

## EEIG IN THE CZECH REPUBLIC

This presentation is focused mainly on the process of creating the EEIG in the Czech Republic and some of the consequences of being a member of an EEIG in the Czech Republic. At the moment in the Czech Republic there is only one existing EEIG. Thus the process of incorporation seems to be the most current topic.

### THE CZECH IMPLEMENTATION LAW

The Czech implementation law came into force 2004/6/15. The act was published in the Collection of Acts under number 360/2004. The law itself is applicable mainly on registration in the Commercial Register, publication of registrations, rules relating to managers and finally bookkeeping. On the other hand it is necessary to point out that the law is rather brief in nature and does not lay down many details. Basically it makes reference to the part of the Commercial Code concerning general commercial partnership.

### CAPACITY TO HAVE RIGHTS AND OBLIGATIONS OF THE EEIG

According to Article 1 of the Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping, an EEIG has capacity to be afforded full rights and be subject to obligations of all kinds; to make contracts or accomplish other legal acts; and to sue and be sued. Such characteristics in Czech law correspond to the legal personality, because in Czech law only legal persons have the capacities described in article 1. This was the reason why it was decided to grant EEIG with a legal personality.

On the other hand even the EEIGs, which are not legal persons according to the law of the state where they are registered, are treated like legal persons in the Czech Republic. The Explanatory report to the bill about EEIG explains that the provision of the § 22 of the Commercial Code stipulates that “legal capacity of a foreign person, other than natural foreign person, shall correspond to the law under which such legal person (entity) was founded”. Because the EEIG is established according to the European law, which gives it full capacity, it has that capacity even without being a legal person.<sup>1</sup>

### THE CREATION OF THE EEIG:

#### - acting on behalf of the company before the company is registered

The persons, who act on behalf of the company before it has been incorporated, are engaged in this acting themselves. In cases where they act jointly they bear joint and several liability. When they are acting on behalf of the EEIG they are not limited solely to the matters relating to the company's incorporation.

The “founders” (persons who act on behalf of the company before it has been incorporated) shall make a list of their activities and submit such a list to the members acting collectively as a body authorised to ratify their activities. The members acting collectively shall ratify the activities carried out by founders within three months from when the EEIG was incorporated.

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<sup>1</sup> Explanatory report to the law No 360/2004 Col. , p. 1

After the activities are ratified, managers must announce the ratification to other participants in such activities.

#### -establishment of the EEIG:

Firstly we have to divide the two stages of creating a company: establishment and incorporation. In the Czech Republic as well as in Slovakia establishment is the stage where you make a contract for the formation of a grouping. It does not create the company. Neither official verification of the signatures of the members nor the notarial registration of the contract is required.<sup>2</sup> At this point rules relating to the contract for the formation follow the rules relating to the partnership agreement.

In the Czech Republic to incorporate a company as a legal person it is necessary to register it in the Commercial Register.

#### -incorporation of the EEIG

For registration of the EEIG there is a special form which can be downloaded from the website of the Czech ministry of the justice<sup>3</sup>. The form with a draft of the registration must be signed by all the members of the EEIG. It is a question relating to on whose behalf the members are acting when submitting the form. Either they act collectively as the representatives of a newly arising company or they act in their own name.

Together with the form several other documents need to be submitted. The documents can be divided into two categories:

- those proving the content of the contract for the formation of a grouping,
- those proving the qualifications of the managers and similar facts.

#### -the process of registration in the Commercial Register and Collection of the Documents

The court of justice has to make a decision about the registration within 5 working days. There are some exceptions to this rule, but in general, in cases where the court of justice does not succeed in making a decision within 5 working days, the proposal for registration in the Commercial Register is automatically approved by a court and the company is registered.

After the EEIG has been registered it has to file certain types of documents into the Collection of Documents like, for example, the contract for the formation of a grouping, different types of decisions made by members acting collectively like, for example, election of new managers etc.

#### NULLITY OF EEIG

Since the EEIG becomes the legal person on the day when it is registered in the Commercial Register, Czech law stipulates that after having been registered nobody can pronounce that the company did not come into being or cancel the court decision that registered it. On the other hand a court of justice may pronounce the nullity of the company.

According to Czech law the nullity must be declared by a judicial decision, for which a Regional court of justice (or in Prague the City court of justice) has competence. The Czech

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<sup>2</sup> Explanatory report to the law No 360/2004 Col. explains that member states of the EU shall not set out any formal obstructions to the creation of an EEIG.

<sup>3</sup> [www.justice.cz](http://www.justice.cz)

law outlines situations where the court of justice can declare the nullity of an EEIG without a proposal. Except in such basic situations like when the contract for the formation of the grouping is incomprehensible or when it is inconsistent with the principals of proper morals; such a declaration may be made when:

- a) the contract for the formation or the grouping was not agreed to (by the parties), or was not made in concordance with law or the contract for the formation of the grouping was not made in writing;
- b) the subject of undertaking is forbidden or it opposes public order;
- c) in the contract for the formation of the EEIG the name of the grouping is missing or the subject of undertaking is missing;
- d) none of the members has capacity for legal acts;
- e) in contradiction to the regulation the number of founders is smaller than two.

The nullity of a company is quite a new legal instrument in the Czech law, which was imported from the law of the European Union, but all the reasons for nullity of the contract for formation correspond to the absolute invalidity of a legal act described in the Civil Code. Although the nullity can be pronounced by the court on its own impulse, in practice it is usually necessary to bring a legal action in order to reach this. The legal action which has to be brought to the court is somewhat different from a standard legal action for a declaratory judgement according to § 80 letter c) of the Civil Judicial Code. In this case it is not necessary to prove the “acute legal interest”. There is a difference also in the results of the court’s decision: decisions according to § 80 of the Civil Judicial Code are only of a declaratory nature but the decision pronouncing the nullity of a company forces the company to enter into liquidation. Liquidation substitutes the settlement of unjust enrichment. According to § 68a article 4 of the Commercial Code the nullity of the company has no effect on the validity of the legal relation to which the company is subject.

The list of reasons for nullity stipulated in § 68a is understood to be exhaustive: once the EEIG (or any other company) is registered, any other irregularities in its process of being establishing are healed.

#### Details of two reasons of nullity of EEIG mentioned above:

Concerning the first of the situations mentioned above:

a) the contract for the formation or the grouping was not agreed to (by the parties) or was not made in concordance with law or the contract for the formation of the grouping was not made in writing.

This reason for nullity covers all cases where the contract for the formation of the grouping is void. The contract can be void for example because one of the essential terms of contract is missing or the contract is not signed or because of other reasons set by law.

The declaration of invalidity of the contract for the formation establishes grounds for the pronouncement of the nullity. However, the decision declaring the invalidity does not automatically mean pronouncement of nullity.<sup>4</sup>

The reason ad b): the subject of undertaking is forbidden or it opposes public order. The nullity of the EEIG can be pronounced in cases where its subject of undertaking includes

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<sup>4</sup> It may happen that somebody brings a legal action to the court on pronouncement of the invalidity of the contract but before the court makes a decision the company has been registered. Such a decision stating that the contract is invalid does not automatically lead to the pronouncement of the nullity of an EEIG

criminal activity or is one which is reserved for the state or for a specific type of legal persons (p.e. the activities of banks that require the formation of a joint-stock company).

### MEMBERS OF EEIG

The members of EEIG may be both natural and legal persons. For natural persons the Czech law number 455/1991 Sb., The Trade Licensing Act sets a few conditions:

- an individual having acquired the age of 18 years
- capacity to contract
- submission of proof that the natural person has properly paid all tax
- submission of proof of impunity<sup>5</sup>.

The Trade Licensing Act also stipulates a few obstructions to becoming a member of an EEIG even though he or she may have already fulfilled the aforementioned conditions. Such obstructions are:

- The proclamation of bankruptcy of the natural person in cases where the court of justice has decided that he or she must terminate the activity of enterprise.
- The discharging of the bankruptcy after fulfilment of the schedule of division of payments to the creditors; discharging of the bankruptcy because the assets of the natural person are insufficient to pay the costs of bankruptcy; rejection of the bankruptcy proposal because of lack of assets: if any of those instances mentioned occur then such a natural person is unable to become member of an EEIG for 3 years afterwards.
- The ban regarding trade licensed activity which is the same as the subject of the enterprise of the EEIG or the ban regarding trade licensed activity which is similar to the subject of the enterprise of the EEIG: such natural persons are not allowed to become members of the EEIG as long as the ban lasts.

### UNLIMITED JOINT AND SEVERAL LIABILITY OF THE MEMBERS.

When talking about the EEIG in the Czech Republic it is impossible not to mention the unlimited joint and several liability of the members of an EEIG for its debts. The regulation stipulates that all the members “have unlimited joint and several liability for its debts and other liabilities of whatever nature”, but in that which concerns liability the directive makes reference to national laws. In Czech law the liability of members of EEIGs is set in the Commercial Code and this type of liability is particular to the liability set by Civil Code. The law states that the creditor firstly has to demand the debtor to fulfill his obligation before he makes demands to the guarantor and only in the case where the debtor is not able or unwilling to pay his debts is the creditor allowed to make demands to the guarantor. The Creditor’s demand to pay does not need to have a special form; in fact the practice is to accept the letter as well as the legal action directly.

There are few exceptions from the rule specified above: the creditor does not need to ask the EEIG in the case where it is obvious that the EEIG is not able to fulfill its obligations, for example when bankruptcy was pronounced on the EEIG. The second example of exception, when the creditor can demand directly that the guarantor fulfils the debtor’s obligations, is the

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<sup>5</sup> Not being sentenced for an intentionally committed crime to the jail for at least one year unconditionally or not being sentenced for an intentionally committed crime related to enterprising or not being sentenced for a negligently committed crime related to subject of enterprising of the EEIG. The Czech Penal Code names situation when a sentenced person is under some conditions regarded as if he or she was never sentenced. In this case such a person may become member of an EEIG.

situation where the creditor did not manage to recover debts through seizure of the debtor's assets in the past.

The characteristics of the liability which is joint and several specify that the member of the EEIG that fulfilled an obligation of the grouping has a subsequent right to demand that either the EEIG or the rest of the members pay their part of the debt.

The liability of natural persons relates not only to the assets of the natural persons but also to the so-called joint estate of spouses in cases where they are married.<sup>6</sup> It means that the liability relates not only to the personal assets of the natural person but also to the assets of a husband or a wife of the member of EEIG. The liability of the member of the EEIG does not relate to the assets of a wife or husband which was obtained before the marriage or which was inherited or received as a gift. Other assets, which are excluded, are assets gained according to the laws of restitution after the Velvet revolution<sup>7</sup> or things which are intended for personal usage by either husband or wife<sup>8</sup>.

Before the joint estate of spouses can be used for the needs of an entrepreneurial activity, the consent of the spouse needs to be given<sup>9</sup>. The scale of the joint estate can be modified either by an agreement or by a court decision.

#### LENGTH OF PERIOD OF LIMITATION OF LIABILITY AND DEBTS

It is necessary to point out that the Regulation in its article 37 sets out the period of five years as a period of limitation for debts and other liabilities of the EEIG after the publication of the conclusion of the liquidation of the EEIG. This period differs from the general period of limitation of four years set out in the Czech Commercial Code.

#### RULES RELATING TO THE MANAGERS OF THE EEIG

The manager of the EEIG can be either a natural person or a legal person. Before election a legal person has to charge a natural person with the potential exercise of the rights and obligations of the manager. The natural person charged by the legal person has to be able to fulfill all the conditions set down by law for managers - natural persons directly elected by members acting collectively.

#### EEIG IN PRACTICE

In the Czech Republic, there is currently just one EEIG named Inter Pool Cover Team, evropské hospodářské zájmové sdružení, which was incorporated the 15<sup>th</sup> of July 2005<sup>10</sup> and

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<sup>6</sup> I. Štenglová, S. Plíva, M. Tomsa a kolektiv, *Obchodní zákoník komentář*, C. H. Beck, 2004 p. 269

<sup>7</sup> For example law number 403/1990 Sb., about the reduction of the results of some property harm, law number 87/1991 Sb., about extrajudicial rehabilitations, law number 229/1991 Sb., about the arrangement of the ownership to the land and other agricultural property.

<sup>8</sup> On the other hand liability will relate to the expensive things aimed for personal usage bought for the money in the marital ownership, like for example the jewellery or fur coat. In case of execution the owner have to pay an equivalent of the price of the expensive thing of the personal usage. *M. Knapová, J. Švestka a kolektiv: Občanské právo hmotné, svazek 1, Praha, ASPI, 2002, p. 333.*

<sup>9</sup> Law does not specify the form of the consent so it can be given in writing or there may be a verbal consent or consent given just by way of behaving.

<sup>10</sup> The online Commercial Register [www.justice.cz](http://www.justice.cz)

situated in Prague. Activities of this EEIG are mainly focused on cooperation in the fields of marketing, advertising and the building of electronic information databases.

In fact the manager of the only existing EEIG in the Czech Republic considers the experience with this type of company as very positive. In general the process of creating the company took about six months but the company was incorporated before the new law about the Commercial Register came into the force and at that time the Court of Justice had as much time as it wished to make a decision about incorporation.

Although when the managers were registering the EEIG at the revenue authority a lot of officers came to see them as a rarity, there were also some positively surprising moments. When the members were discussing creating the EEIG, the local notary from a small town Chrudim came to meet the present-day manager and offered service relating to the incorporation.

The general understanding about the EEIG as a type of a company is progressively improving.

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