

# RIGHTS AND OBLIGATIONS OF STATUTORY BODIES AND PROXYHOLDERS AGREEMENTS ON THE PERFORMANCE OF AN OFFICE

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## WHO ARE THE STATUTORY BODIES?

- executive director/s ("jednatel/é") in a limited liability company
- board of directors ("představenstvo") in a joint stock company
- one, several or all partners ("společník/ci") in an unlimited partnership (veřejná obchodní společnost)
- unlimited partner ("komplementář") in a special limited partnership (komanditní společnost)
- head of branch office ("vedoucí organizační složky")
- board of directors ("představenstvo") in a cooperative (družstvo)

Other persons who might have similar powers:

- proxyholder ("prokurista")

## WHO MAY EXERCISE THE OFFICE/ BE A MEMBER?

- individuals
- Czech or foreign nationals
  - if exercised by a foreigner from abroad, no need of residence permit,
  - if exercised by a foreigner in the CR, residence permit needed; work permit needed only if the individual is directly engaged in the work/services rendered by the company
- either a shareholder/partner or entirely external person

## INDIVIDUAL or COLLECTIVE BODY?

Executives/partners/unlimited partners... etc. = individuals

- even if more than 1, they act individually unless stipulated otherwise by Foundation Deed/Articles of Association (in practice - often joint signature of two)
- the mode of action always registered in the Commercial Register

Board of directors = collective body

- unless specified otherwise by the Articles of Association; in principle every member of BoD may act towards third parties – those members authorized to act must be registered in the Commercial Register; decision making by majority of votes

## RIGHTS and POWERS of the statutory bodies / their Members

- act on behalf of the company
- manage company operations (decisions regarding company business management)
- perform instructions of the General Meeting (unless contrary to law)
- perform acts related to the company's General Meetings where the company has more than one shareholder (convene the meeting, notify of the agenda, draft minutes, etc)
- decide on the reserve fund unless the law reserves this decision for the General Meeting

### Limitation of powers:

possible within the statutes, articles of association/foundation deed/by decision of General Meeting or supervisory board, however not enforceable towards third parties

## RULES OF EXERCISING THE OFFICE

Generally:

- Commercial Code, foundation deed/articles of association, statutes, General Meeting instructions

More specifically:

- provisions regulating mandate agreement (Sec. 566 et seq. of the Commercial Code), or
- Agreement on the performance of an office ("Smlouva o výkonu funkce")

## RULES OF EXERCISING THE OFFICE (continued...)

Do not forget Sec. 196a of Com. Code:

- **Transactions between** the company and the statutory bodies/their members/ family (such as loan agreements, agreements that guarantee their engagements or agreements on the transfer of the company's assets to an executive/member of the board of directors)
  - must be concluded only with prior written consent of the General Meeting and under usual commercial conditions
- **Acquisition** (by the company/entity controlled thereby) of assets **from** an executive and/or his family members or close associates for the price corresponding to at least 1/10 of the registered capital of the company or **sale** of assets of this value **to** them – the price must be determined by a court-appointed expert

## DUTIES

### 1) Based on Commercial Code

#### General:

- act with due care and skill (required increased level of knowledge, skill and experience : "professional care")
- provide shareholders with information on the company and its operation and access to corporate documents
- provide for due bookkeeping of the company
- keep the list of shareholders (both s.r.o. and a.s.)
- draft a report on relations between connected entities (in the event the company is a part of group of companies and no controlling contract is concluded between controlling and controlled entity)
- notify the Commercial Register of all changes in the registered data and file the foundation deed/articles of association, annual financial statement and other statutory documents with the Collection of Deeds
- convene the general meeting and propose relevant measures if the company's uncovered losses would either correspond to ½ of the company's registered capital, or this can be expected given all the circumstances (even if the available funds are used)

## DUTIES

(continued...)

### Personal:

- non-competitive conduct under the Commercial Code  
  
(i.e. statutory body/member thereof is not allowed to perform business activity identical or similar to the business of the company and enter into any commercial relations with the company)
- prohibition to act as an intermediary with respect to the company's business activities
- prohibition to participate in the business activity of another company as a member with unlimited liability or a controlling entity of another entity with the business activity identical or a similar to the business of the company
- prohibition to execute the position of a statutory body/member thereof or any other body of another legal entity with the business activity identical or a similar to the business of the company, unless within a holding.

## DUTIES

(continued...)

### 2) Based on other laws

- Insolvency Act:
  - obligation to file an insolvency petition without undue delay after the statutory body learned (or should have learned if acted with due care) if the company is insolvent
- Accounting Act:
  - obligation to duly keep the accounts and records

## LIABILITY – CIVIL

Liability of statutory bodies for damage caused to the company or third parties = an objective private law liability.

### **Release:**

- solely based on circumstance excluding liability under Sec. 374 of Com.Code, i.e. an obstacle arose independently of the statutory body's will
- proof must be submitted by the statutory body

### **Limitation:**

- of liability for damage caused to the company - not allowed, thus all stipulations of this kind would be invalid

### **Joint and several liability:**

- of all executives, all members of a board of directors

## LIABILITY – CIVIL (continued...)

### Different forms:

- liability for damage caused to creditors by not filing an insolvency petition unless the statutory body can prove that it did not cause the damage
- liability towards the company for:
  - not acting with due care
  - breaching their legal obligations
  - executing instructions of General Meeting that were contrary to law, etc.

## LIABILITY – CIVIL (continued...)

### Consequences:

- compensation of the damage caused
- specific sanctions for breach of non-competitive conduct
- compensation of damage caused to the company by controlling entity if not disclosed in the report and if not compensated by the controlling entity (or no agreement on compensation concluded)
- contractual penalty (if agreed in the agreement on the execution of function)

## LIABILITY – CRIMINAL

Liability of legal entities - not recognized by Czech criminal law → transferred to individuals – statutory bodies (members thereof)

Liability = subjective;  
authorities have to prove fault within majority of criminal acts

- a) Sec. 118 of the Criminal Code (the “CC”) – unauthorised business activity
- b) Sec. 125 CC – misrepresentation of information on economic results and assets (e.g. not keeping company accounts)
- c) Sec. 126 CC – breach of an obligation in insolvency proceedings
- d) Sec. 127 CC – breach of an obligation in business relations
- e) Sec. 128 CC – misuse of information in business relations
- f) Sec.147 CC – non-payment of taxes, statutory social insurance and health insurance contributions
- g) Sec.148 CC – curtailment of taxes, fees and similar payments
- h) Sec. 149 CC – unfair competition
- i) Sec. 248 CC – embezzlement
- j) Sec. 250 CC – fraud
- k) Sec. 250a and 250b CC – insurance fraud and credit fraud
- l) Sec. 255 CC – breach of an obligation to administer the property of third parties
- m) Sec. 256 CC – defrauding a creditor
- n) Sec. 256a CC – favouring a particular creditor

## LIABILITY – ADMINISTRATIVE

Liability of legal entities for administrative offences is regulated by various specific laws (e.g. environmental act, building act, water act, trade licensing etc.)

Liability of individuals for offences committed when acting on behalf of a legal entity is governed by the Misdemeanours Act ("přestupkový zákon")

AGREEMENT ON THE  
PERFORMANCE OF AN  
OFFICE  
„AGREEMENT“

LEGAL FRAMEWORK

- **The relationship between the company and its statutory body (its member) is a commercial one.**
- Governed by:
  - **Commercial Code**
  - **Statutes**
  - **Agreement on the performance of an office, if concluded, otherwise a mandate**

## „AGREEMENT“

### CONCLUSION OF THE AGREEMENT

- The conclusion of the Agreement on the performance of an office is **not obligatory**.

It is thus not a condition for the performance of a statutory function or registration in the Commercial Register.

- If not concluded, the provisions of the Commercial Code on the mandate apply in the appropriate manner.

## „AGREEMENT“

## CONTENT

- Mutual rights and duties which are not regulated by the mandatory provisions of Commercial Code (specification)
- Remuneration, principles of its calculation /determination, method of payment
- Other benefits of the members of the statutory body
- Limitation of liability is excluded
- In conformity with good manners, business rules, it cannot circumvent law

## „AGREEMENT“

## REMUNERATION

- A member of the statutory body is generally entitled to remuneration for the performance of his/her function.
- Remuneration is granted by the General Meeting.
- Remuneration can be agreed in the Agreement. The performance of a statutory function for no consideration is not excluded, if agreed.
- Otherwise, a statutory body member is entitled to the usual remuneration.

## „AGREEMENT“

## PROCEDURE

- The Agreement must be **in writing**.
- The Agreement must be **approved by the General Meeting** / sole shareholder

a condition of its effectiveness, i.e. already concluded concrete Agreement is to be presented for its approval by the General Meeting

## „AGREEMENT“

### SIMULTANEOUS PERFORMANCE OF THE STATUTORY FUNCTION AND EMPLOYMENT RELATIONSHIP

- In business practice, the statutory body member is also frequently in the employment relationship with the company (labour contract).

- **Based on the current decisions of the Supreme Court of the Czech Republic :**

- impossibility to exercise the statutory function on the basis of the labour contract (*statutory body's function is not a type of work*)
- impossibility to conclude a labour contract which scope of work includes the activities falling under the scope of the statutory body's activity (commercial management in large sense)
- possibility to conclude a labour contract for the work out of scope of the statutory body function

## „AGREEMENT“

## RISK OF INVALIDITY

- If a member of a statutory body is simultaneously employed, for example, as general manager on the basis of the employment contract, such a contract risks to be considered invalid:
  - employment relationship has not been duly established by the labour contract
  - employment contract is void

# Main Differences

Relationship	Company Statutory Body	Company Employee
Type	Commercial	Employment
Applicable regulation	Commercial Code Company's Statutes	Labour Code
Object	Performance of the position of statutory body member	Type of work outside of the scope of function of the statutory body
Creation of the office	Appointment to the function by the GM / SB	Conclusion of the contract, commencement of work
Termination	Recall Resignation Expiry of the mandate Other grounds stipulated by the Commercial Code	Expiry of the agreed term Agreement Immediate termination Termination Notice Recall and resignation in specific cases

# Main Differences

Relationship	Company Statutory Body	Company Employee
Liability	Objective No limits for damage	Subjective Limited by the Labour Code (a multiple of 4.5 salary in case of negligence)
Remuration	Remuneration stipulated / approved by the GM Royalties	Salary
Tax and SSHI implications	Executive: - Taxation of the remuneration as income of employee - Remuneration submitted to both, social security and health insurance - Tax deductible expense for the Company	- Employment income is subject to the standart tax rate (15%, probably 12.5% in 2009) to be withheld and transferred to the Czech Tax Authorities by the employer via monthly payroll tax advances - submitted to both, social security and health insurance - Tax deductible expense for the Company

# Main Differences

Relationship	Company Statutory Body	Company Employee
Tax and SSHI implications	<p>Members of Board of Directors or Supervisory Board :</p> <ul style="list-style-type: none"> <li>- Taxation of the remuneration as income of employee</li> <li>- Remuneration submitted to the Health insurance only</li> <li>- Tax non deductible expense for the company</li> </ul>	

## PROXIES

### ACTING ON BEHALF OF THE COMPANY

- direct acting – statutory bodies
  - indirectly - representing the company on the legal basis
    - branch director
    - persons authorised to perform special activities involved in operating the enterprise
- on a contractual basis
- general proxy (power of attorney)
  - „commercial“ proxy („prokurista“)

## PROXIES

## POWER OF ATTORNEY

- There is no special regulation regarding the powers of attorney in the Commercial Code. The provisions of the **Civil Code** apply accordingly (ss. 31 – 33b of the Civil Code).
- The proxy holder may be an individual or legal entity (acting through its statutory body). It is possible to appoint one or more proxies.
- The further delegation (substitution) is possible, if agreed or stipulated by law.
- The specific regulation of the procedural powers of attorney is stipulated in the Civil Procedure Code.

## PROXIES

## POWER OF ATTORNEY

- The power of attorney must be specific:
  - who is represented
  - who is the proxy holder
  - the extent - general powers of attorney
  - specific powers of attorney (one or several acts)
- According to the recent decisions of the Supreme Court, it is however not possible to grant a general power of attorney to one executive/member of the Board of Directors, if two of them must act jointly
- Acting in excess of powers  
If the proxy holder exceeds his/her powers, the acts are binding to the entity which conferred the proxy when the act executed was approved subsequently (even not expressly)

## PROXIES

### „COMMERCIAL“ PROXY

- The „Commercial“ Proxy is a **special type of a power of attorney**.
- Only a person/corporation registered in the Commercial Register may grant such a proxy
- Only an individual may be a proxy holder.
- It is possible to appoint one or more proxy holders
  - acting each independently
  - acting all jointly
  - acting at least two of them jointly
- The proxy holder is appointed by the statutory body, except for a limited liability company where it falls under the powers of the General Meeting (Statutes may grant this power to the executive)

## PROXIES

Extent of the powers of attorney (proxy) is determined by the Commercial Code:

- The proxy holder is authorized to **take all acts which are involved in operating the enterprise** (even if a special power of attorney is required)
- Other limitations are not possible. Any internal limitation of the proxy holder's powers cannot be invoked towards third persons (liability of the proxy holder towards the company is not excluded).
- The proxy holder is **not authorized to alienate and encumber real estate**, unless they are expressly authorised to it

## PROXIES

### Registration of the proxy in the Commercial Register

- The proxy holder must be **registered in the Commercial Register.**
- The proxy becomes effective upon its entry in the Commercial Register
- The effect of the recall of the proxy does not depend on the deletion from the Commercial Register (doctrinal opinion).
- If a proxy is conferred to more than one individual, the method of acting on behalf of the company must also be registered in the Commercial Register.

### Signing on behalf of the company:

The proxy holder attaches his/her signature and the „procura clause“ (as proxy holder, per procura, ppa.) to the business name of the company.

# Thank you for your attention

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