



CHECKS AND BALANCES NEEDED

Czech trust law is still in its infancy, but the introduction of two new registers is poised to undermine trust structures' appeal, says Vlastimil Pihera and Kateřina Ronovská

In 2014, the new Czech *Civil Code* (the Code) introduced the concept of a domestic trust-like instrument: the trust fund (*svěřenský fond*). From a domestic point of view, it was a revolutionary step, since Czech law, as a typical representative of traditional civil law, did not previously recognise any legal structure even resembling a common-law trust.

However, the legislators did not take the risk of seeking an original solution, instead transplanting (with a few technical amendments) into the Code the corresponding parts of the *Civil Code of Québec* (1991) on trusts.

As a result, Czech trust funds are treated as autonomous property, separate from the settlor, administered for a certain purpose. The trust property has no owner in the meaning of traditional civil law, but the administrator (trustee) of the trust has the power to exercise ownership rights over the property. Trust funds can be created for any purpose by dealing *inter vivos* or *donatio mortis causa*.

Following some initial hesitation, trust funds are now increasing in popularity as the primary tool for estate planning in the Czech Republic.

➔ KEY POINTS

WHAT IS THE ISSUE?

Czech legislators introduced two new registers on 1 January 2018. Paradoxically, Czech law is much broader as concerns access to information on trust funds, in contrast with its stance on other legal entities.

WHAT DOES IT MEAN FOR ME?

The Czech functional alternative to the trust, the trust fund, must be registered in the central trust fund register to be considered legal. This register differs from other beneficial ownership registers established in accordance with the EU *Fourth Anti-Money Laundering Directive*. Trust schemes operating in the Czech Republic, even those not governed by Czech law, should pay attention to the new requirement.

WHAT CAN I TAKE AWAY?

On 1 January 2018, two new registers were introduced in the Czech Republic – the trust funds register and the ultimate beneficial ownership register – both of which have raised considerable concerns in the still-young Czech trust industry. As it is our belief that the new system of registering trust structures in the Czech Republic is of interest to the international community as well, this article will outline the registers' main features and point out some of the more intriguing consequences.

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TRUST FUNDS REGISTER

Shortly after the Code was passed, the ethicality of trust funds was called into question, due to their alleged opacity and, by association, the risk of abuse as a tool for money-laundering purposes. These objections originated at the Ministry of Justice, which, at length, decided to establish the Trust Funds Register (TFR) (*Evidence svěřenských fondů*) in order to address the alleged ‘insufficient public supervision over the operation of trust funds’. In this way, Czech law followed French law, which underwent a similar evolution with its comparable trust-like vehicle: *la fiducie*.

The introduction of the TFR was criticised by many academics and practitioners, primarily because the new legislation made the existence of any *inter vivos* trust subject to constitutive registration – i.e. a trust fund is not considered to be officially established until it is entered into the register. This indicates a deep misunderstanding of the role of trust instruments, and, as such, represents a major divergence from the original contractual conception of a trust as outlined in the *Civil Code of Québec*. For Czech trust funds, such an approach means losing part of their flexibility, and shifts them towards the concept of a legal person, such as a foundation. Moreover, to a considerable degree, it also negates the reason why this instrument was introduced in the Czech (continental) legal system in the first place.

The TFR is only semi-public. The name of the trust fund, its purpose, the trustee’s name and residence, and the dates of registration and termination of the trust fund are freely accessible to the public. Information about settlors, beneficiaries and persons performing supervision, however, is accessible only to public bodies such as courts, criminal and investigative authorities, tax administrators and financial registration units. Other persons can only view such information if they can demonstrate justified legal interest.

UBO REGISTER

While the Czech Ministry of Justice was working on the TFR legislation, the Czech Ministry of Finance – in order to meet the

Czech Republic’s obligations arising from the EU *Fourth Anti-Money Laundering Directive* (4AMLD) – was working on the ultimate beneficial ownership (UBO) register (*Evidence údajů o skutečných majitelích*). However, the regulation of this register has also received criticism. Czech law defines beneficial owners in a narrower way than the 4AMLD. Pursuant to the *Czech Anti-Money Laundering Act*, a beneficial owner is a natural person who ultimately controls a legal person, trust fund or other legal arrangement, meaning the definition does not encompass the persons who benefit from the transaction or activity.

Regarding trust funds and similar legal arrangements, Czech regulation presumes that the settlor and beneficiary are beneficial owners only if they also exercise decisive control over the trust. This creates uncertainty about the impact of the clearly inaccurate implantation of the relevant EU law, and raises questions as to whether or not the settlors and beneficiaries should be registered as the beneficial owners, even if they do not have any direct power over administering the trust fund.

The UBO register is not accessible to the public, only to the Czech financial intelligence unit and certain other public authorities, and persons who can prove interest in connection with preventing specific criminal offences related to money laundering or terrorist financing.

FOREIGN TRUSTS REGISTER

Czech law recognises foreign trusts if they have the main features of Czech trust funds. This rule was implemented in 2014, together with the trust fund regulations in the Code. However, because of a lack of detail, there is no certainty as to what ‘exact features’ are decisive for recognising a foreign trust. The most logical solution is to adopt the same attitude as the *Hague Convention of 1 July*

1985 on the Law Applicable to Trusts and on their Recognition, which apparently inspired the current rule. However, it is far from clear whether such interpretation will actually be adopted by the Czech courts.

Moreover, the recent legislation also introduced the requirement that foreign trust schemes operating in the Czech Republic be registered in the TFR. Even though it is not clear what it exactly means for a foreign trust to ‘operate’ in the Czech Republic, there is a risk that the foreign trust’s registration will be required for it to be recognised under Czech law. Such an outcome would be quite unusual and could cause serious problems in practice. For example, the Czech cadastral office can refuse to register the transfer of real estate to the trustee in their capacity as trustee if the trust is not registered in the foreign trust register.

Until this issue is resolved by the Czech courts, it is advisable for foreign trust and trust-like schemes that need to be recognised by the Czech authorities or courts to be registered in the TFR.

SUMMARY

Although the 4AMLD presumes that only competent authorities and financial intelligence units can have access to the information on ultimate beneficial owners of trusts, the Czech regulation of the UBO register does not distinguish between the accessibility of information on legal entities and that on trust funds. On the other hand, the regulation of the TFR (also in the case of foreign trusts and trust-like instruments) grants an even more generous approach to the accessibility of the information on the beneficiaries and other constituents of the trust funds to persons with ‘justified legal interest’.

We believe that such an outcome lacks any coherence and hope that the Czech legislators will find a more sober, rational approach in future.



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