporations. Furthermore this rule makes holding structures of "one man companies" possible without any limitation. New legislation is making new corporate LLC schemes possible opening room for tax optimization, balancing

business risks, multichannel branding and many other business goals achievable by diversification of business plans to larger number of corporations without the danger of loss of overall control over the business. Enterprising in the form of LLC is also currently becoming more suitable for larger corporate projects due to the lift of past restrictions limiting amount of LLC shareholders to 50. For all above reasons it is reasonable to expect that effective corporate governance of LLC structures will favor this form of corporation in comparison to CLS holding structures even more.

Adoption of new LLC rules is providing for setup of different groups of shares with individual different rights attached for each particular group of shareholders largely resulted in desirable liberalization of LLC corporate structures. Priority shares, shares with differentiated voting rights including veto shares, duty of capital contribution, profit share schemas and broad variety of other possible sorts of shares can be issued in the contrary to past when only rigid ordinary shares with uniform catalogue of rights and duties were permitted. New rules are shifting LLC corporate governance more towards the principles of Company Limited by Shares (CLS, akciová společnost, a.s.) where different sorts of shares were traditionally recognized in the Czech business since 1991. New rules of corporate governance can instrumentally define groups of shareholders with differentiated influence over the strategic management of enterprise, new investments, nomination of managers, distribution of dividends and other issues of main importance. Groups of different profit share on the other hand serve at the same time as important tools providing for incentive schemas within the corporate hierarchy.

New rules of corporate governance bring advantage specifically to hospitality business mid-size and small family firms where LLC form of enterprising is prevailing and personal involvement of shareholders in such LLC daily businesses is characteristic. According to the new rules obligation to personally work for the corporation or provide services can now be attached to special ownership share. By the transfer of this type of share obligation of personal duty to work for the company will pass to new shareholder.

The frequent problem of the hospitality business corporate structures in the form of mid size and small LLCs in the past was the lack of effective tools for participation of family members avoiding danger of loss of centralized decision making control over the enterprise. Differentiated categories of shares offer new solution to this problem granting sole rights to profit share to family members or other subjects without granting any voting rights. This arrangement is avoiding the risk of the detrimental impact caused to a company by potential wrong managerial decisions of laymen and at the same time preserving their proprietary rights. In hotel business particularly this can be considered to be the needed tool for development and planning of long term inter-generation family business especially with respect to the fact that such particular categories of shares can be subject to inheritance and may be modified according to the future free shareholder's will.

Minimum capital requirements together with new tools of governance resulted in increasing popularity of this form of enterprising according to statistic showing rapid increase in number of LLC startups in the Czech Republic immediately after the change of legislation in 2014. Existence of new legal instruments of corporate governance are providing for corporate flexibility and adaptability of CLS structures and consequently improving long time planning and potential efficiency of the hospitality business management of CLSs.

Company Limited by Shares

Liberalization of the corporate governance rules will apply in large extent also to CLS (akciová společnost, a. s.) by giving shareholders more flexibility in regulating their relationships. Following comments are primarily focused on rules making this form of enterprising more attractive for the hotel and tourism business by potential simplification of the structure of statutory organs of company and modifications in their status and mutual managerial and controlling function.

The form of CLS was not frequently utilized for small, mid-size or family business in the past being traditionally used more for international chains, hotel holdings, companies with the participation of foreign capital or companies with the dispersed ownership structures (Hučka, 2012). The rigid rules of corporate governance of the past were one of the main barriers for more extensive utilization of CLS schemes for mid-size firms. The rigid rules of corporate governance in the past provided for strict requirement of dualistic model of CLS sharing in various forms the powers and controlling responsibilities of corporation between Board of Directors and Supervisory Board (Normann, 2012). Necessary involvement of large number of skilled, responsible and loyal managers serving in organs of the company significantly limited practical utilization of this model in the past. The new rules of CLS governance introduced new principles of structure and competence providing for alternative simple monistic model of management. In this model both the Board of Directors and Supervisory Board functions can be fulfilled by the Management Board and a single Statutory Director is performing the powers and responsibilities of the Board of Directors, such as acting on behalf of the company or performing business management under the supervision of the Management Board. In the minimalistic model suitable for managing small and mid-size firms even a sole person can fulfill all roles at the same time. The new corporate rules provide room for a single member Management Board when the same person can perform both the function of the sole member of the Management Board and at the same time the function of the Statutory Director of CLS.

Significant new level of stability and strategic control over the CLS is supported by the flexibility in terms of function of statutory body members. The rigid rules limiting terms of service in the past to the maximum of five years were abolished. The terms of service can be now set without any limit by the founding documents of corporation and changed anytime by the decision of the shareholders. Particularly in the hospitality business this can

be used in the function of permanently serving directors with no need for mock alterations of the function anymore. Stability of managerial positions under new principles is able to satisfy both needs of corporation and the directors at the same time based on the proper communication and planning.

Transparency of CLS governance is promoted by the requirement according to which CLS has to form and update companies' official websites. All invitations to shareholders meetings, proposed agenda, shareholders proposals and other significant information must be published at the official website of CLS together with all the official relevant corporate data.

CLS corporations having more than 50 employees were limited in the past by the strict legal requirements of mandatory employees' participation in the management of the company. New law abolished this requirement leaving the possible participation of employees in the company's organs at the sole discretion of the shareholders.

CLSs with the dispersed ownership structures suffered by problems with the minority shareholders abusing their rights in various forms including procedural obstacles and obstructions leading to blackmailing in the past (Borkovec, 2013). This practice has been significantly limited by adopting the new procedural rules of shareholder meetings providing for the strict regime of raising protests against approved resolutions and limiting significantly its scope. Abuse of shareholders' rights in other specific form was also eliminated by the new possibility to limit shareholders' presentations at meetings to specific time limits.

Despite the fact that the main capitalization requirement at the level of CZK 2,000,000 (USD 80,000 approx.) of registered capital was not abolished, the new rules of allocation of funds to reserve fund made capitalization of CLS more favorable. Attractiveness of CLS in the hotel and tourism business especially was limited in the past by strict legal requirements allocating portion of companies' funds to an obligatory statutory reserve fund. Release of previously retained funds under new legislation provided for much better CLS cash flow and for more efficient long-term financial planning. Despite this modification, however, economic reasons still create the main barrier for larger utilization of CLS form of current enterprising in the hospitality business in the Czech Republic.

Liability of Managers

Reduction of the rigid statutory requirements and new flexibility of corporate governance tools is in new legislation largely supplemented by the new definition of managerial responsibility principles. In order to keep the control over the effective corporate governance and personal responsibility of managers, new principles are providing for more precise and strict requirements and duties concerning statutory body members' skills and behavior defining the key mandatory elements of managerial skills and behavior such as

loyalty, knowledge and care. New requirements are distinguishing and aiming different spheres of human personality strictly requiring combination of intellectual, moral and practical skills. Identical principles apply also when legal entities are according to new legislation serving as the statutory body members by appointing representative of such entity in the board.

Loyalty to business and its stakeholders is going far beyond the old formal requirements concerning conflict of interest restrictions. Requirement of knowledge is considered to be a general prerequisite for fulfillment of any managerial function and any possible later failure in this respect provides no room for excuse or justification. Duty of care rule is consisting of two principles – duty to act as a diligent manager and Business Judgment Rule limiting the actual responsibility and liability of managers entirely to cases exceeding standards of diligent care and knowledge. Application of this principle to practical business is of high importance providing vital safeguard preventing automatic legal responsibility in the case of negative consequences of directors' decision making (Sigmundová, 2012; Petrov, 2007). Responsibility of directors is strictly limited to the proof of failure in above mentioned sense. The new concept is protecting managers against the unreasonable business risks, providing more flexibility in their decision making limiting their personal responsibility for company losses. In the case of subsequent claims of the corporation against its managers, however, burden of proof is on the side of the directors. If managers fail to prove that their acting did not exceed reasonable standards of business judgment they are obliged to compensate company for the losses.

New liability rules also provided for special claims against directors in the cases of insolvency. In such cases managers can be held fully liable for the company's debts. Corporation can also retroactively claim repay of two years managers' remuneration and release of all other benefits of managers related to the claim. In all cases of directors' liability personal property of managers frequently including also property of spouses is in stake. For above reasons use of the various forms of managerial insurance will be executed and more frequently implemented in daily business. Limitation of directors' liability can also be subject to various agreements executed between managers and corporation according to the new rules (Vakkur, 2013).

General statutory principles of managers' liability are interpreted in the process of application of law especially by the decision making. Hospitality business standards of behavior, required skills and due diligence care must be interpreted in line with the best practice principles and specifics not only of this specific segment of enterprising but also in relation to each particular hospitality business. Internal rules, standards of behavior, habits, customs and other socio-cultural norms are significantly recognized by new legislation as important interpretation guidelines for the determination of the limits of particular responsibility of managers in particular cases.

Discussion

The new corporate governance rules effective from 2014 provided for long awaited change of legal environment especially by introducing a new level of flexibility in corporate setup and new paradigm of managerial responsibility. Whole body of new legislation is, however, of even much more significant importance creating a whole new structure of private law. Each principal large scale change of legal environment of this character is inevitably leading to implementation difficulties and the new rules are therefore currently subject to wide public discussion as well as the expert controversies. Some of the reservations are purely of technical nature causing no principal controversies such as strict formal requirements of powers of attorney for representation of the shareholders in the process of company setups or need of more precise terminology or legal definitions in some cases (Januš, 2014). In such cases "technical amendments" are already under preparation consequently to feedback from business community.

Principal criticism over new rules is mostly focused on areas not specifically targeted in this article, such as problems of both theoretical and practical issues of trust law related to general question concerning the transparency of ownerships structures. From the perspective of the corporate governance rules an ongoing public debate concerning the possibility of reintroduction of previous registered capital regime of CLSs is relevant. Common denominator of all such debates is, however, interest in stability of business environment and conservative approach to potential future modifications of rules without proper analysis after not more than 2 years of its effectiveness (Kramer, 2014). For strategic corporate planning, however, timely reflection of the principal debates and legislative proposals resulting in modification of business environment are significant.

Conclusion

The legal framework of enterprising in the Czech Republic is currently undergoing important changes due to the recently amended legislation resulting in more business friendly environment featuring flexibility in shaping businesses and higher level of transparency and guarantees of responsibility of directors, managers and other involved business subjects. Seen from the perspective of the hospitality business, one of the most practical benefits of the new corporate legislation is liberalization of the corporate governance rules with the special respect to limited liability companies and companies limited by shares together with introducing new legal protection of family businesses which was not recognized and regulated in the Czech business environment so far.

The new rules are not only applicable for new hospitality business startups. It is advisable for existing corporations and individual entrepreneurs to get acquainted with the new

instruments soon in order to adjust and modify the existing structures in order to meet the standards of most effective management. Review of founding principles and modification of governance rules such as the form of corporate organs, rules of decision making process, profit share principles, personal duty to provide work or services for business, involvement of family members and many other challenges may significantly improve efficiency of the hospitality management and consequently support performance of each particular hospitality enterprise in the long-term perspective.

The process of gradual implementation of new principles within the business community and adaptation of hospitality business to the new rules has to be followed by proper analysis providing for desired feedback. Only such method will secure that the practical needs of the hospitality business will be taken in account in already discussed potential future amendments of relevant legislation. Stability of the new system of corporate governance, however, must be considered to be of major importance providing room for necessary adaptation of the hospitality business to the whole new paradigm.

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