

Disguised distributions in capital companies

Abstract

The balance between providing adequate protection to creditors and securing the right of the shareholders to a distribution is disturbed by the institute of disguised distribution. This thesis analyses this institute against the background of the recent amendment to the Business Corporations Act, which introduced rules prohibiting gratuitous transactions in favour of shareholders into the Czech legal system. The aim of the thesis was to analyse the circumstances under which a disguised transaction between a capital company and its shareholder would constitute a breach of the profit distribution rules by examining the differences between Austrian, German and Czech legislation. The thesis further describes the various aspects of disguised distributions and presents a definition thereof under Czech law.

A disguised distribution is such a contractual legal act concluded between the company and its shareholder, whereby the company provides a material benefit to the shareholder, or to a person close to the shareholder, or to another third party on the shareholder's instruction, outside the scope of the lawful procedure for the distribution of profits by the Commercial Corporations Act, without receiving adequate compensation. Beneficiaries of a disguised distribution include not only the shareholder or persons close to the shareholder, but also third parties to whom the unlawful benefit was granted either on the shareholder's instruction or because of their specific position in relation to the capital company or its shareholder.

The legal implications of disguised distribution must be seen against the backdrop of the complexity of the transaction structures through which they are carried out. In relation to the liability of a third party, the consequences depend on the extent of its participation in the transaction and, in particular, on the extent of its culpability. If the third party participates in bad faith in the disguised distribution, it will bear the legal consequences together with the shareholder as the primary beneficiary.

Key words: disguised distribution, disguised returns of capital, gratuitous payments to shareholders