

## **WANT IT ALL AND BE LEFT EMPTY-HANDED: A DIRECTOR'S CLAIM FOR STATUTORY REMUNERATION PURSUED IN BAD FAITH (EURO MALL PRAHA)**

In a key ruling affecting mergers and acquisitions, but also other important areas of Czech corporate practice, the Supreme Court of the Czech Republic has removed a thorn from the side of many target companies and their acquirers in relation to an all-too-familiar "skeleton in the target company's closet" – potential claims by former directors for statute-based "usual" remuneration. In its judgment no. 29 Cdo 1866/2016 from August 2017, the Supreme Court rejected a claim for "usual" remuneration brought by a former board chairman on the grounds that, under the circumstances of the case, the claim was pursued in bad faith.

### **FACTS OF THE CASE AND APPLICABLE LAW**

Following his removal from the board of directors of Euro Mall Praha a.s. ("Euro Mall"), the plaintiff, a former chairman of the board, sued Euro Mall for the payment of "usual" remuneration for his directorship. Throughout his term as chairman of Euro Mall's board, the plaintiff was employed by EURO MALL HOLDING A/S, Euro Mall's parent company. His job description comprised "the overall management of and responsibility for the organization" of the companies within the group, including Euro Mall. As the parent company's employee, the plaintiff was paid a competitive salary and benefits. During his term as Euro Mall's director, the plaintiff never sought any remuneration for the performance of his office as director and chairman of the board. Indeed, more than two years into his term, during which time the issue of remuneration was not expressly regulated between the parties, the plaintiff and Euro Mall entered into a written agreement providing that the plaintiff would serve as director on a remuneration-free basis. It was only after his employment with the parent company was terminated that the plaintiff sued Euro Mall for "usual" remuneration in relation to the period during which remuneration had not been contractually regulated.

The plaintiff based his claim on provisions of the Czech Commercial Code (in force until the end of 2013) that entitled directors to "usual remuneration" for the performance of their office where no written agreement governing the terms of their directorship had been concluded between the parties.

### **THE SUPREME COURT'S JUDGMENT**

The Czech Supreme Court observed that, pursuant to the law in force until the end of 2013 and in the absence of a written agreement on performance of office between the director and the company on whose board he or she served, directors were indeed entitled to "usual remuneration" by operation of law. The court went on to say that this conclusion would not be affected per se if the director were simultaneously a paid employee of the parent of the company on whose board he or she served.

However, in assessing the plaintiff's claim for usual remuneration in the case at hand, the Supreme Court emphasised as critical the fact that the plaintiff's job description under the employment contract with the parent company overlapped fully with his activities on the board of Euro Mall. Also important was the fact that he received a salary and benefits for the performance of these activities from his employer, and that he did not claim any remuneration for the performance of his office from Euro Mall until his removal from Euro Mall's board. Moreover, the court also had regard to the fact that Euro Mall did not actually conduct any business activities during the period in which the plaintiff served as its director. All these

facts led the Supreme Court to conclude that the plaintiff's claim contradicted the principles of fair business dealings and that the plaintiff could therefore not recover usual remuneration as claimed.

As regards the initial absence of a written agreement on the director serving free-of-charge, the Supreme Court pointed to this as a mistake on Euro Mall's part. However, the court noted that the plaintiff, having served as chairman of Euro Mall's board, was clearly co-responsible for Euro Mall's mistaken conduct, and could not therefore recover the claim pursued since the plaintiff could not lawfully take advantage of misconduct co-induced by himself.

## CONCLUSION

The Euro Mall ruling is welcome news to all Czech companies that had failed to enter into written agreements confirming the free-of-charge performance of office by their directors under the legislation in force until the end of 2013. It will also benefit all parties interested in acquisitions of Czech companies, as the types of risk exemplified in the Euro Mall case have been rather pervasive in the practice of corporate groups and no judicial opinion had previously been available on this point.

The provisions of the new Business Corporations Act in force since 2014 have considerably reduced the chances of success of a claim of this sort. Under the new rules, directors are deemed to perform their office free of charge where no written agreement is in place or where such agreement contains no provision regulating remuneration. Nevertheless, the Euro Mall case still demonstrates that, as a matter of group house-keeping, it pays-off to have written agreements in place governing the terms of the office of directors appointed to group companies and not to rely on the implied understanding of the parties.

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