

JOINT STOCK AND LIMITED
LIABILITY COMPANIES IN EAST
CENTRAL EUROPE

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János Ede SZILÁGYI | Professor of Law at the Faculty of Law, University of Miskolc, Hungary; Strategy Director, Central European Academy, Budapest, Hungary

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The book series has been established in cooperation with the Budapest-based Ferenc Mádl Institute of Comparative Law.

JOINT STOCK AND LIMITED LIABILITY COMPANIES IN EAST CENTRAL EUROPE

Edited by
Emőd VERESS



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| AUTHORS |

Judit BARTA

Full Professor, Faculty of Law and Political Sciences, Institute of Civil Law Studies
Department of Commercial Law, University of Miskolc, Hungary

Gregor DUGAR

Associate Professor, Department of Civil and Commercial Law, Faculty of Law, University of Ljubljana, Slovenia

Kateřina EICHLEROVÁ

Associate Professor, Department of Commercial Law, Faculty of Law, Charles University, the Czech Republic

Marko IVKOŠIĆ

Associate Professor, Chair of Commercial Law and Company Law, Faculty of Law, University of Split, Croatia

Paulina LEDWOŃ

Assistant Professor, Department of Public and European International Law, Faculty of Law, Cracow University of Economics, Poland

Borko MIHAJLOVIĆ

Associate Professor, Department of Company Law and Commercial Law, Faculty of Law, University of Kragujevac, Serbia

Žofia MRÁZOVÁ

Assistant Professor, Department of Commercial and Economic Law, Faculty of Law, Pavol Jozef Šafárik University, Slovakia

Jernej RENKO

Assistant Professor, Department of Civil Law, Faculty of Law, University of Ljubljana, Slovenia

Emőd VERESS

Professor at the Department of Commercial Law, University of Miskolc; Research Professor at the Central European Academy of the University of Miskolc; Professor at the Sapientia Hungarian University of Transylvania, Romania

The authors contributed the following subchapters to this volume:

Judit BARTA: II.4, IV.4, V.4

Gregor DUGAR with Jernej RENKO: I.8, II.8, III.8, IV.8, V.8, VI.8.

Kateřina EICHLEROVÁ: I.2, II.2, III.2, IV.2, V.2, VI.2

Marko IVKOŠIĆ: I.3, II.3, III.3, IV.3, V.3, VI.3

Paulina LEDWOŃ: I.5, II.5, III.5, IV.5, V.5, VI.5

Borko MIHAJLOVIĆ: I.7, II.7, III.7, IV.7, V.7, VI.7

Žofia MRÁZOVÁ: I.9, II.9, III.9, IV.9, V.9, VI.9

Emőd VERESS: Argument, I.1, I.4, I.6, I.10, II.1, II.6, II.10, III.1, III.4, III.6, III.10, IV.1, IV.6, IV.10, V.1, V.6, V.10, VI.1, VI.4, VI.6, VI.10

| REVIEWERS |

Antun BILIĆ

Associate Professor, University of Zagreb, Croatia

Paweł BUCOŃ

Associate Professor, The John Paul II Catholic University of Lublin, Poland

Zsolt FEGYVERESI

Assistant Professor, Sapientia Hungarian University of Transylvania, Romania

Professor at the Department of Commercial Law, University of Miskolc; Research Professor at the Central European Academy of the University of Miskolc; Professor at the Sapientia Hungarian University of Transylvania, Romania

Barbora GRAMBLIČKOVÁ

Assistant Professor, Comenius University in Bratislava, Slovakia

Lucie JOSKOVÁ

Associate Professor, Charles University in Prague, Czech Republic

Miha JUHART

Full Professor, University of Ljubljana, Slovenia

Vladimir MARJANSKI

Associate Professor, University of Novi Sad, Serbia

András SZEGEDI

Associate Professor, Széchenyi István University, Győr, Hungary

| TECHNICAL EDITOR |

János SZÉKELY

Associate Professor, Department of Law, Sapientia Hungarian University of Transylvania, Romania

Introduction: Company Law in East-Central Europe

Limited Liability Companies and Companies Limited by Shares

This book argues that East-Central Europe provides an unusually instructive setting for the study of modern company law. Across the Czech Republic, Croatia, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia, legislators and courts have rebuilt corporate institutions within a single generation and while under the simultaneous pressures of post-socialist transformation, European integration, capital-market development, and digitalisation.

The result is neither a uniform transplant of Germanic or Anglo-American models nor a disparate mosaic of nationally-contingent regulations. Rather, it is a distinct regional synthesis in which familiar building blocks (i.e. limited liability, share capital, board accountability, creditor protection, and shareholder voice) are configured in ways that illuminate how legal form adapts to ownership structures, enforcement capacity, and economic strategy. By focusing on the two ‘racehorse vehicles’ of contemporary enterprise, the limited liability company and the company limited by shares, the book traces both convergences and stubborn differences in the foundations of private enterprises across the eight jurisdictions, which are shown to share historical affinities but have made divergent institutional choices.

The two companies at the centre of the analysis are not chosen for symmetry alone. The limited liability company (variously labelled as s.r.o., d.o.o., sp. z o.o., kft., and srl.) has become the dominant form for closely-held business throughout the region, accommodating family ownership, start-ups, and subsidiaries in corporate groups. It is here that lawmakers have pursued the most aggressive experimentation, relaxing minimum capital, expanding contractual freedom in constitutive documents, and opening pathways for remote formation and decision-making. By contrast, the company limited by shares (e.g. a.s., d.d., s.a., a.d., and rt.) anchors the legal infrastructure for larger enterprises, also for really important firms that access public markets, even where equity markets are thin. Around this form cluster stricter rules on disclosure, board composition, related-party transactions, capital maintenance, and class rights, together with the procedural rigour of the general meeting. The comparison highlights a common problem across the eight systems: how to give owner-managers sufficient flexibility while providing credible protection for outside investors and creditors in economies marked by concentrated ownership, influential banks, and limited public-enforcement resources.

The region’s recent legal history matters for every chapter that follows. All eight systems inherited civil-law codification and a strong conceptual vocabulary of legal personality, separate patrimony, and formal capital. They also absorbed, at different

paces, the acquis on company law, including rules on disclosure, capital formation and maintenance, shareholder rights, takeovers, and cross-border mobility. For the European Union Member States in the set, the Court of Justice jurisprudence on freedom of establishment and cross-border conversions reshaped how national rules on seat, incorporation, and corporate mobility operate; for the non-Member States, the approximation has nonetheless exerted gravitational pull through trade, investment, and legislative or political ambition. This transformation did not stop at the text of the statutes; registry practices, the roles of courts, notaries, and attorneys, the architecture of financial supervision, the rise of beneficial-ownership transparency, and the normalisation of virtual general meetings have altered, sometimes decisively, how law in the books is translated into law in action. This book takes these institutional variables seriously because, in this region, the same statutory text can yield different real-world equilibria depending on enforcement capacity, adjudicatory tempo, and market structure.

A comparison of eight jurisdictions requires caution when drawing general conclusions. The method adopted here is functional rather than formalist. Instead of cataloguing every doctrinal clause, the chapters pose a set of recurring questions to each system. How is the corporate bargain constituted at formation, and what is the residual role of mandatory capital rules after decades of erosion? How is power divided between owners and managers, and what choice exists between one- and two-tier boards in practice (rather than merely on paper)? How are conflicts of interest managed in related-party transactions, and what are the triggers, procedures, and remedies that give these duties bite? How are dividends and other value distributions constrained *ex ante* and policed *ex post*, and what, in practice, protects creditors when capital is light but leverage is heavy? How do minority shareholders get their day in court, and what is the real availability of derivative actions, injunctions, nullity, and avoidance in systems that prize legal certainty and speed? How far can parties contract around default rules, and where do mandatory limits reassert themselves to protect outsiders and co-owners? How are company creditors positioned by the instruments of corporate law? Each of these questions is answered through a mix of positive law, case law tendencies, and practitioner experience, such that a doctrinal comparison is coupled with an account of enforceability.

The limited liability company provides a particularly clear illustration of legal diversity across the region. In some of the jurisdictions of interest, the legislature has allowed near-partnership levels of contractual tailoring: voting and profit-sharing can be decoupled; transfer restrictions can be finely calibrated; deadlock resolution can be engineered *ex ante*. Elsewhere, the limited liability company remains tethered to stricter mandatory limits, with capital rules and exit mechanisms that prioritise creditor security over private ordering. Everywhere, however, the trajectory is toward facilitation, as they focus on faster online incorporation, simplified formalism, and greater reliance on registers and electronic communication for internal governance. These moves respond to a common policy ambition to lower formality costs for small and medium-sized enterprises while keeping in place minimum safeguards for those who deal with them. The book identifies both successful reforms and areas in which

remaining formalities continue to discourage investment or encourage informal business practices.

Companies limited by shares reveal a different set of trade-offs. While public offerings remain concentrated in a few markets, the corporate architecture of the joint-stock form is shaped by the need to accommodate dispersed investors even when ownership is in fact concentrated. Disclosure duties are heavier; audit and supervisory oversight is more demanding; secret voting and cumulative voting mechanisms appear as tools to protect minorities; capital maintenance rules retain more of their original force. Several systems offer a choice between one- and two-tier models, but the real choice is often constrained by listing rules, corporate-governance codes, and the expectations of lenders and institutional investors. The treatment of groups of companies is an area of particular comparative interest. Specifically, some jurisdictions have codified group law with explicit safe harbours for intra-group transactions backed by disclosure and equalisation duties; others rely on general duties of loyalty, interest-balancing tests, and the policing of unlawful distributions. The book maps these approaches and tests their effectiveness against the everyday reality of parent-subsidiary finance, cash-pooling, and upstream guarantees.

A distinctive feature of East-Central European corporate life is that private enforcement must often carry a greater share of the load. Public supervisory bodies have grown in sophistication, but their resources are finite, and courts shoulder heavy caseloads. For that reason, the availability and design of shareholder and creditor remedies are not marginal, but central to the credibility of the law. Special attention is therefore given to standing rules for challenging resolutions, the structure of nullity and voidability, the availability of interim suspension, the standards for director liability, and the calibration of business-judgment deference. The aim is not to exhibit any doctrinal refinement, but to evaluate whether the tools deployed in each system are capable of deterring opportunism, vindicating minority rights, and preserving transactional certainty.

Comparative work within this region must also wrestle with different market structures. Ownership in flagship companies is often concentrated in families, holding companies, or the state. Banks remain core financiers, while equity markets are developing but thin, and delistings have sometimes outpaced new listings. These features amplify the importance of related-party regulation, disclosure discipline, and credible remedies, while moderating the immediate impact of techniques designed for highly-dispersed shareholding. These market conditions do not justify weaker legal standards. They do, however, help explain why registry oversight, professional scrutiny of major transactions, and restrictions on financial assistance play a comparatively prominent role in the region.

The project has three audiences. For scholars, it supplies a regional map of corporate law and practice in a region that is too often discussed in generalities. For legislators, judges, and practitioners, it offers a catalogue of workable solutions and cautionary tales that can inform the next wave of reforms. The region continues to move, and this movement occurs amid digital tools being to mediate incorporation, shareholder communication, and corporate filings. Sustainability and non-financial reporting obligations are

reshaping disclosure, while cross-border mobility has moved from exception to routine for groups that operate across the Danube basin and the Visegrád space. Insolvency and restructuring frameworks are integrating more closely with company-law rules on capital and governance. Each of these dynamics cuts across the binary of limited liability and joint-stock company, and each is treated in the chapters that follow with attention to institutional capacity and legal culture.

But this book is intended also to doctoral researchers. Beyond offering a synoptic account of rules, it frames contestable questions, maps doctrinal fault lines, and highlights avenues for original inquiry across the eight jurisdictions. We hope it functions both as a reference and as a research toolbox for seminars, reading groups, and thesis supervision.

This volume is necessarily provisional. It engages with bodies of law that are in motion, subject to rapid legislative amendment, evolving supervisory practice, and uneven judicial consolidation across the eight jurisdictions under review. Despite a common methodological template, the choices of sources, translations of statutory terminology, and syntheses of sometimes inconsistent case law may introduce inadvertent errors or interpretive asymmetries. We have sought to mitigate these risks through the triangulation of primary texts, official commentaries, and leading scholarship, but the responsibility for any remaining inaccuracies is ours alone. Readers should also be mindful that our emphasis on comparability occasionally requires foregrounding black-letter rules over local practice or soft-law guidance, a trade-off that may compress nuance. We welcome corrections and further materials from practitioners, academics, and officials, and we intend to incorporate them into subsequent editions. Future iterations will update statutory and jurisprudential developments, refine doctrinal mappings, expand the treatment of enforcement and procedural realities, and introduce more intense empirical and transactional evidence. The project is thus conceived as iterative – as a platform for cumulative improvement.

The argument of the book, then, is that East-Central Europe shows how quickly company law can evolve when pushed by powerful external and internal forces, and how persistent certain design problems can be despite the convergence of texts. By reading the Czech Republic next to Croatia, Hungary next to Poland, Romania next to Serbia, Slovakia next to Slovenia, the reader will see both how much is shared and where policy choices consciously diverge. The limited liability company emerges as the form in which contractual freedom and close ownership demand the most from doctrine, and the company limited by shares as the form in which investor confidence and market discipline place the heaviest weight on procedure and disclosure. Together they tell the contemporary story of the region's corporate enterprise, which is pragmatic, reformist, and increasingly sophisticated, yet still marked by the legacies of transition and by the realities of concentrated ownership and bounded enforcement. Comparative company law cannot be understood through statutes alone; it must also account for the institutions and practices through which legal rules are applied. This book provides such an account for East-Central Europe.

The Editor

The Rise of The Modern Company in East-Central Europe*

1. Introduction

by Emőd Veress

2. The Czech Republic

by Kateřina Eichlerová

3. Croatia

by Marko Ivkošić

4. Hungary

by Emőd Veress

5. Poland

by Paulina Ledwoń

6. Romania

by Emőd Veress

7. Serbia

by Borko Mihajlović

8. Slovenia

by Gregor Dugar and Jernej Renko

9. Slovakia

by Žofia Mrázová

10. Conclusions

by Emőd Veress

1. Introduction

1.1. Thesis

East-Central Europe followed a markedly different path of corporate legal development from Western Europe. Because the region largely bypassed (1) the medieval-early modern contractual phase of enterprise and (2) the rise of chartered joint-stock monopoly companies (e.g. the British and Dutch East India Companies), it lacked the incremental institutional learning that, in the West, underwrote modern corporate law. When modernisation arrived in the 19th century, it did so mainly through top-down legal transplants, producing rapid formal convergence but uneven functional outcome. The last decades of the 19th century and the interwar advances in the 20th century were then severed by the Soviet-type legal orders after 1945, creating an increased discontinuity that complicated post-communist reconstructions.

* Eichlerová, K., Ivkošić, M., Ledwoń, P., Veress, E., Barta, J., Dugar, G., Renko, J., Mihajlović, B., Mrázová, Ž. (2025) 'Legal Capital and Finances of the Company' In Veress, E. (Ed.) Joint Stock and Limited Liability Companies in East Central Europe. Miskolc-Budapest: Central European Academic Publishing. pp. 15–90. https://doi.org/10.54171/2025.ev.jsllcece_chapter1

1.2. The Missed Contractual Phase

In Western Europe, late-medieval and early-modern commerce nurtured partnerships and other consensual business forms grounded in private agreement, trust, and small-scale governance. Over time, courts and statutes learned to recognise these collectives as entities distinct from their members, laying the conceptual groundwork for corporate personality and even limited liability. East-Central Europe, by contrast, experienced constraining structural conditions, including entrenched feudal agrarian economies, extended imperial domination (i.e. Ottoman, Habsburg, and Russian empires), and comparatively weaker urban mercantile populations. These factors dampened market-driven experimentation with partnerships and reduced demand for corresponding doctrinal refinement. The consequence was an absence of a long period of iterative practice through which norms of internal governance, risk allocation, and creditor protection could organically evolve.

1.3. The Missing Chartered Joint-Stock Moment

Western Europe's 16th–17th-century chartered companies, notably the English and Dutch East India Companies created under royal/state privilege charters, pioneered large-scale equity finance, transferable shares, professional management, and, crucially, doctrines separating ownership from control. They served as arenas for developing limited liability, fiduciary standards, and shareholder remedies, innovations that became integral to the evolution of modern corporate law.

East-Central Europe did not host analogous entities. Its economies remained more insular and agrarian, and strategic trade routes and high-capital enterprises were often controlled by foreign powers. Without exposure to these capital-intensive organisational experiments, the region missed a second formative phase of institutional learning by doing. The region's involvement in global trade was also minimal, further reducing the impetus for creating large, capital-intensive enterprises that require advanced legal structures.

1.4. 19th-Century Top-Down Modernisation

The absence of these two phases created a significant developmental gap. When East-Central Europe began modernising in the 19th and 20th centuries, it faced the challenge of adopting imported legal frameworks of corporate law without the benefit of having evolved them incrementally. Western legal models, shaped by centuries of organic development, often had to be grafted onto societies with fundamentally different economic and social conditions. This led to implementation and adaptation difficulties because the legal systems were not always aligned with the local realities. Furthermore, the lack of a foundational legal tradition meant that East-Central European countries were often ill-prepared to manage the challenges of company law.

Even in this context, starting from the first half of the 19th century, East-Central Europe embarked on a deliberate and state-driven effort to modernise its legal and economic systems, including through company law development. By the 19th century, East-Central Europe was undergoing significant transformations influenced

by broader political and economic shifts. The decline of feudal systems, the rise of nationalism, and the spread of industrialisation created pressures to modernise the legal and institutional structures. Regional governments sought to emulate Western European models to enhance economic competitiveness, attract foreign investment, and integrate into the broader European economy. This modernisation was characterised by an “up-to-bottom approach”, where reforms were initiated by the ruling elites or governments rather than through grassroots economic evolution. This process allowed many countries in East-Central Europe, despite the region’s earlier divergence from the Western trajectory of legal and economic development, to develop their company law frameworks with relatively little delay compared to Western Europe.

By the mid-late 19th century, the formal company-law gap had largely closed, with an example being that England and Hungary converged on the core doctrines of modern corporate law. England’s Joint Stock Companies Act of 1844 established incorporation by registration, the Limited Liability Act of 1855 generalised shareholder limited liability, and the Companies Act of 1862 consolidated the regime. Hungary moved from Act XVIII of 1840, its first modern company-law statute, to the Commercial Code (Act XXXVII of 1875), which codified the joint-stock company and limited shareholder liability to paid-in capital. By 1875, both jurisdictions possessed the essential legal toolkit, even if enforcement capacity, market depth, and governance practice still differed.

As aforementioned, in East-Central Europe, this modernisation effort was driven by the state, in contrast to the much longer, more organic, bottom-up evolution of company law in Western Europe. Thus, while Western European company law evolved alongside the economic and social changes of the Industrial Revolution, East-Central Europe implemented legal reforms as part of a broader strategy to “catch up” with the West. These reforms were often introduced as comprehensive legal codes and borrowed heavily from Western models, particularly the French, German, and Italian legal traditions. Similarly, the two predecessor states of Romania adopted the French Commercial Code first, some decades after its introduction in France under Napoleon in 1807. This code was one of the most influential legal documents of its time, providing a comprehensive framework for commercial activities, including company law. Later, the newly created Romania in 1887 adopted the Italian Commercial Code, a successful legal transplant. The adoption of these codes signalled a commitment to modernisation and alignment with Western European legal traditions, ensuring that the region’s commercial laws reflected contemporary practices and standards.

These reforms were part of broader legal and institutional modernisation programs, often including the introduction of civil codes, judicial reforms, and administrative changes designed to support economic development and integrate the region into broader markets. In summary, the “up-to-bottom approach” to modernisation in East-Central Europe had several defining features, as follows:

- (a) state leadership, because rulers and administrative elites designed and imposed commercial reforms with limited participatory input from business communities;

- (b) foreign models, because legislators borrowed extensively from French, German, and Italian codes to accelerate “catch-up” and overcome the lack of organic development;
- (c) the objective was to catch-up as the legal changes were aimed at improving competitiveness, investment attraction, and integration with broader markets;
- (d) rapid enactment, because comprehensive commercial codes and company acts were adopted quickly, albeit such a rapid establishment of modern legal frameworks often led to adaptation and implementation challenges.

1.5. Interwar Consolidation and Partial Indigenisation

After the First World War, the political map of East-Central Europe was radically redrawn. The collapse of the Austro-Hungarian, Russian, and Ottoman empires produced a series of newly-independent or enlarged nation states, each inheriting fragments of prewar legal systems. Company law, like other branches of private law, was directly affected by this transformation. The break-up of imperial markets meant that unified commercial codes, previously applied across vast, integrated territories, now operated only within much smaller national economies. Successor states faced the urgent task of consolidating their legal orders by reconciling multiple overlapping legal traditions. In some cases, this meant retaining imperial-era codes temporarily for reasons of legal continuity, while drafting new company law provisions tailored to the national priorities. Moreover, state-building agendas influenced corporate regulation, as governments sought to align the company law with economic nationalism, promote domestic entrepreneurship, and control foreign capital. This often led to protection of domestic shareholders and measures to encourage industrialisation and infrastructure investment.

The interwar decades marked a period of limited organic growth in the region. Legislatures refined company forms (e.g. introduced limited liability companies), clarified shareholder rights, and elaborated rules on capital formation, managerial responsibility, and accountability. Jurisdictions such as Czechoslovakia tailored company law to industrial expansion, while others (e.g., Romania) sought to balance their agrarian legacies with industrial policies. Business communities began to accept and internalise corporate forms, suggesting the emergence, at last, of a regionally-grounded corporate legal culture. The laws gained acceptance among the population and businesses, signalling a maturing legal culture that supported entrepreneurship and economic development, and this occurred even during periods of crises such the one starting in 1929 and lasting in the region until approximately 1933.

1.6. Socialist Rupture (Post-1945)

While the interwar period represented the peak of organic development and integration of company law in the region, with widespread acceptance among businesses and society, this progress was disrupted by the Soviet occupation following the Second World War, and the imposition of planned economies (which rendered capitalist

company law obsolete and replaced it with a framework centred on state ownership and centralised planning).

Private enterprises were nationalised or prohibited, while state ownership and administrative command displaced market coordination. Classical company-law concepts lost operative meaning, like the corporate personality as a private actor and limited liability as investor protection, shareholder governance, and fiduciary duties. “Enterprises” functioned as administrative units within planned hierarchies, and legal rules served allocative compliance rather than private ordering. This created a generational break in professional expertise and institutional memory, and a new break with Western Europe.

The imposition of planned economies had profound and long-lasting effects on the legal and economic systems of East-Central Europe. The abrupt transition from a capitalist to a socialist economic model interfered with the organic development of company law and severed the region’s connection to the legal and economic traditions that had been established in the second half of the 19th century and during the inter-war period. The elimination of private enterprise and the focus on state ownership upset the region’s burgeoning business culture. Entrepreneurs, investors, and private businesses were replaced by state officials and bureaucracies, fundamentally altering the relationship between economic actors and the legal system. Under this planned economy, there was little need or opportunity for innovation in economic law. The legal frameworks that governed Soviet-type state-owned enterprises were rigid and primarily designed to ensure compliance with central plans, stifling the evolution of legal principles related to business. The displacement of capitalist company law created a new significant gap in the region’s legal tradition. Decades of progress in developing refined corporate law frameworks were effectively erased, leaving a void that would have to be addressed after the fall of “communism”.

1.7. Post-Communist Reconstruction

The collapse of communist regimes in the late 20th century required rebuilding the market institutions and reintroducing company law, which was done largely through renewed legal transplants. The long interruption meant scarce judicial precedents, thin regulatory capacity, and limited practitioner familiarity with corporate law and governance. Reform agendas could reinstall code provisions swiftly, but deep complementarities (e.g. financial intermediation, disclosure norms, enforcement credibility, and managerial and investor cultures) were much slower to (re)emerge.

Privatisation set the practical terms of corporate governance, where mass programs (e.g. voucher schemes, insider/management buyouts, auctions, and later strategic sales) produced either highly-concentrated block holdings (often with “golden share” residues) or atomised ownership that was quickly reconsolidated by funds and insiders. This ownership mix, combined with weak regulators and illiquid exchanges, amplified problems of related-party transactions, tunnelling, and minority-shareholder expropriation, forcing successive waves of rules on disclosure, connected-party approvals, and audits. Early finance was predominantly bank-led, with foreign

strategic investors in banking and utilities importing compliance routines and board practices, but also testing the states' capacity to police competition and state aid.

Privatisation also catalysed essential infrastructure laws (e.g. company registries, secured transactions, and bankruptcy/insolvency) and soft-law governance codes, yet courts, supervisory agencies, and professions needed years of training and case-building to make these tools credible. For European Union-bound states, *acquis* alignment (e.g. company, accounting/audit, prospectus, market abuse, and takeover) supplied a second modernisation wave that raised formal standards and listing rules.

1.8. Evaluation

East-Central Europe's company law did not simply arrive late, but travelled a different road. The region skipped the formative early stages, imported rules at speed in the 19th century, found firmer footing in the interwar decades, and then saw that progress be halted by socialist legal orders after 1945. The post-1989 rebuild added a new and disputed chapter characterised by rapid statutory convergence and uneven institutional recovery. Read this way, the region's history can be regarded as less a tale of delay and much more as a record of detours, accelerations, and abrupt stops that left deep marks on how corporate law works in practice.

Two clocks have been ticking throughout these happenings: one measures formal adoption, codes, and acts that came quickly once policy windows opened; the other measures functional uptake, the slower work of courts, regulators, financiers, managers, and investors learning to use those tools. In the 19th century, the first clock raced ahead, as the region could relatively speedily put modern company forms on the books after England, France, or Germany. The second clock lagged, as enforcement routines and commercial habits had to be learned in compressed time. The interwar period seemed to bring these two clocks closer and closer together. New states consolidated company law, refined shareholder rights, experimented with forms suited to their industrial and agrarian mixes, and a recognisable corporate legal culture began to emerge.

Then came rupture. Under central planning, company law stopped and was replaced by the administrative law of state-owned enterprises. After 1989, the statutes aligned swiftly with European models, and thus incorporation, limited liability, disclosure, and listing rules reappeared. Successive reforms tightened disclosure, auditing, and conflict-of-interest rules, but credibility grew only as regulators gained experience, judges built precedents, and market actors came to expect enforcement.

This history carries three lessons for comparative corporate law. First, transplants travel faster than trust, in that it is easier to borrow a code than to build the expectations, incentives, and professional routines that make it work. Second, the state can accelerate, but not substitute for, learning, as while top-down reform creates the legal possibility of modern governance, bottom-up practice (e.g. shareholders litigating and solving managerial conflicts) is what turns that possibility into a constraint. Third, complementarities matter, with corporate law performing differently depending on

ownership patterns, banking structures, media scrutiny, and political insulation of regulators. Where these complements are weak, identical statutory language yields different results.

At the same time, the region is not a monolith. Some jurisdictions built credible securities regulators sooner, while others modernised insolvency faster or cultivated more active courts. The timing and design of privatisation mattered, and so did the sequencing of reforms in accounting, bankruptcy, and competition law. Local legal communities (e.g. judges, notaries, academics, and practitioners) played an outside role in translating the imported concepts into usable doctrines. There were genuine instances of innovation, not mere imitation, especially where lawmakers tailored forms to domestic business needs.

None of this implies fatalism, with the long view showing a steady progress from statutory form to institutional substance. Importantly, the region's corporate law today is not simply a translation of Western law, but rather features a set of frameworks increasingly embedded in local markets and administrative practices. Then, why did the region's laws look familiar so quickly while outcomes varied for so long? Because formal convergence is a sprint and functional convergence is a marathon, the first having been run in the 19th century, again after 1989, and the marathon having been underway ever since. This snapshot suggests that we should avoid both triumphalism (i.e. "the laws are in place; the job is done") and pessimism (i.e. "nothing works here"). The more grounded conclusion is that when institutions are allowed to accumulate experience, and when political will sustains enforcement, corporate law in East-Central Europe does what it is supposed to do: channel capital, allocate control, discipline insiders, and, over time, build the trust that no act can decree but every market requires.

2. The Czech Republic

The joint-stock company (*akciová společnost*) is to some extent the result of historical development, as the lawmaker first reflected this development and then regulated this form in detail. Meanwhile, the limited liability company (*společnost s ručením omezeným*) is a targeted creation of the German lawmaker that was gradually adopted by other countries. The beginnings of the modern regulation of joint-stock companies in the territory of present-day Czech Republic can be dated back to the mid-19th century, when the Czech lands were part of the Austrian Empire. These beginnings can be found in the Act No. 253/1852 ř. z., Act on Associations (*spolkový zákon*). A more extensive regulation of the joint-stock company did not appear until the General Commercial Code (Act No. 1/1863 ř. z.; *všeobecný obchodní zákoník*). However, this regulation

applied only to joint-stock companies that carried on business.¹ Subsequently, the Stock Regulation (*akciový regulativ*) was issued for these joint-stock companies (Regulation No. 175/1899 ř. z.), which was a particularly fine piece of legislation at the time. The Stock Regulation applied to all joint-stock companies except those which carried on banking, credit, or insurance business or were canal, railway, or steamship companies - as these had their own special regulations. The establishment of joint-stock companies, and the significant changes in their proportions, were subject to the concession regime (i.e. the granting of a concession was subject to the discretion of the relevant government authority).²

From 1906, it was possible to establish a limited liability company in the Czech lands on the basis of Act No. 58/1906 ř. z. on Limited Liability Companies (*zákon o společnostech s ručením obmezeným*), which was preceded by the German Act (*GmbH Gesetz* from 1892). The law was valid only for Cisleithania. Its issue was related to the economic need to create a new form of business company between a partnership and a joint-stock company, combining their advantages and counteracting their disadvantages. The aim was to introduce a new business company whose members would not be burdened with unlimited debt to creditors and, concomitantly, the process of incorporation would be considerably simplified compared to a joint-stock company. Therefore, the registration system was introduced for limited liability companies, as was the same for other business companies. The exception was the system for the joint-stock company, which is still applied today and which comprises that when the statutory conditions are met, the legal right to register the company in the Commercial Register and thus to its establishment arises. The reason for the abandonment of the strict conditions applicable to the joint-stock company was that not every business, or the carrying on of business, required a large amount of capital to be raised from the general public through the issue of shares. It was assumed that in the case of small and medium-sized businesses, capital could only be raised from the founders without addressing the public. Therefore, unlike a public limited company with traded shares, a limited liability company was characterised by a closer relationship of the shareholders to the company, representing a more permanent link between the shareholder and the company. This was secured in the law by the exclusion of the issue of participating securities, since a share in a limited liability company, unlike shares in a joint-stock company, was not intended to be the subject of a circulation trade and therefore to speculation.³ If a limited liability company was characterised at that time, it was done so by means of an expression: 'a joint-stock company without shares, a limited partnership without a general partner'.⁴

1 Joint-stock companies that did not conduct business (e.g. theatre joint-stock companies) were governed only by the Act on Associations and did not have the status of traders. Malovský-Wenig, 1947, p. 254.

2 Malovský-Wenig, 1947, p. 255.

3 Černá et al., 2021, p. 321.

4 Malovský-Wenig, 1947, p. 447; Hermann-Otavsky, 1929, p. 694.

The limited liability company was the first company type to allow incorporation for a purpose other than carrying on business, while retaining the status of a full-time trader. Under the Limited Liability Companies Act, it could be formed for any permissible purpose except the carrying on of insurance business and the activities of political societies. Then, by the Reception Act No. 11/1918 Sb., on the establishment of the independent Czechoslovak state, all imperial laws, including the General Commercial Code, the Stock Regulation and the Limited Liability Companies Act, were retained in force. The validity of Act No. 58/1906 ř. z. Limited Liability Companies was extended by Act No. 21/1920 Sb. to the territory of Slovakia and Subcarpathian Rus, where it was not possible to establish a limited liability company until then. However, even then, and unlike in the Czech lands, limited liability companies were only sporadically established in this territory before the Second World War.⁵

During the 1930s, the recodification of Czech commercial law, including business corporation law, was being prepared together with the recodification of civil law. The intent was unifying commercial law in Czechoslovakia. As a result of the 1918 Reception, a dual commercial law was in force in the territory of Czechoslovakia. One in the Czech lands, which belonged to Cisleithania in the Austro-Hungarian Empire, and the other in Slovakia and Subcarpathian Rus, which belonged to Transleithania. In 1937, the Ministry of Justice submitted the Draft of the Commercial Code, containing the first book of traders and the second book of companies; that is, the full text of the new Commercial Code was not submitted at this time, the legal regulation of trades was missing, and so was the regulation of limited liability companies and joint-stock companies, which were to be dealt with in separate laws. The Explanatory Memorandum drew attention to the strong need for a reform of the law on shares and for certain changes in the regulation of limited liability companies. However, it acknowledged that work on these amendments had not even begun.⁶ While the work on the recodification had not been completed, the Draft of the Commercial Code is still a very valuable document for the quality of its drafting.

After the Second World War, a new form of legal entity was created, namely the state-owned national enterprise (*národní podnik*). This form was created in the nationalisation decrees of the President of the Republic No. 100 to 103/1945 Sb. Although national enterprises were considered to be independent legal entities, they were at the same time the property of the State, which, however, did not guarantee their property.⁷ They could be set up for business or for other purposes, but they were always entered in the Commercial Register. As a result of nationalisation, national enterprises acquired the assets of joint-stock companies and limited liability companies,

5 Osnova obchodního zákona, 1937, p. 152.

6 Osnova obchodního zákona, 1937, p. 152.

7 Malovsky-Wenig, 1947, p. 48.

which were nationalised.⁸ In other words, in those sectors of the economy in which nationalisation had taken place⁹ (successively in all of them),¹⁰ although these companies continued to exist formally, they were deprived in principle of all their assets, as these had passed to a particular national enterprise as a result of nationalisation.

After the Second World War, the Stock Regulation was abolished in 1949 by the Act on Public Stock Companies (Act No. 243/1949 Sb.; *zákon o akciových společnostech*). The new law contained only a minimalist regulation allowing the establishment of a joint-stock company in cases strictly necessary for the needs of international trade. The Public Stock Companies Act from 1949 had a total of 20 provisions; the distribution of the share capital into shares and the absence of shareholders' liability for the company's debts were retained.

Act No. 58/1906 ř. z. on Limited Liability Companies was repealed by Act No. 141/1950 Sb., the Civil Code (*občanský zákoník*). On 1 January 1951, all limited liability companies were abolished on the basis of this law, and the related property settlement was to be carried out in accordance with the existing Limited Liability Companies Act. Between 1951 and 1989, no limited liability companies existed or could be established in Czechoslovakia. After 1989, one of the first steps towards the restoration of full-fledged company law was the provisional regulation of joint-stock companies in the Joint-stock Companies Act (Act No. 104/1990 Sb.) (*zákon o akciových společnostech*), which was replaced by the Commercial Code (Act No. 513/1991 Sb.) (*obchodní zákoník*) with effect from 1 January 1992.¹¹

8 At the beginning, it was assumed that own citizens would be compensated for the nationalised property, but this was subsequently abandoned, so it was a confiscation without compensation. However, compensation was provided for the nationalisation of foreign investments. Kuklík, 2010, p. 357.

The way to nationalization was already opened by the Constitution of 1920, which although 'protected the ownership but stipulated that it was possible to expropriate even without adequate compensation if it is laid down by the provisions of Act of Parliament'. Kuklík, 2010, p. 422.

9 In the beginning, large enterprises such as coal mines, leading industries, and banks were nationalised, the so-called first wave of nationalisation. Kuklík, 2010, p. 423.

10 Kuklík, 2010, p. 322. The second wave of nationalisation, that of all industry except small holders of land and small private businesses took place during 1948–1950. Nationalisation was almost complete, as well as more rapid and far reaching when compared with the German Democratic Republic, Poland, Hungary or Romania. Kuklík, 2010, pp. 423 et seq.

11 On the development after 1989, see Havel et al., 2023.

Although the restitution laws in the 1990s¹² did not apply to business companies,¹³ joint-stock companies established before 1948 were “revived” in some specific cases. An illustrative example for the period of nationalisation and redress of injustices after 1989 is the story of the company *Cíl, akciová společnost v Praze*. This company was established on 28 December 1939 mainly to operate in the printing and publishing industry.¹⁴ It issued 3,500 shares to owners, and the sole shareholder was the Czechoslovak Social Democracy (*Československá sociální demokracie*). After the war, the company was twice placed under national administration, and subsequently its printing-related assets were nationalised in 1950 and incorporated into the national enterprise *Svoboda, tiskařské závody, národní podnik v Praze*. The shares were forcibly deposited in a monetary institution as a result of Presidential Decree No. 95/1945 Sb, but the company *Cíl, akciová společnost v Praze* was not deleted from the Commercial Register. In the 1990s, the Czech Social Democratic Party (*Česká strana sociálně demokratická*), as the legal successor of the Czechoslovak Social Democracy, demanded the shares from the State Regional Archive in Prague, where they were transferred in 1993 as archival material of permanent historical value as a “complete collection of shares” by the monetary institution, which had held them in custody until then. The political party also sought to the members of the board of directors of the company *Cíl, akciová společnost v Praze*, appointed by it, to enter into the Commercial Register, on the grounds that it was the sole shareholder of the company.¹⁵ It was initially unsuccessful with its claims in the general courts, but eventually succeeded in the Constitutional Court. The Constitutional Court, in its ruling III.ÚS 462/98 of 11 January 2000, recognised the legal continuity of the Czech Social Democratic Party

12 Restitution was the process of returning illegally-taken (nationalised) property to its original owners, usually former private owners, churches, and other institutions confiscated after the communist coup in February 1948 in what is now the Czech Republic and Slovakia. Restitution was aimed only at restitution of ownership rights, not at redressing the loss of other property rights (e.g. mortgage rights). They were regulated by four basic laws, as follows: Act No. 87/1991 Sb., on Out-of-court Rehabilitation (*o mimosoudních rehabilitacích*), Act No. 229/1991 Sb., on Regulation of Ownership Relations to Land and Other Agricultural Property (*o úpravě vlastnických vztahů k půdě a jinému zemědělskému majetku*), Act No. 403/1990 Sb., on Mitigation of Consequences of Certain Property Injustices (so-called ‘small restitution’) (*o zmírnění následků některých majetkových křivd* (takzvaná “malá restituce”) and Act No. 119/1990 Sb., on Judicial Rehabilitation (*o soudní rehabilitaci*).

13 Only items nationalised or confiscated after the Communist takeover (i.e. 25 February 1948), were subject to restitution, and the beneficiary was basically a person with Czech citizenship and permanent residence in the territory (the second requirement was subsequently dropped). Ecclesiastical restitution was regulated much later. Kuklík, 2010, p. 425.

14 The company is registered in the Commercial Register maintained by the Municipal Court in Prague under the registration number BXXVI 240; its ID number is 26165376.

15 The reason why the Czechoslovak Social Democratic Party embarked on these legal disputes was a dispute over the ownership of the People’s House (*Lidový dům*) in Prague. It was owned by the company *Cíl, akciová společnost v Praze*, and was one of the few that had not been nationalised (it was not part of the printing enterprise). The People’s House was used by the Communist Party of Czechoslovakia, and although the latter tried to bring the legal relations to this house into line with the actual situation, it was not successful in the end.

with the post-war Czechoslovak Social Democracy, and also recognised that this company was the sole shareholder of the company *Cíl, akciová společnost v Praze*, even though over time the original shares had lost their character as a security as a result of Section 7(b) of the Act No. 41/1953 Sb., (Second) Monetary Reform (*zákon o peněžní reformě*).¹⁶

The regulation of limited liability companies returned to the legal system on 1 May 1990 by Act No. 103/1990 Sb., which significantly amended the then Economic Code (Act No. 109/1964 Sb.; *hospodářský zákoník*). The regulation was brief, including only four provisions. This transitional legislation remained in force for 20 months and was completely replaced by the Commercial Code on 1 January 1992, which in turn remained in force until 31 December 2013. It was amended many times during its 22 years of operation. The amendments adopted in 1996 and 2000 were particularly significant for joint-stock companies and limited liability companies. After 1996, many of the amendments were of a harmonising nature with European directives.

Act No. 89/2012 Sb. (the Civil Code, *občanský zákoník*) and Act No. 90/2012 Sb. (the Business Corporations Act; *zákon o obchodních korporacích*), whose regime joint-stock companies and limited liability companies are currently subject to, have been in force since 1 January 2014. A significant amendment that has affected their regulation is Act No. 33/2020 Sb. The Business Corporations Act significantly liberalises the legal relations of companies, and the company law is considerably more liberal than it was in the past, allowing for greater flexibility in setting corporate governance and shareholder rights. Meanwhile, it significantly strengthens the liability of directors.¹⁷

In the case of a joint-stock company, since 2014, founders are currently given the choice of the internal structure they choose, the possibility of creating single-member elected bodies without any conditions, and the only limit for the creation of types of shares is basically good morals and public order. It is also worth mentioning the possibility to set an unlimited term of office for a member of an elected body, and the possibility for a legal person to be a member of an elected body. In summary, the Czech stock law is very liberal in principle, affording great flexibility in setting the company's management and shareholder rights.

For limited liability companies, the following changes have been made to the legislation in force since 2014: the number of shareholders is not limited (previously maximum 50); the prohibition on chaining (i.e. the creation of additional one-member companies by a one-member company) was abandoned; the minimum value of the contribution is 1 Czech koruna (previously 20,000 Czech koruna); the minimum amount of the share capital is based on the minimum amount of the contribution according to the number of shares (e.g. one shareholder may establish a limited liability company with a share capital of 1 Czech koruna; two shareholders may establish a

16 Although the shares lost the character of a security and the share was separated from the deed, the share itself did not cease to exist and survived as an uncertificated share, therefore the court could find that the Czech Social Democratic Party was still the sole shareholder.

17 Černá et al., 2021, p. 403.

limited liability company with a share capital of 2 Czech koruna); the memorandum of association may allow shareholders to hold more shares; it is expressly allowed to create different share types (i.e. shares with different rights attached to them); a share may be represented by a share certificate; the company is not legally obliged to create a loss reserve; the maximum possible amount of the premium is not fixed by law but is to be set out in the memorandum of association.

The legal regulation of joint-stock companies and limited liability companies is mainly found in the Civil Code and the Business Corporations Act. Then, when dealing with a specific legal issue, the following structure of legislation must be applied (we speak of a multi-level structure of legislation):

- a) general regulation of legal entities in the Civil Code (Sections 118–209 Czech Civil Code);
- b) general regulation of corporations in the Civil Code (Sections 210–213 Czech Civil Code);
- c) the provisions of the Civil Code on associations, if expressly provided for in the Business Corporations Act (Sections 3(1)):
 - validity of the decision of the body (Section 45 (1) Business Corporations Act in conjunction with Section 245 Czech Civil Code);
 - invalidity of the resolution of the general meeting (Section 191(1) Business Corporations Act in conjunction with Sections 258–260 Czech Civil Code);
 - reasonable satisfaction of the shareholder (Section 193(2) Business Corporations Act in conjunction with Section 261 Czech Civil Code);
- d) the general provisions on Business Corporations in the Business Corporations Act (Sections 1–94 and Sections 774–785 Business Corporations Act);
- e) special regulation of the relevant type of the business corporation in the Business Corporations Act (Sections 132–242 and Sections 243–551 Business Corporations Act);
- f) special laws.

The lawmaker refers to both companies as capital companies (Section 1(2) Business Corporations Act), albeit factually only a joint-stock company is a purely capital company and a limited liability company is of mixed nature. Its statutory scheme contains a number of personal elements (e.g. unanimity in the event of a decision to amend the memorandum of association affecting the rights and position of the members; Section 171 Business Corporations Act), although the capital elements predominate. The statutory regulation is to a significant extent default, and therefore the regulation of limited liability companies is very flexible. This means that it is up to the shareholders of the limited liability company to decide whether the company's internal structure is more akin to a partnership or a joint-stock company. Despite differences, both company types configure legal entities characterised by property independence, and they are also completely separate from the assets of shareholders. Both company types are always in the position of an entrepreneur as they are entered in the Commercial Register (Section 421(1) Czech Civil Code). This plays a role

in determining the standard of care expected of them in legal dealings (standard of professional care) and in the specifics associated with the status of an entrepreneur in the law of property and obligations (greater contractual freedom in certain cases, less protection, and stricter regime).

Both company types exhibit a number of identical elements, which are outlined herein: they can be formed for any permissible purpose, not just for business purposes; can be formed by only one person; it is not possible to create shares without a contribution obligation in both company types; the legislation allows for professional management; a person other than a shareholder may become a director; the decision-making of the general meeting as well as of the elected bodies is governed by the majority principle; shares are in principle freely transferable; while share transferability may be limited in a joint-stock company, it may be excluded in the case of a limited liability company.

The basic differences between a limited liability company and a joint-stock company are as follows. *First*, while a joint-stock company issues shares as registered share, a limited liability company is given the choice of whether its shares are uncertificated or certificated. *Second*, only a joint-stock company can issue registered shares that are tradable on public markets. A limited liability company is prohibited from offering its registered share for trading on public markets (Section 137(4) Business Corporations Act). *Third*, a joint-stock company must have a minimum share capital of 2 million Czech koruna or 80,000 euros (Section 246(2) Business Corporations Act), while the law does not directly provide for a minimum amount of share capital of a limited liability company. This can only be inferred indirectly from the requirement of the law that a limited liability company must have at least 1 Czech koruna per share (Section 142(1) Business Corporations Act); this entails a significant difference in the financial requirements for the establishment of the two company types. *Fourth*, in the case of a guarantee, the shareholders are not liable for company debts for the duration of the company. Liability comes into play only after the dissolution of the company if the liquidation dividends has been distributed to the shareholders. In that case, the shareholders are liable for the debts of the company up to the amount of their share of the liquidation dividends. In a limited liability company, the shareholders shall be liable for the duration of the company up to the aggregate of the outstanding contribution, as recorded in the Commercial Register on the date of the creditor's call. After its dissolution, they shall be liable to the same extent as the shareholders. *Fifth*, the organisational structure of a joint-stock company is more complex than that of a limited liability company, and these companies, in certain cases, require employee participation in the supervisory board. *Sixth*, the legal regime of a limited liability company is more default than that of a joint-stock company, as the autonomy of a limited liability company to set its internal relations is much broader than that of a joint-stock company. A nice example is the approach of the courts and their discretion in profit distribution. The wording of the statutory rules in this matter is fundamentally the same for both types of companies. Previous case law has been based on the conclusion that the general meeting may decide not to distribute profits

only if there are important reasons for doing so.¹⁸ In a recent decision, the Supreme Court concluded that this requirement does not apply to a limited liability company,¹⁹ meaning that profit in a limited liability company does not have to be distributed among shareholders even if there are no important reasons. Let us leave aside cases of abuse of rights.

If company founders must decide between a limited liability company and a joint-stock company, the decisive criteria also include the object of the business (for certain cases only the form of a joint-stock company is allowed, such as banks), tax rules (the same rules do not apply in all cases), and prestige. Czech law does not recognise a special form of legal entity corresponding to the simplified joint-stock company (e.g. French *Société par actions simplifiée* or SAS), which can be found abroad. In the case of a joint-stock company with variable share capital (SICAV, which can only be used if it is an investment fund under Act No. 240/2013 Sb., on Investment Companies and Investment Funds; *zákon o investičních společnostech a investičních fondech*), there are discussions about whether it is a special form of a company under Czech law.²⁰ There are currently about 27,000 joint-stock companies and over half a million limited liability companies in the Czech Republic.

3. Croatia

The Companies Act²¹ is a fundamental legislative instrument that regulates the formation, internal relations, representation, liability, operation, and termination of companies in the Republic of Croatia. Its excellence and its compliance with other laws that regulate both the relations between market participants and the (co) operation of public authorities in the economy are the base of the realisation of a free market. Since its enforcement in 1995, it has proven to be one of the more permanent regulations adopted in the Republic of Croatia.²² Companies are constantly developing, transforming, and changing. Whether it is an internal need to respond to

18 Judgment of the Supreme Court, case No. 29 Cdo 3059/2011; Judgment of the Supreme Court, case No. 27 Cdo 3885/2017.

19 Judgment of the Supreme Court, case No. 27 Cdo 1306/2023.

20 See Eichlerová, 2023.

21 The Companies Act (hereinafter, CA), Official Gazette No. 111/93, 34/99, 121/99 – credible interpretation, 52/00 – Decision of the Constitutional Court of the Republic of Croatia, 118/03, 107/07, 146/08, 137/09, 125/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23. The act contains 647 articles and regulates all five companies under Croatian law, namely the joint-stock company, the limited liability company, the general partnership, the limited partnership, and the economic interest grouping.

22 Regarding the scope and subject matter of regulation, significant laws have rarely been in force (in application) for more than 20 years. However, there are some regulations that have been in force since 8 October 1991, when part of the legal system of the former federation was adopted on the occasion of the establishment of an independent state (lawyers are familiar with the adoption of regulations at that time that did not contradict the provisions of the Constitution of the Republic of Croatia, Official Gazette No. 51/91). See Ivkošić, 2020, p. 552.

occurrences of inconsistent application of the law, occurrences of abuse of existing legal institutions, concerns over the necessity of adaptation to the legal acquis of the European Union, the legislator must constantly change and supplement the existing legal solutions.

The way in which the members of a company are bound together in the private law community that makes it up is one of the features that distinguishes partnerships from corporations. In the case of partnerships (e.g. general partnership, limited partnership, and economic interest grouping), their connection is of a personal nature; that is, members are personally connected only on the basis of the memorandum by which the company is established in order to achieve a common objective, which they themselves determine. However, for corporations (e.g. joint-stock and limited liability companies), members are linked to a private legal community on the basis of stocks (i.e. share contributions), in which their membership rights in the company are embodied. The essence of corporations is the association of members through capital.²³ For this embodiment of membership, it is essential that each of them participates in the share capital of the company, and from this follows the scope of the rights and obligations that the members have in the company.

The legal status of subjects of commercial law in the Middle Ages was based on customs and statutes of Dalmatian cities. There were various types of partnership in trade, agriculture, shipping, and fishing.²⁴ The Croatian-Hungarian settlement placed the regulation of trade relations under the jurisdiction of the joint Croatian-Hungarian Parliament, which in 1875 codified commercial law by adopting the Croatian Commercial Code.²⁵ For those times, it was a modern law based on the German Commercial Code of 1861, also known as the Austrian Commercial Code of 1862. The Croatian Commercial Code included general partnership (paras. 64–124), limited partnership (paras. 125–146), joint-stock company (paras. 147–222), and cooperatives (paras. 223–257), which by their nature do not belong to commercial companies. After 1875, no new commercial law was enacted in Croatia, and the existing Commercial Law was not changed or supplemented even in the new circumstances of state law in 1918 and 1945.

²³ Barbić, 2006. p. 151.

²⁴ During the time of national rulers, there was a principle according to which, after the death of the father, the property of the family community as a group of persons remained undivided. The son did not inherit from the father, but took over the management of the common property, which had to be preserved. This rule was the basis for the creation of a company with the characteristics of a partnership, called a *compagna*. In 1794, the Dubrovnik Insurance Company was founded in Dubrovnik, the first joint-stock company in the modern sense of the word. It had a capital (initial capital) of 110,000 Dubrovnik ducats, divided into 110 shares, each with a nominal value of 1,000 Dubrovnik ducats. See Margetić, 1997, pp. 13 et seq. See also Luetić, 1982, pp. 123–125.

²⁵ Although passed by a joint parliament, this law differed from the Hungarian law in some respects, partly owing to differences in the wording of the two laws, which were interpreted by different courts in their application. See Stražnický, 1920.

After the Second World War, in the socialist Yugoslav federation, the Basic Law on State Enterprises from 1946 introduced the administrative management of the economy, and in a totalitarian socialist spirit (based on the Basic Law on Private Commercial Activities), all listed commercial companies were abolished.²⁶ Upon the termination of these trading companies, the membership rights of their members ceased, and the seized property was managed by public socialist authorities. This gave rise to a period longer than four decades characterised not only by legal violence²⁷ but also by the socialist concept of social property, in which Croatian law no longer knew the forms of legal entities based on ownership. The socialist experiment initially marked the period of natural planning based on individual administrative acts (i.e. the planning task becomes the basis of the contract). The plans even provided for contractual partners, who were obliged to enter into a contract based on the planned tasks; these tasks also provided the ingredients of the contract, so the contracting parties had little room to make their own decisions. This was to the point that we cannot speak of the free performance of economic entities in legal transactions during this period.²⁸

Based on the Basic Law on the Management of State Enterprises and Higher Economic Associations by Labor Collectives in 1950 and the Constitutional Law on the Basics of the Social and Political Organization of the Federal People's Republic of Yugoslavia and Federal Authorities in 1953, the so-called "socialist self-management" was introduced and the social ownership of means of production and self-management of producers in the economy was established. This was the beginning of an experiment that culminated in 1976 by the adoption of the Joint Work Act. Conceptually, that law dealt with much more areas than is usual in legislative practice. In addition to the organisational issues of business owners, it contained norms for the regulation of mutual relations between workers, on the connection of personal work into the system of joint work, on the management and disposal of social funds, the acquisition and distribution of income, among others. In this way, the approach to legislative regulation was quite uneven. While, with regard to the organisational issues of business owners, there was an obvious effort to fully regulate what the Act covered, in other areas, the approach was significantly different.²⁹

The types of legal entities according to that law were as follows: a) basic organisation of joint work, b) work community, c) work union, d) complex organisation of joint work, and e) business community. These legal entities formally did not have property, but only the right to use social funds, and therefore these entities were not managed

26 A single exception was made by the legal provisions, for private traders' companies that were allowed to continue existing in the form of a general partnership, with prior approval. Regulations on the foundation of companies and the furtherance of economic activities ended this possibility in 1953.

27 During the period of illegal expropriation, that is, the seizure of property from the members of commercial companies without adequate compensation, socialist Yugoslavia simultaneously carried out a powerful state terror against them, persecuting every 'hostile capitalist phenomenon'.

28 For more on this, see Golštajn, 1967, pp. 22 et seq.

29 See Barbić, 2006, pp. 77 et seq.

with regard to property contribution and membership. Instead, that was being formally done exclusively by employees based on the constitutional right to work with social funds, thereby achieving self-management.³⁰ This system of legal entities was based on the fact that a) one legal entity was inside another; b) none of them had all the functions of a legal entity; c) there was no hierarchical relationship in decision-making as this was not suitable for business. Rather, the operation of each system or subsystem was decided by its lowest organisational parts, regularly by consensus, and not infrequently by workers' referendum.³¹ Thus, the conditions in which the market and the legal system are built on did not operate, which made normal business impossible. In establishing a legal entity solely on the basis of labour and not capital, the Joint Work Act also required uniform organisation according to administratively-set frameworks. By prescribing the right and duty to organise workers into a basic organisation and limiting the activity of such an organisation so that it can perform only one activity, the entire economy was organised according to statistical standards.

By the Amendments from 1988, the Constitution gave certain powers to the person who invests capital, who was enabled to participate in the management of a legal entity and to have legal authority over the funds that were previously owned by the company, so that on this basis the person is also recognised with management rights. This means that the association of labour and capital through a self-management agreement was replaced by the classic form of capital investment. Thus, the basis was created for the adoption of the new Law on Companies, which entered into force on January 1, 1989. With the return of companies, the door to the free-market economy was left ajar, and related concepts that had been regulated until then (e.g. private law association, stake, property, membership rights, and profit) returned to the economy.³² Although it provided the basis for the establishment of commercial companies, they were not called as such at this time.

The Law on Companies was based on the division of companies on the basis of ownership, discoursing about a company in social, cooperative, mixed, and private ownership, depending on the ownership regime of the assets with which the company operates. It regulated a) joint-stock companies, b) limited liability companies, c) limited partnerships, d) limited partnerships with shares, and e) companies with unlimited solidary liability of members. The law was extremely underregulated because it contained only 52 articles. Although commercial companies had been revitalised after four decades, their regulation was conceptually not right. Thus, for example, the establishment of all companies was governed by only four articles, and each individual company was referred to only by a few provisions that did not even meet the basic requirements for the company to be considered legally regulated.

30 Ibid.

31 Ibid.

32 This *de jure* rejected the concept of a legal entity without assets but with means as a presumption of work, based exclusively on work with legal and economic neglect of capital and on the result of a business which was manifested in income, in the distribution of which those who did not participate in its creation.

Such an insufficiently elaborated approach to companies led to legal uncertainty, which became more and more apparent the more such companies operated. Amendments to the Law on Companies in 1990 stopped the further establishment of social enterprises, but on the basis of this law, existing ones could not be converted into commercial companies.

This became possible after the dissolution of the Socialist Federation and the independence of the Republic of Croatia, which in 1991 passed the Act on the Conversion of Social Enterprises.³³ According to this Act, which was the basis for ownership conversion, social companies were converted into joint-stock companies and limited liability companies. The object of the transformation of the former social property into private property were not individual things, but enterprises. In addition to this conversion program, the former social companies now had to submit business data, financial indicators, a development program, and data and evidence on the right to use real estate.³⁴ The conversion also accompanied efforts to preserve the unity and integrity of the former social entities, and the “proprietary” conversion of the company was carried out. This entailed the transformation of a legal entity and its legal structuring into a form in which the powers derived from invested capital can be exercised. The aim of the law was not to immediately implement the complete privatisation of companies, but to create the legal prerequisites for its implementation.³⁵ Based on the law on the conversion of social enterprises, the Privatization Fund was created, to which the assets of the former social entities (i.e. shares, things, and rights) were transferred. This fund was established to implement and complete the privatisation process of assets that were temporarily transferred to the Fund, or assets that became the property of the Republic of Croatia on the basis of other laws. Privatisation was finally carried out on the basis of the Act on Privatization³⁶ from 1996, and special laws about the privatisation of particular public companies were also passed.

Since the Law on Companies was such a deficient regulation that corrections were out of the question, in 1993 a completely new law was passed that regulated commercial companies in the Republic of Croatia. The Companies Act³⁷ had a *vacatio legis* for

33 Act on the Conversion of Social Enterprises, Official Gazette No. 19/91. It was applied in accordance with the then Law on Companies, the Law on Securities, the Law on Accounting, and the Law on Obligations. Along with the Law, instructions for its implementation were adopted.

34 Article 11, Act on the Conversion of Social Enterprises and Point I of the Instructions for the Implementation of the Act.

35 It only enabled privatisation, which was partially or fully implemented in the phase of company transformation. Almost three thousand social enterprises, by converting into sole proprietorships and limited liability companies, entered the substandard and deficient regime of the Law on Enterprises. See Barbić, 2006, pp. 91 et seq.

36 Act on Privatization, Official Gazette No. 21/96.

37 In the fall of 1992, a working group was formed to draft the law that was adopted on 23 November 1993 as the Companies Act, Official Gazette No. 111/93, 34/99, 121/99 – credible interpretation, 52/00 – Decision of the Constitutional Court of the Republic of Croatia, 118/03, 107/07, 146/08, 137/09, 125/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23.

more than a year and entered into force on January 1, 1995, and today it is one of the more permanent regulations adopted in the Republic.³⁸ It is a fundamental legislative instrument that regulates the creation, internal relations, representation, liability, operation, and termination of commercial companies. Its excellence and compliance with other laws that regulate both the relations between market participants and the (co)operation of public authorities in the economy are the base of the realisation of a free market.

The regulations on commercial companies had to be adopted according to the model of the developed countries of the West. Through comparing the laws, judicial practice, and legal literature of individual European countries, it was acceptable to refer to the experiences of the Central European legal circle. German law was chosen as a model law, which, as the law of a leading member of the European Union, had the strongest influence on the development of company law in all Central and Eastern European countries. The Republic of Croatia also had intensive business ties with that country and the largest number of foreign investors came from it.³⁹

Commercial companies are constantly developing, transforming, and/or changing, so the dynamic development of company law encourages the legislator to react. Whether it is an internal need to respond to occurrences of inconsistent law application, occurrences of abuse of existing legal institutions, or it concerns the necessity of adaptation to the legal acquis of the European Union, the legislator had to continuously change and supplement the existing legal solutions. By June 2023, the CA was amended and supplemented sixteen times.⁴⁰ The adaptations to the rules of European law (i.e. directives, regulations, and court practice) brought Croatian company law to a level that meets modern needs.

The CA provides the legal forms of commercial companies. It enables the establishment of the following:

38 Regarding the scope and subject of regulation, significant laws were rarely in force (in application) for longer than 20 years. Admittedly, there are some regulations that have been in force since 8 October 1991, when, on the occasion of the creation of an independent Croatian state, a part of the legal order of the former federation was taken over (lawyers are familiar with the taking over of those regulations that did not contradict the provisions of the Constitution of the Republic of Croatia). See the journal *Narodne novine*, Issue No. 51/91 for a comprehensive presentation.

39 German law belongs to those in which commercial companies are most thoroughly regulated. Drafting regulations on companies that are based on German legal experience, except for the fact that they are governed by several laws there, means accepting widely accepted standards for regulating legal relations in companies, with the fact that it is possible to use the experiences contained in their rich judicial practice and legal literature. Complete copying was not possible, because it is a very developed law and some of its complex solutions could cause difficulties in application, which would further burden the transition from a socialist to a capitalist economic environment. See Barbić, 2006, pp. 98 et seq.

40 The CA has so far been amended and supplemented 14 times by legislative means, and in addition, there have been two more 'external' interventions in its content: the authentic interpretation of the Croatian Parliament from 19 November 1999, and the decision of the Constitutional Court of the Republic of Croatia from 10 May 2010. In terms of scope, the most significant amendments to the CA were adopted in 2003, 2007, 2009, 2012 and 2019.

- a) joint-stock company;
- b) limited liability company (including a simple limited liability company), such as corporations;
- c) general partnership;
- d) limited partnership;
- e) economic interest grouping, such as partnerships.

In addition to them, it is possible to establish a European joint-stock company and a European economic interest grouping, in accordance with the directly applicable provisions of European law.

It is not possible to establish a commercial company of any other legal form that is not prescribed by law. This means that commercial companies in Croatian law, like all companies in general, are *numerus clausus*. Despite this, the possibility of autonomous organisation in a commercial company opens up space for the economic activity to be carried out according to the individual needs of each business entity and the persons who are members of that entity. The boundaries of such an autonomous arrangement are set for the protection of shareholders, and especially other persons outside the company with whom it enters into business relations. In this, the CA does not deviate from the solutions in other countries, but follows an already well-established and useful practice.

The fact that commercial companies are *numerus clausus*, however, does not mean that the same rules always apply to all companies of a certain legal form (e.g. a joint-stock company). Sometimes, if such is the juridical-political assessment of the legislator, special provisions are prescribed for performing some special activities, and general provisions, which are valid for all companies of that legal form, are applied unless these special rules stipulate otherwise. The reason for such an approach lies in the assessment that these are activities that are so significant and sensitive that they need to be regulated additionally, and therefore additional provisions are prescribed that apply to the legal form of the company in which they can be performed. In this way, for example, the regulation of banking activities, insurance activities, and sports activities (e.g. participation in sports competitions) can be handled. Importantly, these companies do not configure some new, special form of company, but only feature a warning that they perform specially regulated activities and that, in addition to the general ones, some special rules also apply to them.

4. Hungary

Efforts to codify commercial law in Hungary commenced in the 18th century, signalling a distinctive trajectory in the development of company law compared

to that of Western Europe.⁴¹ In Western Europe, the evolution of company law was predominantly contractual, driven by organic growth to meet economic demands, having begun in the late Middle Ages and been carried through to the modern era. The development of joint-stock companies in Western Europe was peculiar because they were the first to be set up based on state privilege. This organic development was subsequently followed by a phase of state regulation. In contrast, in regions like Hungary, where economic development was historically delayed, the approach was to facilitate the creation of companies through legal means. In this context, legal regulation was instituted prior to the actual formation and proliferation of companies within the economy, serving as an initiative of top-down modernisation.⁴²

In 1779, the Royal Curia was tasked with drafting legislation on trade and bills of exchange. This drafting was completed by 1786, with the second section encompassing company law provisions. It was only in 1791 that this draft was presented to the National Assembly, reconvened by Leo II after an extended hiatus. However, the Assembly did not deliberate on the draft; instead, it appointed a committee to consistently refine the text. In 1795, the Trade Committee submitted the revised proposal to the National Assembly, titled '*Codex Cambio Mercantilís Pro Regno Hungariæ Partibusque Eidem Adnexis In Tres Partes Divisus Per Regnicolarem Juridicam Deputationem Artículo 67. 1791. ordinatam elaboratu*'. This proposal was eventually published in Pozsony (present-day Bratislava) in 1802.⁴³ Nonetheless, the committee's recommendations were neither discussed nor enacted, as the momentum for reform was significantly disrupted for several decades owing to the untimely death of Leo II, the ensuing stringent absolutism under his successor Francis I, and the reactionary stance of the Habsburgs against the radicalising influences of the French Revolution and the Hungarian Jacobin movement led by Ignác Martinovics.

Despite the regulatory difficulties, attempts to set up companies were made, but these either remained at the planning stage, the process of setting up the company stalled for some reason (e.g. lack of capital), or the company only carried out activities of local importance. Worthy of mention is the textile factory founded by the Forgách family, which tried to issue shares around 1800; the draft of the North Wine Export Company (1802); the Révkomárom Ship Insurance Company (1808); the draft of the Hungarian National Joint-Stock Company (1826), which aimed to promote the tobacco trade.⁴⁴ The first joint-stock company to effectively operate in Hungary, the First Danube Steamship Joint-Stock Company, was based in Vienna.⁴⁵ Codification efforts continued in the first half of the 19th century. Building on the results of the previous

41 For a general overview on the history of Hungarian company law before 1918, see Veress, 2024a, pp. 45–51.

42 For details see Veress, 2018, pp. 321–338; Veress, 2020, pp. 123–138.

43 *Codex Cambio Mercantilís Pro Regno Hungariæ Partibusque Eidem Adnexis In Tres Partes Divisus Per Regnicolarem Juridicam Deputationem Artículo 67. 1791. ordinatam elaborate*, 1802.

44 See Horváth, 2005, pp. 111–114.

45 *Ibid.*, pp. 122–125.

codification attempt,⁴⁶ another draft of a commercial law code, the *Codex Cambio-Mercantil* *eiusdemque Ordo Processualis*, was prepared, which was also not adopted, but was published in print in 1830 in Pozsony and Buda. This is the last draft of commercial legislation in Latin.

At the dawn of the 19th century, during the Age of Reform, Hungary experienced a national awakening accompanied by a linguistic revival, which notably included the ascendance of Hungarian as the language of legal proceedings. By 1830, the Curia had begun adjudicating in Hungarian, and by 1834, proficiency in Hungarian was mandated for public officeholders and legal practitioners. István Széchenyi, a key figure of this reform era, was instrumental in the construction of the Chain Bridge, which connected Buda with Pest. Legislative support for this initiative is evidenced in Act XXVI of 1836, which mandated the establishment of a joint-stock company to oversee the construction of a permanent bridge between Buda and Pest. The financing of the bridge was to be recouped through tolls collected by the joint-stock company, with dividends distributed to investors. The duration of toll collection was specified in the contract with the joint-stock company, and the law further stipulated that upon fulfilment of the contract terms, the bridge would be transferred to the nation as a public property. Notably, the legislative focus was primarily on the bridge's construction rather than on detailed regulations governing the joint-stock company's organisation and operations. The Chain Bridge was completed and opened to traffic in 1849. The right to toll the bridge was originally granted for 87 years, but it was actually exercised for two decades, because the bridge was redeemed by the state under Act XXX of 1870.⁴⁷

The Hungarian Commercial Bank of Pest joint-stock company (*Pesti Magyar Kereskedelmi Bank Rt.*) was established on a contractual basis, thanks to an imperial privilege. The privilege was applied for as early as 1830, but the patent was only granted in 1838. The bank was then actually established only on 14 October 1840 (i.e. the date on which the monarch, Ferdinand, signed the bank's charter) owing to opposition from the imperial administration, and began operations only in 1841.⁴⁸ According to the letter of privilege in Latin, the emperor decreed:

To all our subjects of any rank, degree, and dignity, true and loyal, in our Hungary and its associated regions, who become aware of this present charter in any way, we solemnly enjoin and graciously command that you do not disturb, hinder, or trouble, either publicly or privately, the financial institutions established and maintained by the said company.⁴⁹

46 Papp, 2010, p. 265.

47 For further details, see Horváth, 2005, pp. 125–132.

48 See Pólya, 1892; Lamotte, 1941; Botos, 1991; Holbesz, 1939, pp. 41–46; Horváth, 2005, pp. 141–145.

49 Lamotte, 1941, no page numbering in the volume.

It can be seen that the first modern Hungarian bank and one of the first Hungarian joint-stock companies were created using the medieval technique of the privilege granted by the monarch. The regulation and the subsequent “commodification” of companies emerged as significant developments, and this occurred in parallel to similar trends observed in Western Europe. The foundational regulations for companies – namely, the general partnership, the limited partnership, and the joint-stock company – were codified in the 1840 Act XVIII, which delineated the legal relations of companies.⁵⁰

Influenced by the intellectual currents of the reform era and building upon prior legislative accomplishments, a comprehensive suite of laws intended to enhance economic activities was finalised by 1840. Company law was only one part of this. The set included the 1840 Act XV named The Bill of Exchange Code,⁵¹ the 1840 Act XVI on merchants, the 1840 Act XVII on the legal relations of factories, the 1840 Act XIX on merchants’ boards and brokers, the 1840 Act XX on carriers, the 1840 Act XXI on the priority registration of debt claims, and the 1840 Act XXII on bankruptcy. These laws are largely ‘simple translations of the relevant Austrian provisions’,⁵² and their development involved the participation of Ignaz Wildner (1802–1854), a lawyer from Vienna.⁵³ This legislation was enacted in Hungarian. Based on the 1840 Act XVIII, numerous companies were founded, while associations previously operating in cooperative forms (e.g. savings banks) were transformed into joint-stock companies.

The regulation considered the general partnership as the foundational type of company, in which each partner was liable with their entire personal assets for the company’s contracts with external parties. From this form, the law developed the limited partnership by allowing the inclusion of limited partners, modelled similarly to a loan transaction. The limited partner essentially provided a loan to the general partnership and, in return, could stipulate interest; they did not exert any other influence on the company’s affairs and were not liable with their other assets beyond the amount they contributed. A written contract was required with the limited partner, but neither the limited partner nor the contract needed to be registered. During the company’s operation, the limited partner could not demand the return of their loan, unless otherwise stipulated by the contract. However, the full partners were responsible to the limited partner for the contributed capital and its interest, and the limited partner could sue both the company and the full partners. In the event of the company’s failure, the claims of the limited partner were subordinate to those of the company’s creditors, who could be satisfied also from the financial contributions made by the limited partner. Members or full partners generally made equal contributions, unless otherwise specified by the contract, and the company’s members could not undertake activities that contradicted the company’s objectives.

50 See Pókecz Kovács, 2011, pp. 117–127.

51 For details see Balogh, 2011, pp. 1–9.

52 Holbesz, 1939, pp. 43.

53 Sárközi, 1988, p. 525.

Profits were to be distributed in proportion to the capital contributions, and each member had the right to inspect the company's accounts and trading books.

The regulation of joint-stock companies at the time was also detailed. The law established an important freedom, specifying that acquiring shares and joining a joint-stock company were unrestricted for everyone. The regulation permitted only registered shares, and at the general meeting, each shareholder had one vote per whole share, and regardless of the number of shares owned, could not obtain more than 10 votes. In 1864, on the order of Franz Joseph I, Emperor of Austria, the Pest Commodity and Stock Exchange (*Pesti Áru- és Értéktőzsde*) was established. Its first president, Frigyes Kochmeister (1816–1907), led the institution for more than three decades.

However, the true golden age of companies in Hungary dawned only after the closure of the absolutist autocratic period following the 1848–49 revolution. This era began with the Compromise of 1867, which marked the establishment of the dualist Austro-Hungarian Monarchy. By 1868, the press was already reporting on a frenzy of stock market speculation, referring to the period following the Compromise as “*Gründerzeit*”, which can be translated as “founders’ era”. The Industry Act (Act VIII of 1872) subsequently abolished the guilds. The modernisation of company law was undertaken through the Commercial Code (Act XXXVII of 1875), which was modelled on the German example.⁵⁴ The model for this was the Joint Commercial Code of the German states from 1861, which Austria, as a member of the German Confederation (*Deutscher Bund*) at the time, also adopted in 1862–63. István Apáthy (1829–1889) played a pivotal role in the drafting of the proposal. However, the Commercial Code was not a slavish copy of the German regulations, but a flexible adaptation.⁵⁵ Under this Commercial Code, numerous large joint-stock companies (companies limited by shares) were established; for smaller companies, the general partnership and limited partnership forms were also made available.

The 1875 regulation categorised cooperatives alongside general partnerships, limited partnerships, and joint-stock companies as commercial companies. A general partnership arose when two or more individuals conducted commercial business under a common firm name, with unlimited and joint and several liability, and any agreement to the contrary did not have legal effect towards third parties. Anyone who joined an existing general partnership, regardless of whether this involved a change in the firm name or not, was equally liable for the company's obligations that arose before their entry, and any contract to the contrary had no legal effect towards third parties. A limited partnership was formed when, in the course of conducting a commercial business under a common firm, one or more limited partners were liable only up to a specified amount of capital contribution, while one or more general partners had unlimited and joint and several liability. For the general partners, if there were multiple partners, the partnership also qualified as a general partnership.

54 For details on the adaptation of the Commercial Code, see Horváth, 2018, pp. 203–245.

55 Sárközi, 1988, p. 526.

A joint-stock company was defined as a company formed with a predetermined number of shares of equal value, where the shareholders were liable only to the extent of their shares. The shares could be registered (nominative) or bearer shares. The law also introduced the institution of a supervisory board for joint-stock companies, which oversaw the company's management in all its aspects; it was entitled to be informed about the company's operations and had the right to inspect the company's books, documents, and cash reserves at any time. The Commercial Code did not explicitly specify a minimum number of shareholders required for establishing such a company. However, the requirement for a quorum at the founding general meeting was of at least seven shareholders, implying that a joint-stock company had to have at least seven shareholders at its formation. Once established, a joint-stock company could have fewer than seven members if shares were consolidated into fewer hands, as there was no specific prohibition against this in the Commercial Code. Nonetheless, the fundamental principle that a single individual could not constitute a company alone prevented the concentration of all shares in one person's hands, aligning with the inherent legal and conceptual framework of corporate formation. A legal (compulsory) size of the share capital was prescribed by the law only exceptionally, such as for public storage companies, insurance companies, and railway joint-stock companies.

The next step in the reform of company law was Act V of 1930, which introduced the limited liability company into Hungarian law and also regulated the silent partnership. This law detailed the conditions and requirements for the formation of a limited liability company, such as company agreement contents, capital stock amounts, and member liability. It also governed company registration, members' rights and obligations, fundamental issues concerning company operations, the legal status of directors, and dissolution or liquidation circumstances. A limited liability company was a type of commercial company formed with a predetermined amount of capital contributions, constituting its share capital, and where member liability towards the company extended only to their capital contribution and any other financial contributions stipulated in the company agreement. Members were not otherwise liable for the company's obligations. Unlike a joint-stock company, securities could not be issued for membership rights, any issued securities were void, and the issuers were jointly and severally liable for any damages arising from their issuance. Public solicitation for the collection of members was prohibited. The law specified the minimum share capital for a limited liability company at 10,000 *pengő*s (previously, the minimum legal capital requirement was only associated with specific types of activities performed by joint-stock companies). A limited liability company engaged in transport, freight forwarding, warehousing, and pawnshop business was required to publish its balance sheet, and companies whose share capital exceeded 150,000 *pengő*s and whose number of members exceeded 25 had to establish a supervisory board. Other limited liability companies were required to establish a supervisory board if the company agreement mandated it.

Under the Soviet-style dictatorship established after the Second World War, there was no need for companies, which were perceived as capitalistic tools of mass exploitation; hence, no regulations were put in place for them. Noteworthy is that the Commercial Code of 1875 was never formally repealed, but was also not applied in practice. It remained in force until 1988, when the first Company Act, adopted in the course of the pre-transition reforms preceding the regime change, entered into effect. The central actors in the economic sphere were state enterprises, which were integrated into the public administration and possessed characteristics specific to public law.⁵⁶ The assets of the former companies in general were nationalised and their place was taken over by state enterprises.

During and subsequent to the economic and political transformation in Hungary in the context of the fall of the Soviet-type dictatorship, a series of company laws were enacted, reflecting the evolution and adaptation of company law to meet the economic demands at the time. Notable laws included Act VI of 1988, Act CXLIV of 1997, and Act IV of 2006. These statutes demonstrated both an enduring continuity and a pressing necessity for legislative reforms. As of the current framework, the regulation of company law has been consolidated within the Civil Code (Act V of 2013).

Presently, the Civil Code governs four distinct company types: (a) general partnerships (*közkereseti társaság*), (b) limited partnerships (*betéti társaság*), (c) companies limited by shares like joint-stock companies (*részvénytársaság*), and (d) limited liability companies (*korlátolt felelősségű társaság*).⁵⁷ Of these, the limited liability company emerges as the most prevalent form, although the incidence of joint-stock companies remains considerably high. Under the Civil Code system, all company types have legal personality, whereas previously general partnerships and limited partnerships were legal entities but not legal persons. The name of the company shall contain a designation referring to the company's type or its abbreviation. Currently, joint-stock companies have two forms: the public company limited by shares (listed or in process to be listed, *nyilvánosan működő részvénytársaság*, or *nyrt* in Hungarian) and the private company limited by shares (not-listed or closed, *zártkörűen működő részvénytársaság*, or *zrt* in Hungarian).

Interestingly, the core organising idea of contemporary Hungarian company law is an expansive principle of dispositivity, which treats the constitutive instrument of the legal person as a private-law charter capable of displacing most statutory default rules on company organisation and operation. In doctrinal terms, the statute installs a default-mandatory architecture (Civil Code, Article 3:4); as a default, members may freely calibrate (I) their mutual rights and obligations, (II) their relationship to the legal person, and (III) the internal governance structure and decision-making procedures of the entity. This contractarian baseline is then bounded by a set of mandatory carve-outs, as deviation is impermissible where: the statute prohibits it; the deviation

⁵⁶ For a detailed and very interesting analysis, see Sárközy, 2007.

⁵⁷ These English translations are not totally precise, having in mind that the continental legal system is somewhat different than the common law system.

manifestly prejudices creditors, employees, or a minority of members; it would frustrate lawful supervisory control over the company.⁵⁸

The constitutive instrument functions as private legislation for the company. It becomes the principal site for tailoring voting and quorum rules, board and committee design, managerial authority allocation, information and audit rights, conflict-of-interest procedures, transfer restrictions, exit and buy-out mechanisms, dividend and distribution policies, and dispute-resolution clauses. At the same time, the legal hierarchy is unambiguous, as the charter may override statutory defaults but not mandatory provisions, including those that secure third-party protection (creditors and employees), minority rights against oppression or exclusion, and the integrity of public or judicial oversight.

The creditor-protection limit recognises that a corporate constitution can create negative externalities for non-consenting third parties. Clauses that effectively eviscerate capital-maintenance constraints, subordinate outside creditors to insiders without disclosure or consent, or authorise distributions that would leave the company undercapitalised will not withstand review. In practice, core solvency rules, rules on unlawful distributions and return of contributions, and rules that police related-party transactions operate as non-derogable safeguards; attempts to contract out of them are either void *ab initio* or unenforceable against third parties. Similarly, the employee-protection limit prevents the corporate constitution from derogating from mandatory labour law standards or from eliminating co-determination or information rights where these are imposed by sectoral statutes.

The minority-protection limit polices opportunism by controlling shareholders or founding members in closely held firms. Constitutive instrument provisions that strip a minority of essential participation rights, disable information and inspection rights, foreclose judicial review of abusive resolutions, or hard-wire squeeze-out mechanisms without fair-value protections will typically be invalid or subjected to strict scrutiny. This boundary is particularly salient in limited liability companies and private companies limited by shares, where ownership is concentrated and exit can be practically constrained. It channels private ordering toward *ex ante* fair design (e.g. calibrated consent thresholds, balanced drag-along/tag-along frameworks, or tailored deadlock devices).

Finally, the preservation of supervisory control limit serves general societal values. Corporate constitutions cannot be drafted to obstruct registration and court oversight, the work of sectoral regulators, statutory audits, lawful information requests by oversight bodies, or the enforcement of directors' duties. Clauses that purport to shield managers from accountability (e.g. by disabling liability for wilful misconduct or by prohibiting the production of books and records to authorities) are incompatible with the "supervision" reservation and therefore ineffective.

58 For further details and disputes, see Jójárt, 2014, pp. 673–685; Sárközy, 2015, pp. 8–14; Auer, 2016, pp. 395–404; Csehi, 2016, pp. 1–8; Vékás, 2018, pp. 385–391; Veress, 2019, pp. 95–100; Vezekényi, 2020, pp. 44–47; Pázmándi, 2023, pp. 153–161; Auer and Papp, 2023, pp. 314–335.

This boundary is especially tight for publicly-oriented entities (e.g. public companies limited by shares), where European Union-level requirements and listing rules add layers of mandatory governance that private orderings cannot displace. Within those outer walls, the space for private ordering is unusually wide by European standards. The law's starting point is that parties are better positioned than the legislature to minimise agency costs and transaction costs in their specific venture.

The statutory test that forbids deviations which “manifestly” infringe on protected interests invites a calibrated standard of review. The term “manifest” here signals that not every marginal or hypothetical impairment suffices, but that the prejudice must be clear, material, and reasonably foreseeable at the time of drafting or application. In practice, courts can operationalise this by asking, for example, whether the clause: (I) systematically disables a protected constituency's core rights (e.g. minority information and challenge rights); (II) materially elevates insiders' positions at the creditors' expense (e.g. authorising distributions in the vicinity of insolvency or by subordinating outside claims without consent); (III) structurally impairs statutory supervision (e.g. interposing confidentiality devices that block regulator access). Where the defect is confined to a clause, partial invalidity and severability preserve the rest of the charter; where the defect pervades the governance design, courts may refuse registration or grant broader remedial relief.

Compared to other models in Europe, Hungary's model is strongly contractarian, closer to some common-law jurisdictions enabling statutes that privilege private ordering than to the highly mandatory templates of classic continental public company acts. This characterisation, however, must be kept in proportion. The dispositive core sits atop a vast bedrock of non-derogable rules: capital and solvency constraints, basic director duty norms, disclosure and audit rules, minority and creditor protection, sectoral regimes, and the public-law apparatus of supervision. For public companies, European Union company law directives and market rules further thicken the layer of mandatory law; for closely-held companies, the dispositive space is at its widest, but remains policed by the three mandatory limits identified above. When properly applied, these limits preserve the advantages of a high-dispositivity regime, such as tailor-made governance, reduced agency costs, and contractual innovation, while constraining its systemic hazards.

5. Poland

Compared to foreign corporate law systems (e.g. in Germany, France, and the United States of America),⁵⁹ modern Polish regulations regarding companies have a fairly short history. The reasons for this state of affairs are geopolitical and historical in nature, mostly due to the lack of own statehood in the 19th century. In 1795, and for a subsequent period of 123 years, Poland lost its sovereignty as a result of three partitions and occupations carried out by Russia, Prussia, and Austria. Independence was regained only in 1918. At the time of regaining independence, Poland was subject to the relevant legislation of the former partitioning states and, additionally, French law, which resulted from the fact that the Congress Kingdom⁶⁰ during the Napoleonic Wars received the Napoleonic Code. There was thus an urgent need to unify law in Poland. Regaining independence and reviving statehood was primarily connected with the need to create modern laws relating to regulations in non-partitioned areas. This was, as one can imagine, a huge challenge and an extremely complex task. The introduction of all new institutions had to bear in mind the principle of protection of rights acquired under the rule of the partitioning states, while completely eliminating the foreign influences accumulated over a 100 years of partitions is completely impossible even for at least several dozens of years. For example, some of the provisions of the Napoleonic Code protecting rights acquired under his rule are still in force.⁶¹ It should be mentioned that the first capital companies in Poland date back to even before the period of partitions. The first Polish joint-stock company is considered to having been established in 1766 on the initiative of King Stanisław August Poniatowski; this company featured 120 shares submitted for the establishment of wool factories in the country, and was called the Company of Wool Manufactures.⁶²

The first unified and contemporary regulation of the share law was contained in the regulation of the President of the Republic of 2 March 1928 – Law on joint-stock companies. In 1933, the Regulation of the President of the Republic of Poland of 27 October 1933 – Law on Limited Liability Companies was adopted. The provisions of the indicated juridical acts were taken over with amendments to the Commercial Code of 1934, which also took the form of a regulation of the President of the Republic of Poland. These changes were not significant. Accordingly, for the purposes of the

59 The history of the creation of joint-stock companies is discussed by many legal historians. Some researchers point to the Merchant Adventures of England corporation founded in 1390 as the oldest capital company, on the basis of which merchants combined capital in order to conduct ventures burdened with economic risk (Sołtysiński, 1998, p. 24). It is also indicated that the first germ of the concept of corporations could have been Roman *universitates* (colleges) or *societates publicanorum* educated in ancient Rome. Dąbrowska, 2020, p. 8.

60 The state was created in 1815 by the decision of the Congress of Vienna from the lands of the Duchy of Warsaw as a monarchy united by a personal union with Russia.

61 In 2013, the Supreme Court referred to the Napoleonic Code in a case concerning an entry in the land and mortgage register (III CZP 29/13).

62 Bałtruszajtys, 1959, p. 77.

current study, it is reasonable to discuss the Commercial Code of 1934.⁶³ The Polish Commercial Code, which entered into force on 1 July 1934 and essentially ceased to apply on 1 June 1965, was prepared by the Codification Commission established in 1919.⁶⁴ The Commercial Code of 1934 was one of the most significant achievements of the codification of Polish jurisprudence in the 20th century, being a collective work resulting from the cooperation of Polish jurists and created over many years. The original draft of the commercial code was developed and published in 1928 by Antoni Górski, a professor of the Free Polish University in Warsaw, based on an Italian project from 1926 prepared by Alfredo Rocco, which in turn was based on the German system.⁶⁵ In the end, however, this project did not become the subject of the Section's deliberations, and finally, after many discussions, the Subcommittee on Commercial Law, chaired by Stanisław Wróblewski, developed between 23 February and 15 April 1934 a project to include in the Commercial Code - parts of the juridical acts prepared by it and already in force, with modifications, were the Act of 22 March 1928 on joint-stock companies, Regulation of the President of the Republic of Poland of 27 October 1933 - the Law on Limited Liability Companies, Regulation of the President of the Republic of Poland of 28 December 1924 on storage houses and regulations on sale in instalments. Until the outbreak of the Second World War, work continued on the second and third parts of the Commercial Code, covering maritime and river law as well as private insurance law.⁶⁶

As just described, the Commercial Code of 1934 also included a regulation on the law of limited liability companies. This regulation was originally developed on the basis of the Austrian Limited Liability Companies Act of 6 March 1906 and on the basis of the work of the Codification Commission. With the cooperation of Dr. Witold Supiński and Świętosław Baudouin de Courtenay, representatives of the Ministry of Industry and Trade, the Codification Commission proceeded to develop a draft of a uniform law on limited liability companies for the whole country. This draft was adopted by the Commercial Law Section of the Codification Commission in the first reading in January 1928 and published in print, and then addressed to the opinion of representatives of the economic sector. It was amended in 1930 and announced in 1933 as a regulation of the President of the Republic of Poland.⁶⁷

The Commercial Code of 1934 therefore unified Polish company law, eliminated particularisms and differences in the scope of commercial codification of the reborn state, and repealed extra-partition laws, as follows: the French Commercial Code

63 Regulation of the President of the Republic of Poland Commercial Code of 27 June 1934 (Journal of Laws No. 57, item 502).

64 Dz.P.P.P. No 44, poz. 315 i Journal of Laws 1921, No. 75, item 511.

65 Codification Commission of the Republic of Poland. Section of Commercial Law, vol. I, No. 3: Draft of the Polish Commercial Code developed on the models of the Italian project by the chief referent, prof. dr. Antoniego Górski, Warsaw, 1928.

66 Górnicki, 2015, p. 66.

67 Codification Commission. Section of commercial law, vol. I, No. 4 of general collection No. 65. Draft Act on Limited Liability Companies. Justification in the elaboration of the main project referent, prof. A. Chelmoński, Warsaw, 1932.

(*Code de commerce*) of 1807, applied in the territory of the former Congress Kingdom;⁶⁸ the German *Handelsgesetzbuch* (also known as HGB) of 1897, in force in the Western Territories of the Republic of Poland (*Das allgemeine deutsche Handelsgesetzbuch*, also known as ADHGB); the German General Commercial Code of 1862, applicable in the Southern Territories of the Republic of Poland; the Russian Trade Act in the version of 1912 (*Swod Zakonow Rossijskoj Imperii*, T. XI cz. II.), binding in the Eastern Territories of the Republic of Poland. However, the decree of the President of the Republic indicated certain exceptions in the special provisions for the area of binding force of individual codes, maintaining in force certain provisions of the repealed regulations. This was a consequence of the principle of protection of acquired rights and differences between individual non-partitioning territories.⁶⁹

The entry into force of the Commercial Code in 1934 was an unquestionable success of Polish jurisprudence. It is emphasised that this code constituted a kind of constitution of Polish commercial law after Poland regained independence. We should agree with the view that we can talk about modern Polish commercial law as a separate branch of private law only since the adoption of the Commercial Code of 1934. The Polish legislator, when proceeding to the unification of the commercial law, was in a situation that favoured the creation of a law considering the *acquis* and experience resulting from the application of leading European codifications. Specifically, at the deliberations of the codification commission, lawyers who were well-acquainted with all the legislation in force in Poland and the jurisprudence and doctrine arising from them met, which fostered the creation of a commercial code that considered the achievements of European legal thought at a high level.⁷⁰

The Commercial Code remained close to the previous *acquis* of European thought. Importantly, the Commercial Code of 1934 was not a fully original creation, but drew inspiration and shape from individual institutions primarily from the German *Handelsgesetzbuch*, which was considered by contemporary scholars, including Polish lawyers, as a modern codification, and also referred to the Austrian Western Territories of the Republic of Poland of 1862. As far as the layout of the Code is concerned, like the *Handelsgesetzbuch*, it also covered only substantive commercial law, but not in its entirety, leaving all of the following outside the Commercial Code: cooperative law, banking law, stock exchange law, certain specific matters concerning bill of exchange and cheque law, trademark protection, patent law, and other laws applicable in trade and civil trade. The Commercial Code of 1934 hence differed from both the *Handelsgesetzbuch* and other commercial codes, as it contained full regulation of almost all commercial companies. Moreover, contrary to the German legislation, the intention of the Polish codifiers was to include maritime law in the second part of the Commercial Code and private insurance law in the third part.⁷¹

68 Introduced by virtue of the Act of the Sejm of the Duchy of Warsaw of 24 March 1809 (Dz. Pr. Ks. Warsz., vol. I, p. 239).

69 Hryniewicz, 1939, pp. 3–5.

70 Frąckowiak, 2015, pp. 45–48.

71 Górnicki, 2015, p. 88.

Unfortunately, the further fate of the Commercial Code of 1934 was thwarted by the Second World War; owing to the war, the Commercial Code was in force in all its glory for basically only five years. In 1939, the fourth partition of the Polish took place by Germany and Russia on the basis of the Molotov-Ribbentrop Pact. As a result of the loss of sovereignty by Poland, the code was suspended for the duration of the ongoing war and occupation. After 1945, although formally it was still in force, its use was systematically limited owing to the political changes that Poland experienced, as it remained under the sphere of influence of the Soviet Union. In the emerging new regime based on the principle of special protection of state property, nationalisation of private property, and basing the economy on the principle of planning, there was not much room for further development in the field of commercial rights. The concept of the merchant known from the Commercial Code gave way in economic development to the unit of the socialised economy. The selective and inconsistent determination by the post-war legislator of the scope of application of the provisions of the Commercial Code maintained in force constituted a serious obstacle to its application. It was only on 1 January 1989 that the foundations for the return and restoration of commercial law reappeared.⁷² The exposition thus far allows for considering it a convincing argument that Polish commercial law has developed unevenly, and that three periods can be clearly distinguished in its development: the first period until 1939, the second period from 1945 to 1989, and the third period beginning in 1989 and ongoing.⁷³

After the end of the Second World War, with the development of the primacy of the socialist economy, the importance of the 1934 Commercial Code diminished and its role degraded. Until its formal repeal in 1964, however, the Commercial Code was still the basis for a separate commercial law.⁷⁴ Despite the fact that the commercial code was formally in force after the Second World War, fundamental changes in the socioeconomic system quickly began to take place owing to Poland having found itself in the orbit of the Soviet Union's influence. The economy was not based on the free market; instead, the priority that was introduced was of social ownership, primarily of the state, and thus extensive nationalisation and land reform were carried out. The legal basis for nationalisation was the Act of the National Council of 3 January 1946 on the takeover of the basic branches of the national economy into the State,⁷⁵ based on which most Polish private enterprises were nationalised. This nationalisation process included industrial plants employing more than 50 workers per shift, with the exceptions were enterprises belonging to Reich citizens, traitors, and

72 Ibid., p. 71.

73 Frackowiak, 2015, p. 46.

74 Act of 23 April 1964; provisions introducing the Civil Code (Journal of Laws No. 16, item 94, Article VI) repealed the Commercial Code and the provisions introducing this Code, while maintaining most of its provisions concerning general partnerships, limited liability companies, and joint-stock companies. This incident illustrated the marginal role that the new regime was to attribute to commercial law.

75 Act of 3 January 1946 on the takeover of the basic branches of the national economy (Journal of Laws 1946 No. 3, item 17).

collaborators, which were taken over without compensation and regardless of size, as well as enterprises belonging to the 17 key branches listed in the law, nationalised regardless of size. In practice, real compensation was paid to foreign shareholders of Polish companies (apart from Germans), while domestic shareholders were offered substitutes for compensation in securities.⁷⁶

The basis of the economic turnover was the principle of planning and management of governmental acts of an administrative nature, not the principle of freedom of contract. In these new political conditions, there was no legal certainty, no incentives to set up a business, and no commercial law institutions. The basic role began to be played by organisational units related to social property: state-owned enterprises, cooperatives, and other organisations of the working people of cities and villages (in accordance with the nomenclature of the Constitution of the People's Republic of Poland). In place of the concept of the merchant, which granted equal status in the conduct of economic activity to every person, a new term of "unit of socialised economy" was created. Natural and legal persons, as well as organisational units which operated on the basis of individual ownership, could do so only after obtaining the permission of the relevant public authority, and became a margin of economic turnover. This led companies as a form of conducting business activity to disappear from trading. In addition to the formally-binding commercial code, special legislations on socialist trade appeared. It was no longer a commercial law, but a law of the socialised economy.⁷⁷ Trade law remained dead, because the merchant was replaced by a unit of socialised economy. For the merchant and the related institutions of commercial law, there was no justification and *raison d'être* in economic transactions based on the ideas of socialist property.

The culmination of this situation occurred in 1964, when the Commercial Code of 1934 and the provisions introducing this Code were repealed. Somewhat paradoxically, most of the provisions of the Commercial Code of 1934 concerning general partnerships, limited liability companies, and joint-stock companies were maintained, but these provisions were in the form of a hull. As it is emphasised elsewhere, these parts of the provisions of the Commercial Code on companies were maintained only thanks to the prudence and experience of the creators of the Civil Code, which proposed this under the guise of requirements related to cooperation with foreign countries.⁷⁸ The advantage of this situation was the fact that when the gradual return to the market economy began and after the political transformation, good law on companies, which received many valuable studies and research, allowed for the rapid development of modern company law regulations in Poland.

Starting from 1980, along with the permanent economic crisis, there were more and more intensive social changes aimed at breaking the economic system out of the constraints of the socialist economy. Then, a social movement was constituted

76 Morawski, n. d.

77 Frąckowiak, 2015, p. 52.

78 Ibid., p. 53.

under the name of the Independent Self-Governing Trade Union, “Solidarity”; in August 1980, a number of agreements were concluded between Solidarity and the government, which initiated slow changes in the laws regulating economic relations. However, this process, which had good prospects, ceased for several years with the introduction of martial law and related repressions.⁷⁹ The return to talks took place at the end of the 80s, specifically in mid-August 1988, when the authorities began discussions with the opposition caused by numerous social protests lasting since April. As a result of negotiations between the government and Solidarity, talks took place at the so-called round table. This led to key changes in the economic system: from 1 January 1989, the principle of taking up and conducting business activity is free and allowed to everyone on equal rights came into force. There was also another challenge in the form of adapting Polish regulations governing the functioning of commercial companies to the requirements of the new legal system.

The current Code of Commercial Companies (CCC) entered into force on 1 January 2001.⁸⁰ Its primary goal is to modernise Polish commercial company law and adapt it to today’s leading standards. The prevailing view in the Codification Commission was that the solutions adopted should be based on leading continental legislation, in particular German law, which has the most significant influence on the shape of directives created in the European Union. A consequence of this approach was the fact that, for example, the existing structure of the company’s governing bodies was not abandoned in favour of a single management and supervisory body modelled on Anglo-American solutions (board of directors). The idea of continuity was supported, understood as a postulate to preserve those provisions of the Commercial Code of 1934 – which remained valid – and, as far as possible, maintain the terminology and layout of the repealed commercial code.⁸¹ The typology of capital companies is indicated in Article 1 § 2 CCC, which defines three types of capital companies, as shown herein:

- a) a limited liability company (regulated in Articles 151–300 CCC), referring to a capital company with legal personality, a separate legal personality from partners, and the ability to bear liability for the company’s obligations, established for any legally permitted purpose, and which operates on the basis of share capital divided into shares created by partners as a result of the contributions made;
- b) simple joint-stock company; as of 1 July 2021, this new type of capital company was introduced in Polish law. The legislator indicated, as one of the reasons for the introduction of simple joint-stock company, that it:

is a modern form of non-public capital company intended for innovative projects. It is to combine the corporate nature of the company as a legal person and its basic manifestation, which is the exclusion of personal liability of shareholders for its obligations with considerable freedom to shape the company’s

79 Ibid., pp. 53–54.

80 Code of Commercial Companies (Journal of Laws 2000 No. 94, item 1037).

81 Nazaruk, 2014, p. 398.

relationship, both in terms of mutual relations between shareholders and the company's management system and supervision over this process. This new structure of the company is distinguished above all, on the one hand, by the admission of new categories of contributions to cover the membership rights acquired and, on the other hand, by a modern mechanism for the protection of the company's creditors, abandoning the structure of the share capital in favour of flexible restrictions on distributions to shareholders, taking into account both the size of the aggregate indebtedness of the company and the degree of its solvency.

The basic regulation of this company can be found in Articles 300(1) to 300(134) CCC. It is meant to fulfil the hopes of those interested towards the creation of an appropriate form of capital company for developing innovative ventures and technological developments with a new type of capital company.⁸²

- c) a joint-stock company (regulated in Articles 301–490 CCC), describing a capital company with legal personality, established for any legally permitted purpose, created on the basis of a corporate structure, and endowed with a share capital that is determined in the company's articles of association, within the statutory framework of its amount, formed from shareholders' contributions, and divided into a specified number of shares of equal nominal value.

6. Romania

Following the formation of the United Principalities from the union of Wallachia and Moldova in 1859, the question of modernising Romanian law quickly arose.⁸³ In 1864, under the initiative of Prince Alexandru Ioan Cuza, the Civil Code and the Code of Civil Procedure were adopted. The Civil Code was compiled in six weeks, modelled after the 1805 French Code civil (Code Napoléon), came into effect in 1865, and was in use until October 1, 2011, when the new Civil Code, Law No. 287 of 2009, was implemented. This six-week period was relatively brief, but the reception of French law had been ongoing for some time.

In the country, which became independent from the Ottoman rule in 1878 and a kingdom starting in 1881, economic development necessitated the re-regulation of commercial law. Although in Wallachia, a precursor state, the Commercial Code (*Kondika de Komerciu*) had been introduced in 1840 based on the French model and extended to the entire territory of the United Principalities in 1863, a decision was

⁸² Nędzyński, 2021, pp. 233–234.

⁸³ For a general overview on the history of Romanian company law, see Veress, 2024a, pp. 52–63.

made to adopt a new, modern code. The new Commercial Code (*Codul comercial*), which took effect in 1887, was based on Italian sources, specifically the 1882 Italian Commercial Code (*Codice di Commercio*), considered the most modern at the time, but it also incorporated German, Belgian, and French elements. At the time of its adoption, it was considered extremely contemporary and comprised 971 articles. However, it soon became apparent that the Commercial Code alone could not regulate all aspects of commerce, leading to the gradual introduction of more specific commercial laws.

In 1918, the Romanian Commercial Code contained provisions related to corporate and bankruptcy law, which existed at a time when the country expanded significantly in territory owing to political processes and legal outcomes following the First World War, resulting in the creation of Greater Romania. In company law, various legal systems coexisted; for example, the 1887 Commercial Code was applied in the Old Kingdom (the former territory of Wallachia and Moldova), while the Hungarian Commercial Code (Act XXXVII of 1875) was used in the broader region of Transylvania.

In 1924, a law was adopted concerning the trade and regulation of economic enterprises,⁸⁴ introducing uniform regulations for state enterprises under the protectionist policy of the National Liberal Party. The legislation divided state enterprises into two categories, namely those serving public interest and those of a purely economic nature. Enterprises serving the public interest could operate as state monopolies, whereas those in the second category could be operated with private capital participation, including up to a maximum of 40% of foreign capital. To prevent the sale of shares to foreigners, these companies could only issue registered shares, and the approval of the board of directors was a mandatory condition for the transfer of shares. At least two-thirds of the directors, including the chairman of the board and the CEO, were required to be Romanian citizens. Within seven years, the proportion of Romanian citizen employees had to reach 75% in both number and remuneration. This law remained in effect until 1929 when, following the National Peasant Party's rise to power, a new law was adopted regarding the organisation and operation of public companies and public assets on a commercial basis.⁸⁵ This new regulation abolished the 40% limitation, allowed the issuance of bearer shares, and removed the citizenship requirements for management positions. However, under the conditions of a global economic crisis, the anticipated foreign investments did not materialise.

By 1936, the press reported on the successful progress of the Commercial Code:

During the fall, the draft of the unified Commercial Code will be presented to Parliament. The committee tasked with unifying commercial law has advanced sufficiently that the new Commercial Code draft can be brought before Parliament this autumn. The draft incorporates several currently

84 Legea privitoare la comercializarea și controlul întreprinderilor economice, însoțită de expunerea de motive, 1924.

85 Legea pentru organizarea și administrarea pe baze comerciale a întreprinderilor și avuțiilor publice, 1929.

effective laws closely related to industry or commerce. For instance, the law on company registration and the law concerning unfair competition have been fully integrated into the new draft. The proposal introduces the institution of limited liability companies across the entire country, a corporate form previously existing only in Bukovina. The main purpose of the limited liability company, as we know, is to replace family-owned joint-stock companies. Regarding the regulation of joint-stock companies, the new code introduces patched responsibility for board members.⁸⁶

In reality, the process took longer. The implementation of all three codes (the two private law codes and the procedural law code) was initially set for 15 September 1940, was later postponed to 1 January 1941, and indefinitely delayed on 31 December 1940. Among the reasons for this delay were the territorial losses of Greater Romania: Bessarabia had to be ceded to the Soviet Union (June 1940) and Northern Transylvania was given to Hungary as per the Second Vienna Award (30 August 1940). The three codes were nonetheless considered valuable contributions to Romanian legal thought. The territorial losses of Romania, the forced emigration of King Carol II, the events of the Second World War, and the subsequent rise of a Soviet-style dictatorship prevented the implementation of the three private law codes, thus thwarting the unification of private law through the new codes.

In 1943 in Southern Transylvania, and in 1945 in Northern Transylvania after it was returned to Romania, Romanian private law was rapidly implemented through Law No. 260 of 1945, which introduced the 1887 Commercial Code. This rapid implementation overrode the scientifically-grounded plan for gradual integration of private law that had characterised the pre-Second World War period. Romanian private law, in its essential components, was unified through the extension of the legal system of the Old Kingdom. However, there was no time to genuinely apply the Romanian Commercial Code in Transylvania; in the post-Second World War years, Romania, including Transylvania, entered the sphere of influence of the Stalinist Soviet Union, leading to the establishment of a Soviet-style dictatorship.

The cornerstone of the Soviet-style dictatorship's societal transformation project was nationalisation.⁸⁷ The elimination of the ruling bourgeois class involved not only the physical eradication of real or potential resisters but also the economic liquidation of the bourgeoisie, with nationalisation serving as the primary tool. According to the Communist Manifesto (1848),

modern bourgeois private property is the final and most complete expression of the production and appropriation of products based on class antagonisms, where a minority exploits the majority. In this sense, the communists can summarize their theory in one expression: the abolition of private property.

⁸⁶ See *Keleti Újság*, 1936. august 7.

⁸⁷ For further details, see Veress, 2015, pp. 125–137; Veress, 2021, pp. 332–350.

This excerpt shows how the nationalisation of private property and its exploitation by the state for the public good forms a fundamental tenet of communist ideology. This goal was served by nationalisation, collectivisation, and the restriction of private property to personal ownership. Nationalisation, however, can be characterised as nothing less than unjust expropriation, lacking both real public interest and compensation.

On May 8, 1945, Romania and the Soviet Union signed an agreement on mutual trade. Based on this agreement, the *Sovroms* were established, which were joint Soviet-Romanian companies owned 50–50% by the two signing states, legally structured as joint-stock companies such as Sovrompetrol, Sovromgaz, Sovromtransport, or Sovrom Kvarțit (which conducted uranium mining under a “cover name”, including in Bihor County’s Rezbánya). The Sovroms essentially served the exploitation of the Romanian economy for the benefit of the Soviet Union and operated until 1956. However, uranium exports to the Soviet Union continued thereafter.

Significant changes in the ownership structure had not yet occurred by 1948, and the foundation for the abolition of private property was laid by the 1948 constitution. According to Article 11, when the public interest required, the means of production, banks, insurance companies, which were the private property of natural or legal persons, could be taken into state ownership under conditions prescribed by law as goods of the people. In June 1948, the nationalisation law (Law No. 118 of 1948) was enacted, followed by numerous additional nationalisation regulations, as follows: Decree No. 197 of 1948 on the nationalisation of banks and credit institutions; Decree No. 232 of 1948 on the nationalisation of seven railway companies; Decree No. 302 of 1948 on the nationalisation of private healthcare institutions; Decree No. 303 of 1948 on the nationalisation of the film industry (e.g. nine cinemas in Cluj County, four in Mureș County, and 16 in Arad County); Decrees No. 134 of 1949 and No. 418 of 1953 on the nationalisation of pharmacies. In 1948, the Bucharest Stock Exchange was abolished owing to the twilight of joint-stock companies and the nationalisation of commodity trade. All major industrial facilities in Transylvania were also nationalised. By the end of 1948, Romania had 18,569 state enterprises (including 193 Sovroms), which, under the Soviet-style dictatorship, were integrated into the public administration and placed under the subordination of sectoral ministries. They played a role in production, distribution, and public administration, essentially characterised by public law rather than private law. Larger enterprises also had party organisations, serving to monitor and discipline workers.

According to the official stance, nationalisation eliminated the industrial and financial bourgeoisie as a class and established the socialist sector in production: ‘Thus, by this revolutionary act, we snatched the main means of production from the hands of the bourgeoisie’.⁸⁸ A portion of the urban housing stock was also transferred to state ownership. The constitution declared the principle of a centrally-directed planned economy (Section 15); on 2 July 1948, the State Planning Commission was

88 Roller, 1952, p. 806.

established. One-year plans were made for 1949 and 1950, and five-year plans from 1951 onwards.

The goal was to introduce the Soviet model and rapid industrialisation. Propaganda reported incredible successes, praised the socialist competition, and the over-fulfilment of plans. This brought short-term advantages and development to the economy, but proved inoperable in the long term. Regarding the 1949 plan, it was reported: 'In the midst of enthusiastic work, under the leadership of the Romanian Workers' Party and with multifaceted support from the Soviet Union, our country's workers realised the plan at 108%, completing it 20 days before the year's end'.⁸⁹ Continuous success propaganda was a part of everyday life under the Soviet-style dictatorship. The Soviet-style dictatorship operated on the principle (or rather, the fiction) of socialist social ownership: essentially, the means of production were owned collectively by the society (mostly as national property and to a lesser extent as cooperative property). According to this concept,

the state was merely a tool in the hands of the working class, of the entire people, to organize and realize socio-economic development based on socialist ownership. The state exercised oversight to ensure that the people's property was not squandered but rather strengthened and developed. Therefore, the subject of the socialist collective ownership was not the state, but the entire working people.⁹⁰

In reality, the state was indeed the subject of property rights, and the fiction of social ownership played solely a legitimising role, meant to show that the system operated in the interest of the people. State enterprises, however, operated with low efficiency, excessive staffing, limited productivity, multiple conflicting goals due to political interference, poor resource allocation, and inflexibility. They operated in technically-backward conditions (with outdated equipment, methods, and products), took on activities unrelated to profit (e.g. supporting sports teams and holiday resorts), had very limited innovation capabilities, were amidst theft and corruption, and were environmentally polluting.⁹¹ Overall, it can be concluded that a market economy (i.e., capitalism) based on competition and operating under properly regulated conditions resulted in a more efficient economic system than the planned economy based on state ownership introduced in Soviet-style dictatorships. These dictatorships purportedly aimed to eliminate the exploitation of proletarians by capitalists, but in reality replaced capitalist exploitation with exploitation by the dictatorial state.

As a result of this collectivisation, private property as a motivational factor ceased to exist, peasants were reduced to agrarian proletarians, and economic efficiency

⁸⁹ Roller, 1952, p. 811.

⁹⁰ Lupán, 1986, p. 172; For a similar reasoning regarding agricultural land, see Lupán, 1988a, 1988b.

⁹¹ Savas, 1993, p. 287.

only reached the expected outcomes at the level of rhetoric. In December 1989, following the collapse of the Soviet-style dictatorship, it became imperative to recreate the legal framework for a market economy. A market economy cannot exist without companies, leading to the relatively early adoption of the Law No. 31 of 1990 on commercial companies (*Legea societăților comerciale*) in the autumn of 1990.

During the Soviet-style dictatorship, the Commercial Code had been completely sidelined, but it was reinstated after the regime change. The fate of the Romanian Commercial Code is particularly noteworthy, as it survived its own model (the Italian Commercial Code was repealed during the Second World War, when Italy returned to a monist private law system with the 1942 *Codice Civile*), survived the totalitarian Soviet regime, and was revived after 1989 along with its natural environment: capitalism. However, the corporate law provisions of the Commercial Code were outdated (originating from 1887), necessitating the enactment of Law No. 31 of 1990. Nonetheless, there is continuity in that the corporate law provisions of the Carol II Commercial Code from 1940 formed the basis for the creation of the new post-regime-change law. Currently, the Law No. 31 of 1990 on companies remains in effect, albeit with numerous amendments: by the time the manuscript of this volume was completed, it had been amended more than 45 times, with some amendments significant enough to be considered corporate law reforms (e.g. Law No. 441 of 2006 or Law No. 265 of 2022).

Another important process from a corporate law perspective occurred after the regime change, which was privatisation, the details of which are not covered in this volume. However, it is worth noting that in the summer of 1990, Law No. 15 (the transformation law) was passed, which restructured state enterprises: for those enterprises intended to remain under state ownership, the French model of independent management (*regie autonomă*) was prescribed; those that could be privatised were converted into commercial companies. About 47% of state corporate assets, including strategically-significant enterprises, were categorised under independent management. Six months were allocated for this reorganisation. This transformation was a prerequisite for privatisation because:

the socialist state enterprise form was unsuitable for selling the enterprise, as it qualified as a legal, essentially public law institution. As an organization, the enterprise could not be alienated. Therefore, socialist countries were forced to first transform the state enterprise into a one-person state owned joint-stock company using the universal succession technique copied from the German transformation law. This is known as formal privatization, legal privatization, the commercialization of legal form without changing ownership relations (...). Real privatization, both in economic and sociological terms, could only follow formal legal privatization (...).⁹²

92 Sárközy, 1997, p. 20.

Based on the 1990 Law No. 15, 30% of the shares of the transformed joint-stock companies were planned to be distributed for the population. This was followed by several actual privatisation laws and a long transition and privatisation process, the examination of which, although interesting, goes beyond the scope of a company law analysis.

The new Romanian Civil Code, adopted with Law No. 287 of 2009 and effective from October 1, 2011, repealed most of the still-effective provisions of the Commercial Code that regulated separate commercial obligations, introducing a monist private law regime.⁹³ Consequently, efforts were made to eliminate the use of the term “commercial” from the legal system. The text of the Romanian Civil Code no longer speaks of “merchants”, but of “professionals”, and the term “commercial” was removed from the title and text of Law No. 31 of 1990, which now simply refers to companies.

The Law No. 31 of 1990 on companies has matured for recreation; owing to the numerous amendments, its conceptual unity has been broken. Under its regime, companies with legal personality are constituted in one of the following forms: a) general partnership; b) limited partnership; c) joint-stock company; d) limited partnership limited by shares; e) limited liability company.

7. Serbia

The first contours of the development of Serbian company law date back to the mid-19th century, the period of the Serbian liberation from the Ottoman Empire, the revival of the Serbian state in the modern age, and the inception of the slow growth of entrepreneurship in the territories that were becoming released from Turkish influence. From a legal point of view, the adoption of the modern Serbian Civil Code in 1844, as one of the first European codifications at the time, depicts this period of resurrection. The Code was modelled upon the Austrian counterpart, thereby containing a myriad of modern rules of that time. The Code provided guarantees of private property which served as a basis for the later development of the first company law rules. It also contained rules on civil partnerships that had contractual nature and consequentially did not have a legal personality. In that sense, a civil partnership was defined as a contract between several persons who work together and make contributions of material goods to gain the benefits they share among themselves.⁹⁴ The rules on civil partnerships are still applicable in the present Serbian law, as a consequence of specific legal developments that occurred after the Second World War. Briefly, the laws that were in force before the end of the war were declared (provisionally) applicable until the enactment of the new rules.⁹⁵ The new rules for civil partnerships were never enacted, and the old rules are still part of the Serbian legal system.

93 For details, see Veress, 2017, pp. 27–34; Fegyveresi, 2017, pp. 35–42.

94 Serbian Civil Code, Article 723.

95 Mirković, 2019, p. 140.

They have certainly minor practical importance nowadays, but there are still occasions in which Serbian courts apply them in case law.⁹⁶

The next step in the development of Serbian company law and commercial law relates to the adoption of the Serbian Commercial Code in 1860. The role model for this Code was mainly the French Commercial Code, although certain provisions were probably inspired by German law as well. The thrust of the Code comprised rules on the notion of a trader and conditions for conducting commercial activities. A separate part of the Code contained rules on commercial companies and their legal forms. The Code provided for three forms of commercial companies, which in turn were the first, rudimentary legal forms of companies in Serbian law.⁹⁷ These forms mostly resemble today's general partnerships, limited partnerships, and joint-stock companies.

Even though the rules on joint-stock companies were already part of the Commercial Code, the late-19th-century Serbian legislator recognised the particularities and importance of these companies by enacting a specific Law on Joint-Stock Companies in 1896. This Law defined a joint-stock company as a company established with a pre-determined capital (e.g. the legal capital, in terms of modern company law) divided into equal parts designated as shares.⁹⁸ There are several rules and principles from this law that are an essential part of modern law as well. The shares might have been either registered or bearer. The law also prescribed a well-known principle of the non-divisibility of shares.⁹⁹ The shareholders enjoyed the privilege of limited liability, and they were able to go public in order to sell the company's shares and finance the company's operation. There were two governing bodies of the company, which were the general meeting and the management board.

The privilege of limited liability and the ability to externally finance the company's operation was, however, followed by the prominent role of the state in the formation and even in, to a certain extent, the operation of the companies. The formation was based on the system of state approval, meaning that a company needed approval from the ministry competent for the economy to be established. The companies' operation was supervised through the mandatory participation of the state's representative at the general meetings. Finally, it is particularly noteworthy that 19th-century-Serbian law on joint-stock companies dedicated a specific chapter to foreign joint-stock companies, testifying on the openness and receptiveness of old Serbian law to foreign markets. The foreign joint-stock companies could operate in Serbia, provided they had obtained authorisation from the competent ministry and had established a branch in Serbia that acted on behalf of the foreign company.¹⁰⁰

Serbian company law went through three very different stages during the 20th century. The first stage ended with the beginning of Second World War, which brought

96 Jovanović et al., 2021, p. 33.

97 Marković, 1914, p. 11.

98 Ibid., p. 69.

99 Ibid., p. 70.

100 Ibid., p. 113.

significant economic and social changes to the newly-established socialist Yugoslavia. The second stage designated an utter relinquishment of any previous legal and social achievements. Its main characteristic was the creation of laws that reflected the abandonment of the principle of private property and the adoption of new communist premises of state and societal ownership and employee self-government. The third stage coincided with the unprecedented economic crisis and violent separation of Yugoslavia at the end of the 20th century.

In the first stage, two new countries were born, the Kingdom of Yugoslavia born in 1929, which was preceded by the Kingdom of Serbs, Croats, and Slovenians founded at the end of the First World War. Although full of political and social turmoil, this stage did not bring many developments important for the company law. Special attention is required only for the Commercial Code of the Kingdom of Yugoslavia enacted in 1937. This Code, however, never entered into force owing to forthcoming events in the wake of and during the Second World War. The domestic legal scholarship usually considers this Code as an instance of modern regulation of the time.¹⁰¹ The same is true for its provisions dealing with commercial companies. For example, let us turn our attention to the norms stipulating the duties of companies' directors. The Code prescribed general rules of care for the members of the management board, as well as recognised the main behaviours (conditionally) prohibited by the modern duty of loyalty.¹⁰² In that line, it acknowledged the duty to avoid conflicts of interest, the duty not to compete with the company, and the duty to keep trade secrets. It also has the main elements of modern rules on related-party transactions; an instance is the prescription of the obligation to inform the competent body about personal interests and the possibility of consent to such transaction by the supervisory board or the general meeting. It also expanded the application of certain conflict-of-interest rules to persons related to management board members (related parties).¹⁰³

The second stage of company law development in the 20th century was in effect a negation of the recent developments of the time and the disappearance of company law from the legal stage. The end of the Second World War brought revolutionary changes and the establishment of a new country, namely the Federal Peoples's Republic of Yugoslavia. The process of confiscation of private property began as early as 1946, followed by its nationalisation aiming to transfer private proprietary rights into the hands of the state. After confiscating property from the "state enemies", a process justified by many fake judicial proceedings, the state conducted the nationalisation in several stages. The first target was the property of the richest people from pre-war Yugoslavia, the second target was the middle class and the agricultural land, and the final targets were some specific sectors (e.g. all pharmacies were nationalised in 1949).¹⁰⁴

101 Mićović, 2016, p. 21.

102 Article 300, Section 1, Commercial Code of the Kingdom of Yugoslavia.

103 Commercial Code of the Kingdom of Yugoslavia, Article 303–304.

104 Anđelković, 2020.

These processes resulted in several laws aiming to achieve the purposes of implementing the new ideology in the country's economic and social life. The first laws promoted the replacement of private property with state property, while the culmination of the ideological developments of Yugoslavian communism was depicted by the final transfer to the concept of societal property. This property, in the words of one of its founders and most prominent political leaders of the time, Edvard Kardelj, belonged "to everyone and to no one". When it comes to the economic organisations that replaced the commercial companies, depending on the time and laws during the period, they existed in different forms (e.g. state enterprises, work organisations, and organisations of joint work). Their common trait, upon the introduction of societal property, was the firm involvement of employees in the government of the organisation through different bodies (e.g. worker councils and meetings). The vague concept of societal property, combined with the ambiguous rules and principles of governance in the work organisations, which became especially exaggerated after the adoption of the Law on Joint Work in 1976,¹⁰⁵ resulted in the crisis which commenced in the 1980s and culminated in the country's civil war and violent separation.

In the third stage, as a consequence of the crisis and the failure of the old system, company law began to retrieve its importance. In the twilight of Communist Yugoslavia, private property started to regain its prominence, and the first Law on Enterprises, after almost a century, was adopted in 1988. This law returned commercial companies to the country's economic life. It was, however, a reflection of the time, characterised by many enterprises in the state or societal ownership.¹⁰⁶ For these enterprises, special governance rules were provided, and the route to the privatisation process was outlined. However, owing to the civil war that began in 1991, the Law on Enterprises was never fully applied. After the separation of communist Yugoslavia and the establishment of the Federal Republic of Yugoslavia (consisting of Serbia and Montenegro), the new state enacted the new Law on Enterprises in 1996. This law demonstrated the further development of company law, containing many rules that were in accordance with modern developments in company law.¹⁰⁷ This Law acknowledged the main legal forms of commercial companies, including limited liability companies. Related developments occurred, albeit at a gradual pace and constrained by the existence of various state-owned enterprises and societal enterprises (i.e. enterprises in the status of societal property). The turmoil occurring at the end of the 1990s was not fertile ground for the privatisation of these enterprises, and therefore the real economic transformation of the country commenced only in the 2000s.

After the political changes in 2000, the final dissolution of Yugoslavia, and the formation of another new country, the State Community of Serbia and Montenegro, the new Law on Commercial Companies was introduced in 2004. This Law denotes the actual revival of commercial companies and company law, containing the main legal

105 Jovanović et al., 2021, p. 30.

106 Vasiljević, 2012, p. 37.

107 Ibid., p. 38.

rules and principles present in the comparative company law. Above all, it introduced a new term for the business organisation (i.e. commercial company) instead of the outdated and imprecise term of enterprise used in previous laws. The enactment of the new Law preceded the establishment of the Serbian Business Registers Agency (hereinafter, BRA), which was another important step in modernising the business environment. The foundation of BRA led the way for significant simplification, acceleration, and increased efficiency in company formation and operation. The more modern laws accompanied by the process of privatisation, which had been on the way since 2001, as well as the decrease in the number of state and societal enterprises, enabled the gradual creation and growth of a new business environment with limited liability companies at the forefront. Although only a year after the adoption of the Law on Commercial Companies Serbia and Montenegro peacefully separated, this law remained applicable in Serbia up until 2011.

The next step in the evolution of company law rules was the adoption of the new Law on Commercial Companies in 2011 (Serbian Companies Act; hereinafter, CA),¹⁰⁸ which is currently applicable. This law presents the main source of current Serbian company law, and its main provisions will be analysed in the following chapters. Since 2011, the CA underwent several changes aimed at enhancing and modernising Serbian company law. These changes were the result of changes in European Union company law, the process of digitalisation which increasingly began to affect different aspects of company law, and the practical problems caused by vague or non-existent provisions applicable in different practical situations. The most striking change, compared to the time when the initial version of CA was adopted, was introduced by the specific law on companies' registration. In May 2023, the online registration of companies became the only and mandatory form of registration for all Serbian companies.¹⁰⁹ This has been the last stage in the progressive switch to electronic registration, which Serbian law commenced in 2018. It remains to be seen whether the BRA and prospective founders of Serbian companies are ready for this change, as well as whether Serbian law could prevent potential abuses usually related to online registration.¹¹⁰

Although undoubtedly the most important one, the CA is certainly not the only relevant source of Serbian company law, as many different laws affect the formation, operation, and dissolution of companies in Serbia. When it comes to formation, the procedure for acquiring legal personality and establishing a company is regulated by the already mentioned Law on the Registration Procedure with the Business Registers Agency.¹¹¹ The norms of this law are equally relevant for any relatively significant changes that a company has to register during its operation (e.g. changes in legal capital, shareholders, representatives, and shares). The operation of public joint-stock

108 Official Journal of the Republic of Serbia, 36/2011.

109 Law on the Registration Procedure with the Business Registers Agency, Article 9, Section 2.

110 Jevremović Petrović, 2021, p. 306.

111 Official Journal of the Republic of Serbia, No. 99/2011, 83/2014, 31/2019, 105/2021.

companies is particularly affected by the Law on Capital Markets¹¹² and Law on Takeover of Joint-Stock Companies.¹¹³ The preparation and auditing of companies' financial statements are mainly regulated by the Law on Accounting¹¹⁴ and Law on Auditing.¹¹⁵ Regarding the dissolution of insolvent companies, the main source for most commercial companies is Insolvency Law, albeit special insolvency laws apply to banks and insurance companies.¹¹⁶ There is also a specific method of pre-pack reorganisation of insolvent or nearly insolvent companies that is subject to the norms of the Law on Consensual Financial Restructuring.¹¹⁷ Specialised financial undertakings, such as banks, insurance companies, stock exchanges, and investment funds, are subject to specific laws.

Besides state-enacted hard law rules, there are several soft law instruments as sources of company law, the most important of which is the Corporate Governance Code of the Serbian Chamber of Commerce.¹¹⁸ This Code contains several categories of rules tailored to different company types present in the Serbian market, aiming to apply a dynamic approach and to follow the life cycle of a company. In addition to the specific rules for large enterprises, regardless of legal form, and public joint-stock companies, the Code provides separate rules for family companies and companies in state ownership (i.e. the shareholder is the Republic of Serbia). The latter reflects the realities of the Serbian economy in the first decades of the 21st century: the newly (re) established family capitalism and state-owned companies as a legacy of former times. Aside from the Corporate Governance Code, there is the Business Ethics Code of the Serbian Chamber of Commerce, the Corporate Governance Code of the Belgrade Stock Exchange, among others. Importantly, soft law rules are not entirely voluntary for public joint-stock companies in Serbia, as these companies are obliged to apply the corporate governance codex they choose in their business operation on a comply-or-explain basis.¹¹⁹

Finally, in Serbian legal scholarship, case law is usually considered an indirect and informal source of law. Although the standpoints of higher courts are not a formally-binding authority for lower courts, the latter rarely deviate from these standpoints, thereby giving them the status of persuasive authority. However, this statement has very limited importance in company law since case law in this field remains scarce. The CA's rules that are rarely or never applied in practice are not uncommon, and standards of behaviour for the main stakeholders have not yet been established.

112 Official Journal of the Republic of Serbia, No. 129/2021.

113 Official Journal of the Republic of Serbia, No. 46/2006, 107/2009, 99/2011, 108/2016.

114 Official Journal of the Republic of Serbia, No. 73/2019, 44/2021 – other law.

115 Official Journal of the Republic of Serbia, No. 73/2019.

116 Official Journal of the Republic of Serbia, No. 104/2009, 99/2011 – other law, 71/2012 – resolution of the Constitutional Court, 83/2014, 113/2017, 44/2018, and 95/2018.

117 Official Journal of the Republic of Serbia, No. 89/2015.

118 Official Journal of the Republic of Serbia, No. 99/2012.

119 Article 368, CA.

Serbian company law traditionally recognises four legal forms of commercial companies: I) general partnerships, II) limited partnerships, III) limited liability companies, and IV) joint-stock companies. A somewhat different approach existed in the Law on Enterprises from 1988, which recognised the form of limited partnerships by shares. Serbian law does not recognise the simplified forms of limited liability companies and joint-stock companies, but defines a public joint-stock company and provides a lot of specific rules for it. The common features of all legal forms are as follows: a) legal personality, b) conducting business activity, and c) profit-gaining purpose.¹²⁰ The four legal forms are habitually divided into two groups, namely companies of persons (general and limited partnerships) and capital companies (limited liability companies and joint-stock companies). This division used to be a part of the law, but its importance, due to congruence between different legal forms, has steadily decreased. The main difference between the two groups nonetheless remains untouched; the general partners, contrary to the shareholders of limited liability companies and joint-stock companies and limited partners, are jointly and severally liable for companies' obligations.

This very difference made both general and limited partnerships unattractive in business practice, thereby diminishing their actual presence. Joint-stock companies also feature some characteristics that make them unattractive, and the reasons for their limited presence are quite different from those for the aforementioned partnerships. Specifically, joint-stock companies offer a very limited practical possibility for employing their main advantage: gather large amounts of capital through public offers. Initial public offerings are almost inexistent in Serbia; as a matter of fact, after one pre-war initial public offering in 1940, the next public offering in Serbia occurred in 2018. As a result, the entire Serbian capital market is underdeveloped. Although the causes for such underdevelopment are not straightforward, they most likely have to do with the bank-centric system, and banks' lack of interest to act as underwriters. The prominent role of banks in financing Serbian companies led them to avoid capital markets in order to keep the profits from loan interests. Another factor is the absence of a shareholders' culture and negative experiences with certain collective investments in the 1990s, which is reflected in the general non-willingness of citizens to invest in capital markets. It is abundant to say that as a consequence of the limited formation of partnerships and joint-stock companies, limited liability companies are by large the predominant legal form in Serbia.

Finally, one very recent development in Serbian law, not directly related to company law, deserves some attention. In 2022, Serbia enacted its first Law on Social Entrepreneurship.¹²¹ This law allows companies of any legal form, upon the fulfilment of statutory conditions and certification by the BRA, to become a company with the status of social entrepreneurship.¹²² It must be underlined that Serbian law did not

120 Article 2, CA.

121 Official Journal of the Republic of Serbia, No. 14/2022.

122 Law on Social Entrepreneurship, Article 8.

introduce a new legal form through this law (e.g. benefit corporation in certain United States of America states), so the “fifth legal form” still does not exist. Instead, the companies with this status are eligible to gain certain benefits that the state decides to grant them (e.g. more favourable tax treatment, employment benefits, and monetary grants), which serves as compensation for their voluntary deviation from some of the basic business and company law principles (e.g. acceptance of social goals through the change of the company’s purpose in the articles of association, asset lock, and profit lock rules, and stakeholders’ participation in company governance).¹²³ Companies with the status of social entrepreneurship are very rare, and it remains to be seen whether the state measures to promote this type of entrepreneurship will be capable of changing the situation.

8. Slovenia

In the territory of the Republic of Slovenia and the Republic of Croatia, the Austrian Commercial Code was in force from 1862, which was modelled on the German Commercial Code but was more extensive, of a higher quality, and more liberal than the German model.¹²⁴ During the period of the former Kingdom of Yugoslavia, of which Slovenia was an integral part, six Commercial Codes were in force. In addition to the Slovenian one, which was the same, there were the Serbian, the Croatian Hungarian, the Bosnian Herzegovinian, and the Montenegrin ones. The Montenegrin and Serbian ones were almost identical, as were the Croatian and Hungarian ones. Both the Hungarian-Croatian and the Bosnian were based on the old General German Commercial Code, but differed from it in many respects, mainly owing to later amendments. The Serbian and Montenegrin ones were in fact translations of the French *Code de Commerce*. As all the commercial codes in force in the territory of the Kingdom of Yugoslavia were from different periods and quite different in content, the need for a new, unified, and common commercial law arose. This was partly realised in the publication of a codification of commercial law in the form of the Commercial Law for the Kingdom of Yugoslavia, which did not enter into force because no special law was adopted to introduce it.¹²⁵

After the Second World War, Slovenia became part of the Socialist Federal Republic of Yugoslavia (also known as SFRJ). In 1946, the Basic Law on State Economic Enterprises was adopted in the field of the organisation of economic entities, introducing administrative management into the economy, which represented the first stage in the construction of a socialist economic system. This was the period of natural planning, in which the plan replaced the contract. The Basic Law on Private Shops abolished all companies organised under the previous regulations, and while

123 Sørensen and Neville, 2014, pp. 285–290.

124 Ivanjko et al., 2009, p. 85.

125 Ibid.; see also Škerlj, 1938.

individual trades could still be organised as a public trading company, this possibility also ceased with the adoption of the Regulation on the Establishment of Enterprises and Establishments in 1953.¹²⁶

In 1965, the Basic Law on Enterprises and the Law on the Assets of Economic Organisations were adopted. In addition to these two laws, the Basic Law on the Election of the Workers' Council and other Governing Bodies in Workers' Organisations, adopted in 1964, was also important for the situation of economic operators at that time. This marked the transition to the second phase of the development of the socialist economic system.¹²⁷ The constitutional amendments of 1968 made it possible for a section of a workers' organisation to be organised as an "organisation of associated labour" (*organizacija združenega dela*, or OZD, in Slovenian), which could be designated as an independent OZD with the status of a legal entity by the Workers' Council of that work organisation. All OZDs shared the characteristic of being associations of workers who pooled their labour and resources under social ownership, exercising their right to work with social means of production.¹²⁸ The Workers' Council was considered the highest body of the workers' organisation, and it, among other responsibilities, determined the scope of the self-management rights of the OZD. Following the constitutional amendments of 1971, the OZD became the basic form of economic entity, which in turn marked the third phase of the construction of the socialist economic system.¹²⁹

After 1973, numerous laws were enacted to replace the Law on Enterprises, regulating various areas of corporate law (e.g. registration in the court register, employee relations in united labour, company names, and dispute resolution before arbitration) in a partial manner. However, these laws *inter alia* allowed for the introduction of foreign capital into the Socialist Federal Republic of Yugoslavia. The concept of a company was abandoned, and all forms of associated labour had the status of legal entities.¹³⁰

One of the forms of associated labour, the Basic Organization of Associated Labour (*temeljna organizacija združenega dela*, or TOZD, in Slovenian), was an economically-independent entity by nature. However, it had to be associated with the appearance of work organisations, so it appeared in the market not only under its own name but also under the company name of the work organisation. A TOZD was liable for obligations in legal transactions with all its assets, as well as for the obligations of other TOZDs within the work organisation if defined as such in the self-management agreement on association within the work organisation. This agreement typically specified the type and manner of the TOZD's liability in more detail.¹³¹

126 Ivanjko et al., 2009, p. 86.

127 Ibid.

128 Ivanjko, 1977, p. 62.

129 Ibid., p. 10.

130 Ivanjko et al., 2009, p. 87.

131 Ivanjko et al., 2009, p. 87.

In 1976, the Law on Associated Labour (ZZD) was adopted, shifting the organisation of economic entities into the phase of so-called negotiated economy. This phase was based on the principles of mutual agreement and marked the fourth phase of development of the socialist economic system, lasting until 1989 (i.e. a new Law on Enterprises came into effect in 1989). The negotiated economy aimed to eliminate market principles among economic entities and regulate market relations based on agreements.¹³² The ZZD included provisions on the status characteristics of economic entities organised as OZDs, and left the regulation of various legal relationships to self-management through statutes or self-management agreements. The ZZD particularly emphasised the rights of workers, stemming from their right to work and management.¹³³

The amendments to the ZZD in 1987 could not eliminate all the deficiencies of the law nor prevent negative tendencies in the economy. Despite ideological obstacles, the shortcomings of the ZZD and its negative effects on the economy allowed for a discussion on its abolition and a return to the concept of the company and the market. This was realised with the adoption of the Law on Enterprises, which reintroduced the market and market principles into the Yugoslav system, recognised entrepreneurship across all forms of ownership rights, allowed for the establishment of private, mixed, and socially-owned companies, converged with European regulations, and facilitated the formation of all types of companies.¹³⁴

The Law on Enterprises brought revolutionary changes for the legal, ideological, economic, and organisational domains. It eliminated the outdated principles of the negotiated economy enforced by the ZZD, as the substrate of a legal entity was no longer worker labour but once again the capital. The corporate governance was also simplified, and social ownership began to lose importance as private ownership began to replace it. Workers lost the right to manage capital in work organisations, and management had once again a decisive role in company management and leadership.¹³⁵ Despite the revolutionary changes it brought compared to the previous system, the Law on Enterprises was still quite incomplete and deficient, and even two amendments to the law did not address its key shortcomings.¹³⁶

Accordingly, the Law on Enterprises was replaced by the enactment of the Companies Act (ZGD) on 10 July 1993.¹³⁷ This definitively abolished the socialist system of management and organisation of economic entities. The ZGD comprehensively regulated corporate status-related issues in company – defined as legal entities engaged in profit-making activities as their exclusive business on the market – establishment and operation. With the adoption of the ZGD, the significant lacuna resulting from

132 Ibid., p. 88.

133 Ibid.

134 Ibid., p. 89.

135 Ibid., pp. 89–90.

136 Ivanjko et al., 2009, p. 90.

137 *Zakon o gospodarskih družbah*, (ZGD) (Official Journal of the Republic of Slovenia, No. 30/1993).

the concepts of negotiated economy was eliminated. The regulation introduced by the ZGD is based on modern Central European corporate law, with one of its significant influences being the German *Aktiengesetz* (also known as AktG), and it also incorporates harmonised European Union law. In certain institutions, it draws upon solutions from the Romance legal tradition for better placement and applicability.¹³⁸

The ZGD was structurally divided into 10 parts. The first part consisted of common provisions applicable to all companies, encompassing eight chapters that regulated issues related to legal personality, company name law, registered office, representation, trade secrets and non-competition, court register, book of accounts, and annual reports. The second part pertained to the regulation of the (individual) sole trader. The third part, the most extensive, focused on companies and was divided into six chapters that defined six types of economic entities (the chapter regulating silent partnership is today no longer in effect). The fourth part governed affiliated companies, while the fifth part covered economic interest groupings and European Economic Interest Groupings (also known as EEIG). The sixth part comprised seven chapters regulating changes of the legal status of the company, while the seventh part addressed the regime for foreign companies in Slovenia. The last three parts contained provisions related to supervision, penalties, transitional provisions, and final provisions. During its validity from 1993 to 2006, the ZGD underwent eight amendments, including two revisions of the law, one amendment to the law, and five combined amendments and revisions.¹³⁹ One of the most extensive amendments was the ZGD-F amendment, which aimed to align Slovenian company law with European Union law.

In 2006, the ZGD was replaced by the revised Companies Act (ZGD-1),¹⁴⁰ the main reason being to align it with European company law, particularly in introducing the European Company (*Societas Europaea*, also known as SE) as a supranational legal form for conducting economic activities in the form of a joint-stock company within the Slovenian legal system. Additionally, the adaptation to the euro currency, which was introduced in the Republic of Slovenia in 2007, was another motive for the revision. Initially, the legislative changes were intended to be included in a new amendment

138 Ivanjko et al., 2009, p. 76.

139 The amendments to ZGD were as follows: *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-A) (Official Journal of the Republic of Slovenia, No. 29/1994), *Zakon o spremembi zakona o gospodarskih družbah* (ZGD-B) (Official Journal of the Republic of Slovenia, No. 82/1994), *Zakon o spremembah zakona o gospodarskih družbah* (ZGD-C) (Official Journal of the Republic of Slovenia, No. 20/1998), *Zakon o dopolnitvi zakona o gospodarskih družbah* (ZGD-D) (Official Journal of the Republic of Slovenia, No. 84/1998), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-E) (Official Journal of the Republic of Slovenia, No. 6/1999), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-F) (Official Journal of the Republic of Slovenia, No. 45/2001), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-G), (Official Journal of the Republic of Slovenia, No. 57/2004), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-H), (Official Journal of the Republic of Slovenia, No. 138/2004).

140 *Zakon o gospodarskih družbah* (ZGD-1), Official Journal of the Republic of Slovenia, No. 42/2006.

called ZGD-H, but later the decision was made to introduce the comprehensive revised law, ZGD-1, to ensure the transparency and comprehensiveness of the nomotechnical revision of the law and the renumbering of its articles.¹⁴¹ Since then, the ZGD-1 has undergone 11 amendments, including two amendments to the law and nine combined amendments and revisions.¹⁴²

In addition to this fundamental legal source of corporate law in the form of the ZGD-1, certain corporate issues are also regulated by other statutory and subordinate sources. Directly related to the ZGD-1's enactment are regulations governing the registration of economic entities. In this regard, the Register of Companies Act (also known as ZSreg)¹⁴³ takes precedence, supplemented by the Decree on the registration of companies and other legal entities in the register of companies,¹⁴⁴ as well as the Act on Notaries (also known as ZN).¹⁴⁵ The field of auditing procedures is governed by the Auditing Act (also known as ZRev-2),¹⁴⁶ while the maintenance of business records is regulated by the Accounting Act (also known as ZR).¹⁴⁷ For companies involved in public services and utilities management, the Services of General Economic Interest Act (also known as ZGJS)¹⁴⁸ is relevant. Regarding corporate governance, the

141 Ivanjko et al., 2009, pp. 78–79.

142 The amendments to ZGD-1 were as follows: *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1A) (Official Journal of the Republic of Slovenia, No. 10–307/2008), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1B) (Official Journal of the Republic of Slovenia, No. 68–2960/2008), *Zakon o spremembah zakona o gospodarskih družbah* (ZGD-1C) (Official Journal of the Republic of Slovenia, No. 42–2040/2009), *Zakon o dopolnitvi zakona o gospodarskih družbah* (ZGD-1D) (Official Journal of the Republic of Slovenia, No. 33–1587/2011), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1E) (Official Journal of the Republic of Slovenia, No. 91–3912/2011), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1F) (Official Journal of the Republic of Slovenia, No. 32–1401/2012), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1G), (Official Journal of the Republic of Slovenia, No. 57–2405/2012), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1H), (Official Journal of the Republic of Slovenia, No. 82–3035/2013), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1I), (Official Journal of the Republic of Slovenia, No. 55–2281/2015), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1J), (Official Journal of the Republic of Slovenia, No. 15–730/2017), *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1K), (Official Journal of the Republic of Slovenia, No. 18–413/2021).

143 *Zakon o sodnem registru* (Official Journal of the Republic of Slovenia, No. 54/07, 65/08, 49/09, 82/13, 17/15, 54/17, and 16/19).

144 *Uredba o vpisu družb in drugih pravnih oseb v sodni register* (Official Journal of the Republic of Slovenia, No. 43/07 43/07, 5/10, 25/14, 54/15, and 1/18).

145 *Zakon o notariatu* (Official Journal of the Republic of Slovenia, No. 2/07, 33/07, 45/08, 91/13, 189/20, 130/22, and 49/23).

146 *Zakon o revidiranju* (Official Journal of the Republic of Slovenia, No. 65/08, 63/13, 84/18, and 115/21).

147 *Zakon o računovodstvu* (Official Journal of the Republic of Slovenia, No. 23/99, 30/02, and 114/06).

148 *Zakon o gospodarskih javnih službah* (Official Journal of the Republic of Slovenia, No. 32/93, 30/98, and 127/06, 38/10, 57/11).

Worker Participation in Management Act (also known as ZSDU),¹⁴⁹ which regulates the participation of employee representatives on a company's supervisory board, is important. In the case of insolvency, the relevant regulations concerning the termination of companies are found in the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (also known as ZFPPIPP).¹⁵⁰ The manner, conditions, and procedures regarding a takeover bid for the acquisition of public joint-stock companies, where their voting shares are traded on an organised market, are regulated by the Takeovers Act (also known as ZPre-1).¹⁵¹

When discussing the regulation of specific types of economic entities engaged in certain regulated activities, it is necessary to refer to specific regulations based on the nature of the economic activity. The position of insurance companies is governed by the Insurance Act (also known as ZZavar-1),¹⁵² while the regulation of financial organisations and banks is found in the Banking Act (also known as ZBan-3).¹⁵³ The Small Business Act (ObrZ)¹⁵⁴ defines small business as a form of conducting business activities, while the Chambers of Commerce and Industry Act (also known as ZGZ)¹⁵⁵ regulates the status of chambers of commerce as independent, voluntary, interest-based, and non-profit associations of legal and natural persons engaged in independent economic activities on the market. The conditions and methods of trading in financial instruments (e.g. shares) are regulated by the Market in Financial Instruments Act (also known as ZTFI-1),¹⁵⁶ which, in addition to public offerings of securities, also regulates the competencies of the Securities Market Agency (*Agencija za trg vrednostnih papirjev*, or ATPV, in Slovenian). The latter is an independent organisation responsible, among other things, for granting permission for the issuance of securities.

In the Republic of Slovenia, as a European Union Member State, the European Union acts, and the case law of European Union courts are directly applicable as legal sources of company law. As the law does not cover all the details of corporate

149 *Zakon o sodelovanju delavcev pri upravljanju* (Official Journal of the Republic of Slovenia, No. 42/07 and 45/08).

150 *Zakonu o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju* (Official Journal of the Republic of Slovenia, No. 176/21, 178/21, 196/21, 157/22, 35/23, and 57/23).

151 *Zakon o prevzemih* (Official Journal of the Republic of Slovenia, No. 79/06, 67/07, 1/08, 68/08, 35/11, 105/11, 10/12, 38/12, 56/13, 63/13, 25/14, and 75/15).

152 *Zakon o zavarovalništvu* (Official Journal of the Republic of Slovenia, No. 93/15, 9/19, 102/20 and 48/23).

153 *Zakon o bančništvu* (Official Journal of the Republic of Slovenia, No. 92/21 and 123/21).

154 *Obrtni zakon* (Official Journal of the Republic of Slovenia, No. 40/04, 117/06, 102/07, 30/13, and 36/13).

155 *Zakon o gospodarskih zbornicah* (Official Journal of the Republic of Slovenia, No. 60/06, 110/09, and 77/11).

156 *Zakon o trgu finančnih instrumentov* (Official Journal of the Republic of Slovenia, No. 108/10, 78/11, and 55/12, 105/12, 63/13, 30/16, 9/17, 77/18, 66/19, and 123/21); *Zakon o trgu finančnih instrumentov* (Official Journal of the Republic of Slovenia, No. 77/18, 17/19, 66/19, and 123/21).

relationships, the Management Code for Publicly Traded Companies¹⁵⁷ was formulated and adopted, providing more detailed standards for the management and governance of public joint-stock companies. The Code does not contain legally-binding rules but represents recommended practices for the functioning of the bodies of public joint-stock companies, providing non-binding recommendations.

The ZGD-1 regulates the status of economic entities, most of which are established as companies, which also include the sole trader, for whom the ZGD-1, as a systemic law, is also applicable.¹⁵⁸ An (individual) sole trader is a natural person who independently conducts a business activity for profit within an organised enterprise (Article 3(6) ZGD-1). Comparable terms used in comparative law include “*Kaufmann*” in German, “*imprenditore*” in Italian, and “*commerçant*” in French.¹⁵⁹ An entrepreneur can engage in any form of economic activity, and it is essential that this represents their regular profession and that they engage in economic activity for the purpose of making a profit.¹⁶⁰ An (individual) sole trader who has registered their business activity is recognisable in legal transactions by the acronym “*s.p*” (*samostojni podjetnik* in Slovenian). The sole trader is personally liable for the obligations arising from the business operations with all of their assets. Article 71 ZGD-1 stipulates that certain provisions governing activities, company names, registered offices, branches, procuration, and trade secrets for companies shall be applied *mutatis mutandis* to the sole trader.

An unlimited company (*družba z neomejeno odgovornostjo*, or *d.n.o.* in Slovenian)¹⁶¹ is classified as a personal company. Unlike a sole trader, an unlimited company has the status of a legal entity, and must be established by at least two natural or legal persons. No capital contributions are required to establish an unlimited company, within which company members collaborate to achieve a common goal and bear joint and several liability for the obligations of the company with all their assets. The personal liability of company members is the main characteristic of an unlimited company, and they are identified in legal transactions through the acronym “*d.n.o.*”.

A limited partnership (*komanditna družba* in Slovenian) is a type of a personal company in which at least one of the company members is liable for the obligations of the company with all of their assets (referred to as a “general partner”; “*komplementar*” in Slovenian), while at least one company member is not liable for the obligations of the company (referred to as a “limited partner”; “*komanditist*” in Slovenian).¹⁶² Unlike an unlimited company, the fulfilment of a common goal is not an essential characteristic of a limited partnership. From an economic perspective, the general partner is the entrepreneur who carries out the business activities, while the limited

157 *Kodeks upravljanja javnih delniških družb* (Official Journal of the Republic of Slovenia, No. 118/05).

158 See Articles 71–75, ZGD-1.

159 Ivanjko et al., 2009, pp. 325–326.

160 Ivanjko et al., 2009, p. 323.

161 See Articles 76–134, ZGD-1.

162 See Articles 135–157, ZGD-1.

partner is an investor who participates in the profits.¹⁶³ The provisions of an unlimited company are applied *mutatis mutandis* to a limited partnership, especially regarding the legal position of the general partner who bears unlimited personal liability. In legal transactions, a limited partnership is identified by the acronym “k.d.”. A special form of limited partnership in which the sole general partner is a company in which there are no personally-liable company members, or where they are all general partners of such company, is called a double partnership (*dvojna družba* in Slovenian).¹⁶⁴

A joint-stock company is a company limited by shares, where the share capital is divided into shares. As a legal entity, a joint-stock company is liable to its creditors for its obligations with all its assets, while shareholders are not personally liable for the company’s obligations to creditors.¹⁶⁵ Regarding its economic and legal significance, a joint-stock company is the most important type of commercial company, not only among companies limited by shares but also among commercial companies in general. The Slovenian legislator has adopted the term “European joint-stock company”¹⁶⁶ to refer to the *Societas Europaea* as a form of a company limited by shares, following the implementation of Regulation (EC) No. 2157/2001¹⁶⁷ into its corporate legislation. The ZGD-1 provides detailed provisions regarding the establishment and termination of a European joint-stock company.

A partnership limited by shares (*komanditna delniška družba* in Slovenian) is a capital company in which at least one partner is liable for the company’s obligations with all of their assets (referred to as a general partner), while the limited shareholders, who hold shares in the share capital, are not personally liable for the company’s obligations towards creditors.¹⁶⁸ The provisions of the ZGD-1 regarding limited partnerships apply, *mutatis mutandis*, to the legal relationships between general partners and their relationships with limited shareholders. For other matters concerning the partnership limited by shares, the law refers to the applicable provisions of the ZGD-1 regarding joint-stock companies. A partnership limited by shares operates in legal transactions using the acronym “k.d.d.”.

Apart from the joint-stock company, a limited liability company (*družba z omejeno odgovornostjo* in Slovenian) is the most important form of company limited by shares in terms of its economic and legal significance.¹⁶⁹ Its share capital comprises contributions from shareholders of different values, and the shareholders are not personally liable for the company’s obligations. It is also allowed to establish and operate a single-member limited liability company, for which specific regulations are introduced by

163 Ivanjko et al., 2009, p. 392.

164 See Articles 152–157, ZGD-1.

165 See Articles 168–429, ZGD-1.

166 See Articles 430–463, ZGD-1.

167 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, pp. 1–21

168 See Articles 464–470, ZGD-1.

169 See Articles 471–526, ZGD-1.

law.¹⁷⁰ A limited liability company operates in legal transactions using the acronym “d.o.o.”.

It is important to note that the silent partnership regime was deleted in 2012 with an amendment to the Companies Act (ZGD-1G).¹⁷¹ A silent partnership (*tiha družba* in Slovenian) was a special form of partnership that did not have the status of a legal entity, but was based on an obligational relationship similar to the concept of capital investment. It was created through a contract, whereby a silent partner contributed capital to the business of another person or entity (the managing partner) and acquired the right to participate in its profits.¹⁷² A silent partnership did not have a separate business name; it operated in legal transactions using the business name of the managing partner. However, the acronym “t.d.” was allowed to be used alongside the business name of the managing partner to indicate that the business was conducted with a silent partner. The name of the silent partner was not necessarily disclosed.

9. Slovakia¹⁷³

Historically, the territory of the Slovak Republic was part of the Kingdom of Hungary. Therefore, our attention will be briefly focused on the period of the first codification of commercial laws in the Hungarian territory. The requirement to draw up a Hungarian Commercial Code was raised and formulated at the first Hungarian legal congress in 1870.¹⁷⁴ The draft of the codified commercial law was passed by the Hungarian Parliament as Statute Article XXXVII/1985 on Commercial Code, which came into force on 1 January 1876. The Hungarian Commercial Code of 1875 was divided into two parts, the first comprising provisions on merchants and business organisations, and the second dealing with provisions on commercial obligations. This Commercial Code recognised the following types of business entities: a general partnership, a limited partnership, a joint-stock company (*účastinná spoločnosť*), and a cooperative. It did not contain provisions on limited partnerships by shares or silent partnerships.¹⁷⁵

The considerably detailed provisions for the joint-stock company were largely inspired by the German legal regulation of 1861. To establish a joint-stock company under the Hungarian Commercial Code, a state permit was not required,¹⁷⁶ and a written form of articles of association was sufficient, with no need for notary

170 See Articles 523–526, ZGD-1.

171 *Zakon o spremembah in dopolnitvah zakona o gospodarskih družbah* (ZGD-1G), (Official Journal of the Republic of Slovenia, No. 57-2405/2012).

172 See annulled Articles 158–167, ZGD-1.

173 This chapter section was supported by the Slovak Research and Development Agency under the Contract No. APVV-19-0424.

174 Suchoža et al., 2009, p. 22.

175 Gábriš and Janáč, 2022, p. 17.

176 Karmán and Pecháček, 1926, p. 125.

authorisation. The joint-stock company could also be established for non-business purposes. The mandatory bodies of a joint-stock company were the general meeting, the board of directors, and the supervisory board.

In 1918, Slovakia became part of the newly-established Czechoslovak Republic. Owing to specific historical circumstances, the coexistence of Austrian and Hungarian law (the legal dualism) was present on the territory of the Czechoslovak Republic. As a result of the reception norm (Act No. 11/1918 Coll.), the Czechoslovak Republic took over the laws of the defunct Austro-Hungarian Monarchy. While the Austrian Commercial Code of 1863 continued to apply as a main source of private law in the territory of Bohemia, Moravia, and Silesia, Hungarian private law regulation and the Statute Article XXXVII/1875 continued to apply in the territory of Slovakia and Subcarpathian Rus. This dual legal status persisted in Czechoslovak territory until the adoption of the Civil Code in 1950.

In the newly-formed Czechoslovakia, no reliable official Slovak translation of the Statute Article XXXVII/1875 was available, since all the authors of the commentaries derived from Hungarian publications.¹⁷⁷ However, and interestingly, the Statute Article XXXVII/1875 was perceived as the Slovak Commercial Code without the “Hungarian” attribute thereto. Since the Hungarian Commercial Code did not recognise a separate corporate form known today as a limited liability company, there was a need to introduce this type of company in the Slovak territory. The limited liability company was first introduced by Act No. 271/1920 Coll., which extended the application of Austrian Act No. 58/1906 Coll. on limited liability companies into Slovakia and Subcarpathian Rus. Various special laws were also adopted, such as the Act on the Conversion of Limited Liability Companies (No. 279/1924 Coll.), the Trade Act (No. 259/1924 Coll.), and the Bills of Exchange Act (No. 1/1928 Coll.). Furthermore, a separate government decree was passed on the establishment of limited liability companies and joint-stock companies, the increase of the share capital, and the formation of branches (No. 465/1920 Coll.).

Despite the need to adopt new private law regulations and the fact that the outline of the first Czechoslovak Civil Code was formally prepared and presented to the public in 1937, this legislative attempt did not succeed.¹⁷⁸ Following the restoration of the Czechoslovak statehood in 1944–1945 and fundamental changes in the social and political conditions in 1948, a series of legal regulations were introduced to align with the new state ideology. This period was marked by significant restrictions for the private sector. The Hungarian Commercial Code and the Limited Liability Company Act were repealed by the publication of the first Czechoslovak Civil Code (Act No. 141/1950 Coll.) in 1950. The limited liability company as a legal form became part of our legal order again only after 40 years, with the adoption of an amendment to the Economic Code, which came into effect on 1 May 1990.

¹⁷⁷ Husár, 2017, p. 41; Fundárek, 1926, p. 5.

¹⁷⁸ Suchoža et al., 2011, p. 16.

The two Civil Codes (adopted in 1950 and 1964) and the Economic Code (1964) reflected the ideology of the planned management of the national economy. The only corporate form available during this period was the joint-stock company. However, the Joint-Stock Companies Act No. 243/1949 Coll. restricted the use of this corporate form, permitting it only to a limited extent in relation to foreign trade. State permission and approval of the articles of association were required for company incorporation. Moreover, a ministry's approval was required for any amendments to the articles of association.¹⁷⁹

A series of positive political, social, and economic changes in 1989 led to the first major recodification of Czechoslovak commercial law. In 1990, the regulation of stock law was replaced by a new Act No. 104/1990 Coll. on joint-stock companies. The aforementioned act and the amendment to the Economic Code No. 103/1990 Coll. became the legal basis for the formation and operation of companies until the adoption of the Act No. 513/1991 Coll. Commercial Code (in force since 1 January 1992),¹⁸⁰ which remains the primary source of commercial and corporate law in Slovakia to this very day. The company law regulation was influenced by new social changes and the transformation of the national economy from a centrally-planned to a market economy, and was built on foreign models of commercial regulations.

On 1 January 1993, Slovakia became an independent and sovereign state, specifically when the Czech and Slovak Federal Republics peacefully divided into two separate states. The overthrow of the communist government in 1989 (i.e. so-called Velvet Revolution) also led to changes in the ownership of state-owned enterprises. Part of the state's property was transferred to the private sector through voucher privatisation, aiming to rapidly transform state-owned enterprises into joint-stock companies with publicly-traded stocks. However, most privatised enterprises were not prepared to comply with the capital market rules.¹⁸¹

Since its adoption in 1991, the Act No. 513/1991 Coll. Commercial Code, as the key legal regulation of business entities and commercial relations in general, has been amended several times to reflect major business environment changes. An extensive amendment to the Commercial Code was carried out through the so-called harmonisation amendment (Euronovela), introduced by Act. No. 500/2001 Coll, which came into force on 1 January 2002 with the aim of aligning Slovak corporate law with European Union law prior to Slovakia's accession to the European Union. Notably, since Slovakia became a Member State on 1 May 2004, corporate law and its practice have been constantly changing owing to the process of harmonisation of corporate law. The harmonisation has been primarily focused on the implementation of freedom of establishment and various safeguards to protect shareholders' and third parties' interests. Interestingly, in the process of implementing European Union directives, the Slovak legislator has often approximated a limited liability company to

179 Gábriš, 2011, p. 105.

180 Suchoža et al., 2009, p. 520.

181 Gábriš and Janáč, 2022, p. 22.

a joint-stock company. To illustrate, strict mandatory provisions on the creation and maintenance of a share capital, which the European Union directive stipulates only in relation to joint-stock companies, were implemented in such a way as to apply also to limited liability companies (e.g., rules on protection of contributions, distribution of profit, acquisition of own shares). Therefore, in certain ways, the limited liability company legal framework is looked at nowadays as quite rigid,¹⁸² with many restrictions on shareholders' private autonomy.

Recently, Slovakia has carried out several company law reforms focused on creating a better environment for businesses and entrepreneurs. Various regulations emphasising the protection of creditors and other stakeholders were introduced, such as the concept of a company in crisis (in 2016m with further amendments in 2020), the extension of directors' duties with conditions for their disqualification, or the liability regime for de facto directors and controlling entities. These new provisions have been highly influenced by Czech, Austrian, and German law. Meanwhile, recent developments regarding the introduction of digital tools in corporate law, and the new legal framework for mergers, divisions, and cross-border conversions, have been introduced through the adoption of European Union directives.

In the Slovak Commercial Code, the legal regulation of business entities is supplemented by specific acts on certain corporate-related issues, such as Act No. 7/2005 Coll. on bankruptcy and restructuring (*Zákon o konkurze a reštrukturalizácii*), Act No. 203/2011 Coll. on collective investment, Act No. 566/2001 Coll. on securities and investment services, or the Act No. 111/2022 Coll. on the resolution of imminent insolvency. These acts have introduced a new preventive restructuring framework aimed at providing companies with mechanisms to deal with financial distress. The legal definition of a legal person is set by Act No. 40/1964 Coll. Civil Code as *lex generalis* to the Commercial Code. The new Act No. 309/2023 Coll. on the Transformation of Commercial Companies and Cooperative and on the Amendment and Supplementation of other Acts introduced new regulation on domestic and cross-border mergers, divisions, and cross-border conversions. It became effective from 1 March 2024, and was adopted as a result of the implementation of European Union law.¹⁸³

The current Slovak Commercial Code (CC) offers several corporate vehicles with full legal personality, allowing founders and investors to pick and choose according to their needs/objectives. A classical distinction is drawn between partnerships and capital companies (corporations), the former being characterised by a general feature based on the partners' personal involvement in business management and their unlimited joint and several liability. A general partnership (*verejná obchodná spoločnosť*, or v.o.s) is a corporate form in which two or more partners conduct business under a common business name, and bear joint and several liability for the

182 Ibid., p. 23.

183 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions [2019] OJ L 321

obligations of the company.¹⁸⁴ A limited partnership (*komanditná spoločnosť*, or *k.s.*) is a company in which at least two persons must participate at the outset, one of whom is liable for the company's liabilities with all their assets while the other is liable for the company's liabilities up to the amount of the unpaid contribution entered in the Commercial Register.¹⁸⁵ The category of corporations comprises mainly the joint-stock company (*akciová spoločnosť*, or *a. s.*). The simple joint-stock company (*jednoduchá spoločnosť na akcie – j.s.a.*) and limited liability company (*spoločnosť s ručením obmedzeným – s.r.o.*) blend the characteristics of both categories, but are usually referred to as corporations.

A limited liability company is currently the most commonly used corporate form in Slovakia. The reason behind this fact is mainly the limited liability, relatively low costs of its incorporation, and low property risk for founders. According to the statistics, 20,575 new companies were registered in the Commercial Register in 2024, of which 20,238 were incorporated in the form of a limited liability company.¹⁸⁶ Importantly, most limited liability companies are single-member companies. The benefits derive from the limited liability of a sole shareholder and special tax treatments compared to entrepreneurs doing business as freelancers. Although this corporate form is suitable mostly for small and medium-sized enterprises, several significant entrepreneurs and employers in Slovakia have been incorporated in this legal form of business entity.

The legal regulation of limited liability companies was introduced in secs. 105 to 153 Commercial Code. Both, natural persons of legal capacity and legal entities may form a limited liability company. Since 1 February 2023, the new simplified fully online incorporation of limited liability companies with a template of articles of association has been available as a result of the implementation of the Digitalisation Directive.¹⁸⁷ Currently, there is no data available to assess whether the simplified online formation of a company has been significantly used; however, a few drawbacks have been identified with this procedure and legal provisions that may lower its usage by potential founders.¹⁸⁸ Currently, a limited liability company, as well as any other corporate form, can only be registered in the Commercial Register electronically. In addition to the registration court, as of 1 November 2023, any notary public (*registrátor*) is also authorised to carry out registrations of limited liability companies. This change, introduced by the amendment to Act No. 530/2003 on the Commercial Register, aims to accelerate and improve efficiency of the registration process. Since 1 January 2025, notaries public are permitted not only to carry out the initial registration of limited liability companies but also to register changes to the recorded data

184 Section 76, CC.

185 Section 93, CC.

186 FinStat, n.d.

187 Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law [2019] OJ L186/80.

188 Mrázová and Cukerová, 2023.

of such companies, with the exception of changes related to mergers, divisions, and conversions. It is also expected that notaries' competencies will be extended to other forms of business entities.

Each shareholder (*spoločník*) may subscribe to only one business share (*obchodný podiel*). If a shareholder makes additional contributions to the company or acquires a business share from another shareholder, his/her business share is increased. Nonetheless, there is no possibility of owning two separate business shares in a limited liability company. The impossibility of holding multiple business shares by one shareholder leads to several practical complications, such as when the execution of a lien takes place. The registered share capital of a limited liability company must amount to at least 5,000 euros, with a minimum contribution of 750 euros from each shareholder. The corporate bodies of the limited liability company are the general meeting of shareholders (*valné zhromaždenie*) and the managing director (*konateľ*), while the supervisory board (*dozorná rada*) is optional and is established only if stipulated by the articles of association (*spoločenská zmluva*). It features therefore a two-tier governance system, with the managing director always holding the executive position.

A joint-stock company is the second most popular corporate form in Slovakia, albeit only 160 of them were established in 2024.¹⁸⁹ This corporate form is suitable for more capital-demanding projects. The joint-stock company may either be a private or public joint-stock company, which issues all the shares or a part thereof under a public call for the subscription of shares or shares accepted to be traded in the stock market.¹⁹⁰ The minimum share capital for a private or public joint-stock company is 25,000 euros, and it may be founded by a single shareholder (*akcionár*) if the founder is a legal entity; otherwise, there must be at least two founders.¹⁹¹ Besides the ordinary shares, shares to which priority rights to dividends are attached may also be issued. Joint-stock companies operate exclusively under a two-tier governance system, comprising the board of directors (*predstavenstvo*), the supervisory board (*dozorná rada*), and the general meeting (*valné zhromaždenie*).

With effect from 1 January 2017, the amendment to the Slovak Commercial Code introduced a new corporate form: a simple joint-stock company. Although the initial inspiration for the new corporate vehicle was the French simplified joint-stock company (*société par actions simplifiée*) – and thus this legislative approach could be considered a typical example of responsive law-making – provisions regulating the new corporate entity were drafted from scratch by the Slovak legislator.¹⁹² The new entity was designed to overcome certain rigidities in the Slovak corporate law that would make it impossible to employ some of the structures and mechanisms common and available in other, more developed legal markets. Additionally, the vehicle was primarily designed for start-up companies with high innovation and growth potential.

189 FinStat, n.d.

190 Section 154 (3), CC.

191 Section 162 (1), CC.

192 Šuleková, 2016, p. 2.

Specific rules were introduced in secs. 220h to 220zl of the Commercial Code, and for aspects not regulated therein, the regulation of a joint-stock company shall be applied. A simple joint-stock company is a company whose registered capital is distributed into a certain number of shares with a certain nominal value; where a shareholder is not liable for the company's obligations; is a private corporation; cannot be established based on a call for share subscriptions; the minimum prescribed share capital is 1 euro.¹⁹³ While limited liability companies and joint-stock companies may be established for any legal purpose, a simple joint-stock company may be established only with the intention of conducting business activities.

The introduction of the simple joint-stock company brought various novelties into the Commercial Code. First, it brought major changes to the Slovak company law by overruling the rigid principle of the *numerus clausus* of shares, introducing an option to issue shares with specific rights attached thereto, and shares for employees and other natural persons performing activities for a company. Second, a more detailed regulation of shareholders' agreements can be found in the provisions regulating the simple joint-stock company, which includes specific rights such as tag-along right, drag-along right, and shoot-out clause. The two former rights can be concluded as registered rights entered in a special register administered by the Central Securities Depository (*Centrálny depozitár cenných papierov SR*, or *a.s.*). Such registration of tag-along and drag-along rights shall strengthen the enforceability of these rights. The legal framework of a simple joint-stock company also provides a simplified corporate governance structure without the obligation to form a supervisory board, and a less administratively burdensome decision-making procedure by *per rollam* voting.¹⁹⁴

However, considering the very low number of this type of corporate form (only 56 simple joint-stock companies were established in 2024),¹⁹⁵ one can assume that the advantages offered did not appeal to entrepreneurs.¹⁹⁶ This may be caused by higher costs associated with the formation of a company, since the articles of association must be drawn up in the form of a notarial deed, higher fees related to the central depository associated with the operation of a company (e.g. issuance of shares, maintaining a list of shareholders, and registering special rights), and the absence of shareholders' anonymity, since the list of shareholders in the central depository is publicly available.¹⁹⁷

As already stated, the Slovak Commercial Code has been amended multiple times, mainly but not fully owing to the implementation of European Union directives. Despite many attempts at recodifying private law in Slovakia in the last decades, this process has yet to be completed, and corporate law as well as the law of commercial obligations are still regulated by the Commercial Code. However, in 2021, the

193 Section 220t Commercial Code.

194 Šuleková, 2016, pp. 2–10.

195 FinStat, n.d.

196 Patakyová et al., 2020, p. 212.

197 Šuleková, 2016, pp. 2–10.

Slovak government approved the legislative intent for recodification of the corporate law. According to the legislative intent, the new Civil Code shall stipulate general provisions on legal entities, and a separate Act on Corporations shall be prepared in accordance therewith. The main aim of these changes is to set up the corporate law as a set of default provisions, increase the flexibility of corporate relations, and reduce administrative barriers to starting businesses in Slovakia. The new Act on Corporations shall include four types of companies, namely the general partnership, limited partnership, limited liability company, and joint-stock company. Thus, the simple joint-stock company is no longer envisaged by the legislative intent, and this corporate form is planned to be abandoned.¹⁹⁸ But the recodification of the corporate law shall ensure a wide scope for the private autonomy of the founders, and various elements of the current simple joint-stock company legal framework shall be available also for limited liability companies and joint-stock companies (e.g., more flexible rules on corporate structure and decision-making, or the abolition of *numerus clausus* of shares).¹⁹⁹ The most fundamental changes include the stipulation of a registered share capital of 1 euro for limited liability companies, the explicit stipulation of the business judgment rule, and the possibility to contractually negotiate the performance of corporate body members. The new law shall also include the regulation of company groups, which is currently absent in Slovak corporate law.

The new proposal also slightly addresses the concept of the digitalisation of processes in company law. Beyond the requirements of the Digitalisation Directive (online formation of a limited liability company), it also reflects on the remote exercise of shareholders' voting rights.²⁰⁰ It assumes that the new legal regulation will waive the requirements of personal participation at the shareholders' meeting, offering technologically-neutral provisions enabling the use of electronic means of communication, if stipulated so in the articles of association.

10. Conclusions

Viewed as a whole, the company law histories of the Czech Republic, Croatia, Hungary, Poland, Romania, Serbia, Slovenia, and Slovakia trace a common arc that is less a tale of delay than one of discontinuity and reconstruction. In the 19th and early 20th centuries, each jurisdiction built modern corporate doctrines largely through the reception and adaptation of continental models; this was followed by a socialist rupture that displaced private company law for public law economic organisations. After 1989, there was a compressed re-founding that reintroduced companies, modernised governance, and sought alignment with the European *acquis*. The pattern is neither uniform nor linear. Rather, the region reveals a sequence of transplantation before

198 Ministry of Justice of the Slovak Republic, 2021, p. 14.

199 *Ibid.*, p. 15.

200 Mrázová et al., 2021, p. 196.

full practice, partial interwar consolidations left unfinished by war and geopolitical shocks, an abrupt mid-20th century eclipsing of private enterprises, and a rapid post-socialist re-importation of corporate forms that has produced formal convergence accompanied by an uneven functional depth.

The genealogy of these regimes is distinctly transnational. German and Austrian models supply much of the structural backbones of the regulations, with the Austrian Commercial Code of the 1860s and the German Western Territories of the Republic of Poland²⁰¹/*Handelsgesetzbuch*²⁰² tradition resonating in the Czech lands through the General Commercial Code of 1863 and the finely crafted 1899 Stock Regulation; in Hungary through the 1875 Commercial Act explicitly modelled on the German example; in Croatia via the 1875 Croatian Commercial Code grounded in German and Austrian codifications; in Slovenia through the direct force of the Austrian code; in Slovakia through the 1875 Hungarian statute. French influence appears strongly in Poland, where Napoleonic law had long applied in the Congress Kingdom and where the celebrated 1934 Commercial Code, though German-leaning in technique, was drafted in dialogue with leading continental systems. Romania predecessor states initially received French commercial law and then, for commerce, turned decisively to the 1882 Italian Commercial Code when adopting its own code in 1887. Serbia's 19th-century commercial legislation likewise shows French inspiration. The limited liability company's diffusion illustrates the region's receptivity to targeted innovations: engineered in Germany in 1892, the GmbH²⁰³ model was enacted for Cisleithania²⁰⁴ in 1906, extended across Czechoslovakia after 1918, introduced in Hungary by Act V of 1930, and ultimately became the workhorse form throughout the region after 1989.

In several jurisdictions, legislation preceded the development of deep domestic corporate practices. Hungary is emblematic, as its 18th- and 19th-century drafting cycles, the 1840 suite of commercial statutes, and the 1875 Commercial Code laid an elaborate framework even as early joint-stock activity often depended on imperial privilege and iconic projects such as the Chain Bridge turned the corporate shell into an instrument for (privately initiated) public works. Croatia's comprehensive 19th-century codification similarly established sophisticated forms that would outlast state ruptures. Serbia's 1896 joint-stock statute combined modern limited liability and capital-market aspirations with an approval-and-supervision architecture reflecting strong administrative oversight. The Czech concession regime for joint-stock formation underscored the same state-first reflex. Against this dynamic, the limited liability company was consciously designed to small and medium enterprise: it promised

201 Allgemeines Deutsches Handelsgesetzbuch (General German Commercial Code, 1861). The pan-German commercial code that strongly influenced Central European commercial law until the *Handelsgesetzbuch* replaced it.

202 *Handelsgesetzbuch* (German Commercial Code, 1897). Germany's enduring commercial code, influencing modern company law across Central and Eastern Europe.

203 Gesellschaft mit beschränkter Haftung (company with limited liability).

204 The Austrian half of the Austro-Hungarian Empire (1867–1918), where Austrian commercial legislation applied.

(some) creditor protection, simplified incorporation, and a tighter, less speculative link between members and the company, thereby “bridging” partnerships and joint-stock companies.

The interwar decades were an era of consolidation and unification that proved, in important respects, unfinished. Czechoslovakia’s 1918 Reception Act maintained imperial commercial law while policymakers prepared a comprehensive recodification in the 1930s; the draft presented in 1937, which was a product of serious scholarly craftsmanship, never became law. Poland achieved a unifying masterwork with the 1934 Commercial Code, widely regarded as a crucial point of national codification that harmonised the disparate partition regimes while remaining close to the leading European thought of its day. Romania pursued an ambitious project of new codes aimed at unifying private law across the enlarged state, and although the projects were praised as major contributions, territorial losses and war prevented entry into force. These episodes revealed legal capacity and doctrinal erudition across the region, with the through-line that it was political cataclysm, rather than intellectual deficit, that arrested these unification projects.

After 1945, private company law was displaced across the region. In Czechoslovakia, a spare 1949 joint-stock statute permitted incorporation only in tightly-circumscribed contexts connected to foreign trade, and all limited liability companies were abolished in 1951. In the Yugoslav republics (Croatia, Slovenia, and Serbia) the sequence moved from administrative management to a full self-management regime; classical companies gave way to organisations of associated labour in forms like the OZD²⁰⁵ and TOZD,²⁰⁶ with negotiated economy instruments gradually replacing market coordination and contract. Romania embraced the Soviet template of nationalisation, with the 1948 nationalisation wave covering industry, banks, credit institutions, transportation companies, and other sectors; the Sovrom joint ventures functioned as a vehicle for extraction; the stock exchange was abolished; state enterprises became integrated organs of public administration. Hungary’s 1875 Commercial Act or the Romanian Commercial Code of 1887 formally lingered on the books, but fell into practical desuetude, while state enterprises dominated economic life. Poland’s 1934 Code, though formally in force for a time, was progressively sidelined; its repeal in 1964 left only a shell of company provisions and signalled the ascendancy of the socialised economy. The unifying theme is that core private-law concepts, separate personality deployed for private ordering, limited liability as a device to mobilise investment, shareholder governance, and fiduciary accountability all lost their operative meaning in systems where enterprises were effectively arms of the state and plan compliance displaced market signals.

205 Osnovna Zajednica Djelatnosti (Basic Organization of Associated Labour, in former Yugoslavia). The smallest unit of the socialist self-management enterprise system.

206 Temeljna Organizacija Udruženog Rada (Fundamental Organization of Associated Labour, in former Yugoslavia). A higher-level unit of associated labour, integrating OZD into larger structures.

Under the Soviet-type regimes, the economic legislation was designed to concentrate decisional authority in the state, to dissolve private corporate forms, and to replace them with state enterprises. The term “state enterprise” is used here to distinguish these entities from state-owned enterprises operating within market economies; unlike state-owned enterprises subject to market discipline and corporate governance norms, state enterprises were integrated into the administrative apparatus of central planning. They were characterised by unified state ownership and control over major productive assets; enterprise objectives, product mix, output levels, input allocations, and administered prices were determined by plan directives rather than by managerial choice or market signals. Profit maximisation was not the operative criterion, but managerial accountability attached primarily to the fulfilment of quantitative targets set by the plan, as well as to broader socioeconomic or ideological objectives. Domestic competition was largely absent because sectors were commonly monopolised by a single provider, attenuating incentives for cost control, quality improvement, and technological upgrading. Governance was highly bureaucratised, with multilayered approval processes and pervasive reporting requirements impeding timely decision-making and constraining innovation. Resource allocation and manager advancement were influenced by political loyalty and hierarchical position more than by economic performance, producing allocative inefficiencies and, at times, corruption. Labour relations reflected the same logic, as workers were state employees who generally enjoyed employment security but had suppressed wages, restricted mobility, and independent collective bargaining was precluded; official unions functioned principally as transmission belts for policy rather than as autonomous representatives.

Collectively, these features situated the enterprise as an instrument of state policy within a command economy. Centralised planning and political objectives systematically superseded market coordination and private ordering, such that the enterprise ceased to operate as a profit-seeking corporate actor to instead function as an administrative unit tasked with plan implementation.

The re-founding after 1989 proceeded quickly, but not identically. With the collapse of Soviet-type (“communist”) regimes, a critical phase of economic transformation and legal realignment towards market-driven practices ensued. Forms a significant part of the common past of this region that the planned economy based on state ownership under the Soviet-style dictatorship had to be transformed into a market economy grounded in private ownership and competition, within a pluralistic and democratic framework. Establishing political pluralism and a democratic institutional system was not a simple task; however, the economic transition, which spanned decades and had privatisation as its central element, was even more complex. Thus, ‘the central phenomenon of the general socio-economic transition was privatisation, as without the dominance of private property, there can be neither a market economy nor a civil society’.²⁰⁷ Privatisation can be seen as an end in itself in systems theory

and involved an incredible scale of state assets being sold off rapidly; nonetheless, the competition among former socialist countries, oversupply of privatisation opportunities, unfavourable global economic conditions, capital shortages, legal uncertainties deterring investments, technological obsolescence, and environmental damages all negatively impacted the privatisation processes of the countries of interest.²⁰⁸ In economies burdened with social problems, loss of Eastern markets, and ongoing crises, the state had a strong need for revenue from privatisation.

In simpler terms, state-owned enterprises needed to be sold. The privatisation process unfolded in multiple phases, faster or slower, and was fraught with contradictions. For example, the reasons for a delay in privatisation in the case of Romania were summarised as follows:

The lag behind many Central European countries can partly be explained by the fact that the regime change could not be intellectually prepared; there were no economic reforms in the 1980s. Additionally, society was less prepared for radical regime change, with egalitarian views being popular. The third reason is that the elites who came to power were not fully committed to a market economy based on private ownership and were politically too weak to implement consistent programs.²⁰⁹

In parallel, the modern corporate law framework had to be created. Czechoslovakia used transitional joint-stock statutes in 1990 and soon installed a comprehensive Commercial Code effective from 1992; Czech company law now sits in a multi-level architecture anchored in the Civil Code and the Business Corporations Act, with important doctrinal signals from the Supreme Court that grant limited liability companies a wide discretion in profit policy absent abuse. Croatia's Companies Act, effective since 1995 and amended repeatedly by 2023, became a durable construction that intentionally hews to the Central European and German infrastructure while steadily aligning with European Union law; it couples an expanded contractual freedom in governance with a reinforced liability regime for directors. Hungary's company law passed through successive modern statutes in 1988, 1997, and 2006 before consolidation in the 2013 Civil Code; today it recognises the general partnership, the limited partnership, the limited liability company, and the company limited by shares in their public and private forms. Poland's contemporary Code of Commercial Companies entered into force in 2001, with an explicit commitment to continuity with the one from 1934; in 2021, it added a simple joint-stock company to support innovative ventures through flexible capital and creditor-protection mechanics. Romania's Act 31/1990, repeatedly amended more than 45 times, reconstituted the classical forms and was complemented by the 2011 Civil Code's shift to a monist private-law system and a terminological move from "merchant" to "professional"; the transformation

²⁰⁸ Ibid.

²⁰⁹ Hunya, 1991, p. 135.

legislation in 1990 converted state enterprises to company forms and set the stage for privatisation. Serbia revived company law in 2004, adopted a modern Companies Act in 2011, and, with the Business Registers Agency, pushed decisively into digital practice by making online registration mandatory in 2023, while its capital market remains thin enough that public offerings have been exceedingly rare. Slovenia replaced the negotiated-economy edifice with the 1993 Companies Act and then the 2006 ZGD-1,²¹⁰ brought its law into close alignment with the *acquis*, recognised the European Company, and built out an ecosystem of adjacent statutes on worker participation, auditing, takeovers, insolvency, and market instruments. Slovakia's 1991 Commercial Code was heavily harmonised in 2002; in 2017, the legislature introduced a simple joint-stock company to inject contractual freedom (registered tag-along and drag-along rights and streamlined *per-rollam* voting),²¹¹ though uptake has been modest; ongoing plans contemplate a new Act on Corporations, a one-euro minimum capital for limited liability companies, the explicit adoption of the business judgment rule, and the diffusion of flexibility into mainstream forms while phasing out the simple joint-stock company.

Despite national idiosyncrasies, the typological core is now widely shared. The four classical forms (i.e. general partnership, limited partnership, joint-stock company, and limited liability company) are entrenched across the eight systems, with *numerus clausus* protecting third parties while substantial space for internal autonomy remains. Variants exist at the edges, as Czech law confines SICAV²¹² to investment funds; Croatia recognises a simple limited liability company alongside the standard form; Poland and Slovakia have experimented with a simple joint-stock company; Serbia distinguishes the public joint-stock company and relies on soft-law governance codes on a comply-or-explain basis; Slovenia retains the partnership limited by shares and has eliminated the silent partnership.

Everywhere, limited liability companies dominate business practices. The Czech Republic's 2014 reforms are strikingly liberal, whereby contributions may be as low as 1 Czech koruna, there is no cap on the number of members, multiple shares per member can be created with different rights, share certificates are possible, loss reserves are not mandatory, and dividends can be withheld without the "important reasons" constraint, which had long been applied to joint-stock companies. Hungary reports the limited liability company as the most prevalent form. Serbia describes the same company type as the predominant vehicle by far. Slovakia's statistics underline similar dominance; the minimum registered capital remains 5,000 euro, with a 750 euro minimum per shareholder, and each shareholder can hold only a single business

210 ZGD-1 – *Zakon o gospodarskih družbah* (Slovenian Companies Act).

211 *Per rollam* voting is the adoption of a corporate resolution without convening a meeting by circulating the proposed text to all entitled voters and collecting their written consents within a specified period, which is subject to statutory and constitutional limits.

212 *Société d'investissement à capital variable* (investment company with variable capital). An investment fund form developed in Luxembourg and received into Czech law for collective investment undertakings.

share, which creates practical frictions. Slovenia's d.o.o. (limited liability company) stands beside the a.d. (joint-stock company) as a principal engine of commerce, while Croatia's framework emphasises autonomous structuring within the confines of investor and third-party protection. Romania's post-1990 practice likewise centres on the limited liability company, while the joint-stock company remains indispensable for sectors or the capital structures that require it.

Public-private distinctions in the joint-stock shell are also broadly shared, but market consequences diverge. Czech joint-stock law is conspicuously permissive, where founders may select the internal structure, create single-member elected bodies, appoint legal persons as board members, and design shared classes limited only by good morals and public order, with employee participation required in some cases. Hungary's split between the private and the public companies limited by shares aligns with the availability of public offers and market trading. Slovakia distinguishes private and public joint-stock companies on a 25,000-euro capital base for each, while enabling ordinary and preference shares. Serbia maintains a robust public-company regime in statute, but describes initial public offering²¹³ activity as almost non-existent, reflecting a bank-centric environment and a thin equity culture. Moreover, sectoral overlays refine the landscape without multiplying new forms; specifically, Czech law channels SICAV for collective investment, Croatia calibrates banking, insurance, and even sports-competition companies through special statutes while insisting they are not distinct company types, and Slovenia layers extensive financial-market and takeover rules atop the general regime. Beyond substantive company law, institutional complements shape functionality. Digitalisation is explicit in the region.

The comparative balance tilts toward convergence in form and diversity in function. All eight jurisdictions accept full legal personality, limited liability for capital companies, registration-based incorporation, creditor and minority safeguards, and, for joint-stock companies, a public-private hinge that expresses an openness to capital markets. Yet, entry thresholds, the elasticity of internal governance, the vitality of equity finance, and the density of enforcement and advisory institutions vary in ways that reflect national design choices and inherited constraints. The Czech Republic and Croatia exemplify generous contractual freedom within carefully-policed boundaries, with Czech and Hungarian law in particular pressing toward liberal configurations of both joint-stock and limited liability companies. Slovakia presents a more rigid limited liability company core, even as it experiments with, and now plans to make mainstream, many of the flexible mechanisms that the simple joint-stock company was meant to pilot. Serbia combines a modern statutory framework and digital infrastructure with a bank-centric finance ecosystem. Poland's code builds deliberately on interwar traditions while adding a simplified joint-stock shell for innovative ventures. Slovenia's system is notable for the completeness of its

213 Initial Public Offering, the first sale of shares by a private company to the public, which is central to the operation of capital markets.

adjacent statutes and its integration of European company forms. Romania's company law survives as a continuously amended post-1990 statute located within a monist private-law structure. Hungary epitomises a present-day consolidation of modern forms within the Civil Code.

The normative consequence that emerges from these records is that the region's corporate law is best understood as a cycle of transplantation, interrupted indigenisation, socialist erasure, and rapid reconstitution. The modern statutes are erudite and, in many places, strikingly liberal; where institutional complements, such as courts, registries, professions, and capital-market infrastructure are dense and credible, private autonomy in governance and finance can be exercised to full effect. Where they are thin or where residual rigidity remains, the same statutory forms achieve only partial realisation. The eight systems now speak a common corporate language, but they pronounce it in different accents shaped by their distinct sequences of codification, interruption, and reconstruction.

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Legal Capital and Finances of the Company*

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1. Introduction

This chapter examines core questions of corporate finance law, including the notion of legal (share) capital, increase and reduction of that capital, doctrine of capital maintenance, and dividends distribution. Many jurisdictions prescribe minimum capital thresholds for particular legal forms of corporations (e.g. most notably joint-stock companies and, in some systems, limited liability companies) intended to ensure that companies commence operations with adequate resources to absorb initial business risks. The formation and maintenance rules that surround legal capital are therefore fundamental. At incorporation, shareholders must contribute to the required share capital, whether in cash or in kind. Capital-maintenance constraints then police subsequent outflows, such as distributions, share buy-backs, or other equity-reducing transactions, such that the company's financial baseline is not unduly eroded.

In company law, legal capital denotes the portion of equity that must be preserved as a creditor buffer. It functions as a financial cushion, limiting the extent to which assets can be distributed to shareholders and ensuring, at least theoretically, that a

* Eichlerová, K., Ivkošić, M., Ledwoń, P., Veress, E., Barta, J., Dugar, G., Renko, J., Mihajlović, B., Mrázová, Ž. (2025) 'Legal Capital and Finances of the Company' In Veress, E. (Ed.) Joint Stock and Limited Liability Companies in East Central Europe. Miskolc-Budapest: Central European Academic Publishing. pp. 91–191. https://doi.org/10.54171/2025.ev.jsllcece_chapter2

minimum, durable layer of equity remains available to meet obligations. Because it allocates risk between creditors and owners, legal capital sits at the heart of corporate governance and is typically the subject of detailed statutory provisions. Legal capital is commonly tied to the aggregate nominal (par) value of issued shares, sometimes augmented by statutory non-distributable reserves.¹ Its protective purpose is realised by restrictions on withdrawals by shareholders, as well as through by procedural and substantive safeguards around profit distributions and other equity transactions. Preservation is achieved through the following: rules that confine distributions to realised and distributable profits or reserves in such a way that the legal capital itself is not consumed; limits and formalities governing repurchases and redemptions to avoid undue equity depletion; creditor-oriented protections (e.g. notice, opposition, or security) where transactions may materially affect the company's capital position.

Although the rationale for legal capital is creditor protection, the model has attracted sustained criticism in modern finance. Critics contend various points, including that rigid capital rules can over-constrain growing businesses, especially start-ups; sophisticated creditors increasingly rely on covenants, security interests, guarantees, and disclosure rather than nominal capital; a focus on par values says little about actual solvency or going-concern viability. In response, a number of legal systems have shifted their emphasis toward solvency-based tests and director duties calibrated to financial distress, seeking to ensure that companies remain able to meet debts as they fall due and maintain assets in excess of liabilities, rather than simply preserving a historically-stated capital figure.

In general, companies deploy a spectrum of financing tools beyond legal capital to tailor their capital structure to evolving needs, without immediately altering nominal share capital. Debt financing (e.g. bank loans, bond issuances, and committed credit facilities) can mobilise substantial funds without diluting ownership, albeit it introduces fixed-charge obligations and refinancing risk. Hybrid financing instruments bridge debt and equity. For example, convertible bonds defer potential dilution while offering creditors a conversion option. Preference shares can deliver fixed dividends and embed redemption or conversion mechanics to meet bespoke financing objectives. Asset leasing conserves cash by substituting periodic rentals for upfront expenditure, while receivables factoring accelerates liquidity by monetising trade debts at a discount. Internally, retained earnings provide non-dilutive funding by reinvesting profits, which preserves control but presupposes sustained profitability.

1 Statutory non-distributable reserves are equity amounts that the law requires a company to retain and not pay out to shareholders. They exist to protect capital and creditors; distributions may not reduce net assets below the sum of subscribed/registered capital plus all legally non-distributable reserves. They usually can be used only for tightly-defined purposes (e.g., covering losses) or become distributable only when "realised". Some examples of statutory (jurisdiction-dependent) non-distributable reserves: (a) legal reserve (a mandated part of annual profits until it reaches a set percentage of share capital); revaluation reserve (gains from asset revaluations; not distributable until realised through sale/consumption); reserve for own shares/treasury shares (an amount equal to the cost of treasury shares that must be locked).

For early-stage and scaling firms, venture capital and private equity supply risk-bearing funds and strategic support in exchange for governance rights and a path to exit. Non-dilutive grants and subsidies (domestic or supranational) can underwrite research, innovation, or projects with public-interest features, albeit subject to use conditions. Crowdfunding and other alternative-finance channels widen the investor base (or lenders in peer-to-peer models) and may incorporate revenue-sharing arrangements. Strategic alliances and joint ventures mobilise partner resources and allow cost sharing, functioning as indirect financing while aligning incentives on targeted projects, markets, or technologies. Finally, asset-based finance (secured loans or sale-and-leaseback transactions) leverages existing collateral to obtain liquidity. In practice, firms mix these modalities to balance flexibility, cost, control, and risk.

Importantly, increases and reductions in legal capital remain essential corporate mechanisms allowing the company's financial structure to adapt, but only within legal frameworks designed to safeguard shareholders and creditors. Increases of legal capital may serve for growth, acquisitions, and operational scaling, or signal balance-sheet strength to investors and trading partners. They are commonly implemented by issuing new shares to existing members (with pre-emptive rights where applicable) or to new investors, capitalising reserves or retained earnings into share capital, or converting debt into equity to deleverage and improve solvency metrics. Each pathway is conditioned on corporate approvals (typically through a general meeting), compliance with filing and disclosure obligations, and, in some systems, independent valuation for in-kind contributions to ensure fair and transparent pricing.

In contrast, reductions of legal capital are employed to return surplus funds to shareholders, right-size an over-capitalised balance sheet, or absorb losses and restore balance-sheet integrity. They may be impacted by cancelling shares, repaying paid-in amounts to shareholders, or reducing share nominal value. Because reductions alter the creditor buffer, they are subject to tighter procedures, including the following: shareholder resolutions of an enhanced majority; public notice and waiting periods; creditor opposition rights and, where appropriate, the provision of security or full payment of objecting claims before the reduction takes effect. Some systems additionally require disclosure in official journals and court oversight where disputes arise. These safeguards inevitably add time and cost to the process, but are calibrated to protect legitimate creditor reliance on the company's stated equity base. In general, the regulatory architecture around increases and reductions in legal capital seeks to reconcile corporate flexibility with stakeholder protection. When properly observed, it enables firms to respond to market conditions and strategic imperatives without compromising solvency or the priority structure that creditors and minority shareholders reasonably expect.

Capital maintenance is at the basis of this architecture, preserving the integrity of the equity base as established at formation or as later augmented, and it disciplines the use of corporate assets in relation with shareholders. This doctrine bars the arbitrary erosion of legal capital and permits returns to shareholders, even if only within statutory conditions. This means that distributions (e.g. dividends, redemptions, and

buy-backs) are confined to distributable profits or free reserves after provisioning for losses and mandatory reserves; equity-reducing transactions must follow prescribed procedures and, where applicable, creditor-protection steps; in many jurisdictions, the financial assistance rules prevent a company from materially financing the acquisition of its own shares in ways that would undercut its capital position. These rules frequently operate alongside solvency requirements, obliging boards to certify that the company can pay its debts as they fall due and that net assets remain adequate after the transaction. These legal constraints are reinforced by accounting, audit, and disclosure duties that provide transparency and permit monitoring by shareholders, creditors, regulators, and courts.

The law of dividends has a central role in this framework, being at the intersection of shareholder reward and balance-sheet prudence. Dividends are distributions of profits to shareholders and ordinarily depend on properly-determined, distributable earnings after operating expenses, taxes, and statutory allocations. Most systems prohibit distributions that would reduce net assets below the sum of share capital and non-distributable reserves, thereby protecting creditors and the capital floor. The general meeting typically authorises dividends based on the board's recommendation, aligning payout policies with the company's strategy, investment policy, and liquidity needs. Thus, directors who authorise unlawful distributions risk personal liability for breach of duty and may be obliged to procure restitution from shareholders who knew or should have known of the irregularity.

Dividend policy must create a compromise between investor expectations and resilience. Regular, sustainable payouts can signal performance and attract capital, but excessive distributions may starve the firm of funds for innovation, acquisitions, or downturn buffers. Minority-protection concerns can arise if controlling shareholders press for distributions that disproportionately serve their interests, or if remedies in company law (e.g. unfair-prejudice claims or fiduciary-duty enforcement) respond to such conflicts. Finally, the form and timing of distributions (i.e. cash, stock dividends,² or distributions in specie)³ carry distinct legal and financial consequences, whereby boards must select modalities consistent with the corporation's statutory constraints, strategy, and solvency profile.

2 The company issues new shares to shareholders instead of cash, sometimes as an elective alternative to cash, increasing the legal capital; this capitalises reserves but can dilute holdings of non-electing or future shareholders.

3 The company distributes non-cash assets to shareholders, such as property, shares in a subsidiary, equipment, or receivables, valued at fair market value and subject to the usual solvency/capital-maintenance rules.

2. The Czech Republic

2.1. Introduction to Legal Capital in the Czech Republic

Share capital is one of the methods available for financing company activities. In Czech law and in continental law, it is understood as a liability item (balance sheet) expressing the value of the assets contributed by shareholders at the time of establishment or during the life of the company against the acquisition or increase of participation in the company.⁴ The share capital is therefore not a company asset but an expression of the value of the assets received from shareholders when they acquire or increase their participation in the company in exchange for these assets.⁵ The assets contributed may be freely disposed of by the company without affecting the share capital amount.⁶ Still, shareholders can finance the company using methods other than share capital. Share premium, additions to the share capital outside the share capital, or donations may be considered as part of equity,⁷ and so can be the profit generated by the company's activities. The company may also obtain resources from shareholders or third parties in other ways, such as through loans, a silent partnership contribution, or the issue of bonds.

Czech legislation, following Directive 2017/1132, contains a number of rules on the protection of the company's share capital in connection with formation, as well as rules on the maintenance of the company's capital during its existence. Various rules that the Directive requires to be transposed into the law on shares are also applied by the Czech legislator to private companies.

2.2. Minimum Legal Capital Requirements

The statutory requirement for the minimum amount of contribution in a private company in Section 142(1) Business Corporations Act (BCA) indirectly determines the statutory minimum share capital. In a private company, this minimum share capital is symbolic, which could imply to some extent the abandonment of the guarantee function of share capital. Still, various pursuing the real creation and maintenance of share capital are retained for a private company (see below). The share capital of a private company may be expressed only in Czech koruna.

The minimum share capital of a private company is based on the number of shares created in its memorandum of association and the amount of contributions

⁴ Štenglová et al., 2023, p. 13.

⁵ Černá et al., 2021, p. 198.

⁶ Štenglová et al., 2023, p. 13.

⁷ Černá et al., 2021, p. 198.

attributable to them.⁸ If only one share is created (the company has a single shareholder with one share), the minimum share capital is 1 Czech koruna. If more than one share is created, regardless of shareholder numbers, the minimum amount of the share capital corresponds to the number of shares (e.g. 3 Czech koruna for three shares). In certain areas of the economy, sectoral laws may set higher minimum capital or contribution requirements (e.g. minimum capital requirements for a securities trader).

For public companies, the law stipulates that the share capital is at least two million Czech koruna or 80 thousand EUR [Section 246(2) BCA]. The requirements of the Czech law are therefore stricter than the requirements of Directive 2017/1132, according to which the minimum amount of the share capital of a public company should be 25 thousand Czech koruna. The possibility to express the share capital in EUR is subject to the condition that a specific law allows the company's accounts to be kept in EUR [Section 246(1) BCA]. This special law is Act no. 563/1991 Sb. on Accounting, which does not, however, provide any explicit rules for keeping accounting records in EUR. J. Dědič suggests that the creation of share capital in EUR is only possible if the company keeps its entire accounting records in EUR. This, in turn, is only permissible if the company is an issuer of securities admitted to trading on a European regulated market.⁹

Importantly, the Czech legislator does not expressly require that the share capital amount at the time of company incorporation reasonably corresponds to the purpose for which the company is established.¹⁰ Still, this objective is pursued in certain cases where the company is under a special legal regime, such as banks or insurance companies, for which the relevant laws provide for a significantly higher minimum share capital than is required for public companies in general. Despite the absence of a general rule preventing the initial undercapitalisation of companies, I believe that this loophole can be bridged through the principle of fairness under Section 6 of the Czech Civil Code (Czech CC). Therefore, it cannot be excluded that a deliberate undercapitalisation of a company to the detriment of particularly involuntary creditors could be assessed as an abuse of law and lead to the imposition of the liability of shareholders for the company's debts for deliberate breach of good morals [Section

8 Pursuant to Section 108, CC, a minimum share capital of 100,000 Czech koruna was required for a private company established by 31 December 2000, and a minimum share capital of 200,000 Czech koruna for companies established from 1 January 2001. Companies established before 1 January 2001 were not obliged to make up the amount of the share capital to Czech koruna 200,000 (transitional provision of Article VIII, point 18 of Act No. 370/2000 Sb.). The minimum amount of a shareholder's contribution was Czech koruna 20,000 as of 1 January 1992 pursuant to Section 109 CC. A shareholder could only contribute a single contribution and the amount of the contribution had to be divisible into thousands. These requirements are no longer laid down in the Business Corporations Act (BCA); however, they could become part of the autonomous regulation of companies as a result of their enshrinement in the articles of association.

9 Štenglová et al., 2023, pp. 12, 13.

10 Černá et al., 2021, p. 198.

2909 Czech CC] or to their punitive liability as a result of the assessment of the matter as an influence [Section 71(3) BCA].¹¹

The BCA prohibits the issuance of shares at a lower issue price than their nominal or non-par value share (i.e. below price). For a public company, this rule is expressly enshrined in the law (Section 247 BCA) and corresponds to the requirements of Directive 2017/1132. For a private company, it follows indirectly from the provisions of Section 15 (1)(4), taking into account Section 28 BCA. An exception is the case of the benefit of employees of a public company, where it is possible, when increasing the share capital, for such persons to acquire shares in the company below the price if the articles of association or the resolution of the general meeting to increase the share capital so provides, and if the difference between the paid-up part of the issue price and the price or issue price is covered by the company's own resources (Section 258 BCA). This rule is mainly used by start-ups.

In summary, the share capital is the aggregate of all contributions (Section 30 BCA). For shareholders of both private and public companies, the contribution obligation is mandatory, and in neither can a share be created without a contribution obligation.

2.3. Rules for Contributions to the Legal Capital

Czech law requires that the contribution obligation be fulfilled before the company is formed only in the case of contributions in kind [Section 23(3) BCA]. Meanwhile, it does not require that upon the establishment of a company the cash contributions be paid in full before the company is established or before the increase of the share capital takes effect. It only requires that the entire share premium and at least 30% of the nominal value of the shares subscribed for in the case of a private company [Section 148 BCA]), and the entire share premium and in aggregate at least 30% of the nominal value of the shares subscribed for in the case of a public company [Section 253(1) BCA], be paid up before the company is incorporated or the share capital is increased. The time for the payment of the balance is to be determined by the memorandum and articles of association. For a private company, the period of repayment shall not exceed five years [Section 150(1) BCA], and shall not exceed one year from the incorporation of a public company or increase in its share capital [Section 344(1) BCA].

The conditions for the repayment of cash contributions, and for providing contributions in kind, are stricter than those set out in Directive 2017/1132. This means that shareholders may fall into default on their contribution obligation. Moreover, delays in fulfilling the contribution obligation accompany various negative consequences for shareholders, which should motivate them to fulfil the contribution obligation on time. These consequences are:

- a) the company may enforce the defaulting shareholder's claim for satisfaction of the contribution obligation by action in court.

11 Lokajíček, 2016, pp. 115 et seq.

- b) may claim damages to the extent that it is not covered by default interest (Section 1971 Czech CC).
- c) may claim interest for default at the rate specified in the memorandum of association, otherwise at twice the statutory rate [Section 151(1) and 344 (2) BCA].
- d) may demand payment of a contractual penalty if it is agreed in the memorandum or articles of association in case of default in the fulfilment of the contribution obligation.
- e) may initiate exclusion proceedings (*kadukční řízení*). This may result in their expulsion from the company by a resolution of the general meeting or the statutory body in the case of a public limited company (Section 151 and 345 BCA), or a private company may apply to the court for a decision on his/her expulsion (Section 204 BCA).¹²
- f) a shareholder may not exercise the voting rights attached to a share in respect of which he/she is in default of a contribution obligation to the extent of such default [Section 173(1)(d) and Section 426(c) BCA].

Failure to meet the contribution obligation is also a bar to the right to withdrawal of a member from a private company in the cases provided for by law [cf. Section 164(3) BCA and the referring Sections 202 and 207(3) BCA]. The exercise of the right to withdraw from the company is conditional on the extinction of the contribution obligation, not merely the absence of its default. In other words, a shareholder cannot withdraw from the company if they have not fulfilled the contribution obligation, and it is irrelevant whether they are in default in fulfilling it. These rules should also motivate a shareholder to fulfil the contribution obligation, even before they are obliged to do so, if they wish to exercise their right to withdraw from the company.

The statute of limitations for the contribution obligation is the general limitation period (Sections 609, 629 and 630 Czech CC). If the right to fulfil the contribution obligation is time-barred, the shareholder cannot be expelled from the company,¹³ and releasing a shareholder from the contribution obligation is prohibited. This prohibition is set out for private companies in Section 150(2) BCA and for public companies in Section 344(3) BCA. The essence of the prohibition on the waiver of the contribution obligation is that a company cannot enter into an agreement with a shareholder to extinguish the contribution obligation pursuant to Section 1981 Czech CC or an agreement to waive a debt pursuant to Section 1995 Czech CC. An exception is the reduction

¹² The reason is that the law provides that the general meeting decides on the exclusion of a shareholder from a private company. Therefore, it is possible that if there is no consensus on shareholder exclusion, then the court may decide on their exclusion. This is not an option in the circumstances of a public company, where the decision to exclude a shareholder is taken by the board of directors and its members are obliged to act with due care in making that decision.

¹³ Judgments of the Supreme Court, case No. 29 Cdo 631/2010 and 29 Cdo 1553/2007. Judgment of the High Court in Prague, case No. 14 Cmo 190/2019. Černá et al., 2021, p. 372.

of the share capital. The question remains, what about the set-off. We shall elaborate on this further.

The termination of the contribution obligation ideally occurs upon fulfilment, but can also occur as a result of a reduction of the share capital. This last point entails a waiver of the contribution obligation [Section 233(c) BCA], setoff in the case of the realisation of a guarantee for the debts of a private company [Section 134(1) BCA], in the case of the capitalisation of a claim in the event of a capital increase [Section 224(3) BCA], and in other cases. The latter case is contentious.

The BCA, as opposed to Section 108(2) Commercial Code (CC), does not contain an express prohibition on the setoff of a shareholder's claims against a private company's claim to satisfy a contribution obligation, except for a capital increase. A setoff cannot be considered a form of waiver within the meaning of Section 150(2) BCA. J. Pokorná is inclined to the conclusion that a setoff is not possible except in cases of capital increase,¹⁴ while B. Havel takes the opposite view.¹⁵ I am inclined to the second view, namely that a setoff agreement is possible also in relation to a cash contribution to a private company arising on company incorporation, not only on a capital increase. Under Section 21(3) BCA, a unilateral setoff is excluded. Moreover, a setoff agreement must be made in writing [Section 21(3) BCA], and its conclusion is subject to approval by the general meeting and a two-thirds majority vote of all shareholders in a private company [Section 171(1)(c) BCA]; in a public company, a two-thirds majority vote of the shareholders present is required [Section 416(1) BCA]. Dishonest legal conduct is also prevented by the statutory prohibition on setoff of uncertain or indeterminate claims [Section 1987(2) Czech CC].

Contributions in kind are subject to mandatory evaluation. In the case of an item of consideration in kind, which may be anything that can be valued in a monetary equivalent pursuant to Section 15(3) BCA, a valuation report by an independent expert is required in the cases of both private and public companies (Section 143 BCA). This is based on the requirement of Directive 2017/1132 in respect of a public company. The object of the contribution in kind must not be an obligation to do work or perform services [Section 17(3) BCA], and the contribution in kind must be fully paid before the company is formed or the application for registration is made [Section 23(3) BCA].

Unlike the CC, it is no longer required that the object of the contribution in kind be economically usable by the company and be valued by two court-appointed experts. A valuation report by one expert selected from the list of experts maintained by the Ministry of Justice is sufficient. The approval of the expert by the court is no longer required.

In the event of a capital increase, the subject of a contribution in kind is subject to valuation by an expert selected from a list of experts, unless exceptions to the valuation by an expert apply, in which case the value of the contribution in kind is ascertained in another manner permitted by law (Sections 468–473 BCA).

¹⁴ Lasák et al., 2021, p. 841.

¹⁵ Štenglová et al., 2020, p. 370.

These procedures cannot be used in the formation of a corporation,¹⁶ specifically because the departure from the general requirement for an expert valuation must be appropriate, and that appropriateness must be judged with due care by the members of the managing board.¹⁷

Performance contributions are prohibited. In the case of both private and public companies, the subject of the contribution must not be obligation to do work or perform services [Section 17(3) BCA]. This statutory requirement is consistent with Directive 2017/1132.

The capitalisation of claims on incorporation is prohibited, such that it is forbidden to include as the subject of the contribution the shareholder's claim against the private and public company at its incorporation (i.e. at the initial creation of the share capital) [Section 21(3) BCA]. This is because, as a result of the capitalisation of the claim, the debt of the company is converted into an interest in the company, meaning that the company reduces the extent of its indebtedness but does not acquire any assets to start its business. Moreover, when a company is established, in principle, there can be no question of the company's debts (cf. on this point the act for the so-called pre-company; Section 127 Czech CC; on setoff, cf. in more detail under (d)).

Paid-up cash contributions before the company is formed are protected. Cash contributions in private companies and public companies are paid into a special account with a bank or credit union, and may be disposed of only after company formation, unless it is for the payment of establishment costs [Section 23(1) BCA]. An exception to the obligation to establish a special account with a bank is made in cases where cash contributions to a private company do not exceed 20,000 Czech koruna in aggregate [Section 23(2) BCA]. In such cases, they may also be paid to the hands of the contribution administrator in cash or by transfer to their account. The aim of this regulation is not to reduce the amount of funds invested before the company is established below the amount of cash contributions, but to ensure that the company has cash available in the expected amount to start its business.

The shareholders must make up the value of the contribution in kind. A shareholder who has made a contribution in kind to the company, in respect of which the company has either not acquired the ownership right at all or has acquired it, but its value on the date of acquisition of the ownership right was lower than the amount of the issue price, is obliged to make up the value of the contribution in money [Section 26 and 28 BCA]. Again, the purpose of this rule is to achieve a situation where the company has, in connection with its formation, real assets with a value that corresponds to the amount at which the share capital is to be paid up. I judge that this rule is only part of the contribution obligation, not an obligation distinct from the contribution obligation. I am therefore inclined to the conclusion that a default in

16 Lasák et al., 2021, p. 818.

17 Černá et al., 2021, p. 333.

complying with the replacement obligation has the same consequences as a default in complying with the contribution obligation [see (b)].¹⁸

Attempts at circumventing the rules on contributions in kind are prohibited (prohibition of “hidden contributions”). For public companies, the insurance against circumvention of the rule on the valuation of contribution in kind and the prohibition to issue shares “sub pari” is the prohibition to acquire the company’s assets for consideration from the founders or shareholders within two years of company incorporation, unless the statutory conditions are met. The statutory regulation complies with the requirements of Directive 2017/1132. The purpose here is to ensure that the shareholder does not inject cash into the company and then have the company buy the item from them at a price higher than its value, thereby circumventing the rules on contributions in kind. For this reason, for a public company and following the requirements of the Directive, it is stipulated that within two years of its formation, if more than 10% of the subscribed share capital is to be paid for, property may only be acquired for a consideration which does not exceed the value of the property to be acquired, as determined by an expert’s valuation report and with the approval of the general meeting; this is not required in the case of acquisition of property in the ordinary course of business or on a European regulated market [Section 255 BCA]. Section 255(4) BCA contains a special regulation of the consequences of the absence of an expert’s valuation report: the shareholder or founder is obliged to return to the company the part of the consideration exceeding the price determined by the expert valuation report. In the absence of approval by the general meeting, the juridical act in question is relatively invalid under Section 48 BCA, and the invalidity may be invoked by the company or its shareholder. There is no similar express rule for a private company in the BCA. However, very similar in nature is the prohibition on the return of contributions and the prohibition on gratuitous benefits to members contained in Section 40(5) BCA.

Share transfers are subject to a legal guarantee. Upon the transfer of a share for which the contribution obligation has not been fully met, the transferor shall be liable for its fulfilment. This applies in the case of both companies, regardless of whether the transfer is of a certificated or an uncertificated share. If the new transferee fails to fulfil the contribution obligation, the company is entitled to claim performance from the transferor as guarantor by operation of law [Section 209(1), 256(3) and 285(3) BCA].

2.4. Capital Maintenance and Protection

The law does not require a company, throughout its existence, to have assets corresponding to the current value of its share capital. If a company is not successful in business, the value of its assets may fall below the value of its share capital. The rules governing the maintenance of the share capital should prevent the company’s

18 In the same sense, see Janošek, 2015, as well as a contrary judgment of the Supreme Court, case No. 29 Odo 760/2006.

assets from falling in value on purpose (i.e. the company should not purposefully favour its shareholders over its creditors), and the guarantee function of the share capital should be fulfilled to a certain extent. While the distribution of profits will be discussed separately below (see subchapter 3.5), many of the rules relating to the distribution of profits are a manifestation of the capital maintenance principle – particularly the second balance sheet test.

Section 16(1) BCA prohibits the return of the object of the contribution to the shareholder.¹⁹ However, it is modified by other rules, the fulfilment of which may lead to the return of the object of the contribution (e.g. upon reduction of the share capital, payment of the share of the liquidation balance, and payment of the settlement share). Flidr interprets the rule as:

prohibiting disguised payments of profit shares and requiring that in commercial transactions between a capital company and a shareholder, the agreed mutual benefits be equivalent. If the company does not receive equivalent consideration under the contract with the shareholder, the shareholder must make up the difference in consideration after the fact.²⁰

I add that this conclusion, while generally valid, does not apply in a situation where the concern privilege under Section 72 BCA applies.

Closely related to the previous rule is the prohibition of a shareholder's withdrawal from the public company, unlike the case for a shareholder in a private company.²¹ If a shareholder no longer wishes to be a shareholder, one may sell the shares to another or, in the cases provided for by law, require them to be purchased from them by the company, the principal shareholder, or the controlling person. Such a transaction shall be neutral with respect to the company's equity and share capital. A shareholder's participation in a public company may also be extinguished as a result of a reduction in the share capital.

In the case of a shareholder in a private company, it is possible to withdraw from the company in statutory cases if the shareholder's contribution obligation is fully paid [Section 164 (3) BCA and Section 202 and 207 (3) BCA referring to it]. If the released share is not sold or does not pass to other shareholders, then the private company must also proceed to a reduction of the share capital, otherwise it risks dissolution (Section 215 BCA). The reason again is that this operation should not cause the equity capital to fall below the statutory capital. Section 16(2) BCA provides that interest on the issue price cannot be agreed or paid. According to P. Kuhn,

19 However, this view is not uniformly accepted. For example, Kříž and Kubík are inclined to the conclusion that Czech law does not contain a prohibition on the return of the object of contributions, and that Section 16 BCA only negatively establishes the rights of a shareholder (see the contribution of the authors in Lasák et al., 2021, p. 104).

20 Flidr, 2018, p. 241.

21 Exceptionally, the law provides for the shareholder's right to withdraw from the company when regulating certain transformations.

[a]ccountable interest [...] is to be understood as any fixed or floating amount, the amount of which is derived from the issue price or part thereof (whether expressed as a percentage or otherwise) and which is to be paid to the shareholders in excess of the net profit or loss which is by law intended to be paid to the shareholders.²²

For public companies, the prohibition to attaching to shares a right to receive a certain interest independently of the company's results is also enshrined in Section 276(4) BCA. Such an agreement would make the shareholder's claim a fixed claim, as in the case of creditors, which would completely negate the principle that the nature of the shareholder's claim is residual.

In accordance with Directive 2017/1132, the managing board in a public company must convene a general meeting without undue delay after becoming aware that the total loss of the company on the basis of the financial statements has reached such an amount that, if it were to be covered from the company's available resources, the unpaid loss would amount to half of the share capital or could be expected to do so considering all the circumstances, or for any other serious reason, and to propose to the general meeting the dissolution of the company or the adoption of any other appropriate measure [Section 403(2) BCA]. Failure to do so will generally constitute a breach of due care by directors. A similar rule can be encountered for private companies, where the managing director is required to convene a general meeting without undue delay after becoming aware that the company is threatened with bankruptcy or for other serious reasons, in particular if the objective pursued by the company is threatened. The managing director is also required to propose to the general meeting the dissolution of the company or the adoption of any other appropriate measure [Section 182 BCA]. Other than company dissolution, appropriate measures may be to increase the share capital, to effect a conversion, among others. The regulation of this issue is also part of the broader concept of capital maintenance, which is discussed, along with financial assistance, in more detail in Chapter 6.

2.5. Increase and Reduction of Legal Capital

The determination of the share capital amount is an obligatory element of the memorandum and articles of association, which is entered in the Commercial Register. The share capital of private and public companies is based on the principle of a fixed amount of share capital,²³ such that the law prescribes a detailed procedure by which a change in the share capital can be achieved.

These are mandatory rules designed to protect company shareholders and creditors. For private companies, the change of share capital is decided by the general

²² Štenglová et al., 2020, p. 52.

²³ An exception is a public company with variable share capital (also known as SICAV), the regulation of which is governed by Act No. 240/2013 Sb. on investment companies and investment funds.

meeting and requires the consent of a qualified two-thirds majority of all shareholders. If the process of amending the share capital is not successfully completed (e.g. no one assumes the contribution obligation, the application for registration is not submitted in time, or it is finally rejected or refused), the resolution of the general meeting is cancelled or does not take effect. A change in share capital amount results in a change in the content of the memorandum and articles of association. The decision to change the share capital amount falls within the competence of the general meeting even if it is not entitled to decide on a change in the content of the memorandum of association (e.g. in the case of a private company, this competence must be conferred on it by the memorandum of association). For public companies, the general meeting also decides in principle, requiring approval by a qualified majority of the votes of the shareholders present and voting according to share type. Under certain conditions, the managing board may decide to increase the share capital. A notarial record must always be made of the decision to change the share capital amount.

The reasons for changing the share capital amount can vary from the company's need to raise additional funds to finance its business, reimburse losses, and the shareholders' request for a partial return of their contributions if the company does not need such a large amount of share capital for its own financing. The entry of a new shareholder as a strategic partner in the company may also be a reason for increasing share capital.

We distinguish between nominal and effective changes in share capital in the cases of both increases or decreases. In practice, a combination of these methods may also be encountered. If participating securities (e.g. registered shares and certificated share) are issued, the process ends, as the case may be, with their surrender, exchange, or the indication of their new nominal value. In the case of dematerialised shares, it is then necessary to order a change in their nominal value or the issue of new dematerialised shares. A nominal capital increase means that the company's resources are used to increase the share capital. The company may thereby increase its credibility or do so in other cases where a greater involvement of own resources is required (e.g. a bank requires a nominal increase in share capital as a condition for granting a loan). A nominal capital reduction is then the solution chosen to cover the company's losses. In both nominal changes, the company does not acquire or lose any new assets; in other words, it is an accounting operation with no direct impact on the shareholders and creditors. In cases of a nominal increase in share capital, an indirect effect on shareholders may be that the scope for the payment of profit shares is reduced, since this operation reduces the difference between equity and share capital and thus the amount that can be distributed to shareholders as profit shares (cf. the requirement of the second balance sheet test to maintain equity at least equal to the share capital).

Regarding an effective increase in share capital, the increase is made by new contributions or by increasing the existing contributions, hence increasing the company's assets. While this is in principle favourable for creditors, seeing that the company acquires additional assets, it may be unfavourable for shareholders because the

increase in share capital may result in a subsequent change in their position if they do not want to or cannot participate in the share capital increase (e.g. the amount of new contributions is beyond their means or the memorandum and articles of association excludes a preferential right to participate in the increase in share capital). In the case of a capital increase by new contributions, the capitalisation of claims is permissible. A conditional increase of the share capital of a public company is an example of an effective share capital increase, taking place principally when exchangeable or senior bonds are issued. Regarding an effective capital reduction, the company's assets are reduced, and the difference is usually paid to shareholders. Here, it is creditors who may now be endangered.

The law establishes the shareholders' preferential right to participate in a share capital increase by cash contributions in principle in proportion to the amount of their shares. The right of first refusal is the most effective instrument for preventing a subsequent change in a shareholder's position in the company, ensuring that the shareholder participates in the share capital increase and maintains own position in the company. If a shareholder has a pre-emptive right, they may waive it for a particular capital increase or not use it. However, the memorandum of association of a private company may exclude, limit, or determine a different ratio for the assumption of the contribution obligation. Such a provision in the memorandum of association may be risky for shareholders. By contrast, the articles of association of a public company can neither limit nor exclude the right of first refusal, as only the general meeting can decide on this if it is in the important interests of the company.

For a share capital increase by contributions in kind, by the nature of the matter, the shareholders are not granted a preferential right to participate in the increase. In such situations, the non-cash object of the contribution is rarely of a divisible nature to maintain proportionality in the increase in participation. The protection of shareholders is ensured by a share capital increase by means of contributions in kind being only permissible if it is justified, that is, if it is more advantageous for the company to obtain a contribution in kind than a cash contribution.

For a share capital reduction, the protection of shareholders is ensured by the legal requirement for an equal reduction of the shareholders' contributions, and this cannot be excluded or limited by the memorandum and articles of association. An unequal reduction can only be made in a particular case with the consent of all shareholders. In public companies, the withdrawal of shares by lot, which is a method of unequal share capital reduction, is permitted.

The protection of creditors in the event of a capital increase is ensured by the following rules. It shall be prohibited for a company to increase the share capital from own resources beyond the amount of the shareholders' equity. Changes in the share capital may be made on the basis of annual, extraordinary, or interim accounts audited by an auditor with an unqualified opinion, and the applicability of the accounts is limited in time. Increases in cash may be made only after the existing cash contributions have been repaid.

When there is a share capital reduction, the law distinguishes whether it is an effective or nominal reduction, or whether it is aimed at covering a loss. If the nominal share capital reduction is not intended to cover a loss, the managing board must inform known creditors of the resolution of the general meeting to reduce the share capital. The managing board is also obliged to inform creditors by means of a notice in the Commercial Bulletin, providing protection in particular for unknown creditors. The notification must be made twice consecutively, 30 days apart. Only if the share capital reduction would impair the enforceability of creditors' claims against the company is the satisfaction of creditors or their adequate security a condition for a successful share capital reduction; namely, if the share capital reduction would have a negative effect on creditors, the creditors can prevent the reduction, otherwise they cannot.

The amount corresponding to the share capital reduction may be paid to shareholders only after the registration of the reduction in the Commercial Register (i.e. only if it is verified that the reduction does not endanger creditors). This is a concretisation of the principle that the claims of shareholders are residual (subordinate) and cannot "overtake" the fixed claims of creditors. We hold that the insolvency test under Section 40(3) BCA (i.e. the payment of the amount corresponding to the reduction to shareholders must not result in the company's insolvency) is also to be enforced in the case of a share capital reduction. Any opposite conclusion is contrary to the fundamental principle of company law that the claims of shareholders are residual. Importantly, there are some cases provided for by law wherein the company is obliged to reduce its share capital, usually as a penalty for non-compliance with certain rules (e.g. acquisition of treasury shares).

When increasing the share capital, the general meeting must first decide on this increase. When the increase stems from new contributions, this is followed by the assumption of the contribution obligation by the existing or new shareholders or the subscription of new shares. In essence, this is a contract between the company and the contributor or subscriber, since the contributor or subscriber accepts in the declaration or subscription the conditions set by the company during the decision of the general meeting regarding the increase in share capital. Subsequently, in accordance with the decision of the general meeting, contributions are made (i.e. those in kind are made immediately; those in cash may be paid in stages). The process is completed by entering the new share capital amount and other related facts in the Commercial Register (e.g. new amount of contributions and shares).

When reducing the share capital, the process is also initiated by a decision of the general meeting on this reduction. This is followed by a double announcement in the Commercial Bulletin, addressed to known creditors, and satisfaction or securing of creditors whose claims are threatened by the reduction. The process is completed with the registration of the reduction and the related data in the Commercial Register. For a public company, for the reduction of the share capital to be entered in the Commercial Register, there is the need first for a resolution of the general meeting on this reduction; then, the registration procedure is carried out only after all the steps

required by law have been completed twice: once for the registration of the resolution on the reduction of share capital; the second time for the registration of the reduced share capital. For a private company, the registration procedure for the reduction of share capital is carried out only once after all the steps required by law have been completed. Only after the reduction of the share capital is registered in the Commercial Register can the company dispose of the amount corresponding to the reduction of the share capital (e.g. pay it out to shareholders).

If the share capital of a private company is increased exclusively by new contributions or by increasing the existing contributions, the effects of the increase occur upon the assumption of the contribution obligation and the fulfilment of the contribution obligation to the prescribed extent [216(2) BCA]. Additionally, the entry in the Commercial Register has declaratory effects. The same conclusion shall apply if the share capital is increased by a public company whose shares are admitted to trading on a European regulated market or whose issue is the last condition for their admission to a European regulated market [464(1) BCA]. For other cases where the share capital of a privacy company is increased, the related effects shall be registered in the Commercial Register, and the registration shall have constitutive effects. An entry of a reduction of the share capital in the Commercial Register shall always have constitutive effects.

2.6. Rules for Profit Distribution and Dividends

The rights to a share of profits and to a share of other own resources are two separate rights, and their legal regulation is identical only to a certain extent. The regulation in the memorandum and articles of association may be different for the two rights.²⁴

We distinguish between a general right to a share of profits or to other own resources and a claim for payment of a specific share of profits or for other own resources. While a general right cannot be separated from the share, a claim for payment of a specific share can be separated on assignment, or its isolation occurs in the law of shares under Section 281 read with Sections 351 and 352 BCA.²⁵ If the claim is not separated, it remains part of the share.²⁶

The right to a share in the profits accrues to the shareholder by law, albeit companies can create shares without the right to a share in the profits [cf. Section 135(2), Section 256(1), and Section 276 BCA], or even modify the scope of this right by creating different types of shares.²⁷ In order for persons other than the shareholders to share in the distribution of profits or other own resources, this possibility must be expressly permitted by the memorandum and articles of association [Section 34(1) BCA]. This applies, for example, to royalties to directors, silent partnership agreements, and

²⁴ Lasák et al., 2021, p. 174.

²⁵ Lasák et al., 2021, p. 176; Štenglová et al., 2020, p. 87.

²⁶ Judgment of the Supreme Court, case No. 27 Cdo 1499/2017.

²⁷ For an overview of the development of the views of individual authors, see Lasák et al., 2021, pp. 174–176.

other agreements granting a third party a share in the profits (e.g. in a collective agreement).²⁸

The distribution of profits or other own resources is decided by the general meeting based on the annual or extraordinary accounts [Section 34(1) BCA], unless fixed profit shares are created. The approval of the underlying financial statements must take place before the end of the next financial year. Failure to comply with the time limit for approval of the financial statements means that the statutory requirements for the distribution of profits and other equity are not met, and neither are the requirements for their payment. In the case of such failure, the decision of the general meeting has no legal effect.²⁹ In other words, after the expiry of the period in the next financial year for which the financial statements are drawn up, the financial statements cease to be valid for a decision on the distribution of profits or other own resources. A resolution of the general meeting on the distribution of profits is an essential condition for the payment of profits or other equity, but is not required for fixed profit shares [Section 161(3) and Section 348(3) BCA]. If the distribution of other own resources is involved, a resolution of the general meeting on the distribution is always necessary.³⁰

The decision must be made by the end of the following financial year. There may be more than one decision at a given time and, if they do not have irreversible legal effect, they may be revoked.³¹ Failure to comply with the time limit for making a decision means that the legal prerequisites for either the distribution/payment of profits and other own resources are not met; nonetheless, any overrun of the statutory time limit for approval of the accounts, if approval is eventually granted, does not affect the possibility of making a decision on the distribution of profits. A decision based on ineligible accounts (i.e. for which balance sheet tests cannot be conducted) does not have legal effect because the law expressly provides that the decision does not have legal effect if balance sheet tests cannot be conducted.

The first prerequisite for a decision on the distribution of profits or payment of other own funds is the approval of the financial statements by the general meeting.³² In the cases of both private and public companies, three balance sheet tests must be met, the first under Section 34(2) BCA, the second and third under Section 40(1), (2) BCA. Failure to comply with the balance sheet tests renders the decision to distribute profits or other own resources without legal effect, therefore not an eligible basis for the payment of profit sharing. The first balance sheet test provides that the amount available for distribution must not exceed the sum of the profit for the last completed financial year, the profit for previous years, and such other funds as the company may use at its discretion, minus allocations to reserves and other funds in accordance with the law and the memorandum of association.

28 Judgment of the High Court in Olomouc, case No. 8 Cmo 102/2019.

29 Judgment of the Supreme Court, case No. 27 Cdo 1306/2023.

30 Lasák et al., 2021, p. 188.

31 Lasák et al., 2021, p. 194.

32 Judgment of the Supreme Court, case No. 27 Cdo 1457/2018.

The second balance sheet test provides that a company may not distribute profits or other equity resources if, at the end of the last financial year, the equity resulting from the annual or extraordinary accounts – or the equity after such distribution – falls below the amount of the subscribed capital plus any funds that cannot be distributed under the law or the memorandum of association. In other words, as a result of a distribution of profits or other own funds, the equity capital may not fall below the share capital. The third balance sheet test relates to development costs and sets limits on the distribution of profits or own resources in relation to them.

In public company law, case law has established that the profit may only be retained among shareholders for important reasons and in compliance with the prohibition of abuse of the majority of votes.³³ For a private company, the Supreme Court departed from these conclusions.³⁴ In my view, it is also in the interest of the public company that a certain portion of the profits should not be distributed to the shareholders and remain with the public company for its needs,³⁵ making it therefore questionable whether the Supreme Court will not change or at least moderate its view in time. However, no one doubts that more detailed rules can be laid down in the articles of association.

A share in the profits or other own resources is paid in cash unless the memorandum articles of association allow for consideration in kind (Section 161 and 348 BCA). Following the decision of the general meeting on the distribution, if required, the managing board decides on the payment of dividends or other own resources. The managing board must check that the statutory conditions are met, namely, that:

- a) the balance sheet tests have been met on the demerger
- b) the payout does not contravene the solvency test under Section 40(3) BCA;
- c) the other statutory requirements are met (e.g. the timing test for both the financial statements and the general meeting resolution).

If the conditions for payment are not met, the dividends or other own resources may not be paid and the company is not in default. If the dividends or other own resources would nevertheless be paid out, managing board members who agreed to the decision to pay it out must prove that they did not breach the duty of care. The shareholders are obliged to repay the amount paid as unjust enrichment [the exception is in accordance with Directive 2017/1132 Section 348(4) BCA, falling on shareholders who have wrongfully received the amount paid in good faith].

According to Section 35(1) BCA, interim dividends can only be paid based on interim financial statements showing that the company has sufficient resources to distribute the profits according to the first balance sheet test, and without considering capital funds. Interim dividends can only be paid in respect of a dividend, not a share of other own resources, and the memorandum and articles of association may exclude

33 Judgments of the Supreme Court, cases Nos. 27 Cdo 3885/2017 and 27 Cdo 2864/2020.

34 Judgment of the Supreme Court, case No. 27 Cdo 1306/2023.

35 The same opinion is also held by Dědič and Lasák. See Lasák et al., 2021, p. 197.

the possibility of paying interim dividends or tighten the legal conditions for its payment.³⁶ The underlying financial statements need not be approved by the general meeting, even if their approval is otherwise required in the case of a distribution of profits, unless the memorandum and articles of association provide otherwise.

Interim financial statements are prepared during the financial year for the purpose of the payment of interim dividends. They may be used as a basis for decisions throughout the financial year, unless the company's economic situation has changed. Nonetheless, the usefulness of interim financial statements diminishes over time. Ordinary and extraordinary financial statements may also serve as a basis for decisions.³⁷

The management board decides on the payment of the interim dividends based on residual powers (Section 163 Czech CC),³⁸ and cannot delegate the decision on this matter to some of its members or to outsiders because it is a matter concerning the relationship between the company and its members. The general meeting may instruct the management board to pay interim dividends, as this decision is not part of business management.³⁹

Under Section 35(2) BCA, interim dividends are refundable within three months of the date on which the ordinary or extraordinary accounts were or should have been approved. The exception is if the amount of profit to be distributed resulting from the ordinary or extraordinary accounts is at least the sum of the interim dividends paid in accordance with the Act, and the general meeting has decided to distribute that amount. The obligation to settle interim dividends is part of the share, even in a public company, and passes with the share to the new shareholder.⁴⁰

3. Croatia

3.1. Introduction to Legal Capital in Croatia

Members of a joint-stock company and a limited liability company contribute money, things, and/or rights to it when it is established. By investing their capital in the company, members shape the enterprise through which the company appears on the market and achieves its goals. Long-term profitability has a beneficial effect on asset increase, whereas unsuccessful and/or risky operations can reduce assets or lead to their loss if the company goes bankrupt. In addition to financing by its own capital, the company can also be financed by other (external) capital obtained by creditors. It is not an easy task to balance the different and possibly-conflicting interests of

³⁶ Štenglová et al., 2020, p. 100.

³⁷ Eichlerová, 2014, p. 44; Lasák et al., 2021, pp. 215–216.

³⁸ Judgment of the Supreme Court, case No. 27 Cdo 3330/2020.

³⁹ Judgment of the Supreme Court, case No. 27 Cdo 3330/2020. Eichlerová, 2014, p. 46; Lasák et al., 2021, p. 219; Čech and Skálová, 2014, p. 242.

⁴⁰ Eichlerová, 2014, p. 46; Lasák et al., 2021, pp. 233–235; Čech and Skálová, 2014, p. 248. Kuhn expresses a contrary opinion. Štenglová et al., 2020, p. 102.

shareholders, who provide the company with its own capital, and the creditors, who finance it by loans. Since companies are most often financed by their own and other people's capital, creditors are, with regard to the possibility of failure of the entrepreneurial venture, more exposed to risks compared to members of the joint-stock company and limited liability company, as these stakeholders can directly affect company operations. This asymmetry in risk sharing regarding the operations of capital companies is overcome by special rules on the basis of which priority is given to the rights of creditors over the property rights of members in such companies.

The share capital is that part of own capital that the members contribute when establishing the company or later by increasing the share capital. It is not capital in the economic or credit sense,⁴¹ but an accounting category included in the liabilities of the company, and with this capital the company is not liable for obligations.⁴² For the security of creditors, the essential assets of the company are the ones which make up its assets and with which the company is liable for its obligations. This is because when a company enters the market as an enterprise holder, its net assets can "sink" below the nominal value of the share capital as a result of a loss, without affecting the member's settlement obligations or a subsequent increase in the share capital. For this reason, it is not correct to label it as "guarantee capital/amount" or "liability fund", because creditors have no certainty that the company will have assets in the future that are at least equal to the amount of the share capital, nor that their claims will be protected to the extent corresponding to that amount. As a signal of the seriousness of entering into an entrepreneurial venture and of creditor protection, the share capital serves as a buffer against the occurrence of reasons for bankruptcy. The importance of share capital in the service of creditor protection is manifested as follows: a) initial capital supply for the start of the company's economic activity; b) protection against the latent insolvency of the company; c) as a signal of the seriousness and preparedness of entering into an entrepreneurial venture.⁴³ In addition to this protective role, the share capital is also important for regulating internal relations in the company. The membership strength, based on the provisions of Article 398(2) Companies Act (CA), unless otherwise specified by the company contract, is reflected in monetary value based on what the members have contributed to the company through the payment of the share capital.

There are two basic principles on which it is determined that the company has at least the amount of assets that correspond in value to the share capital, and on which creditors are provided with the assurance that the company has enough to settle claims whose value reaches the amount of the share capital. The first is the principle of capital input, while the second is the principle of maintenance capital. Both principles can be subsumed under the higher concept of capital supply. The obligation for

41 Veil expresses a similar opinion. See Scholz, 2022, § 5 rbr. 7.

42 For more information, see Barbić, 2010, pp. 45 et seq.

43 For more on this, see Hennrichs, 2009, pp. 292 et seq.

the company to supply capital is correlated with the member's personal non-liability for the company's obligations.

The founding of the company, along with the distribution of profits and a state of crisis, is the central point pertaining to creditor protection where the interests of shareholders and creditors are in direct conflict.⁴⁴ The members are not required to prove that a certain amount of share capital is sufficient for the achievement of their entrepreneurial goals, nor does the registry court verify the company's capital supply in terms of the possibility of achieving the company's goals, but only checks whether the founders have brought assets into the company that it can dispose of. Accordingly, whether the company's business failure will have a negative impact on the company's creditors is a problem that is solved by the provisions on the protective effect of share capital.

3.2. Minimum Legal Capital Requirements

The mandatory provisions of the CA prevent the possibility of entering into a company less than what is stated as its share capital, that is, the company's initial assets being less than the amount of share capital.⁴⁵ The minimum amount of share capital for a joint-stock company is 25,000 EUR, and for a limited liability company 2,500 EUR.⁴⁶ Shares contributions can be paid to the company by entering money, things, and rights into it, depending on what kind of obligation is established by the company contract or its statement of establishment. The input of money is the simplest subject of payment of share capital and is the basic method of input of contributions to the company, and if there are obstacles to the fulfilment of the contract on the entry of things and rights, the obligation to pay the contribution to the company remains in money.

3.3. Rules for Contributions to the Legal Capital

If the founders assume the obligation of *al pari* payment, everything they bring into the company on that basis must correspond to the amount of the company's share capital. A permanent supply of capital is achieved by means of the principle of capital preservation, to which the company is subjected *ex lege* from its establishment until its termination. It is not possible by regulations to ensure that the company always makes favourable deals and that it does not run into losses, and thus the shareholders do not have the obligation to ensure that the company always has certain net assets.⁴⁷

Based on the provisions of Article 406(1) CA, members may not demand that the company return what they paid as a contribution, and neither be paid even interest on the basic contribution paid. Based on Article 407(1) CA, payments to shareholders

⁴⁴ For more on this, see Höfer, 2016, p. 399.

⁴⁵ In this regard, the provisions of Articles 389, 390, 392, 393, 394, 399, CA.

⁴⁶ Article 162 and 389(2), CA. As an alternative to the establishment of an "ordinary/classic" limited liability company, since 2012, the Croatian legal order allows the establishment of a simple limited liability company whose minimum share capital is 1 euro (Art. 390a, CA).

⁴⁷ For more on this, see Bezenberger, 2005, p. 17.

from the company's assets which correspond in value to the amount of the share capital are not allowed. This determines which part of the company's assets should be protected. The company may pay an amount to members only if its own assets exceed the amount determined by the accounting rules on financial reporting. The company's liabilities, shown on the liability side of the statement of financial position (balance sheet), should be included in the equation for calculating the amount of assets from which payments to members are allowed. It can be said that payments are allowed from own assets (i.e. assets whose value exceeds the sum of the company's share capital and liabilities). On the passive side of the balance sheet, there may be capital reserves (e.g. reserves provided for in the company contract or other reserves arising from payments for which share contributions were issued above par or arising from additional actions of members) and comparable own capital positions that do not reduce the company's net assets (e.g. retained earnings). Conclusions about which payments can be considered permissible should be made from the annual financial report on the company's financial position.⁴⁸

3.4. Capital Maintenance and Protection

When the company's own (net) assets fall below the amount of the share capital (i.e. when the assets of the company are less than so-called true liabilities), it is a negative report on the company's financial position. In that case, payments to members based on the provisions of Article 407(1) CA are not permitted. Nevertheless, the fact that the company operated at a loss does not necessarily lead to a ban on payments to members, because the company can, for example, cover the loss from retained earnings from previous periods or capital reserves, and pay the available excess assets above the share capital to members.⁴⁹ The assessment of the permissibility of each payment from the company's assets is therefore based on the principles of capital input and maintenance and on the rules for compiling a report on the company's financial position.⁵⁰

3.5. Increase and Reduction of Legal Capital

When the report on the financial position of the company is positive, the shareholders can take part in the company's assets, and as long as the company exists, the

48 According to Article 19(2) Accounting Act and in accordance with Article 407 CA. This report should not be equated with the report on the state of the company, which is not required to be prepared by a small entrepreneur according to accounting regulations in accordance with Article 431.bu related to Article 250.a(1), CA.

49 When a company operates at a loss, it is a passive report on the financial position of the company. Loss is an accounting term and represents a value that occurs as a result of the difference between income and expenses that the company realises during the business year. Income is the receipt from natural or legal persons in money or monetary value expressed in goods and services obtained as a counter value (consideration) for sold goods or services, sale or rental of real estate, interest on loans given, among others. Cerovac, 2004.

50 For more on this, see Winnefeld, 2015, § 13 rbr. 57.

members have the right to request that they be paid annually or retained profits.⁵¹ Apart from the basis of annual payment or retained earnings, there are other possible ways of acquiring the company's assets. Both the accounting criteria (e.g. those from the report on the state of the company)⁵² and the relevant assessment of the economic effects of the intervention are relevant for the assessment of the permissibility of the intervention. An intervention in the company's assets is inadmissible when its value corresponds to the amount of the share capital, and when it is an intervention for which the company has not received an appropriate counterobligation. The first intervention on the company's property is prevented or compensated by the provisions on illegal income from Article 407 CA, and others on the basis of liability for damage or of mandatory legal liability for the return of what was acquired without a basis.⁵³

The CA for a joint-stock company provides for three ways through which the company acquires new own capital and can raise the share capital: an increase in share capital through contributions; a conditional increase in share capital and authorised capital; an increase in share capital from the company's funds, meaning only an internal redistribution of already existing capital of the company.⁵⁴ Conditional capital increase is not possible in a limited liability company owing to their differential characteristics; their share contributions are not represented by securities, similar to a joint-stock company, and they do not always give the same rights nor entail the same obligations when it comes to the same nominal values of these shares. That is why it would not be easy, as is the case in a joint-stock company, to determine in advance the conversion of convertible bonds into business shares, nor to exercise the right of company employees to convert their claims against the company in money based on the right to participate in the company's profits into business shares. The share capital of a limited liability company can be increased based on Articles 457 to 461 CA, as follows:

- a) through contributions, which represents an effective increase;
- b) by transformation the company's reserves into share capital, which means a nominal increase in share capital;

51 Article 406, paragraph 1, CA.

52 Article 431.bu related to Article 250.a, CA. Statements in the balance sheet are adjusted according to accounting regulations.

53 Liability for damage is based on Article 430 in connection with Article 273, CA, and the responsibility for the return of what was acquired without a basis in Articles 1111–1120 Law on Obligatory Relations, Official Gazette, Nos. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22. Members may unlawfully encroach on the assets of the company in various ways: by extracting liquid assets from the company, *know-how*, key workforce or business connections in favour of the member or another company over which the member has control, by managing the company's affairs with the aim of favouring the member or another company over which the member has control, or by unfairly competing with the company. For more on this, see Širola, 2011, p. 1689.

54 The increase of share capital in a joint-stock company is governed by the provisions of Articles 304–341, and in the limited liability company Articles 457–461, CA.

- c) if the Board of directors is authorised in the memorandum of association to increase the share capital, if it deems it expedient, during a certain period which may not exceed five years from the date of the company's registration in the Court Register (authorised capital).

The fact that existing share contributions have not been paid in full does not prevent the decision to increase the share capital. Existing shareholders have the right of priority to take over new share contributions in proportion to the nominal values of their share contributions in the company. Since the actions of the company's bodies during an increase of the share capital in both joint-stock and limited liability companies are similar, only the increase of share capital of joint-stock companies is regulated by Articles 304 to 342 CA.

According to Article 304 CA, the decision to increase the share capital by stakes is made by votes representing at least three quarters of the share capital represented at the general meeting when the resolution is made. The company's statute may stipulate that a different majority is required for this (e.g. it can be a larger majority or a smaller majority than three quarters of the share capital, but cannot be less than at least two thirds of that capital), but if non-voting preferred shares are issued, the stipulation can only involve a majority of the represented capital when making a resolution. If the company has more than one class of shares, the shareholders of each class must vote in favour of the resolution by the majority required by law or the Statute. The resolution of the general meeting must then be applied for registration in the court register, and the share capital cannot be increased until all the previous contributions have been paid in full, except in the case that the unpaid part is insignificant.

The share capital may only be increased by issuing new shares, but not, if shares with a nominal value have been issued, by increasing the nominal value of existing shares. In the case of a company which has issued shares without nominal value, the total number of such shares must be increased in proportion to the increase in the share capital and to the share capital before the increase. Existing shareholders have the right to subscribe for new shares in proportion to their previous participation in the company's share capital. It is about their right of priority, but the registration for new shares is not an obligation of the shareholders, being rather dependent on whether they will exercise it. This right of priority can be excluded in whole or in part if a resolution on this is passed by the general meeting with a majority of at least three quarters of the share capital represented at the general meeting when the resolution is made. However, the statute may stipulate that a larger majority (not a smaller one) is required for this along with the fulfilment of additional assumptions.

New shares may be paid for in cash or through the investment of movable property, real estate, or rights. The rules applicable to the payment of shares during company incorporation shall apply *mutatis mutandis*. After the necessary payments are made, the application for registration of the capital increase in the court register can be submitted. The share capital is considered to have been increased on the day of

the entry of the increase in the court register (i.e. the entry of an already implemented increase).

A conditional share capital increase occurs when, at the time the resolution is adopted, it cannot be said in advance whether and by how much the capital will actually be increased. This is because it would depend on the persons who are authorised to acquire shares based on this capital increase and their willingness to actually acquire these shares. Based on Article 313(2) CA, the resolution on conditional share capital increase can only be made for the following purposes:

- a) preparations for the merger of several companies;
- b) preparations for the merger of companies in accordance with the provisions of the CA on affiliated companies, which sometimes requires an increase in the share capital of a company to be able to issue shares that should belong to the shareholders of one of the companies participating in the merger (e.g. in case of merger);
- c) realisation of the right of company employees and management board members to acquire shares in the company based on their investment in the company or their claims against the company based on the right to participate in the company's profits;
- d) exercise of the right of the company's creditors to convert their convertible or variable rate bonds into shares of the company or to exercise their right of priority in the registration of new shares.

Regarding point d) pertaining to the conditional capital increase, several comments should be made. There is a specific situation, for example, when bonds are acquired by bondholders as a result of some action by the company, such as the granting of loans. Bonds generally give their holders the right to be paid interest by the company on a specified amount of debt at specified intervals; exchangeable, convertible bonds give the bondholder the right to be exchange these bonds for shares within a specified period, while the amount of interest paid by the company for variable-rate bonds is affected by the rate at which dividends are paid to shareholders. Finally, bondholders, as creditors of the company, can be given the right of priority to acquire new shares in the case of a new issue of shares (options), similar to the one that previous owners of shares have when increasing the share capital.

The decision on the conditional share capital increase is made by votes representing at least three quarters of the share capital represented at the general meeting when the decision is made. However, the statute may stipulate that a larger majority is required for this along with the fulfilment of additional assumptions.

The general meeting can, based on Article 323 CA, make a decision authorising the management board or the board of directors to increase the share capital up to a certain amount within a certain period, making the increase a matter of authorised capital. This decision, accordingly, does not actually mean that the share capital will be increased, but only that the management board or the board of directors is authorised to decide on such increase. In the case of an authorised capital increase,

the approval of the supervisory board is required for the management board to make decisions on the content of the rights regarding shares and the conditions for the issuance of shares. The purpose of the resolution of the general meeting authorising the management or the board of directors to increase the share capital is to enable these bodies, which are best acquainted with the company's state and operations, to assess when it is necessary for the company to raise new capital. Still, the management board or the board of directors can only be authorised to increase the share capital by means of stakes, meaning that all rules that apply to this method of share capital increase should be appropriately applied. The management board or the board of directors may also be authorised to decide on the partial or total exclusion of the pre-emptive rights of existing shareholders to the registration of new shares.

A resolution of the general meeting authorising the management board or board of directors to increase the share capital is made by votes representing at least three quarters of the share capital represented at the general meeting when the decision is made. However, the statute may stipulate that a larger majority is required and that additional conditions be met. If there are several classes of shares in the company, the shareholders of each class of shares must vote for the decision with the prescribed majority. The decision of the general meeting must be entered in the court register. The authority of the management or the board of directors to increase the company's share capital may, by resolution of the general meeting, be limited to a maximum period of five years from the date of registration of the company in the court register on the occasion of its incorporation (i.e. from the date of the amendment of the company's statute). After the necessary payments have been made, an application for the registration of the share capital increase in the court register can be made. The share capital is deemed to have been increased on the date of the registration of the increase.

An increase in share capital does not bring new capital into the company, but changes the status of the company's existing assets, and is a consequence of the company's good operating performance. It also achieves a more secure position for the company because, owing to the application of the principle of maintaining the company's share capital, stricter rules apply to the part of the company's assets corresponding to the share capital than to the part exceeding the share capital. Concomitantly, an increase in the company's share capital can affect the amount of dividends the company pays, in turn affecting the market price of the shares. In order to avoid abuses, the decision to increase the share capital from the company's funds must be based on the company's financial reports, and it can only be made after determining the profit and loss account for the previous business year.

The decision to increase the share capital from the company's funds based on Article 328(2) CA is passed by votes representing at least three quarters of the share capital represented at the general meeting in which the decision is made. However, the statute may stipulate that a different majority is required for this (e.g. a smaller majority than three quarters of the share capital, but it cannot be less than two thirds of that capital) along with the fulfilment of additional assumptions. With this increase

in the share capital, a separate decision of the shareholders of each class of shares is not required. The decision of the general meeting to increase the share capital from the company's funds must be registered in the court register, and the share capital increase is valid from the registration of that decision.

A reduction in the share capital is any reduction in the amount of that capital specified in the company's statute. The share capital can be reduced effectively or nominally. For an effective reduction, the purpose may be to return the paid contributions to the shareholders or to release them from the obligation to pay the unpaid part of the contributions. These actions are only possible when the share capital is reduced, and are otherwise prohibited considering that they go against the principle of maintaining the share capital. For a nominal reduction, it generally does not serve for the payment of what was paid into the company, but serves primarily to cover company losses. A reduction of the share capital in a joint-stock company is possible based on the provisions of Articles 342 to 354 CA through regular, simplified, and withdrawal of shares. Meanwhile, the reduction of the share capital in a limited liability company is based on Articles 462 to 466 CA and may be carried out:

- a) by returning the contributions to the shareholders;
- b) by reducing the nominal value of the contributions;
- c) by releasing the members in full or in part from the obligation to pay their contributions to the company.

The resolution of the general meeting on the regular reduction of the share capital is actualised by votes representing at least three quarters of the share capital represented at the general meeting when the resolution is made. However, the statute may stipulate that a larger majority is required for this along with the fulfilment of additional assumptions. If the company has several classes of shares, the shareholders of each class must vote in favour of the resolution by the required majority. The resolution on the regular reduction of the share capital must be entered in the court register. Additionally, the resolution of the general meeting must state the purpose of the reduction of the share capital (i.e. whether part of the investment in the company is to be returned to the shareholders) and the method of the reduction of the share capital (i.e. if shares with a nominal value have been issued, whether this should be done by reducing the nominal value of the shares or by consolidation of the shares). Importantly, the share capital can only be reduced by merging shares if the lowest nominal value of the shares can no longer be reduced, as this would lead to a violation of the rule on the lowest nominal value of the share (one euro).

The provisions of the CA contain special rules to protect the position of creditors in the event of a periodic reduction of the company's share capital, providing that their claims must either be settled or adequately insured if the creditors make themselves known to the company within a certain period. The share capital may not be reduced below the minimum amount required by the CA, with the exception being when a resolution to increase the share capital is passed concomitantly to another to reduce the share capital. This means that when the share capital is reduced, the amounts of

assets and liabilities are first reconciled in the accounts (i.e. the differences between them are eliminated), and then fresh capital is brought into the company by payments that can only be made in money and not in movables, real estate, and rights. The share capital shall be deemed to have been reduced on the date on which the resolution on the ordinary share capital reduction is entered in the court register.

A simplified reduction of the share capital can only be used for the purposes of restructuring the company, and only if parts of the company's assets (reserves) that could otherwise be used for this purpose have already been used for this purpose. The resolution of the general meeting on the simplified reduction of the share capital is passed by votes representing at least three quarters of the share capital represented at the general meeting when the resolution is passed. However, the statute may stipulate that a larger majority is required for this along with the fulfilment of additional assumptions. If the company has several classes of shares, the shareholders of each class must vote in favour of the resolution with the required majority. The resolution on the simplified reduction of the share capital must be entered in the court register. The resolution of the general meeting must state the purpose and the method of the reduction of the share capital. Amounts obtained through a simplified reduction of the share capital may not be paid to shareholders and may not be used to release shareholders from the obligation to pay contributions.

3.6. Rules for Withdrawal, Profit Distribution, and Dividends

The reasons for reducing the share capital by withdrawing shares may be to restructure the company, to exclude individual shareholders from the company, or to return to shareholders what they have invested in the company. In contrary to the reduction of the share capital by a regular or simplified method, the withdrawal here does not apply to all, but only to precisely-specified shares. Shares can be withdrawn compulsorily and by withdrawing company's own shares. The general meeting is always authorised to do this, but the matter must be decided on in any case if the legal requirements for the acquisition of own shares are met. The compulsory withdrawal of shares is possible on an orderly basis (i.e. the statute can specify the cases and the conditions under which the management board or the board of directors must decide on the redemption of shares; e.g. at the request of a shareholder) and a voluntary basis (i.e. the statute can specify that, in some cases, the general meeting is authorised to make a decision on the withdrawal of some shares).

The right to the payment of dividends is a fundamental property right of shareholders.⁵⁵ Based on the law, shareholders have the right to participate in the profit made by the company, which may be limited by statute only if and to the extent permitted by law. Article 220(1) CA prescribes the exact purposes for which the profit of a joint-stock company realised in a certain business year can be used, and the order in which the profit must be used for the prescribed purposes. The order serves for

55 For a joint-stock company, this right is governed by the provisions of Article 220(4) and 223, CA; for a limited liability company, Article 406, CA.

prescribing the hierarchy of purposes listed there.⁵⁶ The company's management board are obliged to follow this order when compiling the annual financial reports. For profit use, the following order of settlement is prescribed: a) coverage of losses carried over from previous years; b) entry into legal reserves of the 20th or a larger part of the profit of the current year, minus the amount of the loss from the previous year, until these reserves, together with the capital gain, reach the amount of 5% of the company's share capital; c) entry into reserves for the acquisition of own shares, if the company has acquired them or intends to acquire them; d) entry into statutory reserves, if the company has them.

4. Hungary

4.1. Introduction

The concept of a business association is that all members are obliged to make a financial contribution, albeit their contributions can differ. The amount of the financial contribution of the members is the subscribed capital.⁵⁷

4.2. Capital Contributions: Forms and Regulations

The instrument of the constitution of a legal person shall contain the capital contributions prescribed, the value of such contributions, and how and when such assets are to be made available. The capital contribution may be provided in the form of cash or in the form of contribution in kind. An asset contribution can be the ownership rights of tangible or intangible assets, a right with a financial value, or a receivable, provided that it is acknowledged by the debtor or if it is based on a final court ruling. Commitments of members for performing work or for any other personal involvement or service shall not be accepted as a form of capital contribution.⁵⁸

The value of the asset contribution must be determined by the member, except for limited companies. If the value of the asset contribution does not reach the value indicated in the instrument of constitution, the legal person may demand payment of the difference from the person having provided the asset contribution within five years from the date of transfer.

4.3. Obligations and Consequences of Non-compliance

If a member fails to provide the contribution as undertaken in the instrument of constitution by the prescribed time limit, the management shall call upon such member, with the applicable consequences indicated, to provide the contribution within 30

⁵⁶ See Barbić, 2010, pp. 588 et seq.

⁵⁷ According to subsection 3 of Section 35, Act C of 2000 on Accounting, in the case of public limited companies, private limited liability companies and other companies (if required to be registered by the court of registry in this respect), subscribed capital shall mean the capital registered by the court of registry in the amount specified in the instrument of constitution.

⁵⁸ Article 46, Directive (EU) 2017/1132.

days. In case of non-compliance within the 30-day time limit, the membership of this member who failed to provide the capital contribution shall be terminated on the day following the expiration of such time limit. The management shall notify the former member of membership termination. The former member shall be held liable for damages caused to the business association by virtue of the failure to provide the contribution in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation.

Directive (EU) 2017/1132 requires the insurance of the minimum equivalent protection for both shareholders and creditors of public limited liability companies, with a special emphasis on the coordination of national provisions regarding the formation of such companies and on the maintenance, increase, or reduction of their capital. Act V of 2013 on the Civil Code, which contains the legal material relating to companies, incorporated the provisions of the directive into its regulations, which are indicated in a footnote. Although the aforementioned Directive basically applies to limited companies, the Civil Code also applies certain provisions of the Directive to private limited liability companies.

4.4. Limited Liability Companies

Private limited liability companies (*korlátolt felelősségű társaság* or *kft.*) are founded with an initial capital comprising capital contributions of a predetermined amount. One of their characteristics is that both the member's financial contribution and the subscribed capital have specific names: *core deposit* and *initial capital*. The Civil Code stipulates a mandatory capital minimum for the initial capital, which cannot be less than *three million Hungarian forints*. For members of the company, the Civil Code requires a minimum financial contribution, where the core deposit of a member cannot be less than *one hundred thousand Hungarian forints*. The core deposits of members may differ in terms of value. Moreover, the Civil Code provides flexible rules for the fulfilment of the financial contribution, thereby facilitating the establishment of the company:

- a) The member can pay the full amount of the core deposit until the company registration application is submitted.
- b) The member can pay only the part of the cash contribution agreed in the memorandum of association until the company registration application is submitted (this can also be 0 Hungarian forints). In this case, the remaining part must be paid no later than three months after the acceptance of the annual report of the second complete financial year. The exact date of completion must be specified in the memorandum of association.

If the company member does not have enough money, it is allowed for him/her to pay the cash contributions from the profits distributable according to the provisions on the payment of dividends in whole or in part. In this case, the company cannot pay the member a dividend, as it must be accounted for the member's unpaid core deposit. It is forbidden to deviate from the final delivery deadline specified by the Civil Code.

If the value of asset contributions at the time of foundation reaches or exceeds half of the initial capital, it shall be made available to the company in its entirety before the time of submission of the application for registration. If the value of the asset contributions does not reach half of the initial capital, the remaining asset contribution shall be provided within three years at the latest. The due time for the provision of the asset contribution has to be specified in the memorandum of association, which in turn cannot specify a deadline longer than three years from the time of registration.

For private limited liability companies, the members are not liable for the company's obligations. Therefore, as a general rule, only the own capital of the company⁵⁹ provides coverage for the claims of the company's creditor. In view of this, company law regulations limit the conditions under which the initial capital can be reduced by payments to the members within a strict framework. The company may make any distribution from its own funds to a member, on account of his/her membership, during the company's existence solely in the cases defined in the Civil Code, and, with the exception of the reduction of the initial capital, from the untied retained earnings supplemented by the previous financial year's after-tax profit. Importantly, this provision concerns payments to members, and thus does not include payment to third parties (e.g. employees, contractual partners, and other creditors). Meanwhile, members of the company may receive payments from the company under several legal titles on account of their legal membership (e.g. dividend, interim dividend, and personal contribution fee).

It is the responsibility of the member's meeting to approve the annual account, as prescribed in the Accounting Act, which reveals whether the company generated a taxable result or profit during the activities of the previous year. The company can decide to pay this profit in the form of a dividend or create a reserve from it. The company can create reserve in more years. If, according to the company's books, the retained earnings, or a part of it, is not tied up for a specific purpose (i.e. it is free), then it can be used for payment. If the initial capital decreases as a result of the losses of previous years, it can be supplemented (i.e. corrected) from the taxed profit (retained earnings). If the initial capital is not available in this way, the payment cannot be made. Even if the initial capital is available, dividends cannot be paid if the company has liquidity problems, does not have enough cash to meet its current obligations, or is struggling with payment difficulties. In summary, no payment can be made if:

- a) there is no taxed profit after the previous business year or retained earnings from previous years;
- b) the initial capital is missing;

⁵⁹ According to subsection 2 of Section 35, Act C of 2000 on Accounting, a company's equity shall consist of subscribed capital (decreased by the amount which has not yet been paid up), capital reserve, retained earnings, tied-up reserves, valuation reserve, and the results after tax for the current year.

- c) the company would not be able to meet its payment obligations owing to payment.

The Civil Code also contains limits for cases where the company provides payments to its members for reasons other than membership (e.g. wages and commission fees). If these payments are incompatible with the principle of prudent corporate management, the payment cannot be made. Any distribution made despite these prohibitions must be reimbursed by company members, regardless of whether the member was aware of the lack of payment conditions or not.

One of the rights of members is that they can receive a share from the company's profits, which is called dividend. The condition for the payment of dividend is that the members' meeting expressly decides on it when accepting the annual report, at which point the taxable result (retained earnings), or a specified part thereof, can be paid to the members as a dividend. It is not obligatory for companies to pay dividends, as they can also decide to use taxable results increase the company's own capital. The members' meeting can decide on the payment of dividends once a year, simultaneously to the approval of the financial report. Members are entitled to dividends only to the percentage consistent with their core deposit already paid, meaning that until the core deposit is fully paid, the member is only entitled to the proportional part of the dividend. Only those who were members when the decision on the payment of a dividend was made are entitled to dividends.

The initial capital of a company can be increased in two ways, namely a) by the payment of additional financial contributions, and b) by converting company assets in excess of the initial capital into initial capital. The legal condition for increasing the initial capital by completing new core deposits is that the members have provided their respective share of capital contribution in full. The members may decide on the increase of the initial capital by a resolution, which shall contain the amount of the increase, adopted by at least a three-quarters majority. The initial capital can be increased by financial or asset contribution, and the date of payment of the capital contributions has to be determined. Where the initial capital is increased by financial contribution, the members shall have preferential rights within 15 days following the date of decision for the capital increase. If all members fail to exercise their preferential rights, the members' meeting shall designate other persons upon whom to confer the right to provide the financial contribution. In the process of increasing the initial capital through the provision of additional capital contributions, the regulations on the provision of capital contributions, on the applicable deadlines and consequences in the event of delay, and on the liability for the value of asset contributions shall be duly applied. The company is then required to amend its memorandum of association so as to reflect the increase of capital. The new members participating in the initial capital increase shall supply a statement executed in an authentic instrument or in a private deed representing conclusive evidence for acknowledging the provisions of the memorandum of association as binding.

With a decision of at least a three-quarters majority of the members meeting, the company can increase its initial capital from its assets available in excess of the initial capital. The condition for this is that there are sufficient funds available for the capital increase according to the balance sheet of the annual account prepared for the previous financial year, or according to the interim balance sheet of the current year. Any increase of the initial capital from assets in excess of the initial capital shall increase the capital contributions of members consistent with the percentage of their previous contributions.

The private limited liability company can decide to reduce the initial capital for several reasons, such as through a capital withdrawal, referring to when a member wants to get back a part of his/her financial contribution. The private limited liability company can also operate loss-making, in which case it can use a part of the initial capital during management. The initial capital must then be reduced to the amount reduced due to the loss, and the reason for the capital reduction may be the reorganisation of the own capital components (e.g. by reducing the share capital and increasing the reserve). Members may tender the decision for the reduction of the initial capital by at least a three-quarters majority, and the capital contributions of members shall be decreased by the amount of the reduction in the percentage of their existing core deposits.

Considering that the reduction of the initial capital leads to a decrease in the assets that form the basis for the satisfaction of creditors, the Accounting Act determines several requirements, describing that the company's resolution shall specify:

- a) the amount of reduction;
- b) the core deposit of each member after the capital reduction;
- c) the reason for the reduction.

The managing director shall notify the Court of Registry of the reduction of the initial capital within 30 days thereof and take measures for the disclosure of the capital reduction in the Company Gazette at least on two occasions. The two disclosures shall be made at least 30 days apart. The public notice shall contain the essence of the decision on the capital reduction, and - if the company's creditors are likely to request safeguards - a call to the company's creditors to make their request for safeguards known. The company shall directly send a copy of the public notice to the company's known creditors at the time of publication of the first public notice.

The holders of any claim against the company arising before the first disclosure of a public notice on the initial capital reduction may demand adequate safeguards from the company. There are some examples, such as if the creditor's claim is already secured, if it is not justified in light of the company's assets and liabilities and financial position, or if a capital restructuring has taken place. If the claim of the creditor is rejected, the creditor may turn to the court. A reduction of the initial capital may not be registered until the creditor entitled thereto is provided adequate safeguards, or until the court ruling on the refusal of the creditor's request becomes operative. In case of a reduction of capital, the memorandum of association has to be amended.

The reduction of capital can only be registered if the company is able to provide evidence for the notification of creditors and that the eligible creditors received adequate safeguards.

4.5. Limited Companies

A limited company (*részvénytársaság*, or *rt.*) is a business association founded with a share capital comprising shares of a pre-determined number and nominal value. The name of the subscribed capital is here share capital. The sum total of the nominal value of all shares shall comprise the share capital of a limited company. The obligation of shareholders to the limited company extends to the provision of funds covering the nominal value or the accounting par value of shares. The shareholder's financial contribution is the fulfilment of the nominal value or the accounting par value of the share subscribed by him/her. The amount of cash contributions at the time of foundation may not be less than 30% of the share capital, and a limited company cannot be founded only by asset contribution.

Limited companies can assume two types of operation:

- a) if its shares are listed on a stock exchange, it shall be recognised as a public limited company (*nyrt.*),
- b) if its shares are not listed on any stock exchange, it shall be recognised as a private limited company (*zrt.*).

The share capital of a private limited company may not be less than five million Hungarian forints, while that of a public limited company may not be less than twenty million Hungarian forints. Asset contribution⁶⁰ is regulated in the following manner. In the case of a limited company, it is a guarantee rule that the value of the asset contribution is not determined by the member. It can have an officially-accepted value or a professionally-assessed value, as follows:

- a) it can be evaluated by an auditor or another expert qualified for the asset in question. In the report, the auditor or expert shall provide a statement indicating whether the value of such contribution complies with the quantity and nominal value of the shares to be provided in exchange.
- b) It can be regarded as an accepted value if the shareholder that has provided the asset contribution has an audited financial report (containing the value of the contribution) prepared within three months from the date when the contribution was provided.
- c) It can be regarded as an accepted value if the contribution comprises assets whose price are listed on the stock exchange.

A limited company may be registered only if, prior to the submission of the application for registration, the following is done:

60 Articles 49 and 50, Directive (EU) 2017/1132.

- a) the founders who agreed to provide contributions in cash have paid at least 20% of the nominal value or accounting par value of the shares which they have committed to subscribe for;⁶¹
- b) asset contributions have been made available to the company, with the exception being if the value of such asset contributions is less than 20% of the share capital.

Shareholders shall pay up the nominal value or accounting par value of the shares to the limited company in full within one year from the date when the limited company is registered, and shall place asset contributions at the limited company's disposal in whole within three years from the date of registration. The articles of association cannot provide for a later date.

Shareholders may benefit from the distribution of assets under the conditions⁶² presented herein. For a limited company, the shareholders are not liable for the company's obligations, and thus, as a general rule, only the own capital of the company⁶³ provides coverage for the claims of the company's creditor. In view of this, company law regulations limit the conditions under which the share capital can be reduced by payments to shareholders. Specifically, the company may make any distribution from its own funds (i.e. the assets of the company available at a given time, including the share capital) to a shareholder, on account of his membership, during the company's existence solely in the cases defined in the Civil Code, and from the untied retained earnings supplemented by the previous financial year's after-tax profit – except in cases of the reduction of the share capital. The provision concerns payments to shareholders and does not include payment to third parties (e.g. employees, contractual partners, and other creditors).

It is the responsibility of the general meeting to approve the annual account, as prescribed in the Accounting Act, which reveals whether the company generated a taxable result or profit during the activities of the previous year. The company can decide to pay this in the form of a dividend or create a reserve from it. The company can create reserve in more years. If, according to the company's books, the retained earnings, or a part of it, is not tied up for a specific purpose (i.e. it is free), then it can be used for payment. If the share capital decreases as a result of the losses of previous years, it can be supplemented (i.e. corrected) from the taxed profit (retained earnings). If the share capital is not available in this way, then payments cannot be made. Even if the share capital is available, dividends cannot be paid if the company has liquidity problems, does not have enough cash to meet its current obligations, or is struggling with payment difficulties. In summary, no payment can be made if:

61 Article 48, Directive (EU) 2017/1132.

62 Article 56, Directive (EU) 2017/1132.

63 According to subsection 2 of Section 35, Act C of 2000 on Accounting, a company's equity shall consist of subscribed capital (decreased by the amount which has not yet been paid up), capital reserve, retained earnings, tied-up reserves, valuation reserve, and the results after tax for the current year.

- a) there is no taxed profit after the previous business year or retained earnings from previous years;
- b) the share capital is missing;
- c) the company would not be able to meet its payment obligations due to the payment.

The Civil Code also contains limits for cases where the company provides payments to its shareholders for reasons other than membership (e.g. wages and commission fees). If these payments are incompatible with the principle of prudent corporate management, the payment cannot be made. Any distribution made despite these prohibitions must be reimbursed by shareholders to the company, regardless of whether the shareholder was aware of the lack of payment conditions or not.⁶⁴

The Civil Code provides the rights to a group of shareholders (controlling at least 5% of the voting rights in a private limited company, or at least 1% of the votes in a public limited company), and to any creditor of a limited company who has a claim that is not yet due at the time of distribution and reaches 10% of the share capital, to request the Courts of Registry to appoint an independent auditor to examine the legality of such distribution within a preclusive period of one year from the time of distribution.

Shareholders are entitled to receive a share from the limited company's taxed profit that is available and has been ordered for distribution by the general meeting in the percentage consistent with the nominal value of their shares. Dividends shall be paid to shareholders listed in the register of shareholders at the time when the general meeting adopting the decision for the payment of dividends was held. Shareholders shall be entitled to receive dividends based on the capital contributions they have already paid up.

Additionally, the general meeting of a limited company decides on the increase of the share capital, for which there are different types, and which are explored below.

1. Share capital increase through the issue of new shares

The share capital increase through the issue of new shares takes place in a similar way to the increase of the initial capital: the increase of the share capital is determined by a resolution of the general meeting, and the articles of association must be modified. Where the share capital is increased by way of a cash infusion, the shareholders have preferential rights for share subscription.⁶⁵ If they do not use this right, third parties can subscribe to new shares.

⁶⁴ Article 57, Directive (EU) 2017/1132.

⁶⁵ Article 72, Directive (EU) 2017/1132.

2. Share capital increase from assets not part of the share capital

A limited company may transfer all or part of its assets, other than the share capital, to increase the share capital. This is possible if according to the balance sheet of the annual account for the previous financial year or the interim balance sheet of the current year, there are sufficient additional funds available for the capital increase.

3. Share capital increase through the issue of employee shares

The company gives employee shares free of charge or at a discount. In such a situation, the employee shares shall be covered from the limited company's assets not forming part of the share capital

4. Share capital increase through the conversion of convertible bonds

Here, bonds are issued first and shares are issued later, and the latter occurs along an increase in the share capital, since the sum of the nominal value of the shares gives the share capital. When the bonds are issued, the shareholders only decide on a conditional share capital increase by creating the basis for the subsequent, future share capital increase. Two types of bonds can be issued, which are convertible or equity bonds. Convertible bonds shall be exchanged for shares at the request of the bondholder; equity bonds shall be converted into shares upon the subsequent occurrence of certain requirements specified in the bonds.

The share capital of a limited company may be reduced for the same reasons as those relevant and applicable to the reduction of the initial capital, which are a) withdrawal of equity, b) consolidation of losses, and c) capital structure transformation. The decision for the reduction of the share capital lies with the general meeting, and the articles of association has to be modified.⁶⁶ Additionally, the general meeting must determine the amount by which the share capital is being reduced, the shares affected by the capital reduction, and the procedure for the implementation of the reduction of share capital. The resolution of the general meeting on the reduction of share capital shall be considered effective if the holders of shares considered affected under the articles of association grant their explicit consent to the reduction of the share capital by way of the means specified in the articles.⁶⁷

The reduction of the share capital shall be implemented by reducing the quantity or the nominal value of the share, or by using these two methods in tandem. The reduction of the share capital also affects the creditors of the limited company, and thus the Civil Code, in accordance with Directive (EU) 2017/1132, regulates it with almost the same regulations as for private limited liability companies, as follows:⁶⁸

⁶⁶ Article 73, Directive (EU) 2017/1132.

⁶⁷ Article 74, Directive (EU) 2017/1132.

⁶⁸ Article 75, Directive (EU) 2017/1132.

- a) publication of the reduction of share capital in the Company Gazette;
- b) direct notification of the known creditors;
- c) provision of safeguards to creditors if the legal conditions are met;
- d) reference to the Court of Registry by the creditor in the event of a dispute.

The reduction of the share capital may not be registered until the creditor is provided adequate safeguards or the court ruling on the refusal of the creditor's request becomes operative.

4.6. Protection of Creditors and Equity Maintenance

In accordance with Directive (EU) 2017/1132, the regulations of both private limited liability companies and limited companies provide that the member's meeting or the general meeting must be called in order to provide for the necessary measures in case of the serious loss of the subscribed capital.⁶⁹ Cases of mandatory convocation include those outlined here:

- a) company's equity has dropped to two-thirds of the share capital due to losses;
- b) company's equity dropped below the amount limit defined by law;
- c) company is on the brink of insolvency or has stopped making payments;
- d) company's assets do not cover its debts.

5. Poland

5.1. Limited Liability Company

In a limited liability company, the minimum amount of share capital is 5,000 PLN (Art. 154§1 Commercial Companies Code, CCC).⁷⁰ The amount of share capital should be expressed directly in a specific quantity. It is not acceptable to determine the amount of share capital in a foreign currency (e.g. as the equivalent in PLN) because the share capital, as a numerical size, must have a fixed, precise amount. Otherwise, it would not be possible to include this quantified amount in the liabilities of the company's balance sheet, and the floating exchange rate would violate the requirement to determine the share capital in a fixed amount. Only a precise designation in the Polish currency will ensure the principle of constancy. An unprecise amount would also be contrary to the principle of permanence to determine the amount of the share capital "from amount to amount". The share capital may be divided into shares of equal or unequal nominal value, and the amount of the share of individual owners may be less than the value of assets contributed by them to the company. This surplus is called *agio* and shown as supplementary capital.⁷¹

⁶⁹ Article 58, Directive (EU) 2017/1132.

⁷⁰ Code of Commercial Companies (Journal of Laws 2000 No. 94, item 1037).

⁷¹ Hejnar and Micherda, 2011, p. 38.

In a limited liability company, the provisions of the CCC specify only the minimum statutory amount of share capital, while the upper limit is left to the discretion of the shareholders as to what is the necessary or adequate amount or how they intend to finance the company's operations. In this sense, the minimum amount of share capital is, at most, the so-called seriousness threshold (Germ. *Seriositätsschwelle*). If the contribution to the company in order to cover the share is an in-kind contribution, the articles of association should specify in detail the subject of this contribution and the person of the partner making the contribution, as well as the number and nominal value of the shares taken up in exchange (Art. 158 § 1 CCC).

The increase of the share capital from own funds is regulated in Article 260 § 1 CCC, consisting in the transference of funds from the supplementary and/or reserve capital created from the company's profit to the share capital. An increase in the share capital usually involves an amendment to the articles of association, unless these articles state that the increase to a certain value does not constitute an amendment to the articles.⁷²

A limited liability company may be established using an information technology system in the case of a company whose agreement was concluded using the template included in the system, and only cash contributions can be made to cover the share capital. The share capital should be paid up no later than within seven days from the date of its entry in the register. An increase in the share capital made after the entry in the register of the company whose agreement was concluded using the model agreement may be covered only by cash contributions; this occurs if the amendment to the articles of association was made using the template resolution amending the articles of a limited liability company, and if the amendment to the articles was made in the form of a notarial deed - also requiring contributions in kind.

The share capital may be increased in a limited liability company under the existing provisions in the articles of association providing for the maximum amount of the share capital increase and the date of its increase, or as a result of an amendment to the articles (Art. 257 CCC). In the first case, the shareholders adopt a resolution by an absolute majority of votes (unless the agreement provides otherwise) and the resolution does not have to be recorded by a notary public. This allows the company to significantly speed up the proceedings and reduce their costs. The second case involves the need to amend the articles of association, which then also gives rise to the need for the shareholders' resolution being adopted by a two-thirds majority of votes and recorded by a notary public.

Pursuant to Article 257 § 2 CCC, the share capital is increased by increasing the nominal value of existing shares or establishing new ones. As a result, not every capital increase results in a real inflow of new funds to the company, but rather only in the case of new contributions made by existing or new ones. The increase through capitalisation of profit or conversion of receivables into shares will be nominal because it entails a lack of a new source of financing concomitant to an increase in

72 Spoz, 2017, p. 199.

the part of the company's assets that is subject to a specific legal regime,⁷³ and may authenticate the entity.⁷⁴

A reduction of the share capital in a limited liability company below the minimum amount is unacceptable, unless the share capital is increased at least to the original amount at the same time it is reduced (Article 264 § 2 CCC),⁷⁵ as a result of which the share capital will amount to at least 5,000 PLN. A resolution to reduce the share capital below the statutory limit is invalid as it is contrary to the Act (Article 58 § 1 of CC).^{76,77} Therefore, maintaining the minimum amount of share capital applies not only at the time of establishment but also in the course of the company's activity.

Article 263 § 1 CCC allows for the possibility of reducing the share capital in a limited liability company. Apart from the exception specified in Article 199 §§ 4 and 5 CCC,⁷⁸ the share capital may be reduced only by way of a shareholders' resolution on the reduction of the capital by amending the articles of association. It is not possible to reduce it under the existing provisions of the articles of association.⁷⁹ A resolution on the reduction of the share capital should specify the manner of reducing the capital, and since the nominal value of the sum of all shares must be equal to the share capital, the reduction in capital must be reflected in the shareholding structure. A reduction may be effected, analogous to an increase, by redeeming a part of the shares, reducing the nominal value of the shares, or combining both methods.⁸⁰

73 Weiss, 1994, p. 2.

74 Reasons of the resolution of the Supreme Court of 11 March 1997, III CZP 6/97.

75 Article 264 § 1. The Management Board shall immediately announce the adopted reduction of the share capital, calling on the company's creditors to lodge objections within three months from the date of announcement, if they do not agree to the reduction. Creditors who have lodged an objection within this period should be satisfied or secured by the company. Creditors who have not raised objections are deemed to have agreed to the reduction of the share capital. § 2. The provisions of § 1 shall not apply if, despite the reduction of the share capital, the payments made to the share capital are not returned to the shareholders, and at the same time the share capital is reduced, it is increased at least to the original amount.

76 Civil Code of 23 April 1964. Journal of Laws, 1964, Nr 16, item 93. Journal of Laws 2022, item 1360.

77 Article 58 § 1. A juridical act contrary to the law or intended to circumvent the law shall be null and void unless the relevant provision provides for another result, in particular that the invalid provisions of the legal transaction shall be replaced by the relevant provisions of the law [...].

78 Pursuant to Article 199 §§ 4 and 5, CCC, the articles of association may provide that the share shall be redeemed in if a specific event occurs without a resolution of the shareholders' meeting. The provisions on redemption shall then apply. In the occurrence of an event specified in the articles of association, the management board should immediately adopt a resolution to reduce the share capital, unless the redemption of the share is made from net profit. Thus, in the case of redemption of a share from pure profit (i.e. from the amount that can be allocated for distribution among the shareholders), there shall be no reduction in the share capital or amendment of the articles of association. The basis for payment by the management board of remuneration to a shareholder from pure profit is a redemption resolution. Siemiątkowski and Potrzebszcz, 2001, p. 342.

79 Szajkowski and Tarska, 2005, p. 794.

80 Judgment of the Provincial Administrative Court in Warsaw of 2 June 2015, III SA/Wa 942/15.

A resolution on the reduction of the share capital, both adopted by the shareholders and management board, becomes effective upon entry in the register (Article 255 §§ 1 and 2 CCC).

The share capital shall be reduced in accordance with the convocation procedure specified in Article 264 CCC. This means that the management board must immediately announce the adopted reduction of the share capital in *Monitor Sądowy i Gospodarczy*,⁸¹ calling on the company's creditors to raise objections within three months from the date of announcement if they do not agree to the reduction. Creditors who have lodged an objection within this period should be satisfied or secured by the company. Creditors who have not raised objections are deemed to have agreed to the reduction.

Regarding dividends, as a rule, shareholders have equal rights and obligations in the company. If the articles of association provide for interests with special rights, those rights should be specified in the articles (preference shares). Preference may concern, in particular, voting rights, the right to dividends, or the manner of participating in the distribution of assets in the event of the liquidation of the company. Pursuant to Article 196 CCC, a preferential dividend may be granted to the holder of dividends which does not exceed by more than half the dividend to which non-preferential shares are entitled (preferential dividend). Preferential dividend shares shall not enjoy priority satisfaction over other shares, unless otherwise provided in the articles of association.

Shareholders entitled to the dividends for a given financial year are shareholders who were entitled to shares on the day of adopting the resolution on profit distribution. The articles of association may authorise the general meeting of shareholders to determine the date on which the list of shareholders entitled to dividends for a given financial year (dividend date) is established. If the company has sufficient funds for payment, the articles of association may authorise the management board to pay shareholders an advance towards the expected dividend for the financial year.⁸²

5.2. Simple Joint-Stock Company

In a simple joint-stock company, the legislator introduced that the share capital should be at least 1 PLN. Pursuant to Article 300(3) § 2 CCC, the amount of share capital is not specified in the articles of association, and the provisions on amending the articles of association do not apply to changes in share capital amounts. The reduction, or in fact the complete exclusion, of the need for the founders of the company to acquire funds to cover the share capital (compared to a joint-stock company, where it is 100,000 PLN) is considered to be the “driving force” for the process of creating simple joint-stock companies in Poland.⁸³ The asset structure based on share capital is a response to

81 A nationwide official journal, in which announcements and announcements required by the CCC, the Code of Civil Procedure, the Act on the National Court Register, the Accounting Act and other acts are published.

82 Articles 193 and 194, CCC.

83 Nędzyński, 2021, p. 242.

the growing criticism of the institution of share capital.⁸⁴ This model refers to the solutions of American law, which for a long time has not required companies to have a share capital. The property structure of a simple joint-stock company is based on the model of shares without par value, also known as non-nominal shares, as well as share capital. Albeit the same name is used, the share capital for simple joint-stock companies is not the same as that used in limited liability companies and joint-stock companies. The legislator's intention was to create the most flexible property structure possible, which is particularly appropriate for the case of contributions in the form of work and services in exchange for shares, hence adapting the structure to the conditions of various ventures, especially start-ups. This is to facilitate starting and conducting business activity in the form of a capital company for all investors, and therefore increase the attractiveness of Polish company law in the era of increasing competition between the regulations of European Union countries.⁸⁵

The issues of dividend payment in a simple joint-stock company differ from those in a limited liability company and a regular company, with Article 300(15) CCC being crucial in this respect.⁸⁶ It describes two ways of limiting payments to a shareholder, namely 1) carrying out the balance sheet test provided for in Article 300(15) § 2, and 2) conducting the solvency test provided for in Article 300(15) § 5. These requirements must be met cumulatively.

84 Kotowicz, 2014, pp. 26–27.

85 Explanatory memorandum to the bill, p. 17.

86 Article 300(15), CCC § 1. A shareholder shall have the right to participate in the profit and make a disbursement from the share capital in the amount as shown in annual financial statements, said amount being allocated for being paid out in a resolution of shareholders, unless the company deed provides otherwise.

§ 2. An amount to be distributed among shareholders shall not exceed the aggregate profit for the last financial year, undistributed profits from previous years created from the profit from reserve capital which may be allocated for the disbursement of the dividend and the amount from the share capital which has been allocated for disbursement of the dividend. This amount shall be reduced by uncovered losses, own shares, and sums which under this Act or under the company deed should be allocated from the last financial year's profit for the supplementary capital which shall not be allocated for the disbursement of the dividend.

§ 3. Save as otherwise provided in the company deed, the dividend shall be distributed in relation to the number of shares.

§ 4. Disbursement from the share capital for the benefit of shareholders shall not lead to reduction of the amount of this capital below 1 zloty. The provisions of Article 456(1) and (2) shall apply accordingly to the disbursement from the share capital from the part of this capital constituting 5 per cent of the aggregate liabilities of the company as shown in the approved financial statements for the last financial year.

§ 5. Disbursement for the benefit of shareholders shall not lead to loss, on the part of company, in normal circumstances, of a capability to satisfy matured pecuniary liabilities within six months from the day of making the disbursement.

§ 6. Disbursement from the share capital may be made after entry of a change in the amount thereof in the register. In the case referred to in paragraph 4, the provision of Article 458, paragraph 2, subparagraph 4 shall apply accordingly to an application for making an entry into the register of the share capital amount.

The balance sheet test is commonly used to describe methods to limit distributions to shareholders. This test permits payments to shareholders only to the amount that results from a calculation based on certain amounts resulting from the company's balance sheet (balance sheet surplus test).⁸⁷ The new treatment of distributions for a limited liability company and a simple joint-stock company is manifested mainly in Article 300(15) § 2 CCC, which allows distributions to shareholders also from a fund created from contributions (i.e. in this case from share capital). The only restrictions in this case are that 1) such a payment may not lead to a reduction of the share capital to an amount lower than 1 PLN [Art. 300(15) § 4 CCC], 2) and the payment from share capital is subject to prior entry in the register and, in some cases (e.g. when the payment exceeds 5% of the company's total liabilities resulting from the approved financial statements for the last financial year), also to a convocation procedure.

Another important novelty in a simple joint-stock company is the solvency test described in Article 300(15) § 5 CCC, which states that, in normal circumstances, disbursement for the benefit of shareholders shall not lead to loss, on the part of company, of a capability to satisfy matured pecuniary liabilities within six months from the day of making the disbursement.

5.3. Joint-Stock Company

In a joint-stock company, the share capital should be at least 100,000 PLN, while the nominal value of shares may not be lower than 1 PLN (Art. 308 CCC). Therefore, the law sets a minimum threshold for the share capital of a joint-stock company, and the company's statute may stipulate the minimum or the maximum amount of the share capital. In such a case, the company shall be formed upon subscription by shareholders for such a number of shares - whose total nominal value equals at least the minimum amount of the share capital determined in Article 308 § 1 CCC (100,000 PLN) and upon their creation by the management board - of a representation in the form of a notarial deed on the amount of the subscribed share capital. The amount of the subscribed capital shall fall within the limits stipulated in the statutes.

In the event of a reduction in the share capital, its amount, as well as the nominal value of the shares, may not be lower than the statutory minimum, that is, lower than 100,000 PLN (Art. 455 § 4 in conjunction with Art. 308 § 1 CCC). A reduction of the initial capital shall be effected by way of an amendment to the company articles, by reducing the nominal value of shares, consolidating shares, redeeming a proportion of shares, and in the case of division by separation (art. 455 § 1 CCC). The management board shall immediately announce the adopted reduction of the share capital, calling on creditors to submit claims against the company within three months from the date of announcement (Article 456 § 1 CCC). There is no obligation to conduct a convocation procedure (i.e. to announce a reduction in the share capital and call creditors) if the conditions specified in Articles 360 § 2 and 457 § 1 CCC meet Article 457 § 1 point 1 CCC. The latter refers to a situation in which despite the reduction of the share

87 Komarnicki, 2004, p. 103.

capital, no payments are made to shareholders, in particular the contributions made by them are not returned to shareholders, there are no payments for the redeemed shares, nor shall they be exempt from contributions to the share capital. In such a case, together with the reduction, the share capital must be increased at least to the original amount (i.e. the amount before the resolution on the reduction) by way of a new issue, in which the shares are fully paid up. Therefore, there is no obstacle to an increase by a larger amount in this mode.⁸⁸

An increase in the share capital of a joint-stock company can be carried out in several ways. The ordinary share capital increase is described in Article 431 CCC. The share capital increase is a formalised process, but since currently there are various types of increase, certain common rules set out in Articles 431–433 CCC apply to all procedures, at the same time that each type of increase features individualised procedures. Therefore, we can distinguish a simple increase in the share capital (e.g. increase using the company's own funds, although it is a specific procedure) from an increase based on the target capital and from a conditional increase in the share capital.⁸⁹

Shareholders have the right to participate in the profit shown in the audited financial statements that have been allocated by the general meeting for distribution to shareholders. The profit is distributed in relation to the number of shares, and if the shares are not fully paid, the profit is distributed in relation to the contributions made to the shares. The statutes may provide for a different method of distribution of profits.⁹⁰ The amount to be distributed to shareholders may not exceed the profit for the last financial year, increased by undistributed profits from previous years and by amounts transferred from supplementary and reserve capital created from profit, which may be allocated for dividend payments. This amount should accordingly be reduced by uncovered losses, own shares, and amounts which, in accordance with the law or statutes, should be allocated from the profit for the last financial year to supplementary or reserve capital. It is possible to pay an interim dividend, and the provisions CCC allow the payment of advances towards future (possible) dividends. In contrast to a limited liability company, the provisions concerning a joint-stock company seem to be better formulated in this respect, mainly owing to more detailed regulations on the procedure for payment of advances towards profit and provisions defining the principles of liability for unlawfully-collected advances.⁹¹

88 See Kidyba, 2023.

89 See Kidyba, 2023.

90 Considering Articles 348, 349, 351§4, and 353, CCC.

91 See Kidyba, 2023.

6. Romania

6.1. Legal (Share) Capital

The term *company capital* (*capital social*) refers to the portion of assets explicitly designated as such in a company's founding documents. This capital represents the contributions made by the company's members or shareholders to establish and operate the business, and is not synonymous with the company's total assets. While total assets include all resources the company owns (e.g. cash, inventory, property, and investments), *company capital* is merely a subset of these resources, recorded as the initial or subsequent contributions specified for this purpose.

The total assets of a company are better captured by the concept of *equity* (*capital propriu*), representing the residual interest in the company after all liabilities have been accounted for.⁹² Unlike company capital, equity reflects the company's actual financial standing, incorporating not only the original investments but also the effects of retained earnings, accumulated profits or losses, and other adjustments over time. Thus, while company capital serves as a fixed, legally-defined benchmark of shareholder contributions, it is the equity that provides a more dynamic and comprehensive picture of the company's current financial health. This distinction is crucial for understanding the financial structure of a company and evaluating its performance or solvency.

It is important to recognise that *company capital* is not inherently illiquid; it can be employed for the company's operational and strategic interests in accordance with legal and regulatory requirements. Moreover, the company's liability is not confined to the amount of its registered capital; instead, a company is fully liable for its obligations, and this liability extends to the entirety of its assets, including those that exceed the registered capital. In the case of a joint-stock company, the company's total assets may exceed its company capital even at the time of establishment. This situation arises when shares are issued at a price above their nominal value, with the surplus (referred to as share premium) contributing to the company's additional equity.

In Romania, a joint-stock company can be established through two primary methods, either by the full and simultaneous subscription of capital by the signatories of the founding document, or by initiating a public offering to gather the necessary capital. When the establishment occurs through the full and simultaneous subscription of capital by all signatories, there is a regulatory requirement that at least 30% of the subscribed capital must be paid in at the time of incorporation. This stipulation highlights that the entirety of the subscribed capital is not required to be fully paid at the time of the company's establishment. This distinction forms the basis for differentiating between *subscribed capital*, which represents the total amount of capital

committed by shareholders, and *paid-in capital*, which is the portion of this commitment that has actually been fulfilled at a given time.

The unpaid portion of the subscribed capital must nonetheless be contributed within legally defined timelines. For shares issued based on cash contributions, the remaining unpaid capital must be fully paid within a period of 12 months from the date of the company's registration. For shares issued in exchange for in-kind contributions, the period within which the remaining portion must be paid extends to a maximum of two years from the date of registration. These provisions aim to ensure that the company gradually secures the full amount of its subscribed capital while offering some degree of flexibility to shareholders in fulfilling their financial obligations.

For limited liability companies, the regulatory framework originally imposed a stricter requirement: they companies were mandated to have their subscribed capital fully paid at the time of establishment. Partial payment of capital at the time of incorporation was not permitted for such entities, reflecting a more conservative approach to ensuring financial stability from the outset. However, significant changes to these regulations were introduced in 2022, according to which limited liability companies are now required to pay at least 30% of their subscribed capital within a period of three months following registration, and before any operation is performed in the name of the company. Worthy of note is that this initial payment must be completed before the limited liability company can commence operations under its registered name, thereby maintaining a safeguard for financial accountability.

The remainder of the subscribed capital for a limited liability company must also be contributed within specific deadlines, which are aligned with the principles applied to joint-stock companies. For monetary contributions, the unpaid portion of the subscribed capital must be paid within 12 months from the date of the company's registration. For in-kind contributions, the unpaid portion must be contributed within no more than two years from the date of registration.

This regulatory evolution reflects the effort to offer greater flexibility to entrepreneurs and shareholders in fulfilling their financial obligations over a reasonable period. By distinguishing between subscribed capital and paid-in capital, and by introducing staggered payment schedules, the legal framework governing both joint-stock companies and limited liability companies has become more accommodating to the practicalities of business operations, while still maintaining safeguards to protect creditors and ensure the financial viability of corporate entities.

The capital of a joint-stock company, and that of a limited partnership with shares (a corporate form that, while legally recognised, is not commonly utilised in Romania), must comply with the legal requirement of maintaining a minimum threshold of 90,000 RON. This minimum capital requirement serves as a safeguard to ensure that such companies have a baseline level of financial stability and credibility. Furthermore, the government has the authority to adjust this minimum capital

amount every two years based on exchange rate fluctuations, with the goal of aligning the minimum capital requirement with the RON equivalent of 25,000 EUR.⁹³

The reduction of company capital below the legal minimum is strictly regulated, reflecting the importance of maintaining this threshold as a critical benchmark. A reduction in company capital below the legal minimum is permissible only under specific conditions, a prominent exception being when a company transitions to a different corporate form. Other more sparse conditions involve a reduction being accompanied by a simultaneous capital increase to bring the capital back to at least the legally required minimum. This dual decision (i.e. reducing and simultaneously raising the capital) must be adopted concurrently and in compliance with the procedures established by corporate law.

Failure to comply with these provisions can have serious legal consequences. Any interested party, including creditors or other stakeholders, has the right to petition the court to dissolve the company if the company capital is reduced below the legal minimum in violation of the law. However, the dissolution of the company is not automatic upon the filing of such a petition, as the law provides a mechanism to remedy the situation and avoid dissolution. If the company raises its capital to the legal minimum before the court's dissolution decision becomes final, the company will not be dissolved. This safeguard ensures that companies are given an opportunity to rectify their capital deficiencies and continue their operations without unnecessary disruption, provided that they act promptly and in good faith to meet the legal requirements.⁹⁴

Historically, the establishment of a limited liability company in Romania required a minimum capital of 200 RON, equivalent to approximately 50 EUR.⁹⁵ This capital was divided into equal company shares, known as *părți sociale*. The law specified that the minimum nominal value of a company share was set at 10 RON. Consequently, a limited liability company with the minimum required capital of 200 RON could be structured to have a maximum of 20 company shares, each bearing a nominal value of 10 RON. However, the legal framework also permitted the use of higher nominal values for company shares. For instance, it was entirely feasible to establish a limited liability company with just two shares, each with a nominal value of 100 RON. The nominal value of these shares was carefully determined to reflect the ownership proportions mutually agreed upon by the company's members, ensuring clarity and fairness in governance and profit distribution.

Significant legislative changes were introduced with the passage of Act No. 223 of 2020.⁹⁶ This act abolished both the minimum capital requirement for limited liability companies and the prescribed minimum nominal value of company shares. Under the current legal framework, the nominal value of a company share can be set at

93 Piperea, 2014, p. 123.

94 Piperea, 2014, pp. 124–125.

95 Piperea, 2014, pp. 126–127.

96 Veress, 2024, pp. 99–100.

any amount, granting company founders greater flexibility for structuring their business. As a result, a limited liability company can now be established with a capital as low as 1 RON (e.g. a limited liability company with a capital of 2,000 RON could now issue 2,000 company shares, each with a nominal value of 1 RON).⁹⁷ This shift represents a marked departure from previous practice and significantly alters the traditional characterisation of these companies. The removal of these requirements has blurred some of the distinctions that previously set limited liability companies apart from other corporate forms. In particular, limited liability company shares can now resemble stocks owing to their nominal flexibility. Despite this resemblance, the Romanian Company Act maintains a clear legal boundary: limited liability company shares are explicitly non-tradable and cannot be considered securities, thereby preserving a fundamental distinction between limited liability companies and joint-stock companies.

In general, the minimal mandatory capital level for limited liability companies has historically facilitated the establishment of such companies, offering Romania a competitive advantage compared to jurisdictions with more stringent capital requirements. This ease of establishment explains the rarity of unlimited liability companies in Romania, as the limited liability company structure offers limited liability protections while imposing no financial barriers to entry.

However, the elimination of the minimum capital requirement has not been without its drawbacks. The debates surrounding minimum capital requirements for limited liability companies in Romania echo similar discussions in other jurisdictions. For instance, excessively low capital requirements for limited liability companies can encourage the proliferation of irresponsible or non-viable businesses, the creation of fictitious entities, and abuses that ultimately harm business partners. These risks are exacerbated when capital requirements fail to provide a meaningful threshold that screens for serious entrepreneurial intent. Conversely, excessively high capital requirements could create barriers for small and medium-sized enterprises, stifling innovation and entrepreneurial activity by making it prohibitively expensive to

97 It seems that from 2026, a new regime will be introduced: a differentiated minimum share capital regime for limited liability companies based on their net turnover. According to this new regime, for existing limited liability companies that have reported a net turnover exceeding 400,000 RON in the previous financial year, the minimum share capital is set at 5,000 RON, while for newly incorporated limited liability companies and for those with a turnover under or equal with 400,000 RON it is set at 500 RON. When a limited liability company crosses the turnover threshold, it must increase its share capital to the new legal minimum by the end of the following financial year; however, subsequent decreases in turnover do not trigger a reduction of the minimum capital. As a rule, the share capital of such limited liability companies may not be reduced below the statutory minimum, except where a simultaneous capital increase is adopted to maintain it at or above that minimum, failing which any interested party may petition the court for dissolution. Limited liability companies already registered must adjust their capital accordingly within two years from the entry into force of the law. If the capital is not brought to the required level within the prescribed time, the court may order dissolution at the request of an interested party or the Trade Register, but dissolution is avoided if the capital is regularised before the dissolution judgment becomes final.

establish a business.⁹⁸ In light of these discussions, one may argue that the minimal capital requirements for limited liability companies in Romania reflect a deliberate economic policy decision, with all the potential risks signalled above. While the low capital threshold facilitates entrepreneurship and economic dynamism, it also necessitates caution to prevent its misuse and to maintain trust in the corporate sector.

In the context of Romanian corporate law, contributions to company capital, irrespective of their specific form, are collectively referred to as “*aport*” (contribution). This term, as defined by the Romanian Companies Act, encompasses various contributions, including cash contributions, in-kind contributions, and even claims as contributions. The concept of “*aport*” is therefore broad, reflecting the flexibility allowed in structuring company capital.⁹⁹ Cash contributions represent a mandatory component of the capital structure for all corporate forms under Romanian law.¹⁰⁰ This requirement ensures a baseline liquidity in the company’s initial capital, which is essential for operational needs and creditor confidence. Importantly, cash contribution must not be confused with company financing:¹⁰¹ cash contribution is an equity injection paid into (or for) subscribed capital that creates or increases membership rights and forms part of the company’s tied capital, which cannot be returned to contributors except through legally-prescribed procedures (e.g., capital reduction or liquidation). By contrast, financing refers to debt instruments such as loans, credit lines, or bonds that give rise to repayment obligations (often with interest), confer no membership status, and rank as claims in insolvency rather than residual ownership. The equity/debt distinction entails different governance, creditor-protection, and distribution rules: equity shapes voting and dividends subject to capital-maintenance constraints, whereas debt is contractually repayable and may be secured or subordinated (including shareholder loans).

In addition to cash contributions, in-kind contributions are also permitted across all corporate forms, albeit they must meet specific legal criteria, that is, possess economic value and be capable of accurate appraisal. In practice, in-kind contributions are realised through the transfer of the appropriate rights, such as ownership, usage rights, or other proprietary interests, to the company. The title to assets contributed passes according to the nature of the asset and applicable transfer formalities (e.g., land-book registration for immovables and intellectual property registry filings), and while incorporation confers legal personality, it does not, by itself, impact transfer for all asset classes. This transfer must also be accompanied by the physical delivery of any usable assets involved, ensuring that the company gains effective control over the contributed resources.

98 Sárközy, 2001, p. 153.

99 In contrast, Hungarian corporate terminology employs the term “*aport*” in a narrower sense, referring exclusively to in-kind contributions, thereby distinguishing it from cash contributions, which are treated separately.

100 Piperea, 2014, p. 130.

101 Angheni, 2013, p. 85.

Ownership and control over the assets contributed to the company typically pass to the company upon its registration in the trade register. This moment is critical because it is when the company formally acquires legal personality, thereby enabling it to own property, enter into contracts, and operate as a distinct legal entity. Unless otherwise stipulated in the founding documents or through specific agreements among members, the assets contributed to the company become its property upon this registration. This transfer of ownership solidifies the company's financial base and is integral to the capitalisation process. It is important to emphasise that the rules governing contributions to company capital serve as a foundation for ensuring transparency, accountability, and fairness among the company's members, while also providing protections for the company itself and its stakeholders. By requiring economically-valuable and appraisable contributions, as well as imposing penalties for non-compliance, the legal framework reinforces the integrity of the corporate structure and creates trust in the business environment.

The ability to contribute claims to a company's capital is subject to significant legal limitations under Romanian corporate law. Contributions made through the assignment of claims are governed by the legal regime applicable to in-kind contributions, but the use of claims, such as collectible debts, is expressly prohibited in certain corporate structures. Specifically, publicly subscribed joint-stock companies, limited partnerships with shares, and limited liability companies are barred from using claims as contributions to company capital. This restriction reflects the risks/uncertainties associated with claims as a form of capital, particularly in the context of entities with a broad base of investors or limited liability protections. More specifically, the use of claims as contributions is permissible only under specific circumstances. For instance, claims may be contributed when a joint-stock company is established through the full and simultaneous subscription of capital by the founding signatories.¹⁰² Similarly, claims can be used as contributions in general partnerships and limited partnerships, where the nature of the corporate structure allows for greater flexibility in determining the composition of company capital and members have unlimited liability. In all cases where claims are contributed, the obligation of the contributing member is not considered fulfilled at the time of assignment. Instead, the obligation is only discharged when the claim is successfully collected by the company, as stipulated in Article 84 Romanian Companies Act.¹⁰³

If the claim cannot be collected through enforcement, the contributing member remains fully liable for the uncollected amount. This liability extends to include legal interest from the due date of the contribution, as well as any damages incurred by the company, such as the costs associated with enforcement proceedings. This framework ensures that the company's capital is ultimately secured, either through the realisation of the claim or through compensation from the contributing member.

¹⁰² Angheni, 2013, p. 86; Veress, 2024, p. 100.

¹⁰³ David, 2014, pp. 288–289.

It also protects creditors and other stakeholders from potential losses arising from unrealisable or speculative contributions.

Failure to fulfil the obligation to transfer contributions to the company can have significant legal and financial consequences for the defaulting member: a member who delays transferring their agreed-upon contribution is held liable for any damages resulting from the delay. In the case of cash contributions, the defaulting member is also obligated to pay legal interest from the due date of the contribution until the obligation is fulfilled. This provision serves to underline the importance of timely contributions in maintaining the company's financial integrity and operational readiness. It is noteworthy that no interest is imposed for delayed in-kind contributions, reflecting the different nature of these contributions, which are typically tied to the valuation and transfer of tangible or intangible assets.

A member of a limited liability company may be expelled if, after being formally put in default, they fail to make the contribution to which they are bound (expulsion is not automatic). In joint-stock companies, where shareholders have not paid the instalments (calls) due on their shares, the company shall summon them to perform; if they still fail to pay, the board of directors or the management board may either pursue them for the arrears or cancel (forfeit) those shares. In place of the cancelled shares, an equivalent number of new shares shall be issued and sold, and the proceeds shall be applied to publication and sale expenses, default interest, and the unpaid instalments, with any surplus returned to the shareholders. If the proceeds are insufficient to cover all amounts owed to the company, or if the sale cannot be effected for a lack of buyers, the company may seek recovery from the original subscribers and subsequent transferees. If, after completion of these steps, the sums due to the company have still not been realised, the share capital shall be reduced without delay in proportion to the difference between the stated capital and the capital actually paid in.¹⁰⁴

The Romanian Companies Act explicitly prohibits the contribution of work or services to a company's capital, whether at the time of incorporation or as part of a subsequent capital increase.¹⁰⁵ This prohibition reflects the fundamental principle that company capital serves as a financial guarantee for creditors, providing a tangible and enforceable basis for the company's obligations. In contrast, labour contributions do not meet this standard, as work or services are inherently non-liquid and non-enforceable. Creditors cannot compel a member to perform work on behalf of the company or enforce labour obligations in the event of default. The exclusion of labour contributions therefore ensures that the company's capital remains a reliable and quantifiable resource, safeguarding the interests of creditors and reinforcing the financial integrity of the corporate entity. These limitations on the use of claims and the prohibition of labour contributions emphasise the Romanian legal framework's accent on protecting creditors and maintaining the stability of company capital. By restricting the forms of contributions to those that are economically valuable,

104 Cărpénaru, 2014, p. 240.

105 Piperea, 2014, p. 132.

appraisable, and enforceable, the law ensures that company capital fulfils its intended role as a financial foundation.

Special laws may impose minimum capital requirements that differ from those established under general company law. These specific requirements are designed to the needs and regulatory frameworks of particular industries, ensuring that companies operating in these sectors maintain sufficient financial resources to meet their obligations and protect stakeholders. Several examples illustrate these specialised capital requirements, and are explored hereinafter.¹⁰⁶ First, non-bank financial institutions, such as leasing companies, are subject to a minimum capital requirement of 200,000 EUR, reflecting the need for these entities to maintain a financial buffer appropriate to the risks and obligations associated with their operations. Furthermore, the National Bank of Romania is empowered to establish differentiated capital requirements depending on the specific type of financial activity being undertaken, as stipulated in Act No. 93 of 2009, Article 18. For mortgage lending companies, which typically manage larger financial transactions and bear greater systemic risks, the minimum capital requirement is substantially higher, equivalent to 3,000,000 EUR. These elevated requirements ensure that entities engaging in high-stakes financial activities have the necessary resources to operate responsibly and mitigate potential risks to their clients and the financial system as a whole.

Second, credit institutions, such as commercial banks, are governed by strict capital requirements and can only be established as joint-stock companies. This structural limitation stresses the importance of transparency, accountability, and regulatory oversight in the banking sector. The capital for these institutions must be fully paid at the time of incorporation, underscoring the necessity of financial stability from the outset. The minimum capital requirement for credit institutions is set by the National Bank of Romania and currently stands at 5,000,000 EUR for commercial banks. This threshold reflects the critical role of banks in the financial system, ensuring that they possess the necessary financial foundation to manage risks, safeguard deposits, and fulfil their obligations to customers and other stakeholders. Moreover, in practice, prudential rules require amounts significantly above the statutory floor.

Third, insurance companies are also subject to rigorous capital requirements, with full payment of the capital mandated at the time of incorporation. The minimum capital amount varies depending on the specific insurance sector in which the company operates, ranging from 1,200,000 EUR to 7,400,000 EUR. These variations reflect the differing levels of risk and capital intensity associated with various insurance activities. For example, companies offering life insurance, reinsurance, or large-scale coverage products typically face higher minimum capital requirements owing to the long-term liabilities and substantial reserves needed to meet their contractual obligations.

These specialised capital requirements show the role of sector-specific regulations in maintaining financial stability and protecting the interests of consumers,

creditors, and other stakeholders. By mandating higher capital thresholds for industries that manage significant financial risks or provide critical economic services, the regulatory framework seeks to minimise the likelihood of insolvency and ensure that these entities can meet their obligations even under adverse conditions. Furthermore, the requirement for full payment of capital at incorporation in high-risk sectors reflects the importance of immediate financial readiness, reinforcing the integrity and resilience of these industries. Of course, this regulation is only part of the rules governing these industries focused on reducing the risk of collapse.

In Romanian corporate law, joint-stock companies have the exclusive right to issue corporate bonds,¹⁰⁷ while limited liability companies are prohibited from doing so. The joint-stock companies bond regime applies *mutatis mutandis* to partnerships limited by shares. A bond is a financial instrument classified as a debt security, granting the bondholder specific rights concerning the company's financial operations. When a joint-stock company issues a bond, it undertakes the obligation, as the debtor, to repay the bondholder, who acts as the creditor, the bond's nominal value along with any predetermined interest or other contractual payments. These repayments must follow the conditions, timeframe, and methods explicitly stipulated in the bond. Bonds provide companies with a regulated method of securing financing while offering investors a reliable and structured debt instrument.

Only joint-stock companies are legally allowed to issue bonds, emphasizing the level of financial oversight and structural rigor inherent to this corporate form. Romanian law requires the nominal value of a bond to not be less than 2.5 RON, creating a baseline for the issuance of such instruments. All bonds within the same series must maintain equal nominal values and confer identical rights to their holders. Bonds may be issued in two formats, namely as physical paper certificates or in dematerialised form as electronic entries in financial records. The latter form has become increasingly prevalent, reflecting advancements in financial technologies and the modernisation of securities markets.

Bondholders have the right to convene a general meeting to discuss and address matters affecting their collective interests. Such meetings must be convened at the expense of the issuing company, either at the request of bondholders representing at least one-quarter of the issued and unpaid bonds or at the request of representatives appointed by the bondholders. This provision ensures that bondholders have a formal mechanism to organise and collectively express their concerns or take the decisions necessary to protect their financial rights. The general meeting of bondholders, once properly convened, possesses substantial powers that allow them to act in the interest of safeguarding their investments. For instance, the bondholders' representatives may engage with the company and legal authorities, undertake actions to protect their rights, and propose measures to ensure that their collective interests are preserved. To facilitate these actions, bondholders may agree to create a fund derived from the interest payments owed to them, which will cover expenses related to the

107 David, 2014, pp. 608–620.

protection of their rights. The meeting can also oppose amendments to the company's founding document or to the terms of the loan if such changes could harm bondholders. Furthermore, bondholders may discuss and adopt resolutions on the issuance of new bonds, ensuring that any future debt issuance aligns with their interests and the company's obligations.

Limited liability companies face stricter limitations regarding financing options, such as not being able to issue bonds, as mentioned above. Unlike joint-stock companies, LLCs are not permitted to issue bonds. This restriction originates from the structural and regulatory differences between the two corporate forms. Joint-stock companies are subject to stricter governance, transparency, and financial oversight requirements, making them more suitable for issuing bonds, which involve broader public participation or institutional investors. Limited liability companies, in contrast, are designed for smaller operations and private ownership, relying instead on other forms of financing such as equity contributions or bank loans.

6.2. The Reduction or Increase of Share Capital

The issue of reducing and increasing share capital is regulated under Articles 207–221 Romanian Companies Act,¹⁰⁸ establishing the framework, conditions, and limitations for such changes. The aim is to safeguard both the company's financial stability and the rights of its creditors and shareholders. Share capital can be reduced in the following ways:

- a) by decreasing the number of shares (for joint-stock companies) or ownership units (for limited liability companies);
- b) by reducing the nominal value of shares or ownership units;
- c) by the acquisition of the company's own shares, followed by their cancellation.

If the reduction is not motivated by financial losses, share capital can also be reduced through:

- a) a full or partial exemption of shareholders from their payment obligations;
- b) refunds to shareholders of a portion of their contributions, proportional to the reduction in share capital and calculated equally per share or ownership unit;
- c) other methods provided by law (e.g., exclusion of a company member).¹⁰⁹

Capital reduction can only be implemented after two months have passed from the date the decision is published in the Romanian Official Gazette, Part IV. The resolution must comply with the minimum capital requirements prescribed by law, explicitly state the reasons for the reduction, and detail the method to be used. Creditors whose claims predate the publication of the decision are entitled to seek guarantees for their outstanding claims that have not yet reached maturity by that date. These creditors have the right to challenge the decision by filing an opposition. Capital reduction

¹⁰⁸ Cărpenaru, 2014, pp. 721–744.

¹⁰⁹ Angheni, 2013, p. 231.

does not take effect, and payments to shareholders cannot be made, until creditors have either been paid in full, provided with appropriate guarantees, or their claims have been rejected by the court as inadmissible or unfounded. The court's ruling must become final before the reduction can proceed. At the request of creditors with claims predating the publication of the decision, the court may require the company to provide appropriate guarantees if it is reasonable to assume that the reduction of share capital might impair the likelihood of their claims being satisfied, and if the company has failed to provide adequate guarantees voluntarily. Additionally, if the company has issued bonds, it cannot reduce its share capital by making refunds to shareholders from amounts repaid for shares unless such refunds are proportionate to the value of the redeemed bonds.

The legal framework for reducing share capital reveals several challenges. First, the mandatory waiting period and creditor opposition rights create potential delays in implementing capital reductions, which can hinder a company's flexibility in managing its capital structure. Second, the requirement to provide adequate guarantees for creditors adds a financial and procedural burden on the company, particularly when the company's assets are insufficient or difficult to liquidate. Third, when bondholders are involved, there is the need to align capital reductions with the proportion of redeemed bonds, potentially complicating the company's financial planning. Furthermore, the detailed procedural requirements, such as obtaining court approval in cases of creditor disputes, can lead to lengthy and costly legal proceedings. However, these rules aim to protect creditors and ensure the company's financial health, even if they limit a company's agility in responding to market conditions or restructuring needs.

The share capital of a company can be increased through the issuance of new shares or by raising the nominal value of existing shares in exchange for new contributions in cash and/or in kind. These two approaches provide flexibility in financing, allowing companies to adapt to their specific needs. New shares bring additional funds into the company, while increasing the nominal value of existing shares can consolidate the capital structure, often signifying financial strength. The allowance for contributions both in cash and in kind recognises the diverse ways shareholders can invest in a company. Non-cash contributions, such as real estate or intellectual property, must be, as we will see, independently appraised to ensure transparency and fairness, particularly in joint-stock companies where shareholder equity is a critical concern.

New shares may also be issued by incorporating reserves (except for legal reserves), retained earnings, and share premiums. Additionally, the company can increase its capital by offsetting liquid and due claims against the company with its own shares. Incorporating reserves, retained earnings, or share premiums into share capital demonstrates financial prudence and stability. This method converts accrued profits into long-term capital, strengthening the company's equity base without requiring additional contributions from shareholders; legal reserves are excluded to ensure a safety buffer against financial uncertainties. The possibility of increasing

capital by offsetting liquid and due claims (debt-to-equity swaps) provides a practical solution for companies facing liquidity issues, allowing creditors to convert debt into equity, reducing liabilities, and potentially stabilising the company's financial structure. However, this requires careful management to ensure that creditors do not gain disproportionate control over the company. Favourable differences resulting from the revaluation of the company's assets are to be included in reserves and cannot be used to increase share capital. This prevents companies from inflating their share capital artificially through accounting adjustments, safeguarding shareholder interests and ensuring that the capital reflects genuine contributions or profits.

An increase in share capital through raising the nominal value of shares can only be decided with the unanimous vote of all shareholders, unless the increase is achieved by incorporating reserves, retained earnings, or share premiums. The requirement for unanimous shareholder approval underscores the importance of protecting minority shareholders, as the rule ensures that all stakeholders must consent to such changes and thereto prevents any shareholder from being disproportionately affected. Of course, while requiring unanimous approval for certain changes protects shareholders, it can also hinder decision-making in cases of dissent.

All these methods are equally applicable to limited liability companies. The flexibility to apply these methods to limited liability companies highlights the adaptability of corporate law to various business structures, ensuring that smaller or privately held companies have access to similar financial mechanisms as larger, publicly-traded entities.

In the case of a public subscription of shares of a joint-stock company,¹¹⁰ the prospectus for the issuance of shares - bearing the authentic signatures of two members of the board of directors or the executive board¹¹¹ - must be submitted to the trade register for the fulfilment of publicity formalities. This regulation ensures transparency and thoroughness in the process of public share issuance. By mandating the inclusion of critical information in the prospectus, the law aims to protect potential investors and maintain confidence in the capital markets. The prospectus must include the following:

- a) the date and registration number of the company in the trade register;
- b) the name and registered office of the company (both to establish the issuer's identity and legal standing);
- c) the subscribed and paid-up share capital (to provide insight into the company's financial health and profitability);

110 David, 2014, pp. 135–175.

111 The requirement for signatures from the senior management ensures accountability. The involvement of directors or executive board members signals that the information provided is verified and accurate, reinforcing investor confidence.

- d) the names and addresses of the directors, executive board members, supervisory board members, auditors, or, where applicable, the financial auditor (to offer transparency regarding the company's leadership and oversight mechanisms);
- e) the most recent approved financial statement, along with the report of the auditors or financial auditors;
- f) dividends paid over the last five years, or since the company's incorporation if fewer than five years have passed;
- g) bonds issued by the company (the last three elemental to ensure clarity about the nature of the investment being offered);
- h) the resolution of the general meeting regarding the new issuance of shares, including their total value, number, nominal value, type, details about contributions other than cash, advantages granted for such contributions, and the date from which dividends will be paid.

A subscriber may invoke the nullity of the prospectus if it does not contain all the required elements, provided that they have not exercised any shareholder rights or obligations based on the prospectus - so as to prevent abuse of this remedy.

The increase of a company's share capital through a public offering of securities and/or by allowing shareholders to trade their pre-emptive rights on the capital market is subject to the provisions of capital market-specific legislation. In the case of a capital increase through a public offering, the administrators or members of the executive board are jointly liable for the accuracy of the information presented in the issuance prospectus, the publications made by the company, or the applications submitted to the trade register office, in accordance with the provisions of capital market legislation. If the share capital increase is carried out through contributions in kind, the general meeting that decided on this must propose to the trade registry the appointment of one or more experts to evaluate these contributions. The requirement for expert evaluation ensures that contributions in kind are accurately valued, safeguarding the interests of existing shareholders and the company. The evaluation mitigates the risk of overvaluation, which could unfairly dilute existing shareholders' equity. In cases where the share capital increase is undertaken as part of a merger or division and involves, where applicable, cash payments to the shareholders or associates of the absorbed or divided company, the preparation of an evaluation report is not required, provided that the merger or division project has been reviewed by an independent expert. This simplifies the process and avoids duplicative assessments, particularly when the independent expert's role provides sufficient guarantees of fairness and accuracy. Contributions in the form of claims are not permitted. The regulation eliminates this as a potential source of valuation disputes and legal complexity. Such contributions can pose risks of inflated valuations or difficulties in verifying the claim's enforceability and value.

After the expert report has been submitted, the extraordinary general meeting, reconvened to consider the experts' conclusions, may decide to approve the share

capital increase. The resolution of the general meeting must include a description of the contributions in kind, the names of the contributors, and the number of shares to be issued in exchange for these contributions. Shares issued to increase the share capital must first be offered to existing shareholders in proportion to the number of shares they already hold.¹¹² The prioritisation of existing shareholders in subscribing to new shares ensures that they retain their proportional ownership in the company and that this is not diluted without their consent. This mechanism reflects the principle of equitable treatment among shareholders. Specifically, the court held that, when increasing share capital by issuing new shares, existing shareholders have a statutory pre-emptive right to subscribe pro rata. The general meeting's decision limiting subscription to only those shareholders physically present was unlawful and had to be set aside.¹¹³ Pre-emptive rights are a core anti-dilution safeguard and cannot be curtailed by a simple majority resolution or by attendance-based conditions, as conditioning subscription on physical presence discriminates among shareholders and violates the principle of equal treatment. Proper procedure requires an offer to all entitled shareholders, clear timelines, and proportionate allocation, with any waiver or restriction valid only if adopted in the form and with the majorities the law prescribes.

The exercise of the pre-emptive right can only occur within the timeframe set by the general meeting or the board of directors, or management board, unless the articles of incorporation stipulate a different timeframe. In all cases, the period granted for the exercise of pre-emptive rights must not be shorter than one month from the date of publication of the resolution of the general meeting (i.e. or the decision of the board of directors, or of the management board) in the Official Gazette of Romania, Part IV.¹¹⁴ After the expiration of this period, the shares may be offered for public subscription. By requiring the pre-emptive period to elapse before offering shares to the public, the regulation creates a balance between shareholder rights and the company's need to access broader financing options. Any increase in share capital carried out in violation of the rules governing the exercise of pre-emptive rights is voidable.

The court held that a share capital increase carried out by converting a creditors' certain, liquid, and due claim into shares (debt-to-equity conversion) is a distinct mechanism that benefits only the creditor and, in this context, the statutory pre-emptive right under does not operate.¹¹⁵ The ruling distinguishes conversion from setoff: the company's payment obligation is novated into an obligation to issue shares, so there is no "subscription window" for other shareholders to exercise pre-emption. While pre-emption is inoperative, the general meeting must still approve the transaction and ensure a fair exchange ratio so that the value of the claim equals the value of

112 Angheni, 2013, pp. 233–235.

113 ÎCCJ, s.com., dec. nr. 2613 din 26 septembrie 2008.

114 We cannot deny that, in some cases, companies may face logistical challenges in meeting the one-month minimum pre-emption period, especially in urgent capital-raising scenarios.

115 ÎCCJ, s. a II-a civ., dec. nr. 3388 din 1 noiembrie 2011.

the shares issued, avoiding hidden dilution. This is especially salient where the creditor is an insider or related party, warranting independent valuation and enhanced disclosure to satisfy capital-maintenance and minority-protection norms. Properly structured, conversion can deleverage and stabilise the company; improperly priced, it can be an instrument of opportunistic redistribution of control. Shareholders also have a pre-emptive right when the company issues convertible bonds.¹¹⁶ Extending pre-emptive rights to convertible bonds aligns with the principle of protecting shareholders' interests, as the conversion of such bonds into shares could also dilute their ownership.

The pre-emptive right of shareholders can be limited or waived only by resolution of the extraordinary general meeting of shareholders. The board of directors or the management board must provide the extraordinary general meeting with a written report detailing the reasons for limiting or waiving the pre-emptive right. This report must also explain how the price of the shares issued was determined. Limiting or waiving pre-emptive rights is subject to strict procedural safeguards, and the requirement for a detailed written report by the board of directors or management board and its approval by a qualified majority ensures that any such limitation serves the company's legitimate interests and does not unfairly disadvantage existing shareholders. The resolution on limitation or waiver must be adopted in the presence of shareholders representing three-quarters of the subscribed share capital and by a majority of the votes of those present. The resolution must be filed with the trade registry by the board of directors or the management board for registration and published in the Official Gazette of Romania, Part IV. The resolution of the general meeting regarding the increase of share capital produces effects only if it is implemented within 18 months from the date of its adoption. The 18-month deadline for implementing the general meeting resolution reflects a principle of expediency and prevents prolonged uncertainty for the company and its stakeholders. By requiring timely action, the regulation ensures that capital increases serve their intended purpose and do not become a source of indefinite delay or administrative backlog. If the proposed capital increase is not fully subscribed, the capital will be increased in the amount of received subscriptions only if the issuance terms explicitly allow for this possibility.

Shares issued in exchange for cash contributions must be paid up at least 30% of their nominal value at the time of subscription, and fully paid within no more than three years from the publication date of the general meeting resolution in the Official Gazette of Romania, Part IV. This minimum 30% upfront payment for cash contributions ensures that subscribers demonstrate a genuine commitment to the company at the time of subscription, reducing the risk of financial shortfalls. The three-year deadline for full payment provides flexibility while maintaining a clear timeline for the realisation of the company's financial plans. Shares issued in exchange for

116 Cărpenu, 2014, p. 739.

contributions in kind must also be fully paid within the same three-year period. When an issuance premium is specified, it must be paid in full at the time of subscription.

The Romanian Companies Act also introduces the concept of authorised capital, referring to a flexible mechanism enabling a company to increase its capital without the need for repeated approvals by the general meeting of shareholders. By delegating authority to the board of directors or management board, the company can respond more swiftly to financing opportunities and market conditions. Under the articles of incorporation, the board of directors or the management board may be authorised, for a specified period not exceeding five years from the date of the company's registration, to increase the subscribed share capital up to a predetermined nominal value (authorised capital) by issuing new shares in exchange for contributions. Such authorisation can also be granted by the general meeting of shareholders through an amendment to the articles of incorporation, for a period not exceeding five years from the date of registration of the amendment. The articles of incorporation may impose stricter quorum requirements for such amendments. In both cases, the time limitation of five years for the authorised capital reflects a balance between managerial discretion and shareholder oversight, ensuring that such powers are not indefinitely conferred and remain subject to periodic shareholder review.

The nominal value of the authorised capital cannot exceed half of the subscribed share capital existing at the time of authorisation. The authorisation granted to the board of directors or management board may also include the power to decide on the restriction or removal of the pre-emptive rights of existing shareholders. This potential restriction or removal of pre-emptive rights by the board, subject to specific conditions, highlights the tension between flexibility in raising capital and the protection of existing shareholders. While this power can facilitate the swift entry of new investors/strategic partners, it can also dilute the interests of current shareholders. This authorisation is granted to the board of directors or management board by the general meeting of shareholders under the quorum and majority requirements previously analysed (i.e. presence of shareholders representing three-quarters of the subscribed share capital and by a majority of the votes of those present). The decision of the board of directors or the management board regarding the restriction or removal of pre-emptive rights must be submitted to the trade registry for registration and published in the Official Gazette of Romania, Part IV.

6.3. Dividends

The issue of dividends is regulated by Article 67 Romanian Companies Act.¹¹⁷ First, shareholder contributions to the share capital do not bear interest. The Romanian law explicitly prohibits the payment of interest on shareholder contributions to the share capital, ensuring that returns to shareholders are tied to the company's profitability rather than acting as a fixed return akin to debt instruments.

117 Cărpenaru, 2014, pp. 241–247.

The portion of the profit paid to each shareholder constitutes a dividend. As a default rule, it is stated that dividends are distributed to shareholders proportionally to their paid-up share capital.¹¹⁸ Romanian corporate law allows the members of a company to agree on varying ratios for the distribution of dividends, offering flexibility in aligning dividend entitlements with the specific member contributions, roles, or agreements. This flexibility supports arrangements that can reflect the unique circumstances of each company and its stakeholders. However, such arrangements are subject to the prohibition of the *societas leonina* principle, under which any agreement that entirely excludes a member from receiving dividends is invalid under Romanian law. This rule serves to protect the rights of all members and maintain equity within the corporate structure, ensuring that each member is entitled to a share of the profits proportionate to their agreed-upon stake in the company.

In Romanian company law, the decision to distribute dividends belongs exclusively to the general meeting of members as a part of its competence to determine profit use.¹¹⁹ The meeting may either reinvest earnings into the company (for development needs or strengthening working capital) or declare dividends for distribution. Shareholders' right to claim dividends does not arise automatically from the existence of profit, but only once the general meeting has expressly approved their distribution. Upon such approval, the dividend becomes a binding monetary obligation of the company, payable to the members under the conditions set by the resolution.

The requirement that dividends only come from legally-determined profits serves to protect creditors and maintain the company's financial stability, as it ensures that shareholders cannot receive returns at the expense of the company's solvency. Dividends are distributed optionally on a quarterly basis based on interim financial statements and annually, following adjustments made through the annual financial statements - unless otherwise stipulated in the articles of incorporation. Quarterly payments are optional and must be made within the timeframe established by the general meeting of shareholders or, where applicable, by special laws. The possibility of quarterly distributions introduces flexibility but increases the complexity of financial management, requiring interim statements/adjustments to reflect accurate profitability. Companies may face legal risks if interim distributions are found to exceed the actual profits determined later.

Any differences resulting from dividend distributions during the year must be settled through the annual financial statements. Payments of these differences must be made within 60 days of the approval of the annual financial statements for the concluded financial year. If this deadline is not met, the company owes penalising statutory interest, unless the articles of incorporation or the resolution of the general meeting of shareholders approving the financial statements stipulates a higher interest rate. In cases where partial dividends are distributed among shareholders during the financial year, the annual financial statements must reflect these partial

118 Veress, 2024, p. 101.

119 ÎCCJ, s.com., dec. nr. 2490 din 29 iunie 2010.

dividends and adjust any resulting differences accordingly. If shareholders owe the company the repayments of dividends following the adjustments made in the annual financial statements, these must be paid within 60 days of the approval of the financial statements. If not paid within this period, the shareholders owe penalising statutory interest, unless a higher interest rate is stipulated in the articles of incorporation or the resolution of the general meeting of shareholders approving the financial statements.¹²⁰

As stated above, dividends can only be distributed from profits determined in accordance with the law. Therefore, dividends paid contrary to the above provisions must be reimbursed if the company proves that the shareholders were aware of the irregularity of the distribution or should have been aware of it under the existing circumstances. Shareholders who receive dividends in violation of the law may be held liable if they knew or should have known of the irregularity. This provision protects distribution integrity, but requires clear evidence to enforce. The right to claim the reimbursement of dividends paid in contravention of legal provisions is subject to a limitation period of three years from the date of their distribution.

Dividends due after the transfer of shares belong to the transferee, unless otherwise agreed by the parties. Accordingly, the law allows the parties to agree how to apportion dividends attributable to the period prior to the transfer, and, absent a contrary clause in the transfer agreement, those dividends accrue to the assignee.¹²¹ Doctrinally, this sets a default allocation rule, as pre-transfer period dividends that have not yet been declared follow the share and, by operation of law, belong to the assignee, unless the parties contract otherwise. Undeclared dividends are a mere expectancy (civil fruits) attached to membership; they pass with the transferred participation, whereas once a dividend has been approved by the general meeting, it crystallises into a separate receivable of the then-member and will not pass unless expressly assigned. Practically, transfer agreements deal separately with declared-but-unpaid dividends and use price adjustments/indemnities to align economics with legal entitlement. In relation to the company, payment follows the registered holder and any record date; a different contractual allocation operates *inter partes* only unless the company is duly notified and cooperates in directing payment.

If a loss in net assets is identified, the subscribed share capital must be replenished or reduced before any allocation or distribution of profits can occur. This requirement in the event of a loss in net assets before distributing profits ensures that the company retains sufficient resources to meet its obligations, serving as a safeguard against insolvency, but could delay shareholder returns.

120 The imposition of penalising statutory interest on delayed payments by either the company or shareholders creates a strong incentive for compliance. However, this also places administrative and financial burdens on companies and shareholders alike.

121 ÎCCJ, s. a II-a civ., dec. nr. 1331 din 2 aprilie 2014.

7. Serbia

The rules on the legal capital and finances will be presented separately for limited liability companies and joint-stock companies. The same approach will be implemented in Chapters IV, and V, and partially in Chapter VI.

7.1. *Limited Liability Companies*

Serbian company law adopts the traditional Continental European approach concerning the role of legal capital. Here, at least in theory, legal capital has the function of protecting an “organised pool of assets” ensuing upon company formation and securing the creditors’ preferential access to these assets.¹²² As a consequence of adopting this approach, legal capital remains one of the prerequisites for the formation of limited liability companies in Serbian law. The amount of legal capital is a mandatory element of the articles of association of a limited liability company, and it is subject to mandatory registration.

However, Serbian law and legal scholarship have been up to date with the changes in the role and significance of the concept of legal capital in modern company law. The main result of this perceived change is acceptance of the overarching tendency to lower the amount of minimum legal capital, thereby affecting its protective function, as well as the capital adequacy function. This tendency is particularly observable for limited liability companies, where the prescribed minimum legal capital amounts to only 100 Serbian dinars (less than one euro). This tendency reduces the actual role of the legal capital to the method for determination of the percentage of each shareholder’s contribution in the legal capital, that is, to a denominator of the extent of shareholders’ rights in a company (this denominator does not have a conclusive role owing to the existence of the freedom of contract of principle).¹²³

Regarding the definition of legal capital, former Serbian legislation had produced some uncertainties due to imprecise and even incorrect understanding of some main elements of that definition.¹²⁴ Current law defines legal capital in a manner that goes hand-in-hand with common comparative law, describing that it is the pecuniary value of the company’s shareholders’ subscribed contributions to the company, which is registered in accordance with the registration act.¹²⁵ The amount of legal capital is generally fixed and may be changed only in specifically prescribed cases involving the formal reduction and increase of the legal capital, including a set of specific material and procedural requirements for effecting the change. Despite its general invariability, the capital contributed by the shareholders may be used in trading, but

122 Gerner-Beuerle and Schillig, 2019, pp. 723–724.

123 Jovanović et al., 2021, p. 370.

124 Ibid., pp. 453–454.

125 Article 44, Section 3, CA.

must not be returned to the shareholders, except in liquidation upon payment of all creditors.

Serbian law contains several rules relevant to the initial raising of the legal capital, aiming to secure the performance of shareholders' obligations regarding the subscribed contributions. They cover various issues, from the allowed types of contributions to the valuation of in-kind contributions, the rules inflicting the obligation to pay up the contributions, and concomitant liability in case of failure in performing that obligation.

Shareholders' contributions to the company may be in cash or in kind.¹²⁶ The latter may take the form of any assets of value (e.g. immovable property, claims, and intellectual property rights),¹²⁷ except an undertaking to perform work or to supply services. The Companies Act (CA) requires the valuation of the in-kind contributions, which is to be expressed as a monetary equivalent to enable the counting of the overall amount of the legal capital and the individual contributions. However, in the context of private companies (e.g. private joint-stock companies), this valuation may be done either by the certified expert or by the shareholders themselves.¹²⁸ Hence, the expert's valuation of in-kind contributions is not mandatory in limited liability companies.

As a matter of principle, Serbian company law states that persons who have, under the articles of association or otherwise, taken on the responsibility of paying up certain contributions to the company, are liable to the company for fulfilment of that obligation. This obligation nonetheless does not have to be performed before the company's formation. It is possible to include in the articles of association that contributions are to be paid up after the company's formation, but not later than five years from the day of the registration of the articles of association.¹²⁹ A company may not release the shareholders of the obligation to pay up the contribution to the company, with one full and one partial exception to this rule. The shareholders are fully exempted from their obligation in case of capital reduction which triggers the application of rules on creditor protection (these rules are to be discussed in Chapter VII).¹³⁰ The partial exemption refers to the possibility to replace the shareholders' obligation if the general meeting so decides and if the shareholder in question agrees with the replacement. The replacement may entail, for instance, a change of cash contribution for in-kind contribution or *vice versa*, or a change of one sort of in-kind contribution for another (entering certain assets instead of claims towards third parties).¹³¹

The CA prescribes three consequences for a failure to pay up the contribution or for a late payment. First, a general rule on shareholders' liability to compensate for

126 Article 45, Section 1, CA.

127 Marjanski, 2022, p. 728.

128 Article 50, Section 1, CA.

129 Article 46, Section 2(2), CA.

130 Article 46, Section 3, CA.

131 Article 46, Section 4, CA.

damages caused to the company by failing or being late to carry out their obligations.¹³² Second, it allows the company to request liquidated damages from a shareholder in breach, provided that such a possibility is entrenched in the articles of association.¹³³ Under general civil law rules, payment of liquidated damages is possible only as a consequence of untimely performance, or failure to perform the obligation concerning an in-kind contribution. Finally, as the most severe consequence, the law predicts the possibility of the expulsion of a shareholder who breached his/her duties regarding paying up contributions to the legal capital. The expulsion is possible only after a “second chance” to perform his/her obligation has been provided to the shareholder (i.e. an additional period of at least 30 days).¹³⁴ The decision on the expulsion is made by the qualified majority of the general meeting. This is the only situation in which the court does not decide on the shareholder’s expulsion. In any case, the expulsion remains a mere possibility, as the shareholders are not obliged to bring the resolution on the expulsion of the shareholders who breached their obligations regarding paying up the contributions.

From a corporate finance perspective, a key function of the legal capital concept is to ensure that the creditors have preferential access to the company’s assets by limiting the company’s power to pay dividends and make distributions to shareholders.¹³⁵ Serbian law acknowledges the existence of several instruments for maintaining the value of the company’s legal capital, some of which associate with the process of legal capital formation, while others aim to keep its value after initial formation. The former include rules that prohibit returns of contributions to the shareholders and contributions in performing work or supplying services, as well as on the valuation of in-kind contributions. Among the post-formation instruments, the most important are the rules on distribution in the form of dividends or any other form that extracts the company’s value in favour of the shareholders. The rules on distributions to the shareholders touch upon several issues, as follows:

- a) what is considered a distribution;
- b) what type of distributions are covered;
- c) what are the prerequisites for distributing value to the shareholders;
- d) what are the consequences of breach of the rules on distributions.

The adequate scope of application of the notion of distribution to shareholders has been recognised as a significant element of related regulation. It is abundantly clear that this notion always applies to open dividends, and yet open dividends that do not comply with the prescribed rules on distributions are rare in practice. Much more relevant are hidden or disguised distributions, that is, a transaction between the company and its shareholders that confer some economic benefit to a shareholder

132 Article 46, Section 1, CA.

133 Article 48, Section 1, CA.

134 Article 48, Section 2, CA.

135 Gerner-Beuerle and Schillig, 2019, p. 761.

that he/she would not have obtained in an arm's length transaction.¹³⁶ For instance, the hidden distribution might be the sale of an asset below market value to a shareholder.

Serbian law defines the notion of distributions to the company's shareholders in a very broad manner, expressly encompassing dividends, return of additional payments, and loans. In addition to these expressly-recognised types of payments, CA uses a very broad and open formulation that under the notion of distribution includes *similar payments*, as well as *any other payments on any grounds*.¹³⁷ This certainly covers both distributions that have company law character and those that have civil law character.¹³⁸ Therefore, the letter of the law seems to adopt a very strict approach to the distributions to shareholders, although it may be questioned whether the legislator intended to produce such effect and cover all potential disguised distributions. The side effect of such a broad definition is its failure to recognise that certain payments to shareholders may be a result of commercially-sound transactions in the general interest of the company.¹³⁹

Regarding the second problem, by the letter of the law, CA covers only monetary payments. However, in Serbian scholarship, a literal interpretation of this provision is recognised to potentially lead to unintended consequences, therefore arguing for broadening the scope of the provision to non-monetary distributions made to shareholders.¹⁴⁰

Once it is established that a certain payment (or any other transfer of value) qualifies as a distribution, it triggers the application of the rules that assess the permissibility of that distribution. These rules are based on Article 56 of Directive (EU) 2017/1132, entailing that the CA founds its rules on the distributions made to the shareholders on the so-called "balance sheet test" and "profit and losses test". There are no rules that resemble the solvency test or any other more sophisticated test to determine distribution permissibility. The balance sheet test prohibits a company to make any distribution to the shareholders if, according to the latest financial statements, the company's net assets are lower - or would become lower due to such payments - than the amount of paid-up legal capital increased by the legal or company (voluntary) reserves (if any). The exception is in the case of a reduction of share capital.¹⁴¹ The profit and losses test limits the amount distributed to the shareholders to the profit made at the end of the business year, increased by retained earnings from previous years and the amounts of reserves provided for distribution to shareholders, and decreased for the losses brought forward from previous periods and the amounts of reserves (if any).¹⁴²

136 Ibid., p. 769.

137 Article 182, CA.

138 Marjanski, 2020, p. 217.

139 EMCA, Chapter VII, Part I, Section 7.01. (comments).

140 Jovanović et al., 2021, p. 459; Veličković, 2019a, pp. 300–301.

141 Article 275, Section 1, in relation to Article 181, Section 1, CA.

142 Article 275, Section 2, in relation to Article 181, Section 1, CA.

The main legal consequence of non-permitted distributions is the return of those distributions to the company. The persons liable for the return may be shareholders, directors, and members of the supervisory board (if a limited liability company adopted a two-tier management structure). Regarding shareholders, the law provides different rules on the liability of shareholders who received prohibited distribution, those who voted for the general meeting's resolution on that distribution, and those who neither received the distribution nor voted for it. The shareholders who received prohibited distribution are liable in any case for the return of the payment if that is necessary to settle the claims of the company's creditors. If creditors' claims can be settled without a return of the prohibited distribution, the law requires a return only if the shareholders did not act in good faith.¹⁴³ The liability rule for shareholders who voted for the prohibited distributions is stricter as they are always jointly and severally liable for the return of the payment.¹⁴⁴ Finally, the shareholders who did not vote for the resolution may be jointly and severally liable for the return of the distribution if it is proven that they have deliberately or through gross negligence contributed to the company's making such prohibited payment.¹⁴⁵

When it comes to the directors' liability (including supervisory board members, if any), they are liable for the return of prohibited distributions if they approved it, and if they knew or, according to the specific circumstances, might have known that those distributions were in contravention with the relevant provisions of the CA.¹⁴⁶ In addition, the directors and the supervisory board members are liable, even if stated requirements are not met, if it is proven that they have deliberately or through gross negligence contributed to the company's making such prohibited payment.¹⁴⁷

The procedure for the reduction of the share capital may be conducted in regular or simplified procedures. As these procedures mainly relate to the specific measures of creditor protection, those will be discussed in more detail in Chapter VII. There are several methods of capital reduction in limited liability companies, as follows:

- a) covering losses of the company;
- b) creating or increasing the company's reserves to cover future losses, or increasing the capital from the company's net assets;
- c) in case of non-performance of the shareholders' obligation to pay up the contributions;
- d) in case of annulment of the reserved own share;
- e) in case of status changes;
- f) on the occasion of withdrawing and cancelling a share;
- g) in case of mandatory cancelling of own share if this has not been disposed within three years from the day of acquisition.¹⁴⁸

143 Article 185, Section 2, CA.

144 Article 185, Section 3, CA.

145 Article 185, Section 4, CA.

146 Article 185, Section 3, CA.

147 Article 185, Section 4, CA.

148 Article 147, Section 1, CA.

A resolution on the reduction of share capital is adopted by the general meeting by a majority of two-thirds of the total number of votes of all shareholders, unless the articles of association stipulate a different majority, which may not be smaller than the simple majority of the total number of votes of the shareholders entitled to vote on a certain issue.¹⁴⁹ There are several conditions, that are to be gradually assessed (in their respective order), for distributing dividends to shareholders:

- a) the company's financial statements demonstrating that the company has achieved profits in the previous year;
- b) appreciation of the list of priorities established in CA;
- c) resolution of the general meeting.

Positive financial statements are the first and foremost condition for distributing dividends. However, in case of the deterioration of the company's financial condition after the end of the business year, this negative development may significantly influence the possibility of distributing dividends. Directors and supervisory board members are obliged to inform the general meeting about said deterioration, provided that the company's financial status has considerably and not only temporarily worsened due to the losses or reduction of the share capital value. In such a case, the general meeting must exclude from the distribution of profit the amount corresponding to the reduction of the company's assets.¹⁵⁰

The second condition concerns the statutory list of priorities. Before the general meeting can decide on distributions, directors must make sure that previous years' losses and mandatory legal reserves (if the company must have such reserves, which is unusual for limited liability companies) are covered. Once these priorities (if any) are fulfilled, then the company is free to decide to distribute its profits to the shareholders, or to transfer them to the potential reserves prescribed by the articles of association.¹⁵¹ However, it must be underlined that, in Serbia, there is no legal obligation for the company to do that. Serbian law does not entitle minority shareholders to seek a certain percentage of the profits to be distributed.

The third condition refers to the relevant resolution of the general meeting, which must be adopted by a qualified majority. The decision may be brought either at the regular, annual general meeting or any other extraordinary meeting. The latter concerns the distribution of dividends during the business year, referring to the period between the adoption of the previous year and the current year's financial statement.¹⁵² The main material condition for the distribution of interim dividends is the gaining of profits in the meantime, and the adoption of specific financial statements for determining required positive business results.¹⁵³ Only when the general meeting adopts the decision on dividend distribution will a shareholder who is entitled to a

149 Article 147, Section 2, CA.

150 Article 184, Section 2, CA.

151 Article 270, CA.

152 Article 273 in relation to Article 183, Section 1, CA.

153 Marjanski, 2020, p. 221.

dividend become the company's creditor for the amount of that dividend. The decision on the distribution of dividends must contain the day relevant for the determination of the shareholders entitled to the distribution in question. The articles of association may define the method for the determination of that day, in which case the general meeting must apply that method in its determination of the relevant day.

Finally, there is role of directors and supervisory board members in dividend distribution. Their role is threefold and essentially related to each of the three requirements discussed above:

- a) responsible for the accuracy of financial statements;¹⁵⁴
- b) responsible for the statutory list of priorities to be fulfilled before the distribution;¹⁵⁵
- c) may be allowed to decide on the interim dividends if such possibility has been prescribed in the articles of association.

7.2. Joint-Stock Companies

The basic legal rules and principles on legal capital, its definition, and legal, and practical significance discussed above equally apply to joint-stock companies. Briefly, the legal capital is the prerequisite for their formation in Serbian law, and its amount is a mandatory element of the company's statute. The minimum legal capital is naturally higher amounting to 3,000,000 Serbian dinars (cca. 25,000 euros) unless a higher amount is specified for certain joint-stock companies (insurance companies and banks).¹⁵⁶ In addition to the requirements already discussed in the subchapter dedicated to limited liability companies, there are several specific requirements concerning raising the legal capital in joint-stock companies:

- a) the shareholders must pay up at least 3,000,000 Serbian dinars in cash (minimum legal capital) before the formation of joint-stock company;¹⁵⁷
- b) monetary contributions must be entirely paid up before the company's formation;¹⁵⁸
- c) the shareholders must pay up contributions that represent at least 25% of the legal capital (this rule is applicable only if the legal capital exceeds the minimum amount, and if there are contributions in-kind);¹⁵⁹
- d) the in-kind contributions in public joint-stock companies must be evaluated by an expert following specific requirements prescribed in the law¹⁶⁰ (this rule is a consequence of concern that contributions in kind generally might be overvalued);¹⁶¹

154 Article 225, CA.

155 Article 273, Section 2 in relation to Article 183, Section 1, CA.

156 Article 293, CA.

157 Article 266, Section 2, CA.

158 Article 266, Section 1, CA.

159 Article 266, Section 2, CA.

160 Article 50, Section 2, CA.

161 Gerner-Beuerle and Schillig, 2019, p. 748.

- e) the shareholders of public joint-stock companies must pay up in-kind contributions before company formation, while the statute of private joint-stock companies may provide for the possibility of paying them up after the formation, but not later than five years from the day of the registration of the articles of association;¹⁶²
- f) in case of shareholders' failure to fulfil the obligation to pay up the contribution, even after the additional period left in accordance to the rules applicable in limited liability companies, the public joint-stock company's board of directors, or the supervisory board (if any), is obliged to bring the decision on withdrawal and cancellation of shares (in private joint-stock companies the general meeting may bring this decision, as is the case in the limited liability companies).¹⁶³

The main legal instruments, both those referring to the obligations during company formation and upon formation, are generally the same in joint-stock companies and limited liability companies. The same is true for the distributions to shareholders, with most rules created for joint-stock companies in this regard applying *mutatis mutandis* to limited liability companies.

However, certain differences must be mentioned as they relate to distribution and the liability rules in case of prohibited distributions. Contrary to the rules on distributions to limited liability company shareholders, the CA does not contain any indications on the scope of application of distributions (payments according to the Serbian legislator). In legal theory, it is considered that this notion covers all payments with company law origins, that is, payments made on the basis of the status of a shareholder. According to this opinion, any payments based on the performance of contracts between shareholders and joint-stock company are not covered.¹⁶⁴

When it comes to liability rules, there are three differences compared to the rules for limited liability companies, as follows:

- a) there is no liability at all for the shareholders who received distributions in good faith;¹⁶⁵
- b) there are no specific rules on directors' civil liability, meaning that directors of joint-stock companies are only criminally liable;
- c) there are no liability rules applicable to shareholders who voted for the resolution of the general meeting to make a distribution.

As the measures concerning the procedure of the reduction of share capital almost exclusively concern creditor protection, similar to the situation for limited liability

162 Article 46, Section 2(2), CA.

163 Article 280, Section 1 in relation to Article 48, Sections 7 and 8, CA.

164 Jovanović et al., 2021, pp. 459–460.

165 Article 275, Section 4, CA.

companies, these measures will be discussed in Chapter VII. Here, it suffices to bring up the methods of reduction, described as follows:

- a) withdrawal and cancellation of shares in the possession of shareholders;
- b) cancellation of the company's own shares;
- c) reducing the par value of shares (i.e. accounting value of shares in case of no-par shares).¹⁶⁶

The share capital reduction must be conducted respecting the principle of equal treatment of shareholders of the same class. This is secured through a proportionate withdrawal and cancellation of shares of all shareholders of the relevant class of shares, or by a proportionate reduction of par value (i.e. accounting value of shares of all shareholders of the relevant class of shares).¹⁶⁷ The decision on the reduction of legal capital is passed by the qualified majority of the general meeting.¹⁶⁸

Similar to the share capital maintenance rules, the CA provides for a *mutatis mutandis* application of the rules prescribed for the dividends to joint-stock companies and limited liability companies. Hence, the conditions for distributing dividends to limited liability company shareholders equally apply to joint-stock companies. A dividend on shares is paid to shareholders according to the rights attached to the type and class of the shares they hold. Since dividends may be paid out in cash or shares, there are some rules which cover the latter case, which are outlined herein:

- a) such payment shall be approved by the shareholders of the class of shares to which such payment is made under the rules on the voting of shareholders within a class of shares;
- b) payment to each shareholder of a class of shares who is entitled to dividends is made in shares of that class.¹⁶⁹

As an exception, a dividend may be paid in the form of shares of some other type or class only if any such payment is approved by a three-quarter majority of the present shareholders holding shares of the class to which such payment is made, and by the same majority of votes of the shareholders of the class of shares in whose shares the dividend is paid.¹⁷⁰

166 Article 315, Section 1, CA.

167 Article 318, CA.

168 Article 314, Section 1, CA.

169 Article 272, Section 2, CA.

170 Article 272, Section 3, CA.

8. Slovenia

8.1. Rules on Legal Capital

8.1.1. Limited Liability Company

According to the law, the minimum share capital of a limited liability company must be at least 7,500 EUR (Art. 475(1) Slovenian Companies Act, or ZGD-1). Regarding capital relations, the law specifically regulates the contribution or provision of capital to the company, the maintenance of capital at a minimum level, and the increase or reduction of the share capital. The share capital is composed of the capital contributions of the shareholders, which can have different values (Art. 471(1) ZGD-1) but must not be less than 50 EUR (Art. 475(1) ZGD-1).

The share capital contribution can be provided in cash or in kind as a non-cash contribution or acquisition (Art. 475(2) ZGD-1). Prior to company registration, the founders must ensure at least one-fourth of the capital contribution in cash, and the total value of all provided contributions must amount to at least 7,500 EUR, which must be cumulatively met (Art. 475(4) ZGD-1). Non-cash contributions must be fully transferred before the registration in the register. If the value of the non-cash contribution does not reach the value of the assumed capital contribution, the shareholder must pay the difference in cash (Art. 475(5) ZGD-1).

A founding shareholder can provide a non-cash contribution by undertaking an obligation in the company's articles of association to transfer a specific asset, right, or property to the company, and doing so (non-cash contribution). Alternatively, they can commit to pay a certain amount of money as a contribution but fulfil their obligation by having the company acquire a specific asset or right from a third party, with the payment for that asset being made by the shareholder (non-cash acquisition). The capital contributions must always be expressed in monetary terms, and if non-cash contributions are involved, the value of the assets must be determined, and it must be specified which part of the capital contribution is covered by the non-cash contribution. Additionally, it should be emphasised that the provisions of the ZGD-1 governing the post-formation acquisition of a joint-stock company (Art. 188 ZGD-1) do not apply to limited liability companies.¹⁷¹

If the shareholders provide non-cash contributions to the company, they must prepare and sign a report on non-cash contributions before the registration in the register (Art. 476(1) ZGD-1). The report on non-cash contributions determines the value of each non-cash contribution and whether it corresponds to the value of the assumed capital contribution (Art. 476(2) ZGD-1). To determine the value of non-cash contributions, all criteria that can contribute to assessing the fair market value are considered (e.g. invoices, court expert evaluations, and data on market prices of similar items).¹⁷²

¹⁷¹ Ivanjko et al., 2009, p. 882.

¹⁷² Ibid., 2009, p. 883.

If the total value of the non-cash contributions exceeds 100,000 EUR, the shareholders contributing non-cash contributions must, at their own expense, ensure that the non-cash contributions are assessed by an auditor, and the auditor's report becomes a constituent part of the report on non-cash contributions (Art. 476(4) ZGD-1).

8.1.2. Joint-stock company

A joint-stock company is the owner of own assets because it is liable for its obligations with all its assets (Art. 168(2) ZGD-1). In addition to assets, the share capital of such companies is also important, representing the value, expressed in money, that shareholders must contribute to the company as payments for shares.¹⁷³ The share capital in a joint-stock company is fully divided into shares (Art. 168(1) ZGD-1).

Shares may be in the form of shares with a nominal value or as no-par value shares, but the company may not have both types of shares at the same time (Art. 172(1) ZGD-1). Shares with a nominal value must have a minimum value of 1 euro or multiples thereof, and their proportionate share in the share capital is determined by the ratio between their nominal value and the share capital amount (Art. 172(1) ZGD-1). Therefore, the formula for calculating the share capital of a joint-stock company with shares that have a nominal value is as follows:

$$\text{Number of shares} \times \text{nominal value per share} = \text{share capital}$$

The calculation of the share capital is different if the company has no-par value shares. These do not have a nominal value, but each no-par value share represents an equal share and corresponding amount in the share capital, which shall not be less than 1 EUR.

The share capital represents the initial and reverse capital, as well as the guarantee for the obligations of the joint-stock company. The principle of durability and immutability applies to share capital,¹⁷⁴ which, *inter alia*, prohibits the contributions to be refunded and to bear interest (Art. 227 ZGD-1). Special procedures and requirements are established for increasing or reducing the share capital, which also include amending the articles of association. Under Slovenian law, the minimum share capital of a joint-stock company is set at 25,000 EUR (Art. 171 ZGD-1). The share capital must never be reduced below this amount, except in the case of a combined reduction and increase of the share capital (Art. 378 ZGD-1).¹⁷⁵

¹⁷³ Ibid., 2009, p. 463.

¹⁷⁴ Ibid., 2009, p. 464.

¹⁷⁵ Article 378, ZGD-1 allows for an exception to reduce the share capital below the minimum amount, provided that it is subsequently restored through an increase in share capital. A resolution specifying the increase of the share capital must be adopted simultaneously with the reduction of the share capital, and the increase in this case may not be made through non-cash contributions.

8.2. Raising the Legal Capital

8.2.1. Limited liability company

Raising the share capital of a limited liability company is not a fundamental obligation of shareholders and cannot be derived from the company's articles of association. However, the general meeting of shareholders can determine, by resolution, the obligation to raise the share capital to preserve the share capital and protect the company's assets. The increase of the share capital is particularly relevant when the company faces capital inadequacy.¹⁷⁶ Since the indication of the share capital amount is a mandatory component of the company's articles of association (Art. 474(3) ZGD-1), a resolution to raise the share capital constitutes an amendment to the articles of association.

The share capital of a limited liability company may be increased by shareholders providing new cash or non-cash contributions to the company, effectively increasing the company's assets. This is referred to as an effective increase of share capital. However, if the increase in share capital is achieved by transferring assets from the company's reserves and profits to the share capital, it is referred to as nominal increase.¹⁷⁷ An effective increase of the share capital is constituted by the payment of new investments into the company, which are either subscribed by the shareholders themselves or by third parties. These contributions can be of different values but must not be less than 50 EUR. As mentioned, the increase of share capital is carried out through a resolution of the general meeting of shareholders, which determines the new amount of share capital. The difference between the existing and the new amount of share capital is divided into one or more contributions, which the subscriber pays. Effective increase of capital requires the conclusion of a share purchase agreement between the subscriber and the company.¹⁷⁸ Existing shareholders have a pre-emptive right to subscribe to the new contributions in proportion to their existing shareholdings. The deadline for exercising this right is 14 days from the date of the general meeting where the resolution on the increase of share capital was adopted. The pre-emptive right can be excluded by applying the provisions on the exclusion of preferential rights of shareholders to acquire new shares in a joint-stock company.¹⁷⁹ When the capital is increased through non-cash contributions, the correct valuation of the contributed assets is crucial. If the shareholders overvalue a non-cash contribution and deviate from the usual valuation criteria, they are liable to creditors for damages based on the principles that apply to piercing the corporate veil.¹⁸⁰

In addition, the nominal increase of the share capital is carried out through the transfer of assets from the company's reserves and profits to the share capital, without the contribution of new cash or non-cash contributions. Following the adoption of

176 Ivanjko et al., 2009, pp. 884–885.

177 Ibid., p. 885.

178 Ibid.

179 Ibid., p. 885.

180 Ibid., p. 886.

the resolution of the general meeting on the increase, the initial contributions of the existing shareholders are increased in proportion to their ownership stakes in the existing share capital. The provisions of Articles 358 and 359 ZGD-1, which regulate the increase of share capital from the company's assets in a joint-stock company, are applied *mutatis mutandis* to the nominal increase of share capital in a limited liability company. The general meeting of the limited liability company must adopt a resolution on the transformation of other items of equity into share capital with at least a three-quarter majority. This can only be done after the adoption of the annual report for the last financial year that ended prior to the decision on the increase of the share capital.¹⁸¹

8.2.2. Joint-stock company

Similar to the situation for a limited liability company, the ZGD-1 provides for the effective increase of share capital in a joint-stock company, which involves increasing the share capital through contributions. The increase of the share capital by way of contributions is conditional upon the payment of all the contributions made to date, unless only an insignificant amount remains unpaid (Art. 333(5) ZGD-1). The general meeting's resolution regarding the increase of the share capital shall require a majority of at least three-quarters of the share capital represented at the meeting to be passed. The articles of association may stipulate a different majority - but it should not be less than a majority of the share capital represented at the meeting if at least one half of the share capital is represented at the meeting where the resolution is being decided on (Art. 333(1) ZGD-1) - and additional requirements for the issuance of non-voting preference shares. For an increase of the share capital through contributions, a mandatory provision applies stating that it must always be carried out by issuing new shares (Art. 333(2) ZGD-1). When subscribing to the newly-issued shares, existing shareholders have a pre-emptive right to subscribe to the new shares in proportion to their shareholdings in the share capital. However, the shares can also be offered to external shareholders (i.e. new shareholders), and existing shareholders have at least 14 days to exercise their pre-emptive rights (Art. 337(1) ZGD-1). They can exercise the right themselves, transfer it to someone else, or choose not to use it at all. The pre-emptive right can only be fully or partially excluded by a resolution on the increase of the share capital. In such a case, the adoption of the resolution by the general meeting for the increase of the share capital requires a three-quarter majority of the share capital represented at the general meeting (Art. 337(3) ZGD-1).

Similar to the situation for a limited liability company, a joint-stock company can also increase its share capital from the company's assets. The provisions regulating the increase of share capital through contributions are applied *mutatis mutandis* for the resolution on the increase of the share capital and its registration (Art. 358(2) ZGD-1). However, companies with no-par value shares can increase their share capital

181 Ibid.

without issuing new shares, provided that the resolution on the increase specifies the method of increase (Art. 358(2) ZGD-1).

A conditional increase of the share capital occurs when an increase in debt capital takes place. It may only be carried out for the following purposes:

- a) holders of convertible bonds exercising their right to convert such bonds for shares or exercising their pre-emptive right to purchase new shares;
- b) preparation for the merger of several companies or payment of consideration to shareholders in connection with changes in the legal status of companies;
- c) company employees exercising their right to receive new shares in exchange for their receivables stemming from participation in the profits which has been made available to them by the company, and in order to provide option entitlements for the purchase of shares granted by the company to the members of the management or supervisory bodies, company employees, or employees of its affiliated company (Art. 343(1) ZGD-1).

The minimum price of the shares issued in the procedure of a conditional increase of the share capital shall not exceed one half of the share capital existing during the meeting regarding the conditional increase of the share capital, and may only reach 10% of the share capital existing during the meeting (Art. 343(2) ZGD-1) – the latter serving to ensure share purchase options. The validity of a resolution on the conditional increase of the share capital shall require the majority of at least three-quarters of the share capital represented at the general meeting. (Art. 344(1) ZGD-1).

Authorised share capital is an institution under which the share capital of a joint-stock company may be increased in a simplified procedure where no special resolution of the general meeting and its registration are required for the actual issue of shares. This is because such a decision is taken in advance for a certain period and then implemented by company management, including the issue of new shares and registration.¹⁸² The authorised share capital is therefore the amount of the share capital that may be increased by the issue of new shares for consideration pursuant to a statutory authorisation to the management of the company for a maximum period of five years after the registration of the company (Art. 353(1) ZGD-1). The authorisation may also be given by an amendment to the articles of association for a period of five years after the registration of this amendment (Art. 353(2) ZGD-1).

The concept of authorised share capital is similar to the institution of authorised capital (*authorised shares*) in comparative corporate law, but these two institutions should not be equated. Authorised share capital refers to the statutory determination of the number of shares that a joint-stock company may issue in the future, regardless of different classes and series. The general meeting cannot increase the share capital and issue new shares through authorised capital (authorised shares) alone.¹⁸³

¹⁸² Ibid., p. 700.

¹⁸³ Ibid.

8.3. Capital Maintenance

8.3.1. Limited liability company

A fundamental obligation of shareholders in a limited liability company is to maintain the share capital to protect the company's ability to conduct business and safeguard the rights of its creditors. This obligation complements the obligation to provide share capital and make initial capital contributions, the main difference being that the obligation to maintain share capital is continuous, whereas the obligation to contribute capital is only a one-off obligation and is associated with the permanence of the shareholder's status. Maintaining the share capital of the company involves preserving the value of the company's assets as recorded in the books, after deducting its liabilities. Shareholders are required to maintain the registered share capital of the company, regardless of whether it has been fully paid up or not.¹⁸⁴

In connection with this principle, Article 495 ZGD-1 introduces a general prohibition on payments made from the share capital to shareholders. The sanction for reducing the share capital is the legal obligation to repay all prohibited distributions (Art. 496(1) of the ZGD-1). If the refund cannot be demanded from the recipient, the other shareholders, proportionate to their shareholdings, will guarantee the amount that needs to be refunded and is necessary to settle the company's obligations to its creditors. Amounts that cannot be demanded from individual shareholders are distributed among them in proportion to their ownership interests. If ineligible payments are also made by managers, they shall be liable in the same way as the company member with the largest business interests (Art. 496(3) ZGD-1).

Furthermore, to ensure adherence to the principle of maintaining share capital, a special regulation is introduced when a shareholder provides a loan to the company instead of own capital. A shareholder that granted a loan to the company when in terms of the diligence of a good businessperson they should have provided it with their own capital may not pursue a claim against the company for repayment of the loan in bankruptcy or compulsory settlement proceedings. Such a loan shall be deemed to form a part of the company's assets in bankruptcy or compulsory settlement proceedings (Art. 498 ZGD-1). However, if the company has already repaid the amount of the loan in the year preceding the initiation of the bankruptcy or compulsory settlement, the shareholder who provided the loan or the shareholder who provided collateral or acted as a guarantor must compensate the company for the amount of the loan that was repaid. If a company repays a loan in the year prior to the commencement of bankruptcy or compulsory settlement proceedings, the shareholder that granted the loan, provided security, or stood as a surety shall compensate the company for the amount of the repaid loan (Art. 499 ZGD-1).

184 Ibid., pp. 898–899.

8.3.2. *Joint-stock company*

For joint-stock companies, the ZGD-1 establishes the principles of providing share capital and of maintaining share capital, the latter being primarily ensured by prohibiting the return of contributions. Shareholders provide contributions to the company in exchange for shares, thereby affording tangible assets to the company. From the perspective of maintaining share capital, the prohibition on refunding contributions is significant. Shareholders cannot withdraw from a joint-stock company, as is possible in certain cases of statutory or contractual withdrawal in a limited liability company, by having their withdrawal financed through the return of their contribution. As a result of the absolute prohibition on such refunding, a shareholder can exit by selling their shares to another shareholder or a third party. The sale of shares has no consequences for the assets or the share capital of the joint-stock company, as neither of them is reduced.¹⁸⁵

Despite the principle of maintaining share capital, the creditors of a joint-stock company cannot always rely on the company having assets equal to its share capital, as the assets secured through share capital can decrease through business operations. However, they have an important safeguard here that ensures that the company will not distribute anything to its shareholders from its assets other than the available retained earnings, after covering losses, until all creditors are adequately satisfied.¹⁸⁶ This limitation does not apply to payments made to shareholders in exchange for goods and/or services provided by shareholders within the scope of their business cooperation.¹⁸⁷

The principle of the prohibition of refunding contributions and maintaining share capital also protect shareholders/shareholder groups among themselves. If certain shareholders were treated unequally¹⁸⁸ in profit distribution, they could invoke the same sanctions as creditors for the prohibited refund of contributions. In the ZGD-1, it is detailed what constitutes and does not constitute a prohibited refund of contributions, along with a specific form of “concealed profit distribution” (Art. 227(3) ZGD-1). In Article 227(1) ZGD-1, a general prohibition to refund and pay interest on contributions is established. However, in the Article 227(2) ZGD-1, exceptions are made for the payment of a proportion of the distributable profit in accordance with the ZGD-1, or for payment for the purpose of a permissible acquisition of own shares in accordance with the ZGD-1.

The prohibition on concealed profit distribution is essential as it makes particularly inadmissible payments for benefits or services provided by the shareholder or related companies if they exceed their fair value, regardless of whether the payment is made to the shareholder, related company, or a third party at their instruction. Thus, it is possible to consider actions such as interest-free loans provided by the

185 Ibid., pp. 466–467.

186 Ibid., 2009, p. 467.

187 Ibid.

188 Article 221 ZGD-1, which regulates the principle of equal treatment of shareholders, stipulates that the company’s bodies must treat shareholders equally and under the equal conditions.

company and the provision of disproportionately high commissions as forms of engagement with transactions that attempt to conceal profit distributions. Additionally, the assumption of gratuitous sureties by the company for the shareholder or the provision of collateral by the company to a third party on behalf of its shareholder is also considered a refund of contribution.¹⁸⁹

In addition to the prohibition of returning investments, the charging of interest on investments is also prohibited. Interests include continuous recurring income that the shareholder would obtain from the contribution. “Guaranteed dividends”, which are to be paid even when there are no profits available for distribution, are also considered as interest that must be paid. However, this does not include the payment of preferred dividends to preferred shareholders.¹⁹⁰

It is important to distinguish between prohibited refunds of investments and payments made based on the effects of reducing the share capital. In the case of a simplified reduction of the share capital, there are no payments made to shareholders, but only the regular reduction of the share capital (Art. 372 ZGD-1) or the reduction of share capital by the withdrawal of shares (Art. 381 ZGD-1) are relevant in this context. In the case of a regular reduction of the share capital, it is not considered a prohibited refund of contributions since there is no unlawful interference with the share capital; rather, the share capital is reduced in accordance with a lawful procedure. Additionally, a reduction of share capital by way of a share withdrawal does not involve the company paying all shareholders the effect of the reduction resulting from the withdrawal; instead, the company pays certain shareholders for the shares acquired for the purpose of the share withdrawal.¹⁹¹

Every legal transaction that violates the principle of prohibition of return of investments and charging of interest is void. As a result of the nullity of the legal transaction, the company has all available claims, including contractual claims (unjustified enrichment and damages), proprietary claims (reivindication), and especially a specific corporate law claim under Article 233 ZGD-1. This independent claim is specifically suited for the return of prohibited payments and is stronger than any other claims and possible objections raised by the shareholder. The claim can be asserted by the company itself and by the company’s creditors if the company is unable to pay them (Art. 233(2) ZGD-1). Minority shareholders can also assert this claim (Art. 233(1) ZGD-1), with the provisions of Article 328 ZGD-1 being applicable *mutatis mutandis* regarding the filing of a lawsuit for the recovery of damages on behalf of the company at the request of minority shareholders.^{192,193}

189 Ivanjko et al., 2009, p. 468.

190 Ibid.

191 Ibid., p. 469.

192 Shareholders whose combined interests account for at least one-tenth of the share capital or whose nominal value (or the corresponding amount of share capital) amounts to at least 400,000 euros.

193 Ivanjko et al., 2009, p. 470.

8.4. Reduction of Capital

8.4.1. Limited liability company

A reduction of the share capital of a limited liability company requires a resolution of the general meeting in the form of an amendment to the memorandum of association, and this amendment must be certified by a notary public. The law treats the reduction of share capital in a uniform manner, without distinguishing between the nominal and effective reduction of share capital (see Article 520 ZGD-1). An effective reduction of share capital is followed by the payment of part of the share capital to shareholders and a reduction of the company's assets, while a nominal reduction of share capital involves a reduction of share capital and a transfer of assets to the company's reserves.¹⁹⁴ The law also allows the reduction of share capital to be carried out in a simplified manner or by share withdrawal. In this case, it refers to the *mutandis mutandis* application of the relevant provisions in a joint-stock company (Art. 520 ZGD-1).¹⁹⁵

8.4.2. Joint-stock company

A regular reduction of share capital (effective reduction of share capital) is the reverse of the increase in share capital by contributions. A majority of at least three-quarters of the share capital represented at the resolution is required for the validity of a resolution to reduce the share capital (Art. 372(1) ZGD-1). As a general rule, a company will apply the institution of ordinary reduction of share capital if it decides to make payments to shareholders. However, compliance with the rules governing the procedure for securing creditors is essential here.¹⁹⁶ Creditors whose claims against the company arose before the registration of the resolution on the regular reduction of share capital in the register must be provided with security if they notify their claims within six months after the publication and are unable to be paid. Creditors must be informed of this right (Art. 375(1) ZGD-1). Payments to shareholders based on the reduction of share capital shall be made only after six months have passed since the registration of the regular reduction, and after the timely-notified creditors have been satisfied or provided with security (Art. 375(2) ZGD-1).

In a reduction of the share capital, no new shares will be issued, but the number of shares will be reduced, either by reducing the nominal amounts of the shares, by pooling the shares, without pooling the shares in the case of bulky shares, and even without consolidation in the case of no-par value shares. However, in the case of non-cumulative shares, the procedure for the cancellation of shares must also be carried out in the course of the procedure for the reduction of the share capital (Art. 376 ZGD-1). If the company has no-par value shares, the reduction of share capital also involves the procedure of cancellation of shares (Art. 376 ZGD-1).

¹⁹⁴ Ibid., p. 887.

¹⁹⁵ See the Reduction of capital in joint-stock company in Chapter III., D., II.

¹⁹⁶ Ibid., pp. 717, 718, 723.

A simplified (nominal) reduction of share capital is also possible, serving as the reverse of a nominal increase of share capital. This process of reducing the share capital, which may also be carried out in a simplified manner, is intended to cover a loss carried forward, or a net loss for the financial year, or to transfer amounts to the capital reserves (Arts. 379(1) ZGD-1). The decision to reduce the share capital must state the purpose of the reduction. A simplified reduction of the share capital is only permissible when the company no longer has any available profits or reserves from profits, and only after the capital reserves have been previously used, with the exception of the legal reserve fund (Art. 379(2) ZGD-1).

A company may reduce its share capital also by the withdrawal of shares, but only in exceptional cases. This may be done either by compulsory acquisition or by acquisition by the company. A compulsory withdrawal is only permissible if it was provided for or authorised in the original articles of association or by an amendment to the articles prior to the acquisition or subscription of the shares (Art. 381(1) of ZGD-1).

8.5. Dividends

8.5.1. Limited liability company

The right to participate in profits is a fundamental shareholder right in a limited liability company, and can be equated with the right of a shareholder to receive dividends in a joint-stock company. The right of a shareholder to participate in the profit is conditional by nature, as Article 494(1) ZGD-1 grants it to the shareholder only on the condition that the balance sheet profit has also been generated. The right to participate in profits is always expressed in monetary form in the valid currency, it is transferable, and can also be pledged. The principle of the proportional distribution of profits according to the amount of business shares held by the shareholders applies here (Art. 494(2) ZGD-1). Shareholders are also not obligated to return the amounts received in good faith as a share in the profit, unless the shareholder was not in good faith and the share was paid out even though the shareholders should have known that the profit is necessary for the preservation of the company's share capital (Art. 497 ZGD-1).

8.5.2. Joint-stock company

Participation in profits is a fundamental property right of a shareholder in the joint-stock company. It is necessary to distinguish between the right to a share of the profit (dividend) as an abstract corporate (not yet contractual) right of the shareholders on one hand, and the (contractual) right to receive dividends determined by the general meeting with a resolution on the use of the balance sheet profit in accordance with Article 230(5) ZGD-1. Only when the general assembly determines the method of using the balance profit for the payment of dividends to shareholders does this right become of a contractual nature. Based solely on the abstract corporate right to participate in the balance sheet profit, the shareholder does not yet have a contractual claim towards

the company.¹⁹⁷ The general meeting can use the balance profit for other purposes with a resolution on the use of this profit, but shareholders have the possibility to challenge this resolution if the minimum statutory dividend of 4% of the share capital is not distributed with the resolution (Art. 399(1) ZGD-1).

Before the resolution on the distribution of profit among shareholders, it is necessary to consider the order of using the net profit, which is precisely determined by Article 230(1) ZGD-1. When preparing the annual report, the net profit must be used for the following purposes in the following order:

- a) coverage of carried forward losses;
- b) formation of capital surplus on the basis of a concluded compulsory settlement;
- c) formation of legal reserves;
- d) formation of reserves for own shares;
- e) formation of reserves provided for by the articles of association.

9. Slovakia

9.1. Rules on Legal Capital

The provisions on legal capital and corporate financing embrace the rules regarding the formation and maintenance of the share capital, the company's financial structure, and the ways in which assets return to shareholders without infringing the legal requirements on capital maintenance. In general, a company may finance its activities through equity or debt. Equity includes the shareholders' contributions to the share capital, contributions to the capital funds, the reserve fund, and the retained profits. As small and medium-sized enterprises usually do not have sufficient equity, they often use external capital to finance the company (debt finance). A company's debt finance includes short-term or long-term credits, loans, and other liabilities arising from its business activities, as well as non-repayable financial aid.¹⁹⁸

One of the basic requirements for the incorporation and existence of capital companies is the registered share capital. The principle of the actual creation of the share capital and that of its maintenance are reflected in several provisions of the Slovak legislation. These include, for instance, the requirement of a minimum amount of contributions to be paid up before the company is incorporated,¹⁹⁹ the determination of the value of a contribution in kind,²⁰⁰ or the possibility of increasing the share capital through contributions in cash only after the existing contributions have been paid up in full.²⁰¹ The guarantee function of the share capital was significantly strengthened by the amendment to the CC that entered into force on 1 January 2016.

¹⁹⁷ Ibid., p. 503.

¹⁹⁸ Dolný, 2021, p. 474.

¹⁹⁹ Section 111, CC.

²⁰⁰ Section 59(3), CC.

²⁰¹ Section 142, CC.

This amendment introduced the concept of a company in crisis (*spoločnosť v kríze*), reinforcing protective mechanisms for monitoring the company's equity-to-debt ratio and strengthening the general prohibition on repayment of contributions (*zákaz vrátenia vkladu*). While the prohibition on the repayment of contributions had been part of the CC since the Euronovela (Act No. 500/2001 Coll.), the so-called *Lex Váhostav* expanded this concept in response to the then-current issues regarding bankruptcy and restructuring processes.²⁰² The Slovak CC stipulates that if the equity-to-debt ratio is less than 8:100, the company is in crisis.²⁰³ If the total debt is higher than the company's assets, the company is already insolvent and would be obliged to file a petition for bankruptcy.²⁰⁴

9.2. Rules on Legal Capital Contributions

9.2.1. Limited liability company

A capital company is obliged to create its share capital. In Slovak corporate law, the share capital is defined as the aggregate of contributions in cash and in kind pledged by all shareholders and expressed in monetary terms.²⁰⁵ Contributions in kind (e.g. movable property, immovable property, an enterprise, know-how, or an account receivable, including receivables against the company) can only be assets if their economic value can be determined. A shareholder who transfers a receivable to the company is liable as a guarantor for its enforceability up to the value of the pledged contribution in kind.²⁰⁶

It is expressly prohibited by law to make contributions through a commitment to perform certain work or supply services.²⁰⁷ This prohibition derives from Article 46 of Directive 2017/1132 (former Article 7 of Second Council Directive 77/91/EEC of 13 December 1976) applicable exclusively to joint-stock companies; the Slovak legislator decided to apply such a restriction to all types of companies, including limited liability companies. Such a prohibition is considered impractical, especially for innovative and technologically oriented start-up companies.²⁰⁸

The articles of association shall specify the amount in which a contribution in kind is set-off against the shareholder's contribution.²⁰⁹ The value of a contribution in kind is determined by an official appraiser, unless the conditions for a simplified method of appraisal laid down by law are met. First, it was established in judicial practice that contributions in kind must be paid up before the company is incorporated, and the determination of the value to be set off against the shareholder's contribution

202 Dolný, 2021, p. 483.

203 Section 67a, CC.

204 Dolný, 2021, p. 539.

205 Section 58(1), CC.

206 Section 59(5), CC.

207 Section 59(2), CC.

208 Dolný, 2021, p. 459.

209 Section 59(2), CC.

in kind must not be manifestly disproportionate, otherwise the act would be contrary to good morals.²¹⁰ However, the Supreme Court later deviated from its previous stance regarding the relationship between the value of the contributed asset and the amount to which the contribution is credited. Consequently, it is not excluded that a non-monetary contribution by a shareholder to a company may be credited to the shareholder's contribution at a monetary value lower than its value as determined by an expert appraisal.²¹¹

The person authorised to administer the contributions prior to the incorporation of a company can be the founder, who is authorised to do so in the articles of association, or a bank or a branch of a foreign bank, even if it is not the founder of the company.²¹² The administrator of contributions (*správca vkladov*) is obliged to prepare a written statement on the payment of contributions by individual shareholders, which must be attached to the application for registration of the company in the Commercial Register. If the administrator of contributions states in the written statement a higher amount than that paid up by the shareholders, he/she is liable to the company for the fulfilment of the shareholder's obligation to pay up the contribution and liable to the company's creditors up to the amount of this difference.

For a limited liability company, the minimum amount for the registered share capital is 5,000 EUR. The value of each shareholder's contribution must be at least 750 EUR.²¹³ Before filing the application for registration of a company in the Commercial Register, any contribution in cash must be paid up to at least 30%, and any contribution in kind must be paid up in full. The total value of the paid-up contributions must be at least 50% of the minimum amount of the share capital prescribed by law. In the case of a single-person limited liability company, the share capital must be paid up in full before the company's registration in the Commercial Register.²¹⁴

Special provisions on the payment of contributions apply to limited liability companies initially formed in a simplified online procedure using an electronic template of the articles of association. If the shareholders decide to set up their company in this simplified manner, they may participate in the share capital exclusively in cash, and contributions in kind are not allowed. Moreover, only one person may be designated the administrator of contributions, namely the director of the company, who may be exclusively a natural person.²¹⁵

The company acquires ownership rights to an object of a contribution only upon its incorporation, and ownership of real property only once the right is registered in

210 The Supreme Court of the Slovak Republic, No. 4 Obo 125/2003.

211 The Supreme Court of the Slovak Republic, No. 1 M Obdo V 2/2008, 1 March 2011.

212 Section 60(1), CC.

213 Sections 108 and 109, CC.

214 Section 111(2), CC.

215 Provisions on the simplified online formation of limited liability companies are provided in Section 110a, CC, and are the result of the implementation of Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 regarding the use of digital tools and processes in company law (Digitalisation Directive).

the Land Register. If the company does not acquire the ownership right to the object of the contribution (e.g. if a historical collection that was to become the object of the contribution in kind is stolen before the company acquires the ownership right), the shareholder who undertook to provide such a contribution must pay its value in cash in accordance with the principle of the actual creation of the share capital. Moreover, if the value of the contribution in kind does not reach the amount specified in the articles of association at the time of registration of the share capital in the Commercial Register (e.g., when the motor vehicle that was to become the object of the contribution in kind has been damaged), the shareholder must pay the difference in cash. It is prohibited to exempt the shareholder from the obligation to pay up the contribution and to unilaterally set off the contribution.²¹⁶ Importantly, the registered share capital represents only a calculation figure, and there is no obligation on the part of the company to retain the same funds or assets which have been contributed thereto as long as other assets sufficiently cover the company's liabilities.

Generally, the proportion of the shareholder's contribution to the share capital determines the size of the shareholder's business share (*obchodný podiel*).²¹⁷ Shareholders, within their private autonomy, may regulate their rights and obligations among themselves, irrespective of the amount of their contribution to the share capital.

9.2.2. Joint-stock and simple joint-stock companies

The general provisions on contributions discussed in the previous subchapter apply to all capital companies. For the joint-stock company, the minimum amount of the share capital is 25,000 EUR, which may change during the company's existence but may not fall below the minimum amount laid down by law. The amount of share capital is the aggregate of the nominal values of the shares issued by the company, and while this nominal value must be expressed as a whole number, the law does not specify a minimum nominal value.

Compared to a joint-stock company, the legal framework of a *simple joint-stock company* provides for certain special provisions. For a simple joint-stock company, the minimum amount of share capital is 1 euro,²¹⁸ with a minimum nominal value of 1 eurocent per share, and the entire value of the share capital must be paid up before the company is incorporated. Neither the formation of the company nor an increase of the share capital may be effected by subscription to shares based on a public call.

9.3. Legal Capital Maintenance

9.3.1. Limited liability company

Once a company is incorporated, it is essential that the assets contributed to the company are handled in such a way that the interests of the company and of its

²¹⁶ Sections 108(2) and 113(1), CC.

²¹⁷ Section 114, CC.

²¹⁸ Section 220t(2), CC.

creditors are not jeopardised. One of the mechanisms for ensuring that the share capital is actually maintained is the prohibition on repayment of investment contributions to the shareholders during the company's existence. This is a necessary correction to the principle of limited liability according to which shareholders are not liable for the companies' debts (if the contribution is fully paid),²¹⁹ serving to prevent a company from being tunnelled by its own shareholders. The ban on repayment of the shareholder's investment contribution (*zákaz vrátenia vkladu*) arises from the nature of the contribution itself. Once a shareholder makes a contribution to the share capital, the shareholder's property is transferred to the company's assets, and its repayment is in principle excluded, with the exception of the payment of profits.

The repayment of the contribution is a property transaction between the company and its shareholder, whereby the shareholder receives a payment from the company that does not correspond to a fair market consideration.²²⁰ Thus, the word "contribution" is defined very broadly in the CC, such as by referring to a gratuitous cash loan granted by the company to a shareholder, whereas under market conditions the shareholder would have to pay interest on these funds. Asset allocation may also be made through a transaction with a shareholder in which the company does not receive sufficient value in return.

The prohibition on repayment of the contributions applies to shareholders of a limited liability company as well as to former shareholders if the contribution was repaid to them within two years after they ceased to be shareholders, to future shareholders or related persons of shareholders, and to third parties acting on behalf of shareholders.²²¹ A prohibited allocation to a shareholder may result in the liability of both the shareholder and the managing directors of the company. The legal consequence of the prohibition on repayment of the contribution is not the nullity of the legal transaction, but rather the shareholder's obligation to return to the company the difference between the adequate consideration and the consideration provided.²²² The managing directors who were in office at the time of the unlawful repayment of a contribution are jointly and severally liable for damages to the company and to the company's creditors for returning the unlawfully-repaid contribution.²²³

In addition to the above-mentioned ban, the Slovak Commercial Code expressly prohibits the payment of interest on contributions and the payment of advances on a share in profits.²²⁴ However, shareholders may be paid a share in profits (dividend) and other benefits in case of a reduction of the share capital or use of a capital fund created from contributions.

219 Ovečková et al., 2022, p. 682.

220 Ovečková et al., 2020, p. 389.

221 Section 123 in connection with Section 67j, CC.

222 Section 67k(1), CC.

223 For the assessment on creditor's protection rules in case of prohibition on repayment of contribution see Chapter 6.

224 Section 123(2), CC.

In a limited liability company, a reserve fund is mandatorily created in the amount and at the time specified in the articles of association. There is no obligation to create a reserve fund upon the company's incorporation. If the reserve fund is not created upon the company's incorporation, the company shall create it from the net profit shown in the annual financial statements for the year in which the profit is made for the first time, in the amount of at least 5% of the net profit, but not more than 10% of the share capital. The company must replenish the reserve fund annually, and the use of the reserve fund shall be decided by the company's managing directors. If the cash in the reserve fund exceeds the statutory minimum, upon the decision of shareholders, the company may use it for purposes other than covering losses. For example, it can be distributed to shareholders.²²⁵

The company's equity also includes capital funds (*kapitálové fondy*) created from shareholders' contributions. These are effective means for strengthening the company's equity without having to go through the more demanding process of increasing the company's share capital. Although the legal regulation of capital funds was introduced into the Slovak legislation by Act No. 264/2017 Coll. amending the CC, which only entered into force on 1 January 2018, capital funds could be created even before their explicit stipulation in legal provisions.²²⁶ From a systematic point of view, the legal regulation of capital funds created from contributions is included among the provisions on joint-stock companies,²²⁷ but they also apply to capital funds created by limited liability companies.

The shareholders may agree in the articles of association that the general meeting can decide to impose on the shareholders an obligation to make a cash payment (only)²²⁸ above the amount of the contribution to cover losses suffered by the company (i.e. so-called surcharge obligation, or *príplatková povinnosť*). If the general meeting approves such a surcharge, it shall be binding on all shareholders who pledged contributions. The total amount of the surcharge obligations may not exceed half the amount of the share capital. These financial means may only be used to cover company losses.²²⁹

9.3.2. Joint-stock and simple joint-stock companies

Various provisions are formulated to reflect the principle of share capital creation and maintenance for joint-stock companies. First, the issue price of a share may not be lower than its nominal value. Second, as in the case of a limited liability company, the value of the contribution in kind must be determined by an official appraiser. Furthermore, to prevent a circumvention of the provisions on contributions in kind, additional requirements have been laid down for the acquisition of assets from

225 Section 124 (1) and (2), CC.

226 Patakyová et al., 2022, p. 953.

227 Section 217a, CC.

228 Patakyová et al., 2022, p. 591.

229 Section 121(1), CC.

shareholders.²³⁰ Transfers of property between a company and its shareholder or a person close to its shareholder, if the consideration is at least 10% of the share capital, are subject to the same rules as in the case of a contribution in kind (i.e. its value must be determined by an official appraiser and then approved by the general meeting).²³¹ These rules apply to joint-stock and simple joint-stock companies, but not to limited liability companies. Similarly to a limited liability company, the prohibition on repayment of contributions applies to joint-stock company shareholders.²³²

9.4. Increase and Reduction of Legal Capital

9.4.1. Limited liability company

The increase of the share capital is linked to the need to raise new equity mainly owing to the expansion of business activities. The Commercial Code (CC) provides for two forms of share capital increases, namely increase against contributions and increase from company resources. A share capital increase requires a resolution by the general meeting to be approved by at least a two-thirds majority of the votes of all shareholders. The increase of the share capital by new shareholders' contributions in cash is only permissible if the existing contributions in cash have been paid up in full.²³³ Generally, existing shareholders have a subscription right to make new contributions *pro rata* to their existing contributions;²³⁴ this is a default norm, and the rule can be differently stipulated in the articles of association or in the resolution of the general meeting. The shareholders may exercise this right within one month from the decision of the general meeting to increase the share capital, otherwise it lapses, albeit the articles of association may provide for a different time limit. Third parties may also be permitted to subscribe to new contributions.

Furthermore, the share capital may also be increased by converting retained earnings or other company's equity funds into share capital. This type of capital increase requires the formal approval of the annual financial statements by the general meeting prior to the adoption of the capital increase decision.²³⁵ However, it is not an effective increase, but rather a reclassification in the accounting records.

Share capital reductions are primarily driven by the need to free up resources to cover company losses when its financial situation is unfavourable, although this is not the sole reason for such a reduction. The resources thus freed up may also be used for distribution to shareholders or for the creation of other funds within the equity. However, capital funds under Section 217a of the CC cannot be created from the freed resources from the decrease of the share capital, as these funds need to be created by

230 Ovečková et al., 2020, p. 371.

231 Section 59a, CC.

232 Patakyová et al., 2022, p. 814.

233 Section 142, CC.

234 Section 143, CC.

235 Dolný, 2021, p. 507.

shareholder contribution (*príspevok*).²³⁶ When the share capital is reduced, it must be ensured that the amount of share capital does not fall below the minimum amount of laid down by law.

The share capital may be reduced in two ways: nominally, where there is no change in the amount of the company's equity or assets, but it is only an accounting transfer; or effectively, where the amount of contributions is reduced, entailing that company assets are reduced as a result of the cash payment, generally to shareholders. As the reduction of the share capital may jeopardise creditors' interests, the CC provides for a number of requirements designed to protect them. These include the obligation of managing directors to publish an announcement of the reduction decision of the general meeting and of the amount of the reduction in the Commercial Gazette,²³⁷ calling the creditors to give notice to the company and to act on their right to sufficient security for or satisfaction of their claims.²³⁸ A registration of the reduced share capital into the Business Register is conducted only if evidence is provided that creditors have been secured, unless their claims have been satisfied in the meantime.

9.4.2. Joint-stock company

For joint-stock companies, the CC recognises several forms of an increase of the share capital:

- a) a capital increase against contribution (subscribing for new shares);
- b) a capital increase out of the company's assets;
- c) a combination thereof;
- d) a contingent capital increase, namely by increasing the share capital through the issue of exchangeable or preference bonds.²³⁹

An increase of the share capital may be affected by means of a public or private call to subscribe for shares, or without a call to subscribe for shares if only the existing shareholders participate in the increase of the share capital. Each shareholder has a right to obtain new shares in the event of a capital increase *pro rata* to the nominal value of their shares in the share capital (i.e. the subscription right). The decision to increase the share capital is entrusted to the general meeting, which decides by a two-thirds majority of the votes of the shareholders present. Moreover, the articles of association or the general meeting may authorise the board of directors, for a period not exceeding five years, to increase the share capital up to a specified nominal amount.²⁴⁰

²³⁶ Ovečková, 2022, p. 1690.

²³⁷ The Commercial Gazette is a public administration system available online at: <https://obchodnyvestnik.justice.gov.sk/ObchodnyVestnik/Web/Zoznam.aspx> (Accessed: 15 December 2024).

²³⁸ Ovečková et al., 2020, p. 374.

²³⁹ Dolný, 2021, p. 504.

²⁴⁰ Section 210, CC.

A reduction of the share capital may be actualised by reducing the nominal value of shares or by withdrawing a certain number of shares in issue. The sources freed up by the reduction of the share capital may be used to cover the company's losses, to create company funds, to waive the shareholders' obligation to pay up the outstanding part of the issue price of their shares, or may be distributed to shareholders. Compared to a limited liability company, the protection of creditors in the event of a share capital reduction in joint-stock companies is even stronger. The decision of the general meeting to reduce the share capital must be filed in the Collection of Deeds, while creditors who have outstanding claims against the company may demand that the company provide adequate security for their claims if their claims are not adequately secured.²⁴¹ When a reduction of the share capital is to be registered in the Business Register, the registration court checks whether the time limit for its announcement in the Commercial Gazette has been observed and whether the conditions for securing creditors' claims have been met. If the board of directors determines that payment to the shareholders would cause the company's insolvency, it must refrain from making such a payment. Such a payment could be considered a voidable juridical act.²⁴² Nevertheless, the creditor protection mechanisms are not activated if the share capital is reduced solely for the purpose of covering losses or is reduced by withdrawing shares in issue, whether gratuitously or for consideration.²⁴³

9.4.3. Simple joint-stock company

For simple joint-stock companies, the articles of association may exclude the need for a majority of shareholders holding certain types of shares to approve a change in the share capital.²⁴⁴ Another advantage over a joint-stock company is the possibility of excluding the right of the existing shareholders to subscribe for new shares when the share capital is increased. It is also possible to issue shares exclusively to the company's employees, excluding the subscription rights of existing shareholders.²⁴⁵ In addition to these special rules, the general joint-stock law applies to the increase and reduction of the share capital and the distribution of net profits or capital funds in simple joint-stock companies.

9.5. Profit Distribution and Dividends

9.5.1. Limited liability company

In general, each shareholder of a limited liability company is entitled to a portion of the profits, and has the right to participate in the profits *pro rata* to their paid-up contributions. A different method of calculating the share of profits may be provided

241 Section 215(3), CC.

242 Dolný, 2020, p. 513.

243 Section 215b(2), CC.

244 Section 220zf(2), CC.

245 Šuleková, 2016, p. 2.

for in the articles of association.²⁴⁶ The general meeting makes decisions whether to distribute the profits or retain them for further investment, and a simple majority of the shareholders present at the general meeting is required to approve the distribution of profits.²⁴⁷ The actual proposal for the distribution of profits is submitted to the general meeting by the managing directors in a manner that complies with the law and the distribution tests provided for in Sections 179(3) and (4) CC for joint-stock companies, as it applies to limited liability companies as well. A company may only pay a share in profits from net profit (net surplus test) if such payment does not reduce its equity below the value of the share capital and the reserve fund (balance sheet test), and if it does not thereby cause its insolvency (insolvency test).²⁴⁸ Before deciding on the use or distribution of the company's profits, the annual financial statements must be approved.

If a shareholder has been paid a share in the profits in excess of that to which he/she is entitled, he/she is obliged to return the unlawfully-paid dividend.²⁴⁹ The managing directors are liable for the shareholder's compliance with this obligation, and the provisions on joint-stock companies apply to the distribution of payments from the capital funds.

9.5.2. Joint-stock and simple joint-stock companies

In joint-stock and simple joint-stock companies, the shareholders' share in the profits is generally determined *pro rata* according to the participation they have in the share capital. The articles of association lay down the manner in which profits are distributed not only to shareholders (dividends) but also to board members (royalties). The right of board members to share in the company's profits should be specifically regulated in the articles of association regarding its amount. The distribution of profits is decided at the general meeting by a majority of the votes of the shareholders present.

Unlike a limited liability company, a shareholder of a joint-stock company is not obliged to return a dividend received in good faith.²⁵⁰ The CC expressly stipulates the presumption of a shareholder's good faith, which must be rebutted by the company.²⁵¹ The members of the board of directors of a joint-stock company are liable for damages caused by the unlawful payment of a dividend. As a result of the transposition of the EU Capital Directive, the net surplus test and the balance sheet test have been introduced into Slovak legislation. In addition, the Slovak legislator has introduced in Section 179(4) CC the so-called insolvency test, according to which a company may not distribute net profits or other equity to its shareholders if it would thereby cause its insolvency. The possibility of opposing such a juridical act owing

²⁴⁶ Section 123(1), CC.

²⁴⁷ Section 127(3), CC.

²⁴⁸ Patakyová et al., 2022, p. 818.

²⁴⁹ Section 123(4), CC.

²⁵⁰ Section 179(1), CC.

²⁵¹ Ovečková et al., 2022, p. 1483.

to its voidability ensures the protection of creditors *ex post*.²⁵² As aforementioned, these distribution tests are also applicable to the distribution of net profits in limited liability companies.

Capital funds created from the shareholders' contributions may also be distributed to company's shareholders, but only if the company's articles of association so provide. The actual use of the paid-up capital fund must be decided by the general meeting, and its distribution is possible if:

- a) it has been approved by the general meeting;
- b) a notice of the amount of the distribution has been published 60 days prior to the distribution;
- c) the conditions for distribution set forth in Section 179 CC (i.e. the distribution test) are met.

The capital fund created from the contributions may not be distributed to shareholders if the company is in crisis or would be in crisis as a result of the distribution (company crisis test).²⁵³ The shareholders are obliged to return amounts paid out of the capital fund in violation of the law unless they can prove that they received them in good faith. Members of the statutory body who were in office at the time the distribution was provided in violation of this prohibition shall be jointly and severally liable for its return. In addition, those who held office as members of the statutory body during the period in which the company did not assert its claim for the return of the contribution, and who knew or should have known of this obligation given all the circumstances, are also jointly and severally liable. Liability (*ručenie*) arises towards the company and the company's creditors as well.²⁵⁴ The legal provisions governing the distribution of capital funds of a joint-stock company also apply *mutatis mutandis* to a limited liability company and simple joint-stock company.

10. Conclusions

Together, the eight jurisdictions examined here sketch a coherent but evolving picture of what "legal capital" still means in European company law after the codification brought by Directive (EU) 2017/1132 and the waves of national reforms that followed. The picture is not unitary, but a complex system in which minimum subscribed amounts, in-kind valuation, maintenance rules, distribution tests, and director duties interact with accounting and insolvency law, sectoral prudential regimes, and the contractual freedom of founders and investors. The doctrinal centre of gravity has moved decisively away from treating the registered figure of capital as a reliable guarantee for creditors and toward a composite of *ex ante* formation discipline and *ex*

252 Dolný, 2021, p. 513.

253 Section 217a(2), CC.

254 Section 67f(2) and (3), CC.

post payout policing. Although the formal categories still matter, they matter differently for public and private companies.

Across the systems, the classic public-company design remains largely intact. Public companies carry meaningful floors for initial capital, often well above the Directive's baseline, and they remain bound by a tightly-scripted ceremony for formation and changes to capital. Prohibitions on issuing shares below par, mandatory expert valuations of contributions in kind, pre-emptive rights on cash increases, and two-step or even double-entry registrations for reductions continue to consolidate creditor expectations. Managing bodies are under an express obligation to react to equity erosion (e.g. an archetype is Czech law's early-warning rule to convene when half of capital is threatened), and courts can police abuses through clawbacks and director liability where distributions have breached the balance-sheet constraints. In this setting, capital is still a governance instrument, signalling device to the market, and trigger for procedural creditor protection when it is increased or reduced.

The private-company story is sharper and more heterogeneous. Several legislatures have reduced the statutory floor to a token amount or abolished it altogether, especially for the most entrepreneur-friendly forms, as follows: Czech private companies can start with a single Czech koruna when only one share exists; Romanian limited liability companies can be formed with a nominal capital at the threshold of 1 RON after the 2020 reform; Serbia's 100 dinars and Poland's one-złoty simple joint-stock companies confirm this direction; Slovakia's simple joint-stock companies sit at one euro. Hungary preserves a higher floor for the limited liability company, but couples it with unusually flexible timing for cash pay-ins and the possibility to catch up from distributable profits. Slovenia and Croatia deliberately retain mid-level floors for the the limited liability company (d.o.o.), combining them with rigorous maintenance and clawback rules. In reality, nonetheless, the minimum number on the face of the corporate charter is no longer a proxy for creditor safety in the private space. The operative constraints are instead accounting-based distribution tests, solvency overlays where they exist, and effective remedies against disguised value extractions.

The rules governing how contributions are made and when they must be paid show both convergence and outliers. Everywhere, in-kind contributions must be capable of reliable monetary appraisal and transfer of control, and almost everywhere public companies require independent expert valuation, with narrowed exceptions. Slovenia's regime adds a pragmatic cutoff by mandating an auditor's opinion when non-cash contributions exceed a threshold, and its law articulates shareholder liability for overvaluation with a clarity that maps neatly onto veil-piercing principles. Slovakia insists on full pay-in of non-cash contributions before registration for the limited liability company (s.r.o.), and it has built a modern framework for appraisers and simplified routes in specific cases. Public companies in Hungary accept a mix of expert valuation or "accepted" values if anchored in freshly-audited financials or quoted market prices, but still require minimum cash percentages at incorporation and short deadlines to complete the remainder. The details differ, but the vector is

the same: there is no tolerance for work or services as capital; there is a high-level suspicion of claims as capital outside tightly circumscribed situations; the duty to make good the value of any non-cash contribution that fails to transfer or turns out to be short is universal.

Setoff and capitalisation of claims continue to be pressure points where legal capital interacts with the flexibility for venture finance. The Czech approach illustrates the doctrinal shade, as the BCA forbids capitalisation of a claim at formation, but, outside increases, it does not contain the CC's former explicit ban on setoff of a shareholder's receivable against the contribution debt. On this matter, scholarly opinion is divided and practice resolves this through written setoff agreements, qualified majorities, and exclusions for uncertain or indeterminate claims. Romania takes a more categorical line for widely held or limited liability companies, excluding claims as capital except in narrow founding scenarios, and then only on a collected-cash basis, with full liability for shortfalls and interest from the due date. Slovakia, by contrast, is comfortable with receivables as in-kind contributions, but overlays guarantor-style responsibility for enforceability up to the contributed amount. Two policy instincts collide here, namely the desire to let companies delever or on-board strategic creditors quickly, and the fear that paper claims will be used to manufacture capital without assets. The national answers vary, but the creditor-protection logic behind each answer is consistent with the broader capital-maintenance theme.

Capital maintenance has migrated from the symbolism of a fixed number to a functional triad of tests and remedies. First, the balance-sheet or net-assets constraint tied to the last approved financial statements, with variations on whether development costs must be deducted or locked. Second, the profit-availability constraint that forbids distributions out of legal or statutorily non-disposable reserves and demands that past losses be covered before any payout. The third, which is becoming increasingly more visible, is an explicit or implicit solvency screen. Poland's simple joint-stock company and Romania's solvency-style prohibition for interim payments generalise what was long a directors' duty under corporate or insolvency law: distributions must not push the company below the line where it can meet its due debts in the ordinary course. Slovakia is the most explicit, with its "crisis" concept hard-wiring an equity-to-debt ratio into corporate law and forbidding cash leakage to insiders while the company sits in that zone. Even where the solvency test is not named, courts and codes reach for functionally-equivalent tools, from management's duty to refuse payout when insolvency would result to clawbacks and director liability when distributions slip through purportedly compliant resolutions.

The systems also converge on the anatomy of a lawful distribution decision. There must be eligible financial statements within a defined freshness window and, where interim dividends are used, interim statements that can bear the weight of the payout. The general meeting ordinarily takes the distributive decision, subject to exceptions for fixed profit rights or board-level authority under authorised capital mandates. Managing bodies must then re-check the tests at time of payment and refuse to execute if the situation has deteriorated. If money flows despite a

prerequisite failure, the law makes the recipient's good faith do most of the doctrinal work. In public companies, several systems protect good-faith recipients more readily; in private companies, good faith often yields to a stricter restitution duty. Slovenia shows a particularly robust system, as the clawback action sits on a specific corporate-law footing, outranks general unjust enrichment objections, and can be brought not only by the company but also by creditors and qualified minorities. Serbia goes further at the definitional front, construing "distribution" broadly for the d.o.o. (i.e. dividends, loans, returns of additional payments, and any similar transfers) precisely to capture disguised leakages; the a.d. regime (for companies limited by shares) is more conservative, which is consistent with its capital-market signalling function and other public-law constraints.

Capital reductions and increases remain the moments when creditor protection is ritualised. Where the reduction is nominal to cover losses or to reshuffle equity into capital reserves, the core constraint is that no cash may flow to shareholders; where it is effective and pays money or releases unpaid contribution obligations, the law interposes publicity in official journals, notice to known creditors, waiting periods, and a right to demand satisfaction or security if enforceability would be impaired. Croatia's and Slovenia's texts insist on a waiting period after registration before any payment is made. Czech and Slovak law add a two-step logic in public companies, with a first entry for the resolution and a second for the effectuated amount, and both legal orders let creditors halt registration until safeguards are furnished. The rationale is the same everywhere, which is that shareholder claims are residuary and cannot overtake fixed claims. On the upside, modern codes give boards more tools to raise equity with speed when a window opens. Authorised capital allows management to issue shares within a capped ceiling and a limited horizon without reconvening the meeting each time; conditional capital ties the future increase to convertible or exchangeable securities or to employee participation. Poland's PSA (simple joint-stock company) goes further by abandoning par value and letting founders design a distribution-and-payout discipline that fits high-velocity venture cycles while keeping creditors whole through tough tests and workable clawbacks.

Director and manager duties have been tightened, clarified, or both. The duty to convene when losses threaten half of the capital has firmed up in public companies and has analogues in private companies under general "serious reason" standards. Business judgment is not a safe harbour for ignoring distribution tests, nor for failing to refuse payment when insolvency looms. Several systems pin joint and several liability on those who assented to unlawful payments unless they can show compliance with the duty of care at the time. Others, such as Slovenia, extend the joint liability to managers who presided over a period during which the company failed to pursue restitution that was plainly due. Shareholder liability is calibrated by role and knowledge; those who voted for the unlawful payout or received it with notice of irregularity face stricter restitution and sometimes damages exposure; those who neither voted nor received value may still be captured by knowledge-based standards when they facilitated the outcome.

Two other levers deserve emphasis as they show how capital law coordinates with creditor-protection techniques outside the balance sheet. One is the treatment of shareholder loans. The subordination rule for shareholder loans that should have been equity, and its duty to reconstitute repayments made in the run-up to insolvency, operationalise a simple fairness idea: insiders should not elevate themselves over arm's-length creditors when the company is thinly capitalised. The other is sector-specific minimums coupled with full and immediate pay-ins. Banking and insurance floors, and the National Bank's power to calibrate capital for non-bank financial institutions, respond to systemic risks rather than private orderings. These rules sit comfortably alongside the low floors for general-purpose companies because they speak to a different policy problem.

In summary, the comparative evidence suggests three actionable lessons for law-makers and practitioners. First, for private companies, the credibility of legal capital as a creditor shield now depends less on the number in the articles and more on the quality of the maintenance regime and the enforceability of clawbacks. Jurisdictions that pair low or symbolic minima with explicit solvency screens, credible interim-accounts discipline, and lender-enforceable clawbacks offer functionally-stronger protection than those that cling to higher floors but tolerate porous payout practices. Second, valuation and timing rules around in-kind contributions and setoff must be engineered for the use cases that actually appear in modern finance. Systems that keep the categorical ban on labour contributions, insist on expert valuation where information asymmetries are highest, and allow tightly-documented setoff or capitalisation pathways in increases fare better at reconciling creditor comfort with deal velocity. Third, creditor participation in capital-changing events remains essential, but need not be heavy-handed. Where the law tailors waiting periods to whether the cash will in fact leave the company and gives courts clear criteria to assess when enforceability would be impaired, the ceremony remains protective without becoming paralysing.

None of this implies that legal capital is obsolete, but rather that it has been repurposed. In public companies, it still structures market expectations and coordinates gatekeeping by notaries, registries, auditors, and regulators. In private companies, it plays a finer role as the baseline against which payout tests are run, as the denominator of voting and profit-sharing (unless the founders have bargained around it), and as the legal switch that turns on rigorous creditor-protection procedures. That repurposing is not a weakness; it is legal capital's adaptation to an economy where risk is managed less by static numbers and more by information, accountability, and timing.

For boards, founders, lenders, and counsel, the operational translation is straightforward even if the statutory language is not. Formation should be planned with an eye to valuation that would withstand hostile scrutiny, contribution pay-in schedules that actually fit the cash flows of the business, and charter language that anticipates future raises through authorised or conditional capital. Governance should embed a recurring discipline around the preparation and age of the financial statements used for distributions, and decision logs should document the balance-sheet and solvency

screens at the point of payment, not merely at the meeting that approved the payout. Transactions with insiders should be benchmarked to arm's-length economics,²⁵⁵ and structured to avoid the optics and substance of disguised distributions. Where financing will alternate between shareholder debt and equity, the team should assume that loans advanced into thin capital will be treated as equity in distress and should price and document accordingly. When losses accumulate or liquidity tightens, the priority is to trigger the early-warning duties, assemble options that include nominal increases or reductions, and keep a paper trail that shows how creditors were notified, heard, and, where required, secured.

There are chances for measured reforms, but not necessarily for a revolution. Legislatures considering further reductions of minimum capital for private forms should do so in tandem with explicit solvency tests, sharper good-faith standards for recipient shareholders, and targeted education for small-company directors about their distribution and early-warning duties (a missed opportunity in Romania). Exceptions to expert valuation for in-kind contributions could be harmonised across company types by using objective, auditable anchors (e.g. timely-audited accounts or liquid market prices), coupled with make-good liability if the value proves short *ex post*. Interim dividends, attractive for growth companies and family firms alike, benefit from tighter rules on staleness of interim accounts and from automatic settlement mechanics when the annual close reveals an overshoot. Shareholder-loan subordination, already well developed, can be extended or clarified with safe harbours for genuine rescue finance. Finally, authorised capital has proven itself as a speed tool when calibrated to a proportion of existing subscribed capital and limited in time; its use can be widened, so long as the power to restrict pre-emptive rights remains firmly tethered to a reasoned board report and enhanced majorities in the authorising resolution.

This comparative survey therefore does not end with a verdict for or against legal capital. It ends with an observation about method. Where the law has been realistic about what capital can and cannot guarantee, and has accordingly shifted the weight of protection to timely information, enforceable payout discipline, and credible remedies, firms have gained flexibility without asking creditors to accept opacity. Where symbol and substance still diverge, the doctrines to align them are already visible. The task ahead is not to abandon legal capital, but to keep integrating it with the modern instruments of accounting accuracy, solvency awareness, director accountability, and targeted creditor voice.

255 Whenever a company does a deal with someone who already sits on the “inside” (i.e. a shareholder, director, manager, or an affiliate they control), the terms of that deal should be no less favourable to the company than if it had been negotiated with an independent, unrelated third party in the open market.

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Shares*

1. Introduction

by Emőd Veress

2. The Czech Republic

by Kateřina Eichlerová

3. Croatia

by Marko Ivkošić

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10. Conclusions

by Emőd Veress

1. Introduction

Shares, whether issued by joint-stock companies (JSCs) or embodied as membership interests in limited liability companies (LLCs), constitute the basic legal technology for allocating ownership, control, and economic returns in modern enterprises. However, the two vehicles rely on distinct legal logics, which shape how equity is created, classified, transferred, repurchased, and financed. Because JSCs and LLCs pursue different institutional aims and are embedded in different governance architectures, their equity interests are not interchangeable. The divergences become especially salient in three recurrent problem areas: transferability, issuer repurchases, and financial assistance.

JSCs are engineered to mobilise capital from investors who may be numerous, dispersed, and heterogeneous in sophistication. To serve that function, JSC shares take a standardised form that can be readily valued and traded. The standardisation

* Eichlerová, K., Ivkošić, M., Ledwoń, P., Veress, E., Barta, J., Dugar, G., Renko, J., Mihajlović, B., Mrázová, Ž. (2025) 'Shares' In Veress, E. (Ed.) Joint Stock and Limited Liability Companies in East Central Europe. Miskolc-Budapest: Central European Academic Publishing. pp. 193–279. https://doi.org/10.54171/2025.ev.jsllcece_chapter3

supports liquidity, facilitates price discovery, and reduces transaction costs for new investors entering and existing investors exiting. In public JSCs, the discipline of organised markets amplifies these effects: disclosure, continuous reporting, and corporate governance rules together create a baseline of information and accountability suited to outside investors who lack direct involvement in management. Private JSCs, while not listed, still rely on the conceptual template of standardised shares; their ownership may be concentrated, but the form of the security remains familiar and transferable, subject to negotiated or statutory constraints that temper liquidity to preserve control and coherence.

The regulatory environment mirrors these economic intentions. Public JSCs operate under an overlay of securities regulation, corporate legislation, and, where applicable, stock-exchange rules, all designed to enhance transparency and protect investors. Prospectus requirements, ongoing disclosure, and procedural safeguards around major transactions seek to mitigate information asymmetries and agency costs. Even private JSCs do not lack strict regulation: capital-maintenance rules, director duties, and minority-protection doctrines structure how shares may be issued, transferred, or encumbered. The cumulative effect is a legal regime that trades flexibility for predictability and market access.

LLCs, by contrast, privilege contractual design and member-level control. The LLC interest (membership or business share) is not a standardised security, but a bundle of rights defined primarily by the operating agreement. Members can tailor voting arrangements, profit allocations, capital calls, and management roles to the needs of the venture and the identities of its participants. This plasticity is attractive in closely held settings in which the business depends on trust, complementary personal skills, and shared strategy. Because LLC membership shares are bespoke and typically not offered to the public, they are generally treated through the lens of private ordering, backed by mandatory creditor and minority legal safeguards rather than through a securities-market paradigm.

These structural contrasts explain the different approaches to transferability. In JSCs, especially public ones, ready alienability is a design feature. Shares must move freely to sustain liquidity and market-based valuation. Constraints do exist, particularly in private JSCs, whereby pre-emptive rights, rights of first refusal, or board-approval provisions can protect existing control arrangements and informational equilibria. However, even then, the baseline expectation is that shares represent a portable, standardised claim that can “change hands” without disrupting the firm’s operations or renegotiating its internal constitution.

LLCs invert those priorities. Because the identity, reliability, and compatibility of members often matter as much as their capital, transfers of membership interests are commonly gated. Consent rights, rights of first refusal, and procedural conditions, such as appraisal mechanisms or waiting periods, are typical. Some agreements prohibit transfers outright without unanimity or a specified exit event. These devices preserve the relational and personal character of the venture and stabilise expectations about who sits at the “governance table”.

Issuer dealings in their own equity further highlight the divergent logics of LLCs versus JSCs. In JSCs, buybacks are recognised tools for capital structure management, calibration of earnings per share, and signalling. Precisely because buybacks can influence market prices and alter the creditor–shareholder balance, they are fenced by solvency and liquidity tests, approval mechanics, and disclosure obligations. These safeguards aim to prevent manipulation, protect creditors from value leakage, and ensure that distributions occur only when the firm can bear them. The emphasis is on preserving market integrity while allowing the board to adjust capital efficiently within defined limits.

In LLCs, if permitted at all, repurchases are primarily a matter of contract layered over baseline statutory constraints. Operating agreements may authorise, condition, or foreclose redemptions; some regimes restrict them heavily or render them unavailable to protect the company’s capital base and creditor interests. Where permitted, repurchases usually must respect solvency standards and any priority rights embedded in the capital stack. Because LLC economics are often customised, redemption price and mechanics may be tightly specified, through formulas, third-party valuation, or negotiated processes, to avoid opportunism and to align with the venture’s financing model.

Financial assistance in the form of company support for the acquisition of its own equity remains a sensitive topic across both forms. In JSCs, the risk is that assistance can erode the capital buffer, distort control contests, or entrench insiders at the expense of dispersed shareholders and creditors. Accordingly, many regimes prohibit assistance outright or confine it to narrow pathways subject to shareholder approval, enhanced disclosure, and rigorous solvency assurances. The policy is consistent: prevent conflicts of interest and protect the firm’s asset base for both investors and creditors.

LLCs enjoy greater contractual latitude, but assistance still sits within mandatory guardrails. Any arrangement that effectively funds a new member’s acquisition of a membership share must be assessed against creditor-protection norms, minority-oppression doctrines, and the express bargain of the operating agreement. In jurisdictions that do not provide bright-line rules, the absence of uniformity can produce uncertainty and ex-post disputes, reinforcing the importance of drafting clear instruments around financing, collateral, and default consequences.

Two additional themes follow from this comparison. First, the classification of equity interests tracks their intended audience. JSC shares are built for a market of strangers and, therefore, are standardised, whereas LLC interests are built for a circle of known counterparties, and therefore, are customizable. Second, the direction of legal intervention differs. JSCs accept heavier public oversight to gain liquidity and scale, whereas LLCs accept reduced liquidity and greater ex-ante contracting costs to gain flexibility and control. Neither model is inherently superior: each aligns its equity regime with its institutional mission.

This introduction frames the forthcoming analysis along four axes: (I) the legal nature and classification of equity interests; (II) the mechanics, rationale, and limits

of transfer; (III) issuer repurchases and their creditor and market implications; and (IV) financial assistance as a test case for capital maintenance and conflict management. Throughout, the central claim is constant: the core objectives of each form, aggregating public capital versus preserving tailored member relationships, determine how the law structures, constrains, and enables their equity.

2. The Czech Republic

2.1. Introduction to Shares in Czech Law

Under the Business Corporations Act (BCA) in Czech law, a share represents the extent of a shareholder's participation in a company (corporation) limited by shares and the set of rights and obligations arising from that participation (Section 31, BCA). The existence of a share in a business corporation is one of the features that distinguishes a business corporation from an association. In an association, the set of membership rights and obligations is not constructed as a share. The essence of a share lies in the association of the shareholder with the corporation as a separate legal entity of which the shareholder is a member. The theory distinguishes two aspects of this connection:

- a) the qualitative aspect of the share, describing the rights and obligations between the shareholder and the company and the shareholders among themselves, and
- b) the quantitative aspect of the share, expressing the size of the shareholder's participation in the company and the rights arising therefrom.

2.2. Legal Classification and Characteristics of Shares

Shares are considered as things (*res*) in the legal sense in Czech law, because they fully comply with the Czech concept of a thing in the legal sense as that which is distinct from a person and serves the needs of people (Section 489, Czech Civil Code; Czech CC).¹ The shares in LLCs can be uncertificated or certificated. The shares in JSCs are certificated; however, until the issuance of a certificate or share, the shareholder's rights and obligations are represented by the so-called outstanding share (*nesplacená akcie*) or unissued share (*nevydaná akcie*) (Section 256(2, 3), BCA). In addition, it is an uncertificated share. A share certificated in a security is a movable, tangible thing (§ 496(1) and § 498(2), Czech CC). A share uncertificated in a security is an intangible, movable thing (Articles 496(2) and 498(2), Czech CC). The share is a whole thing and can be disposed of only in its entirety.² A share cannot be divided except by amend-

1 This conclusion is confirmed by case law (Supreme Court Resolution of 19 September 2017, Case No. 29 Cdo 5719/2016). Until 2014, Czech law worked with a narrow concept of a thing, and therefore, when the Commercial Code was in force, an unvested share was not considered a thing in the legal sense, but another property value.

2 Judgment of the Supreme Court, case No. 29 Cdo 1763/2016. For an identical reasoning, also see Štenglová et al., 2020, p. 78; Černá et al., 2021, p. 338.

ment of the memorandum or article of association or by division of the share under Section 43 of the BCA. This is without prejudice to the fact that, under certain conditions, separately transferable rights may be severed from a share (Section 281, BCA).

2.3. Ownership of Shares

A share may be co-owned by several persons (Section 1115, Czech CC). Usually these are heirs, but this might not always be the case. Multiple co-owners of a share constitute only one common shareholder from the company's point of view. The share is administered by the administrator of the joint share (Section 1134 ff, Czech CC) who is also entitled to exercise the rights of the joint shareholder in relation to the company. The administrator may be any of the co-owners of the share, but also a third party. The purpose of this rule is to simplify the position of the company in relation to the co-owners and to exclude the negative effects of possible conflicts between them on the company. The statutory regulation is default in nature. Therefore, the company may deviate from it in favour of the general principles of exercising co-ownership rights and fulfilling co-ownership obligations, allowing joint exercise of company rights.

There are opinions that the memorandum and articles of association may exclude co-ownership of shares.³ In our view, co-ownership can be prohibited in the memorandum and articles of association only if these documents completely exclude the transferability of the share and prohibit the inheritance of the share or its transfer to a legal successor. Thus, the prohibition of co-ownership cannot apply in a JSC (Section 42, BCA).

If a spouse acquires a share during the marriage from funds belonging to the matrimonial community property (*společné jmění manželů*), the share becomes part of the matrimonial community property. However, only the spouse who directly participated in the juridical act based on which the share was acquired is a shareholder (Section 709(3), Czech CC). Such an act may be the conclusion of a memorandum or article of association or a share transfer agreement. For both spouses to become a joint shareholder, they would both have to participate in the juridical act in question.⁴

Under the conditions set out in the Czech CC, the share may be subject to retention (*vydržení*) within the 3-year retention period.⁵

A share which is certificated in a security (share certificated) may be acquired under the conditions set out in the Czech CC from an unauthorised person. In the case of an uncertificated share, there is no unanimity of opinion on this possibility. A part of the doctrine allows for this possibility even in the case of an uncertificated share.⁶ Personally, I am reserved about it. The reason for the doubt is the lack of protection for the owners of the uncertificated shares. An uncertificated share is an intangible thing, the ownership of which is to be registered in the Commercial Register, with

³ Lasák et al., 2021, p. 167.

⁴ For a summary, see Kožiak, 2019.

⁵ Judgment of the Supreme Court, cases No. 27 Cdo 3728/2020, 27 Cdo 3608/2019, 27 ICdo 179/2017.

⁶ Štenglová et al., 2020, p. 77; Čech and Šuk, 2016, p. 235.

the exception of a JSC or cooperative. However, the registration of this fact has only declaratory effects. The current regulation of the Commercial Register does not provide mechanisms for the protection of the original owner of shares. In particular, it lacks an instrument similar to the notice of contentiousness in land law.⁷

In the case of a share, it is necessary to distinguish between the property and the social aspect of the share. In most cases, the owner of the share and, by virtue of that title, the shareholder are the same person, but this might not always be the case. We then distinguish who is the shareholder and who is the owner of the share. In certain cases, a company is dealing legally with a person as a shareholder even if that person is no longer the owner of the share or is not its sole owner. Examples are as follows: (I) a purchaser has duly acquired by endorsement and delivery of registered shares, but they have not yet become a shareholder because the shares have not been delivered to the JSC; and (II) a share held in a matrimonial community of property if only one spouse is a shareholder, but the opposite situation may also arise. For example, someone loses their status as a shareholder in an LLC company as a result of an expulsion. Their share is then transformed into a released share (*uvolněný podíl*). The share remains in their ownership even though they are no longer a shareholder.

Although a share is a set of rights and obligations, it is, in legal terms, a single integral thing and therefore, can be disposed of only in principle. The principle of integrity precludes, in principle, that individual rights may be separated from the share and transferred separately to another (e.g. the right to participate in the general meeting, the right to vote, and the right to information). In the case of a JSC, the law contains an explicit regulation of so-called separately transferable rights, which are separated from the share, and thus, are an exception to the principle of the integrity of the share (e.g. the right to a share in the profit or the preferential right to subscribe for shares). There is no similar express statutory regulation for an LLC. Despite the absence of an express regulation, I conclude that it is not possible that certain rights may be separated from the share. Separable rights include a claim for payment of a specific profit share, a settlement share or a share of the liquidation balance. A shareholder may separate such a claim from the share by assigning it to another.⁸ The difference between the arrangements in the two company forms is that in a JSC, the separation of the separately transferable rights from the share occurs without any further action, whereas in the case of an LLC, it occurs only by a juridical act of the shareholder.

A JSC is built on a plurality of shares. Each share represents one distinct right of participation (share in the economic sense) in a company. A shareholder may own multiple shares. Prior to 2014, in an LLC, a shareholder could hold only one share (a manifestation of the monistic view). If a shareholder acquired another share, it was added to their existing share. This principle is still retained by disposition. An LLC may provide in its memorandum of association that a shareholder may have more than

7 For details, see Zvára, 2017.

8 Judgment of the Supreme Court case No. 29 Cdo 3581/2010.

one share (Section 32(1), BCA). In such a case, the law requires that the memorandum of association distinguish the shares by a different designation, because the mere indication that a share is owned by a particular person cannot serve to distinguish the share. If the memorandum of association is silent on the matter, the principle of unity of shareholding is enforced. However, this is not the case for several classes of shares in the company under the memorandum of association. Shares of different content cannot be added together. If the memorandum of association provides that there is more than one class of share in the company, this would also allow one shareholder to have more than one share if the shares were of different classes (Section 135(2), BCA).

2.4. Classes of Shares

Three rights are regularly associated with a share: a) the right to participate in the management of the company (discussed in Chapter 4), b) the right to a dividend (discussed in Chapter 2), and c) the right to a share in the liquidation balance or the right to a settlement share in the event of loss of the shareholding without a legal successor during the life of the company.

The content of a share is defined by the legislation and the memorandum and article of association. As of 2014, the legislature no longer limits what classes of shares a JSC may create through the permitted list of classes of shares. The limits on the creation of specific classes of shares are set out in Section 1(2) of the Czech CC. The limit is based on good morals and public order, which includes the protection of shareholders and creditors.

Since 2021, the legislator has abandoned the distinction between ordinary shares (*kmenové akcie*) and special classes of shares in a JSC. Ordinary shares were referred to as those with only statutory rights attached to them. Special classes of shares were those that differed from the statutory model. Thus, ordinary shares had the same content in all JSCs. However, the legislator now provides that shares with which the same rights are attached constitute one class. Whether or not they deviate from the law is irrelevant. The same applies in the case of shares in an LLC. The reason for this intervention by the legislator is to avoid the need to enter details of the content of the share or shareholding in the Commercial Register if there is only one class in the company, even if it was different in content from the statutory model.

The scope and content of the rights (and obligations) attached to the share are left to the will of the shareholders. Therefore, some rights may be strengthened and others weakened. The division of shareholder rights into relatively and absolutely inviolable rights plays a role in the content. The distinguishing criterion is the mandatory or default nature of the legal provisions. The first group includes property rights (the right to a share of profits and the right to a share of the liquidation balance) and voting rights. These rights are relatively inviolable because the memorandum and articles of association may create shares without these rights. Therefore, they are also referred to as withdrawable rights. However, the majority of the literature tends to conclude that at least one of them must always be attached to the share, otherwise

the share would lose its participatory character altogether and its owner could hardly be considered a shareholder.⁹ The group of absolutely inviolable rights or inalienable rights includes rights which are granted to the shareholder by mandatory regulation, and therefore, cannot be restricted or taken away by the memorandum and articles of association. These include, in particular, the right to participate in the general meeting, the right to challenge the invalidity of its resolutions, and the right to bring a shareholder's action.¹⁰ This category includes the rights of a qualified shareholder.

Prior research has discussed whether rights other than those directly related to the membership (e.g. the right to park in front of the entrance to the company's registered office) may be attached to a share.¹¹ I consider this discussion outdated. In our opinion, such rights can be associated with the share, *inter alia*, because it is permissible to create a share in an LLC with the right to rent an apartment owned by the LLC. Another argument may be that both an LLC and a JSC can be established for purposes other than business, that is, also for the purpose of supporting their shareholders. Therefore, the rights related to the special support of the shareholders can be certificated in the share.

In a JSC, shares may be issued as paper share certificate or book-entry (dematerialised) securities.¹² If a share is issued as a paper share certificate, the law refers to it as a paper share (*listinná akcie*). A share issued as a dematerialised security is a dematerialised share (*zaknihovaná akcie*). It is up to the company to decide whether to issue paper shares or dematerialised shares.¹³ The determination of what shares are to be issued is a mandatory part of the articles of association (Section 250(2)(c), BCA). The conversion of paper shares into dematerialised shares (and vice versa) is a matter for the general meeting to decide, as it is an amendment to the articles of association (Section 421(2)(a), BCA). Detailed regulation is contained in the Civil Code (Sections 529 to 544, Czech CC). It is possible that the company may partly issue paper shares and partly issue dematerialised shares.¹⁴

Czech stock law distinguishes between two types of shares: shares with nominal value and no-par value shares (*kusové akcie*). A company can choose which type it wants to issue, but it cannot combine them (Section 257(2), BCA). Par value shares contain an indication of the nominal value. No-par value shares, meanwhile, do not contain this indication; their value is determined by the ratio of the share capital to the number of shares. However, a no-par value share must contain an indication that

9 Štenglová et al., 2020, p. 601; Štenglová et al., 2023, pp. 72–73.

10 However, these issues are still under discussion. It is also possible to take the view that a share can be created without all the removable rights, as well as the view that the right to participate in the general meeting can be removed from a share if it is a share without voting rights (Štenglová et al., 2023, p. 73).

11 Čech and Šuk, 2016, p. 268.

12 Under current Czech law, book-entry (dematerialised) securities are not a subcategory of securities, but two categories standing side by side (Sections 514 and 525, Czech CC).

13 In some cases, special laws require that dematerialised shares be issued, for example, if a public company wants to draw support for renewable energy.

14 Černá et al., 2021, p. 416.

it is a no-par value share (Section 259(2), BCA). No-par value shares are linked to the share capital and therefore, are not true no-par value shares.¹⁵ In fact, they are not shares without par value but rather, they are shares without an obvious declaration of their value. The value in relation to the share capital is accountable.

In a JSC, shares can be further subdivided in terms of form into bearer shares (*akcie na majitele*) and registered shares (*akcie na jméno*). Again, this option depends on which form the company opts for. It is up to the company whether part of the shares will be in bearer form and part in registered form.

In a JSC, shares with the identical rights constitute a single class (Section 276(1), BCA). The different nominal values or accountable par values do not form different classes of shares. The literature unanimously concludes that different forms of shares do not constitute different classes of shares, because the form does not define the content of the share but the manner of disposition.

Unlike the Commercial Code, the BCA does not contain an exhaustive list of the permitted classes of shares in a JSC. It prohibits only interest shares (Section 276(4), BCA) and regulates certain classes in more detail. However, this does not preclude other classes being created. It is permissible to create shares without voting rights (Section 276(2), BCA),¹⁶ shares with the right to appoint a director (e.g. Section 438a, BCA),¹⁷ shares with different voting weights (Section 276(5), BCA), shares with a fixed share in profits (Section 348(3), BCA), and preference shares (Section 278, BCA). The literature permits the issuance of so-called information shares¹⁸ or tracking shares.¹⁹ However, a company should be cautious when creating special classes of shares. It is easy for one share with specific content to be created, which, in cases in which voting by share class is required, will essentially have a veto right attached to it.

It is a matter of debate whether it is permissible to attach an obligation, such as a surcharge obligation, to a share in a JSC. Part of the doctrine does not oppose this possibility, provided that all shareholders concerned have agreed to it and the JSC is a non-publicly traded company.²⁰ Part of the doctrine rejects this possibility on the grounds of protecting future shareholders.²¹ On the one hand, such share content may be surprising to future shareholders. On the other hand, shareholder law does not have similar tools to the ability of an heir to cancel their participation in a JSC for reasons for which they cannot fairly be required to remain in the company.

15 For details, see Černá, 2015.

16 However, under certain conditions, the right to vote will be restored, for example, if voting is to be by share class.

17 For details, see Kříž, 2022; Štenglová and Šuk, 2022.

18 For details, see Štenglová and Šuk, 2022.

19 For details, see Kříž, 2019.

20 See Lála, 2020.

21 Černá et al., 2021, p. 424.

2.5. *Transfer of Shares*

The rules on the transfer and transfer of shares co-create the character of the company. Thus, we can distinguish between an open company (shares are freely transferable and their transfer is neither excluded nor restricted), a fully closed company (shares are non-transferable and their transfer is excluded), and a partially closed company (shares are only partially transferable or their transfer is restricted). I comment further on the transferability of shares in the context of an LLC and a JSC.

Here, it is important to note that a special case of acquisition of a share by transfer in Czech law is the acquisition of a share as part of a business enterprise plant's transfer. The transfer of ownership of a business enterprise, to which the principle of integrity applies, results in the transfer of ownership of all the things constituting it *uno actu* (Section 2175(1), Czech CC).²² As it is not a transfer, the acquisition of ownership of the components of the business enterprise, including the share, does not require the fulfilment of the conditions for the acquisition of ownership by transfer.

Therefore, the restriction or even exclusion of the transferability of a share does not apply to the acquisition of the ownership right to a share as a part of a business enterprise, unless the memorandum and articles of association expressly provide for this case and choose the same rules for both cases – transfer and transfer within the acquisition of a business enterprise. Under Section 42(1) of the BCA, a JSC is prohibited from prohibiting or restricting the transfer of shares. In our view, this rule is not inconsistent with the proposed solution. This is because Section 42(1) of the BCA applies only to transfers of shares as a result of the death or dissolution of a shareholder, and not to transfers of shares as a result of the transfer of the business of which they form part.

Since 1992, there has been a gradual liberalisation and opening up of the LLC. Until 2000, the transfer of shares between shareholders was not even possible unless the memorandum of association allowed it. Between 2001 and 2013, the transfer between shareholders was legally possible with the consent of the general meeting and the transfer to a third party had to be permitted by the articles of association. Since 2014, the transfer between shareholders is unconditional and to a third party is possible with the approval of the general meeting (Sections 207 and 208, BCA).

Shares in an LLC are in principle uncertificated, that is, they are intangible assets. However, the memorandum of association may allow a share to be certificated. It must be apparent from the Commercial Register whether the share should be certificated. Different transfer regimes apply to an uncertificated and a certificated share. This is because of their different nature. An uncertificated share is an intangible thing, whereas a certificated share is a tangible thing, namely, a security.

22 Judgment of the Supreme Court case No. NS 29 Odo 314/2001; Judgment of the High Court in Prague case No. 14 Cmo 41/2003. B. Havel (2024) takes the minority view that the change control clause in the memorandum or the articles of association should always be enforced, including the acquisition of shares as part of a business enterprise.

The law requires that a written agreement with signatures certified be executed for the transfer of the uncertificated share in an LLC (Section 209(2), BCA). A share transfer agreement has translational effects unless otherwise provided. Therefore, there is a change in the identity of the owner of the share on the date of its conclusion. The transferee becomes a shareholder upon delivery of the effective transfer agreement to the company.²³ The transferor shall be liable to the company for the debts that have been transferred to the transferee with the share (e.g. unfulfilled deposit or surcharge obligations). A share transfer agreement is not a special type of contract but, depending on the circumstances, may be a purchase, exchange, gift, or other type of contract under which ownership is transferred (e.g. a security transfer). The share transfer agreement must indicate whether the transfer is with payment or free of it.²⁴ Only a share transfer agreement that has substantive effects must comply with the requirement of a written form with officially certified signatures. It is possible that a contract which has only obligatory effects may exist alongside it. Thus, it is possible that the parties agree to divide their obligations relating to the transfer of shares into a contract of obligation and a contract in rem. In the case of such a division, the requirement of a mandatory written form with officially certified signatures does not apply to a contract with bonding effects.²⁵

In an LLC, the law distinguishes between the transfer of a share to another shareholder and the transfer of a share to a third party. The law does not require any conditions for the transfer of a share to another shareholder. For the transfer of a share to a third party, the law requires the general meeting to give its consent to the transfer. These statutory rules are default and the memorandum of association may derogate from them. Thus, it may release the transfer of the share completely (without any conditions) or exclude it entirely.²⁶

Failure to comply with the conditions of limited transferability results in the ineffectiveness or nullity of the share transfer agreement. Ineffectiveness is the consequence of a failure to obtain the consent of the company's bodies required by law or by the memorandum of association (Section 207(2), BCA). In other cases, the law attaches the consequence of nullity (Section 209(4), BCA).

The statutory regulation protects the shareholder against inaction of the bodies as well as against unjustified failure to grant consent. In these cases, the shareholder has the right to withdraw from the company (Section 207(4), BCA).

In the case of a share transfer agreement in an LLC, a distinction is made between the effectiveness of the transfer of the share in relation to the contracting parties, in relation to the company and in relation to third parties. The transfer of a share is in principle effective between the transferor and the transferee upon conclusion of the agreement, unless the agreement provides for a later time of its effectiveness.

23 Judgment of the Supreme Court case No. 29 Cdo 4215/2016.

24 Judgment of the Supreme Court case No. 29 Odo 221/2005.

25 Kříž, 2022.

26 Judgment of the Supreme Court case No. 29 Cdo 5719/2016.

If the consent of a company's body is required for the transfer of a share, the contract shall not be effective until such consent is given. Consent may be given either before or after the conclusion of the contract. The effects of the transfer of the share shall not take effect in relation to the company until the effective share transfer contract has been submitted to the company. Thereby the transferee of the share becomes a shareholder. Subsequently, the shareholder is entered in the list of shareholders kept by the company and then in the Commercial Register. Both entries are declaratory.

The transfer of the share has effect vis-à-vis third parties as soon as it has been notified to them. As a result of the principle of the material publicity of the Commercial Register, the transfer of the share shall become effective against third parties at the latest, irrespective of whether they were aware of it, upon publication of the entry of the change in the identity of the shareholder, or on the fifteenth day after publication of that fact.

In the case of a single-member LLC, neither the statutory prohibitions or restrictions on the transferability, pledge, or assignment of the share nor similar prohibitions or restrictions arising from the memorandum of association apply while the company is a single-member company (Section 14, BCA). The purpose of this regulation is two-fold. First, it aims to ensure that the company is not left without a shareholder. This could occur, for example, if the sole shareholder dies while the prohibition on inheritance is enshrined in the memorandum of association. The rule is also important in order to remove the administrative burden. If a sole shareholder wishes to transfer their share to another and the memorandum of association does not permit such a transfer, it is clear that the sole shareholder can by their decision obtain an amendment to the memorandum of association, but the costs involved would be entirely unnecessary.

The law allows a share in an LLC to be certificated as share certificate (*kmenový list*) (Section 137, BCA). A share certificate (*kmenový list*) cannot be issued as a book-entry share (dematerialised) nor can it be publicly traded. A share may be incorporated in a share certificate only if the memorandum of association so permits and if the share in respect of which the share certificate is freely transferable. It should be recalled that as a statutory rule, in principle, the transfer of a share to a third party is subject to the approval of the general meeting. Therefore, if the share is certificated, the memorandum of association must depart from the default statutory provision (Section 208, BCA) and remove this statutory restriction on transfer. The share certificate (*kmenový list*) in an LLC, therefore, is an unlimited transferable share, which distinguishes its legal regime from that of registered shares in a JSC, the transfer of which may be conditional in the articles of association. Moreover, if share certificate (*kmenový list*) is to be issued, the principle of unity of shares must be abandoned in the memorandum of association, because share certificates, like shares in a JSC, are based on the principle of plurality of shares. If the principle of unity of shares is not expressly abandoned, it may be considered that, if the memorandum of association admits the possibility of issuing share certificates, it has done so implicitly. Where a company has several classes of shares, the possibility of share certificates may be

provided for only in respect of some of them. The law regulates the requirements of the share certificate in a mandatory manner. Unlike a share, a share certificate does not have a nominal value, but it must state the amount of the contribution attributable to the share represented by it.

The transfer of the share certificate is affected by contract (*titulus*) after the share certificate has been endorsed with a counterfoil and handed over (*modus*). The special legal requirements for the share transfer contract (written form and officially certified signatures) apply only to the contract for the transfer of an uncertificated share, which has a legitimising function in relation to the company, as the subject of the transfer is an intangible object. By contrast, a share certificate is a security which itself has a legitimating function vis-à-vis the company and therefore, the general rules for the transfer of securities apply to its transfer. The law does not provide for any special form for the contract under which the transfer of a security takes place. The contract may be concluded in writing, orally, or even merely by implication, for example, by delivery of a counterfoil (Section 1103(2), Czech CC). The counterfoil must comply with the requirements for the counterfoil of promissory notes, but in addition, pursuant to Section 210(1) of the BCA, it must contain a precise identification of the transferee so that it is not confused with another person. In the case of the endorsement of promissory notes, it is sufficient if the endorsement is, for example, ‘for me in favour of Peter Novak’. In the case of the endorsement of a registered share, such a designation of the transferee would be insufficient – properly, it should be ‘for me to Peter Novak, residing at 24 Wenceslas Square, Prague 1’.

We distinguish several effects in the case of a transfer of a share certificate. The effectiveness of the transfer agreement is a condition for the validity of the transfer of the certificate. The effectiveness of the actual transfer of the share certificate occurs at the moment when the transferor delivers the share certificate bearing the transfer endorsement to the transferee (and the transferee witnesses an unbroken series of endorsements). The transferee thereby acquires title to the certificate. The transfer takes effect against the company upon notification of the change in the owner’s personality with the presentation of the duly endorsed share certificate to the company for inspection. Thus, the owner of the share certificate becomes a shareholder. Subsequently, the shareholder is entered in the list of shareholders maintained by the company and then in the Commercial Register. Both entries are declaratory.

A share in an LLC is subject to inheritance. The statutory regulation of an LLC does not provide for special rules on the transfer of the share, and therefore, the default Section 42(1), first sentence, of the BCA applies. The memorandum of association may exclude or condition the transfer of an uncertificated share, but cannot interfere with the regulation of the right of succession and determine the specific person who is to acquire the share as the legal successor of the deceased shareholder.²⁷ If the share is certificated, the transfer of ownership cannot be restricted, let alone excluded, in the

memorandum of association, as the law requires that the share certificate be freely transferable.²⁸

In an LLC, the heir can always consider whether they want to become a shareholder. If this is not their choice, they are free to apply to the court for the cancellation of their participation, unless the memorandum of association provides for the heir's right to withdraw from the company.²⁹ The heir acquires the share upon the death of the testator, but becomes a shareholder of the LLC only after they prove to the company that they acquired the share, that is, at the latest by submitting a succession order to the court. If the share is certificated, the registered share must also be submitted to the company.³⁰

In a JSC, registered shares are transferred by contract, endorsement, and delivery (Section 1103(2), Czech CC). Otherwise, similar rules apply to the transfer as in the case of the transfer of share certificates in an LLC.

However, the share certificate in an LLC must be freely transferable. This does not apply to registered shares in a JSC. The articles of association may restrict the transfer but cannot exclude it (Section 270(1), BCA). An amendment to the articles of association imposing a restriction on transferability does not take effect until it is entered in the Commercial Register (Section 270(2), BCA). This is one of the few constitutive entries.

A restriction on transferability may consist of a requirement for the consent of one of the company's bodies or the satisfaction of another condition. Lack of consent renders the transfer ineffective (Section 271(1), BCA), while the absence of any other condition renders it void (Section 271(3), BCA). The statutory provisions protect shareholders from inaction by the bodies as well as from unreasonable failure to grant consent. The protection against inaction is the fiction of granting consent (Section 272(2), BCA). The defence against unjustified failure to grant consent is the shareholder's right to redeem the shares at a reasonable price (Section 272(3), BCA).

Shares in a JSC may be issued to holders only as dematerialised shares or immobilised shares (Section 274(2), BCA). Immobilised shares are transferred in the same way as dematerialised shares – that is, by changing the entry in the customer's account in the register of dematerialised securities (Section 1104(1), Czech CC). Dematerialised shares may be issued as registered shares or bearer shares. If issued as registered shares, their transferability may be limited.

A special case involves outstanding shares (*nesplacená akcie*) and unissued shares (*nevydaná akcie*). The difference between the two is that in the case of an outstanding share, the issue price has not yet been paid, while in the case of an unissued share, the issue price has already been paid. In both cases, however, the shares have not been certificated. Both are transferred by written agreement; the certificated signatures are not required (Sections 256(2) and (3), BCA).

28 Eichlerová, 2022, p. 270.

29 Ibid., p. 272.

30 Ibid., p. 271.

Czech stock law forbids the exclusion or restriction of inheritance of shares. An heir cannot consider whether they want to become a shareholder. The heir acquires the share on the death of the testator but becomes a shareholder only after they prove that they acquired the share, that is, at the latest by submitting the order of the court of inheritance together with the share.

2.6. Acquisition of Treasury Shares and Financial Assistance

The acquisition of treasury shares by a company results in the company being its own shareholder at the same time. This situation poses several problems. The company controls itself and there is a danger of so-called self-control. If the company acquires its treasury shares by subscribing for a new contribution when increasing the share capital, the share capital would no longer be covered by external resources when it is created. The acquisition of the company's treasury shares from a shareholder for consideration would be a problematic case for creditors to terminate the shareholder's participation in the company. The acquisition of an equity interest for consideration has a negative impact on the company's equity. Equity is the value of the company's assets net of the company's debts. If the company's assets include its treasury shares, it is problematic to determine its value as it is based on the equity. Thus, we are moving in a circle. The acquisition of equity shares may, therefore, lead to distortions in the company's financial situation and its internal functioning. For these reasons, the acquisition of treasury shares by business corporations is prohibited in principle, unless the law exceptionally allows it (Section 33, BCA).

Both JSCs and LLCs are allowed to acquire their treasury shares under certain conditions. For an LLC, more lenient rules are set for the acquisition of treasury shares than for a JSC, for which the Czech Republic is bound by the EU regulation in Directive 2017/1132/EU on certain aspects of company law. The law prohibits an LLC from acquiring its treasury shares by means of a share transfer agreement (§ 149, BCA). The acquisition of treasury shares by subscription for a new contribution when increasing the share capital is also not allowed, as in this case, it is also a de facto transfer of shares. The purpose of the prohibition on contractual acquisition of treasury shares is to prohibit the company from paying for the acquisition of the share. Therefore, I conclude that the statutory prohibition applies only to acquisitions of shares for consideration (acquisitions of shares for no consideration can be excluded based on teleological reduction) and that a gift of shares to the company is, therefore, permissible. A company may become the owner of a share based on a legal fact other than a contract (e.g. conversion, inheritance, and succession). Such cases do not endanger the company's financial stability.

If a company acquires its treasury shares, it may not exercise the voting rights attached to it. This solves the problem of the risk of self-control. The right to a share of the profits or other own resources associated with an equity share shall lapse on maturity and the unpaid profits or other own resources shall be transferred to the retained earnings account of previous years. If the company acquires all its shares by the permitted means, even share certificates, it must transfer them to a third party

within 3 months, otherwise the court shall dissolve the company even without a petition.

As regards the acquisition of treasury shares, the regulation in case of a JSC is contained in Sections 298 to 309 of the BCA. The basic principle is: what is not allowed is prohibited.³¹ Even a JSC is prohibited from subscribing for its own shares. Other ways of acquiring shares are regulated in detail by the requirements for the approval of the general meeting of shareholders, the creation of a reserve fund, and the establishment of a maximum holding period. Violation of the legal rules can lead to the dissolution of a JSC.

These are cases in which a shareholder, owing to the actions of the company, its other shareholders, or the person controlling the company, finds themselves in a situation in which they cannot reasonably be expected to sell their shares at a price commensurate with their value to a third party, and therefore, the law requires the person who caused the situation to buy the shares back at the request of the shareholder.³² This is one of a number of statutory measures to protect minority shareholders.

The right to redeem shares can be distinguished according to the person against whom it arises, whether the company or someone else.

The right to redeem a share of a shareholder against an LLC does not arise, because the regulation of LLCs provides for other institutions allowing the termination of their membership under fair conditions (e.g. agreement of the shareholders, withdrawal from the company, and termination of membership by the court on their proposal).

For the sake of completeness, it should be added that in the Czech context, cautious discussions are emerging on whether an LLC can create a special class of share attached to the right to purchase it by the company. In our view, there is nothing to prevent this if the rules on the acquisition of treasury shares are complied with, that is, if the share is sold or the share capital is reduced accordingly. The same objective could be achieved by the shareholders entering an agreement to terminate the participation of one of them with deferred effect. In both cases, the protection of creditors is sufficiently ensured by the fact that the payment of the settlement share in the case of a termination agreement or the payment of the purchase price in the case of a buyback of the shares must not cause the company to go bankrupt.

In the case of a JSC, the shareholder's right to redeem his shares at a reasonable price arises in the case of:

- a) unjustified refusal to consent to the transfer of registered shares (Section 272(3), BCA);
- b) a decision by the General Meeting to delist the participating securities from trading on a European regulated market (Section 333, BCA);

31 Štenglová et al., 2023, p. 90.

32 Černá et al., 2021, p. 446.

- c) a decision of the general meeting to change the class of shares, to substantially change the rights attached to the shares, or to restrict or tighten the transferability of registered shares (Section 335, BCA).

In relation to other persons, the shareholders have the right to redeem their shares in relation to

- a) a controlled person of the company if the shareholder's position in the controlled person's company is materially impaired or their legitimate interests are otherwise materially prejudiced, and they cannot fairly be required to remain in the company (Section 89, BCA). This is an ultima ratio option, which a shareholder may use only if they have not been successful with other instruments protecting their position or if their position is not insignificant (e.g. in a motion to invalidate a resolution of the general meeting);
- b) the main shareholder, who has the right to squeeze out (Section 395, BCA).

Financial assistance means the granting of an advance, loan, or credit by a company for the purpose of acquiring its shares or the provision of security for such purposes, that is, the company financially assists in the acquisition of a shares. In the past, financial assistance was prohibited. It was already permitted under the Commercial Code in its last years of operation, provided the legal conditions were met, and this is still the case.

In the case of a JSC, financial assistance can be provided only if the articles of association allow it under the conditions set out by law (Section 311 et seq, BCA). The conditions that must be fulfilled in order to be granted financial assistance are similar to those for the acquisition of treasury shares (resolution of the general meeting, prohibition to reduce the equity capital below the share capital, and prohibition to cause bankruptcy by acquiring treasury shares), with the addition of other conditions (verification of the financial capacity of the person to be granted financial assistance, preparation of a report to be deposited in the collection of documents of the Commercial Register, etc.).

In the case of an LLC, financial assistance is possible directly by law if it is provided on fair terms and if the managing director draws up a report on the provision of the financial assistance, in which he justifies why it is not contrary to the interests of the company to provide financial assistance (Section 200, BCA). The report is deposited in the collection of documents of the Commercial Register.

3. Croatia

3.1. *Legal Regime of Shares*

The share capital of a JSC is divided into shares. Each share represents a proportionate part of the company's share capital. If shares with a nominal value are issued, the sum of their nominal values must correspond to the share capital of the JSC. If, however, shares without nominal value are issued, the sum of the amount of the share capital relating to all the shares without nominal value issued must equal the amount of the share capital. Share rights can be divided into management and property rights. In some respects, the most important management right is that which gives the right to vote at the general meeting of the company. More will be said about this when we discuss the general meeting as a special body of the JSC. Other management rights are the right to participate in the general meeting of the company (Article 274, paragraph 1 of the Act on Obligations, hereinafter: CA), the right to be informed (Article 287, CA), and the right to challenge the resolutions of the general meeting (Article 362, CA).

The most important property right of shareholders is the right to be paid a part of the company's profits (dividends). The method of profit distribution may be determined by the statute, but if it is not, the shareholders' share in the profits is proportional to the nominal value of their shares, that is, the amount by which the share participates in the total share capital of the company. If the contributions are not paid in full, shareholders participate in the distribution of profits in proportion to what is paid to shareholders.

Before the distribution of profits, the company's financial statements must be approved, which is usually done jointly by the management board and the company's supervisory board or board of directors. As an exception, the financial statements may be adopted determined by the general meeting of the company if the supervisory board or management board disagrees with the financial reports prepared by the management board or executive directors, or if the management and supervisory board or executive directors and management board decide to leave the adoption of financial reports to the general meeting (Article 300.a-300.e, CA). The profit and loss account must show that the company has made an operating profit. Shareholders are then entitled to a share of the profit, but only after certain amounts have been transferred to the company's reserves in accordance with the law and the company's articles of association, and any losses from previous financial years have been covered. Once this has been done, the general meeting can decide what to do with the remaining profit. If it does not decide to use it for other purposes (e.g. special investments and bolstering the company's reserves), the general meeting can decide to pay the profit to shareholders (Articles 220–222, CA).

3.2. *Nature and Classes of Shares*

In accordance with the provisions of Article 165 paragraph 1 of the CA, shares can be registered only in name. Regarding the rights they confer, shares can be ordinary or

preference (Article 167, CA). Ordinary shares confer the right to vote at the company's general meeting, the right to receive part of the profit (dividend), and the right to receive part of the company's residual assets in the event of liquidation or bankruptcy. Preference shares may be cumulative and participating.³³

Shares that give their holders the same rights make up a class of shares. It is important to know whether the company has issued shares of more than one class and what their number is, because the CA requires in several places that the holders of a certain class of shares vote and make decisions on certain issues at a special meeting, in which only the holders of that class of shares participate, or that they do so at the general meeting separately from the holders of other shares (Article 295, CA).

3.3. *Transfer of Shares*

Registered shares are transferred in the manner determined by the form in which they have been issued (as materialised securities or non-materialised securities). If the shares have been issued as materialised securities, they may be transferred by endorsement or cession. Endorsement is a legal institution that enables the transfer of securities, and the provisions of the Law on Bills of Exchange are applied appropriately to the transfer of shares. In practice, endorsement means that the existing shareholder transfers the share to another by stating the name of the new shareholder on the share (security) and signing it. The transfer of materialised shares by cession is carried out according to the rules of Article 80 of the CA,³⁴ which regulate that legal institution.

The transfer of shares that have been electronically registered in the computer system of the Central Clearing and Depository Company (shares as book-entry securities) requires a corresponding entry in this system on the account of the acquirer. The transfer requires that the shares be transferred from the account of the transferor to the account of the acquirer of the shares. In principle, there is freedom to dispose of shares; that is, each shareholder is free to decide whether and to whom he wishes to transfer his shares. However, the company's statute may stipulate that the company's consent is required for the transfer of registered shares that are not issued

33 Cumulative preferred shares give the holder the right to collect accumulated unpaid dividends before they are paid to holders of ordinary shares. In other words, if dividends were not paid to shareholders in earlier years, in the year in which they are paid, cumulative dividends from those earlier years will primarily be paid to holders of cumulative shares, and only then will dividends be paid to holders of ordinary shares. Holders of participatory preferred shares have, in addition to a certain preferred dividend, the right to a dividend that belongs to holders of ordinary shares. The rights of the holders of preferred shares must be determined in the decision on the issuance of shares. Privileged shares, that is, special rights from preferred shares, can be limited or abolished only with the consent of the holders of those shares, who make a decision on this at a special assembly of only those shareholders or by separate voting at the general assembly of the company (Article 297, of the Croatian Companies Act (*Zakon o trgovačkim društvima*; ZTD)).

34 Act on Obligations, Official Gazette No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22.

in non-materialised form (Article 227, paragraph 2, CA). These shares are called shares with restricted transferability (vinculated shares). The reasons for which restrictions on the transferability of shares may be introduced include, for example, the desire to prevent undesirable persons from becoming shareholders, to protect the company from takeovers by undesirable persons, or to maintain the existing circle of shareholders. Consent for the transfer of shares is given by the management board, if the statute does not stipulate that it is given by the supervisory board or the general meeting of the company. The reasons for which the company can refuse to give consent for the transfer of shares can be specified in the statute. If this is not done, the competent body of the company gives or withholds consent based on a free assessment of what is in the interests of the company. If there is no consent to the transfer, the shareholder who requested such consent may, if he considers that such consent has been unreasonably withheld, require the company to permit the transfer by way of an action in court.

When shares are transferred, membership in the company is transferred. However, the share can be disposed of without transferring the membership. This is done by establishing a usufruct on the share, a lien on the share, or a fiduciary transfer of the share for the purpose of securing a claim.

Shares do not confer any rights if they are held solely by the company (Article 235, CA). In this case, the shares are the company's own. The rights conferred by these shares are dormant; they are reactivated when the company sells them and other people acquire them. In other words, if a company holds its own shares, it cannot, as a rule, exercise any rights deriving from them; that is, it cannot vote at its own general meeting, it cannot receive dividends from them, and so on.

The JSC may never acquire its own shares by original means. This is reflected in the prohibition on the company registering its own shares (Article 219, paragraph 1, CA), even when creating or increasing its share capital. This rule implements the principle of the registration and preservation of the company's share capital. The only exception is when the share capital is increased from the company's own resources, in which case the company itself acquires the shares in proportion to the percentage of its own shares.

The company may acquire its own shares derivatively, that is, from other persons, based only on an authorisation to do so granted by the general meeting, which shall be valid for a maximum of 5 years and shall specify the conditions under which the shares may be acquired, namely, the maximum number of shares to be acquired; the period for which the authorisation to acquire shares is granted; and, if the shares are acquired against payment, the maximum and minimum value of the payment made by the company.

The company may not acquire its own shares for the purpose of trading in them and, and with each acquisition of shares, the company's management board or executive directors must ensure that the conditions prescribed by law have been met. The acquisition and disposal of own shares must respect the principle of equal treatment of shareholders. This principle is deemed to be respected if the shares are

acquired, that is, if they are sold on the organised securities market. A resolution of the general meeting is required for a different disposal of shares. When disposing of shares, the provisions on the right of priority of existing shareholders (to acquire new shares of the company) are applied appropriately.

Nonetheless, even when there is no decision of the general meeting authorising the management to acquire the company's own shares, the company can acquire them in the following cases specified by law:

- a) the acquisition is strictly necessary to prevent serious and imminent harm to the company, for example to prevent the takeover of the company by undesirable persons;
- b) the shares are to be offered to employees of the company or one of its affiliated companies, and this offer is to be followed by the transfer of own shares to the aforementioned persons within 1 year of acquisition at the latest;
- c) the acquisition is necessary to compensate the company's shareholders (e.g. to give them severance pay) or minority shareholders in companies related to the company in question;
- d) the acquisition is unpaid or the financial institution acquires the shares on a commission basis, that is, in its own name but for the account of others, and therefore, the company does not actually acquire them for itself;
- e) it acquires them from the shareholder, because the shareholder has not paid in full the amount for which they were issued;
- f) the shares are acquired by universal succession, that is, the company acquires its own shares by entering into the entire legal position of the person who was their immediate previous owner;
- g) they are acquired based on a resolution of the general meeting on the withdrawal of shares according to the regulations on the reduction of the company's share capital, which means these shares will cease to exist upon withdrawal anyway; or
- h) bidding conducted by the court for the company to settle some of its claims against the shareholder (Article 233, CA).

The acquisition of own shares up to this amount is permitted if, at the time of the acquisition, the company has prescribed reserves that can be used for this purpose (reserves for the acquisition of own shares).

Own shares that the company acquires in violation of the described rules are valid but the transfer transaction is void. Own shares acquired by the company contrary to the described rules and conditions for the acquisition of own shares must be disposed of within 1 year. If the legal basis for acquiring own shares is valid, and their nominal value exceeds 10% of the share capital, the company must dispose of the surplus shares that exceed that amount within 3 years. Own shares that are not handled in accordance with the stated rules must be withdrawn.

The privatisation process in the Republic of Croatia was characterised by a significant number of workers being given the opportunity to acquire shares in

former social enterprises, while the socio-political context favoured the acquisition by individuals of most of the economic entities privatised in this way. In the context of the negative legacy of transformation and privatisation, the development of the concept of employee ownership in Croatia has been set back considerably, and the benefits of the development of employee ownership for companies as a whole have not materialised. By bringing the interests of employees closer to those of other shareholders and enabling employees to take a more active and long-term interest in the development of their company, employee ownership supports and encourages the establishment of transparent and efficient corporate governance. In the post-transition period, employee ownership in Croatia developed mainly in the form of a *sui generis* model based on separately designed solutions in the form of allocation of shares or share options for purchase, transfer of shares to employees, and participation in decision-making.³⁵

4. Hungary

4.1. *Limited Liability Companies*

A membership (business) share in an LLC encompasses the entirety of membership rights and obligations associated with a member's capital contribution (quota or core deposit).³⁶ Under Hungarian law, the minimum value of an individual capital contribution (quota) in an LLC cannot be less than 100,000 Hungarian forint (HUF). Additionally, the company's registered capital must be at least 3,000,000 HUF. The membership share comes into existence upon the company's official registration. Its size corresponds to the proportion of the member's capital contribution. Equal-sized membership shares confer identical membership rights. Even if a member holds multiple membership shares, they are treated as a single member in relation to the company. Any provisions in the company's articles of association that deviate from this principle are considered null and void.

The fundamental legal characteristics of the LLC in Hungary includes the concepts of capital contribution (*törzsbetét*) and membership share (*üzletrész*). The central

35 Examples of companies in Croatia that have implemented certain forms of employee shareholding are: AD Plastik dd, Dalekovod dd, Elektropromet dd, Herbos dd, Hotel Osmine dd, Jadranka dd, Mali Lošinj, Kraš dd, Pliva dd, Tankerska plovidba dd, and Tehnika dd. For more, see Kundić and Smajla, 2020, p. 129. Companies in which employee shareholding was introduced, without having designed an appropriate model in advance, face great financial difficulties. In addition, there is often insufficient interest of workers to participate in worker share ownership, or workers very often sell shares immediately after buying them. Furthermore, the examples of many transition countries show that favourable tax incentives, which existed for the purpose of purchasing shares by workers, are abolished after privatisation. In addition, there is a lack of a legal and fiscal framework or any support policy to support the introduction and effective functioning of the employee shareholding model. Tipurić, 2004, pp. 25 et seq.

36 As a selection of recent and relevant literature, see Veress, 2019, pp. 119–125; Fazakas, 2020, p. 79; Gál, 2022, pp. 56–57; Török, 2022, pp. 11–19; Veress, 2024a, pp. 3–10.

question revolves around the stability of these defining features over time and across legal frameworks, particularly given amendments to the Hungarian Civil Code effective as of January 1, 2022. Historically, the LLC was characterised by any member contributing one capital contribution, corresponding to a single membership share. However, the Civil Code amendments now allow a member to hold multiple capital contributions and membership shares, raising questions about whether this change fundamentally alters the nature of the LLC. Previously, an LLC was distinguished by its ‘one-member-one-capital-contribution-one-business-share’ model. The capital contribution represented the member’s financial input into the company, while the membership share embodied the associated rights and obligations. This clarity in structure was seen as critical for internal governance and external transparency. The current wording of the Civil Code now explicitly allows members to hold multiple capital contributions and membership shares, aligning the Hungarian LLC more closely with corporate entities, like closed companies limited by shares (abbreviated as *zrt.* in Hungarian), which may impact its hybrid nature as a company blending personal and capital elements.

For a better understanding, we should separate the analysis of capital contribution and membership share, as their implications differ significantly under the new legal framework. In our view, allowing a single member to have multiple capital contributions is inherently illogical and contradicts the core purpose of capital contributions as an indivisible representation of a member’s total financial stake in the company. A capital contribution is inherently unified, even if comprised of different types of inputs (e.g. monetary and non-monetary). Splitting it into multiple units undermines its purpose as a single measure of a member’s financial commitment. Introducing multiple capital contributions complicates administration and accounting, potentially reducing transparency for creditors and partners. The legislative amendment enabling multiple capital contributions was justified primarily by arguments related to multiplication of membership shares, with no direct explanation for the need for multiple capital contributions.

The following example illustrates how multiple capital contributions create unnecessary complexity. Say that a member is required to contribute 300,000 HUF but has only partially fulfilled this by contributing 200,000 HUF. The remainder is due in the form of non-monetary property. If the capital contributions are treated separately, it creates ambiguity regarding the member’s obligations. For example, can sanctions apply only to the unpaid contribution, or must they affect all contributions? The unified treatment of contributions would avoid such confusion. A single, unified capital contribution system is simpler, more transparent, and consistent with the original purpose of the LLC structure.

In contrast to capital contributions, the possibility of holding multiple membership shares is deemed more defensible and even beneficial under certain circumstances. Membership shares include not just the financial stake but also the rights and obligations of membership, making their separation into multiple units more justifiable. The French LLC model (*parts sociales*) has long permitted multiple

membership shares per member, enhancing flexibility for partial transfers or differentiated rights. Allowing multiple membership shares facilitates smoother partial transfers of ownership without requiring formal division of a single share, reducing administrative hurdles. Multiple membership shares can enhance functionality, such as when partial ownership is transferred to other members or third parties.

The amendment to allow multiple membership shares reflects a shift, aligning the Hungarian LLC more closely with closed (privately held) JSCs. This trend enhances flexibility but raises questions about the need to maintain separate legal forms for LLCs and privately held JSCs.

A single membership share may be jointly owned by multiple individuals. In such cases, these co-owners are collectively regarded as one member with respect to the company. They exercise their rights through a joint representative and are jointly and severally liable for the obligations associated with membership. The co-owners elect the joint representative from among themselves, based on the voting power assigned to their ownership proportions. The joint representative is obligated to notify the company of any changes in the identity of the co-owners or their respective ownership proportions. If the joint representative changes, the newly appointed representative is responsible for informing the company of the change.

Membership shares in an LLC may be freely transferred among its members. The articles of association can grant members a pre-emptive right³⁷ to acquire membership shares being transferred for monetary consideration. This right is proportionally distributed among members based on the size of their respective membership shares.

A membership share can be transferred to an external party only if the transferring member has fully contributed their share of the capital, unless the transfer arises owing to the termination of membership caused by failure to fulfil capital contributions, supplementary payments, or exclusion from the company. In cases of transfer for monetary consideration, the other members, the company, or a designated third party (in this order) have a pre-emptive right to acquire the membership share. This pre-emptive right cannot be transferred. The proportionate allocation of pre-emptive rights among members is based on the size of their respective membership shares. The exercise of the pre-emptive right by the company or the designation of a third party for this purpose is determined by a resolution of the general meeting. If an agreement is concluded in violation of the pre-emptive right, a lawsuit seeking invalidation of the contract must be filed within 1 year of the agreement's conclusion.

If a member does not respond to the offer within 15 days of its communication, or if the company or its designated person does not respond within 30 days, the member is assumed to have waived this right.

37 Properly characterised, the entitlement is not a pre-emptive right *stricto sensu*, because its object is membership share, an intangible asset. Its nature is of a priority to purchase existing membership shares when they are offered for sale for money or a right of first refusal. Nevertheless, the statutory regime governing pre-emptive rights applies to it *mutatis mutandis*.

If the articles of association require the company's consent for transferring membership shares to external parties, the general meeting decides whether to grant such consent. If the company does not issue a response within 30 days of receiving the notification of intent to transfer, consent is deemed granted. Any provision in the articles of association allowing a longer response time is invalid. Additionally, the articles of association cannot validly prohibit the transfer of membership shares to external parties for monetary consideration.

During the sale of membership shares in enforcement proceedings (against the member of the LLC), individuals entitled to a pre-emptive right may exercise their right to acquire the shares before others.

If a member wishes to transfer only a portion of their membership share, the share must first be divided. The division requires the approval of the general meeting. All transfers of membership shares must be documented in writing. Such transfers do not require amendments to the company's articles of association.

The acquirer of the share must report the change in membership and its effective date to the company within 8 days of the transfer. This report is necessary for updating the member register and must be submitted either as a notarised document or a private document with full probative value, accompanied by the transfer agreement. The report must also include a declaration by the acquirer acknowledging the binding nature of the articles of association. Upon transfer, the transferring member's rights and obligations arising from their membership are transferred to the acquirer. The change in membership becomes effective with respect to the company from the date of notification, regardless of when it is entered into the register. The acquirer's membership rights and obligations commence upon notification to the company.

In the event of a member's death, their heir may request entry into the member register, provided they present proof of their status as heir. Similarly, if a corporate member undergoes transformation, merger, division, or other statutory succession, the successor may request registration. The managing director may refuse registration if individuals entitled under the articles of association exercise their pre-emptive right within 30 days of the heir's or successor's request, provided they compensate the heir or successor for the market value of the membership share. Any provision in the articles of association extending this 30-day period is invalid. If a corporate member ceases to exist without a successor, and the membership share remains unclaimed through liquidation or other asset distribution processes, the company must decide either to cancel the share or to redistribute it among existing members in proportion to their capital contributions.

If a membership share was acquired from marital joint property, the court may allocate a portion of the membership share to the non-member spouse during marital property division proceedings. This allocation is subject to the relevant provisions of the law and the articles of association. In such cases, the pre-emptive acquisition right and the requirement for full contribution payment do not apply. These provisions also apply if the spouses mutually agree to divide the membership share as part of a marital property settlement.

Hungarian law permits LLCs to acquire their own membership shares. This acquisition can occur based on a resolution of the general meeting and through a transfer. However, the company can only purchase its own membership shares using assets exceeding its registered capital and must not proceed if it is unable to declare dividends. The company may acquire only those membership shares for which the corresponding capital contributions have been fully paid. Furthermore, the total value of the capital contributions underlying the acquired shares must not exceed 50% of the company's registered capital. Any provision in the articles of association that imposes less stringent conditions than those prescribed by law is invalid. Membership rights associated with the company's own shares cannot be exercised, and such shares are excluded from quorum calculations at general meetings. Additionally, the company is not entitled to receive dividends for its own shares. Instead, the dividends corresponding to these shares must be distributed among the other members proportionally, based on their respective capital contributions. A company that has acquired its own membership shares for consideration is required to take one of the following actions within 1 year of purchase: sell the shares to a third party, distribute the shares to members proportionally and without consideration, cancel the shares in accordance with the rules governing capital reduction. Provisions in the articles of association that deviate from these legal requirements by granting the company greater flexibility are invalid.

If a member is excluded by court order or their membership is terminated because of non-fulfilment of financial contributions or supplementary payments, their membership share must be sold. This can be achieved through an agreement with the former member. If no agreement is reached, the company must organise an auction. Should the auction fail, the membership share must be cancelled.

4.2. Companies Limited by Shares (Joint-Stock Companies)

A share is a transferable security that embodies the membership rights exercisable in the issuing corporation.³⁸ It is issued in registered form, has a nominal value, and is exclusive to corporations limited by shares; no other entity can issue securities that represent membership rights. Under Hungarian law, the issuance of bearer securities is prohibited.³⁹ The issuance of shares may occur either privately or publicly. Shares of privately held corporations, except in cases related to a change in the corporation's operational form, must be issued in a manner that does not require the preparation of a prospectus or a minimum disclosure document under capital market regulations and does not involve listing on a stock exchange.

If a share has multiple owners, they are regarded as a single shareholder in relation to the corporation. Their rights can be exercised only through a common representative, and they bear joint and several liability for obligations associated with the share.

38 For a monographical approach, see Veress, 2019a.

39 Veress, 2019b, pp. 95–100.

In privately held JSCs, shares may be issued either in physical (printed) form or as dematerialised securities. A share issued in physical form can be converted into a dematerialised share, and vice versa. In publicly traded corporations, shares may be issued only in dematerialised form.

A physically issued share is a document produced by an authorised printing company and must include at least the following information:

- a) the corporate name and registered office of the issuing corporation;
- b) the share's serial number, series, and nominal value;
- c) the name of the initial shareholder;
- d) the date of the articles of association or the amendment forming the basis of issuance;
- e) the amount of share capital or the portion of share capital represented by the share, and the total number of shares issued;
- f) the signatures of the corporation's representatives as required by the corporate signature rules; and
- g) the security code.

Where applicable, the physical share document must also include:

- a) the rights attached to the share type, class, or series as specified in the articles of association;
- b) any restrictions on voting rights; and
- c) any limitations on the transferability of the share or provisions requiring the corporation's consent for transfer.

If, in the case of shares issued in physical form, multiple shares belonging to the same series are consolidated into a single share certificate – either based on the provisions of the articles of association or at the request of the shareholder – the rights associated with the shares included in the consolidated certificate remain individually applicable to each share. Upon the shareholder's request, a consolidated share may be divided into smaller denominations of consolidated shares or into shares with the nominal value specified in the articles of association for the given series. Such division is contingent upon the shareholder reimbursing the costs associated with the conversion.

A dematerialised share is a type of dematerialised security that contains the same essential information as a physical share, with the following differences:

- a) the shareholder's name and other identification data are recorded in the securities account maintained by the account provider for the benefit of the shareholder;
- b) it does not include a serial number; and
- c) it does not bear the signatures of the corporation's representatives.

If the information recorded on a share changes, the corporation must update the affected shares. For physically issued shares, this involves replacing or re-stamping

the shares in accordance with the rules applicable to capital increases. For dematerialised shares, the content must be amended to reflect the changes.

The Hungarian legal framework governing JSCs establishes a highly detailed classification of shares based on their functional and legal characteristics. This classification includes share types (*részvényfajták*), share classes (*részvényosztályok*), and share series (*részvénytörzsek*), providing a structured system to define and manage the rights and obligations of shareholders and the corporate entities issuing the shares. Each category has distinct legal and operational implications, ensuring a high degree of flexibility for companies while safeguarding shareholder rights.

The fundamental distinction within Hungarian corporate law divides shares into five primary types: ordinary shares, preference shares, employee shares, interest-bearing shares, and redeemable shares. These share types serve as the building blocks for corporate equity, with each type designed to address specific economic and governance objectives.

Ordinary shares are the default share type issued by JSCs. These shares confer general membership rights, including participation in the company's general meetings, voting rights, and a proportional entitlement to dividends. Ordinary shares are defined negatively, meaning they include all shares that do not fall into the specialised categories outlined below.

Preference shares, by contrast, are characterised by the conferral of special privileges to their holders. A corporation's articles of association may stipulate the issuance of shares that grant certain advantages to shareholders compared to other share types, subject to specific conditions. These are known as preferred shares. The articles of association may define, within the category of preferred shares, the following: a) dividend preference; b) priority in the distribution of assets in the event of the corporation's dissolution without legal succession (liquidation preference); c) voting preference; d) priority in nominating members of the board of directors or supervisory board; e) pre-emptive rights; and f) shares that simultaneously combine several of the preferences listed in points a–e.⁴⁰ Within the category of preference shares, multiple classes can exist, each corresponding to a specific privilege or combination of privileges. For example, one class may focus solely on voting rights, while another prioritises liquidation entitlements.

Preferred shares granting dividend preference entitle shareholders to receive dividends from the corporation's distributable post-tax profits at a more favourable rate than those attached to other types and classes of shares. Preferred shares granting dividend preference are aimed at aligning shareholder interests with the financial performance and governance of the corporation. The primary function of dividend-preferred shares is to grant shareholders a superior claim to the corporation's

40 The articles of association may also allow for the issuance of a series of shares within the preferred share category, provided conditions are defined, where the corporation is obliged to exchange such shares, upon the shareholder's request, for shares of another preferred share category or ordinary shares. Alternatively, the corporation itself may exchange such shares at its discretion for shares belonging to another preferred share category or for ordinary shares.

distributable post-tax profits. Holders of these shares receive dividends at a more favourable rate compared to other classes of shares, providing a financial incentive and rewarding their investment. This preferential treatment often appeals to investors seeking steady income and reliability in returns, making these shares attractive to certain types of shareholders. In this context, dividend-preferred shares are particularly attractive to long-term investors, such as pension funds or income-focused individuals, who prioritise consistent returns over speculative gains. By guaranteeing prioritised dividends and, in some cases, mandatory payments, these shares offer stability and reduce the risks associated with market fluctuations and corporate profit allocation decisions.

Such shares may require mandatory dividend payments under statutory conditions, even when the corporation allocates its remaining profits for other purposes (i.e. no dividends are paid on ordinary shares). This guarantees that shareholders benefit from the company's profitability, regardless of broader strategic or operational decisions that may limit distributions to ordinary shareholders. This feature ensures that dividend-preferred shareholders are prioritised, making their investment less subject to the corporation's discretionary financial policies.

If voting rights associated with dividend-preferred shares are restricted or excluded by the articles of association, and if the corporation fails to pay dividends on these shares in a given financial year or pays less than the amount due, the voting rights of dividend-preferred shares are reinstated without restriction until the approval of the annual financial statements for the following financial year. This safeguard protects shareholders by providing them with an alternative form of influence in the corporation, ensuring their interests are represented when financial commitments are not met. Reinstated voting rights remain in effect until the approval of the annual financial statements for the subsequent financial year, serving as a temporary corrective measure to uphold shareholder interests.

Voting-preferred shares grant shareholders the right to exercise multiple voting rights, as defined in the articles of association. In a publicly traded corporation, voting rights attached to a single share may not exceed 10 times the voting rights corresponding to the share's nominal value. Any provision in the articles of association to the contrary is invalid. In the case of voting-preferred shares granting veto rights, resolutions of the general meeting can be adopted only with the affirmative vote of the holder(s) of such shares. If only one such share is issued, the resolution requires the affirmative vote of the shareholder holding that share.

Voting-preferred shares play an interesting role in the governance and decision-making structure of a JSC, particularly in safeguarding the interests of certain shareholders or groups. Voting-preferred shares grant holders the ability to exercise multiple voting rights relative to their nominal shareholding, amplifying their influence in corporate decision-making processes. This is particularly useful for founders, early investors, or strategic partners who wish to retain significant control over the corporation's strategic direction, even if they hold a minority stake in terms of capital contribution. In publicly traded corporations, voting-preferred shares are often used

to separate control from financial investment. While regular shareholders contribute capital and hold standard voting rights, voting-preferred shareholders may exert greater influence without necessarily holding a proportionate share of the company's equity. This ensures that the corporation remains under the control of parties deemed essential to its long-term stability and vision, such as founding members or key stakeholders. Additionally, in joint-stock corporations, the limitation on the voting power of a single share – capped at 10 times the nominal voting rights – ensures that the enhanced influence of voting-preferred shares is not abused.

Voting-preferred shares granting veto rights are a mechanism for protecting the interests of specific shareholders or ensuring the alignment of key decisions with the corporation's strategic priorities. The requirement for the affirmative vote of the holder(s) of such shares before a resolution is adopted gives these shareholders significant control over critical matters. This could include decisions related to mergers, acquisitions, changes in capital structure, or crucial amendments to the articles of association. When only one such share is issued, the exclusive affirmative vote required from its holder underscores the extraordinary authority vested in that individual or entity. This arrangement can serve as a safeguard for minority protection, ensuring that certain strategic decisions cannot be made without the express consent of a specific shareholder.

By concentrating voting power among specific shareholders, voting-preferred shares contribute to governance stability. They ensure that decision-making authority resides with individuals or entities with a vested long-term interest in the corporation's well-being. This stability can be particularly beneficial during times of crisis or significant strategic changes, as it reduces the risk of erratic decisions driven by short-term majority sentiment. Voting-preferred shares may also attract strategic investors who seek not only financial returns but also a voice in corporate governance. By offering enhanced voting rights, the corporation may appeal to investors who wish to participate actively in shaping the company's policies and direction. Finally, in corporations in which the founders or original investors wish to preserve the company's identity, mission, or culture, voting-preferred shares can act as a tool to prevent hostile takeovers or decisions that could deviate from the corporation's foundational values.

Preferred shares providing the right to nominate members of the board of directors or supervisory board allow shareholders, under the procedures specified in the articles of association, to nominate one or more members of the board. Preferred shares with nomination rights allow certain shareholders to directly appoint individuals to key governance positions. These members become part of the board upon accepting their nomination. If preferred shareholders fail to nominate a director within the specified time-frame and under the stipulated procedure, the right to elect the director reverts to the corporate body authorised to do so under general rules. Moreover, preferred shareholders may recall directors they have nominated, and they may be required to do so if conditions specified in the articles are met. If they fail to fulfil this obligation within the specified time-frame, the authority to recall passes to the appropriate

corporate body. Even in such cases, preferred shareholders retain the right to nominate a new director to replace the recalled one. However, shares granting the right to nominate directors may not be issued if the corporation operates under a system where the CEO exercises the functions of the board of directors. Similarly, in publicly traded corporations, shares granting the right to nominate members of the board or supervisory board cannot be issued.

These shares ensure that specific shareholders have a direct influence on the leadership and oversight of the corporation. This privilege ensures that shareholders with significant stakes or strategic interests can actively shape the board's composition, aligning it with their vision for the corporation. Certain restrictions on the issuance of preferred shares with nomination rights ensure a balanced governance structure. For example, such shares cannot be issued in corporations in which the CEO exercises the functions of the board of directors, preventing excessive concentration of power in the hands of a single individual or group. Similarly, publicly traded JSCs are prohibited from issuing these shares, promoting equity and transparency in governance practices, and protecting the interests of a broader shareholder base. By involving preferred shareholders in the nomination and recall of board members, these shares foster greater engagement and accountability. Shareholders with these rights are incentivised to take an active interest in the corporation's governance, leading to more informed decision-making and a stronger alignment between the board and shareholder interests.

Shares granting pre-emptive rights may be issued only by privately held corporations. These rights entitle shareholders to priority in purchasing shares that the corporation intends to transfer through sale. If a shareholder does not declare their intention to exercise this right within 15 days of being informed of the sale terms, they are assumed to have waived the right.

If a privately held JSC intends to transition into a publicly traded JSC, it must convert shares granting the right to nominate board members, supervisory board members, or pre-emptive rights, as well as shares combining dividend preferences with other rights, into forms of preferred or ordinary shares permitted for publicly traded corporations. This conversion must take place before the shares are listed on the stock exchange.

Employee shares are a specialised type designed to incentivise and align the interests of employees with those of the company. They may be issued by a corporation to employees working either full-time or part-time, either free of charge or at a discounted price lower than the nominal value of the shares. If the articles of association attach dividend preference rights to employee shares, such rights may be exercised only after the rights of shareholders holding shares classified as dividend-preferred have been satisfied.

Employee shares may be introduced simultaneously with an increase in the corporation's share capital, ensuring compliance with the prohibition against issuing shares below their nominal value. These shares can validly be transferred only to the

corporation's employees or to individuals specified in the articles of association as eligible based on their prior employment relationship with the corporation.

If an employee's employment is terminated and, as a result, they are no longer entitled to hold employee shares, they may transfer their shares up until the first general meeting held after 6 months from the termination of their employment. The same rule applies in the case of inheritance of employee shares. If the former employee or heir fails to transfer the shares within the specified deadline, the corporation may, at the general meeting following the expiration of the deadline, decide to redeem the employee shares or convert them into another type of share for sale.

In such cases, the former employee or heir is entitled to receive the nominal value of the shares, which must be paid within 30 days of the date of the redemption or transfer of the shares.

Employee shares serve multiple roles within a corporate structure, including financial, motivational, and governance dimensions, all of which contribute to the corporation's strategic and operational goals. Employee shares act as a form of financial incentive, aligning the interests of employees with those of the corporation. By granting shares either free of charge or at a discounted price, the corporation provides employees with a stake in its financial success. This fosters a sense of ownership, encouraging employees to contribute more actively to the company's growth and performance. Moreover, employee shares serve as a retention mechanism, because they are linked to continued employment. Employees may be more likely to remain with the corporation if their financial benefits are tied to the long-term success of the organisation. By enabling employees to benefit from the company's distributable post-tax profits, these shares provide a direct financial reward for their contributions to the company's success. When employee shares are associated with dividend preference rights, they function as a profit-sharing mechanism. Although subordinated to other dividend-preferred shares, employee shares still allow employees to participate in the company's profitability, reinforcing their motivation and commitment. The issuance of employee shares is tied to an increase in the corporation's share capital, as mentioned above. This dual purpose of capital raising and employee benefit ensures that the company secures additional financial resources (instead of paying dividends) while simultaneously engaging its workforce. Beyond financial and governance aspects, employee shares symbolise a culture of inclusivity and shared purpose. By granting employees a tangible stake in the company's success, the corporation fosters a collaborative atmosphere, strengthens employee loyalty, and enhances its reputation as an employer of choice.

Interest-bearing shares provide a hybrid between equity and debt by offering a fixed interest payment to shareholders in addition to traditional equity rights. The interest, calculated on the nominal value of the shares, is distributed from the company's free reserves. However, payment is conditional upon the company maintaining a capital level that meets or exceeds its statutory minimum, ensuring the financial stability of the issuing entity.

Redeemable shares grant either the company, the shareholder, or both the right to initiate the repurchase or sale of the shares. This type of share is particularly useful in scenarios in which the company seeks to manage its equity dynamically. The redemption process is subject to strict legal safeguards, including the requirement that the nominal or issue value of the shares be fully paid and that the company is not in breach of its capital maintenance obligations. A corporation may exercise its purchase right or fulfil its obligations arising from a shareholder's sale right in relation to shares for which the shareholder has fully paid the nominal value or the issue value, and has provided any non-monetary contributions to the corporation. However, the corporation is prohibited from exercising rights under the purchase option or fulfilling obligations under the sale option if it would be precluded from declaring or distributing dividends. Shares that are repurchased under these circumstances must be cancelled by the corporation in accordance with the rules governing the mandatory reduction of share capital.

Within any given type of shares, companies can issue series of shares, distinguished by such factors as issue date, specific issuance conditions, or unique rights.

Share types, classes, and series reflect a hierarchical structure that allows for highly customised equity instruments. Ordinary shares provide a baseline of general shareholder rights, while preference shares, with their multiple classes, cater for the design of specific corporate governance and financing strategies. Employee shares align workforce incentives with corporate objectives, while interest-bearing and redeemable shares introduce elements of financial flexibility and risk management.

While the transfer of shares is generally unrestricted, various limitations may be introduced depending on specific interests. If the corporation restricts share transfers or subjects them to its consent as stipulated in the articles of association, these restrictions are only enforceable against third parties if they are evident from the share itself or, in the case of dematerialised shares, from the document deposited with the central securities depository. Similarly, if a pre-emptive right, repurchase right, sale option, or purchase option is established by contract concerning the shares, it is enforceable against the corporation and third parties only if it is reflected in the share or, for dematerialised shares, in the securities account information.

If the articles of association require the corporation's consent for the transfer of shares, the reasons for which such consent may be withheld must also be specified in the articles. The decision on granting or withholding consent lies within the authority of the board of directors. If the board of directors fails to make a declaration within 30 days of the notification of the intent to transfer shares, consent is deemed to have been granted.

Hungarian law provides detailed regulations regarding the acquisition and handling of treasury (own) shares (*saját részvény*) by corporations. Treasury shares serve several strategic, financial, and governance purposes. While corporations are limited in their ability to acquire and use treasury shares, the regulatory framework ensures that such shares can support specific objectives while maintaining the integrity of the corporate structure and protecting the interests of shareholders. Treasury

shares provide corporations with a mechanism for managing their capital structure. By repurchasing their own shares, corporations can reduce the number of outstanding shares, thereby increasing earnings per share and potentially enhancing the market value of remaining shares. Additionally, treasury shares can be used as a tool to stabilise the share price in volatile markets, protecting shareholders and maintaining investor confidence. Treasury shares are often used to fulfil obligations under employee stock ownership plans or other incentive schemes. By holding treasury shares, corporations can allocate them to employees as part of performance-based compensation without issuing additional shares, which helps align employee interests with the long-term success of the corporation.

A corporation may acquire its own shares up to a maximum of 25% of its share capital. When determining the extent of treasury shares, shares owned by legal entities under the majority control of the corporation – including foreign entities recognised as LLCs or corporations under applicable laws – must also be included. Additionally, shares acquired or held by a third party on behalf of the corporation, as well as shares accepted by the corporation as collateral for claims, must be considered treasury shares. However, these provisions do not apply to transactions carried out by banks or other credit institutions in the course of their regular business operations.

A corporation cannot acquire its own shares during its formation or during a capital increase. It is also prohibited from acquiring shares as treasury shares if the nominal value or issue price of the shares has not been fully paid or provided. Treasury shares may be acquired for consideration only if the conditions for paying dividends are met, and the consideration must be paid from the assets that would otherwise be available for dividend distribution.

The acquisition of treasury shares requires prior authorisation from the general meeting. This authorisation must specify the type, class, number, and nominal value of the shares to be acquired, as well as the minimum and maximum price in the case of acquisition for consideration. The authorisation is valid for 18 months. However, prior authorisation from the general meeting is not required if the acquisition of shares is necessary to prevent imminent and serious harm to the corporation. This exception does not apply to public takeover bids for the shares of publicly traded corporations.

The provision allowing corporations to acquire treasury shares without prior authorisation from the general meeting in situations of imminent and serious harm reflects the role of treasury shares in crisis management. In such cases, treasury shares may be used to protect the corporation from hostile takeovers, safeguard its independence, or address other significant threats to its stability and operation.

Furthermore, authorisation is unnecessary if the shares are acquired during court proceedings to settle claims owed to the corporation or during corporate restructuring. In all cases, the board of directors must inform the next general meeting about the reasons and nature of the acquisition, the number and aggregate nominal value of the acquired shares, their proportion relative to the corporation's share capital, and the consideration paid.

If a corporation acquires its own shares in violation of the law, it must dispose of those shares – or, if the quantity cannot be determined, all treasury shares – within 1 year of acquisition, or cancel them by reducing the share capital. If the company is compelled to cancel a treasury share owned by another person, it incurs an obligation to account to that shareholder.⁴¹ Hungarian law explicitly ensures that treasury shares cannot distort corporate governance: treasury shares do not grant shareholder rights. When determining the quorum of the general meeting or exercising subscription priority rights, treasury shares must be disregarded. Any dividends attributable to treasury shares must be distributed proportionally to the other shareholders entitled to dividends, based on the nominal value of their shares. Treasury shares, therefore, indirectly benefit shareholders by reallocating dividends attributable to these shares. Because treasury shares do not confer shareholder rights, the dividends that would otherwise be paid on them are redistributed among the remaining shareholders proportionally to their holdings. This increases the effective dividend yield for existing shareholders.

Any provision in the articles of association that imposes less stringent requirements on the acquisition of treasury shares or the rights associated with treasury shares than those set out by law is invalid.

A distinctive mechanism in corporate law is the provision of financial assistance for share acquisition. Financial assistance can facilitate strategic partnerships or acquisitions by enabling the purchase of significant shareholdings; can support the creation of employee ownership schemes, which contribute to long-term stability and alignment between employees and corporate objectives; and play a role in corporate restructuring or ownership transition scenarios, ensuring smoother processes while adhering to legal safeguards.

A publicly traded corporation may provide financial assistance to a third party for the acquisition of its issued shares only under market conditions and using assets available for dividend distribution. This assistance requires the approval of the general meeting by a resolution passed with at least a three-quarters majority, based on a proposal by the board of directors. The proposal must include the rationale for the financial assistance, associated risks, conditions of implementation, consideration for the shares, and expected benefits for the corporation from the assistance. The board of directors is required to submit the proposal to the registry court.

These restrictions do not apply to transactions that directly or indirectly facilitate the acquisition of shares by employees of the publicly traded corporation – including employees of subsidiaries under its majority control – or by organisations established by employees for this purpose. Similarly, they do not apply to transactions conducted by banks and other financial institutions in the ordinary course of their business. However, financial assistance is strictly prohibited if the corporation's equity does not meet or, as a result of the assistance, would not meet the corporation's registered share capital. By requiring that assistance be granted only from assets available for dividend

41 Fővárosi Ítéltábla Gf.40229/2023/12.

distribution, the law prevents the corporation from depleting its core capital, which is critical for creditor protection and the corporation's long-term sustainability.

Any provision in the articles of association that imposes less stringent requirements than the mandatory statutory rules of financial assistance is void.

5. Poland

5.1. *Limited Liability Companies*

Pursuant to Article 152 of the Commercial Companies Code (CCC), the share capital of an LLC is divided into shares with equal or unequal nominal value. One of the roles in the structure of an LLC is played by the share capital, which should be understood as a specified amount of money determined in the articles of association, constituting the sum of the nominal value of the shareholders' shares, usually corresponding to the value of their declared contributions, made by the shareholders to cover shares in this capital. These contributions may be in cash, in-kind (in-kind contributions) or mixed. The share capital class does not guarantee that the company has assets corresponding to the amount of capital, but legally binds part of the company's funds. The provisions introducing the protection of share capital include:

- a) Article 189 §§ 1 and 2 of the CCC – introducing a general ban on the return of contributions made by shareholders, except for cases expressly provided for in the act, and a ban on payments from the company's assets needed to fully cover the share capital;
- b) Article 158 § 2 of the CCC – prohibiting the payment of remuneration for services provided at the incorporation of the company from the funds paid to cover the share capital and excluding the possibility of crediting the remuneration for these services to cover the participation in the company;
- c) Article 176 § 2 of the CCC – stipulating that the remuneration paid to a shareholder for the performance of recurring non-cash benefits may not exceed the usual prices or rates in turnover;
- d) Article 200 § 1 of the CCC – introducing a ban on taking up and acquiring own shares (with exceptions specified in Article 200 § 1 sentence 3, Article 515 § 2, and Article 541 § 5, CCC).

Using various criteria, we can distinguish the following types of shares in the share capital: initial and new in the increased share capital, ordinary and preferred, received for contributions in kind, cash and mixed, divisible and indivisible, equal and unequal, covered by community and ordinary, own, as well as shares with assigned obligations and with assigned rights.⁴²

Shares in an LLC, unlike shares in a JSC, may have an equal and unequal nominal value; this issue is decided by the articles of association.

42 See Kidyba, 2023.

The articles of association determine whether a shareholder can have only one or more shares. If a shareholder may have more than one share, then all shares in the share capital should be equal and indivisible (Article 153, CCC), this determines the obligation to choose one of two share models of an LLC: a single-share company, in which each shareholder will be entitled to one share, which are then unequal and divisible, and therefore, the number of shares corresponds to the number of shareholders, or a multi-share company, in which the shareholders can hold many shares that are equal in value and indivisible, similar to shares in a JSC. The choice of a particular system determines the structure of membership relations in an LLC. The multi-share system is characteristic for Polish LLCs.⁴³

Pursuant to Article 180 of the CCC, the existence of a share, its part or a fractional part of the share, and its pledge should be made in writing with notarised signatures. In the case of a company whose agreement was concluded using the model agreement, the sale of shares by a shareholder is also possible using the template made available in the ICT system. Statements of the seller and the purchaser shall bear a qualified electronic signature, a trusted signature, or a personal signature.

In the context of the rigour of failure to comply with the form laid down in Article 180 § 1 of the CCC, it should be emphasised that pursuant to Article 73 § 2 CC in conjunction with Article 2 of the CCC, if the law reserves another special form for a legal transaction, the act performed without observing this form is invalid. The abovementioned list of provisions shows that the written form with notarised signatures has been reserved for the sale of shares under pain of nullity.⁴⁴ In addition to the whole share(s), a part of the share may also be the subject of disposal. This is permissible if, according to the agreement, a shareholders can have only one share. In this case, the shares in the company may have an unequal nominal value and may be divisible. As a result of the division, shares lower than 50 Polish zloty (PLN) may not be created (the nominal value of the share in an LLC might not be lower than PLN 50).

Pursuant to Article 182 § 1 of the CCC, the sale of a share, its part or fractional part of the share and pledging of the share may be made conditional on the company's consent or otherwise limited by the articles of association (e.g. make dependent on the investor's consent), while the lack of consent of the authorised entity leads to the so-called ineffectiveness of the suspended legal transaction concerning the shares. This means, in practice, that the effect in the form of an effective (having legal effects) juridical act will not take place until consent is granted. The CCC directly introduces the possibility of making the sale of shares in an LLC dependent on the company's consent, at the same time indicating the possibility of introducing other regulations in the articles of association. If this procedure is used pursuant to Article 182 § 2 of the CCC (unless the articles of association provide otherwise), consent to the sale of shares is granted by the company's management board in writing. If the management board refuses to consent to the sale of shares, the registry court may allow it if there

⁴³ See Jara, 2023.

⁴⁴ Szczurowski, 2018, pp. 25–29.

are important reasons (Article 182 § 3, sentence 2, CCC). In this case, however, the company must propose another buyer within the time limit set by the registry court.⁴⁵ Pursuant to Article 182(1) § 1 of the CCC, the offer to acquire shares in a company may not be submitted to an unspecified addressee. Under paragraph 2 of that provision, the acquisition of shares in a company may not be promoted by targeting an advertisement or other form of promotion to an unspecified addressee.⁴⁶

The compulsory buyout of shares in an LLC was introduced into the CCC by a recent amendment in the holding law regulation (the law of groups of companies), which entered into force on 13 October 2022, the provisions of this law introduce additional possibilities to request the buyout and repurchase of both shares and shares. However, they can be used only in a company participating in a group of companies. The majority power developed in Article 21(11) of the CCC is an expression of seeking a balance between the rights of the minority and the majority in the structure of a group of companies. Its equivalent is the right of repurchase described in Article 21(10) of the CCC. The right to request repurchase belongs only to the parent company (group of companies), which must additionally represent at least 90% of the share capital. In accordance with Article 200 of the CCC, the company shall not take up or acquire or take on pledge its own shares. This prohibition applies equally to the taking up or acquisition of shares or to the taking of the same on pledge by a subsidiary company or cooperative. Exceptions are acquisition under execution in satisfaction of those claims of the company which cannot be satisfied from a shareholder's other estate, acquisition for the purpose of redemption of shares, and acquisition or taking up shares in other cases provided in this act. Failing transfer of shares acquired under execution pursuant to paragraph 1 within 1 year of their acquisition, such shares shall be redeemed pursuant to provisions on initial capital reduction unless the company has set up a special reserve capital with a view to redeeming shares. Own shares shall be shown in the balance sheet under a separate item of assets.

5.2. Simple Joint-Stock Companies

In a simple JSC, shares are taken up in exchange for cash or in-kind contributions. A contribution in kind to cover shares may be any contribution having a property value, in particular the provision of work or services. The shares do not have a nominal value, do not constitute part of the share capital and are indivisible (Article 300(2),

⁴⁵ Kwaśnicki and Pietrzak, 2002, p. 18.

⁴⁶ Article 182(1) of the CCC enters into force on 10 November 2023.

CCC).⁴⁷ Until the emergence of a simple JSC, Polish company law was characterised by a model of property structure in the share rights system, built on assigning a nominal value to units of participation in a company, constituting a part of the amount of share capital. The share model of a simple JSC expresses a fundamental feature that distinguishes it from other capital companies whose share capital is divided into shares.

Shares in a simple JSC have no nominal value and are detached from its share capital in the sense that they do not constitute a fraction of it. This feature is associated with the lack of share capital. Non-denominational shares express membership rights, and the link with share capital is only constituted by the fact that contributions made to cover non-denominational shares, provided that they meet the traditional criteria of in-kind capacity, are credited to the share capital.⁴⁸ Shares need not have any connection with share capital, as they can be taken up in exchange for contributions in kind which are not intended to cover the share capital, in particular contributions in the form of work or services. However, this cannot apply to all shares of the company because of the statutory obligation to participate in the share capital (Article 300(3) § 1 and Article 300(4), item 3, CCC). Shareholders of a simple JSC may withdraw some – or practically all – of their contributions without the need to adopt a resolution to reduce the share capital, within the limits of Article 300(15) of the CCC. Funds accumulated within the share capital are taken into account in determining the balance sheet surplus and may be paid to shareholders as dividends or redemptions of shares. In this way, the company can better adapt its capital needs to the market situation and the capital can be used more efficiently.⁴⁹ The advantage of shaping the construction of a simple JSC is also the simplification of restructuring, facilitation of capitalisation,⁵⁰ and no need to reduce the share capital by reducing the nominal value as the first stage of restructuring.⁵¹

Shares of a simple JSC are transferable. However, as in the case of other capital companies, restrictions on their disposal is possible (Articles 300(39) to 300(42), CCC). The form provided for both the sale and encumbrance of shares in a simple JSC is the document form, reserved under pain of nullity. In order to maintain the documentary

47 Therefore, it seems that the category of in-kind contribution to a simple joint-stock company includes two basic types of in-kind contributions (in-kind contributions): a) in-kind contributions, taking into account Article 14 § 1 of the CCC, the contribution of which increases the amount of share capital (Article 300(3) § 1, CCC); and b) in-kind contributions in the form of an inalienable right, provision of work or services, and other contributions, which do not have the capacity to make contributions in kind in the light of Article 14 § 1 of the CCC and do not contribute to the share capital (*a contrario* Article 300(3) § 1, CCC, according to the explanatory memorandum to the bill, p. 23). Article 14(1) of the CCC provides that the subject of a contribution in kind to an LLC, a JSC, or intended for the share capital of a simple JSC may not be an inalienable right or the provision of work or services.

48 Explanatory memorandum to the bill of 19 July 2019, pp. 20 and 28.

49 Ibid., p. 22.

50 Opalski, 2018, cited by Modzelewska and Reszczyk-Król, 2023.

51 Explanatory memorandum to the bill of 19 July 2019, p. 23.

form of a juridical act, it is sufficient to submit a declaration of will in the form of a document, in a manner enabling the identification of the person making the statement (77(2) of the Civil Code in conjunction with Article 2, CCC). According to 77(3) of the Civil Code, a document is a carrier of information enabling familiarisation with its content. The mere performance of a legal transaction does not have the effect of acquiring rights from shares. This takes place when an entry is made in the register of shareholders indicating the purchaser and the number, type, series, and numbers of the acquired shares (Article 300(37), CCC).

The articles of association may make the disposal of shares subject to the consent of the company or otherwise limit it. The disposal of shares not fully paid up requires the consent of the company until the contribution is made in full. The consent of the company requires a documentary form under pain of nullity, unless the articles of association provide otherwise (Article 300(40) § 1, CCC).

Pursuant to Article 300(49) of the CCC on a request of a shareholder or shareholders representing more than half of the total number of votes, the court, for important reasons concerning a given shareholder, may order his exclusion from the company. The articles of association may limit this entitlement to a shareholder or shareholders representing a larger number of votes. The regulations in force in an LLC shall apply accordingly to such exclusion.

At the request of the shareholder himself, the court may order the resignation of the shareholder from the company if there is an important reason justified by the relationship between the shareholders or between the company and the departing shareholder, resulting in gross harm to the outgoing shareholder. Shares held by the departing shareholder are subject to redemption at a price corresponding to the fair value determined by the court on the date of service of the claim. When ruling on the resignation of a shareholder, the court also determines the date within which the buyout price should be paid to the outgoing shareholder together with interest from the date of service of the claim. The resignation of a shareholder provided for in Article 300(50) of the CCC is a new construction in Polish law, aimed at improving the situation of the so-called ‘corporate prisoner’ in capital companies. Based on the previous legal status, especially the extremely difficult situation for minority shareholders in cases of acute conflict with the majority shareholder – in a JSC, in practice, they did not have a mechanism allowing them to exit the company, while in an LLC, they could use only the *ultima ratio* in the form of an action for dissolution of the company⁵²

As a rule, in a simple JSC, it is not permissible to acquire own shares, but Article 300(47) of the CCC provides for exceptions to this prohibition; for example, a company may acquire shares for redemption, on the basis of and within the limits of the authorisation granted in the shareholders’ resolution, by way of execution to satisfy the company’s claims that cannot be satisfied from other shareholder assets, and by universal succession. Nor can a simple stock shelf include own shares.

52 See Mazgaj, 2023.

This prohibition also applies to the acquisition of shares in the parent company by a subsidiary company or cooperative. However, such a definition of shares is valid, with the proviso that a member of the management board is jointly and severally liable with the person who took up the shares for making a full contribution, unless he is not at fault. If, however, the shares of a company have been subscribed for by a person who has acted in his own name but on behalf of the company or subsidiary company or cooperative, the holder shall be deemed to be acting on his own account.

5.3. Joint-Stock Companies

In a JSC, pursuant to Article 302 of the CCC, the share capital of a JSC is divided into shares of equal nominal value. All shares in the company must, therefore, have the same nominal value. Shares of a non-public JSC exist only in a dematerialised form (Article 328 § 1, CCC). This means that the only way to manifest a shareholder's share rights is an entry in the register kept in electronic form (Article 328(1) § 1, CCC). The dematerialisation of shares in a JSC and the mechanism of their trading is part of a broader legislative trend of the legislator moving away from the traditional form of securities in the form of paper documents. The structure of the provisions concerning the dematerialisation of shares in a JSC is, to a large extent, similar to the provisions concerning a simple JSC. The regulations introduced into the CCC regarding the form of shares of a non-public JSC, as a rule, entered into force on 1 March 2021.⁵³

Pursuant to Article 351 § 1 of the CCC, a JSC may issue shares with special rights (preference shares). Those powers must, as that provision indicates, be laid down in the statutes. Therefore, we can distinguish the so-called ordinary and preferred shares in the company. Preference shares, with the exception of silent shares, should be registered. The preference of shares should be distinguished from the granting, pursuant to Article 354 of the CCC, of personal rights to an individual shareholder. There are also voice actions and silent actions. Shares, as a rule, are endowed with voting rights. However, the company's articles of association may differentiate the scope of this right by giving preference to shares by granting them two votes per share. The opposite of voting shares are so-called silent shares, that is, shares endowed with a special privilege of a financial nature at the expense of limiting their competence to exercise voting rights (Article 353 § 3, CCC).

The provisions of the CCC (Articles 362 et seq., CCC) also regulate the problem of acquiring and taking up so-called own shares.

Based on Article 334 § 1 of the CCC, we can distinguish primarily registered shares and bearer shares. A shareholder may hold only registered shares, only bearer shares, or both types of shares. In connection with the dematerialisation of shares, the distinction between registered and bearer shares, provided for in Article 334 § 1

⁵³ Act of 30 August 2019 amending the CCC and certain other acts (Journal of Laws of 2019, item 1798).

of the CCC, was maintained. However, it is emphasised in the literature that most of the regulations that differentiated them were repealed.⁵⁴

Article 337 § 1 of the CCC expresses the principle of freedom in the sale of shares. The act does not provide for any requirements regarding the form of a legal transaction the subject of which is the sale of shares in a JSC. However, the sale of shares takes place only when the entry in the register of shareholders is made.⁵⁵ Pursuant to Article 337 § 2 of the CCC, the articles of association may make the disposal of shares subject to the consent of the company or otherwise limit the disposal of registered shares. Meanwhile, the provisions of Article 338 of the CCC provide that an agreement limiting the disposal of shares or a fraction of shares for a specified period of time is permissible. A restriction on disposal may not be imposed for a period exceeding 5 years from the date of conclusion of the contract. Agreements establishing a right of pre-emption or other pre-emptive right to acquire shares or a fraction of shares are also permitted. Restrictions on disposal resulting from such agreements may not last longer than 10 years from the date of conclusion of the contract. Such an agreement remains effective *inter partes*, that is, only in the relations between its parties. Thus, in the case of disposal of shares contrary to the provisions of the concluded agreement, which falls within the provisions of Article 338 of the CCC, such a regulation remains valid and effective both between the parties to a given act disposing of shares and with respect to the company itself. The only issue that remains is possible liability for damages or, in certain cases, the possibility of seeking recognition of the contract as ineffective based on the provision of Article 59 of the Civil Code.⁵⁶

In a JSC, the buyback of shares may take place, as described in Article 416 of the CCC – that is, in the event of adopting a resolution on changing the subject of the company's activity. Pursuant to Article 416 § 4 of the CCC, the effectiveness of such a resolution depends on the purchase of shares of those shareholders who do not agree to the change. Shareholders present at the general meeting who voted against the resolution should submit a request to buy back their shares within 2 days of the date of the general meeting, but absent within 1 month of the date of announcement of the resolution. Shareholders who do not request the redemption of their shares on time shall be deemed to have agreed to the change. The CCC also allows for the so-called 'squeeze out' of shareholders, allowing majority shareholders holding a specific capital share in the company to carry out a compulsory buyout of minority shareholders' shares, as a result of which they are deprived of ownership rights to their shares and the loss of shareholder status (Article 418, CCC). As mentioned, when discussing an LLC, it is possible for the parent company of a group of companies to buy out shares held by minority shareholders of a subsidiary. Unlike the right of repurchase, the reverse compulsory buyout procedure for minority shareholders is initiated by majority shareholders who wish either to change the company's business or to buy out some

54 See Kidyba, 2023.

55 Sójka, 2020, p. 673.

56 See Bieniak and Nita-Jagielski, 2022.

of the minority shareholders. Regarding the rights of minority shareholders related to the exit from the company, the legislator has regulated them, in principle, in relation to the shareholders of a JSC. Article 418(1) of the CCC regulates the right to repurchase shares on general principles, which is vested in shareholders representing no more than 5% of the share capital throughout the period of participation in the company. This right is exercised by requesting that a resolution on the compulsory repurchase of their shares be placed on the agenda of the next general meeting.⁵⁷

Poland has transposed the financing procedure currently described in Article 64 of Directive 2017/1132.⁵⁸ Compared to the previous regulations, a completely new approach to financing the acquisition and subscription of company shares is now in force. This is primarily about increasing flexibility in terms of changes in the structure of shareholders, which allows the use of leveraged buyouts and management buyouts.⁵⁹ In the CCC, the issue of the so-called financial assistance has been regulated only in relation to a JSC. In the current legal status, the rule is the admissibility of direct or indirect financing of the acquisition or subscription of own shares by the company. The form of such financing can be diverse – the CCC mentions only the examples of granting a loan, making an advance payment, or establishing a security. The payment of dividend advances is excluded from Article 345 of the CCC, even if its objective purpose is to enable the acquisition or subscription of the company's shares.⁶⁰

6. Romania

6.1. Generalities

The type of corporate participation summarising membership rights varies depending on the legal form of the company. In LLCs, such participation takes the form of *membership shares* (*părți sociale*); in JSCs, they take the form of shares (*ațiuni*).

6.2. Limited Liability Companies

Among the members of an LLC, membership shares may be freely transferred (*inter vivos* transactions). However, transferring these membership shares to third parties outside the company is only possible with the approval of members representing at least three-quarters of the company's capital.⁶¹ Some opinions and practices suggest that, when calculating this majority, the membership shares of the member intending to transfer their participation should be excluded to avoid conflicts of interest

⁵⁷ Michalak, 2022, p. 754.

⁵⁸ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law.

⁵⁹ Jerzmanowski, 2016, pp. 45 et seq.

⁶⁰ Jerzmanowski and Sójka, 2008, p. 11.

⁶¹ Angheni, 2013, p. 220.

between the member and the company.⁶² However, we do not support this view, as identifying conflicts of interest in such cases can be challenging, and it would be unjust to prevent, for example, a member holding 90% of the company's membership shares from transferring their participation based on such an interpretation. This issue can only be satisfactorily resolved through future legal amendments or clarifications.⁶³

In legal literature, it has been noted that a three-quarters majority effectively means unanimity in LLCs with only two or three members, as it would otherwise be impossible to form the legally required majority.⁶⁴ However, the referenced author overlooks that the majority is calculated based on company capital, not the number of members. For example, in a three-member LLC where one member holds 90% of the shares and the other two hold 5% each, the first member could, on their own, form the required three-quarters majority to sell a portion of their membership shares – provided the aforementioned contested interpretation is rejected.

Originally, the requirement for a three-quarters majority was a mandatory norm aimed at protecting the defining characteristics and unique structure of LLCs. However, Act No. 223/2020 modified this logical foundation, allowing parties to deviate from this norm in the articles of incorporation. The problem with this change is that it undermines a fundamental characteristic of LLCs, potentially allowing the issuance of freely transferable membership shares, which makes these shares functionally similar to securities (shares issued by JSCs). However, the prohibition on issuing securities in LLCs remains in place (Article 11(2) of the Romanian Companies Act), and Article 275(1)(d) of the act criminalises the securitisation of membership shares. Thus, the peculiar change introduced by Act No. 223/2020 cannot be interpreted to mean that the requirement for member approval of share transfers is entirely abolished. Increasing the required majority to unanimity is clearly lawful but reducing it should be considered permissible only if it respects the implicit anti-securitisation thresholds established by law. In other words, making membership shares fully transferable would constitute a criminal offense. Therefore, in our view, the three-quarters majority can only lawfully be reduced to a simple majority required by the hybrid nature of this company type as well.

Emergency Government Ordinance No. 54/2010 initially introduced strict procedural rules for transferring membership shares to third parties, aiming to ensure oversight in the sale of indebted companies and prevent the emergence of 'phantom' LLCs. According to these procedures, transferring membership shares to third parties could be implemented as follows. The decision was immediately transmitted electronically by the Trade Registry Office to the National Tax Administration Agency and the Public Finance Directorates of Bucharest Municipality and the counties. Creditors of the company and any other parties adversely affected by the decision could file

62 Cărpenu et al., 2006, p. 628.

63 Veress, 2010, pp. 96–105.

64 Turcu, 1998, p. 437.

an objection, requesting the competent judicial authority to order the company or the transferring member to compensate for damages or establish the transferring member's civil liability. This provision is controversial, as it introduced the concept of piercing the corporate veil without adequately regulating the conditions for such liability. The transfer of membership shares became effective in the absence of objections once the objection period expired or, if objections were raised, upon notification of a court decision rejecting the objections. The updated articles of incorporation, reflecting the new membership structure, had to be registered with the Trade Registry.⁶⁵ This entire procedure was finally repealed by Act No. 223/2020.⁶⁶

The law also addresses the scenario in which a member passes away. If the articles of incorporation contain no contrary provisions, membership shares are transferred via inheritance (*mortis causa* transfer). Alternatively, the articles of incorporation may require approval by a three-quarters majority of the general meeting for such a transfer. If the articles stipulate that membership shares cannot be transferred *mortis causa*, or if the required qualified majority cannot be achieved, the company is obligated to pay the heirs the value of the membership shares based on the last approved financial statements. In cases in which the number of heirs would exceed the statutory maximum number of members (50), the heirs must designate a subset of members that complies with the legal limit.

The transfer of membership shares must be registered with both the Trade Registry and the company's membership register. The transfer becomes opposable against third parties only upon its registration in the Trade Registry.

Under the latest regulations, it is possible to establish a pledge over membership shares. While enforcing such a pledge is straightforward in single-member LLCs, complications may arise in multi-member LLCs where a minority member has pledged their membership shares. For instance, no regulation currently exists for cases in which members representing three-quarters of the company's capital disagree with the enforcement of the pledge. If the legislator were to explicitly permit enforcement for creditor protection, it would challenge the personal nature of LLCs. In our view,

65 Gheorghe, 2020, pp. 338–339.

66 A version of this procedure seems however to be reintroduced in 2026. The new approach has in focus the opposability to the central tax authority of the transfer of shares in a limited liability company that ensures control, within the meaning of Article 25(4) of Law No. 207/2015 on the Tax Procedure Code. The transfer is effective towards the tax authority only if, within 15 days, the transferor, transferee or the company notifies the authority of the share transfer and submits the updated articles of association. Where the company has outstanding tax obligations or other budgetary claims evidenced in enforceable titles, the company or the transferee must constitute guarantees covering the amounts indicated in a tax clearance certificate, and proof of the tax authority's agreement regarding these guarantees must be presented upon registration of the transfer in the trade register. By derogation from the general rule, the tax clearance certificate may also be requested by the transferor or, as the case may be, by the transferee. The trade register verifies compliance with these conditions, requesting the tax certificate from the National Agency for Fiscal Administration, while guarantees are released when the debts are extinguished or, failing payment within 60 days from registration of the transfer, are enforced by the tax authority.

pledges over membership shares in multi-member LLCs should have limited enforceability. Either an existing member must be the buyer (as the law provides them with this right), or the acquisition of shares by a third party through enforcement must still be approved by a three-quarters qualified majority, as previously discussed.

6.3. Joint-Stock Companies

In JSCs, the company's capital is represented by a specific number of registered shares with a defined nominal value, issued by the company. A share is the standardised unit by which a JSC's capital is divided⁶⁷ and, rather than conferring co-ownership of assets, it represents a continuing membership relationship between the shareholder and the company. Within that relationship, the shareholder owes only any unpaid subscription and enjoys organisational rights (vote, information, and participation) and patrimonial rights (dividends when declared, liquidation surplus, and pre-emptive entitlements where applicable), while the company must observe equal treatment and corporate-law formalities. In private-law terms, the share is an incorporeal movable that aggregates these organisational and financial incidents into a single legal position. It is also a negotiable security designed for transfer, by endorsement and delivery for certificated form or by registration for dematerialised form, with opposability to the issuer upon inscription in the relevant register. Although sometimes analogised to a credit instrument, any monetary claims it yields are contingent on valid corporate acts and outcomes, underscoring the hybrid, membership-based nature of the shareholder's position.⁶⁸

The court of appeal has rightly held that, in a JSC – a capital company – the decisive element is the proportion of capital contributed, the identity of the shareholders being immaterial; their liability is limited to the value of the shares, which are negotiable and transferable securities. Consequently, unlike partnerships, in which the corporate directly reflects the partners' will and their participation in decisions expresses the *affectio societatis*, in capital companies, shareholder participation is indirect: the right is attached to the shares, not to the person who holds them.⁶⁹

Shares can be classified based on several criteria:⁷⁰

- a) *By transferability*: Shares were historically either registered (nominative) or bearer shares. However, Act no. 129 of 2019, aimed at preventing and combating money laundering and terrorist financing, abolished the category of bearer shares in Romania as of July 21, 2019.

Registered shares identify the owner, whereas bearer shares did not; in the last case, ownership rights were exercised by whoever held the physical share certificate at the time. Bearer shares represented the most natural and freely transferable category of shares. Their anonymity and unrestricted

67 David, 2014, pp. 307–308.

68 Angheni, 2013, pp. 145–146.

69 High Court of Cassation and Justice, Commercial Section, Decision No. 4175 of 30 November 2010.

70 Veress, 2024b, pp. 90–92.

transferability, without formal requirements, were historically consistent with the logic of corporate law. However, the abolition of bearer shares was driven by factors external to corporate law, particularly in response to European and international efforts to combat financial crimes. Most European states, like Romania, have phased out bearer shares for these reasons. It is worth noting that the European directive on preventing the use of financial systems for money laundering or terrorist financing (Directive 2015/849/EU) did not require member states to eliminate bearer shares from their national legal systems. Instead, it mandated measures to prevent the abuse of bearer shares (Article 10). Nevertheless, states retaining bearer shares were classified as higher-risk jurisdictions, prompting Romania to join through the adoption of Act no. 129 of 2019.

The nature of shares had to be established in the articles of incorporation. In the absence of such provisions, shares were deemed registered by default under supplementary provisions of the law. Shares that had not been fully paid for were always registered.

Registered shares could be converted into bearer shares and vice versa through a resolution of the extraordinary general meeting of shareholders (the rules for majorities required in such meetings will be discussed later). However, following the enactment of Act No. 129 of 2019, it became prohibited to issue bearer shares or transfer existing bearer shares. All previously issued bearer shares had to be converted into registered shares, and the updated articles of incorporation had to be submitted to the Trade Registry. Holders of bearer shares were required to submit their shares to the company within 18 months of the law's effective date.⁷¹ After the 18-month deadline, the company's management was obliged to record the details of the shareholders in the company's shareholder register and the share certificates. Failure to comply with the conversion requirements is subject to severe penalties, including the dissolution of the JSC (or the specific and vehicle of limited partnership by shares, which is not used in practice). Bearer shares not submitted within the specified period automatically became void by operation of law, and the company's capital is reduced accordingly.

Corporate capital cannot be increased, and new shares cannot be issued until all shares from the previous issuance have been fully paid.

Shares are indivisible. If a share becomes the joint property of multiple individuals, the company is not obligated to register the transfer until these individuals designate a single representative to exercise the rights associated with the share. Until such a designation is made, and as long as the share remains the indivisible joint property of multiple persons, they bear joint and several liability for the payment of any amounts owed.

71 Gheorghe, 2020, pp. 358–359.

- b) *By form*: Shares can exist in either material or dematerialised form.⁷² Shares may be issued in material form, on paper (physically printed), or in dematerialised form, recorded in a shareholder registry and share account.

Before the abolition of bearer shares, they were always issued in material form, while shares issued in dematerialised form could only be registered (nominative). Shares representing multiple units could also be issued in material form, known as consolidated shares. If a company issues dematerialised shares, it is required to issue shareholder certificates either automatically or at the request of shareholders.

- c) *By the rights they confer*: Shares can be categorised as ordinary or preference shares.⁷³ All shares must have equal nominal value and generally provide their holders with equal rights. However, under the terms of the articles of incorporation, specific categories of shares can be issued that grant their holders different rights. These are known as preference shares or priority shares. Preference shares typically do not grant voting rights in the general meeting (a disadvantage), but they provide priority in dividend distribution. Dividends are paid first on preference shares from the distributable profit of the financial year, before any other allocations (an advantage).

Before Law No. 441 of 2006 was adopted, preference shares did not grant any participation rights in the general meeting. The law now ensures that holders of preference shares have the right to participate. However, the value of non-voting preference shares with preferential dividends cannot exceed one-quarter of the company's capital, and their nominal value must be equal to that of ordinary shares. Members of the company's management, including executives, directors, members of the board, supervisory committee, and auditors, are prohibited from owning non-voting preference shares with preferential dividends. Preference shares and ordinary shares can be converted into one another through a resolution of the extraordinary general meeting of shareholders.

- d) *By voting rights*: Shares can be classified as granting regular voting rights or restricted voting rights. Generally, each fully paid share entitles its holder to one vote in the general meeting, unless otherwise specified in the articles of incorporation. The articles may limit the number of votes for shareholders who own more than one share. Voting rights are also suspended for shareholders who are in arrears with their due payments.

As stated above, Romanian corporate law explicitly defines non-voting preference shares with priority rights to dividends as a distinct class of preference shares. However, it does not explicitly regulate shares with enhanced voting rights, such as multiple voting shares or veto rights. While these are not expressly named in the law, their issuance is not prohibited. In fact, the

⁷² David, 2014, p. 312.

⁷³ Angheni, 2013, p. 149; Gheorghe, 2020, pp. 360–361.

possibility of issuing multiple voting shares can be inferred from Article 101(1) of the Romanian Companies Act, which states that each fully paid share entitles the holder to one vote, unless otherwise specified in the articles of incorporation. This implies that the articles of incorporation can allow shares to carry multiple voting rights, enabling a shareholder to hold votes exceeding the nominal value of their shares. Similarly, the articles may limit the number of votes for shareholders owning more than one share.

The ability to issue multiple voting shares is further supported by specific exceptions in sectoral legislation. For example, the 2006 Government Emergency Ordinance No. 99, regulating credit institutions and capital adequacy, explicitly prohibits deviations from the “one share–one vote” principle in the banking sector. This prohibition reinforces the interpretation that such deviations are generally allowed in other sectors unless specifically restricted by law. If multiple voting rights were entirely prohibited under Romanian corporate law, this express prohibition for the banking sector would be redundant. The rationale for multiple voting shares lies in their ability to benefit founding or stable shareholders by allowing them to exert greater influence in general meetings.⁷⁴ This mechanism ensures that their preferences are more effectively represented in company decisions. Importantly, the law does not set a maximum limit for enhanced voting rights, leaving this to the discretion of the articles of incorporation.

Veto shares, although not regulated under Romanian corporate law, have occasionally been referenced in legal literature. These shares, sometimes called ‘golden shares’ or shares with special control rights, grant their holders the ability to block certain decisions. Golden shares were commonly used during privatisation to allow the state to retain control over strategic companies, even after selling the majority stake. These shares provide special rights related to the company’s structural changes or significant transactions, regardless of the capital they represent.

There is some debate regarding the validity of veto shares. One view holds that such rights require explicit legal authorisation, as seen in legislation like the 1997 Government Emergency Ordinance No. 88 on privatisation. Another perspective argues that shareholder autonomy and contractual freedom should allow for the issuance of such shares if agreed upon in the articles of incorporation or at the founding general meeting.⁷⁵ Given the discretionary nature of the law, companies are not precluded from introducing unregulated share classes, including shares with veto rights, through their articles of incorporation.

- e) *By market participation*: Shares may be categorised as listed or unlisted, depending on whether they are traded on the stock exchange.

74 Georgescu, 1948, pp. 339–340.

75 Schiau and Prescure, 2009, p. 274.

The nominal value of a share cannot be less than 0.1 Romanian leu, and shares cannot be issued at a value below their nominal value.⁷⁶ The nominal value of shares represents the baseline commitment of shareholders to contribute to the company's capital. Allowing shares to be issued below their nominal value could result in an inflated perception of the company's financial health, potentially misleading creditors about the actual amount of secured capital. However, issuing shares above their nominal value is permitted.⁷⁷

The content of shares must include the following information:⁷⁸

- a) the name of the company and its duration (specified or unspecified);
- b) the date of the articles of incorporation, unified registration number, and issue of the Official Gazette, Part IV, in which the establishment of the company was published;
- c) the company's capital, the total number of shares, their serial numbers, nominal value, and payment status; and
- d) any benefits granted to the founders.

Additionally, shares must indicate the following:

- a) for individual shareholders: their full name and residence; and
- b) for legal entity shareholders: their name, headquarters, and registration number.

Shares must be signed by either two members of the board or, in the case of a sole administrator, by that administrator. If there are multiple administrators, the signatures of two administrators are required.

Ownership of material shares can be transferred by a declaration signed by the assignor and the assignee (or their authorised representatives) in the issuer's share register, accompanied by an annotation on the share certificate itself. If there is no space left on the share certificate, the annotation is recorded on an attachment. For dematerialised shares, ownership is transferred by an entry in the issuer's share register, signed by the assignor and assignee. The articles of incorporation may also specify alternative methods for transferring share ownership.

Share subscribers and subsequent transferees are jointly and severally liable for payment obligations related to the shares for 3 years from the date of transfer entry in the share register.

Bearer shares, abolished in 2019, were transferred through simple delivery (transfer of possession). The holder of the share at any given time was entitled to the rights arising from it. Bearer shares were exclusively issued in material form and did not identify the shareholder or specify the rights holder.

⁷⁶ David, 2014, pp. 313–315.

⁷⁷ Issuing shares above nominal value can generate surplus funds (referred to as a share premium), which the company can use for growth or operational needs without increasing its nominal capital.

⁷⁸ Angheni, 2013, pp. 149–150.

Shares can be pledged as movable collateral. This requires a private document specifying the debt amount, the value, and the category of the pledged shares. For material shares, the fact of their use as collateral must also be annotated on the share certificate, signed by both the creditor and the shareholder debtor (or their authorised representatives). The pledge must be recorded in the share register maintained by the executive officers, or the independent share registry company. A certificate confirming the registration is issued to the creditor in whose favour the pledge was created.

The pledge becomes enforceable against third parties upon its registration in the National Registry of Movable Collateral (*Registrul Național de Publicitate Mobiliară*). The registration date also determines the priority of the guarantee.

In Romania, a JSC is allowed to acquire its own shares, either directly or through a person acting in their own name but on behalf of the company, under the following conditions:

- a) the acquisition of its own shares must be authorised by the extraordinary general meeting of shareholders, which will establish the terms of acquisition, specifically the maximum number of shares to be acquired, the duration of the authorisation (not exceeding 18 months from the registration date in the Trade Registry), and, in the case of acquisition for consideration, the minimum and maximum value of the shares;
- b) the nominal value of the shares acquired by the company, including those already held in its portfolio, must not exceed 10% of the subscribed share capital;
- c) the transaction may only involve fully paid shares; and
- d) payment for the acquired shares may be made only from distributable profits or available reserves of the company as stated in the latest approved annual financial statements, excluding legal reserves.

If the shares are acquired to be distributed to employees of the company, such shares must be distributed within 12 months of the acquisition date.

These restrictions do not apply if the shares are acquired for the purpose of reducing the share capital and are intended to be cancelled. Similarly, the restrictions do not apply to shares acquired as a result of a universal transfer (e.g. through a merger). Exceptions also include fully paid shares acquired pursuant to a court decision in enforcement proceedings against a shareholder who is a debtor of the company, and fully paid shares acquired gratuitously. If the nominal value of the company's shares acquired, either directly or through a person acting in their own name but on behalf of the company, including those already held in its portfolio, exceeds 10% of the subscribed share capital, the shares exceeding this percentage must be disposed of within 3 years of acquisition.

Shares acquired in violation of the law must be disposed of within 1 year of acquisition. If the shares are not disposed of within the prescribed period, they must be cancelled, and the company is required to reduce its subscribed share capital accordingly.

Shares held by the company do not grant dividend rights during the period they are held. Additionally, the voting rights associated with such shares are suspended while they are owned by the company. If the shares are recorded as an asset in the balance sheet, an equal reserve must be recorded as a liability in the balance sheet, and this reserve cannot be distributed.

The board of directors must include in the report accompanying the annual financial statements the following information regarding the acquisition or disposal of its own shares by the company:

- a) the reasons for acquisitions made during the financial year;
- b) the number and nominal value of shares acquired and disposed of during the financial year and the percentage of the subscribed share capital they represent;
- c) in the case of acquisition or disposal for consideration, the value of the shares; and
- d) the total number and nominal value of all shares acquired and held by the company and the percentage of the subscribed share capital they represent.

Under Romanian law, as a general rule, a JSC cannot provide advances, loans, or guarantees for the subscription or acquisition of its own shares by a third party. This prohibition does not apply to transactions carried out in the ordinary course of business by credit institutions and other financial institutions, nor to transactions aimed at the acquisition of shares by or for the employees of the company, provided that these transactions do not reduce the net assets below the cumulative value of the subscribed share capital and the reserves that cannot be distributed under the law or the company's articles of association.

The establishment of security interests on the company's own shares, either directly or through a person acting in their own name but on behalf of the company, is considered an acquisition. These restrictions do not apply to the ordinary operations of banks and other financial institutions.

The subscription, acquisition, or holding of shares of a JSC by another entity in which the company holds, directly or indirectly, the majority of voting rights or whose decisions can be significantly influenced by the company, is considered as having been carried out by the JSC itself. These rules also apply when the intermediary company through which the subscription, acquisition, or holding is carried out is governed by the law of another state.

7. Serbia

7.1. Limited Liability Companies

The LLC share is a part of the shareholder's personal assets, which entitles her to certain membership rights acquired in exchange for her contribution to the company's legal capital. In Serbian legal scholarship, the share is also understood as a set of rights and obligations of a shareholder (e.g. under certain conditions, shareholders may owe the duty of loyalty to a company).⁷⁹

Serbian law adopts the principle of "one share—one shareholder".⁸⁰ The nominal value of the share, in principle, corresponds to the value of members' contributions. However, this is only a default rule because the articles of association may specify the different treatment of shareholders' contributions.⁸¹ This is another important instance that confirms the prevalence of the freedom of contract principle in Serbian law on private companies. A share may belong to multiple persons (share co-owners). In this case, to make the functioning of the company more efficient, the Act on Obligations (CA) requires co-owners to designate a proxy, whose identity should be made known to the company. If co-owners do not fulfil this obligation, the voting rights attached to the share will be suspended until the determination of a proxy.⁸²

The CA specifies the minimum content of shareholders' rights: I) the voting right in the general meeting, II) the right to a share in the company profit, and III) the right to a share in the liquidation surplus.⁸³ These rights are, as a default rule, proportionate to one's share in the company's legal capital. However, under the freedom of contract principle, different proportions may be set down in the articles of association. This raises the question of the permitted level of differentiation in proportion. Serbian literature for a while has recognised the French concept of *clause leonine*.⁸⁴ The clauses that substantially deprive one party of her rights in relation to the governance rights or profit sharing are deemed forbidden.⁸⁵ However, it is for case law to determine the relevance of *clause leonine*, if any, as well as the permitted level in decreasing or increasing shareholders' rights compared to their respective contributions.

Serbian law recognises only registered shares. Personal or business names of the shareholders are the mandatory element of the articles of association, which are publicly available in the national business register. In addition to this requirement, certain basic data about the company's shareholders (e.g. national number, passport number for foreigners, or tax number for legal persons) are subject to specific registration requirements under Article 9a of the CA.

79 Jovanović, Radović, and Radović, 2021, p. 379.

80 Article 151, Section 1, CA.

81 Article 151, Section 2, CA.

82 Article 153, Section 6, CA.

83 Article 152, Section 1, CA.

84 Mićović, 2016, p. 30.

85 Vasiljević, 2012, p. 213.

Because of the exclusive existence of registered shares in Serbian law, shares are immaterial, that is, they do not present paper certificates. The owner of the share in Serbian company law is a natural or legal person registered as such in the national business register. The registration of share ownership in the national register has a constitutive effect, meaning that the status of the shareholder is to be acquired only on the day of registration of share ownership.⁸⁶ The same principle applies in a case of transfer of share. The acquirer of the share becomes the shareholder only after her ownership was registered. For example, the new owner of the share cannot participate in the general meeting before her ownership becomes registered. Serbian business practice recognises one exception from a constitutive effect of the registration of share ownership. This exception applies in the case of acquiring the share ownership based on an inheritance certificate.⁸⁷ In addition to the national register, the CA requires company directors to keep updated internal company's share register. This internal register contains data on the company's shareholders (essentially their postal or email addresses).⁸⁸ Although the law prescribes directors' duty to keep the register updated and potential liability for not complying with this duty, the internal share register does not have any consequences for the legal status of share ownership. The purpose of the internal register is rather to facilitate smooth communication between a company and its shareholders, and to enable company management to know the identity of the shareholders.

The private character of LLCs determines the nature of shares. The CA clarifies that shares are not securities. A company's share may not be acquired, nor may it be disposed of by forwarding a public offer in terms of the law regulating the capital market.⁸⁹ However, this does not mean that an LLC cannot have the status of a public company in terms of capital market law. Shares themselves cannot be publicly traded, but an LLC may issue other financial instruments (e.g. bonds), subject to requirements prescribed in the Serbian capital market law.⁹⁰ However, LLCs rarely use this option owing to the underdevelopment of domestic capital markets. In this regard, two issues are worth mentioning: one has already become part of the law, while the other one is not even in the pipeline, even though it has slowly been integrated into academic and business discussions. First, the CA recognises a specific sort of own shares, called reserved own shares, as well as the specific financial instrument related to them – the right to acquire the share.⁹¹ The rationale for the specific sort of own shares and the new financial instrument is primarily to awarding employees or other persons with particular roles in the business operation the share ownership. This change has been welcomed by the business community, although its practical consequences remain to unfold, as these legal norms have been applied for a relatively short time (since 2020).

86 Article 143, Section 1, CA.

87 BRA website.

88 Article 144, Section 1, CA.

89 Article 150, Section 2, CA.

90 Jovanović, Radović, and Radović, 2021, p. 367.

91 Article 159a, CA.

Second, after Serbia adopted the law on digital assets, the business community has become especially interested in the possibility of the tokenisation of shares. There is no doubt that this possibility is not allowed under current company law. However, Serbia's desire to be at the forefront of the digital assets field opens the possibility of law amendments that would enable private companies to conduct initial coin offerings and trade with LLC shares in the crypto markets.

The CA attaches the same membership right to all LLC shares; there are no specific classes of shares. As mentioned above, the only exception to this rule concerns own shares, which are subject to a specific legal regime. This legal regime is discussed hereafter.

Regarding the transfer of share, there are two separate issues to be discussed: I) potential limitations of the transfer; and II) the method of transfer, that is, the formalities required to conduct the transfer.

The Serbian legislator bases default rules on the transfer of LLC shares on the overarching assumption that LLCs are formed by a small group of shareholders, whose personal relations are important for the business operation and the overall corporate success. The CA's default rules make a distinction between two situations: transfer to the other shareholders (internal transfer), and transfer to any other third party, including family members (external transfer). The former is unrestricted, while the latter is subject to other shareholders' pre-emptive rights (right of first refusal). Some remarks about these rules are inevitable. First, these are only default rules, meaning that shareholders are allowed to adjust them by the articles of association. These adjustments may further limit transferability of shares and alleviate statutory default limitations. The CA itself contains several default rules that may serve as options for further limitations of the transfer (the company's approval of external transfer or the company's right to determine an acquirer of the share). The possible mitigations usually entail free transfer notwithstanding the status of a person acquiring the share. It is noteworthy that Serbian default rules on pre-emptive rights refer only to transfers made for consideration. Therefore, any benevolent share transfer is not covered by the statutory default provisions on pre-emptive rights. This leaves room for potential abuses from fictitious gift agreements.⁹²

Regarding the manner of the transfer of a share, the CA requires the mandatory written form of the agreement on share transfer.⁹³ In addition to this requirement, the signature of the contracting parties must be authorised by the public notary. Upon fulfilment of these conditions, the transfer becomes effective after its registration, that is, after the BRA registers the acquirer of the share as its new owner.

The CA generally allows LLCs to repurchase a share or part of a share of a shareholder.⁹⁴ Repurchase of own shares is subject to the following conditions: I) the general meeting must authorise such repurchase in the form of a specific resolution,

⁹² Jovanović Radović and Radović, 2021, p. 385.

⁹³ Article 175, Section 1, CA.

⁹⁴ Article 157, Section 2(4), CA.

II) the repurchased share must be fully paid up, and III) compensation may be paid exclusively out of the specific reserves that serve these purposes (in effect, the reserves may be created only if a company is profitable).⁹⁵

Voting and profit rights are not attached to own shares. These shares do not count in the quorum at the general meeting.⁹⁶

Regarding the disposal, the CA recognises three possible options: I) benevolent transfer to the shareholders in proportion to their share ownership in the company's legal capital, II) selling the own shares to a shareholders or third party whereas the shareholders keep their pre-emptive rights, and III) cancellation of own shares and concomitant capital reduction if neither of the first two options was employed within 3 years of the acquisition of own shares.⁹⁷

Although Serbian scholars proposed more modern rules on self-financing more than a decade ago,⁹⁸ the CA still contains a blanket prohibition against it. It forbids financial support of any kind, direct or indirect. Furthermore, it specifies the most common instances of financial support that are subject to prohibition, such as granting loans, guarantees, and sureties. A legal transaction that is contrary to this provision is null and void.⁹⁹

7.2. Joint-Stock Companies

The main principles determining the legal regime of shares in JSCs include the principle of indivisibility of shares, the one share-one vote rule, and the prohibition of real non-par value shares. Only the last prohibition is addressed in this section, as it does not strictly arise from the letter of the law.

The CA differentiates between the par value, accounting value, book value, and market value of the shares. The difference between the first two deserves special attention. The par value of a share is the value determined as such by a resolution on the issue of shares.¹⁰⁰ The accounting value exists only when shares do not have a par value, that is, face value. In that case, the accounting value is determined as a value obtained after the entire accounting value of the legal capital is divided by the overall number of shares issued.¹⁰¹ Strictly speaking, according to the CA, a company may issue shares with or without par value.¹⁰² If the company issues shares with par value, all shares of the same class shall have the same par value, and if it issues shares without par value, all company's shares shall be without par value.¹⁰³ However, even shares without par value must have accounting value. In effect, the accounting value

95 Article 157, CA; Marjanski, 2020, p. 219.

96 Article 158, CA.

97 Article 159, CA.

98 Radović, 2007, p. 210.

99 Article 154, CA.

100 Article 258, Section 1, CA.

101 Jovanović, Radović and Radović, 2021, p. 432.

102 Article 250, Section 4, CA.

103 Article 250, Section 5, CA.

is the same as the par value.¹⁰⁴ Thus, even shares without par value in Serbia are not to be considered real non-par value shares, according to its common understanding in European legal scholarship.¹⁰⁵

The shares may have multiple claimants for various reasons (inheritance, status change of a company, specific contractual arrangements, etc.).¹⁰⁶ As in the case of LLCs, share co-owners are obliged to notify the company on the appointment of a proxy, and inscribe him in the Central Registry. The voting rights attached to the co-owned shares are not effective before the appointment of the proxy.¹⁰⁷

The shares of JSCs in Serbia have been dematerialised, electronic financial instruments for more than two decades now (since 2002). It follows that they are created and held on special securities accounts with the Central Registry, the Depository, and the Clearing of Securities (hereafter, the Central Registry). The legal status of a shareholder belongs to a person who is entered in the Central Registry as a legal holder of a share, and the day of entering the Central Registry is the day of acquiring the share.¹⁰⁸

There are two main types of shares: common shares and preferred shares. The difference between the two exists concerns the rights attached to each type of share. Common shares give their owner classic voting and profit rights. While preferred shares generally do not entail voting rights, except in certain specific situations to be discussed below, they do entail some of the preferred rights to be determined in the company's statute. Such rights may encompass priority for payment of dividends (i.e. a preset cash amount or percentage of its par value which is paid in priority to holders of common shares), the right to participate in a dividend belonging to holders of common shares, and the right to convert such shares into common shares or other class of preferred shares.¹⁰⁹

The CA adopts the well-known principle of protecting owners of preferred shares against changes to the specific rights attached to their shares. The owners of preferred shares are entitled to one vote per share within their class of shares at any general meeting on the issues affecting (directly or indirectly) the rights attached to the class. The difficult question for any legislator is to define what exactly constitutes a change to class rights thereby triggering the preferred shareholders' right to vote on the proposed change. The Serbian legislator in Article 255 of the CA exhaustively enumerates the situations to be considered as a change to class rights. Although the CA does not explicitly entitle preferred shareholders to vote on the introduction of any new class of shares, it confers on them voting right in situations that are most likely to affect their rights (e.g. the introduction of new classes of shares carrying larger rights than are the rights carried by the shares of that class, or change of rights carried by

104 Jovanović Radović, and Radović, 2021, p. 432.

105 Ibid.

106 Article 256, Section 1, CA.

107 Article 256, Section 8, CA.

108 Article 249, Section 1, CA.

109 Article 253, CA.

another class of shares so that they carry equal or larger rights in relation to the rights carried by the shares of that class).¹¹⁰

The CA also regulates partly paid-up shares, that is, the common shares based on which the shareholder has not fully performed his obligation to pay up contribution to the company. The rights of the owner of partly paid-up shares are limited. He may only exercise rights in proportion to the paid-up contribution unless the articles of association provide otherwise.¹¹¹

Finally, as a matter of comparison with other legal systems, Serbian law neither allows priority shares (shares that have special decision-making powers, either veto powers or powers to decide things without the cooperation of other shareholders), nor multiple-voting shares¹¹² and loyalty shares.¹¹³

In a more general vein, it should be underlined that Serbian law allows the transfer of shares, as well as the transfer of specific rights attached to the shares except for voting rights.¹¹⁴ Furthermore, as regards the free transferability of shares, the difference is being made between public and private JSCs. Transfer of shares and rights attached to shares of a public JSC may not be restricted.¹¹⁵ In private companies, shares are freely transferable, unless the company's statute restricts the transfer of shares with the pre-emptive purchase right of other shareholders, or with prior approval of the company.¹¹⁶

The manner of share transfer for private JSCs is identical to that for LLCs.¹¹⁷ The transfer of shares in public JSCs, needless to say, is substantially different owing to the different legal nature of shares that are publicly traded. This transfer is regulated by the specific provisions of capital market law.

The rules on repurchasing shares in Serbian company law are inspired by the relevant provisions of the Directive (EU) 2017/1132 (Articles 59–63). A JSC may repurchase its shares from the shareholders under four conditions: I) the authorisation of the general meeting (in a form of a resolution) upon which the board of directors or executive board implements the general meeting's resolution; II) appreciation of the rules on distributions, that is, the balance sheet test (already discussed above) applicable to any distribution to a shareholder; III) repurchased shares must be entirely paid up; and iv) own shares must not overcome the limit of 10% of the legal capital (applicable only to public JSCs).¹¹⁸ The resolution on the repurchase of own shares (including other possible ways of acquiring of own shares) may be brought without prior general meeting's authorisation in two cases: I) where the acquisition

110 Article 255, Section 1, CA.

111 Article 252, Section 2, CA.

112 See Lepetić, 2018, pp. 1195–1215.

113 See Lepetić, 2019.

114 Article 261, Section 4, CA.

115 Article 261, Section 6, CA.

116 Article 261, Section 5, CA.

117 Article 261, Section 2, CA.

118 Article 282, Section 2, CA.

of a company's own shares is necessary to prevent serious and imminent harm to the company; and II) for the purpose of distribution to employees of the company or of an affiliated company, or as a reward to the members of the board of directors.¹¹⁹ Regarding the concrete procedure for the repurchase, the board of directors, or the executive board, must follow two principles: the principle of shareholders' equal treatment, and the principle of proportionality.¹²⁰ The former principle obliges the relevant board to make an offer for buyback to all shareholders of the class of shares in question.¹²¹ The latter relates to the situation in which the shareholders' offers exceed the number of shares the company wants to repurchase. In this case, the company shall purchase from each shareholder a proportionate number of shares that the shareholder offers to sell, while when calculating this proportionate number of shares only the whole number of shares will be taken into account.¹²²

Once the company finalises the repurchase, the own shares do not entail any voting or profit rights. As a general rule, there is no statutory time limit for disposal of own shares. The general meeting is supposed to specify the conditions for the disposal in its resolution that authorise the buyback of the shares.¹²³ The board of directors or executive board must dispose of the own shares based on said conditions. The CA prescribes the obligation to dispose of own shares only when they were acquired in violation of the relevant statutory rules. Under those circumstances, the company must sell or cancel the own shares not later than 1 year from the day when they were acquired (3 years if the violation of the rules consists of exceeding the 10% statutory limit).¹²⁴ In the process of selling of the own shares, the present shareholders have the pre-emptive right to purchase them.¹²⁵

The provision on the prohibition of self-financing analysed in the context of LLCs applies *mutatis mutandis* to JSCs.¹²⁶

8. Slovenia

8.1. Legal Regime of Shares

8.1.1. Limited liability companies

Business shares are based on how much each shareholder has contributed to the share capital. When a business share is acquired, it represents a unified share. An individual shareholder may have only one business share at the time of incorporation but

119 Article 282, Section 4, CA.

120 Jovanović Radović and Radović, 2021, p. 476.

121 Article 285, Section 1, CA.

122 Article 285, Section 4, CA.

123 Article 288, Section 1, CA.

124 Article 287, Section 1, CA.

125 Article 288, Section 2, CA.

126 Article 279, CA.

may subsequently acquire several business shares which retain their independence. Business shares are also divisible, but only in the case of transfer or inheritance and in the division of the matrimonial property of spouses, and division may also be prohibited by the articles of association (Article 483(4), Companies Act; ZGD-1). The value of each business share after division, which takes the form of an independent share, may not be less than 50 euro (EUR) (Article 483(2), ZGD-1).

One business share can belong to multiple individuals (common share). In this case, they exercise rights and share responsibilities related to the share collectively (Article 480, ZGD-1).

Business shares are tied to each individual partner and serve as the basis for assessing the relationship between the company and the shareholder, as well as between shareholders themselves. They serve as an identification mark for the partner and determine the extent of their rights.¹²⁷

Regarding internal relations, contractual freedom applies. If the shareholders do not regulate internal relations, certain default rules apply. A shareholder is not the owner of the LLC but rather holds a bundle of rights to the company derived from their share capital. The partners can agree to distribute their shares differently than their contributions (disproportionate to the contributions).¹²⁸

The fundamental obligation of shareholders in an LLC is to provide funds for the establishment of the company in proportion to their capital contributions (Article 477(1), ZGD-1). If a partner fails to timely pay the required amount as a capital contribution, they must pay default interest (Article 485, ZGD-1). If a shareholder who is in default with the payment of the capital contribution or its part fails to fulfil their payment obligation even after a written notice and a minimum 1-month deadline, their business share, including any partial payments already made, transfers in full to the company (Article 486, ZGD-1). Even after default, the shareholder remains liable for the unpaid amount. If the excluded shareholder cannot be held responsible for the unpaid capital contributions, the responsibility for payment falls on their legal predecessors. Their liability is based on the fact that they sold their business shares before they were fully paid. If neither the legal predecessors nor the sale of the share covers the unpaid capital contribution, other shareholders must make the payment proportionally to the size of their shares (Article 489, ZGD-1). The provisions governing the exclusion of a shareholder due to non-payment and the obligation of the shareholder's legal predecessors are mandatory, meaning the company cannot exempt the partner from these obligations through a resolution or the articles of association (Article 490, ZGD-1).

8.1.2. Joint-stock companies

Shares are the fundamental identifying element of a JSC, as it is a company whose share capital (equity capital) is divided into shares. Although the ZGD-1 does not

¹²⁷ Ivanjko, Kocbek, and Prelič, 2009, p. 888.

¹²⁸ Ibid., p. 915.

provide a definition of a share, it is clear that a JSC cannot exist without shares, and conversely, shares cannot exist in a company that is not organised as a JSC.¹²⁹

In addition to the basic definition of a share as an aliquot part of the equity capital of a JSC (Article 168(1), ZGD-1), a share can also be understood as a document and as the content of membership rights in the company.¹³⁰ Furthermore, a share represents a form of equity financing for companies.

In addition to the Companies Act, shares are also regulated by other acts, such as:

- a) the ZTFI-1 (the Market in Financial Instruments Act),
- b) the Obligations Code (OZ),¹³¹ and
- d) the Book-Entry Securities Act (ZNVP-1).¹³²

A share represents the entirety of corporate rights belonging to its holder (shareholder) in relation to a company organised as a JSC. The corporate rights contained in a share are allowed to be incorporated into a security.¹³³ The JSC is also obligated to issue dematerialised shares (Article 182, ZGD-1).

As previously mentioned, shares in a JSC can be in the form of shares with a nominal value or no-par value shares, but the company cannot have both forms of shares simultaneously. Shares with a nominal value must be denominated at least 1 EUR or multiple thereof, and their share in the share capital is determined by the ratio between their nominal value and the amount of the share capital (Article 172(1, 2), ZGD-1).

No-par value shares, meanwhile, are not denominated with a nominal value. Each no-par value share has an equal share and corresponding amount in the share capital. The amount in the share capital attributable to each no-par value share must not be lower than 1 EUR, and the share of each no-par value share in the share capital is determined by the number of issued no-par value shares (Article 172(3), ZGD-1). A share must not be issued for an amount lower than its nominal value in the case of shares with a nominal value, or lower than the corresponding amount in the case of no-par value shares, but it can be issued for a higher amount (Article 173, ZGD-1).

The main obligation of shareholders is to pay the issue price of subscribed shares to the company's account or to provide it with non-cash contributions (Article 222, ZGD-1). This indicates that shares can be paid for either in cash or with non-cash contributions, with at least one-third of the share capital consisting of shares paid in cash (Article 191(2), ZGD-1). At least 25% of the minimum issue price of each share which is paid for in money shall be paid in before entering a public limited company in the register. For shares that were partly covered by non-cash contributions, the

¹²⁹ Ibid., p. 475.

¹³⁰ Ibid.

¹³¹ *Obligacijski zakonik* (Official Journal of the Republic of Slovenia No. 97/07, 64/16, 20/18).

¹³² *Zakon o nematerializiranih vrednostnih papirjih* (Official Journal of the Republic of Slovenia No. 75/15, 74/16, 5/17, 15/18, 43/19).

¹³³ Ivanjko, Kocbek and Prelič, 2009, p. 488.

part which is not covered by payment with a non-cash contribution shall be paid for in money before the company is entered in the register (Article 191(3), ZGD-1).

The obligation to pay for a share arises with a call from the management, and the management must call all shareholders in the same percentage and under the same conditions, so as to maintain the shareholders' position as it was at the time of establishment of the company. In case of late payment, shareholders are required to pay default interest, and the articles of association may also stipulate a contractual penalty (Article 223(2, 3), ZGD-1). The consequence of late payment may also be the exclusion of the shareholder, which is carried out by revoking the shares. An excluded shareholder loses all rights and is also liable for any resulting damages. Exclusion is applicable only to registered shareholders, as bearer shares must be fully paid before issuance, and this applies only to cash payments. The management conducts the exclusion procedure, which can only be carried out because of non-payment of the contribution.¹³⁴ If the excluded shareholder cannot be held liable for the payment of unpaid shares, the liability for the requested amount rests with their legal predecessors (Article 225, ZGD-1).

8.2. Nature and Classes of Shares

Shares of JSCs can be classified according to various criteria, either based on their content or purely formal criteria. According to the formal criterion, shares can be classified as registered shares and bearer shares. In principle, shares shall be made out to the bearer or by name (registered shares), but they must be registered if they are issued prior to the full payment of the share capital, and the partial payment amount must be indicated on the share certificate (Article 175(2), ZGD-1). Interim share certificates¹³⁵ must also be registered (Article 175(3), ZGD-1).

Because of the obligation to issue shares in dematerialised form, registered and bearer shares no longer differ in terms of transfer, as both types of shares are transferred through the instruction of the holder and subsequent transfer on the account with the Central Securities Clearing Corporation (*Klirinško depotna družba*; KDD) (Article 17, ZNVP-1).

Rights and obligations in relation to the company arise from the shares for the person registered as the holder of these shares in the central register maintained by KDD. In the case of registered shares, shareholders are entered into the share register, which is maintained by KDD on behalf of and for the account of the issuer, and KDD must allow each shareholder to inspect the share register upon request (Article 235(1, 2), ZGD-1). The same applies to interim share certificates (Article 235(4), ZGD-1). For bearer shares, shareholders prove their ownership with a certificate issued by KDD or its member (Article 235(2), ZGD-1).

¹³⁴ Ibid., p. 482.

¹³⁵ Interim certificates are certificates of participation which are delivered to shareholders before the shares are issued (Article 172(6), ZGD-1).

All data entered in the register of registered securities, which is maintained by KDD on behalf of and for the account of the company, are public, except for the taxpayer identification number and the unique identification number of a natural person (personal identification number, *EMŠO*) (Article 39(5), ZNVP-1).

Shares of individual classes, whether registered or bearer, can be converted into another type if provided for in the articles of association. Conversion is carried out at the shareholder's request, and a bearer share can be converted into a registered share or a registered share into a bearer share (Article 184, ZGD-1).

In addition to the formal criterion, shares are also divided based on their content, namely, the rights arising from different types of shares. In terms of content, shares are divided into ordinary shares (German: *Stammaktien*) and preference shares (German: *Vorzugsaktien*).¹³⁶ Shares with the same rights constitute one class (Article 177, ZGD-1).

Ordinary shares grant their holders the following rights (Article 176(2), ZGD-1):

- a) the right to participate in the management of the company;
- b) the right to a share of the profit (dividend); and
- c) the right to a proportionate share of the remaining assets upon liquidation or bankruptcy of the company.

Preference shares provide their holders with certain additional rights in addition to the rights granted by ordinary shares, such as (Article 176(3), ZGD-1):

- a) priority in the payment of predetermined amounts or percentages of the nominal value of shares or profits;
- b) priority in the payment upon liquidation of the company and other rights determined by the articles of association; and
- c) other rights determined by the articles of association.

Two types of preference shares are explicitly defined in Article 176(4, 5) of the ZGD-1: cumulative preference shares and participating preference shares.

Cumulative preference shares, according to the resolution on share issuance, give their holder the priority right to receive all unpaid dividends before any dividends are paid to the holders of ordinary shares in accordance with the profit distribution resolution (Article 176(4), ZGD-1).

Participating preference shares, in addition to the preference dividend, give the holder the right to receive dividends that belong to the holders of ordinary shares in accordance with the profit distribution resolution (Article 176(5), ZGD-1). In practice, it is possible to combine both forms of preference shares, so a share can be both cumulative preference and participating, or only participating without cumulative preference.¹³⁷

¹³⁶ Ivanjko, Kocbek and Prelič, 2009, p. 498.

¹³⁷ Ibid., p. 499.

A JSC can have any number of different classes of shares. In addition to the options listed in the law (priority in payment of predetermined amounts or percentages of the nominal value of shares or from profits, priority in liquidation), other rights provided for in the company's articles of association can also be designated as preferences.¹³⁸

Article 176(6) of the ZGD-1 prohibits the division of rights from shares, meaning that individual rights derived from shares cannot be transferred independently. Therefore, transferring only the voting right from a share while retaining the right to participate in profits is prohibited.

Furthermore, shares that would give a different number of votes for an equal share in the share capital are explicitly prohibited (Article 178(3), ZGD-1).

In accordance with Article 178(1) of the ZGD-1, each share carries voting rights, whereby only preference shares may be issued without voting rights, but the company may not have more than half of such shares in its share capital (Article 178(2), ZGD-1). Issuing shares that would give a different number of votes for an equal share in the share capital is also prohibited (Article 178(3), ZGD-1). Preference shares without voting rights provide all the rights that a shareholder has from a share, except for the voting right. However, if the pre-emption amount is not paid within 1 year or is not paid in full, and the outstanding amount is not paid in the following year, preference shareholders shall have the right to vote until the outstanding amount has been paid. In this case, preference shares shall be taken into account in calculating the majority of the capital required by an act or the articles of association (Article 315, ZGD-1).

Preference shareholders must consent to the issuance of those preference shares that have priority over preference shares without voting rights or are equal to them in the distribution of profits or company assets. No consent is necessary if the shares were issued with the guarantee of preference or if the voting right was subsequently excluded, expressly reserved on exclusion and if the registered right of preference shareholders is not excluded (Article 316(2), ZGD-1). The consent is decided by the preference shareholders at a separate meeting with an extraordinary resolution. The validity of this resolution requires a majority of at least three-quarters of the votes cast by the shareholders, and the articles of association cannot stipulate a different majority nor other requirements. If the preference is cancelled, shares without voting rights will provide voting rights thereafter. This also applies if the shareholders consent to the cancellation of such preference.¹³⁹

Additionally, the ZGD-1 does not recognise ordinary shares without voting rights. However, Article 317 of the ZGD-1 allows for the issuance of such shares by a special act.

138 Bohinc, 2008, p. 218.

139 Ivanjko, Kocbek and Prelič, 2009, p. 501

8.3. *Transfer of Shares*

8.3.1. *Limited liability companies*

The law specifically regulates the transfer of business shares, and in principle, all business shares are transferable in legal transactions and can be inherited (Article 481(1), ZGD-1). The transfer of a business share is possible through any legal basis that transfers the right to the asset. A contract is required for the transfer of a share, which must be executed in the form of a notarial deed. Before drafting the notarial deed for the transfer of a business share, the notary verifies whether there are grounds for restriction on the acquirer of the business share. If the notary determines that there are grounds for restriction as mentioned in the previous sentence, the drafting of the notarial deed must be declined (Article 481(3), ZGD-1).

The articles of association may stipulate that the consent of the majority of or all the shareholders is required for the transfer of a business share to persons who are not shareholders, and it may determine the conditions for granting consent (Article 481(3), ZGD-1).

By law, shareholders have a pre-emptive right in connection with the sale of a business share, but this right can be excluded or limited to specific shareholders by the articles of association. A shareholder intending to sell their business share must inform other shareholders in writing about the intended sale and the conditions of the sale, and invite them to express their willingness to purchase within 1 month of receiving the notice (Article 481(5), ZGD-1). If multiple shareholders are willing to purchase the business share, the purchasers together become the holders of the sold share (Article 481(6), ZGD-1). The pre-emptive right can be exercised only in the case of a sale and not in the case of a gratuitous transfer.¹⁴⁰

A portion of a business share can also be transferred, resulting in the creation of a new separate business share, the value of which must be at least 50 EUR (Article 483, ZGD-1).

The transfer of a business share changes the shareholders, but the change in shareholders does not imply a change in the articles of association.¹⁴¹ If none of the shareholders is willing to purchase the business share, and the shareholders have not given consent for the sale of the business share to a non-shareholder, a shareholder may withdraw from the company (Article 481(8), ZGD-1).

Only the person registered in the register is considered the acquirer of the business share (Article 482(1), ZGD-1). The transferor and the acquirer are jointly liable to the company for obligations that arose before the registration of the transfer of the business share (Article 482(3), ZGD-1).

¹⁴⁰ Ibid., p. 889.

¹⁴¹ Ibid., p. 888.

8.3.2. *Joint-stock companies*

Because of the obligation to issue shares in dematerialised form, both types of shares in a JSC are transferred through an instruction from the holder for transfer and, based on that, through a book-entry transfer to an account at the KDD. Shares are generally freely transferable, but the articles of association can restrict the transferability of registered shares by requiring the company's permission, which is decided by the company's management. The articles of association can also stipulate that the approval for the transfer of shares is decided by the supervisory board or the general meeting of the company (Article 236(2), ZGD-1). Registered shares, whose transfer is subject to the company's approval, are called restricted shares (German: *vinkulierte Aktien*).¹⁴²

The ZGD-1 distinguishes between restricted shares that are traded on an organised securities market and restricted shares that are not traded on an organised securities market. When registered shares are not traded on a regulated market and the articles of association provide that the company's permission is required to transfer these shares, the articles of association shall give well-founded reasons as to why the company may refuse to give its permission for their transfer. The well-founded reasons shall be reasons which, when taking into account the company's share ownership structure, justify the refusal to permit the transfer of shares in cases in which such transfer could jeopardise achievement of the company's goals or its economic independence (Article 237(1, 2), ZGD-1).

When the legal basis for the acquisition of shares is inheritance, the division of matrimonial property or a sale carried out in a compulsory enforcement procedure, the company may refuse to give permission to the transfer of shares only if it offers to acquire these shares from the acquirer at their market value (Article 237(4), ZGD-1).

Until the company grants a permission to transfer shares not traded on a regulated market, the acquirer of these shares shall not have any rights deriving from these shares in relation to the company (Article 238(1), ZGD-1). However, in the case of acquisition through inheritance, community property of spouses, or sales carried out in enforcement proceedings, the acquirer obtains property rights from the shares upon their acquisition, but managerial rights are granted only based on the company's permission for the transfer of shares. The company must decide on the permission within 3 months of receiving the request from the acquirer; otherwise, it is deemed that the permission has been granted (Article 238(3), ZGD-1).

The possibilities for restricting the transfer of shares traded on an organised securities market are even more limited. The fact that shares are restricted does not prevent their trading on an organised securities market. However, such restrictions must not hinder or significantly impede such trading. Therefore, the ZGD-1 restrictively regulates the possibility of restrictions and establishes the procedure for granting permission for transfer by the company, as well as sanctions in case permission

142 Ibid., p. 495.

for transfer is not granted.¹⁴³ In these cases too, the articles of association must specify the reason for refusing permission, but the reason can only be the circumstance that the acquirer, together with the shares they already hold, would exceed a certain percentage of voting rights or capital in the company. This means that shareholders with restricted shares can trade them freely, and the restriction applies only to the upper limit of the permissible acquisition of shares or voting rights.¹⁴⁴

Similar to the case of shares which are not traded on an organised securities market, there are specific provisions for acquiring shares through inheritance, the division of matrimonial property, or a sale carried out in a compulsory enforcement procedure. The difference is that in these cases, the company cannot refuse permission for transfer, even if it would otherwise be willing to buy back those shares (Article 239(3), ZGD-1).

In relation to the effects of transferring shares traded on an organised securities market, the acquirer of such shares immediately acquires property rights from the shares upon acquisition, regardless of whether the company grants permission for the transfer or not. However, the acquirer cannot exercise voting rights or other rights associated with voting until the company issues permission for the transfer. Nevertheless, the acquirer can exercise all other rights deriving from these shares, including pre-emption right to subscribe for new shares (Article 240, ZGD-1).

The company must decide on the permission for the transfer within 20 days of receiving the acquirer's request for the issuance of permission for the transfer of shares. If the company fails to make a decision within this period, it is deemed that the permission has been granted (Article 240(4), ZGD-1). If the company refuses the acquirer's request in contravention of the provisions of the ZGD-1, the acquirer's request in contravention of the provisions of this Act, the acquirer shall acquire the voting rights deriving from the shares on the date when the court ruling instructing the company to grant its permission for the transfer of shares becomes final. Additionally, the company is liable to the acquirer for damages incurred as a result of the unfounded refusal to grant permission to transfer shares (Article 240(5), ZGD-1).

8.4. Repurchase of Shares

8.4.1. Limited liability companies

An LLC, as a legal entity, can also become the holder of its own business shares. However, Article 500 ZGD-1 restricts the acquisition and ownership of own business shares to protect creditors, as such shares may enable shareholders to covertly refund the company's share capital.¹⁴⁵ The company can repurchase its own business shares only if they are fully paid and reserves for its own business shares are established (Article 500(2), ZGD-1). Payments made in violation of this provision are considered

143 Ibid., p. 496.

144 Ibid., pp. 496–497.

145 Ibid., p. 891.

prohibited payments and must be returned in accordance with the obligation to repay prohibited payments (Article 500(3), ZGD-1). The company cannot acquire all its own business shares and become its own owner (Article 500(4), ZGD-1). The Slovenian regulation generally prohibits the acquisition of own business shares for consideration, and this also applies, by analogy, to the acceptance of own shares as collateral (Article 500(1), ZGD-1).

Furthermore, Article 64(5) of the ZGD-1, which regulates reserves, stipulates that a company that has acquired its own shares during the business year must establish reserves for own shares in the balance sheet for that business year in the amount of the payments made to acquire those own shares. Reserves for own shares must be released, and can only be released if the own shares have been disposed of or withdrawn (Article 64(6), ZGD-1). It should be emphasised that the company cannot exercise rights from its own shares (Article 506(4), ZGD-1).

8.4.2. Joint-stock companies

In addition to the prohibition on issuing own shares at the establishment of a JSC, the ZGD-1 also establishes a prohibition on acquiring own shares. While the prohibition on issuing own shares (original acquisition) under Article 229 of the ZGD-1 is absolute, the prohibition on (derivative) acquisition of own shares is relative, as the law provides eight exceptional cases in which a JSC is allowed to acquire its own shares under Article 247(2) of the ZGD-1. However, regardless of the permitted exceptions, a JSC has no rights arising from its own shares (Article 249, ZGD-1).

Therefore, a JSC may acquire its own shares only in the following exceptional cases:

- a) *If the acquisition is necessary to prevent serious, immediate damage*
Such necessary acquisition includes, for example, the acquisition of shares from a shareholder who is a debtor of the company, from whom the company can only recover its claim in this way.¹⁴⁶ Such acquisition of shares is permissible only if the shares are fully paid, meaning that the minimum or higher issue price has been paid for them (Article 247(2), ZGD-1). If the company purchases its own shares for this reason, the management must report on the reasons and purpose of the acquisition, the total number of shares, the minimum issue price, and the proportion and value of the acquired shares at the next general meeting (Article 247(3), ZGD-1).

- b) *If the shares are to be offered for repurchase to the company's employees or a related company*

The acquisition of its own shares by a JSC is also permissible if it involves the acquisition of shares by the company for the benefit of its employees. The process proceeds in such a way that the company repurchases its own shares and later offers them for repurchase to the employees. The company must

146 Ibid., p. 529.

offer the acquired own shares for repurchase to the employees within 1 year of the acquisition (Article 247(3), ZGD-1).

- c) *If the shares are acquired to provide compensation to shareholders under the ZGD-1*
The company may acquire its own shares to provide adequate consideration to shareholders, as enabled by Articles 553 and 556 of the ZGD-1. Control agreements and profit transfer agreements concluded between related companies must contain a specific provision on appropriate compensation for external shareholders of the company to which management is left or to which profits are transferred.

In fact, the management contract and the profit transfer agreement concluded by related companies must contain a specific provision on the appropriate compensation to be paid to the external shareholders of the company to which management is left or to which profits are transferred. As consideration, the agreement may provide for the provision of shares of the parent company or of the company of which the parent company is a subsidiary, or for a cash payment (Article 553(2), ZGD-1).

- d) *If the acquisition is gratuitous*
An exception to the prohibition on the acquisition of own shares is the gratuitous acquisition of own shares. This includes gifts or simple transfer of shares to the company, as long as the company does not pay any consideration for the shares. Such acquisition of shares is permissible only if the shares are fully paid, meaning that the minimum or higher issuance amount has been paid for them (Article 247(2), ZGD-1).

- e) *If a bank, insurance company, or other financial organisation acquires shares from a purchase committee*

This option for the acquisition of own shares is provided only for banks, insurance companies, and other financial organisations that are JSCs and purchase their own shares on behalf of and for the account of their clients. Such an acquisition of shares is permissible only if the shares are fully paid, meaning that the minimum or higher issue price has been paid for them (Article 247(2), ZGD-1).

If the company acquires its own shares through a purchase committee, the total number of shares acquired in this way is not limited to 10%, as is the case with the exceptions listed in the first to third and eighth exceptions in order. Furthermore, for such acquisition, there is no requirement to establish reserves for own shares,¹⁴⁷ which applies only to the first to third and eighth exceptions in order.

147 Article 247(2) of the ZGD-1 in conjunction with Article 64(5) of the ZGD-1 require the creation of reserves for treasury shares to ensure that the share capital is not reduced as a result of the acquisition of own shares.

f) *If it is by way of universal legal succession*

Based on universal legal succession a JSC may acquire its own shares based on universal legal succession. This includes cases of mergers, divisions, transformations, and inheritance based on a will.¹⁴⁸

g) *If it is based on a resolution of the general meeting for the withdrawal of shares in accordance with the provisions on the reduction of share capital*

The company can exceptionally acquire its own shares based on a resolution of the general meeting on the withdrawal of shares, following the procedure prescribed for the reduction of share capital through the withdrawal of shares.

h) *Subject to authorisation by the general meeting for the purchase of own shares*

The acquisition of treasury shares is also permitted for a JSC based on the authorisation of the general meeting for the acquisition of treasury shares, which is valid for a maximum of 36 months and determines the minimum and maximum purchase price for acquiring shares, as well as the number of shares that can be acquired. In this regard, the company may not acquire its own shares solely for trading purposes.¹⁴⁹

It is important to observe the principle of equal treatment of shareholders from Article 221 of the ZGD-1¹⁵⁰ and the provisions of the ZTFI-1. If the purpose of acquiring treasury shares is to realise stock options, the resolution must also specify all essential elements of the option plan, with the scope of permissible acquisition limited to 10% of the total number of shares or 10% of the company's share capital in the case of shares with a nominal value. When disposing of own shares, the provisions of Article 337 of the ZGD-1, which govern the pre-emption right of existing shareholders to subscribe to new shares, and Article 344 of the ZGD-1, which regulates the majority required to adopt a resolution of the general meeting, shall apply by *mutatis mutandis*. The general meeting may also authorise the management to withdraw company's own shares without further resolution on reducing the share capital.¹⁵¹

If the company has acquired its own shares in contravention of the permitted exceptions under Article 247 of the ZGD-1, it must dispose of those shares within 1 year of the acquisition thereof (Article 250(1), ZGD-1). However, if the JSC has acquired its own shares in accordance with the permitted exceptions under Article 247 of the ZGD-1, but the total share of the acquired shares and the shares already held exceeds 10% of the share capital, the company must dispose of the portion of shares that exceeds this percentage within 3 years of their acquisition (Article 250(2), ZGD-1).

148 Ivanjko, Kocbek and Prelič, 2009, p. 533.

149 Ibid., p. 534.

150 The acquisition or disposal of treasury shares is presumed to be in accordance with the principle of equal treatment of shareholders laid down in Article 221 of the ZGD-1, if it is affected based on a transaction concluded on an organised market. A different disposal of treasury shares can only be determined by a resolution of the general meeting (Article 247(1), ZGD-1).

151 Ivanjko, Kocbek and Prelič, 2009, p. 534.

If the treasury shares have not been divested within these specified time limits, the company must withdraw them (Article 250(3), ZGD-1).

In connection with the acquisition of its own shares, the restrictions on acquiring treasury shares through third parties are also important. In other words, a person who conducts transactions in their own name but on behalf of the company may only acquire or hold company shares if it would be permitted to the company in accordance with the first through sixth and eighth exceptions in the order stated above (all exceptions except for the acquisition of own shares based on a resolution of the general meeting on the withdrawal of shares pursuant to provisions on reducing the share capital). This also applies if the company's subsidiary or a company in which the company holds a majority stake acquires or holds shares from the company, or if a third party who conducts transactions in their own name but on behalf of a subsidiary or a company in which the company holds a majority stake acquires or holds shares. In this regard, it should be emphasised that when calculating the maximum permissible total share of shares amounting to 10%, these shares are taken into account as shares of the company. The third party or company must sell the shares to the company upon its request (Article 251, ZGD-1).

8.5. Financial Assistance for the Purchase of Shares

The ZGD-1 contains regulations that attempt to prevent the principle of prohibition of acquiring own shares from being circumvented through legal transactions that would have the same effect for the company as if it had acquired its own shares. Thus, there is a sanction of absolute invalidity – nullity for the legal transaction by which the company secures an advance payment or a loan for the acquisition of shares or any other transaction with comparable effect. Therefore, financial assistance by the company in the acquisition of its own shares is prohibited (Article 248(1), ZGD-1).

Transactions with a “comparable effect” to the provision of a loan are also considered fictitious transactions and, therefore, prohibited. These include transactions involving collateral or offering guarantees to lenders (pledges and sureties).¹⁵² However, the prohibition does not apply in two cases: current legal transactions of financial organisations, or transactions through which employees of the company or related companies would acquire shares. Such a legal transaction is void if the company could not establish its own share fund without reducing the share capital or without using a fund prescribed by law or the articles of association that cannot be used for payment to shareholders (Article 248(2), ZGD-1).

Similarly, a legal transaction between the company and another person, by which the other person would be entitled to acquire shares of the company on behalf of the company, a subsidiary, or a company in which the company holds a majority stake, is void if the company were to acquire shares in violation of the law through fictitious transactions (Article 248(3), ZGD-1). Therefore, the prohibition on acquiring shares of the company also applies to a subsidiary and a company in its majority ownership.

152 Ibid., p. 539.

Consequently, the company cannot purchase shares of its parent company without considering the conditions under which the parent company itself could acquire its own shares. Additionally, for the purpose of obtaining approval from the Securities Market Agency (Agencija za trg vrednostnih papirjev) for a takeover offer, the acquirer must demonstrate that:

- a) he has not in any way, directly or indirectly, pledged or undertaken to pledge or hypothecate securities of the offeree company not owned by the acquirer in payment for the securities to which the takeover bid relates; and
- b) he has not in any way, directly or indirectly, pledged or undertaken to pledge or hypothecate the assets of the target company in consideration of the securities of the target company (Article 32(2) ZPre-1).

9. Slovakia

9.1. *Limited Liability Companies*

9.1.1. *Business shares*

The participation of a shareholder in an LLC is expressed as a business share (*obchodný podiel*). Pursuant to Section 114 of the Slovak Commercial Code (CC), a business share represents rights and duties and the corresponding participation of the shareholder in the LLC. In general, the share is determined as a ratio between the shareholder's pledged contribution to the company and the company's registered share capital. A different approach to determining the share may be stipulated in the articles of association. The Slovak law regulating LLCs is based on the prohibition of one shareholder holding multiple shares in the same LLC. Thus, each shareholder may have only one business share in the company.¹⁵³ If a shareholder makes additional contribution (e.g. in the event of an increase of the share capital) or acquires additional share from another shareholder, his own share is increased by the amount of such additional contribution or acquired shares are amalgamated into one. The limitation to holding only one share in an LLC leads to several practical shortcomings. It is possible for several persons to acquire or inherit a share, however, such persons may exercise their rights attached to the business share only through a joint representative,¹⁵⁴ who is often one of the co-shareholders.

9.1.2. *Transfer of shares*

The Slovak law on LLCs provides for different requirements for share transfers among the shareholders and transfers to persons outside the company. While the transfer of a share to another shareholder is allowed with the consent of the general meeting, the

153 Section 114(2), CC.

154 Section 114(3), CC.

transfer of a share to persons outside the company (*externea*) is prohibited by default. The transfer of a business share to a person other than another shareholder must be expressly provided for in the articles of association (otherwise the transfer is not possible) and may be subject to the approval of the general meeting.¹⁵⁵ Therefore, the CC distinguishes between these types of transfers and determines the consequences of dissent. The share transfer shall not be effective prior to its approval by the general meeting.¹⁵⁶

If a business share transfer is subject to consent granted by the general meeting, the simple majority of the votes of all present shareholders is sufficient to adopt such a decision in the general meeting under Section 125(1)(k) of the Slovak CC, unless the articles of association provide for a higher number of votes required to pass the decision. Consent to the transfer may be requested before or after a share transfer agreement is signed. The transfer of a *part of a share* always requires the consent of the general meeting to be obtained for the share split,¹⁵⁷ irrespective of whether the acquirer of the split share is another shareholder or a person outside the company.¹⁵⁸

Although the only restriction the law provides with respect to an LLC is the consent of the general meeting, other restrictions may be stipulated in the articles of association. The articles of association may further specify the approval requirements, personal requirements for the selection of new shareholders, time requirements, or other terms and conditions for the acquisition of a share. The articles of association may further stipulate the terms of transfers in the form of information obligations of the transferring shareholder with respect to other shareholders or the company, or as an obligation set for the acquirer to accede to the shareholders' agreement.¹⁵⁹

Effective from 1 January 2018, transfers of shares to other shareholders or a person outside the company are also excluded where the company holds a special status,¹⁶⁰ that is, when (I) proceedings to dissolve the company are pending; (II) the company has been dissolved by the decision of a business register court or an insolvency court; or (III) the company is subject to the effects of a passed insolvency order or is granted restructuring.¹⁶¹ The abovementioned rules are aimed at eliminating abusive practices in transferring shares during critical phases of a company's operation. These prohibitions exclusively apply to LLCs and no other corporate form. Furthermore, a share in an LLC may not be transferred or acquired by a person held as an obligor in the register of authorised applications for enforcement.¹⁶² This prohibition applies to both the transferor and the acquirer.

155 Mrázová, 2022a, p. 31.

156 Section 115(5), CC.

157 Section 117(1), CC.

158 Mrázová, 2022a, p. 34.

159 Mrázová, 2022b, p. 58.

160 Section 115(3), CC.

161 Mrázová, 2022a, p. 35.

162 Section 115(6), CC.

The transfer of a share is also affected by the prohibition of so-called cascade shareholding when a unipersonal LLC cannot form or be a sole shareholder of another LLC. The rule is applicable to foreign LLCs. Additionally, a single person may be a sole shareholder of no more than three LLCs.¹⁶³ These restrictions do not apply to JSCs or simple JSCs.

The question of whether the spouse's consent is required for the transfer of a share has been the subject of an intensive debate. Despite the number of opposing theoretical and jurisprudential opinions, the position has been established that the value of a share is part of the joint ownership of the spouses, provided that one of the spouses acquired it during the marriage.¹⁶⁴ Some authors hold the opinion that the consent of the other spouse is always necessary for the transfer of a share; thus, in the absence of this consent, there is a risk of invoking the invalidity of the transfer by the neglected spouse. This also applies in the case of the acquisition of a share, although the other spouse does not become a shareholder.¹⁶⁵ However, according to a recent decision of the Supreme Court, if a spouse is the acquirer of a share, the consent of the other spouse is not required for such an act.¹⁶⁶

A share transfer agreement needs to be in writing, and the signatures of the contracting parties must be authorised. The purchase agreement must clearly specify the share to be transferred, and if the consideration is agreed, must stipulate the amount of the consideration or the method of its determination.¹⁶⁷ The acquirer, who is not a shareholder of the target company must declare in the agreement his will to adhere to the articles of association.

9.1.3 Acquisition of own shares by a company

In general, to protect the legitimate interests of third parties, an LLC cannot contractually acquire its own shares. The prohibition to acquire own shares by the LLC is stipulated in Section 120(1, 2) of the Slovak CC. The reason for this prohibition is primarily the principle of creating a minimum level of equity capital and its maintenance. The acquisition of own shares by the company is only admissible in strictly defined cases and only temporarily.¹⁶⁸ A share is transferred to the company in the event a shareholder is expelled by the general meeting because of failure to fulfil their obligation to repay a contribution or when the shareholder's participation in the company is terminated by a court. If the company acquires its own shares, it cannot exercise shareholders' rights. The company is entitled to transfer the business share of an expelled shareholder to any other shareholder or a person outside the company. The share is also transferred to the company in the event of bankruptcy

163 Section 105a(1), CC.

164 The Supreme Court of the Slovak Republic No. 8 Cdo 196/2018, 28 January 2020.

165 Ovečková et al., 2022, pp. 1065–1066.

166 The Supreme Court of the Slovak Republic No. 4 Cdo/316/2020, 26 January 2023.

167 The Supreme Court of the Slovak Republic No. 2 Obo 102/2001.

168 Mrázová, 2022a, p. 34.

of the shareholder, the execution of their property, or because of the prohibition on inheriting the share, in which case the company acquires the share.

Slovak company law does not provide for rules on prohibition of financial assistance for LLCs.

9.2. Joint-Stock Companies

9.2.1. Nature of shares

Each share with a certain nominal value represents a fraction of the share capital of a JSC. A share, as a security, represents the shareholder's rights, which a shareholder acquires in the company. Each share constitutes an independent right of membership. The general regulation of securities is provided in a separate Act No. 566/2001 Coll. on securities and investment services (*Zákon o cenných papieroch a investičných službách*). The shares of a JSC may be issued only as par value shares with a minimal nominal value of at least 1 EUR. Slovak corporate law does not allow the issuance of no-par value shares by JSCs or for an amount below their par value. However, it is possible that shares are issued for a higher amount than their par value.

Shares may be issued either as bearer shares (*akcie na doručiteľa*) or as registered shares (*akcie na meno*).¹⁶⁹ Registered shares may be issued as paper shares or book-entry shares. Different forms of shares are characterised by different records of shareholders, methods of transfer, and possible restrictions on their transferability.¹⁷⁰ Book-entry shares are recorded by the Central Securities Depository of the Slovak Republic. If the JSC issues registered shares, it is obliged to keep a register of shareholders (*zoznam akcionárov*) with the following information: the identification number of the share, class, and nominal value of shares; the name, address, and birth certificate number of the shareholder who is a natural person; and the business name, registration office, and identification number if the shareholder is a legal entity.¹⁷¹

The registered shares may be owned by two or more persons. If several shares are acquired by one person, the company may issue a bulk share (*hromadná akcia*) as a substitution for more shares of the same class having the same nominal value.¹⁷²

9.2.2. Classes of shares

A Slovak JSC may issue only ordinary shares (*kmeňové akcie*) with no special rights attached to it, or priority shares (*prioritné akcie*) with preference rights to the payment of dividends. The issuance of preference shares must be specified in the company's articles of association. The sum of the nominal value of priority shares cannot exceed half of the registered share capital. In general, each share grants a voting right at the general meeting, but the issuance of priority shares with no voting rights at the

¹⁶⁹ Section 156(1), CC.

¹⁷⁰ Mrázová, 2021, p. 400.

¹⁷¹ Section 156(6), CC.

¹⁷² Section 157(3), CC.

general meeting may be provided by the articles of association.¹⁷³ However, holders of priority shares are entitled to vote at the general meeting when decisions on priority payments for distribution of profits occur. Different treatment of the holders of preference shares compared to the holders of ordinary shares does not, in principle, violate the principle set out in Section 176b (2) of the CC, according to which the company must treat all shareholders equally under the same conditions. Issuing other classes of shares by a JSC is expressly prohibited.¹⁷⁴

A special subtype of JSC with variable share capital (internationally recognised as *Société d'investissement à capital variable*; SICAV) may issue shares with a buyback right against the company. A JSC with variable capital is, under the Collective Investment Act, considered an investment fund and an open investment entity with legal personality, which allows for continuous and flexible entry and exit of financial investors into the company. It differs from the “classic” JSC primarily because of the variability of the share capital and the shareholders’ (investors’) right to have their shares repurchased by the company. In this case, the share capital is divided into a certain number of no-par value shares, which are not tied to a fixed amount of share capital but represent a share in the company’s equity. The issuance of other classes of shares by this type of JSC is expressly prohibited.¹⁷⁵

9.2.3. *Transfer of shares*

Shares of the JSC are freely transferable. In contrast to the legal regulation of LLCs, the private autonomy to limit the transferability of shares is narrowed for JSCs. The transferability of the registered shares may be restricted by the articles of association unless they are accepted for trading on the regulated securities market. The transferability of registered shares cannot be excluded.¹⁷⁶

The requirements for the share transfer are set forth in Act No. 566/2001 Coll. on securities and investment services. In the case of a transfer of shares for consideration, the sale and purchase agreement must contain the determination of the class of shares, the number of shares to be transferred, the purchase price, and the ISIN number of the shares to be transferred, if assigned. The transfer of registered paper shares is carried out based on a unilateral declaration of the transferor recorded in writing on the back of the share certificate (endorsement). The share certificate must be handed over to the acquirer. The acquirer of the registered shares must be entered in the company’s shareholders’ list, as only those persons entered in this register are considered shareholders vis-à-vis the company.¹⁷⁷ If a new shareholder is not entered in the company’s list of shareholders, he cannot exercise his shareholder rights. This includes no possibility of casting votes at the general meeting or bringing action against resolutions of the general meeting prior to his entry into the shareholder’s

173 Section 159(3), CC.

174 Section 155(6), CC.

175 Šuleková, 2017, p. 997.

176 Section 156(9), CC.

177 Section 156(7), CC; Žitňanská, 2022, p. 144.

list.¹⁷⁸ If the company breaches its duty to update the list of shareholders, it may be liable for the damage caused to the shareholder who transferred the shares as well as the acquirer of the shares.

For an efficient transfer of book-entry shares, registration of the share transfer by the central depository is required. Materially identical transfer orders shall be submitted by the transferor and the transferee, otherwise, the registration may not be carried out.

For the case in which the transfer of registered shares is subject to the approval of the company, the articles of association must stipulate the grounds on which the company may refuse to give its approval and the time period within which the company must either accept or dismiss a shareholder's request and notify the concerned shareholder of the decision. The time period could be determined by the reference to the next corporate body meeting.¹⁷⁹ Unless otherwise stated in the articles of association, consent to the share transfer is granted by the board of directors. Consent for the transfer of shares is deemed to be granted if the board of directors or other corporate body, if stipulated so by the articles of association, does not decide within the time period specified in the articles of association. A refusal to grant consent renders the transfer of shares invalid. As a result of the refusal to grant consent, the concerned shareholder acquires the right to have its shares purchased by the company at a reasonable price. For the determination of the amount of the reasonable price for shares, the legal regulation for the calculation of reasonable monetary compensation in the case of national mergers of companies applies.¹⁸⁰ Because the legal provisions do not distinguish between refusal to grant consent in accordance or in contradiction with the requirements stipulated in the company's articles of association, a shareholder has the right to have its shares bought back by the company, even if the board of directors refused to grant consent in accordance with the conditions stated in the articles of association.¹⁸¹

The articles of association may also stipulate other restrictions for the transferability of registered shares; however, the restrictions on transferability must not be so stringent as to render the transfer of shares practically impossible.

In general, the JSC company may not acquire its own shares, which make up its own share capital. The company is entitled to do so only when special conditions are met. First, the acquisition of its own shares by the company is subject to the approval of the general meeting, which also defines the terms of the proposed acquisition, such as the maximum admissible number of shares, the time period by which the company must acquire the shares, and the lowest and highest price, at which the shares may be acquired.¹⁸² Second, the nominal value of all own shares must not exceed 10% of the registered share capital. Moreover, after the acquisition of the shares, the equity

178 The Supreme Court of the Slovak Republic No. 3 Obo 9/2009, 10 June 2010.

179 The Constitutional Court of the Slovak Republic No. II. ÚS 289/2014–34, 11 June 2014.

180 Section 218j(4), CC.

181 Mrázová, 2022b, p. 69.

182 Section 161a, CC.

of the company shall not drop below the aggregate of the registered share capital and the reserve fund. The board of directors must ensure that the conditions stated above are satisfied.

9.2.4 Rules on financial assistance

Despite the relaxed regulation of financial assistance at the EU level, Slovak law maintained a stringent prohibition on financial assistance. This position remained unchanged until the adoption of Act No. 309/2023 Coll. on Transformations of Commercial Companies and Cooperatives and on the Amendment and Supplementation of Other Acts, which entered into force on 1 March 2024. The amendment partially lifted the prohibition, aligning Slovak law more closely with prevailing EU standards.¹⁸³ Currently, under Section 161e of the CC, the JSC may, either directly or indirectly, provide advances, loans, credits, or guarantees for the purpose of enabling a third party to acquire shares in the company. However, such financial assistance is permissible only if expressly allowed by the company's articles of association and several cumulative conditions are met.

Primarily, the financial assistance must be granted under fair market conditions. This requires the transaction to occur at arm's length and the company to receive adequate consideration. The board of directors must verify the financial capacity of any third party to whom, or through whom, the assistance is to be granted. The provision of financial assistance must not result in a reduction of the company's equity below the threshold of its subscribed share capital, increased by the statutory reserve fund and any other mandatory, non-distributable reserves established under law or the articles of association, and decreased by the amount of any unpaid subscribed capital. Additionally, the company must establish a special reserve fund equivalent to the amount of the financial assistance provided.¹⁸⁴

The board of directors is required to prepare a written report for the general meeting, which must include: (a) the rationale for granting the financial assistance; (b) a justification of its alignment with the company's best interests; (c) the terms and conditions under which it is to be provided; (d) a risk assessment, particularly in relation to the company's liquidity and solvency; and (e) the acquisition price of the shares by the third party.¹⁸⁵ The supervisory board is also required to submit a written opinion for the general meeting, evaluating whether the proposed financial assistance is consistent with the best interests of the company, and reviewing the report prepared and submitted by the board of directors.¹⁸⁶ Finally, the provision of financial assistance must be approved by the general meeting with a two-thirds majority of the shareholders present at the company's general meeting.¹⁸⁷

183 Ostáš, 2023, pp. 293–306.

184 Section 161e(1), CC.

185 Section 161e(2), CC.

186 Section 161e(3), CC.

187 Section 161e(5), CC

9.3. Simple Joint-Stock Companies

9.3.1. Classes of shares

As already stated in the chapter regarding the Czech Republic in this publication, the regulation on the simple JSC introduced a novelty into Slovak legislation by providing the possibility of the issuance of different classes of shares by this corporate form. The simple JSC may issue ordinary shares which carry no special rights and shares which encompass specific rights set out therein.¹⁸⁸ The special rights attached to the shares may primarily consist of the determination of (I) the extent of the entitlement to a share in the profit or liquidation balance, (II) the number of shareholder's votes, stated otherwise than the proportion of the nominal value of the shares to the amount of the share capital, or (III) the extent of the right of information. The list of special rights is not exhaustive, and other special rights can be attached to shares issued by the simple JSC. A simple JSC may also issue shares with no voting rights, however, at least one share must carry a voting right, otherwise, a court may order the winding up of the company.¹⁸⁹

Moreover, in contrast to a JSC, a simple JSC may issue only registered shares in book-entry form. The reason for such differentiation is the promotion of digitalisation in corporate law, which also ensures effective registration of special rights, such as tag-along right and drag-along right in special registers.

9.3.2. Transfer of shares

The transferability of shares in a simple JSC may be restricted and even completely excluded,¹⁹⁰ which is not possible for a regular JSC. If the transferability of shares is excluded, the shareholder is entitled to require the company to buy back their shares upon the expiration of 4 years from the date of the payment of their issue price.¹⁹¹ The articles of association may specify a shorter time period.

In contrast to a JSC, in a simple JSC, if the share transfer is subject to company's approval, the shareholder's right to buy back shares does not arise every time the corporate body refuses to grant consent to the share transfer. This shareholder's right does not arise in the event the corporate body is obliged to refuse such consent pursuant to articles of association or certain legal provision.¹⁹²

The legal regulation of the simple JSC provides for other restrictions on the transferability of shares, explicitly the tag-along right (*právo pridať sa k prevodu akcií*), drag-along right (*právo požadovať prevod akcií*) and shoot-out clause (*právo požadovať nadobudnutie akcií*), which may be included in the shareholders' agreements.¹⁹³ These are contractual exit tools for resolving potential conflicts of interests and deadlock

188 Section 220i(3), CC.

189 Section 220i(6), CC.

190 Section 220k, CC.

191 Section 220l(1), CC.

192 Patakyová et al., 2022, p. 1085.

193 Section 220w, CC.

among shareholders or aiming to protect against the opportunistic behaviour of a shareholder and an abuse of his majority or minority position. Only one pre-emptive right, one tag-along right, one drag-along right, and one shoot-out right may be attached to a single share. Provisions of a shareholders' agreement that purport to create additional rights in violation of the limitations set out in this paragraph shall be deemed null and void.¹⁹⁴ Tag-along and drag-along rights may be concluded as registered rights. Registrable rights are available only to the shareholders of a simple JSC and its registration shall strengthen the enforceability of these rights.

10. Conclusions

Across the Czech Republic, Croatia, Hungary, Poland, Romania, Serbia, Slovenia, and Slovakia, the law of equity interests in capital companies reveals a shared architecture with sharp jurisdiction-specific inflections. Two cross-cutting distinctions structure nearly every rule surveyed: (I) form (LLC vs. company limited by shares/JSC); and (II) function (standardised, market-oriented instruments vs. bespoke, relationship-dependent participations).

On that axis, JSC law in each country privileges liquidity, standardised rights, and public-facing safeguards; LLC law privileges contractual design, member screening, and creditor-protective capital rules. Within that common frame, the eight systems diverge on the legal nature of the “share”, transfer mechanics and publicity, the range of permissible classes and control rights, and the intensity and design of capital-maintenance constraints, especially treasury-share acquisition and financial assistance.

All eight jurisdictions treat the JSC “share” as a security-like, standardised unit of membership that aggregates organisational and patrimonial rights. Several codifications make the point expressly (e.g. Hungary, Slovakia, Slovenia), and all couple the instrument with registry-based or documentary transfer techniques and issuer-facing opposability rules. By contrast, the LLC interest (membership share) functions throughout as a non-negotiable instrument, whose content and transferability are largely determined by constitutive documents and default member-protection norms (Romania's explicit anti-securitisation rule exemplifies the point).

However, notable variations in legal ontology and taxonomy exist. The Czech Republic explicitly frames the share as a “thing” in the legal sense, with certificated (tangible) and uncertificated (intangible) variants; JSCs also recognise outstanding and unissued shares before paper or book-entry issuance, and certain rights (e.g. profit claims, pre-emptive rights) may be separated from a JSC share, exceptionally, by statute. Poland offers the most pronounced internal heterogeneity: the simple JSC decouples shares from share capital (no nominal value, indivisible), while the classic JSC retains par-value equality and full dematerialisation; LLCs may operate

194 Section 220w(6), CC.

in a “single-share” or “multi-share” model and tolerate unequal nominal values. Hungary maintains a finely granulated JSC taxonomy: ordinary, several “flavours” of preference (dividend, liquidation, voting, nomination), employee, interest-bearing, and redeemable shares, with classes and series layering. Voting-preferred stock is permitted (capped leverage in public issuers), and nomination rights are available in private companies. Romania has abolished bearer shares, alinging with solution that is slowly becoming the norm across jurisdictions, permits non-voting dividend-preferential stock up to a statutory cap, and, by negative implication and sectoral carve-outs, tolerates multiple-voting and even veto rights where not otherwise prohibited. Serbia draws a bright line: JSC shares are dematerialised securities; multiple-voting, loyalty, and veto shares are not permitted. LLC interests are never securities and are registered in a public business register with constitutive effect. Slovenia allows registered and bearer JSC shares but requires universal dematerialisation and KDD central registration; multiple-voting shares are prohibited, while non-voting preference stock is permitted up to one-half of capital; rights attached to a share are indivisible. Slovakia limits classic JSCs to par-value shares and only two types (ordinary, priority); a special SICAV regime allows variable capital and redemption, while the simple JSC embraces modern private ordering (registered, book-entry only; classes with tailored economic, voting, and information rights).

Across jurisdictions, employee equity appears in different guises (Hungary’s employee shares, Slovenia’s and Croatia’s pathways via treasury-share programs, and Romania’s distributions), reflecting a regional willingness to use equity as an incentive within capital-maintenance limits.

The shift of JSCs toward free transferability with registered-share restrictions is permitted but policed. Croatia’s vinctuated registered shares, Slovenia’s and Slovakia’s consent regimes (with reasons, deadlines, and remedies), Poland’s dematerialisation with register-entry effectiveness, and Romania’s opposability upon registration all express the same outcome: allow contractual screening in private or non-listed contexts while preserving marketability and third-party certainty. Where consent can be withheld, systems typically supply anti-opportunism safety valves (e.g. deemed consent for inaction, right to a buy-out at a reasonable price, and judicial review).

LLCs are consistently more closed. Czech, Hungarian, Serbian, Slovenian, and Slovak law default to member consent, pre-emptive rights, or general-meeting approvals for transfers to outsiders; several add formalities (notarial deeds in Slovenia, and notarised signatures in Poland and Serbia) and graduated effectiveness rules (inter partes, vis-à-vis the company, and vis-à-vis third parties). Romania’s three-quarters approval rule (now contractually adjustable within anti-securitisation limits) captures the same design choice from another angle. Special pipelines, such as transfer within an enterprise sale (the Czech Republic), enforcement and succession carve-outs (Slovenia), or publicity safeguards (register entries with constitutive effect in Serbia, and declaratory entries in the Czech Republic), further tailor the gatekeeping to local contexts.

Co-ownership and matrimonial aspects are also addressed with an eye to issuer certainty: common themes are a requirement of a single representative toward the company (the Czech Republic, Hungary, Slovenia, and Slovakia) and separation of ownership and shareholder status for opposability (Czech examples, and Serbia's constitutive registration rule with an inheritance exception). Several systems confront community property or spousal consent issues (the Czech Republic and Slovakia), generally without letting these unsettle company-facing formalities.

While economic preference (dividend, liquidation) is common across the region, the distribution of control rights varies. We can consider permissive Hungary's voting-preferred shares (with public-issuer caps) and nomination rights; Romania's inferred tolerance for multiple voting (outside banking) and scope for contractual veto rights. However, there are restrictive solutions: Slovenia's prohibition on unequal votes per capital unit and its cap on non-voting stock; Serbia's categorical ban on multiple-voting and veto shares; and Slovakia's classic JSC limited to ordinary/priority with narrow voting flex, offset by the simple JSC's freedom to tailor voting, information, and exit-related rights (e.g. tag/drag). Poland's JSCs are situated in the middle path, with the law allowing two votes per preferred share; simple JSCs, meanwhile, rely on register-based special rights and rigid documentary formalities.

Protection of outsiders and minorities is built into transfer-consent regimes (e.g. buy-out rights when consent is refused: the Czech Republic, Slovakia, and Slovenia), class voting where class rights are affected (Serbia and Romania), and exit-at-fair-value tools linked to structural changes (the Czech Republic, Poland's change-of-object buy-out, and Romanian treasury-share and assistance limits). Hungary overlays this with disclosure-heavy approvals for sensitive transactions (financial assistance in public JSCs).

All eight jurisdictions adopt EU-style capital-maintenance constraints, but the details differ. The Czech Republic starts from a principled prohibition with tailored exceptions. In LLCs, contractual acquisition is barred (teleologically confined to for-consideration cases), while gratuitous and universal-succession routes are tolerated; JSC acquisitions are permitted under tight approvals, solvency tests, and disclosure, and issuer-held rights are dormant. Czech law also couples treasury-share and transferability rules with minority liquidity rights (e.g. buy-outs upon delisting or class changes). Croatia requires general-meeting mandates, enforces equal treatment, and recognises exceptional, authorisation-free acquisitions (to avert serious harm, for employee programs, universal succession, unpaid subscriptions, court enforcement, and capital reduction), backed by reserve and disposal rules. Hungary caps JSC treasury shares at 25%, imposes dividend-capacity and solvency constraints, and, for LLCs, permits acquisition up to 50% of capital subject to full payment, distributable-earnings tests, non-voting/non-dividend status, and 1-year disposal or cancellation. Poland bars LLCs from own-share acquisition (with narrow statutory exceptions) and permits JSC buybacks under the CCC with specific contexts for compulsory buyouts (e.g. change of object), alongside squeeze-out/exit mechanisms. Romania authorises JSC buybacks up to 10% on an 18-month mandate, fully paid shares only, funded

from distributable profits/reserves; voting and dividend rights are suspended, and a balancing reserve is required. There are no rules for LLCs. Serbia, an EU membership candidate country, aligns JSC buybacks with Directive 2017/1132 (authorisation, fully paid shares, distribution tests, 10% limit in public JSCs, equal treatment, and proportional scaling), with no time limit for disposal unless rules are breached; LLC repurchases are allowed from special reserves, with dormant rights and 3-year disposal/cancellation. Slovenia distinguishes LLCs (tight prohibitions, reserve requirement, and no rights on own shares) from JSCs (absolute ban on original acquisition, except for serious harm, employee programs, compensation in group contracts, gratuitous acquisition, universal succession, withdrawal, and GM-authorised buybacks up to 10% for ≤ 36 months; strict disposal deadlines; and aggregation of holdings through affiliates and nominees). Slovakia bars LLC contractual acquisition (limited, temporary transfers to the company upon expulsion or comparable events; and rights dormant) and allows JSC buybacks for a classic model: prior mandate (defining number, window, and min/max price), $\leq 10\%$ of capital, and post-acquisition equity sufficiency.

The common core, fully paid shares, distribution-capacity tests, non-voting/non-dividend status of treasury stock, percentage caps, time-bound disposal, and heightened approvals reflect a shared policy: preserve creditor cushions and prevent control manipulation while allowing legitimate capital-structure management and employee schemes.

The region exhibits convergence toward conditional permissibility in JSCs, with LLCs often more permissive by contract or, conversely, subjected to blunt prohibitions.

All eight systems prioritise registries and dematerialisation to create opposability and reduce transaction costs. Slovenia (KDD), Slovakia (Central Securities Depository), Serbia (Central Registry for JSCs; constitutive business registry for LLCs), Poland (universal dematerialisation of JSC), and Croatia/Romania/the Czech Republic combine material and book-entry forms with issuer-facing lists. A recurring, deliberate design is the tiered effectiveness of transfers (between transferor and transferee, against the issuer, and against third parties) coupled with publicity (business registers, securities accounts) to discipline reliance and mitigate double transfers or unauthorised disposals.

As a policy synthesis, we can first state that the LLC/JSC divide remains the master variable. Where the objective is scalable capital aggregation from strangers, these systems converge on standardised, transparent, and liquid instruments and on robust capital-maintenance rules. Where the objective is a durable relational venture, these entities accept liquidity sacrifices and procedural hurdles to screen entrants, preserve cohesion, and protect creditors.

Second, control engineering through share classes is widely but unevenly available. Hungary and Romania allow meaningful deviations from “one share – one vote” outside sensitive sectors or public markets; Slovenia and Serbia largely forbid such deviations; Poland and Slovakia position flexibility in newer corporate forms (simple JSC) but preserve orthodoxy in classic JSCs. The normative idea is familiar: founder/

stable-owner protection and long-term strategy versus minority participation and market fairness.

Third, minority liquidity is increasingly mediated by targeted buy-out rights keyed to governance frictions (unjustified consent refusals), market status changes (delisting), or class-right alterations. Expanding calibrated exit rights in LLCs, without undermining their personal character, would further rationalise the law's response to deadlock and oppression.

Fourth, financial assistance is the area of greatest dynamism. Slovakia's 2024 reform aligns with EU practice and Hungary's approach; the Czech Republic has already achieved this; Poland liberalised for JSCs to accommodate modern finance; Slovenia and Romania retain stricter limits (with employee/banking carve-outs); and Serbia remains prohibitionist. Given creditor-protection concerns, the emerging consensus package – arm's-length terms, distributable-assets constraints, solvency/liquidity tests, enhanced reporting and approvals, and, where appropriate, mandatory reserves – appears to be both principled and operational.

Finally, publicity rules merit continued harmonisation. The coexistence of constitutive (Serbia) and declaratory (e.g. Czech Commercial Register) effects, and varying issuer versus public-registry opposability points, can lead to cross-border frictions. Clarifying when a transferee is a shareholder for all purposes (and ensuring expedited, reliable entries) would reduce litigation and transactional hold-up.

Despite stylistic and doctrinal differences, the eight jurisdictions show a coherent regional model. JSC law is converging on EU-style standardisation, market integrity, and creditor protection, with room for controlled preference engineering and modern financing tools. LLC law remains a laboratory for contractual freedom, bounded by mandatory rules on creditor protection and transfer gatekeeping. Future reforms that (I) expand carefully conditioned assistance, (II) fine-tune minority exit rights, and (III) streamline registry opposability while respecting each form's core logic would further align legal infrastructure with the economic functions these companies are meant to serve.

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Shareholders and Associates*

1. Introduction

by Emőd Veress

2. The Czech Republic

by Kateřina Eichlerová

3. Croatia

by Marko Ivkošić

4. Hungary

by Judit Barta

5. Poland

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by Žofia Mrázová

10. Conclusions

by Emőd Veress

1. Introduction

The general meeting is the primary forum in which the collective will of the shareholders is articulated and, within the limits imposed by law and the constitutive documents, made legally operative. In most corporate forms, the general meeting is neither a management body nor a mere ceremonial gathering; it is rather a decision-making organ to which the legislature and the company's internal governance instruments allocate defined competences. Typical matters reserved for the general meeting include, inter alia, the election, removal and remuneration of directors (and, where relevant, members of a supervisory board); the approval of annual financial statements and the allocation of profits (including dividend declarations); amendments to the constitutional documents; capital increases and reductions (with or without disapplication of pre-emption rights); approval of major transactions (mergers, demergers, acquisitions, and disposals of relevant material assets); appointment of statutory or external auditors; and decisions relating to winding up and dissolution. According to the legal literature,

* Eichlerová, K., Ivkošić, M., Ledwoń, P., Veress, E., Barta, J., Dugar, G., Renko, J., Mihajlović, B., Mrázová, Ž. (2025) 'Shareholders and Associates' In Veress, E. (Ed.) Joint Stock and Limited Liability Companies in East Central Europe. Miskolc-Budapest: Central European Academic Publishing. pp. 281–400. https://doi.org/10.54171/2025.ev.jsllcece_chapter4

‘matters which relate to the fundamentals of the company or the internal relationship between the shareholders are to be decided by the shareholders themselves. The same applies to the relationship between the company and the members of its management body. A comparative legal analysis shows that the matters assigned to the shareholders are mostly specifically enumerated where by contrast the management body is tasked with managing the business of the company without a more detailed description.’¹

The decisional process ensures that the shareholders’ collective voice is reflected in decisions which shape the company’s future. The legitimacy of decisions made at these meetings hinges on adherence to procedural requirements. The procedural requirements for convening, conducting, and recording general meetings, such as notice periods, quorum thresholds, and agenda specifications, are critical for ensuring transparency and legitimacy. Decisions are formalised through resolutions, which may require ordinary or qualified majorities depending on their nature.

Collective decision-making at general meetings rests on a small set of durable principles. The first is shareholder sovereignty: within the confines of statute and the company’s constitution, shareholders are the ultimate residual authority on matters that reshape the enterprise, electing and removing directors, approving accounts and distributions, amending the articles, or consenting to transformative transactions. This is the practical expression of shareholder democracy and ensures that those who bear the residual risk retain a decisive voice in the company’s strategic direction.

Second, agency theory explains why the general meeting matters in day-to-day governance. Because ownership and control are separated, agency costs inevitably arise. The general meeting provides a formal forum for scrutiny, questioning management, testing disclosures, approving remuneration policies, and signalling consent or dissent through votes. In doing so, it helps align managerial conduct with shareholder interests, reduces information asymmetry, and curbs conflicts of interest.

Third, a system of checks and balances preserves institutional equilibrium. Decisions of the general meeting do not replace, but rather complement, the supervisory and oversight functions of boards of directors (and, where applicable, supervisory boards or audit committees). Properly observed procedural safeguards reinforce this balance, and include notice, quorum, disinterested voting where conflicts exist, and transparent minute-taking, among others. The relationship between shareholders in the general meeting and directors in board meetings ensures that no single organ wields disproportionate influence, theoretically fostering an equitable governance framework that is capable of withstanding legal and commercial scrutiny.

Voting rights are fundamental to shareholder participation in corporate governance. Shareholders exercise their influence on corporate decisions primarily through voting at general meetings. The foundations of voting are grounded in key guiding principles that shape its role in corporate governance. The proportionality

1 Roth and Kindler, 2013, p. 80.

principle establishes that voting rights are typically aligned with the number of shares held by each shareholder, reflecting their financial stake in the company. This ensures that decision-making power is proportional to ownership, preserving equity in influence. Complementing this is the equality principle, which upholds that all shareholders possessing the same class of shares are entitled to equal voting rights. This principle promotes fairness and prevents discrimination, ensuring uniform treatment within shareholder classes. Finally, the concept of corporate democracy supports the essence of voting rights, providing shareholders with a means to express their preferences and participate actively in decisions on crucial issues. Together, these principles form the cornerstone of a fair and democratic voting system within corporate structures.

However, voting rights may be differentiated based on share classes (e.g. ordinary shares with voting rights, preference shares with limited or no voting rights, and shares with multiple voting rights). Modern company law and corporate governance recognise the need to balance majority rule with minority protection, preventing misuse of voting power to the detriment of other shareholders. Unlike political democracies grounded in the “one person, one vote” equality principle, corporate democracy allocates influence in proportion to economic contribution, typically “one share, one vote”, or, where lawfully provided, enhanced or limited voting power per share. This proportionality is a distinctive feature of company law: it aligns control with capital at risk, while remaining bounded by statutory and contractual safeguards for minority shareholders.

The dynamics between majority and minority shareholders play an important role in corporate governance. While majority shareholders wield significant influence, minority rights ensure equitable treatment and prevent abuse of power. The theoretical bases of corporate decision-making are fixed in the design of majority rule and minority protection. The majority rule dictates that decisions within a company are generally determined by the votes of the majority, aligning corporate actions with the preferences of stakeholders holding the larger financial interest. This ensures efficiency in decision-making and reflects the democratic structure of corporate governance. At the same time, the principle of minority protection ensures that the rights of minority shareholders are safeguarded against potential oppressive actions by the majority. Legal frameworks underpin this protection by granting minority shareholders the ability to challenge unfair decisions, access critical corporate information, and participate in significant corporate actions.

Minority rights in company law serve as critical safeguards to ensure the equitable treatment of all shareholders, regardless of the size of their stake. It has been emphasised that

‘as firms grow, ownership eventually separates from control. Hence, corporations end up being run by professional managers with no or very little equity ownership on behalf of the owners or the shareholders. However, (...) this is only an accurate description of the Anglo-American system of corporate

governance. Indeed, in the rest of the world most stock-exchange listed firms have large shareholders that have a substantial degree of control over the firm's affairs (...) These corporations have two types of shareholders: the controlling shareholder(s) and the minority shareholders. While the former type has enough control over the firm's affairs to dominate or at least influence its decision-making process the latter lack power to intervene. As a result, the main corporate governance problem in most corporations across the world is not the classic agency problem between the managers and the shareholders, but the potential expropriation of the minority shareholders by the controlling shareholder.²

Among the most fundamental of these rights is the right to information, which grants minority shareholders access to key documents, such as financial statements, meeting minutes, and other essential records. This transparency helps mitigate information asymmetry, empowering minority shareholders to make informed decisions and hold the company accountable. Additionally, minority shareholders have the right to participate in corporate decision-making. Even if their voting power is limited as a result of their smaller shareholding, their participation ensures that their perspectives and interests are not completely disregarded in pivotal matters affecting the company. The right to challenge decisions is another cornerstone of minority shareholder protections. When resolutions are perceived to be harmful, oppressive, or in violation of legal or procedural standards, minority shareholders can contest these decisions, often through judicial review. This right serves as a check on potential abuses of power by the majority and reinforces the principle of fairness within the company. Derivative actions further enhance the ability of minority shareholders to protect their interests and the integrity of the company. Through these actions, minority shareholders can initiate legal proceedings on behalf of the company to address instances of managerial misconduct or breaches of fiduciary duty. By enabling such recourse, derivative actions help ensure that the company's leadership remains accountable and aligned with the best interests of all shareholders. Together, these rights provide minority shareholders with essential tools to participate actively in corporate governance, safeguard their interests, and contribute to the company's overall health and transparency.

For cooperation between shareholders, specific contracts, called shareholders' agreements, can play a decisive role. Shareholders' agreements are private contracts among shareholders that govern their rights, obligations, and relationships within the company. These agreements often address issues not covered in corporate bylaws or the articles of association. Shareholders' agreements embody the principle of freedom of contract (contractual autonomy), allowing parties to customise arrangements to suit their needs. These agreements provide flexibility to address unique concerns of shareholders while offering certainty through binding commitments.

2 Goergen, 2012, p. 13.

Shareholders' agreements often contain key provisions that establish a framework for governance and collaboration among shareholders. One significant aspect is voting arrangements, which specify how shareholders will vote on critical issues, such as the appointment of directors or the approval of major transactions. These arrangements help align decision-making processes with the shared goals of the shareholders. Another essential component is the inclusion of share transfer restrictions, which outline conditions for the sale or transfer of shares. Common clauses include the right of first refusal, which ensures existing shareholders have the opportunity to purchase shares before they are offered to external parties, and drag-along or tag-along rights, which provide mechanisms to protect minority or majority shareholders during transactions involving the sale of the company. Dispute resolution mechanisms also play a vital role, offering structured procedures to address conflicts among shareholders. These mechanisms often involve mediation or arbitration, ensuring disputes are handled efficiently and without escalating to lengthy litigation. Additionally, shareholders' agreements may include provisions for management participation, granting specific shareholders the ability to influence key decisions within the company. Such arrangements ensure that certain stakeholders have a voice in the strategic direction and operational governance of the business. By incorporating these provisions, shareholders' agreements provide clarity, prevent disputes, and foster a collaborative environment aligned with the interests of all parties. Shareholders' agreements complement corporate governance structures by addressing potential conflicts and aligning shareholder expectations.

Finally, the control of legality in general meetings' resolutions is essential to ensure decisions comply with legal requirements, the company's governing documents, and principles of fairness. The theoretical foundation for controlling the legality of corporate resolutions is rooted in several key concepts. Central to this is the rule of law, which mandates that all corporate decisions comply with statutory requirements and the provisions outlined in the company's articles of association. Adherence to these legal frameworks is essential for protecting the interests of stakeholders and ensuring that corporate governance operates within established boundaries. Judicial oversight serves as a critical element, whereby courts act as arbiters in disputes concerning the legality of corporate resolutions. By providing a mechanism for review and enforcement, courts ensure that corporate actions align with legal and ethical standards.

Corporate integrity captures the idea that legality and transparency are not formalities but the operating system of sound governance. Where processes are documented, disclosures are timely and accurate, and decisions track statutory and constitutional requirements, investor confidence deepens, the cost of capital falls, and the credibility of the company's institutions (board, committees, and the general meeting) is sustained. A culture of compliance, supported by internal controls, audit functions, and clear record-keeping, turns these norms into day-to-day practice. Together, these elements form the backbone of a fair and resilient corporate governance framework, ensuring that resolutions are taken in accordance with legal and ethical obligations and can withstand scrutiny by courts, regulators, and the market.

Legality control operates through both ex-ante safeguards and ex-post review. Pre-meeting requirements set the stage for lawful decision-making: proper authority to convene; observance of notice periods; clear agenda and supporting materials; verification of the record date and quorum; and, where relevant, class votes and conflict-management tools (e.g. related-party transaction procedures or “majority-of-the-minority” approvals). Procedural review seeks to clarify whether the meeting was duly convened and conducted, whether participation, voting, proxy use, and minute-taking complied with the statute, articles/bylaws, and any rules of procedure. Material irregularities may warrant adjournment, a re-run, or annulment. Substantive review examines the content of the resolution. While courts typically defer to business judgment or grant a margin of appreciation to shareholder majorities, they intervene where decisions are *ultra vires*, unlawful, tainted by fraud or bad faith, oppressive/unfairly prejudicial to minorities, or in breach of fiduciary duties.

Remedies match the defect. They include declarations of nullity or voidability, injunctions to restrain implementation, orders for corrective action (rectification of the register or minutes, convening a new meeting, and re-tabulation of votes), and, where loss is proven, damages against the company or responsible officers. Derivative claims may be available where the company is the primary victim; interim relief can preserve the status quo pending determination. Standing, limitation periods, and burden of proof are typically specified by statute and must be observed. Collectively, these mechanisms uphold the integrity of corporate decision-making, deter abuses of power, protect shareholder rights, and safeguard the interests of stakeholders, who rely on lawful and transparent governance.

2. The Czech Republic

2.1. *General Introduction*

The status of shareholders in limited liability companies (LLCs) and joint-stock companies (JSCs) has many of the same elements but differs in many ways. The protection of the shareholder’s position in an LLC is primarily based on their right of ‘veto’. They must always agree to the interference with their position (ex-ante protection), while the protection of any shareholder’s position in a JSC is based on the possibility to leave the company in cases of a change in their position as a result of exercising the right of redemption.³

Primarily, in both companies, the status of the shareholders is based on their shares. Both companies can create different types of shares in terms of content (see Chapter 3).

3 The consent of all the shareholders concerned is required only if a decision is taken to merge shares or to change the type of shares into non-voting shares (Article 417(4), BCA). However, this is a very exceptional case.

A special category comprises the rights of qualified shareholders, which are granted by law to a shareholder or group of shareholders if they reach the statutory share in the share capital or voting rights. Qualified shareholders' rights derive from the law or the memorandum or articles of association and are not directly part of a specific shareholding, but belong to a shareholder if, in aggregate, all their shares or together with other shareholders, reaches the proportion of the share capital prescribed by law or the articles of association by law or the articles of association. In other words, they are 'additional' rights that are activated at a certain share size.

2.2. Rights of Shareholders to Participate in Company Management

Shareholders in both companies have the right to participate in the management of the company. This right includes a number of sub-rights. The first is the right to participate in the general meeting. The exercise of this right presupposes that the general meeting is convened in time, that the agenda is set so that the shareholder can prepare for the meeting, and that the place and time of the general meeting are appropriately chosen. The right to participate in the general meeting includes the right to be present at the general meeting in person or together with an advisor or to participate in the general meeting in any other way, if the memorandum or articles of association so permit, or to participate in the general meeting by proxy. The right to participate in the decision-making of the general meeting, if the general meeting is to take decisions outside the meeting, includes the right to be informed in good time of the draft decision of the general meeting and to have the opportunity to vote on it.

Another sub-right is the right to influence the agenda of the general meeting. A qualified shareholder has the right to add additional items to the agenda and to convene a separate general meeting. Each shareholder has the right to make proposals and counterproposals on the items included.

Among the partial rights in the aggregate constituting the right to participate in the management of the company are the right to protest and the right to file a petition with the court to declare the general meeting resolution invalid.

Probably the most important right of a shareholder is the right to vote on motions for resolutions at the general meeting. The current Czech legislation is not based on the principle of "one share-one vote", which means that the share of voting rights should correspond to the share in the share capital. In fact, shares may be created which do not have voting rights attached to them or, on the contrary, shares with multiple votes may be created.

There must be at least one share with voting rights in an LLC. If the decision to change the content of the memorandum of association in an LLC affects the rights and obligations of a shareholder, the consent of the shareholder who owns a non-voting share is also required (Section 171(2), Business Corporations Act (BCA)). In a JSC, voting rights must be attached to shares whose aggregate nominal value amounts to at least 10% of the share capital (Section 276(2), BCA). Where voting by class of shares is required, shareholders also vote with shares without voting rights. For these cases, the articles of association must include a determination of the

number of votes also for non-voting shares (Section 250(2)(e), BCA). Thus, it would be more accurate to speak of shares with limited voting rights.

A distinction is made between preventive and ex-post suspension of voting rights (*sistace hlasovacích práv*).⁴ Preventive suspension of voting rights refers to conflicts of interest. In preventive suspension of voting rights, the shareholder is excluded in advance from the decision-making process. Meanwhile, the ex-post suspension of voting rights refers to the case when the court, upon the motion of the one who demonstrates a legal interest, decides that the shareholder's vote is not taken into account because they have abused the voting right to the detriment of the whole (Section 212(2), Czech CC).

In the case of preventive suspension of voting rights, the shareholder cannot vote or have their votes counted towards the quorum of the general meeting (Sections 173 and 426, BCA), but their other rights are not affected. Even if voting is prohibited, a shareholder has the right to participate in the general meeting, to make motions and countermotions, to request information, to participate in the debate, to protest or, subsequently, to apply to the court for a declaration that the resolution of the general meeting is invalid. The right to vote is not excluded by law for all conflicts of interest between a shareholder and the company, but only for the cases listed by law, which may be extended by the memorandum or articles of association for important reasons. Among the cases of suspension of voting rights set out in the law are:

- a) default in meeting the contribution or, in the case of an LLC, the surcharge obligation to the extent of the default;
- b) deciding on a contribution in kind;
- c) deciding on the waiver of the obligation;
- d) deciding on the removal from office of a director for breach of duty in the performance of their duties;⁵ and
- e) in an LLC, deciding on the exclusion of a shareholder from the company or filing a motion for their exclusion with the court.

If a shareholder is in default in meeting the contribution obligation or surcharge obligation, that shareholder may not vote at all on any matters to the extent of the default. Other cases are directed only at specific matters on which the prohibition on voting applies. In these other cases, the prohibition on the exercise of voting rights applies not only to the shareholder directly concerned (e.g. when a decision is taken on their contribution in kind) but also to the shareholder acting in concert with them, unless they are all acting in concert. Typical examples of partners acting in concert are close persons (e.g. spouses).

⁴ Kovaříček, 2020, pp. 162 et seq.

⁵ The courts have held that if the voting rights of a shareholder who is removed from the office of a director for breach in the performance of their duties are to be eliminated, the reason for the removal must be sufficiently specified in the invitation (Judgment of the Supreme Court in case No. 27 Cdo 1175/2021).

There are discussions about whether the statutory cases of suspension of voting rights can be narrowed by the articles of association compared to the law. J. Dědič suggests that the nature of these rules is not *per se* mandatory and the nature of the prohibition must be examined on a case-by-case basis. He concludes that they would, for example, allow a derogation from the prohibition of voting rights in the event of removal from office for misconduct in the performance of their duties, because there are other ways of terminating the office (a decision on disqualification from office by a court pursuant to Section 63 ff, BCA).⁶ However, this discussion is in the early stages and therefore, it is difficult to predict how it will develop.

A special law may extend the scope of cases of prohibition of exercising voting rights. For example, pursuant to Section 54 of Act no. 37/2021 Sb., on the registration of beneficial owners (*o evidenci skutečných majitelů*), the absence of the registration of the beneficial owner of the company in the register of beneficial owners results in the prohibition of the exercise of voting rights. The BCA itself provides for other cases of prohibition of exercising voting rights (e.g. when acquiring own shares).

It is up to the chairman of the general meeting, as the guardian of legality, to assess whether the voting rights of a shareholder have been suspended in a particular case.⁷ It is their responsibility to assess correctly whether there has been a suspension of voting rights. The High Court in Prague takes the opposite view.⁸ According to the court, the chairman of the general meeting is not entitled to assess whether the conditions for the suspension of voting rights have been fulfilled; only the court can examine whether the conditions have been fulfilled in proceedings for the annulment of the resolution of the general meeting. I agree with J. Flídr that this opinion of the court is not correct. That judicial opinion is contrary to the overall approach to the legal relevance of the announcement of the result of the vote by the chairman of the general meeting. If their assessment of the voting rights system were not legally relevant, then other factual and legal issues for the chairman to assess (e.g. whether a quorum is present at a general meeting, what majority is required in a particular case, whether to vote by class of shares, etc.) could not be legally relevant either, and the entire approach of doctrine and case law to the announcement of the result of a vote as a formalised conclusion to the vote would fall apart. The existing long-standing approach that if the chairman of a general meeting has declared a resolution passed, the presumption of validity applies in respect of that resolution unless one of the persons entitled to vote invokes its invalidity, serves to protect the company and the stability of its internal affairs.

The right to information is one of the core rights of a shareholder. Sufficient information about the company is a prerequisite for the proper exercise of the right to participate in the management of the company in general, as well as its constituent

⁶ See Dědič, 2023.

⁷ Flídr, 2024, pp. 24 et seq.

⁸ Judgment of the High Court in Prague case No. 68/2022.

sub-rights (e.g. the right to vote, and the right to submit proposals and counter-proposals at the general meeting).

There is a significant difference between the right to information of a shareholder in an LLC and a shareholder in a JSC. While a shareholder in an LLC is entitled to extensive information rights and extensive control rights, a shareholder in a JSC is entitled only to a right of explanation, not to general control of the management board. In the two-tier model, a special body, the supervisory board, is created for the purpose of controlling the board of directors. In a one-tier system, the management board also performs this function in relation to itself. A very limited shareholder control right in a JSC can be seen in the special right of qualified shareholders to ask the supervisory board to review the board of directors' action on a particular matter (Section 370, BCA) and in the right to bring a shareholder action (Section 371 ff, BCA).

The difference in the scope of the right to information is clearly visible, for example, in the fact that a shareholder in an LLC has the right in principle to know the company's trade secrets,⁹ whereas a shareholder in a JSC does not.

In an LLC, in addition to the right to information, shareholders have the right to direct control of the managing directors, namely, the right to inspect the company's documents (Section 155 ff, BCA). The scope of the shareholder's right to information in the broad sense (including the right of control) is similar to the regulation for partners in partnerships and silent partners. A shareholder may request only such information as is necessary to obtain a reasonable overview of the company's affairs and to properly exercise their rights. Such information includes, in particular, information on the extent and structure of the company's assets and on major legal transactions which may affect those assets, even if they are protected as trade secrets.¹⁰

Publicly available information is excluded from the range of information provided only for the purpose of reducing the administrative burden on the part of the company, as well as classified information which the company may not provide to the shareholders based on a special law anyway, unless the shareholders meet the legal conditions for obtaining it. Unlike a JSC, a shareholder may exercise the right to information against the managing director at any time, not only at the general meeting.

The Supreme Court has admitted that the memorandum of association of an LLC may, to a certain extent, regulate the right to information differently from the law, so that the range of information provided may be narrowed, expanded or the conditions for providing it may be tightened.¹¹ However, according to the Supreme Court, the right to information cannot be completely withdrawn from the shareholder, nor can it be marginalised in such a way that the shareholder is effectively deprived of the possibility to participate in the management of the company. In my opinion, the modification of the right to information in the memorandum of association is possible but very limited. The right to information can be extended to publicly available information,

9 Judgment of the Supreme Court case No. 29 Cdo 3704/2009.

10 Judgment of the Supreme Court case No. 27 Cdo 368/2019.

11 Judgment of the Supreme Court case No. 27 Cdo 2708/2018.

but not to classified information. The narrowing can only apply to trade secrets. The tightening of the conditions for the provision of information is conceivable to the extent and in the manner provided by law for a JSC. The right to information must remain to the extent that the shareholder can exercise inalienable control rights (e.g. file a shareholder action) and can exercise rights at the general meeting.¹²

The right to information is generally barred by the expiry of 1 month from the date on which the company refuses to provide the requested information without the requesting shareholder having applied to the court (Sections 156(2) and 360(3), BCA). However, the right to specific information is not extinguished in the case of information necessary for the exercise of a shareholder's inalienable control rights and information relating to matters discussed at a general meeting.¹³

A shareholder's request for information does not have to be justified.¹⁴

In the case of an LLC, the following case law conclusions also apply. The period in respect of which a shareholder requests information is not limited to the period for which they are a shareholder. A shareholder may request information from the managing director and inspect the company's documents and check the data contained therein even during the period when they were not yet a shareholder.¹⁵ The failure to disclose the requested information for a prolonged period of time, to provide documents relating to the company's customers and suppliers, and to disclose complete accounts may constitute a reason that the shareholder cannot fairly be required to remain in the company, and therefore, a reason that their participation in the company may be terminated by the court on their application.¹⁶

A shareholder in a JSC has a more limited right to information about the company than a shareholder in an LLC. They can only request information about the company and the persons controlled by it if such information is necessary for the consideration of the matters put on the agenda of the general meeting or which they need for the exercise of their shareholder rights at the general meeting. The company will not provide information if it is classified information, inside information, trade secrets or any other information that could cause harm to the company or its controlled companies (e.g. confidential information). A shareholder may only apply to the court for a refusal to provide information after having unsuccessfully applied to the supervisory board in the case of a JSC with a two-tier model. An unlawful refusal to provide information may also be grounds for a court to declare a resolution of the general meeting invalid.¹⁷

Control rights include the right to bring a shareholder action. In an LLC, every shareholder has the right to bring a shareholder's action (*action ut singuli*, *actio pro socio*, derivative action), unlike in a JSC, in which this right belongs only to a qualified

12 Judgment of the Supreme Court case No. 27 Cdo 1385/2022.

13 Flídr, 2023, p. 88.

14 Judgment of the High Court in Prague case No. 7 Cmo 150/2022.

15 Ibid.

16 Judgment of the Supreme Court case No. 27 Cdo 368/2019.

17 Judgment of the Supreme Court case No. 29 Cdo 1970/2007.

shareholder. The purpose of a shareholder's action (Section 157 and 371 et seq., BCA) is to give the shareholder the option of defending the interests of the company in specified instances when the company itself or its boards are inactive. The essence of a shareholder's action is that the shareholder, as the company's representative, may bring an action on its behalf and at the company's expense against a specified number of persons for specified causes of action and represent the company throughout the proceedings.¹⁸ A shareholder may bring a shareholder's action against a director or an influential person, seeking compensation for damage caused to the company by them. A shareholder may also bring a shareholder's action against another shareholder for the fulfilment of a contribution obligation or, in the case of an LLC only, an action for expulsion of a shareholder from the company by the court for failure to fulfil a contribution obligation. This is a special case of representation of the company. A shareholder has the right to bring an action on behalf of the company only if the company is inactive, and therefore, they are obliged to first inform the competent boards of the company of their intention and allow them to defend the interests of the company.

A qualified shareholder, to whom the law grants special rights, is either an individual shareholder or several shareholders holding a qualified share. A qualified share in an LLC is a share to which contributions amounting to at least 10% of the share capital or to which a 10% share of voting rights is attached (Section 187, BCA). To qualify as a qualified shareholder, it is sufficient to meet one of these two conditions. Their alternative setting pursues the protection of the shareholder as an investor, and therefore, reference is made to the amount of the contribution, and the protection of the shareholder with regard to their actual position in the company, and therefore, reference is made to their voting power. In the context of a JSC, the status of the qualified shareholder depends on the share of the share capital. However, the limits are lower because a higher share capital is assumed. To qualify as a shareholder in a JSC with a share capital of 500,000,000 Czech koruna (CZK) or more, it is sufficient to own shares with an aggregate nominal value of at least 1% of the share capital. With a share capital of more than 100,000,000 CZK, at least 3% of the share capital is required. For share capital up to 100,000,000 CZK, a 5% share of the share capital is required.

In a memorandum or articles of association, the legal limits for qualifying as a shareholder cannot be increased and thus, the degree of protection of the shareholders reduced. However, the memorandum or the articles of association may grant the status of qualified shareholder to a wider range of persons than required by law. The statutory provisions setting the limits are unilaterally mandatory. It is also permissible for the statutory list of special rights belonging to a qualified shareholder to be extended by the memorandum or articles of association. Its narrowing is again excluded.

A qualified shareholder does not have to be the only shareholder, but may be placed in this position by agreement of several shareholders who may jointly exercise

18 Judgment of the Supreme Court case No. 29 Odo 871/2002.

the special rights granted to a qualified shareholder. The special rights attached to the status of qualified shareholder are not only conferred on the minority shareholders but also on the majority shareholder.¹⁹

The differences in the scope of rights of qualified shareholders between an LLC and a JSC are related to their nature. In both companies, a qualified shareholder has the right to request that the managing board convene a general meeting with a set agenda (Sections 187 and 366 et seq., BCA). The consequences of the managing board not granting the request are regulated differently by law. In such a case, a qualified shareholder in an LLC is entitled to convene the general meeting themselves; in a JSC, the qualified shareholder must apply to the court to authorise the convening of the general meeting.

A qualified shareholder also has the special rights indicated below (Sections 187 and 365 et seq., BCA).

The shareholder has the right to ask the managing director to place a matter designated by them on the agenda of the general meeting. In the case of a member of an LLC, this right is not expressly mentioned in the list of rights of a qualified shareholder, unlike a qualified shareholder in a JSC (Section 369, BCA). However, the existence of this right may also be inferred for a qualified shareholder by applying the *a maiori ad minus* argument.. If a qualified shareholder has the right to demand the convening of a general meeting, it follows all the more strongly that they have the right to demand only the addition of an item to the agenda. Adding to the agenda is also more economical than convening a separate general meeting.

A qualified shareholder has the right to request the appointment of an expert by the court to review a report on relations between related parties for serious reasons. A qualified shareholder has the right to have a relationship report, and thus, effectively a review of the performance of directors, reviewed by a person independent of the company's boards. Thanks to this right, the qualified shareholder can obtain the necessary information to decide whether there are grounds for filing a shareholder action against the directors or for other measures (e.g. filing a motion to remove a particular director from office or filing a shareholder action against an influential person, etc.).

A qualified shareholder in a JSC has the right to request the supervisory board to review the actions of the management board.

Meanwhile, in an LLC, any shareholder is entitled to bring a shareholder action, in a JSC only a qualified shareholder is entitled to bring a shareholder action.

Minority shareholders are defined by practice and doctrine as the other shareholders of a company that has a majority shareholder, or those shareholders who are not in the position of a majority shareholder. A minority partner may or may not be a qualified shareholder. If there are only two shareholders with equal shares in a company, the company has neither a majority nor a minority shareholder. If there

are four partners in the company, each with a 25% interest, the company has only minority partners.

For its protection, a minority shareholder may use the blocking minority and other rights that belong either to all shareholders (e.g. the right to information, the right to challenge the validity of a resolution of the general meeting), or only to qualified shareholders (e.g. the right to have an expert review the relationship report pursuant to Section 85, BCA), or in principle only to minority shareholders (the right to require the controlling person to buy out the minority shareholder's share under the conditions set out in Section 89, BCA).

Because the majority shareholder is able to use its votes to determine who will be the managing director or a member of the supervisory board, if one is established, it is essential for the protection of the minority shareholder that such directors maintain loyalty to the company and not to the majority shareholder. This is primarily the purpose of the concept of due diligence. However, if the minority shareholder is to be able to assess whether the directors are performing their duties properly, that is, in the interests of the company, they need sufficient information to do so. In particular, the following obligations ensure sufficient information about the company's functioning in legally qualified situations: the obligation for the company to submit public statements, the obligation to draw up a report on relations between related parties, the obligation to draw up an annual report, possibly certified by an auditor, and the obligation for directors to report conflicts of interest. In addition, a minority shareholder in an LLC may exercise the right of control vested in all shareholders. The minority shareholder may then consider filing a shareholder action based on the information obtained. This set of rules should have a preventive effect on the directors, so that they do not cause damage to the minority shareholders to the benefit of the majority shareholder, and can be used subsequently to remedy the damage.

Special protective rules are aimed at

- a) protecting the shareholder against a qualitative change of the share, that is, against change of their rights and obligations (ex-ante protection is enforced in an LLC, ex-post protection in a JSC),
- b) protecting against change of the shareholding structure (this is ensured, e.g. by a pre-emptive right when increasing the share capital) or
- c) protecting against depreciation of their share (right of redemption in a group of companies).

The protection of the minority shareholder is also ensured by the fact that in certain exceptional situations, they are allowed to terminate their participation in the company if it is not fair to require them to remain. These cases include the right of a shareholder to demand that the controlling person buy their share at a reasonable price (sell out) if the position of the shareholder has deteriorated significantly as a result of the influence of the controlling person on the company. The termination of a shareholder's participation in an LLC also occurs if the shareholder exercises the

right to withdraw from the company. A shareholder has the right to withdraw from the company if:

- a) the general meeting has decided to change the predominant nature of the company's business (Section 202, BCA),
- b) the general meeting resolves to extend the duration of the company (Section 202, BCA),
- c) the competent body of the company has not given its consent to the transfer of the share to another shareholder without a relevant reason or in cases in which it is obliged to give its consent under the articles of association (Section 207, BCA), or
- d) the general meeting has decided to impose a surcharge (Section 164, BCA).

In all these cases, the right to withdraw from the company can arise for the minority shareholder only on condition that they did not vote for the decisions of the general meeting because the majority shareholder either managed to force the adoption of the above decisions of the general meeting by the power of their votes or could have prevented them by the power of their votes. For the sake of completeness, I note that the right to withdraw from an LLC is supplemented by the right of a shareholder to request the court to dissolve their participation in the company.

2.3. The General Meeting

The general meeting is a permanent body that meets for deliberations or takes decisions outside the general meeting. That the general meeting may meet only once or twice a year does not change this. The general meeting is composed of all shareholders, regardless of whether they are present at the meeting itself or not.

The general meeting has primarily an internal function. Exceptionally, its decisions also have external effects (e.g. approval of a conversion project, and election or removal of a director). We distinguish between statutory competence and competence arising from the memorandum or articles of association. The legal competence may be extended by the memorandum or articles of association or, exceptionally, narrowed (this is subject to discussion).

The basic definition of the competences of the general meeting is contained in Sections 190(2) and 421(2) of the BCA. However, this is not an exhaustive list. Other cases are provided for directly by the BCA, such as approval of a damage settlement agreement pursuant to Section 53(3) of the BCA – the decision to prohibit the conclusion of a contract in the event of a conflict of interest of a director (Section 56(2), BCA), the approval of a contract for the performance of duties (Section 59(2), BCA) – or other laws (e.g. Section 17(1), Act no. 93/2009 Sb., on auditors (*o auditorech*) entrusts the appointment of the auditor to the general meeting).

The competences of the general meeting may also be extended by the memorandum or articles of association. The limit is the prohibition on interfering in the business management of the managing director and the prohibition to interfere in the controlling activities of the supervisory board, if established. However, this does

not preclude the general meeting from deciding on the principles of business management or control activities. Nor can it exclude the narrowing of the powers of the general meeting provided for by law. However, it is always necessary to consider what the purpose of including a particular matter in the statutory list is and whether it is consistent with corporate law for another body to decide on the matter. As an example of a permissible narrowing of the statutory competence, if a supervisory board is established, the election and dismissal of the managing director and the approval of their performance contract may be entrusted to its competence. In the case of both companies, it is conceivable that the general meeting will not decide to assume the obligations taken on behalf of the company before its incorporation and that the memorandum or articles of association will entrust this matter to the directors.

Unlike the general meeting of a JSC, the general meeting of an LLC may take over matters that are not entrusted to it either by law or by the memorandum of association. In this *ad hoc* extension of its competences, the general meeting of an LLC is limited by the fact that

- a) it must deal with a matter that falls within the competence of another body of the company (i.e. it cannot, e.g. reserve to itself the amendment of the content of the memorandum of association if the memorandum of association can only be amended by agreement of all the shareholders, as this matter does not fall within the competence of any of the bodies of the company) and
- b) it must not violate the prohibition on giving instructions to the managing director concerning business management or the prohibition on interfering with the supervisory board's control activities.

The second fundamental difference in the competence of the general meeting of an LLC and a JSC is that only the general meeting of a JSC can decide by law on the amendment of the articles of association and the dissolution of the company with liquidation. The general meeting of an LLC can only decide on these matters if the memorandum of association so provide

Matters falling within the competence of the general meeting can be divided as follows:

- a) Matters regularly decided by the general meeting. This category includes:
 - I) regular decisions on matters relating to management, such as approving the annual accounts, deciding on the distribution of profits or the payment of losses; and
 - II) regular decisions on personnel issues, such as the election and dismissal of directors, appointment of the auditor, approval of the granting and dismissal of proxies, approval of performance contracts, etc.
- b) Making decisions on fundamental issues of the company. This category includes:
 - I) deciding on matters relating to the existence or basic structure of the company, such as decisions to amend the articles of association, to increase or decrease the share capital, to convert the company or to dissolve it; and

- II) decisions on significant property dispositions, such as approval of the transfer or pledge of a business enterprise, approval of a silent partnership agreement.
- III) other cases provided for by law or the memorandum or articles of association. This category includes other cases in which the law entrusts certain matters to the competence of the general meeting (e.g. decision on the exclusion of a shareholder).

The general meeting decides at a meeting in the presence or other participation of the shareholders or outside the meeting (*per rollam*). If the general meeting is in session, it shall take decisions in the presence of the shareholders or their representatives (general meeting with compulsory attendance). If the articles of association so allow, such decision-making may also be attended by shareholders who are not present in person or by their representatives, but only ‘virtually’ by technical means (typically videoconferencing). Distance participation at the general meeting also includes correspondence voting before the general meeting. A special case is the additional consent of a shareholder in an LLC to a decision of the general meeting, for the adoption of which their consent is necessary (Section 174, BCA).

The law requires that a general meeting be held at least once a year, within 6 months of the end of the previous financial year. It is a general meeting with a regular agenda. In particular, the annual accounts and the decision on the distribution of profits or the payment of losses are discussed at this general meeting. The memorandum or articles of association may provide that the general meeting is to meet more frequently (e.g. two or four times a year) and specify the issues to be dealt with (approval of the financial plan, etc.).

Managing directors are also obliged to convene a general meeting if the company’s interests require it, for example, if the company is threatened with bankruptcy, the company’s objective is threatened, or the position of the managing director becomes vacant. Managing directors are also obliged to convene a general meeting if a qualified shareholder requests it. In other cases, it is up to the discretion of the managing director whether to convene a general meeting (e.g. they want to propose the sale of a substantial part of the plant to the general meeting). The right to convene a general meeting may also be linked by the memorandum or the articles of association to certain types of shares.

The institute of a substitute general meeting is regulated in the law of JSCs. The substitute general meeting shall be convened without undue delay after a duly convened general meeting has not been held because a quorum was not present. The agenda of the substitute general meeting shall be the same as that of the general meeting not held. The minimum legal quorum requirements shall not apply unless the articles of association provide otherwise. I believe that it is permissible for the memorandum of association to introduce it in an LLC.

The general meeting shall be convened by written invitation. Nothing may be discussed that was not stated in the invitation unless all (not only present) members

agree to it. A shareholder may waive the right to have a general meeting convened in a timely and orderly manner. This is very practical, for example, if the shareholders find that the managing director is in material breach of their duties and all shareholders agree that they should be removed from office immediately.

The person of the chairman of the general meeting is important for the successful conduct of the general meeting. In addition to the chairman, the position of recorder is also filled, and in the case of a JSC, the position of scrutineers and verifiers of the minutes (however, this is not always strictly necessary).

The general meeting shall decide by resolution. Most doctrine and case law is inclined to conclude that a resolution is a juridical act.²⁰ However, the law opts for a special regulation to assess its validity; the general regulation of juridical acts does not apply (Section 45(4), BCA). A resolution of a general meeting may suffer from a number of defects. Depending on the severity of the defects, two main consequences are distinguished, namely invalidity nullity (Sections 191 et seq. and 428 et seq., BCA in connection to Section 258 et seq., Czech CC) and apparent nullity of the resolution of the general meeting (Section 45(13–), BCA in connection with Section 245, Czech CC). Under the case of nullity, I also include the absence of legal effects of the resolution of the general meeting (Sections 34 and 40, BCA), although these cases are distinguished by some authors.²¹ However, the consequences are the same as in the case of apparent nullity, therefore, in my opinion, there is no reason to make a distinction.

The basic rule is that defects in a resolution of a general meeting can only be grounds for invalidity (*neplatnost*). Exceptionally, defects in the resolution of the general meeting give rise to nullity (*zdanlivost*) (the law uses the phrase ‘the resolution shall be regarded as if it had not been adopted’).

Less serious defects invalidate the resolution. The invalidity of a resolution can only be declared by a court in a special court proceeding; the invalidity of a resolution of a general meeting cannot be assessed in any other proceeding.²² The court decision is constitutive with *ex tunc* effects.²³ Unless and until the court declares the resolution invalid, it shall be deemed valid even if it is defective.²⁴ If the court is to declare the resolution invalid, it must subject the matter to the following test: Is the resolution contrary to law, memorandum or articles of association or good morals? The contradiction may be in terms of content (e.g. the articles of association require that a person over 30 years of age be elected as a director and a younger person is elected) or in terms of form (the rules for convening the general meeting were not observed, the shareholder was not provided with the necessary information they requested, the chairman of the general meeting declared that the general meeting approved the resolution even though the necessary majority did not vote in favour of it, etc.).

20 Judgment of the Supreme Court case No. 27 Cdo 445/2018.

21 Lavický et al., 2022, p. 954.

22 Judgment of the Supreme Court case No. 27 Cdo 1104/2016.

23 Ruban, 2017; Judgment of the Supreme Court case No. 27 Cdo 3420/2017.

24 Judgments of the Supreme Court case Nos. 27 Cdo 3796/2017, 27 Cdo 1407/2019, 27 Cdo 2805/2021.

The resolution may be invalidated (avoided) in the following circumstances:

- a) The invalidity was invoked by one of the entitled persons (a shareholder, a director, a liquidator).
- b) The application for invalidity was filed with the court within the time limit. The subjective time limit is 3 months, the objective time limit is 1 year. It is a substantive and preclusive period (Section 259 Czech CC).
- c) If a shareholder submits an application, a reasoned objection (protest) (including by another shareholder) must have been raised at the general meeting at the latest.²⁵ The shareholder is bound by the grounds set out in the petition to the court and the court is bound by the petition.²⁶ A reasoned protest is not required in the case of a compelling reason; however, this does not include, for example, every absence of a shareholder from a general meeting, but only those which are excusable (e.g. illness).
- d) If the court finds that the aforementioned conditions are met, it shall further examine whether the violation of the law, the articles of association or good morals had serious consequences, whether it is in the company's interest not to declare the resolution invalid and whether the declaration of invalidity would not substantially affect the rights of third parties acquired in good faith (Section 260 Czech CC). Only if the court assesses that the violation of the law, the articles of association or good morals has had serious consequences, leaving the resolution in force would not serve the company's interests and the rights of third parties are not substantially affected, the court will declare the resolution invalid. Regardless of whether the court declares the resolution invalid or not, it may decide to award the shareholder appropriate compensation if the company has violated their rights as a shareholder in a serious manner (Section 261 Czech CC).

Null (non-existent) resolutions of a general meeting are those to which the fiction of non-acceptance applies under 45(1)(2) of the BCA or which the law provides have no legal effect (e.g., the additional non-recording of a notarial deed under Section 45(3), BCA).

The null resolutions of the general meeting include:

- a) decisions that turn out not to have been voted on by the general meeting (although they are listed as adopted in the minutes of the general meeting), nor has the chairman of the general meeting announced the result of the vote, and therefore, there is no such decision at all.²⁷
- b) decisions falling outside the competence (Section 45(1) in connection to Section 245, Czech CC).²⁸

²⁵ Judgment of the Supreme Court case No. 27 Cdo 927/2020.

²⁶ Ibid.

²⁷ Judgment of the Supreme Court case No. 27 Cdo 2586/2018.

²⁸ Judgments of the Supreme Court cases Nos. 29 Odo 1138/2005 and 29 Odo 1060/2006.

- c) a decision on a change to the articles of association contrary to a mandatory provision (Section 45(1) in connection to Section 245, Czech CC).²⁹
- d) a decision to appoint a person who does not meet the prerequisites for the performance of their function (Section 155(1), Czech CC).
- e) decisions vague or unintelligible (Section 45(2), BCA).
- f) a decision binding an impossible performance (Section 45(2), BCA). Impossibility means not only factual impossibility but also legal impossibility. Examples of legal impossibility are decisions that are contrary to public policy, for example, taken in violation of the Banking Act³⁰ or in violation of a restraining order in a criminal proceeding.³¹
- g) a decision of a person claiming to be a sole shareholder who is not a sole shareholder, or a decision of a meeting of persons who are not shareholders at all, and therefore, cannot be regarded as a defectively convened general meeting.³²
- h) a decision which has not been notarised even within the additional period pursuant to Section 45(3) of the BCA.
- i) other statutory cases (e.g. distribution of profits in violation of the balance sheet tests under Sections 34(2) or 40(1)(2), BCA).

The fact that the resolution of the general meeting is null, that is, without legal effect, must be taken into account by the courts as a matter of course in any legal proceedings. The absence of a resolution may be considered as a preliminary question in any proceedings, including registration proceedings.³³ The non-existence of a resolution is decided directly by a judicial pronouncement, either in the proceedings on the invalidity of the resolution of the general meeting (Section 90 of Act no. 292/2013 Sb., on Special Judicial Proceedings) or in the proceedings to determine whether the resolution exists (does not exist) (Section 80 of Act no. 99/1963 Sb., on the Code of Civil Procedure). According to Section 27 of Act no. 292/2013 Sb., on Special Court Proceedings, a final judgment by which the court has decided that the resolution of the general meeting of the company is not in question is binding on everyone, including the court in the proceedings to amend the entry in the Commercial Register, which cannot re-examine this issue (as a preliminary issue).³⁴

The review of the non-existence of the resolution is not, on the face of it, limited in time, although the legal interest in establishing the apparent validity of the order necessarily diminishes over time. An application for a declaration of the *prima facie* validity of a decision is a declaratory application within the meaning of Section 80 of

29 Judgment of the Supreme Court case No. 27 Cdo 4460/2018.

30 Judgment of the Supreme Court case No. 27 Cdo 1141/2020.

31 Judgment of the Supreme Court case No. 27 Cdo 3903/2017.

32 Ruban, 2017, p. 305; Judgments of the Supreme Court cases Nos. 27 Cdo 2816/2020, 27 Cdo 3315/2018, 27 Cdo 4500/2018, 27 Cdo 2798/2020.

33 Judgment of the Supreme Court case No. 29 Cdo 1104/2016.

34 Judgment of the Supreme Court case No. 27 Cdo 3451/2020.

Act no. 99/1963 Sb., Code of Civil Procedure, which requires the existence of an urgent legal interest in the declaration sought; and the urgent legal interest diminishes significantly over time.³⁵

2.4 Shareholders' Agreements

Shareholders' agreements are contracts concluded between all or some shareholders, the subject of which is an obligation related to their participation in the company, in particular an obligation to behave in a certain way in the exercise of rights and obligations arising from participation in the company. The obligation under a shareholders' agreement is only of a contractual nature, not of a corporate nature. This is reflected not only in their different effects, but also in their different interpretations. Obligations under shareholders' agreements are not part of the shareholding, and therefore, do not pass on to the acquirer of the shareholding without further consideration.

The BCA does not provide any explicit rules for the conclusion of shareholders' agreements. It indirectly provides for the existence of shareholders' agreements, as it regulates, for example, the actions of shareholders in concert when exercising voting rights. The limit for the content of shareholders' agreements is, thus, the general correctives for the validity of legal actions, in particular, good morals and public order.

Shareholders' agreements are characterised by their parallel existence alongside the memorandum or the articles of association.³⁶ Czech and Slovak researchers suggest that the reason for such a conclusion may be the rigidity or insufficiency of the legal regulation.³⁷ However, the reason could also be that shareholders want certain agreements to remain hidden from the public, even if the legal regulation would not prevent them from being included with corporate effects in the articles of association.

Usually, shareholders' agreements focus on the exercise of voting rights in certain cases (e.g. election or removal of directors) or the regulation of rights and obligations in the event of deadlocks or other cases allowing for the termination of participation in the company (e.g. negotiation of mutual option rights to buy back shares).

The courts have not had many opportunities to assess the compliance of shareholders' agreements with the law, as most shareholders' agreements contain an arbitration clause and disputes arising from them do not reach the general courts. It is worth mentioning a single case pending before the Czech courts.

In the shareholders' agreement, which has come before the Czech courts for review, it was agreed, among other things, that the board of directors of the JSC would be composed of three members, with B as a shareholder entitled to nominate two members and the remaining shareholders one member. The chairman of the board of directors shall always be a member nominated by company B. It was further agreed in the shareholders' agreement that the parties to the shareholders' agreement were

³⁵ Cileček and Ruban, 2017, p. 53; Judgment of the Supreme Court case No. 27 Cdo 2805/2021.

³⁶ Csach and Havel, 2017, p. 273.

³⁷ Ibid.

obliged to ensure that the members of the board of directors nominated by them would agree, if necessary, to enter into an agreement with the shareholders to grant a loan to the company on the terms agreed in the shareholders' agreement. This obligation was reinforced by a contractual penalty.

The courts were considering the validity of a shareholders' agreement on the financing of a company because a dispute had come before them over the payment of a contractual penalty for breach of a duty to ensure certain conduct by directors in this matter.³⁸ The Regional Court and High Court concluded that the decision as to how the company is to be financed is part of the management of the company's business, that is, its business management, which is, without more, for the board of directors to ensure. The courts found that the shareholders' agreement's provisions concerning the financing of the company were invalid because the law prohibits anyone (including shareholders) from giving instructions to the board of directors concerning the business management of the company.

The Supreme Court overturned the decision of the High Court in Prague.³⁹ It held that the conclusion of the court was premature, because it did not subject the provisions of the shareholders' agreement to an interpretation 'in the spirit of the principle of priority of interpretation which does not lead to the invalidity of the juridical act, and did not consider whether the contested article of the shareholders' agreement could be assessed as a commitment to directing or – as the procedural submissions of all the parties to the proceedings seem to indicate – as a "guarantee of the result".'

The Supreme Court further stated that even if it was an instruction, it would be necessary to distinguish whether the instruction was really about business management or strategic management. Operational financing belongs to business management, whereas, for example, acquisition financing belongs to strategic management, which is not covered by the statutory prohibition on giving instructions.

Thus, it can be concluded that the Supreme Court regards such an agreement of shareholders as invalid, by which they undertook to give instructions to the directors on matters falling within the scope of business management and at the same time undertook to ensure that those instructions would be respected by the directors without further delay (notwithstanding the duty of the directors to act with due care), as it would contradict the meaning and purpose of the statutory prohibition on giving instructions in business management and would be void for initial (legal) impossibility of performance.

However, the Supreme Court has acknowledged that shareholders may agree to intercede with directors for a particular resolution of a particular matter within the scope of business management. In other words, by putting their views or arguments before the board (its members), which, although the board shall not be bound by, may be taken into account in its decision-making. Similarly, the Supreme Court has accepted that it is possible for shareholders to commit to a particular outcome,

38 Judgment of the High Court in Prague case No. 14 Cmo 23/2018.

39 Judgment of the Supreme Court case No. 27 Cdo 1873/2019.

for example, that the board of directors make a particular decision on a particular matter. In such a case, the commitment is not one of intercession, but of assuming responsibility for a particular outcome. Even such an arrangement cannot automatically be considered contrary to law. It is not a commitment to act (conduct) contrary to the law (here, to give instructions to business management), but a 'guarantee' of a certain (agreed) result, which may be secured by a contractual penalty.

3. Croatia

3.1. Decision-Making in General Meetings

Persons who are considered shareholders have acquired this status based on their contribution to the company. Shareholders act in the company through a special body, through which they are primarily authorised to make the most important decisions for the status and fate of the company, such as those on changing the company's business and economic purpose, on status changes, as well as those on the termination of the company. As a rule, they do not have direct authority to manage affairs and management in the company, and they can exercise their management rights only in the body of the company in which they operate. That body is the general meeting. The reason for such a solution is that the shareholders are not necessarily experts in the management of the company, and there are often and usually a large number of them, making participation by all of them in the management of the company's affairs not only impractical but almost impossible.

As far as shareholders are concerned, the principle of equality of shareholders is a fundamental rule in public limited companies (PLCs). This means that shareholders, under equal conditions, must have equal rights and obligations in a JSC. The position of the shareholder must not be influenced by the circumstances of who the shareholder is and what his personal characteristics are, but must be determined by the amount of the shareholder's stake in the company. The body of the JSC in which the shareholders act is the general meeting. As a rule, all shareholders of the company have the right to participate in the general meeting, even those who are holders of shares without the right to vote, although they cannot participate in the decision-making of the general meeting.

The participation of shareholders in the general meeting, as well as the exercise of the voting rights of those who have them, can still be conditioned if so provided by the statute. The law allows that the use of these rights (participation in the general meeting, i.e. voting) is subject to the condition that shareholders register their participation in the general meeting in advance, which is fulfilled if the application reaches the company at the address specified in the invitation no later than 6 days before the general meeting is held (Article 279, paragraphs 2–4 CA). According to Article 290 of the CA, shareholder resolutions in general meetings of shareholders require a simple majority of the votes polled unless the law or statute requires a greater majority or other requirements exist. The general meeting can only decide on matters expressly

provided for by the law and the statute of the company (Article 275, paragraph 1, CA). These are, in particular: a) the election and dismissal of members of the supervisory or management board; b) the appointment of the company's auditors; c) the adoption of a decision on the dismissal of members of the management board and the supervisory board; d) the adoption of annual financial reports, but only in cases in which this possibility is provided by law; e) policy and reports on benefits for members of the management board and members of the supervisory board, that is, executive directors and members of the board of directors of companies whose shares are listed on the regulated market for trading; f) use of profits, amendments to the statutes, listing of company shares on the regulated market for trading and withdrawal of shares from that listing; g) increase and decrease of share capital; and h) termination of the company.

Although the shareholders' meeting is a mandatory body of the LLC, members of the company may make decisions within their competence outside the meeting (assembly) in two cases:

- a) if all shareholders agree in writing on the decision to be made (therefore, unanimity is required for the decision to be made); and
- b) if all shareholders declare in writing that they agree to vote on the decision.

Matters falling within the competence of the shareholders' meeting are determined by law and include, for example (Article 441, paragraph 1, CA):

- a) deciding on the company's financial reports, management reports on the state of the company, if the company is required to prepare them, the use of realised profits and the covering of losses;
- b) deciding on the request for contribution payments;
- c) deciding on the return of additional payments to shareholders;
- d) appointment and recall of members of boards of directors;
- e) election and recall of supervisory board members, if the company has such a board;
- f) division and withdrawal of business contributions (shares);
- g) deciding on measures for examination and supervision of company management;
- h) amendment of the memorandum of association;
- i) setting claims for damages that the company has against members of the boards of directors and the supervisory board and deputy members of the management board; and
- j) appointment of company representatives in court proceedings if the company cannot be represented by members of the boards of directors or the supervisory board.

These provisions are partly of a dispositive nature, which enables the internal structure of the company to be more easily adapted to the needs of each individual case. The memorandum of association can expand or reduce the scope of the shareholders

meeting powers, but some powers cannot be removed. In view of these rules, as well as the possibility of members of the company influencing the board of directors in the management of the company, it can be said that the rules on the division of responsibilities between the bodies of an LLC are much less strict than those of a JSC.⁴⁰

Each share gives its holder the right to vote in the general meeting of the company. The CA does not allow plural voting, that is, it prohibits the issuance of shares that give different voting rights for the same amount of the share capital that belongs to them (Article 169, paragraphs 1 and 3, CA). At the same time, this provision respects the principle that shareholders have an equal position in the company under equal conditions (Article 211, CA), because the number of votes from a share must correspond to its nominal value, that is, the amount of the share capital that belongs to it (Article 291, paragraph 1, CA). Therefore, if a shareholder contributed a larger amount to the company's share capital, he should also have a greater voting right. A shareholder's right to vote can be limited by statute, stipulating that no shareholder can have more than a certain number of votes or more than a certain percentage of votes (Article 291, paragraph 1, CA).

The exclusion of the right to vote should be distinguished from the restriction of the voting rights. While the restriction must be expressly provided for by law, the rules on exclusion are provided for by law (Article 293, CA). They determine that no one can exercise the right to vote for himself or another when it is decided to give him a discharge, to release him from liability or from the claims which the company has against him. In practice, this means that a member of the management board or the supervisory board who is also a shareholder of the company would not have the right to vote on whether to grant discharge. Such persons would also not have the right to vote when the general meeting decides whether to exonerate them from responsibility for the damage caused to the company by their actions.

The right to vote is acquired, as a rule, by full payment of the share. The statute, however, may stipulate that the right to one vote is already acquired when a certain minimum contribution amount is paid for the share. This means that, for example, one-quarter of the nominal value of the share, which is paid in cash, would already give the shareholder the right to one vote. In this case, a greater number of votes is acquired in proportion to the size of the paid stake, so the person who paid half of the nominal value of the share would have two votes, and the person who paid the full amount would have four votes. The provisions of the statute on the calculation of voting rights before the full payment of contributions must not favour individual shareholders, that is, it must not be possible to determine that only certain shareholders acquire voting rights before their contributions have been paid in full (Article 291, CA).

The right to vote in the general meeting can also be exercised through a proxy. The proxy establishes their authority vis-à-vis the company by presenting a written power of attorney, which is handed over to the company for safekeeping.

40 Petrović and Ceronja, 2019, p. 240.

The intermediary is obliged to clearly inform the shareholder each year that the power of attorney can be revoked at any time and that the proxy can be changed (Article 292, paragraph 1, CA).

In business practice, shares are sometimes registered in the name of an intermediary instead of the shareholder who actually owns them. In this case, the intermediary can only exercise the right to vote in respect of registered shares which do not belong to him, but which are registered in his name in the share register, based on the power of attorney granted to him. The rules applicable to the granting of proxies also apply in cases in which the intermediary is not registered as a shareholder in the share register.

When it comes to decision-making in the general meeting, the concept of a quorum should be distinguished from the majority required for decisions to be taken. A quorum is generally a prescribed number of members of a collegial body who must be present at the meeting of that body for it to function and take valid decisions. In a specific case, a quorum means a certain number of the total number of shareholders, that is, shareholders representing a certain proportion of the share capital in relation to the total amount, whose presence is required for the general meeting to be held and for valid resolutions to be taken. The law does not prescribe a quorum (Article 289, CA). This means that a duly convened general meeting can act and take decisions in the manner described above, regardless of the number of shareholders present, that is, how much of the share capital they represent. This rule prevents certain shareholders from repeatedly failing to attend the meeting in order to prevent the adoption of a resolution. However, the quorum can also be determined by the articles of association, and thus, it ultimately depends on the will of the shareholders of each company. If the quorum is determined by the articles of association and there is no quorum at the general meeting convened, the next general meeting may validly pass resolutions regardless of whether the quorum requirement is met, unless the articles of association provide for a special quorum.

The CA provides for different majorities for decisions to be taken at the general meeting, with a simple majority being the basic rule (Article 290, CA). This means that for a resolution to be adopted, it is sufficient for there to be more votes in favour than against. At the same time, abstentions are not counted and are considered not to have been cast. The law allows the statutes to modify the simple majority rule to require a larger majority or the fulfilment of additional conditions, such as a certain quorum. The law requires a qualified majority for the adoption of certain resolutions. Thus, for example, a majority of at least three-quarters of the share capital represented at the general meeting of the company when making a resolution is required when deciding on the amendment of the statutes (Article 301, paragraph 2, CA), when increasing the share capital (Article 304, paragraph 1, Article 314, paragraph 1, Article 323, paragraph 2, and Article 328, paragraph 2, CA) and reduction of share capital (Article 342, paragraph 1, Article 349, paragraph 3, and Article 352, paragraph 2, CA), exclusion or limitation of the right of priority when registering new shares (Article 308, paragraph 4, CA), termination of the company (Article 367, paragraph 1, CA), etc.

In the mentioned cases, the majority required for the resolution is determined according to the share capital.

A majority of three-quarters of the votes cast is required for the adoption of a resolution to recall the members of the supervisory board (Article 259, paragraph 1, CA) and for the adoption of a resolution by which the general meeting gives approval for the management to undertake tasks for which the supervisory board refused its consent which the administration had to request according to the statute (Article 263, paragraph 5, CA). In the aforementioned cases, when the resolution is made by a qualified majority, the statute may, as a rule, stipulate that a different majority is required for the adoption of some resolutions of the general meeting or the satisfaction of additional conditions may be required. As a rule, the statute can require only that a greater majority than that prescribed by the CA is absolutely necessary for the adoption of a decision. However, when it comes to the resolution to increase the share capital by contributions (Article 304, paragraph 1, CA), it is permissible for the statute to provide for the adoption of a resolution with a majority smaller than that prescribed by the CA (three-quarters of the share capital represented at the general meeting when making a decision). However, this second majority must certainly be at least two-thirds of the share capital represented at the general meeting. The simple majority rule is always applied if the CA or the statute does not specify another majority.

All of the above is particularly important in cases in which various intermediaries (custodians, advisers, etc.) are interposed between the shareholders and the company, whose task is to look after the interests of the shareholders in the exercise of their rights deriving from the shares. Article 297a–297f of the CA details the rights and obligations of the company, shareholders, and intermediaries when transferring information important for exercising rights from shares. If the company does not transmit the information concerning the convening of the general meeting or the rights to convert convertible bonds into shares, the right of priority in the subscription of new shares, the payment, for example, in connection with the reduction of the share capital by withdrawal of shares, the subscription of new shares in the event of an increase of the share capital, and the choice of the direct payment of dividends to the shareholders, it must transmit this information electronically to the intermediaries so that they can transmit it to the shareholders. In addition, each intermediary in the chain is obliged to immediately transmit the information received from another intermediary or from the company to the next intermediary in the chain, unless it knows that the company has already transmitted this information to the next intermediary. This also applies to information from a company whose shares are listed on a regulated market and whose registered office is in another EU Member State (Article 297a paragraphs 1 and 3, CA). Intermediaries are also subject to certain information requirements. Thus, they are obliged to transmit the information given to them by the shareholder about exercising their rights from the shares directly to the company or intermediary in the chain without delay. Furthermore, the intermediary in the chain is obliged to transmit this information without delay to the next intermediary until

the information reaches the company. The intermediary is obliged to immediately provide the shareholder, upon request, with a written confirmation of his shares or to forward it to the company (Article 297c, CA).

3.2. Shareholders' Agreements

The Companies Act does not explicitly mention shareholders' agreements, but they are allowed in JSCs and LLCs. As a means of coordinated action, the shareholders' agreement provides contracting parties with increased protection in relation to the autonomous law of the company itself (statutes, rules of procedure on the work of the management or supervisory board, etc.) or the dispositive provisions of heteronomous law. The content of the provisions of the shareholders' agreement must be harmonised with public order. Nullity is a sanction in case of violation of some compulsory legal provisions. As a rule, the shareholders' agreement is a confidential and unique document that the contracting parties do not want to share with other shareholders who are not contracting parties, nor with the public. As a reflection of the contracting parties' economic and commercial goals, the contract reflects their will for coordinated action at the company's general meeting. If a contracting party does not respect the contract, that is, does not perform the assumed obligations or does not act in accordance with its provisions, the other contracting party or contracting parties can request legal protection before the specialised Commercial Court, and if the contracting parties exclude regular court protection with an arbitration clause, legal protection can be obtained before by the agreed arbitration court. The shareholders' agreement must not encroach on the provisions of the statute, nor can it impose any obligation on shareholders who are not contracting parties, future shareholders or the company, and it is not allowed to restrict or violate one's membership right in the company. It must not encroach on the imperative provision of Article 169 of the CA that each share under equal conditions gives equal voting rights. The members of both capital companies can sign contracts between themselves by which they commit themselves to vote at the company's meeting. The aim of such contracts may be to achieve the closure of the company by agreements on decision-making when the shareholders belong to a certain circle of persons. The shareholders thereby commit themselves on a mandatory legal basis and can freely contract anything that is not contrary to the general limitation of the autonomy of the contracting parties. The contract is effective only among the shareholders who concluded it and does not impact other persons, or companies, and transfer of the share does not occur to a new shareholder, unless it is done by the rules of law of obligations.

3.3. Control of Legality of General Meeting Resolutions

Decisions of the general meeting can be invalidated, by being declared null or voidable. Which of the two forms of invalidity applies depends on the ground of invalidity. The reasons for such consequences are determined by the law. In principle, it can be said that nullity is a more severe form of invalidity.

Null decisions of the general meeting do not produce any legal effect. Nullity emerges on the basis of the law, already at the moment of making the decision. The court should not enter null and voidable decisions in the court register, because nullity is considered *ex officio*. In addition, any interested person can invoke nullity. This can also be seen as a lawsuit to declare the decision null or voided. The court ruling only establishes that some decision of the general meeting was null or is voided from the beginning. Decisions of the general meeting that are voidable can be challenged by an action. If the authorised person succeeds in bringing the case, the decision shall be declared as nulled. This judgment has an *erga omnes* effect. A decision that has been declared as nulled owing to a lawsuit is considered as null from the outset (*ex tunc*). Depending on whether the decision of the general meeting is null or voidable, the circle of persons with standing for a lawsuit differs. Consequently, the time limits in which lawsuits can be filed (owing to certain reasons of nullity or voidability of the decisions of the general meeting) are also different. Reasons for the invalidity of the decisions of the general meeting are, for example, failures in convening it, violation of the rules on the operation of the general meeting and decision-making and the announcement of the decisions made, failures in connection with the minutes of the general meeting, decisions contrary to morals and violations of regulations on the protection of company creditors.

The rules on nullity and voidability of decisions of the general meeting are contained in Articles 355–366 of the CA.

The decisions of the general meeting are null in the following cases:

- a) if the decision was made at a general meeting that was not convened by the authorised persons to convene the general meeting or if they did not make a valid decision on convening it (Article 277, paragraph 2, CA);
- b) if the decision was made at the general meeting but during the convening process the provisions of the CA on the content of the decision on convening the general meeting and the invitation to the general meeting, were not taken into consideration (Article 277, paragraph 3, CA);
- c) if the decision was made at the general meeting but the convening notice was not published in the company's official gazette, or sent by registered letter if the shareholders are known to the company by their names (Article 277, paragraph 6, CA);
- d) if the decision of the general meeting is not specified in the minutes composed by a notary public, or if the notary public does not sign the minutes or if the minutes do not contain the place and time of the general meeting, the name and surname of the notary public, the method and result of the voting process and the president's declarations of the decisions made (Article 286, paragraphs 1, 2, and 4, CA);
- e) if the decision is not in accordance with the aim of the company or if its content constitutes a violation of regulations that exclusively or predominantly protect the interests of the company's creditors or were adopted to protect the public interest (Article 355, item 3, CA);

- f) if the decision of the general meeting is contrary to public morals (Article 355, item 4, CA);
- g) if it was declared null or voided by a final judgment issued on the occasion of a lawsuit to challenge the decision (Article 355, item 5, CA);
- h) the decision of the general meeting of the company that is contrary to the decision on the conditional increase of the company's share capital (Article 313, paragraph 4, CA);
- i) the decision on participation in the profit of new shares already in the business year that expires before the decision on the increase of the share capital and the decision on the use of the profit from the previous year when increasing the share capital from the company's funds, if they are not entered in the court register within 3 months of having been adopted (Article 338, paragraph 2, CA);
- j) decisions on the reduction and increase of the share capital when it is reduced below the lowest prescribed amount, if they are not entered in the court register within 6 months of the adoption of the decisions (Article 348, paragraph 2, CA);
- k) the decision of the general meeting amending the annual financial report examined by the auditor and the decision on the use of profits if they are not examined by the auditor and the report is not submitted without reservation within 2 weeks of the date of their adoption (Article 300.e, paragraph 3, CA).

Article 358 of the CA specifically regulates the nullity of the election of members of the supervisory or management board.

Article 359 of the CA specifically regulates the nullity of the decision on the adoption of annual financial reports.

The usual way of asserting nullity is through a lawsuit (to establish nullity). In addition, nullity can be asserted in any other way. A lawsuit can be brought by anyone who has a legal interest without a time limit, and the CA specifically mentions shareholders, management or board members, executive directors and members of the supervisory or management board of a JSC as authorised persons, which means that the aforementioned individuals do not have to prove the existence of a legal interest to file a lawsuit. The decisions of the general meeting are voidable if they are made contrary to the law or the statute of the company (Article 360, paragraph 1, CA).

The decision of the general meeting of the JSC can only be voided by a lawsuit within 30 days of the decision being made. If the plaintiff was present at the general meeting at which the decision was made, that deadline begins on the first day following the day when the general meeting at which the decision was made was concluded. If the claimant did not attend the general meeting where the decision was made, the deadline begins on the first day following the day on which he was able to find out about the decision.

The persons authorised to dispute the decision of the general meeting are (Article 362, CA):

- a) a shareholder who participated in the work of the general meeting, acquired shares before the agenda of the general meeting was published and declared his opposition to the decision in the minutes;
- b) a shareholder who did not participate in the work of the general meeting because he was (wrongly) not allowed to participate in it, if the general meeting was not properly convened or the amendment to the decision-making matter at the general meeting was not validly published, provided that he acquired shares before the agenda was published of the general meeting;
- c) each shareholder, if the decision is disputed because the shareholder tried to gain benefits for himself or for someone else by voting at the general meeting, to the detriment of the company or other shareholders, and this is achieved by the contested decision, if he acquired shares before the agenda was published;
- d) the management or the management board of the company;
- e) each member of the management or executive director and member of the supervisory or management board if by implementing the decision he would commit an action that is punishable, illegal or for which he could be liable for damages.

The decision of the general meeting cannot be challenged (even if there is a reason for challenging it) if the meeting confirms it with a new decision, and this new decision is not challenged within the period prescribed for challenging it, or if the lawsuit to challenge that decision is rejected. Then we are talking about the confirmation of a decision that can be challenged. If the plaintiff has a legal interest in having the challenged decision declared null or voided until a new decision confirming the contested decision is made, he can request that the contested decision be declared null or voided until a new decision is made (Article 361, CA).

As with the general meeting of a JSC, the decisions of the meeting of an LLC can be invalid, so they can be null or voidable (Articles 448–449, CA).

4. Hungary

4.1. Decision-Making by the Members of a Business Association in the General Meeting

The members or shareholders exercise their decision-making powers under the Civil Code and the instrument of constitution in a body comprised of all the members. The supreme body is the decision-making organ of the members of the business association. The areas of competence of the supreme body of the single-member company are exercised by the founder or the sole member who takes decisions in writing, and the written decision is communicated to the management. The supreme body of a private limited-liability company is the members' meeting. The supreme body of a limited-liability company is the general meeting. Sessions of the supreme body are

not open to the public. Only persons defined by the Civil Code may attend the meetings of the supreme body:

- a) the members or shareholders,
- b) the company's executive officers,
- c) members of the supervisory board,
- d) the auditor, and
- e) the invitees.

Non-member participants may attend the meeting in an advisory capacity. The principal duty of the supreme body of the business association is to adopt decisions on fundamental business and personnel issues. The Civil Code defines areas of which are the responsibilities of the supreme body of every business association, such as:

- a) the approval of the annual account (hereafter: financial report), as prescribed in the Accounting Act,
- b) decisions on the distribution of profits, and
- c) the decision for the enforcement of claims for damages against the company's members, executive officers, supervisory board members, etc.

Additional duties can be found at certain legal institutions (e.g. member exclusion) or at certain business associations:

- a) the members' meeting of the private limited-liability company has exclusive competence for the approval to conclude contracts which take place between the company and one of its members, its managing director, supervisory board member, auditor, or their close relatives.
- b) the general meeting of the public limited companies has exclusive jurisdiction to put the remuneration policy to an advisory vote. The general meeting is competent to have the advisory vote on the remuneration report for the previous financial year.

The decisions of the supreme body are usually taken by holding a meeting. If the members can participate in the meeting by electronic communications equipment and all members make use of this possibility, or if the meeting of the supreme body is announced as taking place by electronic communications equipment, it is called a meeting by conferencing. The supreme body may take its decisions in writing, in which case no meeting is held.

The general rule is that meetings of the supreme body are convened by the executive officer. The executive officer convenes the meeting of the supreme body by sending or publishing an invitation. The agenda is set by the executive officer. The option of adding items to the agenda is a special right granted separately to members and shareholders of a private limited-liability company under the Civil Code.

The Civil Code generally states that any legal statement pertaining to the company must be made in writing. The invitation constitutes a legal statement and must, therefore, be sent or published in writing.

According to the Civil Code, the invitation must contain:

- a) the name and registered address of the business association,
- b) the date and place of the meeting, and
- c) the agenda.

The Civil Code emphasises that the agenda must be indicated in the invitation in sufficient detail to enable the persons entitled to vote to formulate their position on the subjects to be discussed. For example, it is not sufficient to state that the articles of association are to be amended, but it must be specified for what reason and which part of the articles of association are to be amended. It is also a general rule that the general body of the business association holds its meetings at its head office. The articles of association are free to differ on this point.

If a meeting of the supreme body has not been convened in due form, the meeting may be held if all entitled persons are present, and if they unanimously agree to open the meeting. Failure to do so will render the decisions taken unlawful and any person entitled to vote may apply for judicial review. The supreme body may only be able to pass resolutions on duly notified points that are included in the agenda. An item not on the agenda may be discussed and a decision taken on it only if all entitled persons are present and they unanimously agree to discuss the matter that is not included in the agenda.

The right to convene a general meeting is a cardinal issue in the operation of business association. As a general rule, the executive officer may convene it, but the Civil Code also grants this power to others on an exceptional basis as follows.

- a) If, in the judgment of the supervisory board, the activity of the management is contrary to the law or to the instrument of constitution, opposite to the resolutions of the business association's supreme body, or otherwise infringes upon the interests of the business association, the supervisory board has the right to convene the meeting of the business association's supreme body to discuss that issue and to take the necessary decisions.
- b) If the LLC is left without a managing director, the members' meeting may be convened and the decision-making process without having to hold a meeting may be initiated by any member. If the meeting is not convened within 30 days of the change, it is to be convened at the request of any member or creditor by the court of registry, or the court shall delegate powers to convene the members' meeting or to initiate the decision-making process without having to hold a meeting upon such member.
- c) The Civil Code allows for the convening of the supreme body in the area of minority rights.

In the case of private limited-liability companies, the Civil Code requires that at least 15 days must elapse between the sending of the invitations and the date of the general meeting. The articles of association may not specify a time limit of less than 3 days.

In the case of public limited companies, the invitation to the general meeting must contain, in addition to the generally binding content elements:

- a) the procedure for holding the general meeting;
- b) the conditions for exercising voting rights, as laid down in the articles of association; and
- c) the place and time of a reconvened general meeting in the event of failure to meet quorum requirements.

In case of the closed public limited company, the general meeting must be called by means of an invitation sent to the shareholders at least 15 days prior to the first day of the general meeting. The invitation to the general meeting may be sent by way of electronic means to the shareholders who specifically requested it.

In case of the open public limited company, the invitation for the general meeting must be posted on the company's website at least 30 days prior to the first day of the meeting. The invitation for the meeting contains the conditions for exercising the right to make additions to the agenda, and indicates the place where draft resolutions and the originals of complete documents to be submitted to the general meeting are available.

For the private limited-liability company, responsibility for having minutes taken at the members' meetings lies with the executive officer. The minutes of the members' meeting are signed by the executive officer and a member present at the meeting and elected to witness the minutes.

In the case of the public limited company, the events of general meetings must be recorded in the minutes; the Civil Code specifically defines its mandatory content:

- a) the corporate name and registered office of the public limited company;
- b) the place and time as well as the procedure for holding the general meeting;
- c) the names of the chairman of the general meeting, the keeper of the minutes, the person appointed to witness the minutes and the official vote counters;
- d) key events and proposals made during the general meeting; and
- e) draft resolutions; each resolution should record at least the number of shares for which votes have been validly cast, the proportion of the share capital represented by those votes, the total number of votes validly cast as well as the number of votes cast in favour of and against each resolution, and the number of abstentions.

The minutes are signed by the keeper of the minutes and the chairman of the general meeting and are witnessed by an elected shareholder present.

In case of the open public limited company, the minutes of the general meeting (abstract) must be submitted to the court of registry. All members of the business association have the right to partake in the activities of the supreme body. The participation can happen in person or by way of a representative. A member may delegate one representative; however, a representative is allowed to represent more than one

member. The power of attorney for representation shall be fixed in an authentic instrument or in a private document with full probative force.

In the case of the public limited company, the Civil Code lays down special rules on the representation of the shareholder. Executive officers, supervisory board members, and the auditor may not function as a representative of a shareholder. A shareholder can be represented by more than one agent; however, if these agents submit contradictory votes or statements, all such votes and statements are considered null and void.

In the case of the public limited company, there is a special legal institute for representation, the institution of the *shareholder proxy*. The shareholder may appoint a proxy to exercise his rights facing the company by means of a contract of appointment, and the name of the proxy shall be entered in the share register, who shall exercise the shareholder's rights in his own name and for the benefit of the shareholder. In this case, the identity of the shareholder remains incognito.

Members may exercise their rights in meetings of the supreme body by means of electronic communications instead of attending in person, if the articles of association define such electronic communications equipment and the condition for their use to contain facilities for the identification of members and for mutual and unrestricted communication between the members.

In the case of the public limited company, the Civil Code also contains further specific provisions. If according to the articles of association shareholders are allowed to participate in the general meeting by way of electronic communications equipment, shareholders may freely decide the way to participate. The Civil Code establishes a presumption that the shareholder participates in the general meeting by means of electronic communications equipment, so if he wishes to attend in person, this must be notified to the company separately. The Civil Code expressly states that the costs arising in connection with the use of electronic communications equipment are borne by the limited company and cannot be charged to the shareholders, in accordance with Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

A so-called general meeting by conferencing may not be held if shareholders holding at least 5% of the votes cast together object in writing and request that the general meeting be held in the conventional way. If voting in a general meeting by conferencing is held via electronic communications equipment, an electronic confirmation of receipt of the votes must be sent to the shareholders who cast their vote through electronic communications equipment. The articles of association of the public limited company provides the option to shareholders to exercise their voting right by correspondence before the general meeting. In exercising this right, the shareholder may be required to provide the information necessary to verify his identity.

The voting right of a member in the supreme body of the company is consistent with the members' capital contribution. In the case of a public limited company, the voting rights are determined by the nominal value of the share, and the shareholder

is entitled to vote in proportion to the nominal value of the share. The Civil Code expressly states that a shareholder may not exercise his voting rights until he has paid his due contribution. The Civil Code allows the limited company, according to the articles of association, to provide for the issue of shares which are granted certain preferences to their holders over other types of shares.

The articles of association of a public limited company may, therefore, provide for the issue of shares which confer a specific advantage on the shareholder, known as preference shares. Within the preference share class, the articles of association may specify the shares conferring a voting preference (prior voting right), which constitute a share class. The holders of shares conferring prior voting right may exercise multiple voting rights to the extent defined in the articles of association. In respect of public limited companies, the voting rights attached to one share may not exceed the voting rights corresponding to the nominal value of the share by a factor of 10. Thus, for public limited companies, the Civil Code limits the concentration of votes in the hands of a single shareholder. A public limited company may also issue preference shares with a so-called veto right.

A decision of the general meeting is adopted if it is approved by a simple majority of the shareholders with veto rights or, if there is only one share conferring a prior voting right in issue, such resolutions may be adopted if supported by the holder of this share. In the meeting of the decision-making body, a quorum is constituted when members representing more than half of the total votes available in the company are present. Quorum shall be considered for each decision.

The members or shareholders decide the matters at issue by voting at the meetings of supreme body. A member or shareholder who is affected by the given issue for a reason specified in the Civil Code may not participate in the decision. In the process of adopting a resolution, the following persons may not vote:

- a) any person for whom the resolution contains an exemption from any obligation or responsibility, or for whom any advantage is to be provided by the business association;
- b) any person with whom an agreement is to be concluded according to the resolution;
- c) against whom a lawsuit must be brought;
- d) a relative who is interested in the decision and who is not otherwise a member or shareholder;
- e) any person who maintains any relation based on majority control with an organisation that has a vested interest in the decision; or
- f) any person who himself has a vested interest in the decision.

The members or shareholders adopt resolutions by a majority of the votes of those present. The Civil Code distinguishes between a decision taken by a simple majority or by more than a simple majority (higher majority) which may be:

- a) a three-quarters majority, that is, when the general meeting decides by at least a three-quarters majority on the amendment of the articles of association,

on changing the company form, on the transformation, merger, or division of the business association, on its dissolution without succession, and on the reduction of its share capital.

- b) a unanimous decision, that is, when any amendment that would harm the rights of some members or make their status more onerous is to be decided by the supreme body unanimously. In voting for such issue members without the right to vote may also participate.

In connection with open public limited companies, the provisions on the requirement of unanimous decision for the amendment of the instrument of constitution do not apply.

Where the instrument of constitution allows for adopting resolutions out of session, the supreme body can initiate adopting resolutions out of session. The draft of the resolution is prepared by the management and processed by sending to the members or founders. Members or shareholders are given at least 8 days from the time of receipt of the draft to send their vote to management. The quorum and voting requirements must also be respected when decisions are made out of session. A quorum is constituted when members representing more than half of the votes cast have sent in his vote. Following the vote, the management establishes the result of the vote and communicates it to the members within 3 days.

The Civil Code provides as a rule of guarantee that any member who wishes to hold a meeting must have the meeting convened by the management. The Civil Code states that the executive officer is required to keep the members (shareholders) of the legal person (hereafter, business association), or the founders in the case of non-membership legal persons, informed concerning the legal person, and to provide access for them to the legal person's documents, records, and registers. The disclosure of information and access to documents may be made subject to a written declaration of confidentiality by the managing director. He may refuse to grant this right if this would prejudice the business secrets of the business association of the company, if the person requesting the information abuses his right, or if he or she does not make a declaration of confidentiality. If the member (shareholder) considers the refusal to be unjustified, he may apply to the commercial court for an order requiring the business association to provide the information and to grant access to the documents.

The member of the limited-liability company can have access to the minutes of members' meetings and the recordings made on members' meetings held by way of electronic means of communication, as well as the *book of resolutions*.⁴¹ The copy issued in written form shall be authenticated by the signature of the managing director.

The Civil Code grants the member the right to propose certain additions to the agenda of the general meeting. The proposal to add an item to the agenda must be

41 The managing director shall enter all resolutions adopted by the members' meeting in the book of resolutions.

communicated to the members and the managing director at least 3 days before the general meeting.

4.2. Shareholder Rights in Relation to the General Meeting

The Civil Code regulates shareholders' rights in accordance with Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007⁴² on the exercise of certain rights of shareholders in listed companies.

Shareholders have the right to participate, to request information, and to make remarks and proposals at the general meeting. Shareholders with voting rights are also entitled to vote.

The management board must provide information at the latest 3 days before the date fixed for the general meeting to all shareholders which may be deemed necessary for discussions held in connection with the items placed on the agenda of the general meeting. The management board must disclose the key data of the financial report and key data of the report of the management board and the supervisory board to the shareholders at least 15 days before the general meeting.

In a closed public limited company, the group of shareholders together controlling at least 5% of the votes have the right to propose certain additions to the agenda, which must be communicated to the members and the board of directors. Shareholders together controlling at least 1% of the votes in an open public limited company have the right to propose certain additions to the agenda, which must be communicated to the board of directors, that publishes a notice to that effect.

The invitation for the general meeting of the open public limited company contains the conditions for exercising the right to make additions to the agenda. The invitation for the general meeting of the open public limited company contains the draft resolutions and the access details of the full and original text of documents to be submitted to the general meeting may be obtained.

The public limited companies publish on their website, at least 21 days before the general meeting, the following information:

- a) the proposals relating to the items on the agenda and the related reports of the supervisory board, including the draft resolutions; and
- b) the forms to be used to vote by proxy and to vote by correspondence, unless those forms are sent directly to each shareholder.

42 Amended by: Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council; Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement; Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No. 1095/2010, (EU) No. 648/2012, (EU) No. 600/2014, (EU) No. 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU, and (EU) 2017/1132.

Public general meeting materials may be sent by way of electronic means to the shareholders who specifically requested it. At the shareholder's request, the management board has to confirm to the shareholder or to a person the shareholder has designated that the shareholder's vote was duly recorded and adapted by the general meeting, except if the necessary information is available to the shareholder. This requirement is most relevant for voting by electronic means of communication. Any shareholder may request a copy of the minutes of general meetings or an abstract of a part of the minutes from the management board. Public limited companies shall make their general meeting resolutions available to the public on their website.

In the case of public limited companies, the Civil Code makes specific provision for shareholders' rights in relation to a general meeting resolution adversely affecting individual shareholders. Any resolution of the general meeting that discriminates against the rights attached to a certain series of shares may be passed only if, according to the procedure set out in the articles of association, the shareholders of the share series in question grant their explicit consent. In the course thereof, the provisions on the restriction or exclusion of the voting rights attached to such shares may not be applied.

4.3. Protection of Minority Stakeholders

Members of companies with few votes may be disadvantaged. Even without them, a quorum of the supreme body is required for most decisions, and a simple majority of votes is sufficient, which is the case even without their votes, as a result of which they lose their importance within the company and may become vulnerable. The Civil Code, therefore, seeks to give minority members additional rights to protect their interests. The code provides for three minority rights for all business associations:

- a) the right to convene the supreme body,
- b) the right to an individual audit, and
- c) the right to bring legal proceedings.

Not all members are entitled to the right of minority; the Civil Code requires a minimum number of votes to exercise this right. It is not required that only one member has the voting rights required by the Civil Code, several members can join together and act to exercise minority rights. Under the Civil Code, minority rights may be exercised by the member or members of the company who together control at least 5% of the voting rights.

In the case open public limited companies, a group of shareholders together controlling at least 1% of the votes in a public limited company are entitled to exercise minority rights.

The articles of association of a business association may grant minority rights to members with less than 5% of the voting rights.

The Civil Code does not specify the maximum percentage of votes at which a member or members may exercise minority rights, but, as appropriate, minority rights may be exercised at less than 50% of the votes.

Those members of the business association together controlling at least 5% of the voting rights may, at any time, request that the business association's supreme body be convened, indicating the reason and the purpose thereof, or the passing of a decision without a meeting. If management fails to comply with such request within 8 days of the date of receipt, and fails to convene the meeting of the supreme body at the earliest possible date, and fails to provide for the passing of a decision out of session, the court of registry shall convene the meeting of the supreme body at the request of the members making the proposal, or shall empower the requesting members to convene the meeting, or to carry out the procedure for the passing of a decision out of session. In such a case, the agenda of the meeting is set by the proposers.

However, the supreme body is not obliged to discuss the agenda items indicated by the petitioners or may reject the petition by decision.

The expected costs must be paid in advance by the applicants, and the supreme body decides whether the costs are to be borne by the applicants or the business association.

The member or members controlling at least 5% of the voting rights, in the cases provided for in the Civil Code, are entitled to request an individual audit. The prerequisite is that the issue of an individual audit has been put on the agenda of the general meeting of the business association, but has been rejected or not submitted for decision by the business association's general meeting. The proposal may be directed at an audit of the last annual accounts or of an economic event or commitment relating to the activities of the management for the last 2 years. The applicants may not go beyond the limits set by the Civil Code and may not request an overall examination of the management of the company. The audit must be carried out by a separate auditor and may not be carried out by the auditor of the company. The petitioners must apply for a special audit within a time limit of 30 days from the date of the meeting of the supreme body to the commercial court, which must order it. The costs of the individual audit must be advanced to the applicants. The court of registry shall refuse the request in the event of abuse of minority rights by the members presenting the request. The costs of the audit shall be covered by the company, except if the request made by the requesting members was manifestly unfounded.

The member or members holding at least 5% of the voting rights, in the cases provided for in the Civil Code, shall be entitled to bring an action for damages against the persons defined in the Civil Code. This prerequisite is that the question of the enforcement of the claim has been put on the agenda of the supreme body, but has been rejected or not submitted for decision by the business association's supreme body.

Recall that, according to the Civil Code, it is the competence of the business association's supreme body to decide on the enforcement of a claim for damages against a member, a manager, supervisory board member, and the business association's auditor.

The claim may be enforced within a 30-day preclusive period from the date of the meeting of the supreme body. The minority shareholders, therefore, bring the action, but they are entitled to enforce the claim for the benefit of the business association

and not for their own benefit. The minority members, therefore, are the plaintiffs in the action, but the claim will be for the benefit of the company (i.e. the non-party to the action). The fee will be paid by the member or members exercising minority rights, and in the event of a challenge, the costs will be borne by them.

4.4. Shareholders' Agreements (Syndicate Agreements)

Syndicate agreements are typically concluded between members in the context of the operation of a business association, between members and the business association, or between members and third parties. The syndicate contract is not regulated by law. The syndicate contract is completely separate from the company contract (the articles of association) and deals with matters that cannot be regulated in the articles of association or that the drafters did not want to be regulated in the articles of association. In a syndicate contract, members and shareholders may agree, for example, to vote in the same way on certain issues or to exercise minority rights together.

4.5. Judicial Review of Decisions

The legal institute is placed in the Civil Code under the General Rules Relating to Legal Persons, under Title IV, Guarantees for the Legal Operation of a Legal Person. The reason for this is because the review of decisions is not only relevant for business associations, but also for all legal persons governed by the Civil Code.

There are three means of safeguards for the lawful operation under the Civil Code: the Judicial Oversight of Legal Persons, the Statutory Auditor, and the Judicial Review of the Resolutions of Legal Persons.

The Civil Code uses this institution to ensure that the persons concerned can challenge unlawful decisions and take legal action. It creates the possibility of judicial review of corporate resolutions within the limits set by the Civil Code. The court can establish the infringement and, if it is serious, annul the decision, thus remedying the infringement. The court's review, therefore, is limited to determining whether the decision is contrary to the law or the articles of association, but the court may not issue a new decision or replace the offending decision by a judgment. An application for judicial review may seek the annulment of a *decision* taken by any body of the business association (e.g. the supreme body, supervisory board, or management board). A decision can be taken not only by a body composed of several members, but also by the chief executive acting alone. The resolutions adopted in connection with the register of shareholders shall be construed as corporate decisions.⁴³ An application can

43 Limited companies keep a register of shareholders, including holders of interim shares, in which to record the name and home address or registered office of shareholders, or their proxy in the case of jointly owned shares; the name and home address or registered office of the joint representative; the number of shares or interim shares; and the percentage of control of shareholders for each series of shares. Shareholders may exercise shareholder rights in dealings with the limited company only upon being registered in the register of shareholders. Failure to enter a shareholder in the register of shareholders shall not affect the shareholder's right of ownership of his shares.

be made if the decision is unlawful or *in breach of the articles of association* (company statutes, articles of association). Infringement of the law means not only a breach of the rules of the Civil Code but also of the provisions of any other legislation. No review is possible if the decision conflicts with the so-called syndicate contract, because the syndicate contract is a background agreement between the members or part of the members, which does not become part of the company contract, and therefore, does not deserve the same protection as the company contract.

The persons entitled to initiate reviews include:

- a) members or shareholders of the business association,
- b) executive officers of the business association,
- c) members of the supervisory board of the business association, and
- d) the owner of the share in the event of refusal of entry in the share register.

Members of the legal person, or the founders in the case of non-membership legal persons, the executive officers of legal persons, and members of the supervisory board shall be entitled to bring court action seeking annulment of resolutions adopted by the members or founders, or by the bodies of the legal person, if the resolution is alleged to be unlawful or to violate the instrument of constitution.

Persons who contributed to the adoption of the resolution with their votes, are not entitled to bring proceedings except for cases of mistake, misrepresentation or duress, are not entitled to bring action.

The action must be brought against the business association, and the defendant, therefore, is the business association. As a general rule, the company is represented in the proceedings by its executive officer as its legal representative. If the decision is challenged by the executive officer and there is no other executive officer who can represent the company, the company is represented in the proceedings by the member of the supervisory board appointed by the supervisory board. If the company does not have a supervisory board or if all the members of the supervisory board are sued as plaintiffs, the court shall appoint a curator ad litem to represent the business association in the proceedings.

The action may be brought against the business association within 30 days of the time when the person entitled has become, or could be expected to have become, aware of the resolution. No action may be brought after a preclusive period of 1 year from the date of the resolution. Bringing action for the annulment of a resolution shall have no suspensory effect on the enforcement of the resolution. The court shall be entitled to suspend execution on reasonable grounds, upon the applicant's request. If a resolution is found unlawful or to violate the instrument of constitution, the court shall annul the resolution and order the passing of a new resolution if necessary. If the violation of the law or the instrument of constitution is not considered significant, and does not jeopardise the legal person's lawful operation, the court shall establish the fact of infringement.

5. Poland

5.1. *Limited Liability Companies*

In an LLC, as a rule, shareholders have equal rights and obligations in the company, unless the law or articles of association provide otherwise. Preference may concern, in particular, voting rights, the right to dividends or the manner of participating in the distribution of assets in the event of liquidation of the company. Voting rights preference may apply only to shares of equal nominal value and may not grant the holder more than three votes per share (Article 174, CCC).

Resolutions of shareholders are adopted at a shareholders' meeting, or without a shareholders' meeting, if all shareholders agree in writing to the decision to be taken or to a written vote. The general meeting may be formally convened (Article 238, CCC) or held without a formal convocation (Article 240, CCC). In a single-member company, all powers of the shareholders' meeting are exercised by the sole shareholder, with appropriate application of the provisions on the shareholders' meeting (Article 156, CCC).

As for the consequences of the lack of a shareholders' resolution, the CCC regulates this issue in Article 17 of the CCC and this provision applies to all types of companies indicated in the CCC. If a resolution of shareholders or a general meeting or a supervisory board is required by law to perform a legal transaction by a company, a juridical act performed without the required resolution is invalid. The consent may be expressed before the submission of the statement by the company or after its submission, but no later than 2 months after the date of submission of the statement by the company. The confirmation expressed after the declaration has been made has retroactive effect from the time of the juridical act. If, however, consent is required only by the statutes or articles of association, a juridical act performed without the consent of the competent organ of the company is valid, but this does not exclude the liability of directors towards the company for violation of the articles of association or articles of association.

A resolution of the shareholders of the CCC is required the following matters (Article 228, CCC):

- a) consideration and approval of the management board's report on the company's activities, financial statements for the previous financial year and granting discharge to the members of the company's governing bodies for the performance of their duties;
- b) a decision on claims for compensation for damage caused during the establishment of a company or the exercise of management or supervision;
- c) sale and lease of an enterprise or its organised part and establishment of a limited right *in rem* thereon;
- d) acquisition and disposal of real estate, perpetual usufruct, or interest in real estate, unless the articles of association provide otherwise;
- e) reimbursement of subsidies; or

- f) conclusion of the agreement referred to in Article 4 § 1 point 4 letter F of the CCC.⁴⁴

Pursuant to Article 229 of the CCC, an agreement on the purchase of real estate or a share in real estate or fixed assets for a company for a price exceeding one-quarter of the share capital, but not lower than 50,000 Polish zloty (PLN), concluded before the lapse of 2 years from the date of registration of the company, requires a resolution of the shareholders, unless the agreement was provided for in the articles of association. The purpose of this regulation is two-fold. First, it protects the company against circumvention of the provisions on making in-kind contributions (consisting in making a cash contribution and purchasing the subject of the in-kind contribution after the registration of the company instead of making a contribution in kind to cover the share capital). Second, thanks to the regulation contained in Article 229, the company in the first period of its activity is protected against overinvestment without the knowledge and consent of shareholders (freezing of excessive amounts of current assets in acquired fixed assets).⁴⁵

Pursuant to Article 230 of the CCC, the disposal of the right or incurring an obligation to provide a value twice as high as the share capital requires a resolution of the shareholders, unless the articles of association provide otherwise. That provision is based on the mistaken premise that the value of the share capital is of any relevance to determining whether it is a contract which is essential for the company. Such a criterion could be a fraction (e.g. 10%) of the value of equity (net assets according to the last balance sheet), rather than the amount of share capital, which may be relatively low (how the company shapes its equity structure is an internal matter). The provision of Article 17 § 1 does not apply then, which means that the violation of Article 230 sentence 1 no longer leads to the invalidity of a legal transaction, but only justifies intra-corporate sanctions against members of the management board.⁴⁶ Similarly, Article 15 of the CCC is to protect shareholders, according to its content, the conclusion by a capital company of a credit, loan, surety or other similar agreement with a member of the management board, supervisory board, audit committee, proxy, liquidator or for the benefit of any of these persons requires the consent of the shareholders' meeting or the general meeting, unless the law provides otherwise.

An ordinary shareholders' meeting in an LLC should be held within 6 months of the end of each financial year. It should concern at least:

- a) consideration and approval of the management board's report on the company's activities and the financial statements for the previous financial year;

44 Article 228 point 6 was amended by Article 1 point 17 of the Act of 9 February 2022 (Journal of Laws 2022 item 807), with effect from 13 October 2022. This change is related to the introduction of regulations concerning the law of groups of companies into the CCC. It is the conclusion of an agreement between a parent company and a subsidiary providing for the management of the subsidiary or the transfer of profits by such a company.

45 See Rodzyńkiewicz, 2018.

46 Ibid.

- b) adoption of a resolution on the distribution of profit or coverage of loss, if, pursuant to Article 191 § 2 of the CCC, these matters have not been excluded from the competence of the shareholders' meeting;
- c) granting a vote of approval to the members of the company's governing bodies for the performance of their duties.

In an LLC. Extraordinary shareholders' meetings may also be held, which are convened in the cases specified by law⁴⁷ or articles of association, and when the bodies or persons empowered to convene meetings deem it advisable. Participation in the shareholders' meeting may also be taken by means of electronic communication, unless the articles of association provide otherwise. A member or members representing at least one-tenth of the share capital may request that an extraordinary general meeting be convened and that certain matters be placed on the agenda of that general meeting. Such a request must be submitted in writing to the management board no later than 1 month before the proposed date of the shareholders' meeting. A shareholder or shareholders representing at least one-twentieth of the share capital may request that certain matters be placed on the agenda of the next shareholders' meeting, and they should submit them in writing to the management board no later than 3 weeks before the date of the shareholders' meeting. The articles of association may grant such rights to members representing a lower share in the share capital. If the management board fails to take action at the request of the shareholders, the registry court may, after calling the management board to submit a statement, authorise the requesting shareholder or shareholders to convene an extraordinary meeting. The court appoints the chairman of this meeting (Articles 236 and 237, CCC).

The shareholders' meeting is traditionally convened by registered letters or courier mail, sent at least 2 weeks before the date of the shareholders' meeting, the notice may be sent to the shareholder at the address for electronic service or by e-mail, if he has previously agreed to it in writing, giving the address to which the notice should be sent.

Resolutions may be adopted despite the lack of a formal convening of the shareholders' meeting if the entire share capital is represented and no one present has objected to holding the meeting or putting individual matters on the agenda (Article 240, CCC). The presence of all capital, the lack of objection to the holding of the meeting and to the introduction of individual matters to the agenda does not mean the need for unanimous voting for resolutions.⁴⁸ As a rule, shareholders may be represented by proxies.⁴⁹ A shareholder may not, either personally or by proxy, or as a proxy of another person, vote on the adoption of resolutions concerning his liability

47 For example, in the case referred to in Article 202 § 6 of the CCC (resignation of a member of the management board resulting in no mandate in the management board being filled), a member of the management board is obliged to convene a shareholders' meeting.

48 See Chomiuk, 2023.

49 A member of the management board and an employee of the company may not be proxies at the shareholders' meeting (Article 243 § 3, CCC).

to the company on any account, including the granting of discharge, release from the obligation towards the company and the dispute between him and the company.

Resolutions are adopted by an absolute majority of votes, unless the provisions of the CCC or the articles of association provide otherwise (Article 245, CCC). There are many exceptions to this rule already in the CCC itself. For example, pursuant to Article 246 of the CCC, resolutions concerning amendments to the articles of association, dissolution of the company or sale of an enterprise or its organised part are adopted by a two-thirds majority of votes. A resolution concerning a material change in the company's business requires a three-quarters majority of votes. The articles of association may lay down stricter conditions for the adoption of such resolutions.

In addition, the glory of amending the articles of association, increasing the benefits of shareholders or reducing the shareholding rights or rights granted personally to individual shareholders, requires the consent of all shareholders concerned. A reduction in shareholding rights means a reduction in the rights arising from shares. These are both rights vested in each shareholder (e.g. the right to participate in profit) and rights arising from preferential shares, such as voting rights granted in accordance with Article 174 of the CCC.⁵⁰

Voting on resolutions, depending on the subject, is open or secret. In addition, a secret ballot must be ordered at the request of at least one of the shareholders present or represented at the shareholders' meeting (Article 247, CCC). The minutes should state the correctness of convening the shareholders' meeting and its ability to adopt resolutions, list the resolutions adopted, the number of votes cast for each resolution and objections raised. Shareholders may browse the book of minutes and request copies of resolutions certified by the management board (Article 248, CCC).

The CCC also regulates the conditions for filing an action to set aside a resolution (Article 250, CCC) and to declare a resolution invalid (Article 252, CCC). Shareholders also have the right of control based on Article 212 of the CCC. For this purpose, a shareholder with a person authorised by him may at any time inspect the books and documents of the company, draw up a balance sheet for his use or request explanations from the management board. As a last resort, a shareholder who has been refused explanations or access to the company's documents or books may apply to the registry court to oblige the management board to provide explanations or make available for inspection documents or books of the company.

5.2. Simple Joint-Stock Companies

In a simple JSC, pursuant to Article 300(80) of the CCC, shareholders' resolutions are adopted at the general meeting either outside the general meeting in writing or using electronic means of communication. Shareholders may vote using electronic means of communication if they have been indicated in the articles of association or all shareholders have agreed in documentary form to such a voting procedure.

⁵⁰ Strzępka and Zielińska, 2009, p. 497.

Shareholders may vote in writing if all shareholders have expressed their consent to this voting procedure in documentary form.

As in other capital companies, the CCC indicates situations where the adoption of a shareholders' resolution is obligatory (e.g. purchase and sale of real estate, issue of convertible or pre-emptive bonds and issue of subscription warrants referred to in Article 300(119), CCC). As in other companies, the ordinary general meeting should be held within 6 months of the end of each financial year. Shareholders representing a certain number of votes may convene an extraordinary general meeting or request that specific matters be placed on the agenda of the next general meeting (Articles 300(85) and 300(86), CCC). Resolutions may be taken despite the lack of a formal convening of the general meeting, if all shares are represented, and no one present has objected to holding a general meeting or placing individual matters on the agenda (Article 300(90), CCC).

The articles of association may not limit the rights of minority shareholders specified in the provisions of this branch, but may grant these rights to shareholders representing a smaller fraction of the total number of votes or the total number of shares.⁵¹ As in an LLC, it is possible to adopt a resolution without a formal convocation if all shares are represented and no one present has objected to holding a general meeting or placing individual matters on the agenda (Article 300(90), CCC).

A person entitled to participate in the general meeting is a person entered in the register of shareholders on the day falling 3 days before the date of the general meeting (Article 300(91), CCC). The articles of association may allow participation in the general meeting by means of electronic communication.

Unless the provisions of the CCC or the articles of association provide otherwise, the general meeting is valid regardless of the number of shares represented therein. The general meeting may adjourn the session by a two-thirds majority. In total, breaks may not last more than 30 days. The commented regulation refers in part to the provision of Article 241 of the CCC concerning the shareholders' meeting in an LLC (which, however, does not refer to the issue of adjournments and changes in the agenda), as well as to the very similar provisions of Articles 408 and 409 § 2 of the CCC relating to the general meeting in a JSC.⁵²

In accordance with the assumption of limiting the formalities related to the establishment and operation of a simple JSC, the document form was reserved for the power of attorney referred to in the commented provision, while maintaining the rigor of nullity and the obligation to attach the power of attorney to the book of protocols (cf. Article 243 § 2, CCC).⁵³

During the general meeting, the management board is obliged to provide the shareholder, at his request, with information about the company, if it is justified for

51 For example, the articles of association may introduce lower requirements for convening an extraordinary general meeting (Article 300(85) § 1, CCC).

52 Koziół, 2020.

53 Modzelewska and Reszczyk-Król, 2023.

the assessment of the matter included in the agenda. Articles 428 § 27– and 429 of the CCC shall apply accordingly to the manner of providing information.

Resolutions of the general meeting are generally adopted by an absolute majority of votes (Article 300(98) § 1, CCC), but there are many exceptions to this rule both in the CCC itself, as well as modified by the articles of association. Resolutions of the general meeting shall be recorded in the minutes. The minutes shall state the correctness of convening the general meeting and its ability to adopt resolutions and shall list the resolutions adopted and, in respect of each resolution, the number of shares from which valid votes were cast, the percentage share of these shares in the total number of shares, the total number of valid votes, the number of votes ‘for’, ‘against’, and ‘abstaining’ and objections raised. The minutes shall be accompanied by evidence of convening the general meeting, an attendance list with signatures of the participants of the general meeting and a list of shareholders voting by means of electronic communication (Article 300(100) § 1, CCC).

Article 300(101) of the CCC introduces the principle that the provisions of Articles 422–427 shall apply *mutatis mutandis* to shareholders’ resolutions. By reference to Articles 422 to 427 of the CCC, this provision regulates the procedure for appealing against defective or unlawful resolutions of shareholders. These provisions shall be applied accordingly after taking into account the specificity of a simple JSC. A shareholders’ resolution is subject to appeal as part of an action to set aside a resolution and an action to declare the resolution invalid. The defendant company in the dispute is represented by either the management board or the board of directors, respectively, depending on the structure of the company’s governing bodies.⁵⁴

5.3. Joint-Stock Companies

In a JSC, shares of a company that is not a public company are subject to registration in the register of shareholders. The register of shareholders is public for the company and each shareholder (Article 328(5) § 1, CCC). Preference shares, with the exception of silent shares, should be registered.

No more than two votes may be granted per share. If such shares are converted into bearer shares or if they are sold contrary to the stipulated conditions, the preference expires (Article 352, CCC). Pursuant to Article 351 § 4 of the CCC, a shareholder may exercise the special rights granted to him related to the preferred share after the end of the financial year in which he made his full contribution to cover the share capital. Pursuant to Article 354 § 1 of the CCC, the articles of association may grant personal rights to an individually designated shareholder. In particular, they may concern the right to appoint or dismiss members of the management board or supervisory board, and the right to receive designated benefits from the company.

The CCC also provides for cases in which it is obligatory to adopt a resolution by the general meeting. Resolutions of the general meeting, pursuant to Article 393 of the CCC, for example, requires:

⁵⁴ Ibid.

- a) consideration and approval of the management board's report on the company's activities and the financial statements for the previous financial year and granting discharge to the members of the company's governing bodies for the performance of their duties;
- b) a decision on claims for compensation for damage caused during the establishment of the company or the exercise of management or supervision;
- c) sale and lease of an enterprise or its organised part and establishment of a limited right *in rem* thereon;
- d) acquisition and disposal of real estate, perpetual usufruct, or interest in real estate, unless the statute provides otherwise;
- e) issue of convertible or pre-emptive bonds and issue of subscription warrants referred to in Article 453 § 2 of the CCC;
- f) acquisition of own shares in the case referred to in Article 362 § 1 point 2 and authorisation to acquire them in the case specified in Article 362 § 1 point 8 of the CCC; and
- g) conclusion of the agreement referred to in Article 4 § 1 point 4 letter f of the CCC.

Pursuant to Article 394 § 1 of the CCC, agreements for the acquisition of any property for a company, for a price exceeding one-tenth of the paid-up share capital, from the founder or shareholder or for a company or cooperative dependent on the founder or shareholder of the company, concluded before the expiry of 2 years from the date of registration of the company, require a resolution of the general meeting, adopted by a majority of two thirds of votes. The protective functions of Article 394 of the CCC are based on the assumption adopted by the legislator to ensure protection of the company in its initial phase of activity (2 years from the date of registration of the company) against potential depletion of its assets as a result of the withdrawal of part of the contributions made by the founder or shareholder, which may occur as a result of the founder or shareholder concluding agreements for the sale of property of significant value to the company.⁵⁵

Article 395 § 1 of the CCC provides that an ordinary general meeting should be held within 6 months of the end of each financial year. Pursuant to article 395 § 2 of the CCC, the subject of the ordinary general meeting should be:

- a) consideration and approval of the management board's report on the company's activities and the financial statements for the previous financial year;
- b) adoption of a resolution on the distribution of profit or on covering the loss; and
- c) granting a vote of approval to the members of the company's governing bodies for the performance of their duties.

⁵⁵ Zapadka, 2014, p. 15.

Pursuant to Article 397 of the CCC, the management board is obliged to immediately convene a general meeting to adopt a resolution regarding the continued existence of the company if the balance sheet prepared by the management board shows a loss exceeding the sum of supplementary and reserve capital and one third of the share capital. The purpose of the provision is to protect the assets of the company, or to terminate its operation at the stage when it still has any assets. The purpose of the commented provision is mainly to protect shareholders (including the company's creditors) against incurring a larger loss. The purpose of the provision is to apply remedial measures as early as possible or to terminate the functioning of the company.⁵⁶ A similar provision applies in an LLC (pursuant to Article 233 § 1 of the CCC, if the balance sheet prepared by the management board shows a loss exceeding the sum of supplementary and reserve capital and half of the share capital, the management board is obliged to immediately convene a shareholders' meeting in order to adopt a resolution regarding the continued existence of the company).

To secure the continuity of the functioning of the governing bodies in a JSC, in the case referred to in Article 369 § 5(2) of the CCC (no supervisory board in the event of the resignation of the last member of the management board), a member of the management board is obliged to convene a general meeting. As a rule, the general meeting in a JSC is convened by the management board (Article 399 § 1, CCC), but further paragraphs of this provision state that it may also be done by the supervisory board, shareholders representing at least half of the share capital or half of the votes in the company, they may also be other persons if the articles of association so provide. Potential entities authorised by the statute to convene an extraordinary general meeting may be, for example, groups of employees, trade unions, proxies, and state or local government bodies.⁵⁷

Article 400 of the CCC provides for the right to request that minority shareholders convene an extraordinary general meeting. Minority shareholders or a shareholder representing at least one-twentieth of the share capital may request that an extraordinary general meeting be convened and that certain matters be placed on the agenda of that meeting; the statutes may authorise the convening of an extraordinary general meeting of shareholders representing less than one-twentieth of the share capital.

If an extraordinary general meeting is not convened within 2 weeks of the date of submission of the request to the management board, the registry court may authorise the requesting shareholders to convene an extraordinary general meeting. The court shall appoint the chairman of that meeting. Meanwhile, pursuant to Article 401 of the CCC, a shareholder or shareholders representing at least one-twentieth of the share capital may request that certain matters be placed on the agenda of the next general meeting (§ 1), or may, before the date of the general meeting, submit to the company draft resolutions on matters introduced into the agenda of the general meeting or matters to be introduced into the agenda (§ 4).

⁵⁶ Naworski, 2003, p. 682.

⁵⁷ Kidyba, 2023.

A general meeting in a non-public JSC is convened by announcement, which should be made at least 3 weeks before the date of the general meeting. The General Meeting in a non-public company is convened by means of an announcement made through a nationwide publication, which is *Monitor Sądowy i Gospodarczy* (Article 5 § 34–, CCC). *Monitor Sądowy i Gospodarczy* is an obligatory publication for non-public companies.⁵⁸ The general meeting may be convened by registered letters or courier mail, sent at least 2 weeks before the date of the general meeting. The day on which letters or parcels are sent shall be deemed to be the day of publication. Instead of a letter or parcel, the notification may be sent to the shareholder to the address for electronic service, by e-mail to the address indicated in the register of shareholders or with the written consent of the shareholder to another e-mail address indicated by the shareholder (Article 402 § 3, CCC).

Resolutions may be adopted, despite the lack of a formal convening of the general meeting, if the entire share capital is represented, and no one present has objected to the holding of the general meeting or bringing individual matters to the agenda (Article 405, CCC) and in matters not included in the agenda no resolution may be adopted, unless the entire share capital is represented at the general meeting, and none of those present objected to the adoption of the resolution (Article 404 § 1, CCC). Participation in the general meeting may also be taken by means of electronic communication, unless the company's articles of association provide otherwise (Article 406(5) § 1, first sentence, CCC). The attendance list shall be drawn up immediately after the election of the chairman and presented during the proceedings of that meeting. At the request of shareholders holding one-tenth of the share capital represented at that general meeting, the attendance list should be checked by a committee elected for that purpose, consisting of at least three persons. Applicants have the right to elect one member of the committee (Article 410, CCC). A shareholder may participate in the general meeting and exercise the right to vote in person or by proxy (Article 412 § 1, CCC). The CCC limits this right subjectively, also introducing significant differences between a public and a private company (e.g. a member of the management board and an employee of the company may not be proxies at the general meeting of a non-public JSC),⁵⁹ A shareholder may not vote either personally or by proxy, or as a proxy of another person in the adoption of resolutions concerning his liability towards the company on any account, including granting a discharge, release from the obligation towards the company and a dispute between him and the company (Article 413 § 1, CCC).⁶⁰

The statutes of a JSC may modify the voting right, such as provide for the accumulation of votes belonging to shareholders between whom there is a relationship

58 Oplustil and Sokołowski, 2003, p. 14.

59 This exclusion does not apply to a public company (Article 412(2) § 2, CCC).

60 A shareholder of a public company may vote as a proxy when adopting resolutions concerning his person referred to in § 1. The provisions of Article 412(2) § 3 and 4 shall apply *mutatis mutandis*.

of dominance or dependence within the meaning of this or a separate act, as well as specify the rules for reducing votes (Article 411 § 4, CCC).

The CCC in certain matters requires a qualified majority, for example, a resolution on the issue of convertible bonds and bonds with pre-emptive rights to subscribe for shares, change the articles of association, redemption of shares, reduction of share capital, sale of an enterprise or its organised part and dissolution of the company is adopted by a three-quarters majority of votes (Article 415 § 1, CCC), a two-thirds majority of votes is required to adopt a resolution on a material change in the company's business (Article 416, paragraph 1, CCC).⁶¹

The CCC also introduces the possibility of compulsory buyout of shareholders representing no more than 5% of the share capital (Article 418, CCC) and compulsory repurchase of shares (Article 418(1), CCC). In a group of companies, the rights of minority shareholders are regulated by Articles 21(10) (right of a minority shareholder of a subsidiary to repurchase his shares by the parent company) and 21(11) (compulsory buyout of shares held by minority shareholders of a subsidiary by the parent company) of the CCC.

The CCC also regulates the conditions and conditions for filing an action to set aside a resolution (Article 422, CCC) and to declare a resolution invalid (Article 425, CCC).

Pursuant to Article 429 of the CCC, a shareholder who was refused to disclose the requested information during the general meeting and who objected to the minutes may apply to the registry court to oblige the management board to provide information.

6. Romania

6.1. Decision-Making in General Meetings

The highest decision-making body in a company is the general meeting of members or shareholders, where they exercise collectively their specific rights.⁶² This governing body serves as a deliberative and decision-making forum, comprising the totality of the company's members or shareholders. It can be described as the central point for forming the company's will, a space where each member or shareholder is entitled to participate, present proposals, nominate candidates, speak, request information, and, importantly, cast votes, unless their voting rights are excluded or restricted.⁶³

In an LLC, members make decisions at the general meetings of the company. The founding document of the company may provide that voting rights exercisable at the general meeting can also be expressed in writing. In the case of a single-member

61 The effectiveness of the resolution depends on the purchase of shares of those shareholders who do not agree to the change (Article 416 § 4, CCC).

62 Angheni, 2013, p. 211.

63 Duțescu, 2010, pp. 163–164; Cărpenaru, 2016, p. 200; Tuleașcă, 2016, pp. 218–219; Susanu, 2018, p. 92.

LLC, the sole member assumes all the rights and obligations typically allocated to the general meeting under the law.

The general meeting must be convened by the company's executive officer (*administrator*) at least once a year. As a general rule, these meetings are held at the company's registered office unless the founding document specifies another location. Beyond the annual general meeting, executive officers are obligated to convene additional meetings whenever necessary. The process for calling a general meeting is generally governed by the provisions of the founding document. In the absence of specific provisions, the meeting must be convened by sending a registered letter to the members at least 10 days before the scheduled date. This notice must include the agenda for the meeting. While the procedural requirements for convening and holding general meetings might appear straightforward, their observance is crucial for the validity of the resolutions passed.

The general meeting has several critical responsibilities, as outlined in the law, although this list is not exhaustive.⁶⁴ Among its primary duties are approving the annual financial statements and determining the distribution of net profits. The general meeting also appoints, dismisses, and discharges executive officers and auditors. If not legally mandated, it may also decide on contracting an external financial auditor. The body holds the authority to pursue liability claims against managers and auditors for damages caused to the company, including designating the individual responsible for filing such claims. The general meeting has the power to amend the founding document of the company. The outlined duties of the general meeting also highlight the harmonising act between oversight and management. By approving financial statements, deciding profit distribution, and appointing or dismissing key officials, the general meeting exercises direct control over the company's trajectory. At the same time, the ability to hold managers and auditors accountable ensures that the company's leadership remains aligned with the interests of its members.

In single-member LLCs, the sole member's assumption of general meeting rights and obligations emphasises the unique governance structure of such entities.

Romanian company law articulates a full architecture for how the general meeting operates in a JSC, not only naming the forms a meeting can take but also tying each form to specific corporate decisions, safeguards, and shareholder prerogatives. The legal regime starts from a functional premise: what matters is the substance of the business put before the shareholders. A meeting is "ordinary", "extraordinary", "founding/constitutive", or "special"⁶⁵ because of the matters on its agenda, not because of when it is held or how it is labelled in the notice. That classification then drives who can decide what, which quorum and majority thresholds apply, what preparatory disclosures are required, and which minority protections are triggered.⁶⁶

64 Angheni, 2013, p. 212.

65 Fegyveresi, 2024, p. 127.

66 Georgescu, 1948, p. 309.

Within this framework, the ordinary general meeting is the forum for the company's recurring, cyclical business: the locus of the mandatory annual governance cycle.⁶⁷ It receives and votes the financial statements, allocates profits and losses, sets or approves compensation frameworks, appoints or renews directors and auditors, and, where applicable, grants discharge. These items under the authority of the ordinary general meeting are routine in the sense that they repeat each financial year, but they are not trivial; they are the levers through which shareholders exercise ongoing oversight of performance and accountability. Its procedures are optimised for recurrence and continuity: notice periods, quorum rules and majorities are set so that a representative shareholder body can carry on the company's business year after year without undue friction. Ordinary general meeting must be convened at least once annually, within 5 months of the close of the fiscal year. This 5-month deadline is neither a statute of limitations nor a forfeiture period, but rather an administrative time-frame meant to ensure timely oversight of the company's affairs.⁶⁸ Failure to convene the ordinary general meeting within this period can result in penalties for the company's executives, typically in the form of fines imposed by the fiscal authorities. Furthermore, shareholders attending such delayed meetings may exercise their rights to initiate liability claims against executives for damages caused by administrative delays. It is worth noting that even if the financial statements for the preceding fiscal year are approved at the meeting, this does not preclude shareholders from pursuing claims against executives for financial misconduct or negligence.⁶⁹

The extraordinary general meeting is the venue for structural or foundational changes to the company,⁷⁰ therefore, is reserved for decisions that alter the corporate setting or the company's economic perimeter: amendments to the constitutive act, changes to the capital structure, creation or modification of share classes, mergers, divisions, transformations, and voluntary winding-up. These meetings can be called whenever necessary.⁷¹ Because these resolutions reshape the company's allocative baseline, the statute overlays enhanced safeguards: tighter disclosure obligations *ex ante*, supermajority voting or quorum requirements, and, in defined cases, ancillary individual rights, such as pre-emption, withdrawal, or appraisal. Treating these topics as "extraordinary" by substance ensures that a board cannot slide a transformative transaction through under the guise of an ordinary meeting agenda.

In incorporations by public subscription, the constitutive meeting appears as a one-time deliberation at which the subscribers validate the formation, confirm the constitutive act, appoint the initial management and control bodies, approve

67 Angheni, 2013, p. 159.

68 David, 2014, p. 353.

69 Fegyveresi, 2024, p. 127.

70 David, 2014, p. 365.

71 Angheni, 2013, p. 160; Fegyveresi, 2024, p. 127.

incorporation expenses, and ratify any in-kind subscriptions based on expert assessments.⁷²

Finally, when only one class of shares is affected by a proposed alteration, a special meeting of that class operates as a class-specific consent mechanism;⁷³ it is not a second legislature but a mandatory filter that prevents the majority in another class from rewriting the bargain embodied in class rights. However, special meetings are not empowered to issue resolutions binding on the company as a whole.⁷⁴ Instead, their decisions must be presented to the appropriate general meeting for ratification.⁷⁵

The Romanian Companies Act outlines the competencies of ordinary and extraordinary general meetings in Articles 111 and 113, respectively.⁷⁶ Ordinary general meetings are entrusted with matters crucial for the company's lawful operation and internal governance. These include approving the annual financial statements, determining the distribution of dividends, appointing and dismissing executive officers, financial auditors, and controllers, and addressing remuneration and oversight of management. Additionally, ordinary meetings deliberate on the company's budget, operational programs, and decisions regarding the sale, lease, or closure of business units. These functions highlight the centrality of ordinary general meetings in ensuring the company's financial and administrative stability and everyday functioning.

Extraordinary general meetings, meanwhile, are reserved for decisions that require amendments to the company's foundational structure or governance framework. These meetings handle such matters as increasing or reducing share capital, merging or dividing the company, dissolving the company, and approving bond issuances or share conversions. Additionally, extraordinary meetings may decide on relocating the company's headquarters, altering its business activities, and extending its operational duration. Such decisions often necessitate broader consultation and consensus among shareholders owing to their potential to fundamentally alter the company's trajectory.

The law also provides for the delegation of certain competencies from extraordinary general meetings to the board of directors or the management board in a two-tier system.⁷⁷ For example, decisions on relocating the company's headquarters, modifying secondary business activities, and establishing or closing secondary offices can be delegated. Similarly, share capital increases may fall under this category, provided they adhere to guidelines established in the articles of incorporation or a

72 However, if resolutions adopted at the founding meeting are invalidated by court proceedings, the meeting may need to be reconvened, demonstrating the potential for such assemblies to have ongoing relevance beyond their initial convening. See Fegyveresi, 2024, p. 127.

73 Angheni, 2013, p. 162.

74 Săuleanu, 2008, pp. 86–87.

75 Fegyveresi, 2024, p. 127.

76 Angheni, 2013, pp. 159–160; Fegyveresi, 2024, pp. 128–129.

77 Angheni, 2013, p. 161; David, 2014, pp. 367–370; Gheorghe, 2020, pp. 393–394; Fegyveresi, 2024, p. 129.

prior resolution of the extraordinary general meeting (the institution of the authorised capital). This delegation mechanism allows for greater operational flexibility, meanwhile ensuring that strategic decisions remain subject to shareholder oversight. A distinction has to be made between delegable and non-delegable powers. Delegable powers include operational decisions, such as modifying secondary business activities or establishing branch offices. Non-delegable powers, by contrast, involve decisions of a structural nature, such as merging the company, dissolving it, or amending the articles of incorporation. By delineating these categories, the law safeguards the managerial efficiency and the collective decision-making authority of shareholders.

Under the Romanian Companies Act, the convocation of a general meeting of a JSC is governed by both statutory provisions and the company's articles of incorporation.⁷⁸ Within the standard architecture of corporate governance, the competence to convene the shareholders' general meeting (*ius convocandi*) is allocated to the executive organ that directs the company's current affairs, namely, to the board of directors in a unitary system or to the management board in a dualistic system.⁷⁹ This allocation follows a functional logic. The organ entrusted with business planning, resource allocation, and risk surveillance possesses the most immediate epistemic access to the company's operational and financial condition. Because it is uniquely placed to discern when shareholder deliberation is necessary to legitimate or enable corporate action, the law vests the convening initiative in that organ and, simultaneously, burdens it with a duty to exercise the initiative in a timely and informed manner. This duty is a standing obligation to convoke the general meeting whenever the state of the company's affairs reasonably requires shareholder intervention or oversight. The applicable standard is deliberately open-textured: it captures both routine corporate running and exceptional situations in which the company proposes to undertake transactions of constitutive significance.

At a more determinate level, the duty hardens into specific statutory mandates. Chief among these is the annual accountability cycle: after the close of each financial year, the executive organ must convene an ordinary general meeting within the legally

78 Fegyveresi, 2024, p. 129.

79 In addition, shareholders can trigger a convocation pathway. Holders of at least 5% of the share capital may require the executive organ to convene the meeting; if the request is ignored or refused, the tribunal can authorise those shareholders (or a designated person) to convene the meeting and set the agenda. Separately, if all shareholders are present and no one objects, they may validly meet and deliberate without any prior formal convocation. Oversight bodies have limited convening powers. Statutory censors must immediately convene the general meeting when a shareholder complaint they investigate is both justified and urgent. By contrast, an internal auditor reports to the board/supervisory board, which must then convene; the internal auditor does not convene directly. The supervisory board in a dualist system has also the *ius convocandi* when it identifies major issues regarding company management or financial integrity. Courts may intervene to ensure convocation in governance-failure scenarios. For example, if the supervisory board's headcount drops below the legal minimum in a dualist system and the directorate does not promptly call a meeting to fill vacancies, any interested party may ask the court to appoint a person to convene the meeting. Similar court assistance is permitted when administrators fail to convene as required.

prescribed window (as shown earlier, no later than 5 months after year-end) to present the (audited, when mandatory) financial statements, to propose the appropriation of results (including any distributions), and to submit reports on management's conduct and, in a dualistic system, the supervisory board's oversight.⁸⁰ Because these matters delimit the distribution constraint, inform the market, and structure the next business cycle, the ordinary general meeting is not a matter of managerial discretion; it is a compulsory forum. The legal consequences attached to this allocation are equally clear. The power to convene is fiduciary in character: it must be exercised with due care, in good faith, and for proper corporate purposes. Unwarranted delay or omission in summoning the shareholders' forum when the company's circumstances call for it may distort the allocation of decision rights between management and owners, impede the exercise of statutory or constitutional prerogatives by the shareholders, and expose the company to enforcement risks in respect of actions that require prior shareholder authorisation. Conversely, timely convocation within the statutory period for the annual general meeting sustains the chain of corporate authorisation, preserves the integrity of the financial reporting cycle, and anchors dividend discipline in lawfully approved accounts.

The Romanian regime on mandatory convocation embeds a capital-maintenance early-warning system into the governance of JSCs. When the approved annual accounts reveal that net assets have eroded below one half of the subscribed share capital, Article 153/24 of Act No. 31/1990 shifts the initiative from managerial discretion to managerial obligation: the board of directors in a unitary structure, or the management board in a dualistic structure, must promptly summon an extraordinary general meeting and, in advance of that meeting, circulate a reasoned report on the company's financial condition so that shareholders are not asked to deliberate in informational darkness. The purpose of this compulsory forum is not merely diagnostic. It is a decision-forcing device designed to restore the equilibrium between the company's asset base and the level of legally "tied" capital or, failing that, to channel the firm toward an orderly exit. Orthodox doctrine treats the agenda of such a meeting as oriented toward reconstitution of equity through fresh capital or reserves, toward nominal adjustment through a lawful reduction of share capital,⁸¹ or toward dissolution and liquidation where viability cannot be credibly re-established.⁸² A minority view reads the statute more narrowly, based on the theory that only a resolution on dissolution is strictly mandated while recapitalisation or reduction remain optional.⁸³ Even on that reading, the meeting cannot be an formal ritual: where dissolution is rejected, the company must regularise its position by the close of the financial year

80 Duțescu, 2010, p. 189.

81 This measure is possible only if the amount of the company's capital allows it, that is, if the reduction does not cause the capital to fall below the minimum level prescribed by law. See Fegyveresi, 2024, p. 130.

82 Schiau and Prescure, 2009, p. 463; Cărpenu, Piperea, and David, 2014, p. 576; Duțescu, 2010, p. 189.

83 Oroviceanu, 2010, pp. 18–19.

either by replenishing equity or by reducing the legal capital to align with the diminished net assets. Shareholders retain the capacity, by exercise of their statutory right to supplement the agenda, to place alternatives to dissolution before the meeting, including structural measures, such as conversion into an LLC.⁸⁴

A separate, governance-integrity trigger concerns the lawful composition of the administrative organs. Articles 137/2 and 153/7(2) address the situation in which the board falls below the statutory floor. In a unitary system the remaining directors⁸⁵ must immediately convene an ordinary general meeting to restore the board to legality; if they do not act, any interested party may seek judicial assistance to appoint a convener, thereby preventing a vacuum of corporate agency from ossifying. In a dualistic system, the supervisory board exercises oversight over the management board but itself must be constituted within a corridor of 3 to 11 members, with no requirement that the headcount be odd. Should the supervisory board's membership drop beneath the minimum, the obligation to summon an ordinary general meeting shifts to the management board; persistent inaction again unlocks the same judicial convocation mechanism. These rules protect the continuity and the legitimacy of corporate decision-making by ensuring that shareholder authority can be mobilised to restore the administrative architecture whenever either capital adequacy or organ composition ceases to satisfy the statutory baseline.

Additionally, the law recognises a narrow but important safety valve (functional especially in the case of smaller, closed JSCs): the “universal” or “spontaneous” general meeting.⁸⁶ Where the entirety of the voting capital is present or represented and every shareholder consents to deliberate, the protective function of convocation formalities is fulfilled by unanimity itself. In that configuration, the shareholders may validly waive defects in notice and may even constitute the agenda *in medias res*, provided that all participants expressly accept to debate and vote the items proposed. The universal meeting does not, however, transubstantiate the meeting into an omnipotent organ. Unanimous presence and consent can cure defects of convocation and agenda-setting, but they cannot extend the material competence of the general meeting beyond what the statute or the articles permit. Nor does unanimity relieve the company of post-meeting formalities, such as minute-taking, and registrations or publications needed for opposability. Properly understood, the doctrine of the universal meeting is a functional substitute for notice, not a license to disregard the remainder of corporate law's mandatory rules.

In Romanian company law, the convocation formalities for general meetings are constitutive of the deliberative power of the meeting. Accordingly, jurisprudence and doctrine converge on the proposition that resolutions adopted at a meeting called in breach of the statutory and constitutional rules on notice, timing, form,

⁸⁴ Fegyveresi, 2024, p. 130.

⁸⁵ The law does not impose a maximum number of directors in a unitary system, but their number must be odd to facilitate decision-making.

⁸⁶ Fegyveresi, 2024, pp. 132–133.

or agenda-setting are sanctioned by nullity. Absent a law-compliant convocation, shareholders' participatory and informational rights are structurally impaired, and any subsequent vote lacks the procedural predicate that legitimises collective will-formation. This is not a simple irregularity to be remedied *post hoc* by majority approval; it goes to the existence of the meeting as a lawful decision-making forum.

The Romanian Companies Act requires that invitations for general meetings be published in both Part IV of Romania's Official Gazette and a widely circulated newspaper.⁸⁷ The meeting cannot take place sooner than 30 days after the invitation's publication in the Official Gazette. This rule ensures shareholders have sufficient time to prepare for the meeting. Special circumstances require immediate action. If the number of board members falls below the statutory minimum, the remaining board members must promptly convene a general meeting. However, the obligation for immediate convening refers only to the issuance of the invitation and not to bypassing the mandatory 30-day notice period. This period, stipulated in Article 117(2) of the Romanian Companies Act, is a binding and non-derogable rule.⁸⁸

If the first general meeting fails to achieve a quorum, the invitation may include a date for a repeated meeting.⁸⁹ This repeated meeting cannot take place sooner than the day following the initial meeting. The courts have ruled that any decision adopted during a repeated meeting held on the same day as the original meeting is invalid.⁹⁰ If the initial invitation does not specify a date for the repeated meeting, a new invitation must be issued. The mandatory notice period for this second invitation may be reduced to 8 days.

Romanian company law accommodates several individualised modes of convening the general meeting, reflecting the fact that, since the 2019 reform, all shares in a JSC are registered in nominative form. Because every shareholder is identifiable in the register of shares, the company may validly replace newspaper notices with targeted dispatches, most commonly letters sent by registered post to the address recorded in the register.⁹¹ Where the articles of association so provide, electronic

87 Angheni, 2013, p. 163; David, 2014, pp. 378–379. The question of which type of newspaper should be used for publication has been a subject of debate. Some argue that it must be a local or regional newspaper available in the area of the company's headquarters. Others consider that any widely circulated newspaper could suffice. The prevailing opinion supports publication in a local or regional newspaper. However, if such a newspaper does not exist in the area of the company's headquarters, a newspaper from the nearest locality should be chosen. National newspapers are seen by some as a better alternative, because they ensure wider circulation and broader territorial coverage, which can help inform shareholders who do not reside near the company's headquarters.

88 Fegyveresi, 2024, p. 133.

89 Angheni, 2013, p. 164.

90 Fegyveresi, 2024, p. 134.

91 The courts held that the company's convening of the meeting solely by registered letter was lawful. This is because, where all shares are registered (nominative), notice may be given exclusively by registered letter, provided this method is not prohibited by the articles of association, and in the company's articles there is no express prohibition of this convening method. High Court of Cassation and Justice, Commercial Section, Decision No. 2741 of 15 September 2010.

communication may also be employed: the convocation and supporting documents can be transmitted by e-mail bearing a qualified electronic signature, on condition that the message reaches the shareholder not less than 30 days before the meeting. The use of a qualified signature serves the evidentiary and integrity functions that traditional registered mail performs, authenticating the sender, fixing the content and the date of dispatch, and enabling the company to prove timely delivery. For issuers that maintain an official website, publication of the notice and agenda online is an additional transparency obligation; it does not displace individualised notice but operates in parallel to facilitate equal access to information.

The convocation must contain all information necessary for shareholders to organise their participation and to understand the matters to be decided.⁹² In practice this requires an unambiguous indication of the date, hour, and venue; the reference date used to determine entitlement to attend and vote; and a statement of the agenda drafted in clear, intelligible terms that allow shareholders to anticipate the legal and economic implications of each item. Unless the articles specify a different arrangement, the meeting takes place either at the company's registered office or at the location stated in the notice. Deliberations held outside the time, date, or place announced are procedurally defective and the resolutions adopted there are in principle void, because the convocation has a constitutive function: it defines the procedural framework within which the collective will of the company may lawfully be formed.

Enhanced information duties apply where structural decisions are proposed. If amendments to the articles of association are on the agenda, shareholders must receive the full text of the proposed clauses with the convocation so that they can assess the precise drafting and seek advice if necessary; a generic indication that "amendments" will be discussed does not suffice. Where appointments to the board of directors or to the supervisory board are to be made, the notice should inform shareholders that the list of candidates and their files are available for inspection at the company's headquarters. Sensitive personal data contained in those files should not be reproduced in the convocation itself; the combination of an on-site inspection right and website publication of the notice strikes a balance between corporate transparency and data-protection compliance.

Romanian law adheres to a strict agenda discipline: as a rule, the general meeting may not adopt resolutions on matters that were not previously included in the published agenda.⁹³ This rule secures the shareholder's right to be informed in advance and to decide (by attending, appointing a proxy, or divesting) how to respond to the proposed corporate action. Two narrow pathways permit deviation. First, when all shareholders are present or represented and no one objects, the meeting may add and decide new items; the unanimity requirement is intentionally demanding and is met solely in smaller closely held companies. Second, when the annual financial statements are submitted for approval, the meeting may, as an accessory decision,

⁹² Angheni, 2013, pp. 163–164.

⁹³ For the rights of minority shareholders to amend the agenda, see Section 6.3.

rule on the discharge or liability of directors or supervisory board members and on the initiation of actions against them, even if these measures are not expressly listed in the notice. Beyond these situations, attempts to extend deliberations beyond the agenda expose the resolutions to annulment. Shareholders who have consented to the inclusion of an additional item but later vote against it cannot subsequently invoke the initial omission as grounds to challenge the decision; their prior consent cures the procedural defect.

The conduct of the meeting must be memorialised in minutes that record the constitution of the meeting, the identity and holdings of those present or represented, the substance of the debates, and the text and outcome of each resolution. The minutes must be signed by the chair and secretary, and they should annex the convocation documents and attendance lists so that a complete procedural file exists. To render the resolutions enforceable *erga omnes* and to ensure commercial publicity, the JSC must file them with the Trade Registry and procure their publication in the Official Gazette within 15 days of adoption; if the issuer maintains a website, posting the results there is also required. Individual shareholders may request confirmed extracts or notifications of the resolutions and voting outcomes, which operate both as a transparency device and as a trigger for litigation time-limits.

In current Romanian law, the position of holders of dividend-preference shares illustrates the interaction between participation and voting rights in Romanian corporate governance. Before the 2006 amendments, these shareholders were not only excluded from voting but could even be barred from attending the general meeting. The legislature retained the voting limitation but abolished the participation ban, recognising that informed attendance is a cornerstone of minority protection and market discipline. On a principled reading of the amended framework, the correlative right to request the convocation of a meeting should also extend to dividend-preference shareholders.

6.2. Voting Rights

In corporate law, the vote is the instrument through which private ownership positions are translated into collective authority. The general meeting furnishes the institutional setting for that translation: it constitutes the company's supreme deliberative forum and provides the procedural safeguards within which individual preferences are aggregated into binding corporate decisions. As a baseline, every member or shareholder participates in that process; disenfranchisement is exceptional and justified only to protect capital integrity, procedural fairness, or the company's interest. Thus, a shareholder who has not paid a due contribution is temporarily disabled from voting until performance cures the default, because voting power is premised on fully assumed proprietary risk.⁹⁴

The act of voting expresses a personal position, but it acquires corporate effect only when the thresholds fixed by statute or the constitutive documents are satisfied.

94 Fegyveresi, 2024, p. 134.

Therefore, majority formations perform a constitutive function: they convert dispersed, individual choices into the company's will. The normative rationale is democratic in form yet prudential in content. Individual votes reflect heterogeneous interests; the majority rules define when those interests legitimately speak for the enterprise as a whole, ensuring both decisional legitimacy and legal certainty.

In LLCs, the general meeting remains the principal arena for decision-making, but Romanian law accommodates participation beyond physical attendance. The constitutive instrument may authorise voting in writing, enabling members who cannot be present to contribute to the formation of the corporate will.

Unless the founding document provides otherwise, each LLC-share carries a single vote, which aligns decisional weight with the economic stake. Substantively, decisions are ordinarily subject to a dual approval logic (double majority rule): they must secure an absolute majority measured both by headcount of members and by the proportion of corporate shares they collectively hold.⁹⁵ This double filter prevents domination either by a numerically small but economically powerful bloc or by a numerical majority that lacks a commensurate capital commitment, thereby preserving the hybrid, personal-capital character of the LLC. Where a regularly convened meeting fails at the threshold stage, the law authorises reconvening; at the subsequent session, the items on the original agenda may be resolved by a majority of votes actually cast, allowing the company to overcome persistent coordination failures without sacrificing minority protections embedded in notice and agenda discipline.

Amendments to the constitutive instrument historically demanded unanimity (except for cases in which the statute or the charter had different rules), an imperative that underscored the contractual and personal substratum of the LLC.⁹⁶ In one case, the highest court stated that the manner in which the general meeting operates and reaches decisions demonstrates the predominance of this company's *intuitu personae* character. Accordingly, any amendment to the articles of association must be adopted with the vote of all members, save for the exceptions provided in the articles or by statute. It follows indisputably that the legislature intended resolutions amending the articles of an LLC to be adopted only with the unanimous consent of the members concerned. Had the norm been meant merely to require the presence/participation of all members at the general meeting, rather than the expression of a common will as a deliberative act, the legislature would not have referred to the general adoption of general-meeting resolutions by absolute majority, a formulation that clearly indicates the requirement is the common will of one-half plus one of the members; otherwise, it would have spoken of presence, not of "the vote of all members". Thus, if the legislature had not envisaged the common will of all members as a precondition for

⁹⁵ Gheorghe, 2020, p. 332.

⁹⁶ The courts decided that 'an increase of the share capital entails an amendment to the articles of association, which requires the unanimous vote of the members, since neither the law nor the articles of association provide any exception to the unanimity rule' (High Court of Cassation and Justice, Commercial Section, Decision No. 3017 of 29 September 2010).

amending the articles, but only their attendance, the purpose of such a requirement would be devoid of rationale.⁹⁷

Legislative reform in 2022 recast this rigidity. The current regulation states: the general meeting decides by a vote representing the absolute majority of the associates and the shareholdings, except when the articles of association provide otherwise. If the company wishes to require a qualified majority (larger than simple majority, e.g. two-thirds) or unanimity (all associates agree) for certain or all decisions, this must be explicitly stated in the articles of association. Companies that want extra safeguards for important decisions, such as changes to the constitutive documents, can raise the decision-making threshold only through clear language in their articles. If the articles are silent, the law's default applies. The calibration of voting power is thus shifted, as a matter of policy, from unanimity in case of charter reform to party autonomy bounded by good faith, creditor protection, and publicity rules.

Even where voting rights subsist in principle, they are curtailed to neutralise conflicts of interest that would undermine the integrity of deliberation. A member whose own in-kind contribution is at issue, or who stands on both sides of a contemplated transaction with the company, must refrain from voting on the matter. The prohibition removes the structural temptation to adjudicate a private claim under the cloak of corporate decision-making and aligns with the broader maxim that no one should be judge in their own cause.

In JSCs, the framework is more detailed. The starting point is proportionality: each fully paid share generally confers one vote,⁹⁸ although the articles may deviate within the limits of mandatory law, including by capping the number of votes exercisable by a large shareholder. Where shares are pledged, the voting entitlement follows ownership and remains with the pledgor unless and until the enforcement process culminates in a transfer. Parties may, however, organise representation contractually during the pledge period, so that the creditor acts as proxy while the legal titleholder retains the underlying right. If enforcement proceedings are initiated regarding the shares, the shareholder retains voting rights until the shares are sold or auctioned.⁹⁹ Once the sale is perfected, the acquirer steps into the full panoply of shareholder rights, voting included.

The manner of casting votes is ordinarily open, but secrecy is required for personal matters, such as the appointment or dismissal of directors, auditors, or supervisory board members, and for decisions regarding their liability.¹⁰⁰ Provisions that attempt to substitute publicity for secrecy in these contexts, or resolutions adopted in defiance of the secrecy requirement, are invalid because the protection of independence and freedom from retaliation would otherwise be illusory. Where correspondence voting is permitted, ballots relating to secret-vote items are counted only after in-person

97 High Court of Cassation and Justice, Commercial Section, Decision No. 2765 of 22 September 2011.

98 Angheni, 2013, p. 164.

99 Săuleanu, 2008, p. 170.

100 Angheni, 2013, p. 167.

votes have been tallied, and the identity of mail-in voters is confined to the tellers to preserve confidentiality. Public issuers may not conduct general meetings exclusively by correspondence; a physical or virtual session must be held, though postal or electronic voting can complement the meeting for both listed and unlisted companies.¹⁰¹

Quorum and majority rules reflect a compromise between decisional efficiency and minority protection. For ordinary general meetings, the presence of shareholders holding at least one-quarter of the voting rights suffices to constitute the meeting, and resolutions pass by a simple majority of votes cast. If that threshold proves unattainable, a second call may proceed without any quorum requirement and may adopt resolutions, again by a majority of votes actually expressed, but only on matters included in the initial agenda.¹⁰² The unanimity exception persists in another guise: if all shareholders are present and consent, the meeting may decide on any issue, whether or not announced.¹⁰³ The flexibility of the second-call regime cannot be neutralised by private ordering; the articles cannot reimpose stricter quorum or majority rules for repeated meetings, which is why, in extreme dispersion scenarios, a single attending shareholder may adopt valid decisions so long as the agenda discipline is respected.

Extraordinary general meetings follow a similar architecture but with enhanced thresholds when the legal or economic identity of the company is at stake. The presence of at least one-quarter of the voting rights is typically required, with the threshold reduced at a second call to one fifth.¹⁰⁴ Routine extraordinary matters pass by a simple majority of votes cast, but structural transactions (alterations to the company's main object, capital changes, mergers, divisions, or dissolution) demand supermajority support measured, as a default, at two-thirds of the votes present or represented. The articles may raise, but not lower, these safeguards.

Not every share counts toward the arithmetic of constitution and decision. Financial instruments that do not carry voting rights are excluded from quorum computations, as are shares whose voting power is suspended or restricted at the time of the meeting.¹⁰⁵ The founding meeting of a company created by public subscription is treated differently to reflect the pre-corporate, contractual nature of that stage. Each subscriber has one vote irrespective of the number of subscribed shares, and more than half of the subscribers must attend; while this equal-vote model has been criticised for undervaluing larger risk bearers, it responds to the need to police the formation process rather than to measure capital power.¹⁰⁶ Subscribers who fail to meet their financial obligations or pay at least half of their cash contribution are excluded from voting.

101 Fegyveresi, 2024, pp. 141–143.

102 David, 2014, pp. 363–364.

103 Fegyveresi, 2024, p. 143.

104 David, 2014, p. 370.

105 *Ibid.*, pp. 362–363.

106 Georgescu, 1948, p. 239.

Romanian law specifies both the occasions for disabling the vote in JSCs and the conditions for its reactivation. Directors, members of the executive or supervisory board, and comparable insiders may not participate in decisions regarding their own discharge from management or in matters that directly implicate their personal interests; resolutions adopted with their decisive participation are susceptible to challenge. Legal doctrine suggests that this principle should apply to all company types.¹⁰⁷

Nonetheless, the law contains a safety valve. First, where the approval of the annual financial statements cannot otherwise attract the requisite majority, the restriction may be lifted for that vote. Second, the restriction does not apply if the resolution could have been passed also without the vote of the restricted shareholder.¹⁰⁸ This “last resort” mechanism is generally interpreted as relating to the vote threshold rather than to meeting constitution, and it loses salience in the setting of a second-call ordinary meeting for which neither quorum nor enhanced majority requirements apply and the articles cannot stipulate stricter conditions.

A distinct but related discipline governs shareholders who face a conflict of interest. They must abstain, and if their decisive vote tips the balance, they are exposed to damages liability. Because the statute does not exhaustively define conflict, the analysis is context-sensitive; when a conflict is manifest and the shareholder nonetheless votes, best practice excludes that vote from both quorum and majority counts and bars the conflicted shareholder from participating in the associated debates.¹⁰⁹

Founding meetings in public subscriptions are further constrained by fairness concerns. A subscriber who transfers a non-cash contribution may not vote on resolutions dealing with that contribution, thereby protecting cash contributors from dilution by valuations that the contributor would otherwise help to ratify.¹¹⁰ Preference shares that ordinarily lack voting rights regain the vote if the promised preference, typically a dividend privilege, is delayed or denied, and the vote persists until the preference is satisfied, which restores parity with ordinary shareholders for the duration of the default. Shares are indivisible for corporate purposes; co-owners must appoint a common representative, failing which a court may do so, and the company is entitled to ignore a putative transfer until the representative is designated. Treasury shares, as repurchased but not cancelled equity, are neutralised for governance: their voting rights are suspended and they do not count toward quorum until they are alienated again.

When corporate action would vary the rights attached to a particular class, the logic of class autonomy controls. The affected class must approve the change in a separate meeting before the decision becomes effective for the company as a whole. Preference shareholders, even when ordinarily disenfranchised, recover the vote for the purpose of protecting their class prerogatives; thus, class consent operates

107 Căpățină, 1991, pp. 186–187; Cărpenu, Piperea, and David, 2014, p. 415.

108 Georgescu, 1948, p. 348.

109 Săuleanu, 2008, pp. 189–190.

110 David, 2014, p. 159.

as a constitutional check on majoritarian opportunism at the level of the general meeting.

In Romanian law voting is a property right, a governance tool, and a liability-control device.

6.3. Minority Shareholders

Romanian company law does not establish a unified system for minority protection but contains various provisions that safeguard minority shareholders' rights. Article 119 of the Romanian Company Law is a key legal provision designed to protect the interests of minority shareholders. However, its applicability is not exclusive to them, as shareholders holding at least 5% of the company's share capital, whether individually or collectively, may invoke it. This threshold allows both minority and majority shareholders to exercise the right to request the convocation of a general meeting, reflecting a mechanism for ensuring corporate oversight.¹¹¹

Under Article 119(1), shareholders who meet the 5% threshold can request the board of directors (in a unitary management system) or the management board (in a dualistic system) to convene the general meeting to deliberate on matters within its competence. The company's articles of incorporation may lower this threshold but cannot set it higher than 5%. Once such a request is made, the directors or management board must convene the general meeting within 30 days and hold it within 60 days of the request.

Scholars debate whether shareholders need to justify their request for convening the general meeting. One perspective suggests that shareholders are not required to provide reasons for their request.¹¹² Another view argues that the request must specify the purpose, agenda, and rationale to ensure that the proposed matters fall within the general meeting's scope of authority.¹¹³ A third perspective adds that the request should indicate the type of meeting being called, whether ordinary or extraordinary. However, it is generally agreed that the purpose and type of meeting can be inferred from the proposed agenda items, making explicit inclusion of these details optional rather than mandatory.¹¹⁴

If the directors or management board fail to convene the meeting in response to a valid request, shareholders may petition the court where the company is headquartered to order the convocation. Importantly, the High Court of Cassation and Justice has ruled that without judicial approval, shareholders themselves cannot convene the general meeting.¹¹⁵ Once the court intervenes, it determines the meeting's date, agenda, record date for shareholder identification, and appoints a presiding officer for the meeting from among the shareholders.

111 Cărpenu, Piperea, and David, 2014, p. 398; Duțescu, 2010, p. 451.

112 Duțescu, 2010, p. 190.

113 Pascu and Pârnu, 2005, pp. 63–64.

114 Săuleanu, 2008, pp. 103–104.

115 High Court of Cassation and Justice, II. Civil College, Decision No. 2690/2006.

Legal doctrine diverges on whether the judicial process for authorising the general meeting is contentious or non-contentious. Until the 2006 amendment of the Romanian Company Law, Article 119(3) explicitly provided that such proceedings were governed by the non-contentious procedure rules of the Code of Civil Procedure. Following the amendment, this provision was repealed, leading to differing interpretations. Some argue that the process has since become contentious, involving adversarial proceedings. Others maintain that it remains non-contentious, focusing on supplementing the executive body's inaction rather than resolving disputes between corporate organs. The latter view is supported by the High Court of Cassation and Justice's Decision 2015/1037, which clarified that proceedings initiated under Article 119(3) are non-contentious. The court emphasised that the process does not aim to resolve a conflict between opposing parties but to ensure the convocation of the general meeting when the management body has failed to act. The decision further argued that the non-contentious nature of the proceedings allows for an efficient and expedited resolution, which aligns with the need for prompt corporate governance interventions. By providing a mechanism for minority shareholders to convene general meetings and requiring judicial oversight in cases of managerial inaction, Romanian company law ensures that corporate decision-making remains inclusive and adheres to legal and procedural standards.

For minority shareholders, the right to information is both a tool for oversight and a safeguard against potential abuses by the majority. This right enables them to challenge unfair resolutions, monitor corporate governance, and advocate for transparency. By ensuring access to critical company information, Romanian law strengthens minority shareholders' ability to protect their interests and contribute meaningfully to corporate decision-making processes. The right to information is an inherent non-monetary right derived from a shareholder's ownership of shares. It is crucial for ensuring the effective exercise of other shareholder rights, such as oversight and participation in the company's business management. This right obligates the company to provide access to essential documents and information, enabling shareholders to make informed decisions, particularly at general meetings. Minority shareholders benefit significantly from this right, as access to information can provide a defence against the dominance of majority shareholders and serve as the foundation for legal remedies, such as challenging invalid corporate resolutions. The Romanian Companies Act explicitly grants the right to information in the context of JSCs but does not exclude members of other corporate forms from similar rights. Minority shareholders can use this right to ensure transparency and accountability, fostering fairness in corporate governance.

The Romanian Companies Act requires that specific documents (e.g. annual financial statements, directors' reports, supervisory board reports, and dividend proposals) be made available to shareholders at the company's registered office from the date of the meeting's convening notice. Shareholders must be granted access to these documents for at least 30 days before the meeting. In cases in which the notice specifies a meeting date beyond this minimum period, shareholders retain their

right to access documents throughout the extended period. If notices are delivered by registered mail or electronically with a qualified electronic signature, the right to access documents must be upheld from the receipt of the notice until the meeting date. Shareholders may request copies of these documents, and companies are prohibited from charging fees beyond the administrative costs of producing them. For companies with websites, these materials must also be published online to ensure broader access.

Shareholders are entitled to address written questions to company executives about past and future company operations following the convening of the general meeting. Executives must respond to these questions during the meeting, and answers may be provided orally, as general meeting proceedings are recorded and accessible to shareholders. If written responses are specifically requested, especially for complex queries, executives are obligated to comply unless disclosure would significantly harm the company's interests, such as in cases involving trade secrets or confidential information.

Failure to fulfil the obligation to provide information is not directly sanctioned by the Romanian Companies Act but may serve as a basis for legal action to annul general meeting resolutions. Additionally, knowingly providing false or misleading information about the company's financial situation constitutes a criminal offense, punishable by imprisonment or fines.

Shareholders representing at least 5% of the company's capital may request additions to the agenda. These requests must be submitted within 15 days of the invitation's publication. The supplemented agenda must be published at least 10 days before the meeting.

A shareholder has the inherent right to lodge complaints with the company's internal auditors or internal financial controllers regarding actions they believe should be subject to audit. The auditors and internal controllers are required to consider these complaints when preparing their report for the general meeting. If the complaint is raised by one or more shareholders who collectively represent at least 5% of the company's share capital (or a smaller percentage if allowed by the company's articles of association) the internal auditors or controllers are obliged to investigate. If they determine that the complaint is well-founded and urgent, the internal auditors must immediately convene a general meeting and present their findings. Otherwise, the complaint must be addressed at the next general meeting. The general meeting is required to adopt a resolution on the complaint. Internal controllers do not have the right or obligation to directly convene the general meeting. However, they are required to notify the board of directors, or the supervisory board in a dual management system, who will then convene the general meeting.

The Romanian Companies Act mandates that JSCs maintain specific records, including the shareholder register, meeting minutes, resolutions, and bond registers. These records are accessible to shareholders and, in some cases, to third parties. For instance, the shareholder register must include details about shareholders' identities and shareholdings, and it is publicly accessible.

The minutes of general meetings record resolutions, votes cast, abstentions, and dissenting opinions. Shareholders have the right to request and receive copies of these records at their own expense. While the law does not explicitly require disclosure of board meeting minutes, shareholders may access these records if the company's articles of association permit it. If access is denied, shareholders may seek a resolution from the general meeting or a court order to enforce their rights.

In the case of an LLC, a shareholder or a group of shareholders representing at least one-quarter of the share capital may request the convening of the general meeting, specifying the purpose of the convening.

A specific tool of minority protection in the Romanian legal system is cumulative voting, which was first introduced into Romanian corporate law in 2000, and currently is regulated by Act No. 24/2017 on issuers of financial instruments and market operations. Article 85(3) prohibits any corporate charter provisions from invalidating, altering, or limiting shareholders' rights to request cumulative voting during board elections. Any charter clause intended to restrict these rights is declared null and void. By safeguarding this voting system, the law seeks to balance corporate governance by providing minority shareholders a meaningful opportunity to influence board composition.

The cumulative voting method is one of the most effective mechanisms for ensuring minority shareholders are represented on a company's board of directors (in a unitary management system) or supervisory board (in a dual management system). Although the cumulative voting method is primarily designed to ensure the representation of minority shareholders in corporate bodies, it does not violate the principle of equality of rights attached to shares. Unlike traditional vote multiplication, where a single share can carry multiple votes, cumulative voting adheres to the proportionality principle, as each share still represents one vote. The key feature of this system is that a shareholder's total voting rights are multiplied by the number of seats to be filled on the board. The shareholder can then allocate their votes across candidates in any manner they choose, either concentrating all votes on a single candidate or distributing them among several candidates. For example, if five board seats are to be filled and a minority shareholder owns 1,000 shares (each granting 1 vote), they have a total of 5,000 votes under cumulative voting. Instead of casting a maximum of 1,000 votes for any one candidate under a majority voting system, the shareholder can allocate all 5,000 votes to one candidate or distribute them among multiple candidates, such as 3,000 votes for one and 2,000 votes for another, depending on their preferences or strategy. The cumulative voting system offers an equitable approach to corporate governance, fostering minority shareholder representation without disrupting the proportionality of voting rights.

To understand the mechanism, here is a simplified model. Consider a company with five board seats to fill and 1,000 shares issued. The shareholders are divided into two groups: majority shareholders who hold 800 shares and minority shareholders who hold 200 shares. Each share represents 1 vote, and the cumulative voting system allows shareholders to multiply their votes by the number of board seats, giving each

group more flexibility in allocating their votes. The majority shareholders, with 800 shares, have a total of 4,000 votes (800 multiplied by 5). They can distribute these votes among their preferred candidates, typically spreading them strategically to ensure control of most board seats. For example, they might allocate their votes evenly across four candidates, giving each candidate 1,000 votes. This strategy maximises their influence while leaving one seat potentially open for competition. The minority shareholders, with 200 shares, have 1,000 votes (200 multiplied by 5). By concentrating all their votes on a single candidate, they can compete effectively for one of the board seats. With 1,000 votes focused on one candidate, the minority representative can match the votes of any single majority-backed candidate, assuming the majority's votes are distributed as described. When the votes are tallied, four candidates backed by the majority receive 1,000 votes each, while the minority candidate also receives 1,000 votes. This results in the minority candidate securing the fifth board seat. The cumulative system ensures that the minority, despite holding only 20% of the shares, can achieve proportional representation by focusing their votes strategically. Without cumulative voting, the majority would likely dominate all five board seats, leaving the minority without representation.

6.4. Shareholders' Agreements

Shareholders' agreements in Romanian law occupy a marginal role, primarily due to historical and cultural factors that have shaped the perception and utility of this legal tool.¹¹⁶ Unlike jurisdictions where such agreements are widely recognised and utilised as effective mechanisms for governing shareholder relationships, their use in Romania remains rare and underdeveloped. This limited adoption can be attributed to several interrelated factors.

Romanian legal culture has traditionally placed significant emphasis on the corporate founding documents, such as the articles of association or the statutes of a company. These documents are viewed as the primary source of governance rules and shareholder obligations. Any arrangement that seeks to supplement or deviate from these formalised agreements is often regarded with suspicion, as it may be seen as undermining the principles enshrined in the foundational legal framework of the company and the requirement for transparency in company law.

Additionally, there is a perception within Romanian legal tradition that shareholders' agreements serve primarily as instruments to circumvent the articles of association, creating informal arrangements that might conflict with or overshadow the corporate governance rules established by law. This perception is further reinforced by a conservative legal approach that values the predictability and transparency of formal corporate structures over the flexibility offered by private agreements.

The limited prevalence of shareholders' agreements in Romania may also be linked to the lack of a legal framework explicitly regulating these agreements.

¹¹⁶ For an analysis on shareholders' agreements in Romania, see Catană and Șumandea-Simionescu, 2018, pp. 509–538.

In jurisdictions where shareholders' agreements are common, there is often if not a regulation, but at least hints to recognition of these contracts, which provides confidence to shareholders in using them. By contrast, Romanian law does not offer provisions or established jurisprudence on the subject, which contributes to uncertainty about their legal standing and practical enforceability.

Moreover, the business culture in Romania has historically prioritised informal negotiations and personal relationships over formalised private agreements among shareholders. This cultural inclination may reduce the perceived necessity of entering into shareholders' agreements, as stakeholders often rely on trust and verbal understandings.

The result of these factors is that shareholders' agreements are not commonly integrated into Romanian corporate practice. However, this does not mean that they are entirely absent or without utility. In certain complex or international business contexts, particularly where foreign investors are involved, shareholders' agreements are increasingly used to supplement the provisions of the articles of association. They can provide additional flexibility and clarity on such issues as voting arrangements, dividend policies, transfer of shares, and dispute resolution, which may not be adequately addressed in the founding documents.

From a legal viewpoint, the reality of these agreements is acknowledged through the provisions of Act no. 297/2004 on the capital market. This act implicitly acknowledges the significance of such agreements in shaping corporate governance, especially in scenarios involving joint control or strategic collaboration among shareholders. For instance, it refers to persons who directly or indirectly participate in the conclusion of agreements aimed at obtaining or jointly exercising voting rights if the shares that are the object of the agreement may confer a position of control. Act no. 297/2004 addresses situations where individuals or entities enter into agreements that impact voting rights. Such agreements often aim to consolidate influence or exercise joint decision-making power within a company. This provision demonstrates an acceptance that shareholders' agreements can play a role in structuring relationships among stakeholders and in achieving specific objectives, such as consolidating control or facilitating coordinated actions.

6.5. Control of Legality of General Meeting Resolutions

Judicial control over general-meeting resolutions operates as a constitutional feature of Romanian corporate law rather than an exceptional remedy. It disciplines the exercise of majority power by insisting that the company's will be articulated only within the limits traced by statute and by the constitutive documents. The validity inquiry, therefore, is legal and not economic: a resolution must comply with mandatory legislation and must not contradict the articles of association. Where either condition fails, the resolution is open to judicial censure at the suit of a qualified claimant, and the claimant need not prove loss to the company or to any investor. Unlawfulness in itself, whether sourced in a statutory breach or a conflict with the charter, provides a sufficient ground for annulment.

The Constitutional Court of Romania held that it cannot be maintained that the abusive filing of actions to annul resolutions of the general meeting of shareholders has the effect of blocking the company's activity. Under Act No. 31/1990, bringing an annulment action does not suspend the enforcement of the challenged resolution; suspension may be ordered only by way of a presidential ordinance (an interim order), with the claimant potentially required to post security. These rules operate as procedural safeguards designed to deter vexatious annulment actions against general meeting resolutions.¹¹⁷

The right to invoke this control belongs to each shareholder as a non-pecuniary membership entitlement, inseparable from the status of member and unavailable to *ex ante* waiver through private ordering.¹¹⁸ The articles cannot validly strip shareholders of the challenge right, and private undertakings to forgo litigation are similarly ineffective where they would neuter the legality review. As a matter of standing, the law privileges those who were absent from the meeting and those who attended but voted against the impugned resolution, on condition that dissent was captured in the minutes. Abstention is ordinarily treated as acquiescence and will not sustain an action. Even this scheme yields for cases in which consent was vitiated; a shareholder who supported the resolution may still obtain annulment by establishing coercion, fraud, material mistake, or other defects that taint will-formation. However, this ground is necessary to control if the vitiated vote was necessary to obtain the majority.¹¹⁹ Secret ballots pose a well-known friction between the value of confidentiality and the evidentiary burden of dissent.¹²⁰ A coherent solution, consistent with the rationale for secrecy on sensitive agenda items, recognises the sufficiency of the tellers' report showing at least one negative or dissenting vote while forgoing identification of the voter.

The court's mandate is confined to legality. It does not substitute its economic judgment for that of the corporate organs, and it will not reassess expediency, profitability, or business strategy when the decision lies within the board's or the meeting's substantive competence. Remedial power tracks that narrow mandate: the court annuls what is unlawful but does not replace it with an alternative corporate decision. Legality review nonetheless ranges across both procedure and substance.¹²¹ On the procedural side, the convocation must meet statutory and charter requirements concerning the competent convening organ, the form and content of notice, and the specification of date, time, and place; material departures can vitiate the ensuing resolution. On the substantive side, the decision's content must respect mandatory norms and the charter's constraints. Measures that trespass on capital maintenance rules, disregard class-rights protections or exceed the general meeting's or board's powers are *ultra vires* and unlawful.

117 Decision No. 904/2006, Official Gazette No. 55 of 24 January 2007.

118 Fegyveresi, 2024, p. 152.

119 Angheni, 2013, pp. 169–170.

120 Georgescu, 1948, p. 367; Cârpenaru, Piperea, and David, 2014, pp. 438–439.

121 Turcu, 1998, p. 318.

Romanian doctrine and jurisprudence distinguish between invalidity protecting public interests and invalidity protecting private interests.¹²² The former, usually styled as nullity, is engaged when rules serving the integrity of the corporate constitution or the legality of convocation and competence are broken. In such circumstances any person with a legitimate interest, including creditors and other affected third parties, may pursue an action in nullity.¹²³ The latter, voidability, protects private interests and is triggered by such infringements as vitiated consent or breaches of charter-based procedural accommodations; it may be pursued only by those directly affected. Because the Companies Act largely articulates mandatory, public-interest norms, their violation typically grounds nullity; conversely, contraventions limited to contractual provisions of the articles generally have found claims in avoidance at the instance of interested shareholders. The line between the two is not purely taxonomic, as it also dictates consequences. Partial invalidity is conceptually available where the unlawful element can be severed without distorting the remainder; the courts will prefer to preserve the balance of the resolution if the illicit component is separable and if the residual decision continues to make legal and practical sense.

Article 132 of Act No. 31/1990 captures the validity test for JSCs by tying binding force to compliance with law and charter. A resolution that surpasses this threshold binds all shareholders, dissenters, and absentees alike; disagreement is not illegality. Similarly, a resolution that fails the test is vulnerable to annulment, and courts consistently resist invitations to police business merits once legality is satisfied. This solution aligns Romanian law with the broader European model in which judicial review of corporate decisions secures legality while leaving business judgment to corporate actors.

Temporal discipline is rigorous and must be observed with precision. In JSCs, the action to annul a resolution ordinarily must be filed within 15 days of the resolution's publication in Part IV of the Official Gazette.¹²⁴ In LLCs, which do not rely on that publication channel, the relevant period is 15 days from the date on which the member became, or reasonably should have become, aware of the decision.¹²⁵ Romanian courts generally treat these periods as limitation periods: the abstract right to seek legality control subsists, but the courts will refuse enforcement after expiry. By contrast, actions that assert nullity for breaches of public-interest norms are not time-barred;¹²⁶ they remain available at any time in deference to the systemic weight of the infringed rule. Attention to these deadlines is not merely formalistic, because

122 David, 2014, pp. 434–437.

123 For example, creditors may challenge amendments to the articles of association that jeopardise their claims. However, shareholders cannot use the specific opposition mechanism available to creditors, as they have a dedicated right to challenge resolutions under Article 132 of Act No. 31/1990. For details, see David, 2014, pp. 439–440.

124 *Ibid.*, pp. 440–441.

125 Fegyveresi, 2024, p. 161.

126 Angheni, 2013, p. 173.

they mediate the tension between legal certainty in corporate affairs and the protection of minority and third-party interests.

The procedural posture of such disputes preserves adversarial structure by placing the company in the defendant's role. Where a unitary board collectively contests the resolution, the ordinary representation of the company cannot stand; the court appoints a shareholder to act for the company, and in a dualistic system the supervisory board may assume this function. Parallel or overlapping suits arising from the same resolution may be consolidated to avoid inconsistent outcomes and advance procedural economy. Appeal routes remain open under the ordinary hierarchy, thereby harmonising the need for rapid certainty with the demands of accuracy and fairness.

The highest court has decided that from the interpretation of the statutory provisions, there emerge the categories of persons to whom the legislature has accorded active standing to bring actions for the annulment of general meeting resolutions. Thus, in addition to shareholders who voted in person or by proxy against the resolution and requested that this be recorded in the minutes, and shareholders who did not attend the meeting, there may also be other persons who, although not shareholders, can demonstrate a legitimate, personal interest that has arisen and is current where absolute nullity is alleged. That the legislature did not intend to include the company itself among the holders of the right to seek annulment is supported by two textual arguments. First, where a resolution is challenged by all members of the board of directors or all members of the management board, the company is to be represented in court by a person designated under the applicable rules – an arrangement consistent with the company's position as defendant. Second, the law provides that the action be adjudicated in contradiction with (i.e. against) the company. Finally, it must not be overlooked that a resolution, even if unlawful, remains the company's own juridical act, embodying its will. Accordingly, the phrase "any other interested person" does not confer standing on the company to promote actions for the nullity of general meeting resolutions – a conclusion correctly reached by the court of appeal, rendering the appellant's grounds of recourse unfounded.¹²⁷

Because filing a claim does not suspend the effects of a resolution, Romanian law couples the annulment remedy with interim relief.¹²⁸ A claimant may ask for suspension pending judgment on the merits. This request is processed summarily and typically hinges on a credible showing of a serious issue to be tried and a risk of harm that would be difficult to repair later, together with the posting of security calibrated to deter frivolous applications while not pricing out meritorious claims. The preventive function of suspension is central in practice, as it forestalls the entrenchment of unlawful decisions and diminishes the risk of irreversible effects for the company or third parties.

127 High Court of Cassation and Justice, Commercial Section, Decision No. 3402 of 20 October 2010.

128 Angheni, 2013, pp. 174–175; David, 2014, pp. 445–446.

Standing is not confined to shareholders in every case. Creditors and other third parties who can demonstrate a legitimate interest may bring actions in nullity, for example to contest amendments to the articles that endanger creditor protections or to challenge structural operations adopted despite convocation defects. Extending access in this way renders the governance system permeable to the concerns of stakeholders beyond the shareholder body while leaving claims in avoidance to those whose private interests are directly impaired. At the same time, the system guards against opportunism. Abuse of the challenge right, such as strategic litigation aimed to paralyze governance rather than vindicate legality, can be mitigated through security for costs in suspension proceedings, consolidation of duplicative claims and, where appropriate, cost-shifting against unsuccessful plaintiffs.

Two further features round out the remedial rules. First, subsequent ratification may cure certain procedural defects, provided the ratifying meeting is itself lawfully convened, fully informed and competent, and provided ratification does not trench on mandatory norms or the rights of absent or dissenting shareholders in ways the law does not permit. Ratification cannot sanitise violations of public-interest rules, nor can it affect rights already crystallised in favour of bona fide third parties. Second, the external effects of invalidity are mediated by publicity and reliance. Annulment of an internal resolution does not automatically unravel transactions already concluded with third parties who reasonably relied on corporate disclosures and registry entries; instead, the fallout is managed through internal liability, restitution between company and counterparties where possible, and director or officer responsibility where breach of duty has led the company into unlawful acts.

The challenge mechanism can be seen for what it is: a device that marks the boundary between legitimate majority rule and unlawful corporate power. The distinction between nullity and voidability structures both who may sue and what consequences follow; short and precisely defined filing periods promote certainty without disabling public-interest review; judicial scrutiny is restricted to legality to respect corporate autonomy; and interim suspension prevents fait accompli harms while the merits are adjudicated.

7. Serbia

7.1. Limited Liability Companies

The rules that affect decision-making in the general meeting concern:

- a) the competencies of the general meeting,
- b) the formalities concerning the process of decision-making, and
- c) the rules on quorum and requested majorities for adopting different decisions.

The first issue substantially determines the position of the general meeting, the relationship between the general meeting and directors, as well as the overall shaping of powers between the organs of the LLC. It is worth bearing in mind that the general

meeting holds the most prominent role among the companies' organs. This role entails that, as a representative body of the shareholders, the general meeting brings the most significant decisions for the company.¹²⁹ While this is certainly true, and unanimously adopted in Serbian legal scholarship, it remains ambiguous whether the general meeting is also the omnipotent body that may take over the responsibilities of the directors, as understood, for example, in Nordic company laws. Two issues are to be addressed to determine the role of the general meeting: its relationship with the directors, and the extent to which the general meeting's competencies are subject to mandatory provisions.

Serbian law does not have an explicit provision allowing shareholders to give mandatory instructions to the directors (comparable to Section 11.01, EMCA). The directors are, however, obliged to manage the company following the resolutions of the general meeting.¹³⁰ It follows that the question of which resolutions the general meeting may bring has decisive importance. The Act on Obligations (CA) prescribes 24 issues assigned to the general meeting as its competencies. These specific competencies may be divided into several groups depending on the subject matter (issues concerning the status of the company, its finances, appointments and dismissals, etc.).¹³¹ Serbian legal literature usually understands the items on this list as the general meetings' exclusive competencies.¹³² The amendments of the CA, which omitted the formulation – unless the articles of association provide otherwise – that indicated a default nature of the rule that enumerated the competencies, support this understanding. There is nonetheless another provision of the CA that creates the full picture. The company's bodies have competencies provided by the CA only if the articles of association do not specify those competencies.¹³³ It seems that the CA still presumes that the competencies of the LLC's organs are to be primarily determined by the shareholders in the articles of association. In that line, it may be possible to confer certain decisions that normally are for the directors (business decisions) to the general meeting. This follows the common understanding that the ultimate power to decide on all important company matters should belong to the shareholders. Nevertheless, the legislator's intent on this issue remains hard to ascertain.

Regarding the formalities that concern the process of decision-making at the general meeting, one may distinguish between

- a) formalities related to the convocation, and
- b) formalities related to the holding of the meeting. In general, these formalities are established to enable shareholders to make informed decisions when casting their votes, as well as to secure the legality of the entire process.

129 See, for example, Arsić, 2008, pp. 133–134.

130 Article 224, paragraph 1, CA.

131 Article 200, CA.

132 Vasiljević, Jevremović Petrović, and Lepetić, 2022, p. 181; Jovanović, Radović, and Radović, 2021, pp. 399–400.

133 Article 141, paragraph 2, CA.

The formalities required to be respected before the meeting are related to the convocation of ordinary and extraordinary general meetings. An ordinary general meeting is held once a year, no later than within 6 months of the end of a business year,¹³⁴ while extraordinary general meetings are held as needed, as well as when so prescribed by the CA or the articles of association.¹³⁵ In summary, the requested formalities imply convening the meeting and preparing the agenda by the competent body, timely notification to the shareholders about the meeting and its agenda, determining the adequate mode of notice, as well as the legally specified content of such notice, provision of necessary documents prior to the meeting, etc. The directors, or the supervisory board in the two-tier management system, must take care of these formalities and make sure that all preparatory steps for the general meeting have been conducted according to law and articles of association. However, in LLCs, a general meeting may be held even without the implementation of mentioned rules if it is attended by all shareholders, unless otherwise provided in the articles of association (the so-called universal meeting).¹³⁶ This exception is due to the need for less formalistic and bureaucratic decision-making in small private companies. In that line, every resolution may be also passed without a formal meeting, if it is signed by all shareholders entitled to vote thereon.¹³⁷ This means that, for example, a company's lawyer may prepare the draft text of the decision and circulate it to the shareholders for signature.

When it comes to the formalities present during the general meeting, the general meeting may adopt its rules of procedure to lay down in detail the manner of work and decision-making.¹³⁸ The general meeting has a chairman. Shareholders may participate in general meetings through their rights to speak, vote, make proposals, ask questions, etc. The general meeting may be held by using a conference call or other audio and visual conference equipment, enabling all persons participating in the work may communicate among themselves at the same time.¹³⁹

The CA prescribes a quorum as a prerequisite for the general meeting's decision-making, which is a simple majority of the total number of shareholders' votes, unless the articles of association provide for a larger number of votes.¹⁴⁰ If the general meeting cannot be held owing to a lack of quorum, a meeting is reconvened with the same proposed agenda shortly within the timeline prescribed by law (repeated session). A quorum for the repeated session is one-third of the total number of shareholders' votes, unless the articles of association provide for a larger number of votes.¹⁴¹

134 Article 364, Section 1 in relation to Article 201, Section 2, CA.

135 Article 371, Section 1 in relation to Article 201, Section 3, CA.

136 Article 206, CA.

137 Article 212, Section 4, CA.

138 Article 209, Section 1, CA.

139 Article 212, Section 1, CA.

140 Article 208, Section 1, CA.

141 Article 208, Section 3, CA.

A general meeting adopts resolutions by a simple majority of votes of the present shareholders entitled to vote on a specific issue, unless the law or the articles of association provides for a higher number of votes for some issues.¹⁴² The general meeting decides by a qualified, two-thirds majority of the total number of votes all shareholders on the following:

- a) increase or reduction of legal capital;
- b) status changes and changes of legal form;
- c) voluntary liquidation of the company or filing a motion for initiating insolvency proceedings;
- d) profit distribution and the manner in which losses are covered;
- e) acquisition of company's own shares; and
- f) acquisition of company's reserved own shares.¹⁴³

The company's articles of association may also determine another majority for making decisions listed above, but not smaller than the simple majority of the total number of votes of shareholders entitled to vote on a given issue.

The Serbian legislator explicitly provides that every shareholder has a voting right in the general meeting in proportion to his share or the articles of association (if they set a different proportion), provided that articles of association may not stipulate that a shareholder has no voting right.¹⁴⁴ Therefore, non-voting shares are prohibited in Serbian law, but technically, there are no statutory limitations on the extent to which shareholders' rights may be restricted. For instance, it seems that even 0.01% of votes would be enough for complying with this provision. It remains to be seen whether and how the abovementioned concept of *clause léonine* could affect the application of this rule.

The shareholders may perform their voting rights in person or through a proxy.¹⁴⁵ In general, shareholders may perform their voting rights in their own interest, that is, they are not obliged to take care of the interests of the company or other shareholders. A shareholder may not exercise his voting rights only in a case of an actual or potential conflict of interest. The CA enumerates these cases, and among others, excludes the shareholder's voting rights for the resolution of his withdrawal or expulsion, initiating or withdrawing from a lawsuit against him, reduction or exclusion of his obligations to the company, etc.¹⁴⁶

Serbian law does not contain a general clause on the protection of minority shareholders. The rules on minority rights are spread across the entire CA and for purposes of systematisation may be divided into several groups:

- a) rules related to the convening of the general meeting,
- b) rules on super-majority for adopting certain decisions,

142 Article 211, Section 1, CA.

143 Article 211, Section 2, CA.

144 Article 199, Section 2, CA.

145 Article 207, CA.

146 Article 214, CA.

- c) rules on shareholders' right to exit,
- d) rules on derivative suits,
- e) rules on the shareholders' right to require company's dissolution,
- f) rules on protection in specific situations that entail a substantial change of company' business, and
- g) rules on shareholder information rights.

Regarding the convening of the general meeting, minority shareholders have the right to convene the meeting, and the right to put an item to the agenda. The former right has been assigned to the shareholders holding or representing at least 10% of the voting rights.¹⁴⁷ The director or supervisory board has no discretion regarding shareholders' request to convene the meeting. They are obliged to fulfil the request. The same applies to the right to put an item on the agenda. This right belongs to the shareholders who hold or represent at least 5% of the legal capital.¹⁴⁸ It should be underlined that the Serbian legislator uses not only different percentage thresholds for the performance of the two rights but also different benchmarks (voting rights vs. legal capital).

Regarding the rules on the super-majority for certain issues, the most important rule of such kind deals with the changes of the articles of association. As a general rule, the articles of association are amended by a simple majority of votes of all shareholders, unless the articles of association provide a higher qualified majority.¹⁴⁹ However, a special rule exists concerning the changes that reduce the rights of a shareholder. Such changes may be adopted only with the consent of the shareholder whose rights are to be reduced. The CA enlists cases considered as the most common situations that would reduce shareholders' rights (e.g. abolishing or restricting the pre-emptive right to subscribe or purchase shares, change of majority required for decision-making in the general meeting, and introduction or increase of the obligation of additional payments).¹⁵⁰

The shareholders of LLCs have a universal right to exit the company if there are justified reasons. The withdrawal procedure entails submitting the request to the general meeting with the reasons for exit and the amount of compensation for the share required.¹⁵¹ The general meeting may adopt or decline the exit request in its entirety (partial adoption is not possible). If the request is declined, the shareholder is entitled to seek judicial protection, that is, the court gives the final word on the existence of justified reasons for leaving the company, and/or on the fair market compensation for the share in LLC.¹⁵² A shareholder may leave the company even without a justified reason but only if she does not request compensation for the share,

147 Article 202, Section 3, CA.

148 Article 205, Section 1, CA.

149 Article 142, Section 1, CA.

150 Article 142, Section 2, CA.

151 Article 189, CA.

152 Article 192, CA.

provided that she fully paid up her share.¹⁵³ Another situation in which a shareholder may exit the company relates to the exercise of the special rights of dissenting shareholders. These rules are tailored for the JSCs but also apply to LLCs. A shareholder may require the company to repurchase his share if he votes against or abstains from voting for a decision: a) on a status change; b) on a change of legal form; c) on a change of company duration; or d) on approving the acquisition, that is, disposal of high-value assets.¹⁵⁴ Importantly, the rights of dissenting shareholders in LLCs are not mandatory, and therefore, it is possible to exclude the application of these rights in the articles of association.

Derivative suits are considered one of the most important procedural instruments of protection of minority shareholders in comparative company law.¹⁵⁵ Serbian law allows minority shareholders to bring derivative suits in two situations:

- a) in case of breach of special (fiduciary) duties, and
- b) in a case of the general meeting's decline of the proposal for bringing a claim for shareholder's expulsion, or when it remains silent on that proposal.¹⁵⁶

Shareholders, who represent a minimum of 20% of the company's legal capital may bring the action before the competent court for the imposition of the liquidation of a company or other related measures. The reasons for bringing such action include different instances of deadlock and abuses conducted by the majority shareholders or by the management (e.g. the deadlock in decision-making either at the level of the directors or shareholders owing to which the company's business may no longer be conducted in the interest of shareholders, abuse of powers by the directors or supervisory board, and dissipation or decrease of the company's assets).¹⁵⁷ If the court finds that the minority shareholders' allegations are justified, it may either liquidate the company or impose other measures predicted by the law (e.g. dismissal of a director or a member of the supervisory board, imposition of receivership on the company until the appointment of new directors, i.e. members of the supervisory board, and conducting an extraordinary audit of the company's financial statements).¹⁵⁸

On top of the exit right arising from the "right to disagree" in instances of substantial company transformations (rights of dissenting shareholders), the shareholders also have specific rights to additional payment upon the company's status change. Specifically, the shareholder of the transferring company who deems that he is damaged by the determined ratio of the exchange of shares in the transferring company for the shares in the recipient company may file an action with the competent court against the recipient company and seek an additional payment.¹⁵⁹

153 Article 187, Section 1, CA.

154 Article 474, Section 1, CA.

155 Veličković, 2019, pp. 140–151.

156 Article 196, Section 6, CA.

157 Article 469, Section 1 in relation to Article 239, CA.

158 Article 469, Section 3 in relation to Article 239, CA.

159 Article 507, Section 1, CA.

Finally, shareholders' information rights are secured in two ways. On the one hand, there is a general obligation of the directors to promptly notify each shareholder of the important facts regarding the company's business or the exercise of the rights of shareholders.¹⁶⁰ This way of informing shareholders does not presuppose any action for the shareholders to effectuate the right. It is the positive statutory obligation of directors. On the other hand, each shareholder is entitled to inspect and copy (at his own expense) all the relevant company documents, during working hours.¹⁶¹ Similarly to this, each shareholder may request to be provided by the directors with a copy of each resolution passed by the general meeting. These rights may be denied if:

- a) there is a justified concern that this right could be used for purposes that are contrary to the interests of the company, that is, for a purpose that is not related to his membership in the company;
- b) the exercise of such right might inflict considerable damage to the company or its affiliated company.¹⁶²

If the right to information was unlawfully denied to a shareholder, the former is entitled to seek judicial protection to exercise his rights.¹⁶³

The CA dedicates only one special provision to the shareholders' agreements. This provision makes clear that shareholders' agreements are allowed in Serbian law, and that shareholders may stipulate the issues of importance for their mutual relations with the company.¹⁶⁴ The CA's regulation of the shareholders' agreements may be the consequence of the legislator's intent to leave specific issues concerning these agreements to the shareholders' will. Shareholders' agreements are still not too often used instrument of regulation in LLCs. However, in business practice, especially in the case of LLCs with foreign ownership, there has been an increased presence of legal instruments originating from Anglo-Saxon law. Among them, shareholders' agreements are the most common. The clear advantage of shareholders' agreements lies in the fact that, contrary to the articles of associations, they do not have to be registered and published. This makes them a particularly used tool when the parties involved wish to conceal certain clauses and/or parts of their agreements. In that regard, certain issues specifically left to the articles of associations become part of the clauses of the shareholders' agreements. Even though case law has not had many opportunities to decide on the enforceability of such clauses, it seems that their judicial enforcement may be difficult.

Serbian company law doctrine traditionally distinguishes between void (i.e. null) and voidable general meeting resolutions. The former implies more serious inconsistency with the mandatory provisions, while the latter relates to all other possible breaches of law and companies' internal acts. The CA does not have any specific rules

160 Article 242, Section 1, CA.

161 Article 241, CA.

162 Article 243, CA.

163 Article 81, Section 4, CA.

164 Article 15, Section 1, CA.

on void resolutions. This means that in this regard general civil law rules are to be applied.¹⁶⁵ Therefore, any shareholder, as a person with a clear legal interest in the matter, is entitled to bring an action for nullity of the specific resolution. Serbian law specifies several decisions that are null and void.¹⁶⁶ The rules on void decisions are not systematised but spread through different sections of the CA. An example of a void resolution is one that grants certain shareholders priority over other shareholders from the same class with regard to the payment of dividends. Another example refers to the decision on the capital reduction that has not been registered within the specified deadline. However, the CA contains rather detailed provisions on voidable resolutions. These provisions cover reasons for voidability and exemptions, the standing to sue, the consequences of initiating the proceedings, and the consequences of annulment of the resolution. Briefly, the reasons for voidability are broadly defined, and they encompass many cases of material and procedural breaches that ensued before and during the general meeting.¹⁶⁷ Given the latitude of the reasons, the law prescribes several exemptions (e.g. minor breaches are exempted). The right to bring an action belongs to every shareholder entitled to participate in the general meeting. Therefore, the right to participate is a decisive factor. The law does not require the shareholders to possess either the right to vote or the shares of certain classes. A part of the ruling that annuls the resolution affects the company, shareholders, directors, and members of the supervisory board.¹⁶⁸ It may be unclear whether the annulment has effects on third parties.¹⁶⁹ In general, it has such effects, unless the affected third party in its dealings with the company acted in good faith.¹⁷⁰

7.2. Joint-Stock Companies

The main challenge in contemporary company law regarding decision-making in the general meeting of JSCs is to secure active shareholders' participation and more possibilities to oversee the work of the management body. This is particularly true in large listed companies. As the Serbian capital market is still not developed, the significance of this problem is arguably lower compared to some of the EU member states. In any case, recent changes of CA implemented the provisions of Directive EU 2017/828 on the encouragement of long-term shareholder engagement.¹⁷¹ These provisions may be found in Articles 469a–469k of CA. After these short general observations, we proceed to analyse the three types of rules which are important for decision-making in the general meeting, as already discussed in the context of LLCs:

- a) competencies,
- b) formalities, and

¹⁶⁵ Arsić, 2007, p. 11.

¹⁶⁶ Jovanović, Radović, and Radović, 2021, p. 536.

¹⁶⁷ Article 376, Section 1, CA.

¹⁶⁸ Article 379, Section 1, CA.

¹⁶⁹ Jovanović, Radović, and Radović, 2021, p. 539.

¹⁷⁰ Article 379, Section 3, CA.

¹⁷¹ See Mićović, 2018, pp. 5–18; Radović, 2022, pp. 9–29.

c) quorum and majority.

Regardless of the type of management structure, the general meeting is the highest governing body of the company and makes the most important decisions in the corporate governance system, such as the appointment and dismissal of directors and members of the supervisory board, approval of the financial statements, decisions on the capital increase and reduction, and decisions on the disposal of assets of great value. When it comes to the relationship between the general meeting and other corporate bodies, the general meeting must not take over any of the operational and managerial responsibilities performed by the directors or board of directors, unless the law explicitly allows it. The competencies of the general meeting are defined by the mandatory provision, and therefore, they may not be limited or expanded.¹⁷² The same applies, in principle, to the competencies of other bodies of JSCs, as discussed in the following chapter.

When it comes to the formalities that follow ordinary and extraordinary meetings in JSC they mainly resemble the rules already exposed for LLCs. Certain rules, however, are stricter. In general, the obligation to notify shareholders before the general meeting has more elements intended to favour their informed choice (e.g. the shareholders are to be informed about their main rights before and during the meeting and the manners in which those rights may be achieved).¹⁷³ The possibility of holding a meeting without formalities is quite narrower in JSCs. The so-called universal meeting may be held in private JSCs, and it applies only to extraordinary meetings. Moreover, the universal meeting may be held if all shareholders entitled to vote on all items of the agenda are present and if no shareholders object to that.¹⁷⁴ Finally, the statute of a JSC may entirely exclude the option of having the universal meeting.

Voting of special classes of shareholders (e.g. preferred shareholders) may take place either at the general meeting or at a specially convened session of the general meeting of the shareholders belonging to that class. The latter option exists only if: a) shareholders holding the special class of shares, which represent at least 10% of the total number of votes of the shares, are entitled to vote on the matter concerned, and b) such option is not excluded by the company's statute.¹⁷⁵

Overall, the rules on the quorum are the same for LLCs and JSCs. There is an initially required quorum (simple majority calculated of the total number of votes of the class of shares carrying a right of vote on a question at issue), and decreased quorum for the reconvened session, if any (one-third of the total number of votes).¹⁷⁶ The general meeting renders decisions by a simple majority of the votes of the present shareholders entitled to vote on a certain matter unless the CA or articles of association

172 Jovanović, Radović, and Radović, 2021, p. 512.

173 Article 335, Sections 1 and 2, CA.

174 Article 375, CA.

175 Article 357, Section 1, CA.

176 Articles 352–353, CA.

require a larger number of votes for certain matters.¹⁷⁷ The resolutions which require a larger number of votes are discussed in the section on minority rights.

The voting rights of the shareholders depend on the class of shares they own. The difference between classes of shares and the rights attached to them has been already explained in Chapter 4. The right to vote at the specific meeting belongs only to the shareholders who have that status on the record date (in terms of Serbian law, shareholders' day). The record date falls on the tenth day before the day when the meeting takes place.¹⁷⁸ The list of shareholders is made by the company based on the extract from the single records of shareholders kept with the Central Registry.¹⁷⁹ This means that shareholders who transfer their shares within the period of the 10 days before the general meeting are still enabled to vote, while the new owners of the shares do not have such a right.

Generally, the pre-condition for a shareholder's right to vote is the right to participate. Every shareholder, in principle, is entitled to participate in the general meeting. This right encompasses the right to participate in the debate about the issues on the agenda of the general meeting, which includes the right to file motions, ask questions related to the agenda of the general meeting, and receive answers. The statute of the JSC may, however, restrict the right to participate for certain minority shareholders. In other words, the statute may prescribe a certain threshold for participation at the meeting (minimum number of shares that a shareholder must possess), which cannot be higher than 0,1% of the total number of shares of the relevant class.¹⁸⁰

The right to participate does not imply only physical presence. This is accordance in with contemporary tendencies to facilitate the shareholders' participation in the general meetings. The statute or the rules of procedure of the general meeting may allow participation in the work of the general meeting via electronic means. There are two possibilities for such participation:

- a) by the real-time transmission of the general meeting, or
- b) by the real-time, two-way transmission of the general meeting through which the shareholders may address the general meeting from a different location.¹⁸¹

It follows that completely virtual general meetings are still not allowed in Serbian law.¹⁸² In addition, a shareholder may exercise her right to participate through a proxy.

The shareholders' voting right may be exercised in several ways:

- a) directly by the shareholder who is physically present at the meeting;

177 Article 358, Section 1, CA.

178 Article 331, Section 1, CA.

179 Article 331, Section 2, CA.

180 Article 328, Section 3, CA.

181 Article 341, Section 1, CA.

182 Jovanović, Radović, and Radović, 2021, p. 525.

- b) in writing, without attending a session, provided that shareholders' signatures on the ballot sheets are certified in compliance with the law regulating signature certification;
- c) by a mechanism for electronic voting, either before or during the session; or
- d) through a proxy.

The CA enlists resolutions on which the shareholders may not vote. These are resolutions on:

- a) eliminating or reducing the shareholder's obligations towards the company;
- b) initiating or terminating a civil action against him; and
- c) approving the transactions in which that shareholder has a personal interest.¹⁸³ The exclusion equally applies to the related parties of that shareholder.

The main subject of the following analysis concerns seven types of rules, already explained in the case of LLCs, and discussed here in the context of JSCs. Furthermore, we address the specific rules on squeeze-out and sell-out rights that are not available in LLCs.

Regarding the rights that concern convening the general meeting, shareholders that hold a minimum of 5% of the legal capital of the company, that is, shareholders that hold a minimum of 5% of the shares within the class entitled to vote on the items of the proposed agenda, have the right to propose convening the general meeting.¹⁸⁴ In addition, shareholders possessing at least 5% of shares carrying voting rights have two specific rights regarding the agenda of the general meeting: a) the right to expand the agenda (to put a new item on the agenda); and b) the right to propose resolutions, that is, to oppose the proposed content of the resolutions.¹⁸⁵ In case of a breach of any of these rights, the shareholder(s) may seek judicial protection.

Regarding the decisions that require a qualified or super majority, similar to the LLCs, but adjusted to the different nature of JSCs, there are specific rules that concern a change of a company's statute. The decision to change the statute is brought by a majority of the overall number of shares.¹⁸⁶ Any change of statute that diminishes the voting and profit rights of a shareholder triggers her right to require the company to repurchase her shares. The qualified (three-quarter majority) is requested for the following decisions: status changes, change of legal form, capital reduction, exclusion or limitation of the shareholder's pre-emptive right, approval of certain agreements with shareholders upon the company's registration, and approval of the agreement on control and management.

183 Article 362, Section 1, CA.

184 Article 372, Section 1(2), CA.

185 Article 337, Section 1, CA.

186 Article 247, Section 1, CA.

The shareholders' right to exit exists in case of the exercise of the special rights of dissenting shareholders. Here, the rules are the same as those for the LLCs with one important difference. The rules provided for JSCs are mandatory.¹⁸⁷

The right to bring a derivative suit exists regarding the special duties of directors (as briefly discussed in the following chapter).

The rules on shareholders' right to bring an action before the competent court for the imposition of the dissolution of a company or other related measures, analysed in the context of LLCs, are entirely the same as those for JSCs.

Specific situations that brought a significant change in the company's business are, first, covered by the shareholder's right to exit in case of her dissent. Additionally, if the shareholder does not intend to leave the company, he may have certain rights depending on the circumstances. In case of status changes, the shareholder may sue the recipient company for an additional payment (as in the LLC).¹⁸⁸ After the conclusion of the agreement on control and management, the external shareholders (each shareholder of a controlled company who is neither a controlling company nor a shareholder of the controlling company) are entitled to appropriate compensation per share which the controlling company shall pay on an annual basis.¹⁸⁹ If those shareholders consider the proposed compensation unfair, they may ask the court to assess the amount of compensation.¹⁹⁰

Regarding the shareholder's right to access the company's acts and documents, he may use this right either for purely informational purposes or to bring a judicial procedure against the company.¹⁹¹ The shareholder's right to access may be limited only to the extent necessary for the regular identification of the shareholder.¹⁹²

Finally, the CA recognises both the squeeze-out rights of the controlling shareholder and the sell-out rights of the minority shareholder. These rights are not conditional upon the abusive conduct of the controlling shareholder. Both rights may be considered as means of minority protection, although the former has also many other purposes.¹⁹³ Both rights are triggered when the controlling shareholder acquires 90% of the share capital and 90% of the votes of all shareholders holding common shares.¹⁹⁴ The CA assigns sell-out rights to the external shareholders as well in case of the conclusion of the agreement on control and management.¹⁹⁵

The CA's rule on shareholders' agreements is equally applicable to all legal forms of companies in Serbian law.

187 See Vasiljević and Radović, 2017, pp. 7–27.

188 Article 507, Section 1, CA.

189 Article 562, Section 2, CA.

190 Article 563, Section 1, CA.

191 Article 465, Section 1, CA.

192 Article 465, Section 3, CA.

193 EMCA, Section 11.34 (comments).

194 Articles 515 and 522, CA.

195 Article 564, Section 1, CA.

The rules on voidable resolutions of the general meeting analysed above are primarily intended for JSCs, as they apply *mutatis mutandis* to LLCs.

8. Slovenia

8.1. Decision Making in General Meetings

8.1.1. Limited Liability Companies

In an LLC, the shareholders are the holders of management rights, which they exercise within the framework of the general meeting of shareholders (Article 507 (1), ZGD-1). The general meeting of shareholders decides on the following matters:

- a) adoption of the annual report and the use of the balance sheet profit;
- b) requests for the payment of initial contributions;
- c) repayment of additional contributions;
- d) distribution and termination of business shares;
- e) appointment and dismissal of directors;
- f) measures for reviewing and supervising the work of directors;
- g) appointment of a procurator and a business representative;
- h) enforcement of claims by the company against directors or shareholders regarding reimbursement of damages incurred during establishment or management;
- i) representation of the company in legal proceedings against directors; and
- j) other matters specified in the ZGD-1 or the company's articles of association.

At the general meeting of shareholders, as the highest authority of the company, shareholders decide on all matters related to the company's management through resolutions.

The manager is responsible for convening the general meeting of shareholders and must do so in the following cases:

- a) when shareholders are to decide on matters within their competence (as listed above)'
- b) when it is necessary for the interests of the company; and
- c) when the annual balance sheet or the balance sheet during the business year shows that half of the share capital is lost.¹⁹⁶

The manager convenes the general meeting of shareholders by sending a registered letter to all shareholders registered in the register on the day of convening the meeting. The notice must also include the agenda of the meeting, which must be sent at least 25 days before the date of the meeting (Article 509 (1), ZGD-1). In the case of an

196 Ivanjko, Kocbek, and Prelič, 2009, p. 930.

improper convening of the general meeting, valid resolutions can only be adopted if all shareholders are present (Article 509 (2), ZGD-1).

Regarding the requirement for the quorum of the general meeting of shareholders, the law stipulates that it can validly decide if there are enough shareholders present who have the majority of votes (Article 510 (1), ZGD-1). The general rule in Article 510 (2) of the ZGD-1 states that shareholders decide at the general meeting by a majority of the votes cast, although the law or the articles of association may prescribe a different majority.

8.1.2. Joint-Stock Companies

The general meeting of a JSC is the highest hierarchical body within the company, where shareholders exercise their rights on various matters. The general meeting decides on fundamental issues of the company that do not relate to regular operations or day-to-day management but rather to developmental and certain organisational and status-related matters concerning the structure and functioning of the company.¹⁹⁷

The general meeting of shareholders decides on the following:

- a) Adoption of the annual report, but only if it has not been approved by the supervisory board or management board, that is, if the governing or supervisory bodies leave the decision on the adoption of the annual report to the general meeting, or if it is determined so in the company's articles of association, which has chosen a one-tier management system. In this case, the report submitted to the general meeting by the supervisory board or management board must include the relevant resolutions of the governing or supervisory bodies.
- b) Appropriation of retained earnings.
- c) Appointment and dismissal of members of the supervisory board and management board.
- d) Granting discharge¹⁹⁸ to the members of the management or supervisory bodies.
- e) Amendments to the articles of association.
- f) Measures to increase or decrease the share capital.
- g) Termination of the company and changes to its legal form.
- h) Appointment of an auditor.
- i) Other matters as specified in the articles of association or as prescribed by law (Article 293 (1), ZGD-1).

The management, acting by a simple majority, may be requested in writing to convene a general meeting by shareholders whose aggregate holdings amount to 5% of the

¹⁹⁷ Bohinc, 2008, pp. 501–502.

¹⁹⁸ By granting a discharge, the general meeting shall confirm and approve the work of the management or supervisory bodies for the financial year (Article 294(2), ZGD-1). If no discharge is granted to the management board or any of its members by the general meeting, this shall not imply a motion of no confidence (Article 294(4), ZGD-1).

share capital, of which the request must be accompanied in writing by the agenda, a draft resolution for each proposed agenda item on which the general meeting is to take a decision, or, if the general meeting does not take a decision on a particular agenda item, by a statement of the reasons for the agenda item. The articles of association may link the right to request the convening of a general meeting to a lower proportion of the share capital (Article 295 (2, 3), ZGD-1).

If shareholders request the convening of the general meeting, it must be held as soon as possible but no later than 2 months from the receipt of the request. Otherwise, the court may authorise the shareholders who made the request or their representatives to convene the general meeting (Article 295 (4), ZGD-1).

The general meeting is usually held at the company's registered office unless the articles of association specify otherwise (Article 295 (6), ZGD-1). The convening of the general meeting must be published at least 30 days before the meeting (Article 297 (1), ZGD-1). The notice of the general meeting must contain the information prescribed by law, such as the company's name and registered office, time and place of the meeting, proposed agenda, and other information specified in Article 296 (1) of the ZGD-1. If it is a general meeting of a JSC whose securities are traded on an organised market, the notice of the general meeting must also include additional information specified in Article 296 (2) of the ZGD-1. The law further specifies the manner and place of publication of the notice of the general meeting and imposes additional requirements if it is a JSC whose securities are traded on an organised market (Article 296 (4, 5), ZGD-1).

The articles of association of a JSC may require shareholders to register their participation in the general meeting or exercise their voting rights by submitting a prior notification. In this case, it is sufficient for shareholders to register no later than the end of the fourth day before the general meeting (Article 297 (2), ZGD-1). Moreover, the law allows participation and voting by electronic means without physical presence (Article 297 (4), ZGD-1).

The law also stipulates the obligation to publish shareholders' proposals that include prior objections from shareholders against the proposal of the management or supervisory body, which are communicated to the company within 7 days of the announcement of the general meeting. The management is not required to publish the shareholder's proposal and its justification if:

- a) publishing the proposal would constitute a criminal offense or an offense;
- b) the proposal could lead to a resolution by the general meeting that would be contrary to the law or the company's articles of association;
- c) the justification of the proposal contains obviously incorrect or misleading information or insults;
- d) the shareholder's proposal with the same content has already been communicated to the company's general meeting;
- e) the same shareholder's proposal with substantially the same justification has already been communicated at least twice in the last 5 years at different general meetings of the company, and if less than one-fifth of the represented share capital voted in favour of it;

- f) the shareholder indicates that they will not attend or be represented at the general meeting;
- g) the shareholder has not submitted or requested their proposal to be submitted at the general meeting in the last 2 years (Article 300 (3), ZGD-1).
- h) the justification of the proposal also does not need to be published if it exceeds 3000 characters (Article 300 (4), ZGD-1).

At the general meeting, a list of attending or represented shareholders and their representatives is compiled, including their names, surnames, places of residence, and for each shareholder, the number of shares and class, and for shares with a nominal amount, their nominal amount (Article 303 (1), ZGD-1). The list is then signed by the chairman of the general meeting and made available for inspection by the participants before the voting (Article 303 (4), ZGD-1).

Every resolution of the general meeting must be confirmed by a notary public in a notarial record, which includes the location and date of the meeting, the notary's name and surname, the voting results, and the chairman's findings regarding the adoption of resolutions (Article 304 (1, 2), ZGD-1). The list of participants and evidence of the convening must be attached to the record. If the content of the evidence of the convening is stated in the record, it does not need to be attached (Article 304 (4), ZGD-1). Within 24 hours of the end of the general meeting, the management must send a notarised copy of the record and attachments to the registry (Article 304 (5), ZGD-1). Furthermore, a shareholder has the right to request a certificate from the company within 30 days of the voting day at the general meeting, confirming whether and how their vote was counted (Article 304 (7), ZGD-1).

The general meeting makes its decisions through resolutions (Article 307, ZGD-1). Resolutions of the general meeting can be regular or extraordinary. Extraordinary resolutions are mainly related to different classes of shares.¹⁹⁹ An extraordinary resolution is adopted when required by law or when autonomously defined in the company's articles of association. The same requirements as for regular resolutions apply to the adoption of extraordinary resolutions. The difference is that they are adopted through separate voting, which can be technically conducted either at a joint meeting of the general meeting or at a separate meeting of shareholders (Article 313 (1), ZGD-1). Only holders of a specific class of shares decide at the meeting of a particular class of shareholders. The ZGD-1 stipulates that shareholders participating in the voting on an extraordinary resolution can request the convening of a separate meeting or the publication of the subject of separate voting if their combined shares, through which they can exercise voting rights on the extraordinary resolution, reach 10% of the shares from which the voting right can be exercised (Article 313 (1), ZGD-1).

For the adoption of resolutions at the general meeting, a majority of the votes cast by shareholders ("simple majority") is required, unless the law or the articles of association prescribe a higher majority or other requirements (Article 307, ZGD-1).

199 Ivanjko, Kocbek, and Prelič, 2009, p. 632.

In certain cases, the law already requires a higher majority or other requirements. A higher majority of votes is required, for example, for the removal of members of the supervisory board, where at least three-quarters of the votes cast are required (Article 275(1), ZGD-1). Other requirements apply to specific resolutions concerning, for example, share capital and changes in status, where a three-quarters majority is required for the approval of the represented share capital (“capital majority”) (Article 329(2), ZGD-1).

8.2. Voting Rights

8.2.1. Limited Liability Companies

Voting rights enable shareholders to participate in the formation of the company’s will at the general meeting. Each full 50 euro (EUR) of the share capital gives the shareholder one vote, although the articles of association may specify that certain shareholders have multiple votes for each 50 EUR of the share capital or that the voting rights of certain shareholders are limited (Article 506 (1), ZGD-1). A shareholder can also vote through an authorised representative with a written power of attorney (Article 506 (3), ZGD-1). Similar to Article 311(1) of the ZGD-1, a shareholder’s exercise of voting rights can be restricted in deciding on the shareholder’s exemption from individual obligations or the enforcement of the company’s claim against them. Similarly, Article 506 (3) of the ZGD-1 prohibits a shareholder in an LLC from voting in such cases in which the shareholder is exempted from obligations by a resolution of the general meeting or where the resolution of the general meeting relates to a legal transaction, initiation, or termination of a dispute with that shareholder, and also prohibits the exercise of voting rights on behalf of others. It should be emphasised that the company cannot exercise rights from its own shares (Article 506 (4), ZGD-1).

8.2.2. Joint-Stock Companies

Voting rights, as the fundamental rights of shareholders participating in the management of the JSC, are exercised in proportion to their shareholding in the share capital, with each share having one vote. The articles of association can specify limitations on voting rights so that the number of votes an individual has based on the number of shares cannot exceed a certain number or percentage. The articles of association can also stipulate that shares belonging to another entity are attributed to the shareholder’s shares. If a shareholder is a company, the articles of association can provide that shares belonging to a subsidiary, parent company, affiliated company, or shares held on behalf of such companies by a third party are attributed to its shares. Limitations on voting rights cannot be determined for individual shareholders or for voting rights from shares traded on an organised market (Article 308 (1), ZGD-1).

Unpaid shares do not have voting rights, as voting rights are generally acquired only upon full payment of the contribution. However, the articles of association can determine that voting rights are acquired when the legal minimum or higher contribution is paid for the shares. In this case, the payment of the minimum contribution

guarantees one vote. In the case of higher contributions, the voting ratio is determined based on the amount of contributions paid (Article 308 (2), ZGD-1).

If the articles of association do not specify that voting rights are acquired before full payment of the contribution, and if no contribution has been fully paid for any share, the voting ratio is determined based on the amount of contributions paid. In this case, the payment of the minimum contribution guarantees one vote. Partial votes are considered only if shareholders with voting rights cast full votes (Article 308 (3), ZGD-1).

Every shareholder entitled to attend the general meeting has the right to authorise a legally capable natural or legal person in writing to attend the general meeting on their behalf and exercise their voting rights, speak, and ask questions as a shareholder they represent (Article 308 (6), ZGD-1).

If a person, without being authorised by them, offers to represent shareholders at the general meeting of the company, the person must disclose in writing to the shareholders all circumstances that may be relevant to the shareholders in assessing the risk that the authorised representative may act in a manner contrary to the shareholders' interests. Conflict of interest can occur primarily in situations where the authorised representative is a majority shareholder of the JSC, a member of the management or supervisory body, or their close family member (Article 308a, ZGD-1).

The voting rights of a shareholder cannot be excluded except in the case of shares which grant a priority right in the distribution of the profit (non-voting priority shares).²⁰⁰ However, a shareholder's voting rights can be denied when deciding on the shareholder's exemption from individual obligations or the enforcement of the company's claim against them (Article 311(1), ZGD-1).

8.3. Majority And Minority Shareholders, Minority Rights, And Shareholders' Information Rights

8.3.1. Limited Liability Companies

According to Article 511 of the ZGD-1, minority shareholders have certain rights that are tied to shareholders whose business shares represent at least 10% of the share capital. They are entitled to:

- a) request the convening of a general meeting; in doing so, they must specify the matters on which the general meeting should decide and provide reasons for convening the meeting;
- b) demand that a particular matter be included on the agenda of an already convened general meeting; and
- c) convene a general meeting or include a matter on the agenda themselves if their request under the previous paragraphs has been rejected or if the persons to whom the request should have been addressed are absent.²⁰¹

²⁰⁰ See Articles 314–317, ZGD-1.

²⁰¹ Ivanjko, Kocbek, and Prelič, 2009, p. 936.

The law provides for a minimum level of protection for shareholders, which can be supplemented by the company's articles of association to expand the protection of minority shareholders in their favour, such as by setting a lower ownership threshold in the share capital as a condition for exercising minority shareholder rights.²⁰²

Shareholders have a right to information. Article 512 (1) of the ZGD-1 stipulates that the company's management must immediately inform the shareholder, upon their request, about the company's matters and allow them access to the company's books and records. However, if the management determines that it is likely that the shareholder would use such information in a manner contrary to the company's interests, resulting in substantial harm to the company or its affiliated entities, the management may refuse the shareholder's request for information or access. The management's decision to refuse is only temporary, as the final decision on refusal is made by the shareholders (Article 512 (2), ZGD-1). A shareholder who has not obtained the requested information or whose request has been unjustifiably refused may request a court order to allow the provision of information or access (Article 513, ZGD-1).

Shareholders may exit the company or move to exclude other shareholders from the company. Exiting the company is not a statutory right for a shareholder, except when there are justified reasons. A shareholder may file a lawsuit against the company to demand an exit, particularly:

- a) if other shareholders or the management cause harm to the shareholder;
- b) if the company or shareholders hinder or prevent the exercise of the shareholder's right to exit;
- c) if the shareholder is hindered in exercising rights provided by law or contract;
- or
- d) if the general meeting or the management impose disproportionate obligations on the shareholder (Article 501 (2), ZGD-1).

To protect the principle that shareholders are not obliged to tolerate a shareholder who obstructs the realisation of common goals or harms the company, Article 501 (3) of the ZGD-1 grants the right to any shareholder to file a lawsuit demanding the exclusion of another shareholder from the company if there are justified reasons, especially:

- a) if the other shareholder causes harm to the company or other shareholders;
- b) if the other shareholder acts contrary to the resolutions of the general meeting;
- c) if the other shareholder fails to participate in management and thereby hinders the regular operation of the company or the exercise of rights by other shareholders; or
- d) if the other shareholder grossly violates the contract.

A shareholder cannot waive in advance the rights to exit or demand the exclusion of another shareholder (Article 501 (4), ZGD-1).

8.3.2. *Joint-Stock Companies*

Minority rights are those rights specifically addressed to minority shareholders. They mainly concern resolutions of the general meeting, on which shareholders directly decide. The ZGD-1 regulates the following minority rights.²⁰³

- a) Minority shareholders (10% of share capital) can propose to the court the removal of a member of the supervisory board for well-founded reasons (Article 276 (2), ZGD-1).
- b) Minority shareholders (5% of share capital) can demand the convening of a general meeting and, if the demand is not met, they can convene it themselves via the help of court (Article 295 (3), ZGD-1).
- c) Minority shareholders (5% of share capital) can, for well-founded reasons, file a lawsuit to request the court to order the company's dissolution (Article 402 (3), ZGD-1).
- d) Minority shareholders (5% of share capital) can, for well-founded reasons, propose the appointment of a liquidator through the court (Article 408 (3), ZGD-1).
- e) Minority shareholders (10% of share capital) must consent to or can object to the termination or offsetting of compensation claims held by the company regarding breaches of care and liability by members of management or supervisory bodies (Article 263 (3), ZGD-1).
- f) In the successive establishment of a JSC, the minority of subscribers and acquirers of shares (20% of all shares paid in cash) can demand a reassessment of the founding general report (Article 220 (1), ZGD-1).
- g) Shareholders whose combined interests represent at least 10% of the share capital or whose combined minimum issue price amounts to at least 400,000 EUR can enforce the company's claim against shareholders owing to unlawfully received payments, either in case of impermissible return of contributions or concealed distribution of profits (Article 233 (1), ZGD-1).
- h) Shareholders whose combined interests represent at least 10% of the share capital or whose combined minimum issue price amounts to at least 400,000 EUR can file a lawsuit on behalf of the company to seek compensation from founders or members of management or supervisory bodies for damages resulting from the merger (Article 328 (1), ZGD-1).
- i) Shareholders whose combined interests represent at least 10% of the share capital or whose combined minimum issue price amounts to at least 400,000 EUR can request the appointment of a special auditor through the court, based on the minority shareholders' proposal, if there is reason to suspect

203 Ibid., pp. 632–642.

- misconduct or serious violations of the law or the statute in conducting procedures and operations (Article 322 (1), ZGD-1).
- j) Minority shareholders (10% of share capital) can request that the discharge of an individual member of a management or supervisory body be voted on separately (Article 294 (1), ZGD-1).
 - k) Minority shareholders (10% of share capital) have the right to demand that the election proposals of shareholders relating to the election of members of the supervisory board or management board be decided upon before the proposal of the supervisory board or management board, regardless of whether they have submitted the proposal in advance or at the general meeting (Article 312, ZGD-1).
 - l) Minority shareholders (10% of share capital) can request the convening of a separate meeting or the publication of a matter for separate voting in extraordinary resolutions (Article 313 (2), ZGD-1).
 - m) Shareholders whose combined interests represent at least 10% of the share capital or whose combined minimum issue price amounts to at least 400,000 EUR can file a lawsuit challenging the resolution of the general meeting regarding the use of retained earnings (Article 399 (2), ZGD-1).
 - n) Shareholders of the acquiring company whose holdings reach at least 1% of the share capital of the acquired company or whose value of the combined minimum issuance amount reaches at least 25,000 EUR can propose the appointment of a special representative to the court. The special representative can file a lawsuit to enforce claims for damages against the members of the management or supervisory bodies of the acquired company for losses incurred through the merger (Article 595 (3), ZGD-1).
 - o) Shareholders whose combined holdings reach at least 5% of the share capital can request the convening of a general meeting to decide on the consent for a simplified merger or division, regardless of the provision that the consent of the general meeting of the acquiring company is not required for the validity of the merger and division agreement (Article 599 (3), ZGD-1).
 - p) Shareholders in the transforming participating company whose holdings reach at least 1% of the share capital of the participating company or whose value of the combined minimum issue price reaches at least 25,000 EUR can propose a judicial review of the amount of cash compensation in status transformations and in the transformation of a JSC into an LLC and vice versa (Articles 603, 651 (3), 656 (3), ZGD-1).
 - q) Shareholders in the transforming participating company whose holdings reach at least 1% of the share capital of the participating company or whose value of the combined minimum issuance amount reaches at least 25,000 EUR can propose a judicial review of the exchange ratio in status transformations (Article 605 (3), ZGD-1).

Shareholders have the right to reliable and accurate information about the company's affairs that are necessary for the assessment of the agenda items at the general meeting. The obligation to provide such information lies with the management, which may provide the information in a collective response to shareholders' questions with the same content. This right to information also applies to legal and business relationships between the company and related companies (Article 305 (1), ZGD-1).

However, the management is not required to provide information to shareholders in the following cases:

- a) if providing the information could cause harm to the company or a related company, based on reasonable business judgment;
- b) regarding methods of balancing and valuation, if the disclosure of these methods in the annex is sufficient for assessing the company's financial, asset, and profitability position, provided that it corresponds to the actual circumstances;
- c) if providing the information would constitute a criminal offense, an administrative offense, or a violation of good business practices; or
- d) if the information is already published on the company's website in a question-and-answer format at least 7 days before the general meeting (Article 305 (2), ZGD-1).

If information has been provided to a shareholder outside the general meeting, it must be provided to any other shareholder upon their request, even if it is not necessary for the assessment of the agenda item (Article 305 (3), ZGD-1). In case of a dispute regarding the obligation of the management to provide information, the court may decide on this obligation upon the shareholder's request (Article 306, ZGD-1).

Corporate legislation provides a special procedure for excluding minority shareholders, which ensures transparency, particularly in determining fair compensation, to protect the interests of excluded minority shareholders. The regulation of a JSC in this legal institution is aligned with the regulation of LLCs and personal companies, where it is established as a classical institution. However, there is a significant difference in two respects. On the one hand, such exclusion of shareholders is not financed by the company's assets but by the majority shareholder. On the other hand, no justified reasons, either specified in the articles of association or known as "specifically justified reasons", are required for such exclusion.²⁰⁴ The decision to exclude minority shareholders rests with the majority shareholder, who must pay appropriate compensation for it.

The exclusion of minority shareholders is not decided by the majority shareholder alone. A resolution on the transfer of shares of the remaining (minority) shareholders to the majority shareholder for payment of appropriate monetary compensation must be adopted at the general meeting of the JSC, upon the proposal of the majority

204 Ibid., p. 786.

shareholder, who is the holder of shares representing at least 90% of the company's share capital.²⁰⁵

The protection of minority shareholders is ensured by preparing and conducting a general meeting at which the transfer of shares to the majority shareholder is decided. Prior to the general meeting, each minority shareholder must be given the opportunity to inspect the draft resolution on the transfer of shares, the company's annual report for the last 3 financial years, the written report of the majority shareholder, and the auditor's report (Article 386 (2), ZGD-1). At the request of any shareholder, a copy of all these documents must be provided free of charge no later than the next working day (Article 386 (3), ZGD-1). The documents must also be submitted at the general meeting. At the beginning of the discussion at the general meeting, the majority shareholder must orally explain the proposal for the transfer of shares and the method of calculating the amount of monetary compensation. Before deciding on approval for the transfer of shares, the majority shareholder must inform minority shareholders of any significant changes in the company's assets during the period from the preparation of the draft resolution to the convening of the general meeting, particularly those that would warrant a different monetary compensation (Article 386 (5), ZGD-1).

However, the adoption of the resolution at the general meeting of the JSC alone is not sufficient for a valid exclusion of a shareholder, as the exclusion is only completed with the court registration of this resolution. Thus, the entry of the resolution on the transfer has a constitutive effect for the exclusion and transfer of shares (Article 387 (3), ZGD-1), and the management of the company is responsible for filing the application for registration.

The majority shareholder can only be a group of related companies or individuals. A consortium of shareholders or shareholders associated with a shareholders' agreement cannot be the majority shareholder.²⁰⁶ Persons associated with a shareholders' agreement are taken into consideration on the side of the majority shareholder in the procedure regulating takeovers under the ZPre-1 (Takeovers Act). In the event of a company takeover, the exclusion and withdrawal of minority shareholders generally proceeds in accordance with the provisions of the ZGD-1 (Articles 68 (1), 69 (1) of the ZPre-1). Special regulations apply only within 3 months of the publication of the outcome of the takeover bid regarding the amount and form of monetary compensation. In accordance with the ZGD-1, the majority shareholder must pay the minority shareholders an 'appropriate' monetary compensation in the event of exclusion or withdrawal, with the method and procedure for determining it also being specified (Article 385, ZGD-1), including judicial review (Article 388, ZGD-1). In the case of the exclusion or withdrawal of minority shareholders, the acquirer must offer compensation of the same kind and in the same amount as specified in the takeover bid (Article 68 (2), 69 (2), ZPre-1).

²⁰⁵ Ibid.

²⁰⁶ Ibid., p. 788.

The right of minority shareholders to sell-out represents a mirror image of the right of majority shareholders to exclude (squeeze-out) minority shareholders. The right to sell-out from the company is already known, among other things, in the case of an LLC. In an LLC, the exit of shareholders is financed by the company from its own assets, resulting in the amortisation of the business interest and a decrease in the company's assets owing to the payout to the exiting shareholders. However, the sell-out of minority shareholders from a JSC is a financially neutral operation, as the buyout must be financed by the majority shareholder.²⁰⁷

The sell-out procedure begins upon the request of one or more minority shareholders, after which the majority shareholder (holder of shares representing at least 90% of the share capital) must, within 1 month of receiving the request, offer the respective individual or multiple minority shareholders an appropriate monetary compensation for the purchase of all remaining shares held by the individual minority shareholder (Article 389 (1), ZGD-1). The determination of the amount of appropriate monetary compensation applies, by analogy, the provisions governing the monetary compensation for the exclusion of minority shareholders from the company and its judicial review (Article 389 (2), ZGD-1).

8.4. Shareholders' Agreements

8.4.1. Limited Liability Companies

Unlike a JSC, an LLC provides more flexibility and discretion in regulating governance issues in its articles of association. A plethora of mandatory provisions regarding governance in a JSC is primarily associated with securities laws and the protection of minority shareholders.²⁰⁸ JSCs are subject to stricter formalities and statutory regulations regarding their governance structure, while in an LLC, the default position is subsidiarity of statutory provisions if governance is not addressed in the articles of association. Therefore, shareholders in an LLC have more freedom to enter into agreements among themselves in compared to shareholders' agreements in a JSC, where the principle of statutory strictness (German: *Satzungsstrenge*) applies.

8.4.2. Joint-Stock Companies

Shareholders are free to exercise their voting rights. Comparative corporate laws recognise shareholders' agreements, which allow them to agree on how they will vote on specific matters. The ZGD-1 does not have specific provisions regarding such agreements, but this does not mean they are prohibited.²⁰⁹ The ZGD-1 addresses only the exercise of voting rights through shareholders' associations, which is similar to a shareholders' agreement, except that in this case, the association votes as the shareholder's representative (Article 310 (1), ZGD-1).

²⁰⁷ Ibid., p. 795.

²⁰⁸ Bohinc, 2008, p. 160.

²⁰⁹ Ivanjko, Kocbek and Prelič, 2009, p. 638.

However, the ZGD-1 explicitly prohibits a shareholder from contractually committing to exercise their voting rights according to the instructions of the company, management, or supervisory body, as well as instructions from a subsidiary. The legal consequence of such a contract is nullity. Similarly, a contract in which a shareholder commits to vote in favour of any proposals of the management or supervisory board is also void (Article 311 (2), ZGD-1).

8.5. Control of Legality of General Meeting Resolutions

8.5.1. Limited Liability Companies

Regarding the enforcement of nullity and contestability of resolutions adopted by the general meeting, Article 522 of the ZGD-1 refers, among other things, to the *mutatis mutandis* application of provisions regulating the nullity and contestability of resolutions in a JSC.²¹⁰

8.5.2. Joint-Stock Companies

Resolutions of the general meeting are corporate law transactions and not civil law transactions, and they have corporate law consequences, which is why they are specifically regulated.²¹¹ ZGD-1 recognises two types of invalidity of corporate law transactions:

A resolution of the general meeting may be null and void if there are serious errors in its adoption, which renders it void *ex tunc* (retroactively from the moment of adopting the resolution). This means that a null-and-void resolution has no legal effect.²¹² Any benefits received based on a null-and-void resolution must be returned to the company, along with any costs incurred (Article 394, ZGD-1).

The grounds for nullity under the ZGD-1 are as follows:

- a) A resolution of the general meeting is null and void if it is adopted in violation of provisions relating to the adoption of a resolution on conditional increase of share capital (Article 343 (3), ZGD-1).
- b) A resolution of the general meeting is null and void if it contradicts the statutory provision that the beneficiaries of an increase in share capital from company assets are existing shareholders in proportion to their holdings (Article 363, ZGD-1).
- c) A resolution of the general meeting on an increase in share capital and a resolution on the use of profit are null and void if the resolution on the increase in share capital is not registered in the register within 3 months of its adoption (Article 368 (2), ZGD-1).
- d) A resolution of the general meeting is null and void if the general meeting was not properly convened or the convocation of the general meeting was not

210 See below on the control of legality of general meetings' resolutions in a JSC.

211 Ivanjko, Kocbek and Prelič, 2009, p. 751.

212 Ibid., p. 754.

- correctly published, unless all shareholders attended the meeting or were validly represented (Article 390, ZGD-1).
- e) A resolution of the general meeting is null and void if it is not certified by a notary in a notarial record (Article 390, ZGD-1).
 - f) A resolution of the general meeting is null and void if it is incompatible with the essence of the company or if its content contradicts provisions of this Act that are exclusively or predominantly applicable to the protection of the company's creditors or are otherwise in the public interest (Article 390, ZGD-1).
 - g) A resolution of the general meeting is null and void if its content is contrary to morality or public order (Article 390, ZGD-1).
 - h) A resolution of the general meeting on a reduction of share capital below the legally prescribed minimum nominal amount is null and void if, within 6 months of its adoption, the resolution on the increase in share capital and the implementation of the increase in share capital are not registered (Article 390, ZGD-1).

The deadline for asserting nullity is tied to the registration of the resolution in the register. Therefore, nullity of a resolution cannot be asserted after the resolution has been registered (Article 391 (1), ZGD-1). Nullity of a resolution for reasons stated in (d), (f), (g), or (h) above cannot be asserted after 3 years have elapsed from the registration of the resolution, unless a lawsuit for the declaration of nullity of the resolution has been filed within that period (Article 391 (2), ZGD-1). Nullity is claimed through a lawsuit against the company, and the proceedings for determination must be expedited (Article 393, ZGD-1). The court must consider nullity *ex officio*, and any interested party can invoke it.²¹³

ZGD-1 also recognises two specific cases of nullity, namely nullity of the election of members of the supervisory board or management board, and nullity of the annual report. In addition to the reasons mentioned above, the election of members of the supervisory board or management board is null and void if:

- a) the supervisory board or management board is composed in violation of the law or the articles of association;
- b) the general meeting elects a person who was not proposed in accordance with the law or the articles of association; or
- c) more members are elected than prescribed by the law or the articles of association (Article 392, ZGD-1).

Regarding nullity of the annual report, there are two groups of reasons for nullity:

- a) substantive reasons, and
- b) formal irregularities in the adoption and auditing of the annual report (Article 401, ZGD-1).

213 Ibid., p. 767.

ZGD-1 also recognises a milder form of invalidity of general meeting resolutions – voidability (known as contestability). A resolution of the general meeting is contestable if:

- a) its content contradicts the law or the articles of association; or
- b) the law or the articles of association were violated during its adoption, and these violations affect the validity of the resolution (e.g. if the required majority did not vote in favour) (Article 395 (1), ZGD-1).

Contestability can also be based on the shareholder, through the exercise of voting rights for their own benefit or the benefit of a third party, attempting to obtain special benefits at the expense of the company or other shareholders, provided that the resolution allows for such harm to be compensated to other shareholders (Article 395 (3), ZGD-1).

A contested resolution of the general meeting cannot be annulled if the general meeting confirms the contested resolution with a new resolution and:

- a) no lawsuit for annulment or declaration of nullity of the new resolution has been filed within the contestation period;
- b) a lawsuit filed has been withdrawn; or
- c) the claim for annulment or declaration of nullity of the new resolution has been definitively rejected (Article 395 (5), ZGD-1).

Entitled parties to contest a resolution of the general meeting are:

- a) shareholders,
- b) management, and
- c) any member of the management or supervisory body if the members, by implementing the resolution of the general meeting, would commit a criminal offense or act in violation of the law (Article 395 (7), ZGD-1).

A lawsuit to contest a resolution of the general meeting must be filed within 1 month, starting (Article 396, ZGD-1):

- a) from the day the plaintiff attended the general meeting, if applicable;
- b) from the day the plaintiff became aware of the resolution or should have become aware of it; or
- c) from the day of the publication of the resolution, if applicable.

As a fundamental condition for contesting a resolution of the general meeting, a shareholder who attended the general meeting is obligated to announce the contestation (Article 389, ZGD-1).

Similar to specific forms of nullity, the law also recognises three specific forms of contestability. These include the contestability of a resolution on the use of retained earnings (Article 399, ZGD-1), the contestability of a resolution on the increase of share capital (Article 400, ZGD-1), and the contestability of a resolution on the adoption of the annual report (Article 401 (5), ZGD-1).

9. Slovakia

9.1. Decision-Making in General Meetings

9.1.1. Limited Liability Companies

The shareholders' general meeting is one of the mandatory corporate bodies of LLCs, where shareholders exercise their rights. It makes decisions on the most fundamental issues affecting the existence and operation of a company. The general meeting mainly decides on structural changes to the company, amendments to the articles of association, adjustments to the registered share capital, the appointment and dismissal of managing directors (or members of the optional supervisory board), and other corporate issues.²¹⁴ Furthermore, its approval is required for decisions regarding the performance agreement of managing directors, the financial statements and the distribution of profit, or granting consent for the transfer of shares. The general meeting of an LLC may, by its own decision, reserve matters that otherwise fall under the powers of other corporate bodies. Such entitlement is not allowed in JSCs. However, if the authority which lead to the restriction of the managing director's powers, is reserved to the general meeting, the decisions of the general meeting on these matters are ineffective vis-à-vis third parties.²¹⁵

A general meeting of the LLC must be convened by the managing director at least once a year.²¹⁶ In special cases, the supervisory board is entitled to convene a general meeting whenever the interests of the company so require.²¹⁷ Shareholders holding at least 10% of the registered share capital also have the right to demand the convening of the general meeting. If the demand to convene the general meeting is not fulfilled and the meeting is not held within 1 month, the concerned shareholders are authorised to convene the general meeting themselves.²¹⁸

Shareholders must be notified in advance of the date and agenda of the general meeting by means of a written invitation at least 15 days prior to the date of the general meeting. The agenda of the general meeting must be sufficiently detailed to allow shareholders to assess the importance of the items on the agenda. While default provisions on convening a general meeting apply, the articles of association may provide for different set of rules. If an invitation is not delivered to a shareholder in accordance with the requirements stated by law or the articles of association, the shareholder may express that he does not insist on the formal requirements of convening the general meeting, and thus, the formal defect of convening is remedied. However, according to a recent Supreme Court decision, the mere attendance and voting of a shareholder at the general meeting without a special expression of intent

214 Section 125(1), CC.

215 Patakyová et al., 2022, p. 613.

216 Section 128(1), CC.

217 Section 140(2), CC.

218 Section 129(2), CC.

to waive the right to a proper convening of the general meeting, does not cure the formal defect of improper convening procedure.²¹⁹ If the general meeting has not been properly convened, resolutions may still be passed if all shareholders are present and unanimously waive the formalities of the convening, thereby curing the defect of the resolution adopted at the general meeting.²²⁰

9.1.2. *Joint-Stock And Simple Joint-Stock Companies*

Similar to an LLC, the general meeting of a JSC makes decisions on matters of fundamental importance for the company, in particular the amendments to the articles of association, increase and reduction of share capital, the appointment and dismissal of board members, the winding up of the company, and other matters expressly stipulated in law or the articles of association. Shareholders of the JSC are entitled to exercise their rights only at the general meeting.

The joint-stock law provides for more detailed provisions on the convening of the general meeting than the limited liability legal framework. The general meeting is convened by the board of directors at least once a year (an ordinary general meeting). The method of informing shareholders about the convening of the general meeting depends on their form of shareholding. For registered shares, the invitation must be sent to all shareholders whose addresses are recorded in the list of shareholders not less than 30 days prior to the date of the general meeting. Meanwhile, for holders of bearer shares, a notice of the general meeting must be published in a nationwide newspaper or periodical press that provides public stock market information.²²¹ The costs associated with convening and holding the general meeting are borne by the company.

The invitation or announcement must include the agenda of the general meeting. If the general meeting is to decide on an amendment to the articles of association, the essential content of the amendment must be announced.²²² If the election of members of the company's boards is on the agenda of the general meeting, the names of the individuals nominated for each body must be made available to shareholders for inspection at the company's registered office within the period specified for convening the general meeting.²²³

Unless otherwise provided for in the articles of association, the general meeting is to be held at the registered office of the company. Provisions in the articles of association stipulating the location and date of the general meeting must not make the shareholders' attendance significantly difficult or impossible.²²⁴

The general provision on JSCs applies, with some exceptions, to simple JSCs. According to Section 220za of the Commercial Code (CC) matters not included in the

219 The Supreme Court of the Slovak Republic No. 5 Obdo/25/2021, 27 September 2022.

220 The Supreme Court of the Slovak Republic No. 3 Obdo V 30/2001, 29 October 2003.

221 Section 184(3), CC.

222 Section 184(6), CC.

223 Ibid.

224 Section 184(5), CC.

proposed agenda of the general meeting can only be decided with the participation and consent of all shareholders of the simple JSC who are entitled to vote.

9.2. Voting Rights

9.2.1. Limited Liability Companies

A quorum for the general meeting is constituted by the presence of at least one-half of all the votes of shareholders, unless the articles of association stipulate otherwise.²²⁵ As a general rule, the decisions at the general meeting are made by a simple majority of the votes of shareholders attending the meeting. However, a qualified majority of two-thirds of the votes cast is required for amendments to the articles of association, the increase and reduction of the share capital, the winding up the company, resolutions on mergers or any other expressly stated issues under the CC.²²⁶

Slovak legislation currently requires the physical participation of shareholders at a general meeting, either in person or by proxy. A shareholder has the right to attend the general meeting even if no voting rights are attached to his share.²²⁷ Managing directors and members of the supervisory board are not entitled to be proxies because of potential conflicts of interest.²²⁸ Representation by another shareholder of the company or a third party is not prohibited. The power of attorney must be in writing, but it does not have to contain instructions on how the proxy representative should vote.²²⁹ The Slovak CC currently does not stipulate the possibility of participating and voting by electronic means of communication at the general meeting of an LLC.²³⁰ However, temporary measures were introduced during the restrictions imposed as a result of the COVID-19 pandemic, enabling virtual shareholders' meetings, remote voting and the electronic casting of votes.²³¹

In general, the number of votes of each shareholder is determined by the ratio of the value of their contribution to the amount of the company's share capital. Where a resolution of the general meeting is to be passed to approve a contribution in kind pledged by the shareholder or a decision to expel the shareholder, the shareholder concerned is not entitled to exercise his voting right.²³² However, when deciding on the appointment of a shareholder as managing director or a member of the supervisory board, the shareholder retains their voting rights even when they are the one to be appointed as member of managing or supervisory board. The Slovak CC does

225 Section 127(1), CC.

226 Section 127(4), CC.

227 Patakyová et al., 2022, p. 615.

228 Section 126, CC.

229 Ovečková, Csach, and Žitňanská, 2020, p. 310.

230 Csach, 2022, p. 4.

231 Section 5 of Act No. 62/2020 Coll. on Certain Emergency Measures in Relation to the Spread of the Dangerous Contagious Human Disease COVID-19 and in the Judiciary.

232 Section 127(5), CC.

not stipulate a general prohibition against casting the vote in cases of shareholders' conflicts of interests.

Under certain circumstances, shareholders' resolutions may be taken without a physical meeting (decision-making *per rollam*). In this case, the managing director, or shareholder/shareholders whose contributions reach 10% of the share capital (or lower if stipulate by articles of association), or member of the supervisory board, if established, may send a proposal of the resolution to each shareholder, who then expresses their comments within a prescribed time period.²³³ The time period for a shareholder to express their opinion on a proposed resolution adopted outside of the general meeting must be reasonable, taking into account the content of the proposal, its significance, and the urgency of its adoption, ensuring that the shareholder is provided with adequate time to respond to the proposed resolution.²³⁴ Shareholders make decisions only on the basis of the documents provided by the managing director. If a shareholder does not submit his written comment by a specific date, it is considered that they are not in agreement with the proposed measures. The results of the voting are announced to each shareholder by the managing director.

9.2.2. Joint-Stock Companies

There are no provisions prescribing a minimum attendance quorum for the general meeting of a JSC. Resolutions of the general meeting require a simple majority of votes cast by the shareholders present at the general meeting, unless the law or the articles of association stipulate a different majority. Votes that a shareholder cannot exercise do not count towards the results. Amendments to the rights associated with certain classes of shares or decisions on restrictions on the transferability of registered shares, in addition to the majority of votes cast, require a majority of two-thirds votes of the shareholders holding the particular class of shares or affected by the amendment.²³⁵

Amendments to the articles of association and other fundamental changes to the company require a majority of two-thirds votes of the attending shareholders. In addition, such a decision must be recorded in a notarial deed. The voting results of the general meeting need to be published on the company's website, if available, within 15 days of the date of the general meeting. The minutes of the general meeting must be drawn up within 15 days of the date thereof and must include the signatures of the secretary, chairman of the general meeting, and two elected verifiers.²³⁶

Each shareholder of a JSC has a right to be present at the general meeting in person or be represented by a proxy. A proxy cannot be a member of the supervisory board. Attendance and exercise of shareholders' rights at the general meeting are conditional upon the determination of the relevant date. Present shareholders or

233 Section 130, CC.

234 The Supreme Court of the Slovak Republic No. 1 Obdo/22/2018, 12 February 2019.

235 Section 186(2), CC.

236 Section 189(1), CC.

their proxies are entered in the list of attendees. If a shareholder authorises several proxies to exercise the voting rights attached to the same share, the company only allows voting of the proxy who has been registered in the list of attendees first.²³⁷ If a shareholder is prevented from participating in the general meeting by being involuntarily expelled, it may be considered a violation of his shareholders' rights because, in principle, the shareholder is allowed to exercise his rights exclusively at the general meeting. In general, the voting rights of a shareholder are determined as a portion between the nominal value of the shares held and the share capital.

Votes attached to shares on which the shareholder is unable to exercise voting rights shall not be counted in the general meeting vote.²³⁸

The Slovak CC contains special provisions on convening, participation, and voting at the general meeting of a public JSC whose shares have been admitted to trading on a regulated market (listed companies). These provisions are the result of the implementation of EU directives. In accordance with EU law, the provisions distinguish between remote postal voting and voting by electronic means of communication. If the listed company allows shareholders to participate in general meetings and cast their votes digitally, each exercise of the shareholders' voting right must be signed by a qualified electronic signature and bear a qualified electronic time stamp.²³⁹ The company itself shall take all measures necessary to ensure the proper and uninterrupted conduct of voting by electronic means of communication. However, no provisions for electronic voting are stipulated for the private JSCs.²⁴⁰ Temporary measures were available during the restrictions imposed as a result of the COVID-19 pandemic, enabling virtual shareholders' meetings and remote voting.²⁴¹

Regarding the shareholders' voting rights, it is important to notice that when a shareholder decides to attend the general meeting, it does not constitute the duty to exercise their voting rights (if attached to the shares) or to exercise other rights, or to carry out any other activity. However, the duty of loyalty and the misuse of shareholders' rights might be the limits thereto. The articles of association may restrict the exercise of voting rights by imposing a maximum number of votes per shareholder or by sliding scale. The JSC may issue preference shares with or without voting rights. The possibility of issuing preference shares without voting rights must be specified in the articles of association.²⁴² The holders of preference shares without voting rights retains other rights, such as the right to attend the general meeting, the right to file an objection to the minutes, the right to seek the invalidity of the resolution of the general meeting, or the right to preferentially subscribe for shares. The articles of association cannot exclude the voting rights of preference shareholders in situations

237 Section 184(1), CC.

238 Section 186(3), CC.

239 Section 190d(2), CC.

240 Csach, 2022, p. 4.

241 Section 5 of Act No. 62/2020 Coll. on Certain Emergency Measures in Relation to the Spread of the Dangerous Contagious Human Disease COVID-19 and in the Judiciary.

242 Section 159, CC.

where voting is required according to the type of shares. In such cases, the consent of a two-thirds majority of the votes of the shareholders present with preference shares will always be required. Similarly, the consent of the preference shares holders is required when the general meeting decides on an increase and a reduction in share capital, and when approving the proposal for the national and cross-border transformation of the JSC.²⁴³

9.2.3. Simple Joint-Stock Companies

Regarding some specificities of simple joint-stock company, it is worth mentioning, that a decision by the general meeting to change the rights attached to a certain type of shares and to limit their transferability requires the approval of at least a two-thirds majority of the votes of shareholders who own those shares.²⁴⁴

In contrast to a JSC legal framework, which requires shareholders' decision-making to be taken at the general meeting, default provisions regulating a simple JSC provide for the possibility of taking decisions outside the general meeting (*per rollam*).²⁴⁵ This rule represents one of the fundamental organisational simplifications of this legal framework. The board of directors is obliged to send the proposal of the decision to all shareholders, including those shareholders holding shares with no voting rights attached thereto. Although the shareholders with no voting rights do not cast votes, they still have a right to be informed on the subject matter of the shareholders' decision-making.

9.3. Majority and Minority Shareholders, Minority Rights, Shareholders' Information Rights

One of the basic principles of company law is the prohibition of abuse of shareholder rights, especially abuse of the majority or minority of votes in the company. This general rule in Section 56a of the Slovak CC applies to all forms of companies.

9.3.1. Limited Liability Companies

An LLC's legal framework stipulates only a few special rights for minority shareholders. For instance, minority shareholders' rights include the possibility of convening a general meeting. Each shareholder whose contribution reaches 10% of the registered share capital may request the convening of the general meeting. If the managing director does not hold the general meeting within 1 month of receiving of such a request, the shareholders are entitled to convene the general meeting themselves.²⁴⁶ However, in practice, the protection of minority shareholders is limited. While a general meeting may be held, the adoption of resolution at the meeting depends on the will of other (the majority) shareholders. The rights of minority shareholders are

243 Sections 41 and 98(4) of Act No. 309/2023 Coll. on the Transformation of Commercial Companies and Cooperatives.

244 Section 220za(2), CC.

245 Section 220zb(1), CC.

246 Section 129(2), CC.

guaranteed even in decision-making outside of the general meeting. A proposal for a resolution may also be submitted by a shareholder whose contribution amounts to at least 10% of the registered share capital. However, the protection of the minority shareholders is limited, as the decision-making itself is again up to the majority shareholders.

In addition to the voting right, shareholders may exercise other rights, in particular, they may request information about the affairs of the company from the managing director and inspect the company's documents with the possibility of making copies. The right to information may not be restricted in the articles of association and is not reduced when a supervisory board is formed in the company.²⁴⁷ However, a recent decision of the Supreme Court of the Slovak Republic²⁴⁸ expressly limited the shareholders' right to information when it narrowed down the scope of it to the fundamental corporate decisions with substantial impact on the company's assets and excluded some information from being given to the shareholders. As a result of the court's decision, the shareholder has no right to request information regarding the ordinary operation of the company. Thus, the information rights of the supervisory board are much wider than those of shareholders, whereas shareholders do not acquire additional information rights when the supervisory board is not formed in the company. This judicial outcome, however, has been widely criticised in the Slovak doctrine.²⁴⁹

The limits of the right to information are defined specifically by the shareholders' loyalty and the principle of the prohibition of abuse of rights. Another reason for denying to provide information to shareholders is that when disclosing, it would lead to a breach of confidential information regarding the company or interference with the company's trade secrets.²⁵⁰ If shareholders are denied information, they may bring action against the company to enforce their right to information.

9.3.2. *Joint-Stock Companies*

According to Section 176b of the CC, shareholders may not exercise their rights to the detriment of the rights and legitimate interests of other shareholders. Furthermore, the company must provide for equal treatment for all shareholders. In contrast to JSCs in common law countries, where dispersed ownership of shares prevails, in Slovakia most JSCs are established with a dominant shareholder. Enshrining the rights of minority shareholders should ensure a balance between the will of the majority and the minority in the company. According to Section 181 (1) of the CC, a shareholder or shareholders holding shares with a nominal value of at least 5% of the registered share capital may request in writing the convening of an extraordinary general meeting to discuss the proposed matters. The articles of association may provide for a lower

247 Ovečková et al., 2022, p. 1131.

248 The Supreme Court of the Slovak Republic No. 3 Obdo 21/2019, 29 May 2019.

249 Ovečková et al., 2022, p. 1134; Csach, 2021, p. 137; Patakyová, 2022, p. 594.

250 Buhala, 2022, p. 60.

percentage. In contrast to the law governing an LLC, a shareholder who requests the convening of a general meeting must formulate the reasons for its convenience and items on the agenda. The board of directors is not allowed to change the proposed agenda and adding more items to the agenda is possible only with the consent of the shareholders requesting the convening of the meeting. The extraordinary general meeting must be held no later than 40 days from the receipt of the request. In case the request is not fulfilled, a shareholder may initiate a court proceeding, and if successful, he will become entitled to take all the actions regarding the convocation of the extraordinary meeting.²⁵¹ In addition to abovementioned right, minority shareholders are entitled to request the inclusion of an item in the agenda of the general meeting.

In relation to the board of directors, minority shareholders have a right to request that the company exercises its claim against shareholders for repayment of the issue price or the return of repayment provided in violation of the law.²⁵² Furthermore, they can demand that the supervisory board enforce the company's claims against the members of the board of directors. If the board of directors or the supervisory board does not exercise these claims, the minority shareholders are entitled to bring an action on behalf of the company (a derivative action).

Unlike an LLC, shareholders of a JSC are entitled to exercise their information rights only at the general meeting. Beside the right to participate and vote at the general meeting, each shareholder has the right to request information and explanation from the board of directors at the general meeting regarding the company's affairs, even if they do not have the voting right. However, the right to information is restricted to the information pertinent to the agenda of the general meeting, which shall avoid abusive actions from shareholders. The board of directors is obliged to disclose full and true information, and if unable to provide information at the meeting or a shareholder requests the information be provided in writing, the information must be sent to the shareholder no later than 15 days from the date of the general meeting.²⁵³ The board of directors may also refer the shareholder to the company's website if the information requested by the shareholder can be found there.

Section 180 of the CC further stipulates certain instances in which the board of directors may refuse to provide information. The reason for refusing to disclose the information may be a breach of law or potential damage caused to the company or to its controlled company. If information is denied, a shareholder may request that the supervisory board decides whether the information should or should not be disclosed. If the supervisory board disapproves of the disclosure of the information, a shareholder may initiate a court proceeding to enforce the right to information. However, the action must be brought no later than 1 month from the date of the general meeting where the shareholder exercised his right to information, which was denied. Furthermore, shareholders have a right to review and inspect the company's

251 Ovečková et al., 2022, p. 1499.

252 Section 182(1), CC.

253 Section 180(3), CC.

documents, which are to be filed with the Collection of Deeds, in the registered office of the company, and request copies of such documents at their own risk and expenses.²⁵⁴ Some authors argue that the abovementioned right could be an excessive administrative burden for the company and a potential hidden abuse of a shareholder's right, as the information requested is publicly available.²⁵⁵

9.3.3. *Simple Joint-Stock Companies*

For simple JSCs, specific rules apply. In case the supervisory board is not formed in the simple JSC, shareholders' rights to request information on the company's affairs at the general meeting are extended. In addition to the general right to request information and explanations at the general meeting, shareholders also have the right to request in writing the information from the board of directors regarding the company's matters.²⁵⁶ If the board of directors refuses to provide the information, the court shall decide, upon the shareholder's action, whether the company is obliged to disclose the requested information.

9.4. *Shareholders' Agreements*

Shareholders' rights and duties may be stipulated in legal provisions, articles of association or shareholders' agreements. An amendment to the CC No. 389/2015 Coll., effective as of 1 January 2017 expressly introduced a basic statutory legal framework on shareholders' agreements. Section 66c of the CC indicates the content of such agreements, which may include conditions for the exercise of shareholders' rights related to the shares, rights related to corporate governance and share capital, or conditions related to the transfer of shares. The requirement of a written form for shareholders' agreements is expressly stipulated. Section 66c of the CC also regulates the relationship between a corporate decision and a contractual agreement among shareholders. If a decision of the general meeting or other corporate body is passed contrary to the shareholders' agreement, this shall not result in the invalidity of such a decision.²⁵⁷

As follows from the above, a breach of a shareholders' agreement (e.g. when a shareholder's vote is cast contrary to the provisions in the shareholders' agreement) shall not be accepted by courts as grounds for finding a resolution of the general meeting void. The result of non-compliance with the shareholders' (voting) agreement by a shareholder can only be the application of agreed contractual sanctions or the emergence of liability for damages.

In general, the law does not provide for any special requirements concerning voting agreements, however, those in contravention of good morals would be void.²⁵⁸ It is disputable whether voting agreements may also be executed as agreements involving

254 Section 183a, CC.

255 Buhala, 2022, p. 29.

256 Section 220zc, CC.

257 Section 66c(2), CC; Mrázová, 2018, p. 543.

258 Mrázová, 2018, p. 547.

a consideration. Some scholars argue that agreements involving consideration should be void owing to a breach of loyalty by a shareholder towards a corporation.²⁵⁹

Voting agreements among shareholders of a JSC expressly defined in Section 186a (1) of the CC are void. Those are voting agreements whereby a shareholder agrees with a corporation or member of a corporate body to vote according to the instructions of a corporation or corporate bodies, to vote for a proposal submitted by a corporate body, or agrees to exercise his voting right in a certain manner for consideration provided by the company itself. Beside this exception, the law does not provide for any special requirements concerning agreements on the exercise of voting rights.²⁶⁰

The Slovak regulation on simple JSCs explicitly regulates certain types of shareholders' arrangements. According to Section 220w of the CC, such ancillary covenants may include the right to accede to the transfer of shares (tag-along right), the right to request the transfer of shares (drag-along right) and the right to request the acquisition of shares (shoot-out clause). These ancillary covenants may not be assigned to another person without simultaneously transferring the shares to which such a right is attached. Although these provisions are applicable solely to the shareholders' agreements, within a simple JSC, it is possible to agree on those rights in a manner and to an extent different from the statutory provisions.

In general, the acquirer of shares does not automatically become a party to a shareholders' agreement. The acquirer may become a party to the shareholders' agreement under the conditions set forth by contract law, especially on the ground of a consent of the remaining parties to the agreement.

9.5. Control of Legality of General Meeting Resolutions

9.5.1. Limited Liability Companies

It is in the interest of the company that the resolution passed at the general meeting become and remain valid. However, sometimes the resolution of the general meeting may be affected by formal or material defects. Therefore, the CC contains provisions based on which action may be taken against the resolutions of the general meeting which have been adopted in a way that breaches the law or the articles of association. A resolution of the general meeting may be challenged by an action to set aside the resolution (*žaloba o určenie neplatnosti uznesenia valného zhromaždenia*) provided in Section 131 of the Slovak CC. Although it is not explicitly stated by the law, the reason for determining the invalidity of a resolution can also be a conflict with good morals or other principles on which the CC is based.²⁶¹ The action can be brought to challenge shareholders' decisions made outside the general meeting as well.

The reasons for determining the invalidity of the resolution of the general meeting relate mostly to formal and procedural defects. These are mainly defects relating to

259 Ovečková et al., 2022, p. 620.

260 Mrázová, 2018, p. 546.

261 Patakyová et al., 2021, p. 695.

the procedure for convening the general meeting, for instance, a failure to meet the specified time periods for convening the general meeting,²⁶² insufficient specification of the items on the agenda,²⁶³ or non-compliance with the prescribed voting majority.²⁶⁴ The defects are not expressly listed in the law, but they are the results of judicial law-making. In this context, the Supreme Court of the Slovak Republic stated that formal defects relating to the convening of the general meeting can be remedied as long as all shareholders attend the general meeting and expressly state that they do not insist on the prescribed formal procedure. However, it is worthy to mention that mere attendance and voting without further expression of will cannot be considered an expression of will aiming at curing the defects in the formal procedure of convening the general meeting.²⁶⁵

As already stated, if the resolution of the general meeting is passed in violation of the law or the articles of association, the resolution may be subject to an action to set aside the resolution. The CC expressly stipulates who is entitled to initiate the court's proceedings. The lawsuit may be filed by each shareholder, a managing director, a member of a supervisory board, a former shareholder, or a former member of a corporate board if the resolution concerns them, the liquidator, and the bankruptcy administrator.²⁶⁶ In order to successfully bring an action, it is necessary to exercise this right within a 3-month period of the adoption of the resolution, or if the general meeting was not properly convened, the period runs from the day when the plaintiff could have learned about the resolution. After the expiration of this time period, the resolution becomes binding despite any potential defects that may have occurred.

If a lawsuit is filed by a shareholder, the court may declare the resolution void only if the violation of the law or the articles of association could have restricted the rights of the shareholder bringing the action. However, it is sufficient to prove that the illegal resolution could potentially affect and restrict any right of the shareholder, but it is not necessary to prove the actual violation of this right.²⁶⁷ If the lawsuit to determine the invalidity of the general meeting's resolution is filed by a shareholder who meets the statutory conditions, it is sufficient that the person claiming the invalidity of the resolution became a shareholder of the company just at the time of filing the lawsuit.²⁶⁸ When the action is taken by a managing director who is at the same time a shareholder of the company, the requirement to meet the abovementioned condition on restriction of rights is not required.²⁶⁹ Each managing director or member of the

262 The Supreme Court of the Slovak Republic No. 3 Obo 339/98, and No. V 30/2001, 29 October 2003.

263 The Supreme Court of the Slovak Republic No. 1 Obo 154/02, 1 July 2003.

264 The Supreme Court of the Slovak Republic No. 1 Obo 95/2002.

265 The Supreme Court of the Slovak Republic No. 5 Obdo/25/2021, 27 September 2022.

266 Section 131(1), CC.

267 The Constitutional Court of the Slovak Republic No. IV. ÚS 434/20103–9, 16 June 2011.

268 The Supreme Court of the Slovak Republic No. 1 Obdo V 86/2004, 24 March 2006.

269 The Supreme Court of the Slovak Republic No. 5 Obdo/25/2021, 27 September 2022.

supervisory board has the right to bring an action in his own name, even if they are not authorised to act on behalf of the company alone.²⁷⁰

The action to set aside is filed against the company represented by managing directors, otherwise by a member of the supervisory board if the lawsuit was filed by the managing director. In the absence of a supervisory board, the representative of the company is appointed by the general meeting. The court's decision is generally binding with retroactive effects *ex tunc*, however, the invalidity of the resolution does not affect rights acquired in good faith by third parties.

Although the Slovak corporate law does not explicitly distinguish between invalidity and nullity of resolutions, certain defects of a decision shall not be remedied even after the expiration of the statutory period of 3 months. Null resolutions of the general meeting can be those decisions clearly exceeding the powers of the general meeting, passed by the general meeting that was convened by unauthorised person, or when the outcome is contrary to the public order.²⁷¹ However, it is not possible to file an action to set aside pursuant to Section 131 of the CC to declare the nullity of the general meeting's decision, but a general action under the Civil Proceedings Code for Adversarial Proceedings must be filed.²⁷²

9.5.2. Joint-Stock And Simple Joint-Stock Companies

The LLC's legal framework on the basis of which action may be taken against the defective resolution passed by the general meeting also applies for JSCs and simple JSCs with some specificities.²⁷³ When a shareholder or a former shareholder is present at the general meeting that adopted the defective resolution, another requirement must be met to successfully bring an action: the need to file a protest in the minutes of the general meeting. Although filing a protest does not necessarily mean immediate success in court proceeding, its absence always leads to the rejection of the action. Thus, at first glance, it may appear that the shareholder who was not present at the general meeting has a more favourable position than a shareholder who participated in the general meeting and whose status as plaintiff is conditioned by the filing of the protest.

The requirement to file a protest is assessed according to the presence of the shareholder at the general meeting at the time of voting on the agenda item that resulted in the resolution, whose validity the shareholder contested. If the shareholder's presence is recorded in the list of shareholders and he leaves during the general meeting, registration of protest to those items of the agenda that were voted upon during his absence at the general meeting is not required.²⁷⁴ Furthermore, a shareholder's objections raised in the agenda item regarding the opening and control of the quorum of

270 The Regional Court of Bratislava, No. 4 Cob/83/2019, 17 September 2020.

271 Šuleková, 2016, pp. 18–21.

272 The Supreme Court of the Slovak Republic, the Great Senate of the Commercial Law Collegium, 1 V Obdo 1/2021, 24 June 2021.

273 Sections 220h(3) and 220h(4), CC.

274 The Constitutional Court of the Slovak Republic No. III. ÚS 323/2012, 10 June 2012.

the general meeting is considered a protest raised by the shareholder against all resolutions adopted at the general meeting.²⁷⁵ However, some scholars consider that the protest should contain at least the description of the resolution or resolutions against which the shareholder is protesting.²⁷⁶

10. Conclusions

Across the eight Central and Eastern European jurisdictions examined, three fundamental themes emerge: (I) how shareholder participation in governance is structured and balanced against managerial prerogative; (II) how private ordering through shareholders' agreements is permitted and policed; and (III) how courts review the legality of general-meeting decisions. While the building blocks are recognisably European, each system calibrates them differently, often reflecting the ownership patterns and policy priorities of its market.

All systems place the general meeting at the top of member decision-making, yet the mechanics of convening, agenda-setting, and voting diverge in ways that matter in practice. Czech law explicitly recognises a broad bundle of participation rights (attendance, proposals/counter-proposals, protest, and access to judicial review) and permits significant tailoring of voting power (including non-voting and multi-voting shares) subject to targeted safeguards (e.g. minimum voting capital in a JSC; consent rights for affected non-voting holders in an LLC). This goes hand-in-hand with a distinctive split between ex-ante veto-style protection in LLCs and ex-post exit (redemption) protection in JSCs.

Hungarian law, while maintaining the general meeting's primacy, emphasises procedural formalism in convocation (content-rich notices) and embraces technology: participation by electronic means, "meeting by conferencing", and even a presumption of remote attendance for open public companies where the articles so provide. It also admits preference shares conferring multiple votes (capped at ten times the nominal value to curb excessive concentration in case of public companies limited by shares) and authorises veto-right preference shares for designated resolutions.

Croatia takes a different tack by entrenching shareholder equality in listed companies: the Companies Act bars plural voting and ties votes strictly to nominal value, though statutes may cap any one shareholder's aggregate votes. The law is otherwise permissive on convening (e.g. advance registration) and, strikingly, does not impose a statutory quorum, limiting the ability of holdouts to paralyse meetings, while reserving qualified majorities for structural decisions (capital changes, amendments, dissolution).

Information rights likewise reflect distinct governance philosophies. Czech law draws a sharp line: the LLC shareholder enjoys robust information and inspection

275 The Regional Court of Nitra No. 26 Cob/43/2020, 8 October 2020.

276 Patakyová et al., 2022, p. 835.

(even trade secrets are within limits), whereas the JSC shareholder's right is confined to explanations necessary for items on the agenda. Slovakia adopts a similar gradient, restricting joint-stock information rights largely to the general meeting's agenda and introducing short judicial deadlines when disclosure is denied, with enhanced written information rights in the simple JSC.

In Polish LLCs, preferences may extend to voting, dividends, or liquidation proceeds, but voting preference is attached only to shares of equal nominal value and may not exceed three votes per share. Resolutions can be taken without a meeting by unanimous written decision, and even where a meeting is held, it may proceed without formal convocation in the circumstances laid down by the Commercial Companies Code; in single-member companies, the sole shareholder exercises the meeting's powers. If a transaction requires a resolution by law, acting without it renders the juridical act invalid, although a post factum shareholder consent within 2 months cures the defect with retroactive effect; where only the articles require consent, the act remains valid but management faces internal liability for breach. For the simple JSC (PSA), the Code makes the general meeting workable and auditable in hybrid settings by allowing electronic participation, by treating the meeting as valid irrespective of the number of shares represented unless the law or articles say otherwise, and by prescribing highly granular minutes that record headcounts, vote totals, and participants using electronic communication. In JSCs, shares in non-public companies are recorded in a shareholder register accessible to the company and each shareholder, and, crucially for control engineering, no more than two votes may be granted per share.

Finally, minority-rights toolkits vary but converge on three pillars: the right to force a meeting/agenda, targeted audits, and derivative-style litigation. Hungary articulates these expressly (5% in most companies; 1% in public companies limited by shares), with detailed procedures and cost-allocation rules.

All surveyed systems recognise the shareholders' agreement as a contract alongside the charter, but they police its perimeter differently. Czech doctrine treats shareholders' agreements as purely contractual, external to the corporate constitution and non-propagating with the share, yet the Supreme Court has clarified the "no instructions on business management" principle: while a promise to procure that directors decide a matter in a particular way may be void if it compels them to breach duty, a commitment to achieve an agreed outcome (backed by a contractual penalty) can be valid if it does not subordinate managerial judgment to shareholder dictates.

Croatian law accepts shareholders' agreements in both company types but forbids encroachment on mandatory equality (no derogation from "one share-one vote" in PLCs) and denies effects against non-parties and the company; enforcement is typically arbitral or before commercial courts. Slovak law goes further by positively codifying the device (since 2017), specifying permissible content (e.g. governance arrangements, transfer restrictions) and clarifying that a corporate decision contrary to such a contract is not thereby invalid, thus privileging corporate over purely

contractual ordering. It also singles out ancillary covenants (tag-/drag-along, shoot-out) at least for simple JSCs.

Regional practice also acknowledges voting arrangements beyond classic shareholder-to-shareholder agreements. Romanian legislation accepts pacts that affect voting rights, often to coordinate control, while preserving the primacy of statutory and charter constraints. Hungary's "syndicate agreement" remains an unregulated but familiar instrument, explicitly positioned as separate from the articles and typically used to coordinate voting or joint exercise of minority rights. Slovenia underscores a policy contrast: more latitude in LLCs and an elevated strictness in JSCs, invalidating undertakings to vote as management instructs to preserve shareholder autonomy and market integrity.

Every jurisdiction distinguishes between curable defects leading to voidability and graver defects entailing nullity/non-existence, yet the triggers and filters differ. Czech law channels most defects into an avoidability action, tempered by a proportionality test that can deny annulment where consequences are minor or third-party reliance would be unduly harmed; only in specified circumstances does the law treat a resolution as non-existent (e.g. *ultra vires* matters, legal impossibility, and lack of notarisation), which courts must recognise *ex officio*.

Croatia also operates a two-track regime. Nullity (the graver sanction) arises, *inter alia*, from defective convocation/notice, missing notarial minutes, *ultra vires* content, or contrariety to morals or creditor-protection rules; voidability actions are constrained by short limitation periods and standing rules (e.g. a 30-day suit by dissenters whose opposition was recorded).

Slovakia centralises review in the action to set aside resolutions, with courts focusing on procedural defects (convening, specificity of agenda, and voting majorities) and recognising that unanimous presence and waiver can cure certain notice flaws, a pragmatic tilt toward corporate stability. Legality control centres on the action to set aside a resolution under Section 131 of the CC, which must be brought within 3 months and is open to a broad set of claimants; courts focus on procedural breaches in convening and voting, and have accepted that unanimous attendance plus an explicit waiver can cure certain notice defects. More serious flaws remain unremedied after the 3-month period: Slovak law does not label "nullity" expressly, but decisions that exceed general-meeting powers, are convened by an unauthorised person or offend public order are treated as null and must be attacked by a general civil action rather than under Section 131. In JSCs and simple JSCs, a shareholder who was present must have a protest recorded in the minutes to keep a later challenge alive, with case-law detailing when a protest is deemed to extend to multiple items or to items adopted after the shareholder left.

Romania conceptualises review as a legality check, neither a re-business-judgment review nor a remedial power to substitute decisions, grounded in mandatory law and the charter, with standing rules that favour dissenters and absentees while preserving relief where consent was vitiated. Likewise, Serbia separates null and voidable resolutions, spreading nullity cases across the Companies Act and anchoring voidability in

broad, procedurally framed grounds, again with attention to third-party good faith. Poland maintains a dual track for annulment and invalidity, reinforced by meticulous minute-keeping, and applies the same logic to the simple JSC.

Two vectors of convergence stand out. First, EU-level impulses (e.g. the Shareholder Rights framework) are visible in the modernisation of meeting mechanics: remote participation, proxy transparency, advance disclosure of drafts, most fully elaborated in Hungary's provisions on electronic participation and publication of meeting materials. Second, minority-protection toolkits now commonly combine meeting-forcing rights, bespoke audit remedies, and company-benefit litigation, albeit at different thresholds, reflecting a regional consensus on "voice plus oversight".

Natural and necessary divergences remain: Croatia's insistence on strict voting equality in PLCs contrasts with the calibrated plural-voting allowances of Czech and Hungarian law; Czech law's ex-ante veto in LLCs and ex-post exit in JSCs mark a distinctive solution for entrenchment and mobility; Slovakia's statutory treatment of shareholders' agreements and ancillary covenants goes beyond neighbouring systems in clarity; and Czech doctrine's granular taxonomy of non-existent resolutions sets a comparatively sharp boundary for corporate nullities.

For closely held companies, the region generally privileges flexibility (strong member information/inspection, expansive agenda rights, and enforceable private ordering), although the "no-instructions" principle remains a hard stop on attempts to contract around managerial fiduciary duties. For widely held or listed companies, the law leans toward procedural discipline, technologically enabled participation, and equality of treatment, coupled with a litigation architecture that polices legality without substituting business judgment. This composite shows a recognisably European model of shareholder governance, locally adapted to market structures and institutional histories, and likely to continue converging at the procedural margin while preserving substantive diversity in voting design and the reach of private ordering.

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Management*

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1. Introduction

Executive officers occupy the centre of corporate life. They convert the company's strategic ambitions into concrete choices, policies, and actions, and they do so within a dense network of legal obligations and institutional controls. This chapter sets out the legal and theoretical background against which their work is understood, drawing on company law, corporate law, agency theory, and corporate governance. It also outlines the practical tools through which authority is exercised and supervised across different legal systems. As shown,

‘the members of the management body are subject to dual, conflicting interests and obligations. As the mandataries of the shareholders, they are responsible on the one hand to implement the business object to the best of their abilities, to avoid or overcome crises and to recognise and take advantage of business opportunities for the company. They should act as successful entrepreneurs. On the other hand, the members of the management body are

Eichlerová, K., Ivkošić, M., Ledwoń, P., Veress, E., Barta, J., Dugar, G., Renko, J., Mihajlović, B., Mrázová, Ž. (2025) ‘Management’ In Veress, E. (Ed.) Joint Stock and Limited Liability Companies in East Central Europe. Miskolc-Budapest: Central European Academic Publishing. pp. 401–526.
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also responsible for ensuring that the company complies with all statutory rules and regulations of the relevant legal system (principle of legality) and that they satisfy their personal duties as part of the management body which exist to protect each individual shareholder, the employees, the company's creditors and the public. The organisational structure of the corporation must take this plurality of interests into account.¹

Company law embeds executive officers within the internal structure of the corporation. As the company's agents, executive officers enjoy delegated authority to manage day-to-day affairs, subject to statutory limits and to the terms of their appointment and removal. Their legal position is anchored in fiduciary obligations: to act in good faith, promote the company's interests, exercise due care and skill, and avoid conflicts. These duties express the trust that justifies managerial discretion while defining its boundaries. In many jurisdictions, the sources of an officer's authority are layered, comprising the statute, the company's constitutive documents, board resolutions, and the contract of employment or service. Delegations of authority specify who may commit the company to transactions, approve expenditures, or hire key personnel. These instruments are complemented by "reserved matters" lists, which withhold certain decisions, major acquisitions, changes to capital structure, or entry into related-party transactions from executive discretion and require board approval.

Corporate law situates executive authority within the company as a separate legal person. In many systems, executive officers function as organs of that legal person, capable of binding it through their acts. The law both empowers and constrains this role, conferring powers needed for effective management while imposing safeguards for shareholders, creditors, employees, and other stakeholders. The resulting design aims to couple managerial effectiveness with accountability.

Rules of attribution and representation mediate how an officer's acts become the company's acts. Apparent (or ostensible) authority protects good-faith counterparties that rely on the company's manifestations of authority, while internal limits constrain the officer vis-à-vis the company. The tension between internal limitation and external effectiveness is addressed by such doctrines as internal management and corporate organs theory in civil law systems. *Ultra vires* concerns are largely attenuated in modern statutes but persist through specific capacity limits and public-law constraints on regulated entities.

Fiduciary duties translate into operational standards: loyalty (avoid conflicts, refrain from misappropriating corporate opportunities, disclose interests), care (informed decision-making, adequate supervision), and good faith (proper purposes, honesty in corporate dealings). Compliance requires active oversight, not mere abstention. Officers must ensure that information flows enable the board to discharge its own duties. Courts typically defer to honest, informed business judgments (the "business judgment" principle), while intensifying scrutiny where self-dealing or

1 Roth and Kindler, 2013, p. 98.

structural conflicts are present (entire fairness or equivalent standards). Remedies range from injunctive relief and rescission to damages, disgorgement of profits, and, in some systems, and disqualification from management. Parallel exposure may arise under securities law (misstatements, insider dealing), competition law (cartel conduct), and sectoral regulation (financial services, data protection, health and safety).

Executive contracts increasingly include malus and clawback provisions, post-termination restrictive covenants, and mandatory cooperation with investigations. Directors' and officers' insurance, indemnities, and advancement of defence costs shift part of the litigation risk, but they cannot lawfully insure against fraud or deliberate breaches of duty. Internal control failures could trigger personal liability if officers knew or ought to have known of systemic defects and failed to remediate them.

The work of executive officers is practical as well as legal. It covers strategy, operations, compliance, risk management, and stakeholder engagement. Officers translate board-approved strategy into budgets, capital allocation, product roadmaps, and talent plans. They are expected to steer the enterprise through changing market and regulatory conditions while remaining within the limits set by constitutive documents, board directives, and applicable law. The position, therefore, demands judgment, expertise, and integrity.

Modern governance relies on a layered control environment of “three lines”: business management, risk and compliance, and internal audit. Executive officers are responsible for designing and maintaining this environment, including risk appetite statements, key risk indicators, reporting dashboards, whistleblowing channels, and incident response plans.

Executive officers are the company's principal interlocutors with regulators, employees, creditors, customers, and the community. They oversee periodic financial and non-financial reporting, earnings guidance (where applicable), and market disclosures of price-sensitive information. Inaccurate or selective disclosure can produce both legal exposure and loss of market trust. Engagement with creditors (via covenants and waivers), works councils or unions, and key suppliers requires aligning short-term liquidity needs with long-term relationships.

Agency theory diagnoses the structural risks of separation between ownership and control: misaligned incentives, information asymmetry, and moral hazard. In the corporate context, executive officers act as agents entrusted with managing the company on behalf of its shareholders. Absent counter-measures, managers might prioritise private benefits (empire-building, entrenchment, perquisite consumption) over firm value. Agency theory informs a toolkit to reduce agency costs: performance-linked remuneration (with deferral and equity), vesting and holding periods to promote long-term horizons, board and committee monitoring, independent audit, and disclosure obligations. Malus and clawback provisions address risk-taking that crystallises losses after payout. Outside the firm, market-based disciplines (debt covenants, the market for corporate control, and shareholder activism) constrain

managerial slack. A credible threat of removal, backed by transparent succession planning, remains a powerful governance lever.

Because monitoring depends on information quality, officers must ensure timely, decision-useful reporting to the board. Management information systems should distinguish between leading and lagging indicators, segregate duties to reduce fraud risk, and preserve audit trails. Where estimates and valuations are central (impairments, fair value), robust model governance and independent challenge are essential.

Corporate governance integrates legal, managerial, and ethical dimensions. It concerns the structures and processes through which companies are directed and controlled. Executive officers are central to implementing governance rules, ensuring regulatory compliance, enabling transparent reporting, and embedding controls. Board committees – audit, risk, remuneration, and nominations – provide focused oversight. Management committees – executive, investment, and disclosure – coordinate execution and escalate material issues.

Contemporary governance frameworks require balancing financial performance with longer-term considerations, including sustainability and other ESG concerns where relevant to the firm's strategy and risk profile.² Executive officers must map material environmental and social risks to business models, set targets, and integrate them into capital allocation and remuneration. They should distinguish between compliance-driven reporting and strategy-driven commitments, avoiding green- or social-washing by tying claims to verifiable metrics and board-approved plans.

Governance is not only structural; it is also cultural. Officers shape norms through hiring, incentives, and response to misconduct. Clear escalation protocols, protection for whistleblowers, and consistent disciplinary outcomes are markers of an ethical culture. Training must be risk-based and role-specific, moving beyond generic e-learning to scenario analysis and table-top exercises for high-impact risks.

The board–management boundary varies across systems. One-tier boards combine oversight and certain executive functions whereas two-tier systems separate a supervisory board from a management board. In both cases, clarity over “who decides what” is critical. Board charters, executive officers' mandates, and committee terms of reference should align and address reserved matters, information rights, and emergency authority.

In groups, executive officers must reconcile duties to the subsidiary with the interests of the group. While group synergies are legitimate, subsidiary officers cannot disregard the legal personality of the subsidiary, particularly where creditor protection or minority shareholder rights are implicated. Cross-border operations add complexity: divergent labour regimes, data localisation, sanctions compliance, and extraterritorial enforcement demand coordinated policies and local accountability.

Liability does not depend solely on title. Individuals who act as *de facto* officers, or who exercise controlling influence as shadow managers may attract fiduciary and statutory duties. Therefore, private-equity sponsors, controlling shareholders, or

2 For a comparative analysis of this issue, see Ekkenga and Winner, 2024.

parent-company executives must calibrate involvement to avoid unintended assumption of officer-level responsibilities.

Appointments should follow transparent processes aligned with skills matrices and diversity objectives. Fit-and-proper assessments are common in regulated sectors. Clear probation and evaluation frameworks, with measurable objectives and behavioural indicators, enable early course correction. Succession planning reduces key-person risk and underpins credible removal decisions where performance or conduct is deficient.

Termination triggers vary: performance failure, breach of duty, loss of regulatory approval, or change in control. Severance terms must respect statutory and governance constraints and should preserve the company's ability to enforce post-termination obligations, retrieve confidential information, and secure cooperation in investigations or litigation.

Accountability mechanisms connect law, theory, and practice. Board oversight, audit and risk committees, internal controls, and external assurance discipline the exercise of executive power. Whistleblowing regimes, internal investigations protocols, and incident remediation tracking make accountability operational. Liability regimes – statutory, fiduciary, and contractual – supply incentives to comply and remedies when they do not. For systemic wrongdoing, regulators increasingly look to personal accountability frameworks that require named executives to own specific functions.

Comparative law reveals variation in terminology and institutional design. Common-law systems often articulate duties through judge-made standards supplemented by statute; civil-law systems tend to codify duties and emphasise the “organ” character of management. Some jurisdictions extend express duties to creditors near insolvency³; others locate those protections in avoidance rules and directors' disqualification regimes. Despite these differences, a common pattern is evident – broad managerial discretion, bounded by fiduciary principle, procedural discipline, and credible enforcement.

Executive officers are indispensable to corporate success, yet their authority is legitimate only because it is accountable. The sections in this chapter examine, across the eight legal systems from East-Central Europe, the status of executive officers: their appointment and removal, powers and limits, duties and liabilities, and the contractual and statutory sources of their mandate. By examining the literature alongside agency theory and governance practice, the analysis explains how executive authority is constructed, supervised, and justified.

3 See Chapter 6 of the present book.

2. The Czech Republic

2.1. Structure of Company Management

At present, two basic corporate governance concepts can be found in the Czech Republic: the one-tier and two-tier systems. The one-tier system is typical for a limited liability company (LLC).⁴ A one-tier management board (*jednatelé*) has actual authority to manage the company as determined by the statutory and the memorandum of association. The shareholders exercise control over the company at the general meeting. However, a one-tier system can exist in a joint-stock company (JSC) too. In that case, the management board (*správní rada*) combines executive and control powers. The two-tier system divides control of an LLC or a JSC into two tiers: the management board (*jednatelé* in an LLC, *představenstvo* in a JSC) is entrusted with the task of managing the company, while the supervisory board (*dozorčí rada*) has only a controlling function.⁵ A characteristic of the Czech two-tier system is that it is never possible for the same person to have a dual role (i.e. be represented in both the management and supervisory boards).

For both systems in both types of companies, (I) bodies may have only one member, even in the case of a management board in a one-tier system of a JSC (except for cases of mandatory employee participation in the composition of the supervisory board in a two-tier system of a JSC) and (II) a legal person may be a member of the body.

The law refers to the management board as the statutory body (*statutární orgán*). Every legal person must create a statutory body, as it is the body through which action on behalf of the legal person is taken. Historically, the name “statutory body” originated from this function, because it was ‘constructed exclusively for the purpose of executive authority, even though this body could also have decision-making powers’.⁶ However, this does not fully express the characteristics of the management board as a company body. In addition to unlimited representative powers, the management board also has significant internal decision-making powers. Thus, the management board is also the executive body of the company.

An LLC should have a management board composed of a single director or several directors and, if it wants, the supervisory board, too. In certain cases, the creation of a supervisory board is mandatory (e.g. if the LLC is a securities trader). Thus, we can

4 I compare the organisational structure in an LLC to the one-tier system according to stock law. However, I acknowledge a significant difference between stock law and LLC law. The one-tier system in stock law means that a single elected body has both executive and supervisory powers (the managing and control functions are concentrated into a single body and a distinction is made between executive and non-executive members). However, in an LLC, the one-tier system means that a single elected body has executive powers, there is no separate body with supervisory powers, and the supervisory rights belong to the shareholders.

5 The term board of directors is used to denote the company’s elected body in general.

6 Pelikánová, 2015.

conclude that in an LLC, both corporate concepts exist. Most LLCs have a one-tier system in a special sense. The two-tier system is an exception.

A mandatory element of the memorandum of association is the determination of the number of managing directors. This may set a fixed number of managing directors. Whether the determination of the number of managing directors is sufficiently certain and the manner of its additional determination are in dispute. For example, assume that the memorandum of association specifies that the company has two to four managing directors and that it is for the general meeting to determine the specific number of managing directors. There is no consensus on this solution. However, the exact number of managing directors must always be entered in the Commercial Register.

The law gives the LLC the option to determine in the memorandum of association that several managing directors shall constitute several individual bodies or one collective body; if this question is not expressly provided for in the memorandum of association, each managing director is a separate body. This is a reaction to the discussion during the time the Commercial Code was in effect as to whether multiple managing directors constitute a single body or not, which completely ignored the fact that this issue did not exist at all under the previous legislation, as multiple managing directors were considered as a single body.

I find this legal regulation problematic, because it is both dysfunctional and contradictory to other legal rules.⁷ If we accept the conclusion that the function of managing directors is individual, then each managing director could decide independently of another on issues entrusted to the competence of the managing directors. However, this is not the case, because the Business Corporations Act (BCA), like the Commercial Code before it, determines by default that collective decision-making on business management is required (Section 195(1), BCA). If collective decision-making is mandatory on matters relating to business management, then collective decision-making should be all the more so required on matters related to strategic management (*argumentum a minori ad maius*).⁸ However, the conclusion that several managing directors constitute individual bodies is strongly rooted in doctrine and practice, posing many problems in application.

A JSC can choose a one-tier system or a two-tier system. The option to choose a system has been available since 2014. Before then, the only possible model for a JSC was a two-tier structure; however, a one-tier model could be used in the case of a European company (SE). At present, the one-tier model is used by about one-fifth of JSCs.

The founders determine the internal structure when the company is established in the articles of association. The chosen structure can be changed at any time by amending the articles of association.

⁷ For details, see Eichlerová, 2015.

⁸ Černá et al., 2021, p. 384.

The two-tier system was adapted from the solution in force in Germany. The Czech regulation differs from the German one in that the right to elect and dismiss members of the management board belongs to the general meeting. The supervisory board elects and dismisses members of the management board only if the articles of association so provide. Such a case is referred to in the literature as the “German model”.

The management board in a one-tier system in a JSC (*správní rada*) is a body with executive and control powers. The Czech legislation raises concerns about part of the doctrine of good corporate governance. Indeed, the law does not require that the members of the board be divided into an executive component, providing day-to-day management of the company, and a non-executive component, supervising the exercise of executive powers. It is even possible for the board to be single member. The concern is mainly because the general meeting does not have the tools to properly control it, as the shareholders’ right to explanation is limited and not as extensive as that of the shareholders in an LLC, whereby the shareholders can control the managing directors.⁹ The solution may be to strengthen shareholders’ right to information in the articles of association.

2.2. Organs of the Company and its Powers

The scope of activities of the management board in an LLC and in a two-tier system in a JSC can be categorised as internal and external. Internal competence includes the management of the company, that is, deciding the operation of the business enterprise and matters related to the functioning of the company as a legal entity (convening the general meeting and fulfilling information obligations toward shareholders, the registry court, the public, etc.). External competence includes the general representative authority, that is, the authority to act on behalf of the company in all matters. The two competences influence and condition each other.

Internal competence distinguishes three basic levels – decision-making on extraordinary issues; strategic issues; and business management, that is, day-to-day matters (*obchodní vedení*).¹⁰

Issues of exceptional importance (e.g. sale of a business enterprise or its substantial part) are decided exclusively by the general meeting.

By contrast, day-to-day matters are decided exclusively by the management board. The law forbids giving instructions regarding business management to the management board (195(2) and 435(3) BCA).¹¹ The exceptions are requested instructions and instructions within the disclosed concern (see chapter 6).¹² The purpose of the prohibition on giving instructions is to strengthen the independence of the management board. However, its position is not as strong as in Germany, for example,

9 Černá et al., 2021, p. 471.

10 Eichlerová, 2009, pp. 75 et seq.

11 Havel doubts whether this is a mandatory rule that cannot be deviated from in the context of an LLC (Havel, 2019). However, this view is rather unique in the doctrine.

12 For details, see Josková, 2022a.

because Czech law is based on the principle that a member of the management board can be removed from office at any time, even without giving a reason.

Business management is the day-to-day management of the business enterprise (i.e. decisions on the day-to-day operation of the business enterprise). The scope of business management coincides with the company's short-term plans.

Business management does not include long-term plans or major changes in the company's business and direction.¹³ This area of the company's strategic management lies between business management, on the one hand, and the extraordinary decisions entrusted by law to the general meeting, on the other hand. Decisions on the financing of the company constitute an example distinguishing strategic management and business management. Decisions on operational financing (e.g. credit for the purchase of raw materials or the payment of wages) are in realm of business management. Acquisition financing (e.g. a loan to acquire equity in another business corporation) fits within strategic management. Strategic management is a function of the management board based on the rule on the residual competence of the statutory body, but may be entrusted by the memorandum or the articles of association to the general meeting or another body, such as the supervisory board (Section 163, Czech Commercial Code).

In an LLC, the general meeting is entitled to decide on strategic management matters, because it can take decisions on matters within the competence of other bodies (Section 190(3), BCA). Meanwhile, the general meeting of a JSC may decide on strategic management only if the articles of association entrust it with this matter. It cannot do so based on its own decision, unless it is a one-off breakthrough in the articles of association.¹⁴

The general meeting of both types of companies is also entitled to approve strategic and conceptual guidelines (Sections 195(2), 435(3), BCA).

The supervisory board is the controlling body of the company. It oversees the performance of the management board's duties and the company's activities.¹⁵

Its position can be significantly strengthened by the fact that the articles of association entrust it with the election and dismissal of the members of the management board. In such a case, it also decides on their remuneration and the content of the performance contract.

The right to control includes the unlimited right to information, including access to all company documents, and the right to propose and implement corrective measures (*nápravná opatření*).¹⁶

13 Judgment of the Supreme Court case No. 31 Cdo 1993/2019.

14 A one-off breakthrough in the articles of association refers to an ad hoc decision of the general meeting made in the manner prescribed for changing the article of association (required majority and notarial certification of the decision).

15 For details, see Lasák, 2023.

16 Štenglová et al., 2023, p. 559.

Traditionally, control is divided into *ex ante* and *ex post* control. *Ex ante* control instruments include:¹⁷

- a) approval of prior legal action where required by law or the memorandum or the articles of association (Section 49, BCA);
- b) approval of the transfer of registered shares where the articles of association so provide (Section 272, BCA);
- c) reviewing the management board proposal for the distribution of profits or the payment of losses (Section 447(3), BCA).

The *ex post* control system includes¹⁸:

- a) a review of the financial statements (Section 447(3), BCA);
- b) a review of the related party report, if it is made by the group of persons allowed to bring claims against the company according to the law (Section 83, BCA);
- c) a review of the exercise of management board's powers at the request of a qualified shareholder or at the discretion of the supervisory board (Section 370, BCA)
- d) a review of the management board's decision to refuse explanations (Section 360(2), BCA).

The supervisory board also plays an important role in suppressing conflicts of interest between the members of the management board and the company. To this end, it may¹⁹

- a) authorise a member of the supervisory board to represent the company in proceedings against a member of the management board (Section 447(3), BCA).
- b) suspend a member of the management board from exercising their functions in the event of a conflict of interest, even where the supervisory board's competence does not include the appointment and dismissal of members of the management board (Section 54(4), BCA).
- c) prohibit the conclusion of a contract between the company and a member of the management board or other persons in respect of whom a conflict of interest is being considered in relation to such member (Section 56(2), BCA).

The position of the management board in a one-tier system combines both executive and supervisory powers, although the law does not mention in detail, as in the case of

17 For details, see Štenglová et al., 2023, pp. 560–561.

18 Ibid., p. 561.

19 Ibid., pp. 562–563.

the supervisory board, the individual supervisory powers.²⁰ This is obvious, because even the management board in a two-tier system has controlling powers in relation to the company's activities; for example, the responsibility for establishing a proper compliance system rests with the management board.

The powers of each board of directors (management or supervisory board) may be divided horizontally by branch among its individual members, either collectively (horizontal delegation) or outside the board (vertical delegation, which is classified as external and internal). Vertical delegation can be directed inside the board to a subordinate person (e.g. a technical director) or outside the board (e.g. an external accounting provider). Delegation does not lead to the creation of a new board, but only to a partial transfer of their competence. In our view, horizontal delegation, or the creation of branches, can be carried out not only by a decision of the board, whose competence is at stake, but also by the memorandum or the article of association or, based on these documents, another board. In my opinion, it is up to the company to choose the method of occupation of these branches, whether their occupation depends on the board itself or another board which elects and removes its members.²¹ It is not possible to delegate all competence; the board as a whole must decide on basic questions falling within the competence of the board, such as those related to business management, and the board as a whole must decide at least on questions of control over the proper exercise of the delegated competence.²² Neither horizontal nor vertical delegation should prevent the whole board from deciding on the delegated matter.²³

2.3. Appointment into the Organs of the Company. Establishment and Termination of Functions, Remuneration, and Conflicts of Interest

A director and its representative, if the member is a legal person, must meet the following requirements:

- a) full legal capacity pursuant to Section 152(2) of the Czech Civil Code (Czech CC), which shall be enforced only in the case of the director being a natural person; and
- b) absence of obstacles pursuant to Section 46(1) of the BCA.

20 Only from 2021 has the one-tier system truly been one-tier. In the period 2014 to 2020, two bodies had to be created: the board of directors and the statutory director. The difference with the two-tier system was that the statutory director could be a member of the management board (incompatibility of functions did not apply) and could only be a natural person. However, the question of what fell within the competence of the management board versus that of the statutory director, and to what extent the company had autonomy in setting their competences, was the subject of frequent disputes. The legislation was very unclear. This was the reason for the legislative change.

21 Other authors take the view that the determination of which member will administer a particular branch is a decision for the board concerned by the horizontal delegation alone. Štenglová et al., 2023, p. 396; Štenglová et al., 2020, p. 131.

22 Lasák et al., 2021, p. 300.

23 Lavický et al., 2022, p. 587.

These obstacles are recorded in the register of persons disqualified from performing their duties (Section 70 ff, BCA).

Another obstacle not registered in the register of disqualified persons is incompatibility of functions as defined by law in a two-tier system.²⁴

Range of obstacles under Section 46(1) of the BCA:

- a) a decision on the prohibition to perform the function of a director. In this case the law does not extend the impact of a specific decision on prohibition to other cases; it only clarifies that such a prohibition also constitutes an obstacle to the exercise of office. In other words, it does not follow from the provision that any prohibition on the exercise of the functions of a director of any legal person will create an obstacle to the exercise of the functions of a director of all boards of all companies.²⁵
- b) a decision prohibiting the carrying on of an activity related to the business of the business or field of activity corresponding to the object of the business or activity of the company. It is disputed whether the actual nature of the business or other activities of the corporation or their definition in the articles of incorporation is determinative. The first option is favoured by Josková,²⁶ and the second by Dědič and Štenglová.²⁷ A third possibility is that both are legally relevant – that is, the actual nature of the business or other activity and the defined subject of the business or other activity in the memorandum or the articles of association. In my opinion, the purpose of the prohibition is that the director should not engage in the activity within the company which has been prohibited, regardless of whether the activity is yet to be commenced (i.e. it is defined in the memorandum or the articles of association but not yet carried out by the company) or whether it is actually carried out by the company, even if it is not defined in the articles of association.
- c) final convictions for offences (I) of property; (II) of tax, foreign exchange, and fees; and (III) against the binding rules of the market economy and the circulation of goods in dealings with foreign countries. A final conviction abroad for (IV) an offence similar to the enumerated offences (Section 46(1)(c) (4), BCA) will also constitute a bar, the similarity to be assessed according to the definition of the facts.
- d) a decision declaring bankruptcy.

Only the decision to declare bankruptcy, not other bankruptcy solutions (e.g. insolvency or reorganisation), creates an obstacle.

The decisions referred to above are:

- a) a decision of a public authority of the Czech Republic, which is

24 Incompatibility means that a member of the management board cannot be a member of the supervisory board.

25 Dědič and Štenglová, 2023, pp. 37–38.

26 Štenglová et al., 2023, p. 403.

27 Dědič and Štenglová, 2023, p. 45.

- I) a court decision on disqualification from performing office pursuant to Section 63 et seq. of the BCA (so-called disqualification),
- II) a judgment issued in criminal proceedings imposing a ban on performing office,
- III) a decision issued in misdemeanour proceedings imposing a ban on performing office, and
- IV) entry in the national sanctions list.²⁸
- b) a decision of another Member State of the European Union or a State of the European Economic Area.
- c) a decision of an international organisation.
- d) a decision of public authorities of a non-member state.

Obstacles imply incapacity to perform the function pursuant to Section 155(1) of the Czech CC. If the incapacitated person is called to office, the office does not arise and the decision in question is apparent (Section 45, BCA). If an impediment to the exercise of the office arises, the office ceases *ex lege* under Section 155(1) of the Czech CC. If the office is exercised despite the existence of an obstacle, the person concerned is in the position of *de facto* director (Section 62, BCA).

The statutory prerequisites for the exercise of the office may be extended in the memorandum or the articles of association. A decision to appoint a person who does not meet the requirements for the exercise of the office as defined in the memorandum or articles of association (e.g. age, qualifications) is defective if it is a one-off breakthrough in the memorandum or the articles of association; otherwise, it is defective because it is contrary to the memorandum or the articles of association; until the court declares it invalid, it is a valid decision. Thus, failure to meet the requirements for performing office in the memorandum or the articles of association has much milder consequences than failure to meet the statutory requirements.

The position of director may arise in any of the following ways.

The first directors may be designated in the memorandum or the articles of association.

The directors shall be elected by the general meeting, unless otherwise provided by law or the memorandum or the articles of association. This is the case if the memorandum or the articles of association entrust the supervisory board with the power to elect the members of the management board or if the law or the memorandum or the articles of association provide that some of the members of the supervisory board are elected by the employees.

A director may also be called to office by a decision of the shareholder if such authority is certificated in their shares (*vysílací právo*). The number of directors appointed directly by the shareholders based on the right of appointment may not exceed the number of directors elected by the general meeting or, in the case of the management board, by the supervisory board if their election falls within the

28 Ibid., p. 39.

competence of the supervisory board under the memorandum or the articles of association.

In exceptional cases, a director may be appointed by the court (e.g. a vacancy preventing the entire body from functioning).

Finally, the directors may be temporarily elected by the board of directors itself, if the memorandum or the articles of association so permit, for the period until the meeting of the body which is to elect the directors (general meeting, supervisory board). Co-optation cannot be used in the event of a vacancy occurring after a director is appointed by a shareholder by virtue of a right of appointment or by employees by virtue of their participation. The condition for using the co-option option is that the number of directors of the board has not fallen below half.

The office of the director shall cease on the expiry of the term of office, if stated. The term of office should be fixed for directors in a JSC.²⁹ For directors in an LLC, the determination of the term of office is not required. Expiry of the term of office does not preclude re-election.

The office is also terminated by removal and resignation. Regarding removal, Czech law is based on the principle that a director may be removed even during their term of office without giving reasons. The subject of discussion is whether the memorandum or the articles of association may depart from this rule and provide that a director may be removed from office only for specific reasons.³⁰ It is cautiously suggested that this is permissible unless the members of the supervisory board are elected by the employees.³¹

The statutory rules on resignation are default. The company is free to set its own arrangements according to its needs, but the rule is that no one may be forced to remain in office against their will and that it may be contrary to the exercise of due care if a director resigns at an inopportune time without serious reasons (e.g. serious illness).³²

The office of the director shall also cease on the election of a new director if it is clear from the decision whose place the director is filling.

The office is also terminated by loss of prerequisites (e.g. disqualification decision).

A special case of termination of the office of a director who is a legal person is the expiry of the time limit for the appointment of a natural person's representative.

Special cases of termination of office may be determined by the memorandum or the articles of association (e.g. a director becomes an unlimited liability partner).³³

29 According to the Supreme Court, even in the case of a JSC, the articles of association may stipulate that the term of office of a member of the board of directors is unlimited. See judgment of the Supreme Court case No. 27 Cdo 1915/2022.

30 For details, see Lasák et al., 2021, pp. 1981–1982.

31 Štenglová et al., 2023, p. 420.

32 Ibid., p. 421; Pokorná et al., 2022, p. 121.

33 Štenglová et al., 2023, p. 423.

The remuneration is in the competence of the body that elected the member, except for members elected by employees or appointed by shareholders.

The doctrine implies that it is possible to separate the approval of the performance contract from the election of a member of the management board. Thus, it is permissible to provide in the memorandum or the articles of association that the general meeting elects the members of the management board but the supervisory board approves the performance contract, or that the supervisory board elects the members of the management board but approves the performance contract.³⁴

If the remuneration agreement is not approved by the general meeting or the supervisory board, it shall not take effect and the performance of the function shall be free of charge (Sections 59(2), 59(3), BCA). Only if the approval is granted for reasons set by the company and not the director, the director is entitled to the usual remuneration (Section 59(4), BCA).

In summary, the right to remuneration accrues to a director

- a) based on a performance contract,
- b) by law at the usual rate, unless the performance contract has been approved by the general meeting or supervisory board in the case of the German model owing to obstacles for the company,
- c) based on an internal regulation on directors' remuneration approved by the general meeting or supervisory board in the case of the German model, or
- d) based on a decision by the general meeting or supervisory board in the case of the German model to award remuneration on an ad hoc basis.

The directors may receive royalties only if the distribution of profits among the directors is provided for in the memorandum or the articles of association and the general meeting has decided on the royalties when deciding on the distribution of profits.

The traded companies are required to have a remuneration policy approved by the general meeting pursuant to Sections 121k et seq. of the CMEA. The remuneration policy is a binding document that applies to (I) directors and (II) the chief executive officer and (III) their deputies, if they exist. The remuneration policy, therefore, applies not only to persons in a business relationship with the company (members of boards) but also to employees in top management positions.

The remuneration policy is a strategic document prepared by the management board and approved by the general meeting at least once every 4 years, or more frequently if there is a material change.

If the remuneration policy is not submitted to the general meeting for approval, the performance of the functions of the persons concerned shall be free of charge until the date of the general meeting to which the remuneration policy was submitted for approval (Section 121k(1), CMEA).

If it is submitted but not approved, then the company may temporarily maintain its current remuneration practice until the policy is approved; the revised remuneration

34 Hurychová, 2016, pp. 305 et seq.

policy shall be submitted to the following general meeting for approval (Section 121k(3), CMEA).

The remuneration policy is followed by an annual remuneration report, which is to be published on the company's website for a period of 10 years (Section 121o(4), CMEA).

The remuneration report is intended to provide up-to-date information on the remuneration of those to whom the remuneration policy applies, namely an overview of all remuneration, including all benefits in whatever form.

The conflict-of-interest regulation in the BCA addresses two issues. The first concerns any conflict situation (e.g. a director's spouse becomes a director in a competing company) (Section 54, BCA). The second is directed toward the conclusion of contracts, including the securing and consolidation of debt, unless the contracts are concluded in the ordinary course of business (Section 55, BCA). In both cases, the competent bodies (management board, supervisory board, or general meeting) are required to be informed of the conflict situation. Their first option is to suspend the performance of director functions, and the second to prohibit the conclusion of a contract, the provision of collateral, or the consolidation of a debt.

The range of persons in respect of whom conflict situations are assessed is quite wide. It includes the director; a person close to the director (e.g. a spouse or descendant); a person influenced or controlled by the director (e.g. a company in which the director is a majority shareholder); the deputy director, if the director is a legal person, and all persons related to the director (close, influenced, controlled person); the *de facto* director and all persons related to the director (close, influenced, controlled person); companies from the controlling group to which the company belongs, unless it is a qualified group of companies (*koncern*).

There are two consequences for breaching the rules on conflict of interest regulated in the BCA: failure to give notice of the conflict,³⁵ and failure to wait for the reaction of the competent body (suspension or prohibition of legal action). The first is that it is a breach of the duty to perform the function properly, with all the ensuing consequences (e.g. the obligation to compensate for damages, the possibility of being disqualified from performing the function, etc.). The second consequence in the case of a juridical act in conflict of interest is that the company will not be bound by such an act if the third party could not have been in good faith that there was no conflict situation.³⁶

2.4. Duties and Liability

The duty of care of a director of a business corporation is regulated by the Civil Code and BCA. The BCA governs the issue of duty of care in general for all business

35 When giving notice of a conflict situation, everything relevant must be communicated. Judgment of the Supreme Court case No. 27 Cdo 1206/2022.

36 For details, see the judgment of the Supreme Court case No. 31 Cdo 1640/2022.

corporations and does not provide for any exceptions for particular forms of business corporations.

The Czech Civil Code requires all directors of legal persons to exercise their functions with the duty of care. Under Section 159(1) of the Czech CC, whoever accepts the office of a member of a board undertakes to perform it with the necessary loyalty and with the knowledge and care needed. A person is deemed negligent if she/he is not capable of exercising such care, although she/he must have discovered this when accepting the office or exercising it and does not draw the consequences thereof.

The duty of care applies to directors, namely, members of the board of directors, *de facto* directors, and possibly shadow directors.³⁷ The duty of care is also applicable to the director's representative if the director is a legal person.³⁸

The duty of care consists of two parts – duty of loyalty and duty of care in a narrower sense. The two duties are closely linked and overlap.³⁹ The conclusion that it is not appropriate to strictly distinguish the duty of loyalty and the duty of care from each other was already reached in pre-codification doctrine and case law,⁴⁰ and law-makers followed up on these conclusions by combining the two duties in defining the duty of care in Section 159(1) of the Czech CC.⁴¹

The duty of loyalty does not mean only a prohibition on enriching oneself at the expense of the company or harming the company, but also the duty to fulfil the purpose for which the company was established.⁴² The duty of loyalty is specifically manifested in the duty of confidentiality or non-competition. It includes general information obligations, too.⁴³

The duty of care is not about liability for the result, but the proper performance of the function. It concerns the duty to perform the function with the necessary knowledge and care, and is essentially about managerial competence. The members of the board are not required to be experts in all areas of the company's operations (e.g. finance, business, law, and technology). In other words, they do not have to have the quality of expertise required of a company as an entrepreneur and a person operating in a particular sector of the economy. However, they are required to be professional

37 Neither the *de facto* nor the shadow director is the *de jure* director. The difference between them is that the *de facto* director presents themselves externally as the director, while the shadow director is hidden from the public. Thus, a *de facto* director is commonly a director whose term of office has expired and who nevertheless continues to hold the post. Meanwhile, the shadow director is a controlling person who interferes so intensively in the management of the company that the *de iure* directors are probably just figureheads.

38 For details, see Eichlerová, 2022, p. 26.

39 For details, see Eichlerová, 2022, p. 29.

40 Havel, 2010, pp. 155 et seq.

41 Čech and Šuk, 2016, p. 165; Novotná Krtoušová, 2019, p. 9; Štenglová and Šuk, 2021, p. 153. Judgment of the Supreme Court case No. 27 Cdo 2695/2018.

42 Černá and Josková, 2020, p. 42.

43 By general duty of information, I mean the obligation to provide the company's bodies with all available and relevant information for decision-making (Štenglová et al., 2023, p. 435).

managers, that is, to have a sufficient overview of all areas of the company's operations. Thus, the quality of their care exceeds the standards of the average person.

The duty of care then requires that the function be performed with a certain quality.⁴⁴ The propriety of the performance of the function is judged according to the particular circumstances, which may include the type of legal persons, type and size of the business, number of employees, market situation, and the company's particular economic context.⁴⁵ Other relevant circumstances may include whether the company has issued securities traded on a European regulated market, whether the director is a member of the managing or supervisory board, whether they are an executive or non-executive board member, and whether the horizontal delegation of competence is made in the board. In summary, all circumstances should be evaluated.⁴⁶

However, if the director is an expert in a particular field (lawyer, economist, engineer, etc.), it is possible for the company to agree with them to use that professional knowledge, skills or abilities in their role as a director.⁴⁷

In the case of business decisions, the business judgment rule applies. The purpose of the business judgment rule is to provide a safe harbour for board members to make decisions on matters relating to the operations of the business. The business judgment rule emphasises compliance with the process for making a decision, not the consequences of the decision. The members of the board do not bear the business risk of the company; that is borne by the shareholders. Entrepreneurial risk cannot be avoided in business and members of board are required to take risky decisions.⁴⁸

The members of the board cannot undertake all the activities related to the management of the company themselves. Thus, the duty of care also applies when delegating tasks to other persons – both employees within the company and persons outside the company, such as consultants. In delegating, a member of a board shall act with due care and diligence if they meet this standard in selecting the persons (*culpa in eligendo*), creating the conditions for their activities (*culpa in instruendo*), and checking their activities (*culpa in inspiciendo*).⁴⁹

If a member of a board breaches their duties in the performance of their duties, they are not only obliged to compensate the company for material damage, but also for non-material damage. It is, however, disputed whether a member of the board is

44 Černá and Josková, 2020, p. 42.

45 Ibid.

46 Štenglová and Šuk, 2021, pp. 153 et seq.

47 This conclusion corresponds to the constant case law of the Supreme Court that if a director has certain professional knowledge, skills, or abilities, they are obliged to use them in the performance of their duties – within the limits of their abilities (Judgment of the Supreme Court, case No. 29 Cdo 1262/2006). For details, see Eichlerová, 2022, p. 30.

48 For details, see Josková, 2022a.

49 Judgment of the Supreme Court, case No. 31 Cdo 1993/2019.

also liable for non-material damage.⁵⁰ The basis of the dispute is an interpretation of Section 3(2) of the BCA.

There is no consensus in the doctrine as to whether the proper performance of an office is a contractual or a legal obligation. The reason to this dispute is that since 2014, the Civil Code has left the doctrine of single tort and newly distinguishes between contractual and non-contractual liability for damages. These differ in their prerequisites (e.g. whether culpability is required) and in their nature (subjective vs. strict liability). The matter is not yet clarified; arguments can be made for both conclusions.⁵¹

An action for damages may be brought against the director by the company or by each shareholder in an LLC or qualified shareholder in a JSC (*actio pro socio*).

Compensation for damages cannot be limited *ex ante* in advance (Section 53(2), BCA). This is a deviation from the general rules in the law of obligations, where limitation of damages is generally permitted. The damage incurred can be settled *ex post*. However, this requires the qualified consent of the general meeting; without consent, the agreement is ineffective (Section 53(2), BCA).

A member of a board bears the burden of proving that he has acted with due care, unless a court decides that he cannot fairly be required to do so (Section 52(2), BCA). Repeated or serious breaches of the duty of care may lead to a court decision of disqualification even if the company does not go bankrupt. A member of the board shall also be obliged to surrender to the company the benefit they have received in connection with the breach of due care (Section 53(1), BCA). Another consequence of the breach of due care is the creation of a legal liability for the company's debts toward its creditors (Section 159(3), Czech CC). Finally, a member of a board may also be guilty of a criminal offence (e.g. a criminal offence of breach of duty in the management of someone else's property, fraud, etc.) by breaching the duty of care. Their unlawful conduct may be imputed to the company and, as a result, the company may incur criminal liability.

If the company is bankrupt, the range of consequences of a breach of due care is wider. The general consequences of a breach of due care supplemented by additional consequences if the breach of due care contributed to the company's bankruptcy. In such a case, the court, on the application of the insolvency administrator, shall decide that the (former) director (or their representative if the director is a legal person) or the *de facto* director is obliged

- a) to surrender the benefit (clawback) to the estate received for the performance of their function up to 2 years before the opening of the insolvency proceedings (66(1)(a) BCA). This obligation cannot be imposed by the court if the insolvency petition was filed by the company.

50 The proponents of broad liability include, for example, Čech (Čech and Šuk, 2016, p. 175). The proponents of liability only for damages include, for example, Šuk and Havel (Čech and Šuk, 2016, p. 175; Štenglová et al., 2020, p. 11).

51 For details, see Eichlerová, 2022, pp. 31–32; Lasák et al., 2021, pp. 359–360.

- b) to provide a benefit to the estate (action to replenish liabilities). The amount of the consideration may be up to the difference between the total debts and the value of the company's assets (66(1)(b) BCA). However, the amount of the consideration should reflect the extent to which the member of the body contributed to the lack of assets.

If the court imposes at least one of the abovementioned obligations, it must disqualify the director from performing their duties (disqualification) if the director is a member of the management board (63(2) BCA). The court may also decide on disqualification without imposing these obligations if the managing director has repeatedly or seriously violated their duties in performing their function in the last 3 years, including duties relating to the prevention of bankruptcy, the duty to inform about the company's economic difficulties, and the duty to submit a timely insolvency petition. The court may prohibit a managing director from performing the functions of a member of the management board for up to 3 years in any business corporation (63(1) BCA).

2.5. Employee Participation

Employee participation is required by law only for two-tier system JSCs with more than 500 employees (448(2) BCA).⁵²

In such cases, at least one-third of the members of the supervisory board must be elected and removed by employees. The articles of association may increase the proportion of employees on the supervisory board to up to half, but not more than those elected by the general meeting (448(2) BCA).

The law provides that if employees elect one-third of the members of the supervisory board, the number of members of the supervisory board must be divisible by three (448(1) BCA). The doctrine has established that it will not be contrary to the law if the requirement of at least one-third of representation is met even if the total number of supervisory board members is not divisible by three. For example, if the employees elect two members of the supervisory board, it is sufficient for the total number of members to be five.⁵³

Voluntary participation is expressly permitted by law in the case of a JSC with a two-tier system (448(2) BCA).

3. Croatia

3.1. Structure (Boards), Appointment, Mandate, and Remuneration

Croatian law conceptualises the organisation of the organs of JSC in two ways: dualistic and monistic. In the monistic approach, there is no strict separation of the

⁵² For details, see Dvořák, 2020; Dědič and Šuk, 2017.

⁵³ These opinions have been expressed in formal and informal meetings, but have not yet been published.

management of affairs from the supervision of the management of these affairs, because the supervision is not carried out by persons who would be clearly separated from those who manage the affairs of the society. The bodies of the company are the general meeting of shareholders, including the shareholders and the board of directors, as the body for the management of the company's affairs and supervision of the business. The dualistic concept is grounded in the management and supervision of the company's operations being entrusted to different bodies that are completely separate from each other, with a prohibition on the same person being a member of both bodies (management and supervisory board). Shareholders are left to choose the concept of organ organisation. In the Croatian law, the dualistic concept prevails.

The management of a JSC consists of one or more natural persons (directors), whose number is determined by the statute. It can determine only the minimum and/or maximum number of members that the board must have. If the board consists of several persons, one of them must be appointed as president. Any natural person with capacity to act can be a member of the management board.⁵⁴ The statute of the company may stipulate that the members of the management board have deputies. They are considered true members of the management, and have the same rights and obligations, except that they are designated below other members of the board in the board's internal hierarchy. Deputy board members are appointed and dismissed in the same way and under the same conditions as board members.

Management board members do not have to be employed by the company. In fact, this is not recommended, because it creates a labour law relationship between the board member and the company, which might not be suitable for that function. Nevertheless, and without discussing this issue in detail, it should be mentioned that the relationship between the board member and the company is certainly twofold. It is based, on the one hand, on the status legal basis, and, on the other hand, on the

54 However, it must not be: a) a person who has been punished for certain criminal offenses provided for in the Criminal Code for a period of 5 years after the finality of the verdict by which he was convicted, during which time the time spent serving the sentence is not counted (Article 239, paragraph 2, point 1, CA); b) a person against whom a security measure has been imposed prohibiting the performance of an occupation that is included in the subject of the company's business, but only for the duration of the ban (Article 239, paragraph 2, point 2, CA); or c) a member of the company's supervisory board. However, according to Article 261, paragraph 2 of the CA, in the event that a member of the management board is missing or a member of the management board is unable to perform his function, the supervisory board could appoint its member as a deputy member of the management board for a certain period, which must not be longer than 1 year. The appointed deputy member of the management board should not be confused with the permanent deputy member of the management board mentioned in the text that follows later. During the performance of the function of a deputy member of the management board, the person so appointed may not perform the duties of a member of the supervisory board; d) persons who cannot do so based on the provisions of the Act on the Prevention of Conflict of Interest. Apart from these, the CA does not prescribe special conditions for appointing a member of the management board, but these conditions may be prescribed by the statute. For example, it could be determined that a member of the board must be a person who has certain experience in performing some tasks or a person who has some formal professional education, and the like. In this sense, see Petrović and Ceronja, 2019, pp. 240 et seq.

contractual legal basis. The status and legal position of the board member is based on the appointment of the board member by the supervisory board or the court. The contractual legal basis of the position derives from the contract on performing the duties of a member of the management which that person concludes with the company.

The members of the management board and its president are appointed by the company's supervisory board for a maximum period of 5 years. Re-election is possible, but re-appointment of a member of the board is not possible earlier than 1 year before the end of his mandate (Article 244, paragraph 1, Act on Obligations; CA). The duration of the mandate is counted from the day specified in the appointment decision. The day when the appointment decision was made or the day when the appointment was entered in the court register is not decisive for this. Therefore, the entry in the court register is only of a declaratory nature. However, one should consider the rules on the effect of registration in the court register, respect for the principle of trust in registration in the court register, and protection of the principle of good faith, which has already been discussed. To implement these principles, it was determined that after every change in the composition of the management as well as a change in the power of representation, an application must be submitted without delay to the registry court in order to enter this change in the court register. Decisions of the supervisory board on the revocation and appointment of board members (i.e. the resignation of a board member in the original or a publicly certified copy, and information on the date of appointment, resignation, or recall of the board member) must be attached to that application (Article 245a, CA). The appointment of a board member is considered valid only when he declares that he accepts the appointment.

The supervisory board can recall a member of the management board only when there is an important reason for doing so (Article 244, paragraph 2, CA). Whether there is an important reason for impeachment of a member of the board is assessed according to specific circumstances. The cases cited by the CA are specified as examples. These include gross breach of duty, inability to perform the company's business, and vote of no confidence in the board member at the company's general meeting. Neither the general meeting as a body of the company nor individual shareholders (even when they hold the majority of shares) can directly influence the appointment and dismissal of board members. Shareholders express their position on this matter in two main ways. Shareholders primarily influence the appointment of management board members by the fact that the general meeting, as the body in which they operate, elects the members of the supervisory board, and the supervisory board appoints the members of the management board.

If the company decides to operate according to the monist principle, the statute stipulates that it has a board of directors instead of a management board or a supervisory board (Article 272a, CA). In a monistic system, the board of directors is the only mandatory body, along with the general meeting. Executive directors are not considered as part of a company's body, but they must be appointed. They do not act as an organ of the company, but only in personal manner. The number of members of the board of directors is determined by the statute. At the same time, the autonomy

to regulate this issue is limited by the minimum number of members of the board of directors, which must be at least three (Article 272b, paragraph 1, CA) and by their maximum number according to the criteria that apply to the number of members of the supervisory board in companies with a dualistic structure. In addition, the number of members must always be odd. The same applies to the characteristics of persons who can be elected as members of the board of directors as for the members of the supervisory board in the dualistic structure of the company's organs. This means that with the limitations prescribed by law and the statute, the characteristics of the persons elected to the board of directors can be determined.

The management of an LLC may consist of one member or several members (directors) (Article 422, paragraph 1, CA). The conditions that must be met by a member of the management board of an LLC are the same as those for a member of the management board of a JSC. In addition, the CA does not prescribe special conditions for the appointment of members of a board of directors, but the memorandum of association could prescribe them. For example, it could be determined that a member of the board of directors must be a person who has certain experience in performing certain tasks or a person who has some formal professional education. A member of the board does not have to be a Croatian citizen. Additionally, there is no obstacle to all members of the board of directors being foreign citizens, regardless of who the shareholders are (whether domestic or foreign natural or legal persons). Members of the board of directors can have deputies (Article 433, CA). The position and powers of these persons are equal in relation to third parties to those held by members of the board. Differences between members of the board of directors and their deputies apply only internally. The same holds for their appointment and recall. The shareholders' meeting is subordinate to other LLC bodies and may give mandatory instructions to the management board, while shareholders may bring decisions on the management of the LLC. Consequently, directors may be dismissed at any time.⁵⁵

3.2. Shaping Board Powers (Including Supervisory Boards)

It follows from the provisions of the CA that the tasks of the management are, in particular, to manage the affairs of the company (Articles 240 and 242, paragraph 2); to represent the company (Articles 241 and 242, paragraph 1); to keep the register of shares, at the request of the general meeting of the company; to prepare draft of decisions that the general meeting enacts; to prepare contracts for which the consent of the general meeting is required; to execute the decisions that the general meeting makes within its jurisdiction (Article 243); to report to the supervisory board (at intervals specified by the law) on the fundamental issues of running the company's business, on the profitability of the company's operations, and especially on the profitability of the use of own capital and operations that could be very significant for the profitability of the company's operations, and on the course of business, income, and state of the company (Article 250); and to prepare an annual report on the state

55 For more about this, see Barbić, 2010, pp. 319 et seq.

of the company and a consolidated annual report of the company (Article 250a and 250b, CA).

Managing the affairs of the company includes all activities with the aim of achieving the basic purpose of the company. The management board manages the affairs of the company on its own responsibility. This actually means that the board makes decisions within its jurisdiction independently, based on its own business judgment, what is useful and favourable for the company, and what serves its interests. When a conflict occurs between the interests of the company and the interests of certain persons in the company or outside it (e.g. shareholders, employees, or creditors), the management board should prioritise what it considers to serve the interests of the company. Although the management board is independent in managing affairs, it is still bound by the rules of the profession, and its members must act as orderly and conscientious business managers. The management board is primarily obliged to take care of the long-term profitability of the company and is not bound by the obligation to maximise profit. The latter is just one business element that management must take into account when conducting business. The independence of the board in making business decisions is mainly ensured by the rule that its members can be recalled only if there is an important reason for doing so. In this way, the company is adequately protected from the disorderly and unconscionable actions of board members, but at the same time, also encourages their creativity in their work.

The statute or decision of the supervisory board may stipulate that the management board needs the consent of the supervisory board to perform certain types of work (Article 263, paragraph 5, CA). At the same time, seeking the approval of the supervisory board for almost every job should be avoided to prevent the supervisory board taking on the role of the management board and becoming the body for managing the company's affairs. The consent of the supervisory board is also required for participation in decision-making or concluding a legal transaction in cases in which there is a risk of conflict of interest between a board member and the company (Article 248a, CA).

The general meeting can decide on matters of running the affairs of the company if (I) the management board does not obtain the approval of the supervisory board for the aforementioned operations and requests approval for undertaking them from the general meeting, which decides on it by a majority of at least three-quarters of the votes cast (Article 263, paragraph 5, CA); and (II) the management board invites the general meeting to decide on an issue from the domain of business management (Article 275, paragraph 2, CA). If the management board undertakes activities for which the approval of the supervisory board or the general meeting is needed, but was not received, these activities are valid, but the management is held responsible for the damage caused to the company. This decision is an expression of the rule that the authority of the management board in representing the company cannot be limited. Management board decisions can be made at meetings or outside of them – in that regard, the law does not set any restrictions. If the board consists of several people, it usually makes its decisions unanimously. Members of the board can give

their consent to take certain actions explicitly or implicitly, orally or in writing. The statute or the rules of the management board may provide for other solutions – for example, some or all decisions concerning the conduct of business are made by a certain majority of votes. It would however not be possible to provide that in the case of different opinions of the members of the board, the decision of a minority should prevail. It is also possible to envisage individual management of affairs, so that an individual member of the board oversees some area of activity (e.g. finance, legal affairs, or procurement) or for some territorial area. However, such a division of tasks is considered to be only internal, and certain actions are deemed to be taken by the management as a whole, making all members of the management responsible for those actions.

To fulfil its obligation to manage the affairs of the company, the management board must take actions toward third parties. Among these actions, the conclusion of legal deals stands out. In this way, the management board performs a second important task, which is to represent the company. At the same time the management board must express the company's business management measures in relation to third parties through representation. In this sense, it can be said that the same actions are internally considered to be business management and externally manifest as representation.

If the management board consists of several persons, and the statute does not provide otherwise, it can only represent the company so that the members act collectively. This means that in order to express the will of the company, it is absolutely necessary for each member of the management board express their will (e.g. each member signs a contract that the company enters into with a third party), and this does not have to be simultaneous. On the other hand, even in situations of collective representation, it is enough to express the will of third parties toward the company if it is also done towards one of the members of the management board. By statute or decision of the supervisory board, if the supervisory board is authorised to do so by the statute, a different way of representing the company can be determined.⁵⁶

It is generally true that the authority of the management board to represent the company cannot be limited, but the members of the management board are obliged in relation to the company to respect the restrictions in the conduct of business that are set for them by the statute, decisions of the supervisory board and the rules of the management board (Article 242, CA). In relation to third parties, such internal restrictions have no effect, except in the case that the third party knew about this restriction or did not know about it owing to gross negligence (case of collusion).

⁵⁶ It is possible, for example, that each member of the board is authorised to represent the company independently, that only some members of the board are authorised to represent the company individually, that several are authorised to represent the company collectively, or that each member of the board together with the procurator or two or more members collectively are authorised to do so. At the same time, it is important to emphasise that the basic legal authority of the administration for collective representation cannot be further limited. Petrović and Ceronja, 2019, pp. 246 et seq.

3.3. The Supervisory Board

The supervisory board must have at least three members. The statute may specify that there are more, but their number must be odd. The maximum number of members that the supervisory board can have is determined, depending on the size of the company's share capital (9, 15, or 21 members). Any natural person of full legal capacity may be a member of the supervisory board. It can also be a foreign citizen, as could all members of the supervisory board. The members of the supervisory board are elected by a simple majority of votes by the general meeting of the company.

The general meeting evaluates the work of members of the supervisory board. If the general meeting approves the way in which the members of the supervisory board performed their tasks, it can give them a discharge from liability. The general meeting decides on the discharge of all members of the supervisory board together, and individually for each of them if the general meeting so decides or if the shareholders whose shares make up at least 10% of the company's share capital request it (Article 256, paragraph 1, Article 276, CA). The tasks of the supervisory board are in particular: a) supervision over the management of the company's affairs and informing the general meeting about the above (Article 263, paragraphs 1–3, CA); b) appointing and recalling members of the board (Article 244, CA); c) representation of the company toward members of the board (Article 268, CA); and d) convening of the general meeting (Article 263, paragraph 4, CA).

The fundamental duty of the supervisory board is to supervise how the management runs the affairs of the company. In carrying out this task, the supervisory board, of course, should not supervise every action or every detail of current business, but the overall procedure of business management. However, the duty of the supervisory board is not only limited to considering past business or examining actions already taken by the management; its duty should also include preventive action. This means that the supervisory board, through advice and proposals to management, should participate in determining the company's future business strategy. Thus, the supervisory board in fact influences the company's operations, but it should be cautious that its supervisory function does not turn into a managerial one. The law expressly stipulates that the task of managing the company's affairs cannot be transferred to the supervisory board. However, the statute may provide that certain tasks or certain types of tasks can be undertaken by the administration only with the consent of the supervisory board (Article 263, paragraph 5, CA). However, this does not mean that the management is entrusted to the supervisory board, but only that the approval is necessary for these affairs.

The supervisory board is an organ that is usually optional in LLC, and thus, it is up to the company to decide whether to have it or not. However, as an exception, in certain cases the supervisory board must exist: (a) if the average number of employees per year is greater than 200; b) if a special law stipulates that a company performing a certain activity must have one; c) if the capital of the company is greater than 80,000 euro (EUR), and the company has more than 50 members (thus, cumulatively, both of the above assumptions must be met); d) if the average number of employees in LLC

together is greater than 200; e) if the company is solely managed by a JSC or an LLC that must have a supervisory board, and the number of employees in one of these companies or in all of these companies combined in a year is greater than 200 on average; or f) if the company directly participates with more than 50% in the share capital of JSC or LLC that must have a supervisory board, these companies are jointly managed, and the number of employees in any of these companies or in all of these companies together in a year is on average greater than 200 (Article 434, paragraph 1, CA). In other cases, the supervisory board is an optional organ of the LLC. Whether the company will have a supervisory board is determined by the memorandum of association. However, if the memorandum of association stipulates the existence of a supervisory board, the company must have one.

3.4. Conflict of Interest, Duties, and Liability

Board members must act loyally toward the company, which is prescribed in the provisions of the CA on the prohibition of competition and cases when conflicts of interest between board members and the company arise. Board members are expected to take care of the protection of the company's interests when conducting business and representing the company, and not to abuse their position and promote their individual interests. Prohibition of competition prescribed by Article 248 of the CA refers to members of the management board and their deputies. As the members of the board are familiar with the company's daily operations, there is a greater chance of abusing their position. For this reason, it is stipulated that a member of the management board cannot, without the consent of the supervisory board, perform tasks that are part of the company's business for his own account or for someone else's account; cannot be a member of the management board or the supervisory board in another company that deals with the business of the company's affairs; and cannot carry out work for their own account or for someone else's account either on or off the premises of the company. In the event of a violation of the prohibition of competition, if the consent of the supervisory board was absent, this is a valid reason for the revocation of the appointment of a member of the management board, and his liability for the damage he has caused to the company. The company then, based on Article 248, paragraph 2, can request the board member to repair the damage as follows: a) compensate the company for the damage caused, b) give permission to consider the transactions concluded on his own account as transactions concluded on behalf of the company, c) transfer to the company what he received from the transactions he concluded for someone else's account, or d) transfer to the company the request for collection of what he should have received.

The CA specifically regulates the conclusion of contracts with ones self (Article 41, paragraph 3 in connection with Article 49) and the granting of loans to members of the management (Article 249). These are two cases in which a conflict arises between the interests of the company and the personal interests of board members, as business decisions are made by board members who are interested in a transaction in

question and may abuse their position. Therefore, such transactions can be carried out only with the consent of the supervisory board or the assembly of the company.

Management board members must manage the company's affairs as orderly and conscientious business managers, and are obliged to keep the company's business secrets (Article 252, CA). A member of the board of directors does not act contrary to the duty to manage the company's affairs if, when making a business decision, he can reasonably assume, based on appropriate information, that he is acting in the best interests of the company. If he fails to do so, he is jointly and severally liable to the company for damages. Management board members are liable for any type of guilt that is presumed (principle of presumed guilt). This means that the company must prove the existence of the damage itself, the action or omission of the board member, and the causal link between the damage and act or omission. Board members bear the burden of proof that they are not liable for the damage that occurred. The determination of culpability is based on an objective criterion; in other words, the attention of the management board members is compared with the average behaviour in the profession. Management board members may be discharged from liability if they can show that they conducted their affairs with due care.

Claims for damages against management board members may be brought by: (I) the company. (II) the company's creditors, if they cannot settle their claims from the company; and (III) the company's shareholders only if the general assumptions from Article 252 of the CA, and the special assumptions from Article 273 of the CA are fulfilled. In the latter case, the board members, in addition to being liable to the company, are also liable to the shareholders if they suffer a loss independent of that caused to the company. In this case, members of the management board are liable for damage jointly with the members of the supervisory board and the person who, using their influence in the company (e.g. majority shareholder) with intent, induced a member of the management board, supervisory board, procurator, or proxy to take some action to the detriment of the company or shareholders.

If they do not act in accordance with the prescribed standard of due care, the members of the management board are liable to the company for damages as joint and several debtors.

3.5. Employee Participation

The CA completely abandoned the system of worker participation in company affairs, except for their involvement based on an employment relationship. The exclusive influence of capital was limited by the provisions of Article 158 of the Labor Act.⁵⁷ Based on the provisions of Article 140 of the Labor Act, workers employed by an employer with at least 20 workers have the right to participate in decision-making on issues relating to their economic and social rights and interests. In a company in

57 Labor Act, Official Gazette No. 123/17, 127/17, 98/19, 151/22, 64/23. The Labor Act, after the amendments made in 2003, prescribed the obligation for certain JSCs to have a representative of workers on the supervisory board.

which a special body has been set up to supervise the conduct of business, one of the members of that body shall be a representative of the employees pursuant to Article 164. paragraph 1 of the Labor Act. The body in which employees can exercise this right in capital companies is the supervisory board or board of directors. They can exercise this right in a JSC, because if a dualistic structure of the company's bodies is applied, it must have a supervisory board, and if a monistic structure of bodies is applied, a board of directors. In an LLC, workers can exercise this right only if the organisation has a supervisory board, that is, if Article 434 of the CA stipulates that the company must have a supervisory board.

4. Hungary

4.1. Definition and Power of Management

The organisational structure of business associations can consist of four organisational bodies named by the Civil Code (CC):

- a) Supreme body of business associations
- b) Management
- c) Supervisory board
- d) Statutory auditor.

Further organisational units (e.g. audit committee) are mentioned by the Civil Code in the case of public limited companies. Based on the regulation of the act, companies may establish and operate additional organisational units.

Management is a generic, umbrella term referring to the day-to-day operational management of a company. Management tasks are carried out by the executive officers.

The management can be one-person, joint, or corporate. One-person management can be carried out by several people at the same time, independently of each other: each executive officer may act, decide, and manage independently. In joint management, two executive officers carry out the task together. Corporate management refers to the cooperation and joint decision of at least three executive officers.

The Civil Code uses a different name for business management in each company type.

- a) In the case of a private LLC, this task is performed by the managing director.
- b) In the case of a private limited company, management can be undertaken by one person (the general director) or by a board (the management board).
- c) In the case of a public limited company, management can be undertaken only by the board (the management board or board of directors).

The Civil Code defines the task of management in general and the day-to-day, operational management and operation of the company. Management can and should make all decisions that do not fall under the competence of the supreme body.

The competence of the executive officer may not be negated, and can be narrowed only by the instrument (articles) of constitution (incorporation) and certain decisions can be provided by the supreme body or supervisory board. The executive officer should manage the operations of the business association *independently*. Independence means that he/she makes decisions freely, but it does not mean “full power”. In this capacity, the executive officer should discharge his duties in due compliance with the relevant legislation, the instrument of constitution, and the resolutions of the company’s supreme body.

The members of the company cannot give instructions to the executive officer; they exercise their will through the decisions of the supreme body. An exception is the *single-member business association*, in which the *sole member is allowed to give instructions to management* (in fact, this is analogous to the decisions of the supreme body), which are to be implemented by the executive officer. The executive officer shall manage the tasks based on the *primacy of the business association’s interests* and may not put his/her own interests or the interests of third parties before the company.

The Civil Code does not oblige executive officers to report to the supreme body. In fact, the annual report,⁵⁸ prepared in line with accounting rules, reflects the annual management results, making part of their activity about the way they handle the company’s assets indirectly visible. In a certain sense, the supervisory board and auditor are separate corporate legal instruments for the control of executive officers, but the establishment of these bodies is not mandatory, except in the case of public limited companies.

4.2. Establishment and Termination of Executive Officers’ Mandate

The first executive officer of the business association is appointed by the founders in the instrument of constitution, and his/her person must be named in the document.

At a later stage, the instrument of constitution shall not be amended; if the person occupying the position of executive officer changes, it is sufficient to transcribe this change to the instrument of constitution.

After the establishment of the business association, the executive officers are elected or dismissed by the supreme body. The appointment of an executive officer takes effect when accepted by the person delegated, elected, or appointed.

Executive officers are elected for a term of 5 years, or – if the business association is established for a shorter period – for that period. It is allowed to derogate from this rule in the instrument of constitution; in other words, in the case of a definite period, the duration can be shorter or longer, and the mandate can also be for an indefinite period. Executive officers may be re-elected without restriction.

58 According to Section 4(1) of Act C of 2000 on Accounting, economic entities shall prepare a financial statement – in the Hungarian language – on their operations, financial position, and performance, supported by an accounting system prescribed in the act, following the closing of the books pertaining to the financial year.

The performance of management tasks requires regular and sustained activity, and consequently, the law provides for it separately. The executive officer shall manage the operations of the business association *under a personal service contract or under a contract of employment*, as agreed with the company. Thus, the executive officer is linked to the company by a double thread: he/she has a corporate legal mandate and a personal service contract or employment relationship aimed at fulfilling this task.

The cases of the termination of the mandate of executive officer are listed by the Civil Code.

The mandate of an executive officer shall terminate, for example,

- a) upon expiry of the designated term of office,
- b) by dismissal,
- c) upon resignation,
- d) upon death of the executive officer,
- e) upon the occurrence of any grounds for exclusion, etc.

The supreme body is entitled to dismiss the executive officer at any time, without giving any reason. Therefore, there is no need for a special reason, even a violation of a duty – a breakdown of trust is sufficient.

The executive officer may resign at any time, without giving any reason.

The resignation of an executive officer can have a sensitive effect on the operation of the company, especially if it does not have another executive officer, and thus, no other representative too. Therefore, the act stipulates, if so required by any vital interest of the legal person, that the resignation shall only take effect upon the delegation or election of a new executive officer, or failing this, on the 60th day after the announcement thereof.

4.3. The Person of the Executive Officer and Legal Requirements

The executive officer can be a member of the company, an employee, or a person outside the company. The executive officer can hold this position at several companies at the same time. The limits for this position may be reflected in the rules on conflict of interest.

The executive officer must be of legal age and must have full legal capacity in the scope required for discharging his functions.

An executive officer can also be a legal person, not only a natural person, but in this case the legal person shall designate a natural person to discharge the functions of the executive officer in its name and on its behalf.

The Civil Code lists the following *exclusionary reasons* for being an executive officer:

- a) a person who has been sentenced to imprisonment by final verdict for the commission of a crime and has not been exonerated from the detrimental consequences of having a criminal record,
- b) any person who has been prohibited from practicing as an executive officer by a court order,

- c) any person who has been prohibited by final court order from practicing a profession that is engaged in the activity of the business association, or
- d) any person who has been prohibited from practicing as an executive officer by a registry court order.

Reasons for conflict of interest are distinguished from exclusionary reasons. The *exclusionary reasons* are incompatible with being an executive officer, and they preclude someone from being an executive officer. Reasons for conflicts of interest are grounds that may harm the interests of the company, which cannot be supported by law. The Civil Code does not prohibit the institution of constitution from granting exemption from grounds of conflict of interest.

According to the Civil Code, executive officers shall be regarded as incompatible if they

- a) acquire any share in the capital of a business association – except for the shares of public limited companies, where the main activity is the same,
- b) hold an executive office in a business association which is engaged in the pursuit of the same activity, or
- c) enter into contracts in their own name or for their own benefit within the scope of the main activity of the company.

The legal consequence of a conflict of interest emerging is that the company is allowed to terminate the legal relationship of the executive officer, and in the event of damage, may demand compensation from the senior official.

If there is no conflict of interest, or if the executive officer has been exempted from this by the company, the executive officer may perform the management duties of several business associations.

In the event of accepting a new executive office, the officer shall notify any other company in which he already serves as an executive officer within 15 days.

4.4. Liability of Executive Officers

The executive officer shall be held liable for damages caused to the legal person resulting from his management activities in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation. This liability rule only applies to the internal relationship between the business association and the executive officer.

In Hungarian civil law, two types of liability regime can be applied: liability for damage caused by breach of contract (contractual liability); and liability for damage caused in a non-contractual relationship (delictual/non-contractual liability). The liability for damages caused by breach of contract is a strict form of liability from which there is only a narrow range of exemptions. The legislator considers the application of this liability for two reasons: on one hand, there is a quasi-contractual, corporate legal relationship between the executive officer and the business association; on the

other hand, the harmful behaviour of the executive officer shall be sanctioned in a stricter way.

According to the Civil Code, the legal person shall be liable for damages caused to third parties by the executive officer in that capacity. Liability for any damage caused by the executive officer *intentionally* lies with the executive officer and the legal person *jointly and severally*.

According to the perception of the Civil Code, when the executive officer, acting on behalf of the business association, comes into contact with third parties, and possible causes damage to them, it is an act of the business association, and thus, the damage shall be attributed to it, and must be borne by it.

However, if the executive officer causes the damage intentionally (i.e. wants to, or knows and acquiesces to it), this establishes the direct liability for damage, joint and several, with the company.

If the business association compensates for the damage, it results in a decrease in assets; that is, the executive indirectly causes damage to the company through his/her conduct. The company can assert this as damages if the legal conditions are met.

The *institution of hold-harmless warrant* may exempt the executive officer from liability toward the business association.

This can be provided by the supreme body of the business association upon the request of the executive officer at the time of approval of the financial report. The hold-harmless warrant is a declaration on waiver of legal enforcement, under which the company acknowledges that the executive officer performed his/her activities in accordance with the interests of the company in the previous business year. However, the company may bring action against the executive officer on the grounds of breaching management obligations in a claim for damages if the facts and information underlying the hold-harmless warrant proved to be false or incomplete.

The disclaimer appears only in the relationship between the company and executive officer, and does not exempt third parties from liability. The temporary scope of the exemption is limited – it can be applied to the period mentioned in the report, and does not grant exemption from compensation for damages caused before or after the period covered by the exemption. An exception is when the Civil Code makes the executive officer directly liable to the creditors of the company, which may arise in the case of the termination of the business association without a legal successor. According to the Civil Code, in the event of a business association's dissolution without succession, creditors may bring action for damages *up to their claims* outstanding against the company's executive officers on the grounds of non-contractual liability, should the executive officer fail to take the creditors' interests into account in the event of an imminent threat to the business association's solvency.

Creditors can demand compensation in maximum in line with the reduction in assets caused by the executive officer.

The abovementioned liability rule of the Civil Code can be fully realised in liquidation proceedings⁵⁹ and in the de-registration procedure,⁶⁰ whose detailed rules can be found in separate acts (Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings; and Act V of 2006 on Public Company Information, Company Registration, and Winding-up Proceedings).

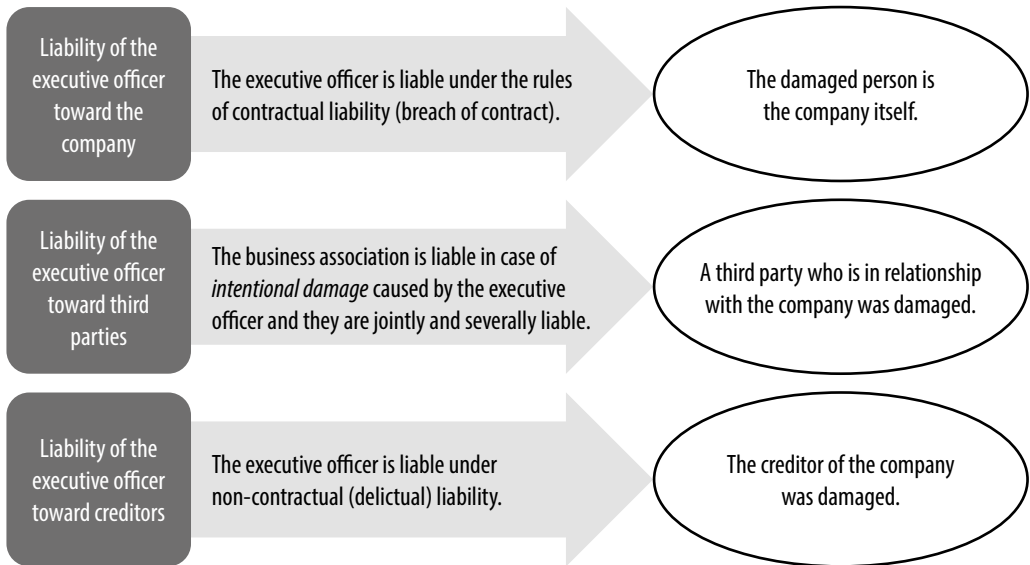


Figure 1.: The system of liability for damage caused by an executive officer in the Civil Code (Source: created by the author)

4.5. Managers

The company's supreme body may decide to appoint one or more managers to assist the executive officers in their work.

Managers direct the continuous operation of the company based on the executive officer's instructions.

The authority of the manager can be dual; *general* (i.e. covers the entire financial aspects of the company), or restricted to competence, as the supreme body of the

59 According to Section 1(1) of Act XLIX of 1991, liquidation proceedings refer to proceedings aimed at providing satisfaction, as stipulated in the act, to the creditors of an insolvent debtor upon its winding-up without succession.

60 De-registration procedure has no legal definition in the act. The law only defines the cases for which the company court orders the conduct of this procedure. According to Section 116(1) of Act V of 2006, the court of registry shall order the opening of an involuntary de-registration procedure: a) if it declares the company wound up; b) if the company did not conclude its dissolution within 3 years, and did not submit a request for the company's de-registration; or c) if there are grounds for the termination of the company without succession, and dissolution proceedings cannot be conducted.

business association (or, with the authorisation of the supreme body, the management) may appoint managers with restricted competence in various businesses and branches of the company.

4.6. Legal Representation of the Business Association

In companies, the regulation of representation and management is separated, because, according to the Civil Code, a representative cannot be only an executive officer, but a company manager or an employee also. The circle of persons entitled to representation is wider than the circle of persons entitled to management.

At the same time, the law expressly stipulates that *responsibility for providing legal representation of legal persons lies with the executive officer*. The Civil Code declares, as a general rule, that the executive officer shall exercise his power of representation *independently*.

However, the instrument of constitution can deviate from this rule. It may stipulate that several executive officer *can only act together* and represent the company with a *joint legal statement*, or the approval of the supreme body or the supervisory board is required to make the legal statement. This is called the *limitation of the right of representation*. If the company has several executive officers, the right of representation *can be shared between them*; for example, only one of them may be authorised to dispose of a bank account or be authorised to enter into specific contracts.

Corporate management does not affect the independence of the right of representation, because the decisions are made jointly by the executive officers, but the company is still represented separately and independently by them.

According to the *Directive (EU) 2017/1132 relating to certain aspects of company law*, the Civil Code stipulates among the rules on *private LLCs and limited companies* that any restriction or division of the power of representation vested upon the managing director or rendering such managing director's actions conditional or subject to approval shall not be effective against third parties.

According to the Civil Code, *managers* can represent the company but may confer general power of representation upon managers. The representative role of the manager is limited if he/she is appointed for the head of place of business and branches of the company, because he/she is entitled to represent only these units.

In the case of companies with a complex organisational structure, there is a need for *certain employees to have the right of representation* in order to handle transactions within the scope of activities of individual organisational units more efficiently, without burdening the executive officer (e.g. head of the human resources department), to be able to make legal statements in relation to labour relations, the head of the production department can acquire raw materials, etc. For this purpose, the Civil Code provides the possibility that the management is entitled to grant the right of representation for the company for a specific group of cases for the employees of the company by a written statement. *Employees shall be able to exercise such power of representation together with another person vested with power of representation by management in a written statement*.

4.7. Power of Representation (Procuration)

The free exercise of the right of representation requires that the representatives have a written right of representation, that is, so-called procuration.

In line with this, the Civil Code stipulates, that business associations are represented by their executive officers and other duly authorised employees in writing.

According to the Act V of 2006 on Public Company Information, Company Registration, and Winding-up Proceedings, *power of representation shall be independent or joint*.

In the case of more than two authorised representers, it is possible that some of them are entitled to individual procuration rights, while others are entitled to a joint procuration right, or that one of them is always a specific person.

Act V of 2006 emphasises that *the method of representation and procuration can only be the same*. This means that in the case of independent representation, procuration rights can only be independent, while in the case of joint representation, the procuration right can only be joint.

The right and method of procuration can be verified with two types of documents: a copy of the address with a notary's signature authentication, or a sample signature countersigned by an attorney.

The signature registration certificate (signature specimen) shall indicate – in the same way as indicated in the instrument of constitution – the company's name, the name and address of the authorised signatory, the position of the authorised signatory (e.g. executive officer, employee), the form of authorisation, and a sample of the signature of the authorised signatory. When so requested by the employee vested with powers of representation, the signature registration certificate shall indicate his job and/or position at the company.

4.8. The Supervisory Board

The basic organisational units of companies are the supreme body and management. The supreme body brings together the members of the business association, who usually meet once a year to accept the annual report.

The day-to-day management of the company is carried out by the management, without regular and competent control. Those companies that want to keep business management under proper control, can establish so-called supervisory board, which main task is the supervision of management to protect the interests of the legal person.

The founders may provide for the establishment of a supervisory board in the founding document, or the supreme body may later amend the founding document by adding provisions relating to the supervisory board. The following compulsory cases exist for establishing a supervisory board:

- a) if the annual average number of full-time employees employed by the business association exceeds 200;
- b) in the case of public limited company; and

- c) in the case of private limited companies, if so requested by a group of shareholders together controlling at least 5% of the voting rights, a supervisory board shall be installed.

The Civil Code defines only general criteria regarding the members of the supervisory board; for example, members of the supervisory board must be of legal age and have full legal capacity, but a legal entity can also be a member. If the supervisory board member is a legal person, that legal person shall designate a natural person to discharge the functions of the supervisory board member in its name and on its behalf.

The Civil Code defines exclusionary reasons in relation to the members. No person can be a member if:

- a) they are subject to any grounds for exclusion applicable to executive officers,
- b) their family member is an executive officer,
- c) they are employees of the business association (except where membership is based on employee participation).

In fact, the supervisory board can supervise effectively only if its members include those who understand the activities carried out by the company, have legal and accounting knowledge, etc. However, the Civil Code allows the discretion of the supreme body as to which members with competence it chooses. The only and narrow exception is found in the rules of public limited companies (see the description in the audit committee section).

According to the Civil Code, the supervisory board shall consist of three members. However, this is not a strict rule, and in the case of a public limited company, it must consist of at least three members.

Supervisory board members shall be independent of the management of the legal person and shall not be bound by any instructions in performing their duties. The members of the first supervisory board shall be designated in the instrument of constitution, after which such members are appointed by the decision-making body. Supervisory board members are elected for a maximum of 5 years.

- In accordance with the Civil Code, supervisory board has concrete tasks as well:
- a) it shall assess all motions brought before the decision-making body of members or founders, and present its opinion thereof at the meeting of the decision-making body,
 - b) it shall prepare a written report about the annual financial reports and the supreme body may adopt the financial report under the report of the supervisory board; and
 - c) if, in the judgment of the supervisory board, the activity of the management is contrary to the law, the instrument of constitution, or the resolutions of the business association's supreme body, or otherwise infringes upon the interests of the business association, the supervisory board shall have the right to convene a meeting of the business association's supreme body to discuss that issue and to take the necessary decisions.

The supervisory board is entitled by numerous powers in the Civil Code for effective monitoring:

- a) it shall have access to the documents, accounting records, and books of the company;
- b) it is entitled to request information from executive officers and employees;
- c) it can inspect the company's payment account, cash desk, securities portfolio, inventories, and contracts; and
- d) if necessary, it can ask for an expert.

The supervisory board shall function as a body and elect a chairman from among its members.

The board may entrust any of its members to fulfil certain supervisory tasks or may divide supervisory duties among its members.

The meeting of the supervisory board has a quorum if at least two-thirds of its members, or at least three persons, are present.

The decisions of the supervisory board are made by the majority of those present. The supervisory board shall establish its own rules of procedure, subject to approval by the business association's supreme body.

4.9. The Peremptory Supervisory Body

The instrument of constitution may refer the decision-making or approval of decisions in the competence of the supreme body or the management to the competence of the supervisory board.

The members of the supervisory board are obliged to compensate for damages caused to the company by the activities performed in their decision-making powers according to the rules of liability for non-performance.

If the supervisory board approves the proposal of management for a decision, the executive officers and supervisory board members, having voted for the proposal, shall be jointly and severally liable for damages caused to the business association in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation.

Public limited companies may not have a peremptory supervisory body.

4.10. Employee Participation in the Supervisory Board

If the annual average number of full-time employees employed by the business association exceeds 200, one-third of the supervisory board shall be made up of employee representatives.

Employee representatives are delegated by the works council from among the employees, following consultation with the trade unions operating at the business association.

Persons delegated by the works council shall be given a seat on the supervisory board by the business association's supreme body at its first meeting following such delegation, unless statutory grounds for disqualification exist in respect of the persons

delegated. Failure to delegate such person shall have no effect on the supervisory board's operation, provided that all other statutory requirements are satisfied. In that case, the seats of employee representatives may not be occupied. Nonetheless, the supreme body should elect at least three members for the supervisory board.

4.11. Statutory Auditor

The auditor should also be mentioned in connection with the control of business management.

The statutory auditor appointed by the supreme body shall be responsible for carrying out the audits of accounting documents according to the relevant regulations, and to provide an independent audit report to determine as to whether the annual account of the business association is in conformity with legal requirements, and whether it provides a true and fair view of the company's assets and liabilities, financial position, and profit or loss.

As a result of the duties, the auditor oversees the company's management and its effectiveness. Consequently, the auditor sees the work of executive officers. If the auditor notices that the responsibility of executive officer arises, they shall adopt the measures prescribed in the Civil Code: the auditor is obliged to initiate a meeting of the supreme body and the adoption of the necessary measures by the management without delay. If this request is not complied with, the auditor shall inform the court of registry exercising judicial oversight over the legal person concerning the situation.

However, the engagement of the auditor is mandatory only in the case of public limited companies, and in line with the rules of the Act C of 2000 on Accounting.⁶¹

4.12. Management of the Limited Liability Company

The management of an LLC shall be provided by *managing director*. The managing director can be a member of the company, an employee, or a third party outside the company.

Management is provided by one or more managing directors independently. If the company has several members, even all of them can be executive officers if they meet the legal criteria. In addition, the abovementioned general rules shall be applied to managing directors.

4.13. Management of Limited Companies and its Monitoring

Limited companies shall be managed by the *management board*, which comprises three natural persons. The management board shall elect its chairman from among its members. The management board shall adopt its decisions by a simple majority of the votes of members present.

⁶¹ According to Section 155(2) of Act C of 2000 on Accounting, with the exception set out in Subsection (3), the auditing of accounting documents shall be statutory for all companies keeping double-entry books. In all cases when an audit is not statutory based on this act or other legislation, the company shall be free to decide whether to employ an auditor to review its accounting documents or not.

In the case of private limited companies, the articles of association can provide that the *chief executive officer* should exercise the powers of the management board.

Public limited companies shall install a supervisory board for the monitoring of management. Accordingly, the management of a public limited company can be dualistic if the board of directors and the supervisory board operate separately. Where the articles of association of a public limited company so provide, it shall be controlled by the *board of directors* under the one-tier system instead of the management board and the supervisory board. The board of directors shall discharge the duties of the management board and the supervisory board conferred upon them by law.

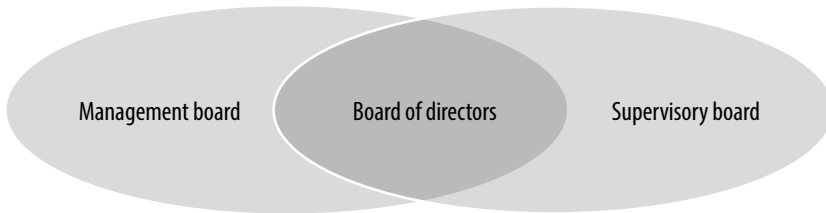


Figure 2. (Source: created by the author)

The board of directors comprises at least five natural persons. The chairperson of the board of directors can be elected by the general meeting, or by the board itself.

The board of directors fulfils a dual role. On one hand, it performs business management tasks, and on other hand, the tasks of the supervisory board. To ensure that executive officers do not control themselves, the legislator defined special rules. The majority of the members of the board of directors must be independent persons, and should carry out monitoring. Thus, the board of directors has members who undertake management (non-independent members) and some members who undertake control (independent members). The Civil Code also defines what is meant by independence of members.

A board member shall be considered independent if, apart from his seat on the board of directors or any transaction conducted within the company's usual activities aimed at satisfying the board member's personal needs, he does not hold any other office.

A member of the board of directors shall not be considered independent if, for example, he is employees of the limited company, provides expert services to the limited company, is a shareholder with at least 30% of the votes, is a close relative or domestic partner of any executive officer or executive employee of the limited company, or is entitled to receive financial benefits based on his board membership if the limited company operates profitably.

If the annual average number of employees reaches 200, employee representation must be ensured in the supervisory board. This expectation also applies to the board of directors, in this case the board of directors, and the works council shall agree in a contract on the exercise of the rights resulting from employee participation.

All limited companies shall elect an auditor.

4.14. The Audit Committee

Almost two decades ago, the European Parliament asked the Commission to develop rules for public limited companies that could improve the effectiveness of internal control within the company. It emphasised that there should be a committee which ensure the auditor's independence, objectivity, and efficiency. The commission issued the suggestions in the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC).

It suggested creating an audit committee, which would increase the efficiency of the monitoring and assists the work of the supervisory board. The commission notes the need for an expert member to be on the committee.

According to the Civil Code, public limited companies are required to set up audit committees, which shall provide assistance to the supervisory board or the board of directors in supervising the financial report regime in selecting an auditor, and in working with the auditor.

The audit committee comprises at least three members.

The general meeting shall elect the audit committee from among the independent members of the supervisory board or the board of directors. At least one member of the audit committee shall have competence in accounting or auditing.

4.15. Remuneration of Management in Public Limited Companies

The commission has adopted several recommendations on the remuneration of directors of public limited companies. After Commission Recommendation 2004/913/EC, the 2009/385/EC Recommendation was created especially based on the experience of the 2008 financial crisis.

The Civil Code applied the proposal from the recommendations that shareholders should vote on certain remuneration issues: in public limited companies the general meeting has exclusive jurisdiction to put the remuneration policy to an advisory vote. The remuneration policy shall be put on the agenda of the general meeting in the case of significant changes therein, or at least every 4 years.

5. Poland

Pursuant to Article 18 of the Commercial Companies Code (CCC), only a natural person with full legal capacity may be a member of the management board, supervisory board, audit committee, or liquidator in a capital company (Article 18 § 1, CCC). A person who has been convicted by a final judgment for an offence specified in Articles 587–587(2) may not be a member of the management board, supervisory board, audit committee, liquidator, or proxy (Articles 590 and 591, CCC; Articles

228–231 and Chapters XXXIII–XXXVII, Criminal Code).⁶² The prohibition shall cease at the end of the 5th year from the date on which the conviction became final, unless the conviction has previously been expunged.⁶³ In addition to this regulation, Polish law has special provisions concerning, for example, persons holding managerial state positions, where special regulations more strictly define the catalogue of persons who may hold positions in the management board.⁶⁴

5.1. *Limited Liability Company*

In an LLC, the management board may consist of one or more members, and members of the management board may be shareholders or external persons. As a rule, a management board member is appointed and dismissed by a resolution of shareholders, unless the articles of association provide otherwise. A shareholders' resolution or articles of association may also specify the requirements to be met by candidates for the position of a member of the management board (Article 201, CCC).

Unless the articles of association provide otherwise, the mandate of a member of the management board expires on the date of the shareholders' meeting approving the financial statements for the first full financial year of performing the function. If a member of the management board is appointed for a period longer than 1 year, the mandate of a member of the management board expires on the date of the shareholders' meeting approving the financial statements for the last full financial year of performing the function. The term of office shall be calculated in full financial years, unless otherwise provided in the articles of association. If the articles of association provide that members of the management board are to be appointed for a joint term of office, the mandate of a member of the management board appointed before the end of a given term of office of the management board expires simultaneously with the expiry of the mandates of the other members of the management board. The mandate of a member of the management board also expires as a result of death, resignation, or dismissal from the management board.

The CCC also secures the company in the event of loss of the management board, if as a result of the resignation of a member of the management board no mandate in the management board would be filled, a member of the management board shall resign to the shareholders, at the same time convening a shareholders' meeting referred to in Article 233(1) of the CCC. The invitation to the shareholders' meeting also contains a statement of resignation of a member of the management board. The resignation takes effect on the day following that on which the shareholders' meeting was convened. The provisions of the CCC apply the concept of the so-called “mirror

62 Act of 6 June 1997 – Criminal Code (Journal of Laws of 2022, item 1138).

63 Pursuant to Article 18(4) of the CCC, within 3 months of the judgment referred to in § 2 becoming final, the convicted person may submit an application to the court that issued the judgment for exemption from the ban on performing functions in a commercial company or for shortening the duration of the ban. This does not apply to intentional offences.

64 Act on the Limitation of Business Activity by Persons Performing Public Functions of 21 August 1997 (Journal of Laws No. 106, item 679).

principle”, including for the resignation of the last member of the management board bodies, which, in accordance with the statutory template, are competent to appoint members of the management board: in the case of an LLC and a simple JSC of shareholders (Articles 202 § 6 and 300(56) § 6, CCC). In a JSC, this applies to the supervisory board (Article 369 § 5(1), CCC), and in the alternative, also the general meeting (Article 369 § 5(2), CCC). Therefore, the main purpose is to link the rules of resignation with the possibility of a quick reaction to the resignation of the appointing authority and to complete the composition of the body affected by the resignation.⁶⁵ A member of the management board may be dismissed at any time by a resolution of the shareholders. This does not deprive him of claims arising from an employment relationship or other legal relationship regarding the performance of the function of a member of the management board. The articles of association may contain other provisions, and in particular, may limit the right to dismiss a member of the management board to important reasons. A former member of the management board is entitled and obliged to provide explanations in the course of preparing the management board's activity report and financial statements, covering the period of his or her function as a member of the management board, and to participate in the shareholders' meeting approving these reports, unless a resolution of the shareholders' meeting provides otherwise (Article 203, CCC).

A shareholders' resolution may set out the principles of remunerating members of the management board, particularly the maximum amount of remuneration, granting management board members the right to additional benefits or the maximum value of such benefits. The remuneration of members of the management board employed under an employment contract or other contract is determined by the body or person appointed by a resolution of the shareholders' meeting to conclude an agreement with a member of the management board.

If the management board is composed of many people, the manner of representation is specified in the articles of association. If it is silent on this subject, the cooperation of two members of the management board or one member of the management board together with a proxy is required to make statements on behalf of the company. Pursuant to Article 208 of the CCC, if the management board is composed of many persons and the articles of association do not provide otherwise, each member has the right and obligation to manage the company's affairs and may conduct matters not exceeding the scope of the company's ordinary activities without a prior resolution of the management board. If, however, before settling such a matter, even one of the other members objects to its conduct, or if the matter exceeds the scope of the company's ordinary activities, a prior resolution of the management board is required. Resolutions of the management board may be adopted if all members have been properly notified of the meeting of the management board and are adopted by an absolute majority of votes (unless the articles of association introduce other rules). The articles of association may provide that in the event of a tie, the chairman of the

65 Moskała, 2020, p. 317.

board shall have the casting vote, as well as grant him certain powers to direct the work of the management board.

Pursuant to Article 209 of the CCC, in the event of a conflict of interests of the company with the interests of a member of the management board, his spouse, relatives, or relatives by marriage up to the second degree and persons with whom he is personally related, a member of the management board should disclose the conflict of interest and refrain from participating in resolving such matters and may request that this be noted in the minutes. A debatable issue related to the interpretation of the discussed provisions is the interpretation of the term “conflict of interest”; some believe that a conflict of interest occurs especially when actions are taken that may even potentially harm the interests of the company or takes place at the expense of the company or in favour of others. That advantage need not be of a financial nature. According to another view, the conflict of interests must be genuine.⁶⁶

Pursuant to Article 209(1) § 1 of the CCC, a member of the management board should, in the performance of his duties, exercise diligence resulting from the professional nature of his activity and remain loyal to the company, and according to § 2 of this provision, he may not disclose company secrets even after the expiry of the mandate. In turn, Article 211 of the CCC describes the non-competition clause, according to the wording of § 1 of this provision; a member of the management board may not deal with competitive interests without the consent of the company or participate in a competitive company as a partner in a civil law partnership, partnership or as a member of a body of a capital company or participate in another competitive legal person as a member of a body. This prohibition also covers participation in a competitive capital company if a member of the management board holds at least 10% of the shares in that company or the right to appoint at least one member of the management board. Unless the articles of association provide otherwise, consent for competitive activity is granted by the body authorised to appoint the management board.

In every capital company (i.e. LLC), a simple JSC and in a JSC pursuant to Article 15 of the CCC, the conclusion of a credit, loan, surety, or other similar agreement with or for a member of the management board (inter alia) requires the consent of the shareholders’ meeting or the general meeting, unless the law provides otherwise. Similarly, the conclusion by a subsidiary of such an agreement with a member of the management board of the parent company requires the consent of the general meeting of shareholders or the general meeting of the parent company. In an LLC, issues of concluding agreements with a member of the management board are also regulated by Article 210 of the CCC. Pursuant to § 1 of this provision, in the agreement between the company and a member of the management board and in a dispute with him, the company is represented by the supervisory board or a proxy appointed by a resolution of the shareholders’ meeting; however, if the company is a sole proprietorship, then pursuant to Article 210 § 2, the legal transaction between this partner and

⁶⁶ Jaszczuk, 2017, pp. 34–35.

the company represented by him requires the form of a notarial deed. The notary notifies the registry court about such a juridical act in a single-member company via electronic means.

The basic regulations concerning the civil liability of a member of the management board of an LLC in the CCC are contained in Articles 291–300 of the CCC. The CCC provides for the liability of a member of the management board for reporting false data (Article 291, CCC) or damage caused by an act or omission contrary to the law or the provisions of the articles of association (Article 293, CCC). One of the most important provisions concerning the liability of a member of the management board in an LLC is Article 299 of the CCC. Article 299 § 1 provides that if enforcement against the company proves ineffective, the members of the management board are jointly and severally liable for its obligations (cf. Chapter 6).

Title V of the CCC also contains penal provisions common to commercial companies. Article 586 of the CCC introduces liability toward a member of the company's management board who does not file a petition for bankruptcy of a commercial company despite the conditions justifying the bankruptcy of the company according to the regulations. Such a management board member is subject to a fine, restriction of liberty, or imprisonment for up to 1 year. Article 594 § 1 of the CCC provides that the following actions are subject to a fine of up to PLN 20,000 by the management board of a commercial company for a board member, contrary to the obligation:

- a) failure to submit to the registry court a list of shareholders,
- b) does not keep a register of shares, or allows the failure to keep a register of shareholders in accordance with the provisions of the act or to register shares in the securities depository;
- c) failure to convene a meeting of shareholders,
- d) refuses to explain to the person appointed for revision or does not allow him to perform his duties,
- e) does not submit to the registry court a request for the appointment of statutory auditors, and
- f) does not announce the submission of an opinion by a statutory auditor to the registry court in accordance with the provision of Article 312 § 7 of the CCC.

Article 595 of the CCC introduces the liability of a member of the management board of a capital company for improper marking of letters and commercial orders. The provisions governing the liability of management board members are also contained in the Criminal Code, Penal-Fiscal Code,⁶⁷ and Labour Code⁶⁸. One of the most common managerial crimes is so-called breach of trust. The act described in Article 296 of the Criminal Code concerns all persons obliged to deal with the property affairs or business activities of the company. Members of the management board may be liable for failure to disclose the subject or basis of taxation, tax evasion, failure to submit

67 Penal Fiscal Code of 10 September 1999 (Journal of Laws No. 83, item 930).

68 Labour Code of 26 June 1974 (Journal of Laws No. 24, item 141).

returns (Article 54, Penal-Fiscal Code), providing false tax data in the declaration or statement (Article 56, Penal-Fiscal Code), unreliable or defective bookkeeping or records (Article 61, Penal-Fiscal Code) failure to pay the tax collected on time (Article 77, Penal-Fiscal Code) or failure to submit tax information on time (Article 80, Penal-Fiscal Code). Members of the management board may be liable for violations of employee rights. They are described in Articles 281–283 of the Labour Code and Articles 218–221 of the Criminal Code.

5.2. Simple Joint-Stock Company

Pursuant to Article 300(52) of the CCC § 1, a management board or a board of directors is established in a simple JSC. The articles of association may provide that, in addition to the establishment of a board of directors in the company, a supervisory board should also be established. The dissolution of the monistic structure of authorities is specific to the systems of English law and the law of individual states in the United States.⁶⁹ The combination of management and supervisory competences in the board of directors is included in Article 300(73) § 1 of the CCC. The board of directors manages the company's affairs, represents the company, and supervises the conduct of the company's affairs.

A member of the supervisory body should, in the performance of his duties, exercise diligence resulting from the professional nature of his activity and maintain loyalty to the company (Article 300(54), CCC).

The CCC also regulates problems related to the emergence of conflicts of interest. In the event of a conflict of interests of the company with the interests of a member of the authority, his spouse, relatives and relatives by marriage up to the second degree and persons with whom he is personally connected, the member of the body should disclose the conflict of interest and refrain from participating in the resolution of such matters and may request that this be noted in the minutes. It is also not allowed to disclose company secrets, even after the expiry of the mandate. A member of the management board or a director may not, without the consent of the company, deal with competitive interests or participate in a competitive company as a partner in a civil law partnership, partnership or as a member of a body of a capital company or participate in another competitive legal person as a member of a body, unless the articles of association provide otherwise. This prohibition also covers participation in a competitive capital company where a member of the management board or director holds at least 10% of the total number of votes or the total number of shares or the right to appoint at least one member of the management board or director. Unless the articles of association provide otherwise, the consent is granted by the body authorised to appoint a member of the body (Article 300(55), CCC).

The mandate of a member of the body expires on the date of the general meeting approving the financial statements for the first full financial year after the date of appointment, unless the articles of association provide otherwise, in particular for

69 Gower and Davies, 2008, pp. 398–410.

appointment for an indefinite period. The mandate of a member of the body also expires as a result of death, resignation, or dismissal from the composition of the body. If, as a result of the resignation of a member of the management board or director, no seat on the management board or board of directors would be filled, the member of the management board or the director shall resign to the shareholders and at the same time convene a general meeting referred to in Article 300(84) § 4 of the CCC. The notice convening the general meeting shall also contain a statement of resignation of a member of the management board or director. The resignation is effective on the day following the day on which the general meeting was convened (Article 300(56), CCC).

The management board manages the affairs of the company and represents the company, it may consist of one or more members. As a rule, members of the management board are appointed and dismissed and suspended, for important reasons, by the shareholders or the supervisory board, unless the articles of association provide otherwise (Article 300(62), CCC). A member of the management board may be dismissed at any time by a resolution of the shareholders. This does not deprive him of claims arising from the legal relationship regarding the performance of the function of a member of the management board. The right of a member of the management board to represent the company applies to all judicial and extrajudicial acts of the company.

The supervisory board may delegate members of the supervisory board, for a period not longer than 3 months, to temporarily perform the duties of members of the management board who have been suspended or whose mandates have expired for reasons other than the expiry of their term of office, or who for other reasons cannot perform their duties (Article 300(70) § 1, CCC).

As mentioned, in a simple JSC, a board of directors may be appointed, then, pursuant to Article 300(73) § 1 of the CCC, the board of directors manages the company's affairs, represents the company and supervises the conduct of the company's affairs, it may consist of one or more directors whom the shareholders appoint and dismiss and suspend, for important reasons, by resolution. The director may be dismissed at any time by a resolution of the shareholders. This does not deprive him of claims arising from his relationship as director. The articles of association may contain other provisions, in particular limit the right of appeal to important reasons (Article 300(74), CCC). With some exceptions,⁷⁰ the articles of association, the bylaws of the board of directors, or a resolution of the board of directors may delegate some or all the business activities of the company to one or more directors (executive directors). Non-executive

70 Activities excluded from the scope of delegation: a) making decisions of strategic importance for the company; b) establishing annual and multi-year business plans; c) determining the organisational structure of the company's enterprise and shaping the basic functions related to running the enterprise. Only management decisions are subject to delegation, and not other activities included in the statutory concept of managing the company's affairs, including corporate activities which, under the law, are performed by the board of directors *in gremio* or activities which, under the articles of association, require the adoption of a resolution of the body.

directors exercise ongoing supervision over the conduct of the company's affairs. To carry out the activities of running the company's business, an executive committee may be appointed, composed exclusively of executive directors, similarly, a committee of the board of directors, composed exclusively of non-executive directors, may be appointed to exercise permanent supervision over the conduct of the company's affairs (Article 300(76), CCC). In the agreement between the company and the director, as well as in a dispute with him, the company is represented by a proxy appointed by a resolution of the shareholders.

The provisions on a simple JSC contain a regulation on civil liability, which applies to members of bodies. Pursuant to Article 300(123) of the CCC, if the members of the management board intentionally or negligently provide false data in the statement referred to in Article 300(12) § 3 point 3 or Article 300 (107) § 2 point 3, they are liable to the company's creditors jointly and severally with the company for 3 years from the date of registration of the company or registration of the issue of new shares. Article 300(127) of the CCC also regulates the institution referred to as *actio pro socio*. This grants shareholders standing to bring an action for compensation for damage caused to a simple JSC in the event of failure to pursue a claim for damages by the injured company itself, a similar regulation is contained in the regulations concerning an LLC and a JSC (cf. CCC). Article 300(132) of the CCC regulates the liability of members of the management board (or board of directors) of a simple JSC for the company's obligations in the event that execution against its assets turns out to be ineffective (more broadly, Chapter 6). The grounds of liability (e.g. for breaches of labour law and fiscal penal provisions) also apply to members of the management board and the board of directors (cf. LLC).

5.3. Joint-Stock Company

In a JSC, as in an LLC and a simple JSC, the management board manages the company's affairs and may consist of one or more members who are appointed and dismissed by the supervisory board, unless the company's articles of association provide otherwise. A member of the management board may also be dismissed or suspended by the general meeting (Article 368, CCC). A member of the management board is appointed for a period not longer than 5 years (term of office). The term of office shall be calculated in full financial years, unless otherwise provided in the company's statutes. Re-appointments of the same person as a member of the management board are permissible, but not earlier than 1 year before the end of the current term of office.

The articles of association may provide for the partial renewal of the board of directors in such a way that a number of the members of the board of directors resign in succession, either by lot, seniority of election, or some other means. If the articles of association provide that members of the management board are appointed for a joint term of office, the mandate of a member of the management board appointed before the end of a given term of office of the management board shall expire at the same time as the expiry of the mandates of the other members of the management board, unless the company's statutes provide otherwise. The mandate of a member

of the management board expires at the latest on the date of the general meeting approving the financial statements for the last full financial year of performing the function of a member of the board. The mandate of a member of the management board also expires as a result of death, resignation, or dismissal from the board. If, as a result of the resignation of a member of the management board, no mandate in the board would be filled, a member of the board shall submit his resignation to the supervisory board, and if no mandate in the supervisory board is filled, he shall submit it to the shareholders, convening a general meeting at the same time. The announcement of the general meeting also contains a statement of resignation of a member of the management board. The resignation takes effect on the day following the day on which the general meeting was convened. A member of the management board may be dismissed at any time. This does not deprive him of claims arising from an employment relationship or other legal relationship regarding the performance of the function of a member of the board. The articles of association may contain other provisions, in particular, those limiting the right of appeal to important reasons. Resolutions of the management board are adopted by an absolute majority of votes, unless the statutes provide otherwise. The statutes may provide that, in the event of a tie, the chairman of the management board shall have the casting vote, and may confer on him certain powers to direct the work of the board.

As in other capital companies, the right of a member of the management board to represent the company applies to all judicial and extrajudicial actions of the company. The company's management board administers the company's operations on a daily basis. This does not mean, however, that its status is not subject to any limitations. Pursuant to Article 375 of the CCC, members of the management board are subject to restrictions established by the CCC, the articles of association, the regulations of the management board, and resolutions of the supervisory board and general meeting. However, in this context, one should not forget about Article 375(1) of the CCC, which, specifying the scope of this subordination, indicates that neither the supervisory board nor the general meeting may, however, issue binding instructions to the management board regarding the conduct of the company's affairs. Members of the management board are subject to restrictions resulting from resolutions of the supervisory board and the general meeting only if these bodies acted within the scope of their competences under the law or the statutes.⁷¹ In the event of a conflict of interests of the company with the interests of a member of the management board, his spouse, relatives, or relatives by marriage up to the second degree and persons with whom he is personally related, the member should disclose the conflict of interests and refrain from participating in resolving such matters and may request that this be noted in the minutes (Article 377, CCC).

A member of the management board should, in the performance of his duties, exercise diligence resulting from the professional nature of his business and remain loyal, and may not disclose company secrets, also after the expiry of the mandate

71 Szumański, 2008, p. 688.

(Article 377(1), CCC). The supervisory board determines the remuneration of members of the management board employed under an employment contract or other contract, unless the articles of association provide otherwise. The general meeting may determine the principles of remuneration of members of the management board, in particular the maximum amount of remuneration, granting members of the management board the right to additional benefits or the maximum value of such benefits, and may also authorise the supervisory board to determine that the remuneration of members of the management board also includes the right to a specific share in the company's annual profit, which is to be distributed among shareholders in accordance with Article 347 § 1 of the CCC. The bond relationship of a member of the management board may have different bases. It may be based on an employment contract or another contract. Pursuant to Article 735 § 1 of the Civil Code, if neither the contract nor the circumstances indicate that the recipient of the order undertook to perform it without remuneration, remuneration is due for the execution of the order. The supervisory board determines the remuneration for a member of the management board by adopting an appropriate resolution. Independent action in this respect of any of its members is excluded.⁷²

In the agreement between the company and a member of the management board, as well as in a dispute with him, the company is represented by the supervisory board or a proxy appointed by a resolution of the general meeting. This resolution – similarly to other companies – may be adopted using the template made available in the ICT system. If a shareholder is also the only member of the management board (single-member company), a legal transaction between this shareholder and the company represented by him requires the form of a notarial deed, the notary notifies the registry court about such an action via the ICT system.

A member of the management board may not, without the consent of the company, deal with competitive interests or participate in a competitive company as a partner in a civil law partnership or partnership, or as a member of a body of a capital company, or participate in another competitive legal person as a member of a body. This prohibition also applies to participation in a competitive capital company, if a member of the management board holds at least 10% of shares or the right to appoint at least one member of that board. Unless the statutes provide otherwise, the consent is granted by the body authorised to appoint the management board (Article 380, CCC).

One of the key changes that came into force on October 13, 2022 aimed at increasing the effectiveness of supervisory boards, is the obligation of the management

72 Marszałkowska-Krześ, 2001, p. 204.

board to provide specific information to the supervisory board on its own initiative.⁷³ Pursuant to Article 383 § 1 of the CCC, the powers of the supervisory board include suspending, for important reasons, individual or all members of the management board and delegating members of the supervisory board, for a period not longer than 3 months, to temporarily perform the duties of members of the management board who have been dismissed, resigned, or for other reasons cannot perform their duties. If a member of the management board is unable to perform his duties, the supervisory board should immediately take appropriate action to change the composition of the management board. The articles of association may extend the powers of the supervisory board, and in particular, provide that the management board is obliged to obtain the consent of the supervisory board before performing the activities specified in the articles of association. If the supervisory board does not consent to perform a specific action, the management board may request the general meeting to adopt a resolution granting consent to perform this action (Article 384, CCC).

The regulations governing JSCs also contain a section regulating civil liability (Chapter 8). Article 479 of the CCC provides that if members of the management board intentionally or negligently provided false data in the statement referred to in Article 320 § 1 items 3 and 4 of the CCC or in Article 441 § 2 item 5 of the CCC, they are liable to the company's creditors jointly and severally with the company for 3 years from the date of registration of the company or registration of the share capital increase. Pursuant to Article 483 § 1 of the CCC, a member of the management board, a member of the supervisory board, and liquidator are liable to the company for damage caused by an act or omission contrary to the law or the provisions of the company's articles of association, unless he is not at fault. However, that person does not infringe the duty of care resulting from the professional nature of his activity if, acting loyally to the company, he acts within the limits of justified economic risk, including on the

73 Pursuant to Article 380(1) § 1 of the CCC, the management board is obliged, without additional request, to provide the supervisory board with information on: a) resolutions of the management board and their subject; b) the company's situation, including its assets, as well as significant circumstances in the field of conducting the company's affairs, in particular in the operational, investment and human resources areas; c) progress in the implementation of the set directions of development of the company's operations, while indicating deviations from previously set directions, at the same time giving justification for the deviations; d) transactions and other events or circumstances which materially affect or may affect the company's assets, including profitability or liquidity; and e) changes in the information previously provided to the supervisory board, if such changes significantly affect or may affect the company's situation. The implementation of the obligations referred to in points a–e includes information held by the management board regarding subsidiaries and related companies. § 3. The information referred to in § 1 and § 2 should be provided in the cases referred to in points a–c – at each meeting of the supervisory board, unless the supervisory board decides otherwise – and in points d and e – immediately after the occurrence of specific events or circumstances. The information should be provided in writing, except where this form is not possible owing to the need to immediately inform the supervisory board. The supervisory board may decide on the admissibility of providing this information also in another form. The statutes may exclude or limit information obligations.

basis of information, analyses, and opinions that should be taken into account in the circumstances when making a diligent assessment (§ 3) (more broadly Chapter 6).

The grounds for criminal liability of a member of the management board of a JSC are also introduced by the provisions of Title V of the CCC. For example, whoever, being a member of the management board, allows a commercial company to acquire its own shares or pledge them is subject to a fine, restriction of liberty, or imprisonment for up to 6 months (Article 588, CCC). Whoever, being authorised alone or jointly with other persons on the basis of the law or the statutes to conduct the affairs and represent a JSC, allows the company to issue documents for shares, subscription warrants, utility certificates, certificates of incorporation, or other titles of participation in the income or in the distribution of the company's assets shall be subject to a fine, restriction of liberty, or imprisonment for up to 6 months (Article 589(2), CCC). This provision may coincide with the provision penalising the offences of the so-called material falsification of documents (Article 270, Criminal Code).⁷⁴

5.4. Participation of Employees

The participation of employees in the management boards of some companies is regulated in the Act on Commercialisation and Certain Employee Rights,⁷⁵ pursuant to Article 16 of that act, in companies established by commercialisation, as well as after the State Treasury has sold more than half the company's shares, employees elect one member of the management board if the average annual employment in the company is above 500 employees. The rules and procedure for the election and dismissal of a member of the management board by employees shall be specified in the articles of association. The election referred to here is only the right of employees, not their obligation, because § 3 provides that failure to elect a member of the management board by the company's employees does not prevent the company from being entered in the register of entrepreneurs or from adopting valid resolutions by the management board. In a company created as a result of commercialisation, there is also a supervisory board. The number of members of the supervisory board is determined by the articles of association, with the proviso that the first supervisory board consists of five people, including two employee representatives. In companies resulting from the transformation of agri-food industry enterprises, farmers or fishermen and employees have one representative on the supervisory board (Article 11).

⁷⁴ Raglewski, 2008, p. 592.

⁷⁵ Act on Commercialisation and Certain Employee Rights of 30 August 1996 (Journal of Laws No. 118, item 561), Journal of Laws of 2023, item 343.

6. Romania

6.1. The Concept of the “Executive Officer”

The will of a company, as a legal entity, is formed in part by its deliberative body, which is the meeting of members or shareholders. However, the deliberative body, which convenes periodically, is not the sole custodian of the corporate will. A company must also have an “executive branch” alongside its “parliament”. Consequently, executive bodies - namely, the management - are necessary for the organisation’s functioning. This dual structure is reflected in Article 209(1) of the Romanian Companies Act, which stipulates that a ‘legal person exercises its rights and fulfils its obligations through its executive bodies’. Furthermore, Article 70(1) of the Romanian Companies Act provides that executives may perform all operations necessary to achieve the company’s business objectives, subject to any restrictions outlined in the law, the company’s founding documents or the resolutions of the general meeting.

The term *executive officer* can be understood as a broad, umbrella concept. Although the Romanian Companies Act does not explicitly use this term, it is a useful analytical tool and is adopted for the purposes of this volume. In the context of a JSC, the term *executive officer* encompasses the sole administrator (*administrator unic*), members of the board of directors (*membrul consiliului de administrație*), directors (*director*), general director (*director general*), members of the management board (*membrul directoratului*), and sole directors (*director unic*).⁷⁶ Members of the *supervisory board*, however, do not engage directly in operational management activities. As a result, the supervisory board does not belong to the category of executive bodies; rather, it functions as a control body. Nonetheless, supervisory board members are also responsible for properly fulfilling their duties. In the case of an LLC, the term *executive officer* refers to the administrator (*administrator*).

The concept of an executive officer’s role is primarily defined by their area of responsibility. The executive officer is tasked with managing the company’s activities, which encompass two primary dimensions. First, the executive officer handles the internal organisational tasks of the company, such as overseeing and organising workflows. This involves the general management of the company’s affairs, internal governance, and operational leadership. Second, the role extends outward, involving interactions with external parties in the economic sphere and, more broadly, society. This external activity typically manifests in the negotiation and conclusion of contracts with third parties on behalf of the company as a legal entity. Additionally, executive officers represent the company in public law matters, such as tax-related obligations, and make legal declarations in these contexts. In this external capacity, their primary tool is representation, executed both verbally and in writing.

The Romanian Companies Act does not provide a legal definition for either the term *executive officer* or *administrator*. Instead, it stipulates that the obligations and

responsibilities of administrators are governed by the rules applicable to mandates (Article 72). This establishes that the executive officer is, in essence, an agent of the company. Consequently, the primary legal framework governing the relationship between the company and its executive officer is corporate law, with the secondary framework being the provisions applicable to mandate contracts. The primacy of corporate law norms implies that an executive officer is not merely an agent of the company but an essential organisational unit – an integral organ of the company. An executive officer is not merely fulfilling a contractual mandate but is also exercising legal authority. The contractual nature of the executive officer's position applies only in relation to the company itself. In dealings with third parties, the executive officer acts as a statutory organ authorised to represent the company. Even in the relationship between the executive officer and the company, the role reflects a dual nature defined by both contract and law. The obligations of the executive officer derive not only from the contractual agreement but also from statutory provisions, creating a hybrid legal framework that governs their responsibilities.

As previously discussed, the concept of *executive officers* in JSCs forms a complex matrix. Therefore, it is essential to analyse the relevant legal norms at the outset, as the Romanian JSC encompasses a diverse range of structures and practices. The first critical distinction lies in whether the company operates under a unitary or dualist (two-tier) management system.

In a unitary system, executive officers are members of the board of directors (*membrii consiliului de administrație*). In such a structure, the company's management may be conducted by a single individual or delegated to directors (*directorii*). For JSCs with a sole administrator (*administrator unic*), the Romanian Companies Act requires the application of rules governing the board of directors.

If powers are delegated, the concept of *executive officer* in a unitary system also includes directors and the general director (*director general*). Delegation in this system does not create a conflict of interest between board membership and an executive mandate. Consequently, the executive officers in a unitary JSC can be divided into two categories:

- a) Executive officers with decision-making authority: This group includes directors and the general director, who hold executive powers.
- b) Non-executive officers: These are board members to whom no executive authority has been delegated.

This distinction ensures clarity in the roles and responsibilities within the management structure of unitary JSCs.

In a dualist management system, the management of the JSC is carried out by a management board (*directorat*), which, under Romanian law, consists of one or more members, but always an odd number. The Romanian Companies Act refers to a sole member of the management board as the sole general director (*director general unic*) (Article 153¹). In the dualist system, the establishment of a supervisory board (*consiliu de supraveghere*) is mandatory. Membership in the supervisory board is incompatible

with membership in the management board, ensuring a clear separation of oversight and operational responsibilities.

For LLCs, management is entrusted to one or more administrators (*administrator*), as specified in Article 197. An administrator may be a member of the company but does not necessarily have to be; an external individual can also be appointed to this role.

A persistent governance question concerns the cumulation of roles: may a person entrusted with the company's management also remain bound to it by an employment contract?⁷⁷ Romanian company law offers no single, across-the-board answer; the outcome turns on the corporate form. In the JSC, the Romanian Companies Act draws a categorical boundary: directors, members of the board, and members of the supervisory board cannot at the same time hold employee status. When someone is elevated to an executive mandate from within the workforce, the individual's labour agreement is stayed by operation of law for the full term of office. The picture is different in the LLC. There the statute implicitly allows the combination, because Article 197(4) excludes the joint-stock governance rules from applying to LLCs. As a result, a manager in an LLC may perform the executive mandate while continuing as an employee of the same company.

6.2. Appointment of Executive Officers

In Romanian company law, the route by which a person becomes an executive officer is twofold. The mandate can be built into the company from the very beginning, by naming the officer in the constitutive act at incorporation, or it can be created later by a decision of the general meeting of shareholders or, in the case of an LLC, of the members. In either scenario, the appointment does not arise by virtue of the company's will alone. The individual (or entity) proposed must affirmatively accept the office. That requirement of express acceptance is now spelled out in statute following Act No. 265/2022, which brought positive-law clarity to a practice that courts and scholarship had already treated as implicit under the general rules of mandate in the Civil Code and by virtue of the Romanian Companies Act's reference to those rules in delineating executive officers' rights and obligations. Therefore, acceptance is a constitutive element of the relationship: without it, there is no valid mandate and the corporate resolution remains inoperative toward the designee.

Once the company is already up and running, the mechanics of appointment diverge by legal form. In an LLC, executive authority is conferred by the general meeting of members, and the resolution must gather votes representing an absolute majority of the company's share capital. The JSC follows a different track: the ordinary general meeting of shareholders is the body that installs executive officers. The distinction is not just terminological, because it aligns decision-making power with the intensity of member participation that each form presupposes and locates

77 Pál, 2024, pp. 173–174.

managerial selection within the ordinary governance cycle of the JSC, while requiring a capital-based majority in the more “personal” setting of the LLC.

Romanian law recognises that the office may be held by a natural person or by a legal person. The statute explicitly contemplates legal entities serving as executive officers in JSCs and requires such an entity to appoint a permanent natural-person representative who will actually attend meetings of the board, management board, or supervisory board and act on the entity’s behalf. That representative remains in place unless and until the representative authority is revoked, at which point a new permanent representative must be designated. This explicit reference has given rise to a debate for LLCs. One view reads the text narrowly, confining legal-entity mandates to the joint-stock context.⁷⁸ The opposing view, invoking the absence of an express prohibition and the general permissive structure of company law, holds that a legal entity may also be entrusted with executive functions in an LLC provided that a permanent natural-person representative is named.⁷⁹ In practice, companies that choose this path replicate the joint-stock safeguards by resolution and disclosure so that counterparties and the trade register can identify who, in fact, exercises the functions of the office.

If the executive officer is a natural person, eligibility is not purely a matter of corporate preference. Persons lacking full legal capacity are excluded, and the law bars individuals finally convicted of offenses that speak to integrity and trustworthiness, property and patrimonial crimes, corruption and embezzlement, forgery, tax evasion, and crimes addressed in anti-money laundering and counter-terrorism legislation, together with the specific disqualifying offenses listed in the Romanian Companies Act.⁸⁰ These are not reputational screens but rather legal incapacities to hold office. In practice, companies can maintain evidence compliance through declarations on honour and criminal record certificates and may review the trade register to ensure that ineligible persons are not recorded as representatives.

Every valid appointment is followed by a set of publicity formalities designed to make representation verifiable to third parties. Under Article 45(1) of the Romanian Companies Act, those who represent the company must lodge a specimen signature with the trade register. If an executive officer is named in the constitutive act, the specimen signature accompanies that filing. If the appointment is made later by a general meeting resolution, the signature must be deposited within 15 days of the date of the decision. Observing these timelines is not a mere technicality: timely filing ensures that the register reflects who can bind the company and reduces transactional friction, as counterparties and banks routinely condition dealings on the public record matching the signatures presented.

78 Cărpenu, 2014, pp. 207, 291; Nemeş, 2015, p. 143.

79 David, 2014, p. 265; Todică, 2011, pp. 137–138; Schiau and Prescure, 2007, p. 232; Georgescu, 2002, pp. 386–387.

80 Cărpenu, 2014, p. 258.

6.3. Composition and Operation of Executive Bodies

In an LLC, in which multiple individuals are entrusted with executive authority (are administrators), each must act independently, in good faith, and in the company's best interests. However, if the constitutive act explicitly requires joint decision-making by the executive officers, decisions must be made unanimously. Should unanimity not be achievable because of the objection of one executive officer, the decision-making authority shifts to the company's members holding an absolute majority of the share capital.⁸¹

The Romanian Companies Act also permits deviations from the unanimity requirement under two cumulative conditions, allowing a single executive officer to make decisions without the consent of others. These conditions are: (a) the other executive officers are unable to participate in the decision-making process, and (b) the decision is required for an urgent matter where failure to act would result in significant harm to the company. The representation rights of executive officers in an LLC are governed by Article 75 of the Romanian Companies Act. According to this provision, unless the constitutive act specifies otherwise, each executive officer is vested with representation authority.⁸²

The management of JSCs is extensively detailed in the Romanian Companies Act, specifically in Part III of Chapter IV. As previously discussed, Romanian law provides two fundamental models for managing JSCs: the unitary, monist management system (*sistemul unitar*)⁸³ and the dualist, two-tier management system (*sistemul dualist*).⁸⁴ Companies may choose between these two models.

6.3.1. The unitary management system

In JSCs operating under the unitary system, management is carried out by one or more executive officers, who may be either natural or legal persons. When multiple individuals manage the company, a board of directors (*consiliu de administrație*) is established, and the board must always consist of an odd number of members. The appointment of a board of directors is mandatory, meaning sole management is prohibited, if the company is subject to a legal audit requirement for its annual financial statements (Article 137(2), Romanian Companies Act).

The board of directors elects a chairperson from among its members. However, the company's constitutive act may stipulate that the chairperson must be appointed by the same ordinary general meeting of shareholders that appoints the board. In such cases, the general meeting retains the right to designate the chairperson directly. The term of office for the chairperson cannot exceed the term of their mandate as a board member. The principle of symmetry applies to the removal of the chairperson: they can only be removed by the body that appointed them. The primary

81 Angheni, 2013, p. 213.

82 David, 2014, pp. 266–267.

83 Angheni, 2013, pp. 178–191; Gheorghe, 2020, pp. 410–420.

84 Angheni, 2013, pp. 191–196; Gheorghe, 2020, pp. 420–424.

role of the chairperson is to coordinate the board's activities, for which they must provide a specific report to the general meeting. If the chairperson is unable to fulfil their duties, the board may delegate the role to another member.

The board of directors must convene at least quarterly, or once every 3 months. The chairperson is responsible for convening meetings, setting the agenda, ensuring proper communication with board members, and presiding over meetings. However, the chairperson's authority to call meetings is neither exclusive nor unlimited. The Romanian Companies Act requires that a board meeting be convened upon the justified request of at least two board members or the general director. In such cases, the agenda is set by the requesting parties. If the chairperson fails to convene the meeting as required, the requesting parties are entitled to do so themselves.

The chairperson of the board of directors convenes board meetings by issuing a timely notice, which must specify the date, location, and agenda. Issues not included in the agenda may only be discussed if they require immediate resolution to prevent harm to the company. The company's constitutive act may impose stricter requirements regarding notices for board meetings.

Under the Romanian Companies Act, the board of directors has the authority to carry out any actions that align with the company's purpose and are necessary or beneficial to its operations, except for matters reserved by law to the general meeting. In addition to this general principle, the act explicitly identifies certain core responsibilities that cannot be delegated by the board. These include defining the company's main activities and development strategies; approving accounting policies, financial control systems, and financial planning; appointing and removing directors; setting their remuneration; overseeing and monitoring directors' activities; preparing annual financial statements; organising general meetings; implementing general meeting resolutions; and filing for insolvency proceedings. The board is also prohibited from delegating any authority granted to it by the extraordinary general meeting (Article 142).

As an alternative, Article 143 of the Romanian Companies Act permits the board of directors to delegate the company's operational management to one or more directors (*directori*), one of whom must hold the position of general director (*director general*). For companies whose annual financial statements are subject to mandatory auditing, such delegation of operational management is compulsory. This structure creates a division within the board: some members (the directors) are tasked with executive functions, while the remaining board members focus on supervision and oversight. This results in a dual-level management structure within unitary-system JSCs, comprising executive and non-executive levels.

Only individuals formally appointed by the board as directors are recognised as such under the Romanian Companies Act. The rules applicable to directors do not extend to other individuals, regardless of their job title or function. Additionally, when the board delegates management to directors, a majority of the board members must remain non-executive and may not hold director positions.

This framework ensures a clear separation of responsibilities, with executive directors managing the company's operations and non-executive board members providing oversight and ensuring compliance with corporate governance principles.

In a JSC operating under a unitary (monist) management system, the board of directors may include independent members. According to Article 138/² of the Romanian Companies Act, the company's constitutive act or a resolution of the general meeting may stipulate that one or more board members must be independent. When appointing independent board members, the general meeting must consider the following criteria:

- a) The individual is not, and has not been in the past 5 years, a director of the company or any other company controlled by it.
- b) The individual is not, and has not been in the past 5 years, an employee of the company or any company it controls.
- c) The individual does not receive, and has not received, additional remuneration or benefits from the company or its controlled entities beyond compensation for their non-executive position.
- d) The individual is not a significant shareholder of the company.
- e) The individual has no, and has not had in the past year, any business relationship with the company or its controlled entities that could significantly affect their objectivity, either personally or as an associate, shareholder, director, or employee of another entity.
- f) The individual is not currently, and has not been in the past 3 years, a financial auditor of the company or its controlled entities, nor an associate or employee of the company's current auditor.
- g) The individual is not a director in another company where one of the company's directors serves as a non-executive officer.
- h) The individual has not served as a non-executive officer of the company for more than three terms.
- i) The individual has no family ties with persons described in points (a) and (d).

These provisions aim to ensure the independence and impartiality of certain board members, thereby promoting better governance and reducing potential conflicts of interest within the company.

The board of directors has the authority to establish advisory committees (*comitete consultative*). These committees must consist of at least two board members. According to legal requirements, at least one member of each advisory committee must be an independent non-executive officer. Specific committees, such as the remuneration committee (*comitet de remunerație*) and the audit committee (*comitet de audit*), are created to streamline decision-making processes related to remuneration and auditing matters. Membership of these committees is restricted to non-executive officers. Furthermore, at least one member of the audit committee must have expertise in accounting and auditing.

The primary role of advisory committees is to support the board by providing analyses, conducting research, and making recommendations. Their responsibilities focus on such matters as the company's accounting systems, and the remuneration of board members, directors, auditors, and employees. Similar to directors, advisory committees are subject to strict and regular reporting obligations to ensure transparency and accountability.

In a JSC operating under a unitary management system, representation before third parties and in legal proceedings is performed by the board of directors. Given that the board is a collegial corporate body, it would be neither reasonable nor practical to require all, or even a majority, of its members to appear in dealings with third parties or before judicial authorities. As a general rule, the chairperson of the board of directors conveys the board's decisions when representing the company.

The constitutive act, however, may stipulate that multiple board members, or even all members, must jointly represent the company. In line with other non-exclusive powers of the board, the general rule allows the delegation of the company's representation authority to directors. If multiple directors are appointed, representation is typically carried out by the general director. In such cases, the board's authority to represent the company is limited to interactions with the directors themselves.

6.3.2. The Dualist Management System

When a JSC adopts a dualist management system, both a supervisory board (*consiliu de supraveghere*) and a management board (*directorat*) are established. At first glance, this may appear similar to the unitary system, whereby functions are delegated to directors. However, upon closer examination, it becomes clear that the dualist system involves more than just a division of functions – it creates two distinct corporate bodies that are entirely separate from one another.

In the unitary system, a common practice is for the chairperson of the board of directors to also serve as the general director, resulting in overlapping roles. By contrast, the dualist system strictly prohibits any overlap in membership between the supervisory board and the management board. Executive officers responsible for operational management are consolidated within the management board, which operates as a collegial body, entirely independent of the supervisory board.

In a JSC adopting a dualist management system, the management board (*directorat*) serves as the exclusive executive body, while the supervisory board (*consiliu de supraveghere*) functions as the oversight body.

The management board may consist of one or more members, who can be either natural or legal persons. If there are multiple members, the number must always be odd. In the case of a single-member management board, the sole general director (*director general unic*) manages the company. For companies whose annual financial statements require statutory auditing, the management board must have at least three members. Members of the management board are appointed by the supervisory board, which also designates one of them as chairperson. The supervisory board also has the authority to remove management board members *ad nutum* (without cause).

As a strict rule, no individual can simultaneously serve on both the management and supervisory boards.

By default, the members of the management board jointly represent the company. However, through unanimous decision, the management board can authorise one or more members to conclude specific transactions or conduct particular operations. The management board is required to submit a written report to the supervisory board at least once every 3 months, detailing its activities. Additionally, it must immediately inform the supervisory board of any matters that could significantly affect the company's financial or legal position. The supervisory board may request information from the management board at any time and with any frequency.

Members of the supervisory board are not considered executive officers, as this body does not have managerial or executive powers. Its primary role is to oversee the activities of the management board. The Romanian Companies Act specifies that the supervisory board must consist of a minimum of three and a maximum of eleven members, with no requirement for an odd number. The absence of this requirement reflects the low likelihood of a deadlock in decisions, given the supervisory board's oversight-focused role.⁸⁵ Members are typically elected by the shareholders during the ordinary general meeting, although the initial members may be appointed in the company's constitutive act.

Supervisory board members cannot simultaneously serve on the management board or hold an employment relationship with the company. The board is required to meet at least quarterly, and its meetings are typically convened and chaired by a chairperson elected from among its members. However, at least two supervisory board members or the management board may request a meeting. In such cases, the supervisory board must convene within 15 days of the request. If the chairperson does not honour the request, the initiators may convene the meeting themselves and set the agenda.

Members of the management board may attend supervisory board meetings but do not have voting rights. In exceptional cases, when the company's interests demand it, the supervisory board may convene a general meeting of shareholders.

While the supervisory board cannot engage in executive functions, the constitutive act may stipulate that certain transactions or categories of transactions require its prior approval. If the supervisory board denies such approval, the management board can appeal to the general meeting, which can approve the transaction with a three-quarters majority of the votes cast by attending shareholders. The Romanian Companies Act prohibits deviations from the three-quarters majority rule or the establishment of alternative conditions for such approvals.⁸⁶

Supervisory board members can be removed *ad nutum* by the general meeting with a two-thirds majority vote. This ensures accountability while maintaining the board's independence in its oversight role.

85 Nász, 2019, p. 176.

86 Angheni, 2013, p. 194.

6.4. Self-Dealing

Romanian legal doctrine distinguishes between ordinary and extraordinary management activities. Extraordinary management refers to transactions or operations that exceed the company's usual scope of activity and, therefore, require prior approval from the general meeting of shareholders or members.⁸⁷

An example of such extraordinary management is provided in Article 44¹ of the Romanian Companies Act. According to this provision, if a company, within 2 years of commencing its operations, decides to acquire assets from its founders or shareholders with a value equal to at least one-tenth of the company's subscribed capital, the transaction must be pre-approved by the general meeting. Transactions concluded without such prior approval are deemed null and void. This rule also applies to LLCs. In JSCs, the provision extends to rental and leasing agreements as specified in Article 150(1)-(2).⁸⁸

Article 150 of the Romanian Companies Act treats as suspect any transaction in which the administrator, acting in a personal capacity, sells assets to the company or acquires assets from it, whenever the transaction's value exceeds 10% of the company's net assets.⁸⁹ For transactions at or above that materiality threshold, the administrator may proceed only after obtaining prior approval from the extraordinary general meeting, in the manner set out for extraordinary decisions (Article 115). If this approval is not obtained, the statute attaches the sanction of nullity to the transaction. The text also makes the rule elastic enough to catch indirect self-dealing: it extends the approval requirement to transactions in which the counterparty is the administrator's spouse or a relative or affine up to and including the fourth degree (e.g. parents, siblings, nieces and nephews, first cousins, and analogous in-law relationships).⁹⁰ It goes further to include dealings with a company in which any of those persons serves as an administrator or director, or (alone or together) holds at least 20% of the subscribed share capital. The only explicit carve-out is for intragroup transactions in which one of the companies is a subsidiary of the other.

Two structural ideas animate the rule. The first concerns materiality. The 10% of net assets threshold is a legislative judgment about when private incentives are

⁸⁷ Georgescu, 2002, p. 393; Pál, 2024, p. 189.

⁸⁸ Piperea, 2014, pp. 548–550.

⁸⁹ Goods (*bunuri*) are not limited to tangible assets; they ordinarily include rights and other assets capable of transfer, and thus, the provision should be read to include immovables, movables, receivables, intellectual property, and similar items. “Net assets” are, in corporate usage, the company's equity; although the excerpt does not specify the measurement date, prudent practice is to reference the most recently approved financial statements and, where the transaction is close to the threshold or there has been material change, to obtain an updated statement from management or the auditor to evidence compliance.

⁹⁰ “In his or her own name” captures cases for which the administrator is a direct party, but the extension to spouses, relatives, affines, and controlled or influenced companies is designed to neutralise obvious circumvention routes. The fourth-degree reach in collateral lines is intentionally broad: siblings are second degree, nieces and nephews third degree, and first cousins fourth degree; the affinity mirror covers in-law equivalents.

most likely to diverge from the company's interest. Below that threshold, ordinary governance and general conflict-of-interest duties are expected to police behaviour; beyond it, a special, more public approval channel is mandatory. The second concept is independence. The rule substitutes the extraordinary general meeting's approval for the administrator's conflicted judgment, thereby externalising the decision to the body best positioned to balance risk and return for the residual claimants. The requirement that approval come from the extraordinary general meeting matters for both process and voting thresholds. Extraordinary meetings carry higher quorum and majority requirements and typically demand fuller disclosure. Compliance, therefore, presupposes a convening notice that clearly describes the proposed transaction, its economics (including valuation), the administrator's personal interest, and the relationships that trigger the rule, so that disinterested shareholders can assess the proposal on an informed basis. Because the sanction specified is nullity "for want of approval", the safest inference is that the approval must be obtained *ex ante*. *Ex-post* ratification may be argued in some settings, but it is precarious against a statutory nullity clause designed to deter conflicted execution.

Qualifications in the text delimit flexibility and rigidity. The opening phrase, "unless the articles of association provide otherwise" signals that some private ordering is permissible; companies may tighten the rule (e.g. by lowering the threshold, broadening the class of covered counterparties, or requiring supervisory-board pre-clearance in addition to shareholder approval), or, subject to the next point, reallocate approval competences internally. That freedom is expressly "subject to Article 44¹" of the Romanian Companies Act, which functions as a mandatory floor. Without needing to quote Article 44¹, the clause tells us that the articles cannot dilute any non-derogable conflict-of-interest prohibitions or approval requirements that Article 44¹ imposes; put differently, private ordering may supplement, but not contradict, mandatory conflict-of-interest law.

The related-party extension that looks to positions held and capital stakes deserves weight. If the administrator or a covered relative sits as administrator or director in the counterparty, or if any of them holds at least 20% of its subscribed capital, the law presumes a significant influence channel and triggers the same approval discipline, even when the administrator is not personally signing as buyer or seller. This is a control-and-influence test, not merely a formal party test. The subsidiary exception reflects a different policy concern: within a corporate group, group strategy and intra-group funding often require frequent asset transfers; therefore, the law exempts parent-subsidiary deals from this specific approval rule, although other protections (transfer pricing norms, general duties of loyalty and care, and minority protection) continue to apply.

On remedies and enforcement, the clause's express sanction is nullity if approval is missing. Whether that nullity is absolute or relative/voidable is a matter of general doctrine, but because the rule primarily protects the company and its shareholders, many courts treat such defects as grounds that the company can invoke to unwind the transaction and seek restitution, rather than as automatically void against the world.

In parallel, the administrator's breach of the approval rule can ground personal liability for damages to the company and, where statutory conditions are met, derivative or creditor actions. None of this displaces general conflict-of-interest duties: even below the 10% threshold, the administrator remains bound by loyalty, must avoid self-dealing without proper safeguards, and must disclose material interests.

In application, three recurrent difficulties arise. The first concerns measurement. Parties must decide how to compute the 10% threshold, particularly when there are multiple contemporaneous or linked transactions that could be seen as a series. A cautious approach aggregates linked operations to prevent artificial fragmentation. The second difficulty is disclosure. The quality of information provided to the extraordinary meeting determines both the validity of the approval and the administrator's exposure; incomplete or misleading disclosure undermines informed consent and risks later challenge. The third difficulty concerns perimeter. Identifying fourth-degree relatives and relevant holdings in counterparties is fact-intensive; companies should implement a standing related-party register and periodic questionnaires for administrators and their close affiliates to ensure that potential conflicts are surfaced before commitments are made.

Conceptually, the rule fits within a modern, European pattern: it does not forbid large related-party transactions, but insists they be authorised by an independent corporate organ after full disclosure. Properly implemented, it preserves transactional flexibility whereby a deal is genuinely in the company's interest, while giving shareholders a veto over transactions that would otherwise externalise private gains and internalise corporate risk.

Another case concerns Article 153/22 of the Romanian Companies Act, which imposes a "significant transactions" discipline that is structurally different from the related-party rule discussed earlier and operates irrespective of who the counterparty is. It reserves to the shareholders, acting in extraordinary general meeting under Article 115, the decision on whether the company may enter into juridical acts that would acquire, dispose of, lease, exchange, or encumber assets where the value of the operation exceeds one-half of the company's total assets on the books on the date of the act. Two design choices are worth underlining. First, the trigger is pegged to the accounting carrying amount of the company's assets, not to net assets or market value. By using book value at the time of execution, the statute turns a governance question into an accounting one: boards must know, and be able to provide evidence that the current balance-sheet total to determine whether a contemplated deal crosses the 50% line. In practice, this requirement pushes companies toward obtaining an accountant's certificate or interim balance sheet for cases in which the last approved financial statements are stale or recent events have materially altered the asset base. Second, the rule addresses both sides of the balance sheet and all major modes of asset reconfiguration. It does not only police divestitures; it also captures large acquisitions and security packages that, taken alone, could fundamentally change the firm's risk profile. A pledge or mortgage over assets representing more than half

the balance-sheet total is as much a “significant transaction” as a sale or a lease of comparable scope.

Because approval must be given “in the conditions of Article 115” of the Romanian Companies Act, the process and voting thresholds that govern extraordinary meetings apply. That entails (as in previous cases) a formal convocation with an agenda item that clearly describes the transaction, its structure and economics, the method and date of valuation used to establish compliance with the statutory trigger, and the foreseeable effects on the company’s business and creditors. In the unitary model, the board of directors proposes and the shareholders decide; in the dualist model, the directorate executes but cannot bind the company without prior shareholder authorisation when the threshold is met. Therefore, the allocation of competence is categorical: managerial organs may negotiate, structure, and recommend, but they cannot consummate without the shareholders’ say-so once the materiality line is crossed. Although Article 153/22 of the Romanian Companies Act does not, in the language quoted, specify a sanction in the way the self-dealing provision does, it functions as a mandatory reservation of powers, and thus, acts concluded without the extraordinary general meeting’s prior approval are liable to legal challenge by the company and, as a matter of contractual practice, are made conditional on shareholder authorisation precisely to avoid later invalidity. Good-faith counterparties typically protect themselves by insisting on delivery of the minutes and resolution as a condition precedent to closing.

In application, the provision raises recurrent questions. The first concerns measurement. Because the threshold is “more than half of the book value of the company’s assets at the date of the juridical act”, boards must decide how to treat linked or staged transactions. The anti-avoidance logic of the rule supports aggregation whereby a series of steps forms a single economic operation, even if documented separately or spread over a short period, so that the shareholder veto cannot be neutralised by artificial fragmentation. The second question concerns valuation. “Book value” means carrying amount under the applicable accounting framework, which can diverge from fair-market value. Where assets are significantly under- or over-stated on the books, boards should still anchor the threshold analysis in carrying amounts, while providing shareholders with supplementary valuation materials so that the approval decision is substantively informed. The third is interaction with other approval regimes. Article 153/22 of the Romanian Companies Act is indifferent to conflicts of interest; it applies even where the counterparty is entirely unrelated. Conversely, a transaction that is both large and related (e.g. a sale to a controlling shareholder that exceeds the 50% trigger) must engage both regimes at once: it requires extraordinary-meeting approval because of its size and must also satisfy any special-approval, disclosure, and abstention requirements that attach to related-party dealings. One carefully drafted resolution can discharge both sets of constraints, provided it recites the relevant facts, cites both legal bases, and reflects the correct voting perimeter for disinterested shareholders.

Article 153/22 of the Romanian Companies Act functions as a “quasi-structural change” safeguard. It recognises that disposing of, encumbering, leasing, exchanging, or acquiring assets at or above one-half of the balance-sheet total can alter the company’s risk and business profile to an extent comparable to transformations that are otherwise reserved to the extraordinary meeting. Therefore, it substitutes a shareholder decision, taken under heightened procedural and voting rules, for managerial discretion at precisely the moment when private incentives to act quickly or to “bet the company” are strongest. When integrated with the earlier 10% related-party rule, it yields a coherent two-dimensional control: one axis keyed to the identity of the counterparty and the danger of conflicted judgment, the other keyed to the sheer size of the operation and the danger of firm-level drift without owner consent. Properly implemented - through ex-ante approval, full and comprehensible disclosure, and careful documentation of the accounting basis for the threshold - this discipline preserves transactional flexibility while ensuring that decisions that can redefine the company’s asset base and creditor exposure are taken by those who bear the residual risk.

6.5. Duty of Care and Loyalty

The relationship between a company and its executive officers is contractual in nature and primarily governed by the legal provisions relating to a mandate. Article 72 of the Romanian Companies Act explicitly states that the duties and liability of executive officers are regulated by the rules applicable to mandates, as well as by the specific provisions outlined in the Romanian Companies Act. This framework establishes a hierarchy of applicable rules, which are prioritised as follows:

- a) Special provisions on the executive officer’s mandate: These are found within the act and take precedence.
- b) Rules from the Civil Code: These apply in the absence of specific derogations in the act and include:
 - I) general rules on mandates from the Civil Code;
 - II) general norms concerning the responsibilities of the officers of legal entities; and
 - III) rules governing the administration of another’s property.

This layered structure ensures that executive officers’ obligations and liabilities are governed by a combination of specific and general legal principles, with the provisions of the Romanian Companies Act taking priority.

In the case of JSCs, specific rules were introduced in 2006 in a significant modernisation attempt of Romanian company law through Act no. 441/2006.⁹¹ At that moment, the “business judgment rule” was introduced, as indicated in the (very short) explanatory memorandum of the law, to bring the legislation in line with OECD corporate governance standards. According to the OECD standards, ‘board members should act

91 Veress, 2022, pp. 75–86.

on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders’.⁹²

In the context of Article 144-1 of the Romanian Companies Act, introduced in 2006, the executive officers shall exercise their mandate with the prudence and diligence of a “good executive officer”. An executive officer is not in violation of this obligation if, at the time of making a business decision, they are reasonably entitled to believe that they are acting in the company’s best interests and based on adequate information. According to the law, a business decision is any decision to take or not to take certain action concerning the company’s management. Practically, through these norms, the Romanian legislature has created specific rules on the duty of care.

In 2006, elements which also materialise the duty of loyalty were introduced. For example, executive officers shall exercise their office faithfully in the company’s best interests. They shall not disclose confidential information and trade secrets of the company to which they have access in their capacity. This obligation continues to apply to them after they cease to be executive officers. According to the law, the content and duration of these obligations shall be stipulated in the management contract.

These rules are also applicable in case of a dualist management system, to members of the management board, and of the supervisory board.

Practically, in favour of the executive officer, operates on the assumption that they acted in good faith, in the context of the duty of care, and the company – the applicant requesting the court the award of damages – must prove that the conditions for the business judgment rule were not met. However, this regulation must be integrated into the system of contractual liability in Romanian law. Given that Romanian law operates with a presumption of fault regarding contractual liability,⁹³ the mere fact of the existence of the damage means that the executive officer acted culpably unless they prove otherwise. In reality, the burden of proof is shared: the applicant (the company) must prove the existence of the damage, and the defendant (the executive officer) must prove that they acted without fault.

To exclude fault, an executive officer may prove that they acted with the prudence and diligence of a good executive officer and was reasonably entitled to consider that they were acting in the best interests of the company and based on adequate information. Thus, the business judgment rule is a shield recognised by law to favour an executive officer, a protection from liability if specific conditions are met. The general criterion of contractual liability is not appropriate for the mandate regarding the management of a company’s businesses. Compared to the classic contractual model, a management contract has specific content: sailing the company’s ship on the stormy sea of the market. An executive officer is obliged to take risks, and fault is assessed

92 G20/OECD Principles of Corporate Governance, 2015, p. 45. For details in the Romanian legal literature, see Catană, 2007, pp. 191–194; Bercea, 2006a, pp. 201–208; Bercea, 2006b, pp. 159–166; Bercea, 2007, pp. 26–38.

93 According to Article 1548 of the Civil Code, the debtor’s fault in the non-performance of a contractual obligation is presumed by the mere fact of non-performance.

differently than in the case of a contract, such as a contract of sale, a works contract, or a lease. Risk-taking must be made possible. However, it cannot be irresponsible, without limits, and criteria of assessment. Thus, limits are drawn by law, and the valuation of whether the legal requirements on adequate information, prudence, and diligence are met, as must be the guiding idea (the interest of the company), will be made on a case-by-case basis. Thus, even if damage is caused to the company, an executive officer may be absolved of liability if they have acted properly.

Under these circumstances, in Romanian law, the system of burden of proof is not perfectly adapted and is not clearly determined. The presumption of good faith, diligence, and prudence conflicts with the general presumption of fault. However, even this ambiguous situation entails certain advantages over a clear but rigid system. If the burden of proof were clearly placed on executive officers, then they would be discouraged from taking risks, would seek justification, and provide evidence in advance even if the risk taken was reasonable, otherwise, their position in court would be precarious. If the burden of proof were placed solely on the company, the outcome would be that the company alone would have to prove a lack of diligence, prudence, and information, and adequate proof would be made difficult. Thus, the litigants are forced to produce evidence to find out the truth, which serves the judge to get the most accurate picture of reality.

The hazards of using general standards (e.g. prudence and diligence of a good executive officer, adequate information, best interest of the company) by the legislature have been underlined in the Romanian legal literature as follows.

The judge establishes *ex post* the conduct, which the recipients of the standard can then use as indicators to anticipate the behaviour that the standard requires, establishing the *de facto* content of a *de jure* standard. In this way, the ideal content of the standard, the one envisaged by the legislator, will be replaced by concrete content created by court judgments. In this context, it should be noted that the legislator runs the risk of misusing the content of the standard by establishing standards rather than rules. Although the premise on which the law is based in establishing the standard is the perfect identity between its legal content and its judicial content, this premise often proves to be unrealistic, given the court judgments results from applying standards. These results contain deviations from the conduct contained in the standard, which goes beyond the limits of the space for manoeuvre, which a standard itself implies (tendencies to over-simplify the mechanism established by the standard, to ignore the economic reasons behind the standard, etc.).⁹⁴

It is worthwhile considering the application of these principles by the courts. The High Court of Cassation stated in a case that the duty of prudence and diligence referred to in Article 144-1 of the Romanian Companies Act is not breached if, when making a business decision, the executive officer is reasonably entitled to believe that they are acting in the company's interest. Thus, if an executive officer's judgment is not affected by a personal stake, they are properly informed about the nature of the

94 Bercea, 2014, p. 412.

business and is convinced that the decisions taken are in the company's interest, then the executive officer is exonerated from liability.⁹⁵

According to another judgment, executive officers are often faced with choices in exercising their executive officer's duties. They are obliged to lean toward the solution or decision which, according to the information in their possession and on the basis of their judgement, appears to be the most profitable for the company. Under the business judgment rule concept, the courts cannot be called upon to rule on the actions and executive office activity of a company's executive officers without allegations and, in particular, evidence that the executive officers have breached their duties of care and loyalty or have acted in bad faith or without rational basis.

Thus, the court should not substitute its own notions as to whether a particular business decision is appropriate, as long as the company's management acted based on adequate information, in good faith, and with an honest belief that the action taken was entirely in the best interests of the legal entity, without involving any personal interest of the executive officer.

The court concluded that these conditions were not met in the case:

Without any hesitation, cannot be said of the legal transaction whereby the executive officer of a joint-stock company acknowledges and even undertakes to pay an amount exceeding not only the share capital of the legal person but also the total capital, to another company, owned by the same person, together with a first-degree relative, and whose executive officer also was for approximatively 10 years.⁹⁶

The court confronted the standard and the facts, reaching the rational conclusion that the legal requirements of executive officer protection in such a setting are not met.

In regulating the exercise of the mandate, the provisions of Article 144-1 paragraph 1 of the Romanian Companies Act provides that the executive officers shall exercise their mandate with the prudence and diligence of a good executive officer by behaving like a reasonable person, a good executive officer would behave in similar circumstances in relation to their own affairs.

Executive officers are liable to the company for failure to comply with the legal provisions relating to their duties and for failure to comply with the obligations laid down in the mandate given by the shareholders, in the articles of association, or by a resolution of the general meeting. According to the High Court of Cassation and Justice, liability cannot arise where, even after they have carried out certain acts or taken certain decisions, the general meeting of shareholders adopts a resolution confirming, even implicitly, those acts or decisions. In such cases, the will of the company itself is entirely consistent with the actions of the executive officers. According to the

95 High Court of Cassation and Justice, 2nd Civil Chamber, Decision No. 2827 of 27 September 2011.

96 Timișoara Court of Appeal, Commercial Chamber, Decision No. 64 of 30 March 2010.

highest court of Romania, it is evident that under such circumstances, the executive officer's actions are in accordance with the company's will, which excludes the possibility of their liability toward the company.⁹⁷ This exclusion of an executive officer's liability owing to the shareholders will is applicable in relations between the executive officer and the company itself. The shareholders in such a case are acting at their own risk.⁹⁸

In another case, the Romanian court stated that the provisions of the management contract governing the liability of an executive officer for 'damage caused to the company by any act contrary to the interests of the company, by acts of imprudent management, by the improper and negligent use of the company's funds' should be supplemented by the corresponding rules from Article 12 of the Romanian Companies Act.

By their conduct of paying the sum of 820,000 Romanian leu by way of an advance to a company with which they have not concluded a (written) contract of sale and purchase for building materials, and which already had payment obligations to the applicant company, the executive officer carried out an act of imprudent administration, demonstrating negligence contrary to the interests of the company. Given their capacity as executive officer, under a management contract of a commercial nature, the liability is all the greater, because in commercial matters, the executive officer is liable for the lesser fault. As it is a remunerated mandate, according to Article 1540 of the Civil Code,⁹⁹ fault is assessed according to the abstract type – *culpa levis in abstracto*, of the prudent and diligent man (*bonus pater familias*).

The court found that the conditions relating to the damage caused to the company and the causal link are met. It follows implicitly that by their imprudent act, showing negligence and a lack of diligence, an executive officer caused damage to the company.

The executive officer submitted that the amount paid by way of an advance might be interpreted as a preliminary contract of sale and purchase, the conclusion of which is not subject to any special formal condition. Nonetheless, that submission does not remove or diminish the seriousness of their conduct. However, it merely

97 High Court of Cassation and Justice, 2nd Civil Chamber, Decision No. 326 of 28 February 2017.

98 Concerning third persons, other rules are applicable. In general, lawful or illicit acts of the organs of the company shall affect only the company itself. However, this is true only if the acts are related to the powers or purpose of the functions entrusted to the company organs. *Per a contrario*, in other cases, the liability of the executive officer or even of the shareholder can be raised. Illicit acts also render the perpetrators personally, jointly, and severally liable both toward the company and toward third parties on a delictual basis.

99 This judgment refers to the old Civil Code of 1864, in force until 1 October 2011, which stated that 'for fault, when the mandate is without payment, liability is applied less rigorously than otherwise'. The legal text in force, Article 2018 of the Civil Code, states that 'if the mandate is for a pecuniary consideration, the mandatary shall execute the mandate with the diligence of a good owner. However, if the mandate is gratuitous, the mandatary is bound to perform it with the diligence he/she shows in his/her own business.'

demonstrates their lack of diligence in the company's management, which they were required to protect from the risks inherent in carrying on business precisely by concluding a contract.

According to the analysis offered by the defendant on the legal nature of the executive officer's obligations (obligations of result and obligations of means) in the assessment which the court had to make of the executive officer's fault (*in abstracto*) – also taking into account the elements *in concreto*, the objective criterion, supplemented by certain subjective elements relating to the specific circumstances arising from the place, time, and circumstances in which the conduct was committed, and the qualities and training of the subject, is generally adopted as the criteria for assessing fault.

The objective, abstract criterion means that the court adopts the reference type of a normal, prudent man: *bonus pater familias*. The court stated that this criterion applies even more rigorously in commercial matters and in the case of a remunerated mandate. The application of this objective criterion also takes account of the specific conditions in which the executive officer is acting, in which case the level of requirements will be higher, because the person concerned is a professionally trained specialist in the field of business as is the nature of the activity in the course of which the harmful act occurred (commercial activity carried out by a professional).

In conclusion, the court found that the conditions for contractual liability were met. There was a management contract between the parties (as a precondition for liability). There was a breach consisting of a violation of a contractual obligation, a pecuniary loss, and a causal link between the breach of contract and the loss. There was fault (guilt) on the part of the person who committed the breach.¹⁰⁰

In the context of this judgment, we also refer to the problem of the conflict between the duty of care, in practice a legal transplant, and the Roman tradition of *bonus pater familias*. The court considered that the *bonus pater familias* standard must be applied more rigorously in the case of executive officers. On the contrary, the major Romanian commentary on the company law considers that the business judgment rule originating from the United States and introduced into Romanian law in 2006 is practically a watered-down version of the *bonus pater familias* rule. As stated,

‘[T]he American business judgment rule, which was adopted in 2006 in our legislation, exempts executive officers from liability if the failure of a company's business is due to the risk of the business and is not the consequence of negligent or fraudulent management judgment. In any business, inherent risk can turn decisions made in good faith into failures. As long as the executive officers' judgment is not impaired by a personal stake, as long as they are properly informed about the nature of the business and are convinced that decisions are made in the best interests of the company, then they are absolved of liability. The business judgment rule test means that decisions are

100 Bucharest Court of Appeal, 5th Commercial Chamber, Decision No. 167 of 13 April 2011.

taken with speed, based on reasonable information, do not attract liability on the part of executive officers, however great the damage to the company.¹⁰¹

In my opinion, there are two different standards, each with its own field of application. There is no need to reconcile these two standards: the business judgment rule can be applied independently from its correspondent from the Civil Code. In the case of JSCs, the conduct of the executive officers must be assessed under the provisions of Article 144-1 of the Romanian Companies Act, because these norms have a special character compared to the norms of the Civil Code.

A critical question is whether or not the duty of care test is applicable to LLCs. Keeping in mind that the Romanian LLC has a relatively short regulation in the Romanian Companies Act, it was raised several times that some rules regarding the management of the JSC can be applied by analogy for an LLC. Finally, the High Court of Cassation and Justice stated that the management rules laid down by the law for JSCs should not be applicable to LLCs unless there are expressly and restrictively provided for in the Romanian Companies Act. The absence of such rules of reference, which are, as it was stated, restrictive and of a strict interpretation, undoubtedly leads to the conclusion that different rules govern the management of an LLC from those laid down for the JSCs.¹⁰² In this circumstance, the responsibility of an executive officer in an LLC is governed not by the business judgment and duty of care rules, but by the legal norms on mandates. Two approaches can be considered:

- a) Article 213 of the Civil Code, according to which members of the management bodies of a legal person must act in its interest with the prudence and diligence required of a good owner.
- b) Article 2018 of the Civil Code, which states that: if the mandate is for a pecuniary consideration, the mandatary shall execute the mandate with the diligence of a good owner. However, if the mandate is gratuitous, the mandatary is bound to execute it with the diligence he/she shows in his/her own business.

Article 2018 of the Civil Code differentiates between mandates for pecuniary consideration and gratuitous mandates, with effects on the responsibility. Liability in the case of a gratuitous mandate is less severe. Article 213, however, makes no such difference. Two interpretations are possible:

- a) We must apply Article 213 of the Civil Code, as a general rule, for legal persons. Therefore, we cannot differentiate based on the nature of the mandate (for consideration or gratuitous). The executive officer of an LLC has the more severe responsibility of the “good owner” irrespective of whether the mandate is gratuitous.

101 Piperea, 2014, p. 529.

102 High Court of Cassation and Justice, 2nd Civil Chamber, Decision No. 3679 of 31 October 2013. Article 197 of the Romanian Companies Act states that the provisions relating to the management of JSCs are not applicable to limited liability companies, regardless of whether they are subject to the audit obligation.

- b) Keeping in mind that Article 72 of the Romanian Companies Act states that the liability of executive officers is governed by the provisions relating to a mandate, Article 213 of the Civil Code, as a general norm for legal persons, is not an applicable rule for companies. There is an express legal text that requires applying the rules on the mandate. Therefore, the gratuitous or for consideration character of the mandate influences the responsibility of the executive officers to the company.

The High Court of Cassation and Justice, when there was a special norm in the Romanian Companies Act, granted the priority of that regulation in comparison to norms included into the Civil Code. For example, in the case of a simple partnership (without legal personality, in Romanian *societate simplă*), Article 1928 of the Civil Code states that at the request of a partner, the court may exclude any partner (contracting party) for a good cause from a simple partnership. Article 222 of the Romanian Companies Act, on the contrary, in the case of an LLC, permits the exclusion of a member who is also an executive officer and commits fraud to the detriment of the company or uses the company's signature or capital for their own benefit or that of others. The sanction of exclusion may be applied when revocation of the management mandate is considered insufficient not only for abuse of power and breach of the limits of the management mandate, but also for any fraudulent action or inaction to the detriment of the company – that is, not only for fraud which they are in a position to commit given their role as executive officer but also for any intentional offence committed to the detriment of the LLC. The regulation, in this way, protects, in a distinct manner, the trust that the holder of the position of executive officer must enjoy. Therefore, an LLC member who is not an executive officer cannot be excluded for fraud against the company: the specific rules from the Romanian Companies Act exclude the application of the Civil Code. The arguments presented above lead to the conclusion that the situations of exclusion of the associate provided for in Article 222 of the Romanian Companies Act, republished, as subsequently amended and supplemented, do not complement the provisions of Article 1928 of the Civil Code. Of course, within the limits of contractual autonomy, following the legislature's thinking and the institution's rationale, the parties have the right to multiply or contractually restrict the grounds for exclusion in company law.¹⁰³

Analysing the paradigm, in my view, the express reference to the rules of the mandate does not exclude the application of another general rule, which complements the regulation of the LLC. The Romanian Companies Act does not itself contain rules derogating from the Civil Code in this situation. Thus, not only do the rules of the mandate apply but also those of Article 213 of the Civil Code. Generally speaking, while a gratuitous mandate entails less severe liability, this rule is not applicable to LLCs because of the effects of Article 213 of the Civil Code. The liability

103 For details, see High Court of Cassation and Justice, Chamber for Solving Legal Interpretation Issues (*Completul pentru dezlegarea unor chestiuni de drept*), Decision No. 28 of 10 May 2021.

of the executive officers of an LLC has a unitary character, regardless of whether the mandate is gratuitous or for consideration. The executive officer is liable according to the objective criterion of the good owner in all cases. The distinction between gratuitous and a mandate for consideration is completely logical in typical cases of a mandate, but it is not reasonable for characterising the executive officer's mandate. If, in general, the members of the governing bodies of legal persons are held liable according to the abstract type of good owner (e.g. the case of non-profit entities) then it would be quite strange to have different rules for an LLC. This issue remains to be clarified by the courts.

The courts also significantly contributed to the interpretation of executive officer's responsibility in case of an LLC. An executive officer – a natural person – of a company represents the company in relations with third parties and engaging the company's liability toward them. The executive officer is liable to the company for any damage caused by exceeding the powers given by the mandate contract concluded, or by not properly fulfilling that mandate or the obligations incumbent on them under the provisions of the Romanian Companies Act.¹⁰⁴ The same law regulating the liability of executive officers aims to protect the LLC associates' interests and implicitly of the company, establishing the presumption of liability of the company's management bodies – in this case of the executive officer – even after the end of their mandate for acts and actions detrimental to the company during the exercise of the mandate.¹⁰⁵

The confirmed interest in importing the business judgment rule into Romanian law is given by the specificity of the agency relationship between the company and its executive officers. In fact, the criterion for a good owner is also adequate to offer a standard of appreciation for the judge, who can solve a case practically with an identical result to one given by a business judgment rule, without creating, in reality, a gap in the applicable standards between executive officers of a JSC and of an LLC. Nevertheless, the legal transplant of the business judgement rule for JSCs chisels the regulation, principally sending a message to executive officers: risk-taking is permissible; it may be in the company's best interests; and it is expected that in some cases, risk will lead to losses. Romanian law is currently characterised by the parallel application of the two standards: the duty of care and business judgment for JSCs, the good owner standard in the case of LLCs.

Managing a company, without a doubt, means making quick decisions in an incomplete informational context. Sometimes complete information is not possible owing to insufficient time, but the decision must still be taken. Thus, the standard of diligence and prudence in case of a JSC, is not an abstract one, but is assessed in the concrete context in which the executive officer acted: whether in that context they did everything necessary to act as a good executive officer, whether within the limits

104 High Court of Cassation and Justice, Commercial Chamber, Decision No. 1246 of 27 March 2008.

105 High Court of Cassation and Justice, Commercial Chamber, Decision No. 1603 of 13 May 2008.

of their possibilities they tried to do everything possible to have all the information necessary to fundamant an accurate decision, and whether they acted with prudence and diligence in all concrete circumstances. All aspects are related to the moment when the business decision was taken, and knowledge of subsequent developments does not justify any approach other than what is possible by reference to the decision-making minute already past.

Business decisions seldom concern unambiguous questions; on the contrary, they are usually prudential judgments of choice among several plausible alternatives. Moreover, given the nature of commercial activity, in which even diligently made choices can be wrong, whether a business decision has produced harm, the quality of the decision and the process of making it, and the consequences produced are analyzed contextually, *ex ante*, by reference to the knowledge and information reasonably available to the executive officer at the time the decision was made, rather than *ex post*, by taking into account information available at the time of judicial review.¹⁰⁶

The business judgment rule added contextuality and flexibility to the abstract good owner (*bonus pater familias*) rule that is needed in a business context, adapting the legal and moral standards to the specificity of an executive officer's mandate. Finally, justified risk-taking does not involve recklessness, lack of diligence, lack of information, or violation of the corporate interest. In the latter situation, the executive officer cannot be protected from liability.

6.6. Liability of Executive Officers

The civil liability of an executive officer can be classified based on various criteria. Depending on the nature of the sanction, an executive officer's liability may be either pecuniary or non-pecuniary.¹⁰⁷ The Romanian Companies Act establishes the framework for the non-pecuniary liability of executive officers. This includes such sanctions as the removal of an executive officer owing to incompetence, poor performance of their mandate, or violation of legal obligations. Removal is also mandated by law if a claim for damages is filed against the executive officer. These measures ensure accountability and provide a mechanism for addressing misconduct or failure to fulfil the duties associated with the role.

The civil liability of an executive officer can be categorised based on the party to whom they are accountable. Ordinary liability arises when the executive officer is responsible to the company. Exceptional liability applies when the executive officer is accountable to third parties. Extraordinary liability occurs when the executive officer is accountable to the company's creditors, but only within the framework of insolvency proceedings.¹⁰⁸ The civil liability of an executive officer toward the company

106 Bercea, 2019, p. 262.

107 Todică, 2012, p. 23.

108 Stanca, 2009, p. 267.

can take several forms: direct, indirect (regressive), or guarantee-based. Additionally, this liability can be individual or joint and several.¹⁰⁹

The legal relationship between an executive officer and a company is of a dual (hybrid) nature. It is primarily governed by a contract – typically a mandate or management agreement – but also incorporates significant obligations imposed by law. When determining the nature of the officer’s liability, the decisive factor is the source of the breached obligation.

If the breach pertains to obligations set forth in a contract (including the mandate agreement, articles of association, bylaws, or resolutions of the general meeting), the executive officer is liable under the principles of contractual liability. Conversely, if the breach involves statutory obligations, the liability is governed by the principles of tort liability.¹¹⁰ Importantly, embedding statutory obligations into a contract does not alter the nature of the liability; it remains tortious in such cases.¹¹¹

I earlier indicated that I am more inclined to think that directors’ liability toward the company is always contractual. Obligations arising directly from the law still form duties that become integral parts of the mandate, which has a contractual origin. Any contract binds not only what is expressly laid down in the contract but also what the law imposes on the contractual debtor. Thus, there is no need to distinguish from case to case whether the director has a contractual or a tortious liability, with the differences in a legal regime that would arise from this qualification. This interpretation is underlined by the provisions of Article 1272 of the Civil Code. The code expressly states that a valid contract concluded is binding not only on what is expressly stipulated but also on all the consequences which established practices between the parties, custom, *law*, or equity given to the contract, according to its nature. Consequently, a breach of any of these entails contractual liability.¹¹² However, the dominant opinion is that the dual nature of the legal relationship between the company and its executive officer leads to the parallel application of the two regimes of liability (contractual and delictual).

The liability of an executive officer is based on the principle of full reparation. This means that the officer is liable not only for the company’s actual losses (*damnum emergens*) but also for the loss of profits (*lucrum cessans*) that the company failed to achieve because of the officer’s wrongful conduct. Additionally, damages include any expenses incurred by the company to avoid or mitigate the harm. The distinction between contractual and tort liability has no bearing on the scope of damages for which the executive officer is held accountable. The liability of an executive officer toward the company can manifest in three forms: direct liability, when the officer causes damage directly to the company; indirect liability, when the officer’s actions cause damage to a third party who then seeks compensation from the company; and

109 Piperea, 2014, p. 531.

110 Cărpénaru, 2014, p. 256; Georgescu, 2002, p. 433; Todică, 2012, p. 27.

111 For a contrary opinion, see Todică, 2012, p. 28.

112 Veress, 2022, pp. 77–78.

guarantee or subsidiary liability, when the officer is held responsible for the actions or transactions of another individual.¹¹³

Direct liability arises from the mixed nature of the relationship between the company and the executive officer, which is governed by both contractual and statutory obligations. Depending on the specific case, the liability may be either contractual or tortious. Recent amendments introduced by Law No. 216/2022 have expanded the scope of liability for executive officers in companies facing financial difficulties. Officers are now required to consider the interests of creditors, shareholders, and other stakeholders, to take reasonable and appropriate measures to prevent insolvency and minimise losses for these parties, and to avoid intentional or grossly negligent conduct that could jeopardise the company's viability.

The liability of executive officers is fault-based and may be either joint and several or individual. Joint liability applies in specific cases, such as when an officer improperly delegates representation rights, as outlined in Article 71(3) of the Romanian Companies Act. It also applies in ensuring the accuracy of payments, dividends, and mandatory records, as well as in fulfilling obligations prescribed by law or the constitutive act, respectively resolutions of the general meeting, as stated in Article 73(1). Additional provisions in Article 144²(4)–(5) extend joint liability to specific scenarios in JSCs. For instance, executive officers are jointly liable with their predecessors for irregularities if they were aware of these issues but failed to report them to the auditors or internal controllers.

In general, exemptions from joint liability are granted to executive officers who formally document their opposition to harmful decisions or omissions in the meeting minutes and notify the auditors in writing. This provision ensures accountability while protecting officers who act in good faith to prevent harm to the company.

A company exercises its rights and fulfils its obligations through its executive bodies. Contracts concluded and actions undertaken by executive officers bind and benefit the company directly. Acting as an organ of the company, the executive officer's conduct typically results in the company bearing liability for any damages caused. In such cases, third parties must assert their claims against the company, not the executive officer. Consequently, an executive officer's liability toward third parties is exceptional and extraordinary.

As a general rule, Article 73(2) of the Romanian Companies Act stipulates that the company's creditors may initiate direct claims against executive officers only within

113 The subsidiary liability of an executive officer is regulated under Article 144²(2) of the Romanian Companies Act. This provision establishes the principle that an executive officer is liable to the company for damages arising from transactions conducted by directors or employees if such damages would not have occurred had the officer fulfilled the oversight duties required by their position. The indirect liability of an executive officer is based on their own fault, either for failing to exercise their oversight duties or for performing them inadequately. Importantly, an executive officer is not jointly and severally liable for damages arising from the harmful conduct of a director or subordinate personnel. Joint and several liability cannot be presumed; it must be explicitly established by law. See Cărpănu et al., 2014, p. 227.

insolvency or reorganisation proceedings (this is further elaborated in the following subsection).

Nevertheless, there are two other specific situations in which an executive officer may be held directly liable by third parties:

- a) *Exceeding the scope of authority*: An executive officer may be directly liable to third parties if their actions exceed the scope of the company's activities or the limits of their mandate. According to Article 55 of the Romanian Companies Act, the company remains liable to third parties even if its representative (the executive officer) acts beyond the scope of the company's activities or their mandate, unless it can be proven that the third party knew or should have known about the irregularity. However, if the executive officer oversteps their legal or contractual authority, this may establish their direct liability toward the affected third party.
- b) *Personal guarantees*: An executive officer may also be directly liable when they personally guarantee the company's obligations (e.g. by acting as a guarantor).

These exceptions underscore that, while the primary liability lies with the company, there are circumstances where an executive officer's actions or commitments may expose them to direct claims from third parties.

The liability of members of management bodies in cases of insolvency is a cornerstone of corporate accountability under Romanian law, as regulated by Articles 169 to 173 of Law No. 85/2014 on insolvency prevention and insolvency procedures. These provisions establish the framework for holding individuals responsible for actions that contribute to a company's financial distress, ensuring that such actions are addressed and creditors' interests are safeguarded. Article 169 stipulates that members of management and supervisory bodies, along with any other individuals who have contributed to the debtor's insolvency through specific actions, may be held financially liable. This liability covers the debtor's obligations, but only up to the extent of the damage caused and directly linked to their actions. Examples of such actions include the misuse of corporate assets for personal benefit, conducting activities under the guise of the company for personal gain, or continuing loss-making operations when cessation of payments was imminent. Additionally, individuals who engage in improper accounting practices, such as maintaining fictitious records or concealing financial documents,¹¹⁴ can also be held liable. Other culpable actions include diverting assets, inflating liabilities, using ruinous financing to delay insolvency, favouring certain creditors over others shortly before insolvency, or any other intentional acts that directly contribute to the financial collapse of the company.

114 According to the High Court of Cassation and Justice, if the defendant fails to hand over the accounting documents to the insolvency practitioner after prior notification, it is presumed, albeit rebuttably, that all the necessary conditions for the imposition of patrimonial liability for their actions are met (Decision No. 14/2022 in the interpretation of the law).

Liability actions are typically initiated by the judicial administrator or liquidator, whose duty is to identify and pursue those responsible for the debtor's insolvency. If these officials fail to act, other stakeholders, including the creditors' committee or creditors holding more than 30% of the registered claims, may initiate the action. Such claims are adjudicated separately in associated cases, with the court assessing causality and culpability. In cases involving multiple individuals, liability is shared jointly and severally, provided their actions align temporally with the onset of insolvency.

Exemptions from liability are explicitly defined. Members of management who oppose decisions leading to insolvency and document their dissent are not held accountable. Similarly, actions undertaken in good faith, such as payments made as part of an agreement with creditors aimed at financial recovery, are protected, provided they do not harm or discriminate against other creditors. Preventive restructuring agreements, such as concordats, are also exempt from liability when they genuinely aim to restore the financial health of the debtor.

The consequences of liability under Article 169 of Law No. 85/2014 are significant. Financially, sums recovered from liable individuals are reintegrated into the debtor's estate to facilitate the payment of creditors during reorganisation or to cover liabilities in bankruptcy. Professionally, individuals found liable are disqualified from serving as administrators or holding similar positions in other companies for a period of 10 years, and this prohibition is officially recorded to prevent recurrence. Moreover, these civil liabilities do not preclude the application of criminal penalties if the actions constitute offenses under criminal law.

The law also provides for procedural safeguards to secure claims against the accused. The judicial administrator or liquidator can request precautionary measures, such as asset freezes, with the court requiring a guarantee of up to 10% of the claimed amount. Enforcement of these measures, as well as the collection of sums awarded, is carried out by judicial executors in accordance with the Civil Procedure Code. Post-bankruptcy, the recovered funds are distributed among creditors based on the final consolidated claims table, ensuring equitable treatment.¹¹⁵

The right to initiate liability actions is subject to a 3-year prescription period, which begins when the culpable party is identified or reasonably should have been identified. This period also considers the publication of mandatory judicial reports to ensure transparency and fairness in proceedings.

Romanian insolvency law emphasises the importance of responsible corporate governance and management. By holding directors and other decision-makers personally accountable for their actions, the law deters reckless behaviour and promotes the diligent stewardship of corporate assets. This framework not only protects creditors but also strengthens confidence in the broader insolvency system, ensuring

115 The High Court of Cassation and Justice established that the insolvency procedure cannot be concluded before the definitive resolution of the action for establishing liability for the insolvency, filed pursuant to Article 169 of Law No. 85/2014 (Decision No. 27/2022 in the interpretation of the law).

that financial distress is managed equitably and in accordance with the principles of justice and accountability.

7. Serbia

7.1. *Introductory Remarks*

This section first separately analyses issues concerning the governance structure of LLCs and JSCs, owing to differences between these structures in the two company forms. Then, it addresses issues of duties and liabilities simultaneously for both forms, as the Act on Obligations (CA) prescribes the same general rules applicable regardless of the form of the company.

7.2. *Limited Liability Company*

7.2.1. *Structure (boards), Appointment, Mandate, and Remuneration*

Serbian law does not prescribe a mandatory corporate governance structure. It is based on a presumption that the most common structures (one-tier and two-tier management) imply both advantages and disadvantages.¹¹⁶ There is no ideal system for each company, and for that reason, Serbian legislation leaves the choice to the company's promoters. This does not mean, however, that companies may entirely follow their preferences in creating company bodies. The CA predicts two management systems and provides the structure of organs in both systems. Companies are obliged to express their choice for one of the two systems in the articles of association and to establish the corporate governance structure in accordance with that choice. In LLCs, the legislator naturally opts for a less complicated system adapted to the needs of most smaller LLCs in Serbia. The difference between the two systems in LLCs is the existence of a specific supervisory authority in a company. Companies which opted for one-tier management, besides the general meeting, must have only one or more directors.¹¹⁷ Companies opting for the two-tier management must have a supervisory board in addition.¹¹⁸ According to the letter of the law, there are no boards of directors in Serbian LLCs. The number of directors is determined by the articles of association or by a resolution of the general meeting. If either does not determine the number of directors, a company has one director.¹¹⁹ The number of directors is not limited, but in any case, they act as individual bodies. The CA has no rules on the meetings, organisation, and functioning of the board of directors. The supervisory board is a collegial body that must have at least three members.

¹¹⁶ Hopt, 2011, p. 20.

¹¹⁷ Article 198, Section 2, CA.

¹¹⁸ Article 198, Section 3, CA.

¹¹⁹ Article 218, Section 3, CA.

The number of supervisory board members is determined by the articles of association and should be odd.¹²⁰

A director is appointed by the general meeting (i.e. supervisory board) if the company has a two-tier management system. When incorporating a company, a director may be appointed by the articles of association. In LLCs, there are no mandatory requirements for directors. These requirements may be prescribed in the articles of association or a resolution of the general meeting (e.g. professional experience, education, and Serbian or foreign language). Unless otherwise specified in the decision on appointment, the mandate of the director starts on the day of adoption of the appointment decision.¹²¹ By default, the mandate of a director is not limited (but could be arranged differently in the articles of association). Serbian law adopts the rule that a director may be dismissed at any time without cause by those who have appointed her/him.¹²² This is an important instrument of shareholders' power in the company, and their control over performing directors' tasks, which is particularly relevant in cases of professional management (when the ownership and management functions are separated).¹²³

Contrary to the case for directors, the CA prescribed conditions for appointment as a member of the supervisory board. Besides the legal capacity, other requirements are negative: I) a member of the board may not be a director or member of the supervisory board in more than five companies; II) she/he may not have been sentenced for a crime against the economy in the previous 5 years, determined as the date of the final ruling, where this period does not include time spent serving a prison sentence; III) nor may it be a person imposed with a security injunction prohibiting her/him from conducting the activity which constitutes the predominant business activity of the company, for the duration of such prohibition; and IV) she/he must not be employed in the company.¹²⁴

A candidate for a supervisory board member is nominated by the supervisory board and/or by the shareholders representing at least 5% of the legal capital.¹²⁵ The chairman and members of the supervisory board are elected by the general meeting.¹²⁶ Upon company incorporation, the first chairman and members of the supervisory board may be appointed by the articles of association. Members of the supervisory board are appointed for a period stipulated by the articles of association, which may not be longer than 4 years.¹²⁷ If the mandate of the supervisory board members is not stipulated by the articles of association or a resolution of the

120 Articles 433, Sections 1 and 2 in relation to Article 228, Section 2, CA.

121 Article 219, Section 3, CA.

122 Article 220, Section 1, CA.

123 Vasiljević, 2023, pp. 240–241.

124 Article 229, Section 1 and Article 382, Sections 1 and 3, CA.

125 Article 434, Section 2 in relation to Article 229, Section 3, CA.

126 Article 229, Section 2, CA.

127 Article 385, Section 1 in relation to Article 229, Section 4 and Article 435, CA.

general meeting on the appointment of directors, their mandate lasts for 4 years.¹²⁸ Upon expiry of the mandate, a director may be reappointed. The general meeting of the company may dismiss the member of the supervisory board even prior to the expiry of the mandate for which she was appointed, without stating the reasons.¹²⁹

The CA provides common rules on the remuneration of LLC directors and supervisory board members. These rules stipulate the structure of the remuneration, the determination of the remuneration, as well as the recently introduced specific shareholder's right to inspection regarding the remuneration. The structure of the remuneration consists of the salary, that is, the remuneration for the work, and of the bonus rights through the possible allocation of shares.¹³⁰ The total remuneration or the manner of its determination shall be determined by the articles of association, the resolution of the general meeting, or the decision of the supervisory board (if the management of the company is two-tier).¹³¹ The amount of the total remuneration may depend on the business results of the company, but this remuneration cannot be determined as a participation in the distribution of the company's profit.¹³² A shareholder who owns a share representing at least 5% of the legal capital of the company may require a company to inspect the data on the amount and the structure of the total remuneration for each director or the supervisory board member. A company must, at the latest within 3 days of the date of receiving the request, allow the shareholder to inspect the data.¹³³

7.2.2. Powers and Shaping the Powers

There is a negative determination of directors' powers in LLC. In a company with a one-tier board system, the directors perform all tasks not falling under the competence of the general meeting.¹³⁴ In a company with a two-tier management system, the directors perform all tasks not falling under the competence of the general meeting and the supervisory board.¹³⁵ The directors of a company have two main powers: they are the legal representatives of the company, and they manage the company's business operations. The former refers to their power to conclude agreements on behalf of the company, as well as to represent the company in different judicial and administrative proceedings. The latter generally includes day-to-day decision-making and running the company. It should be reiterated that the following general rule substantially orders directors' position in the company and their relationship with other organs: a director represents and manages the company's operations in keeping with

128 Article 385, Section 2 in relation to Article 229, Section 4 and Article 435, CA.

129 Article 395 in relation to Articles 231 and 439, CA.

130 Article 393, Section 1, CA.

131 Article 393, Section 2, CA.

132 Article 393, Section 3, CA.

133 Article 393a, Section 1, CA.

134 Article 224, Section 4, CA.

135 Article 224, Section 5, CA.

the articles of association, resolutions of the general meeting, and instructions of the supervisory board, if the company has a two-tier management system.¹³⁶

In cases for which the stated general principle gives discretion to the directors, it is important to determine their mutual relationships, that is, the internal shaping of powers between them (as a company may have several directors). This is especially relevant because there are no rules on the board of directors, the sessions of the board, quorum, majority, etc. In essence, the question to be answered is whether the directors are to perform their tasks jointly or independently. Joint performance substantially means unanimity, while independent performance allows each director to exercise every power that directors have in relation to the company. Serbian law prescribes only default rules on these matters, thereby leaving the final decision on the shaping of powers to the shareholders. If the articles of association do not contain a “final say” on these matters, then the directors must represent the company and manage its business operations jointly.¹³⁷ However, unanimity is in effect requested even when the articles of association or the resolution of the general meeting provide that, in managing the company’s operations, each director acts independently. In such a case, the CA prescribes the veto right of any director. In other words, a director may not undertake a contemplated action if any of the remaining directors have objections thereto.¹³⁸ However, if the intended action is blocked, he may ask for instructions from the general meeting or the supervisory board (if any).

The main role of the supervisory board is to oversee directors’ performance of their functions. The board has several tools in exercising this role: I) it may dismiss directors without any cause at any moment, II) it controls and adopts directors’ reports on business operations, III) it determines their remuneration and principles for remuneration, and IV) it may give mandatory instructions to the directors. Besides its supervisory role, the board also has some financial and management powers. For instance, the board sets the company’s business strategy, establishes accounting policies of the company and risk management policies, controls the proposed profit distribution and other payments to shareholders, and issues prior consent for the conclusion of some of the most significant transactions, unless otherwise provided by the articles of association or resolution of the general meeting (e.g. loan and credit agreements, sale of immovable property, sale of share the company owns in other companies).¹³⁹

136 Article 224, Section 1, CA.

137 Articles 221 and 224, Section 2, CA.

138 Article 224, Section 3, CA.

139 Article 232, CA.

7.3. Joint-Stock Company

7.3.1. Structure (boards), Appointment, Mandate, and Remuneration

The CA allows a JSC to choose between one-tier and two-tier board structures. The board structures offered by the law are different for private and public JSCs. The common body for both structures is the general meeting. The one-tier system, private JSC, besides its general meeting, has one or more directors, or a board of directors, while public JSCs must have a board of directors (which is always formed when a company has three or more directors).¹⁴⁰ In the two-tier system, private JSCs must have one or more executive directors or an executive board, and a supervisory board, while public JSCs have an executive board (which is always formed when a company has three or more executive directors), and a supervisory board.¹⁴¹

In the one-tier system, the main difference is between executive and non-executive directors. If a company has less than three directors, each director is an executive director.¹⁴² A public JSC shall have non-executive directors whose number is higher than the number of executive directors.¹⁴³ One of the executive directors may be a general director (CEO). Among (non-executive) directors, a (public) JSC may have a chairman. It follows that the functions of a general director and chairman are separated in the one-tier structure in public JSCs. Public JSC must have at least one independent director.¹⁴⁴

The following subjects may propose candidates for directors: I) directors, that is, the board of directors (not applicable to the public JSC); II) appointment committee (if any); and III) shareholders with 5% of the legal capital.¹⁴⁵ The general meeting appoints directors, while the general director and the chairman are elected by fellow directors. The CA predicts direct voting as a rule and cumulative voting as an exception, whose application is substantially limited. Cumulative voting is an option available only to the public JSC, and provided this option is embedded in the company's statute.¹⁴⁶ Additionally, it is possible to co-opt directors in case of a reduced number of directors.¹⁴⁷

At the level of a default rule, the mandate of a director lasts 4 years. If specified in the statute, it may not exceed 4 years.¹⁴⁸ The general meeting may dismiss directors at any time without cause.

The two-tier system does not recognise only non-executive directors, as their functions are taken over by the supervisory board. In the two-tier system, executive

140 Article 326, Section 2, CA.

141 Article 326, Section 3, CA.

142 Article 387, Section 2, CA.

143 Article 387, Section 3, CA.

144 Article 392, Section 1, CA.

145 Article 384, Sections 2 and 3, CA.

146 Article 384, Section 4, CA.

147 Article 386, CA.

148 Article 385, CA.

directors are appointed by the supervisory board of a company. The appointment committee, if any, nominates a candidate for an executive director. If no appointment committee has been set up in the company, each member of the supervisory board may nominate a candidate for an executive director.¹⁴⁹ The supervisory board may appoint one of the executive directors, authorised to represent the company, to be the general director of the company.¹⁵⁰ Such appointment is mandatory for the supervisory board if the company has an executive board. When the executive board works in the sessions, the general director performs at the same time the function of the chairman of the board.¹⁵¹

The supervisory board has at least three members. The number of supervisory board members is determined by the articles of association and shall be odd.¹⁵² Supervisory board members are appointed by the general meeting. A candidate for a supervisory board member is nominated by:

- a) the supervisory board;
- b) the appointment committee, if any; or
- c) the shareholders who own 5% of the legal capital.¹⁵³

A public JSC has at least one member of the supervisory board who is independent of the company.¹⁵⁴

Regarding dismissal, Serbian law follows the principle that the same body is competent both for the appointment and dismissal. Hence, in the two-tier structure power to dismiss has the supervisory board. Meanwhile, the general meeting may dismiss the members of the supervisory board. In any case, dismissal is not dependent on any justified reason. Directors and supervisory board members may be dismissed at any cause.¹⁵⁵

The rules on the structure of remuneration, the determination of remuneration, and the shareholder's right to inspection as regards the remuneration, as presented for the LLCs in this section, are equally applicable to private JSCs. The CA specifies certain additional rules that apply only to public JSCs. Most importantly, a public JSC must have a remuneration policy for directors and members of the supervisory board.¹⁵⁶ Such policy must be clear and intelligible. The general meeting decides on the proposed remuneration policy. The company may pay the remuneration only in accordance with the remuneration policy adopted by the general meeting. The board of directors (i.e. the supervisory board if the management of the company is two-tier, or the remuneration committee if it is formed) shall annually prepare a

149 Article 420, Sections 2 and 3, CA.

150 Article 423, Section 1, CA.

151 Article 423, Section 4, CA.

152 Article 433, Sections 1 and 2, CA.

153 Article 434, Section 2, CA.

154 Article 437, Section 1, CA.

155 Article 395, CA.

156 Article 463a, Section 1, CA.

clear, comprehensive, and intelligible report on all remuneration paid or committed for payment by the company or an affiliated company operating within the same group. The auditor's report shall be submitted to the general meeting together with the remuneration report. The company shall publish the remuneration report on its website after the session of the general meeting at which that report was discussed.

7.3.2. *Powers and Shaping of Powers*

Executive directors in the one-tier structure have two main powers: they are legal representatives of a company, and they manage the company's business operations.¹⁵⁷ If a company has two or more executive directors, they jointly conduct the operations of the company and represent it, unless the articles of association or a resolution of the general meeting stipulate otherwise.¹⁵⁸ A general director coordinates the work of executive directors and organises the company's business operations.¹⁵⁹

Non-executive directors have a dual function: I) to monitor the executive directors, and II) to propose the business strategy, and monitor its implementation. They also decide on approving executive directors' related party transactions.¹⁶⁰

Both executive and non-executive directors are the members of the board of directors if any. The main powers of the board of directors include but are not limited to: I) defining the business strategy and business objectives of the company; II) conducting the company's operations and defining the internal organisation of the company, and III) implementing resolutions, and other measures of the general meeting.¹⁶¹ If the votes of directors are evenly distributed, the chairman of the board of directors has the casting vote, unless otherwise prescribed by the articles of association or the rules of procedure.¹⁶²

Several rules define the mutual relations between different bodies in the Serbian one-tier structure of JSCs and the nature of the described structure of bodies: I) the board of directors must not delegate its powers to executive directors; II) the board of directors may delegate its powers to the general meeting only by its own decision unless otherwise prescribed by the articles of association, III) in conducting the operations of the company, executive directors shall comply with the limitations prescribed by the CA, articles of association, resolutions of the general meeting, or decisions of the board of directors, and IV) executive directors have reporting obligations toward the board of directors. The stated features indicate that the Serbian one-tier structure most likely presents a modified one-tier structure.¹⁶³

The powers of executive directors in the two-tier structure are the same as those in the one-tier structure. The same is true for the general director, and for her right to

157 Article 388, Section 1, CA.

158 Article 388, Section 2, CA.

159 Article 389, Section 2, CA.

160 Article 390, Sections 1 and 2, CA.

161 Article 398, Section 1, CA.

162 Article 406, Section 2, CA.

163 Jovanović, Radović, and Radović, 2021, p. 542.

cast a decisive vote in performing her role as chairman (if the executive board works in sessions). The executive board has two main powers:

- a) to manage the business operations, and
- b) to implement the resolutions of the general meeting.¹⁶⁴

The supervisory board has a dual function:

- a) overall management responsibilities, and
- b) controlling executive directors.¹⁶⁵

Regarding the mutual relations between different bodies, several rules can be highlighted: I) the powers of the executive board and supervisory board are strictly separated, with delegation of powers forbidden in both directions; II) the supervisory board may delegate its powers to the general meeting; III) the executive board has reporting obligations toward the supervisory board; IV) there is a list of significant transaction for which the executive board needs the supervisory board's approval (e.g. transactions related to the shares, immovable assets, and credit and loan agreements); and V) when managing the company's operations, the executive directors shall observe the limitations regarding the closing of certain transactions or types of affairs that require the consent of the supervisory board or the general meeting, and which are prescribed by the CA, articles of association, resolutions of the general meeting, and decisions of the supervisory board.

7.4. Directors' Duties and Liabilities (Common Rules for Limited Liability Companies and Joint-Stock Companies)

7.4.1. Duty of Care and Loyalty

Serbian law recognises five main special duties of the members of the management, and of the controlling or majority shareholders:

- a) duty of care,
- b) duty to report transactions with personal interest,
- c) duty to avoid conflicts of interest,
- d) duty to keep trade secrets, and
- e) duty not to compete with the company.

Three introductory remarks should be emphasised. First, those special duties are, in principle, owed by the members of the management, and of the controlling or majority shareholders. The CA strictly enumerates the persons who owe duties (this list may be enlarged by the articles of association).¹⁶⁶ However, not every person from the general list of subjects who owe special duties is the subject of each special duty

¹⁶⁴ Article 427, Section 1, CA.

¹⁶⁵ Article 441, Section 1, CA.

¹⁶⁶ Article 61, CA.

(e.g. shareholders are not subject to duty of care). Second, the object of the duties is a company. There are no explicit or implicit hints on the meaning of the interest of a company, and whether there is room in the interpretation of that interest to include the interests of other stakeholders but shareholders. Furthermore, the courts did not have many occasions to rule on this issue. Third, although not explicitly, Serbian law follows the comparative law understanding of the existence of the two main duties (care and loyalty).¹⁶⁷ The former is explicitly designated duty, while all other duties, except the duty of care, are considered as emanations of the duty of loyalty.

The duty of care is related to the process of directors' decision-making in the broadest sense, as well as the way of assuming risks in running the company's affairs. It establishes the criteria for evaluating directors' decision-making.¹⁶⁸ According to the CA, directors, members of the supervisory board, representatives, procurators, and the liquidator, when acting in those capacities, are obliged to act in good faith, with the care of a reasonable businessman, and in the reasonable belief that they act in the best interest of the company.¹⁶⁹ In determining the required degree of care, the Serbian legislation applies the so-called objective-subjective criteria. This criterion involves an objective, lower level of care, which applies to all subjects of the duty of care, as well as a subjective, higher level of care applicable only to those subjects who possess special knowledge and skills. Specifically, the objective part of the criteria is based on the assessment of an average person holding the position of director (a reasonably careful person who would possess the knowledge, skills, and experience that could reasonably be expected to the performance of a director's obligations).¹⁷⁰ The subjective part of the criteria is relevant only when the person in question possesses specific knowledge, skills, or experience.¹⁷¹ In that case, the court should assess the required level of care from the angle of that particular person and his capabilities.

The duty of loyalty comes to the fore in situations in which there is a "temptation" for a director or another person with special duties to ignore the interest of a company and to act in personal interest (directly or indirectly).¹⁷² The duty of loyalty has a broader personal scope of application contrasted to the duty of care. Besides the members of the management, this duty is owed by the shareholders who may exert influence on the company's business operation. On the whole, this influence is either a result of their share ownership or other ways of controlling the company or its management. In that regard, Serbian law confers the duty of loyalty to i) any shareholder who possesses more than 25% of voting rights; or 2) a shareholder who possesses less than 25% of voting rights in the company if that shareholder gained the

167 Sections 9.03 and 9.04, European Model Companies Act.

168 Mihajlović, 2018, pp. 44–45.

169 Article 63, Section 1, CA.

170 Article 63, Section 2, CA.

171 Article 63, Section 3, CA.

172 Mihajlović, 2018, pp. 50–52.

status of the controlling shareholder.¹⁷³ Control implies the right or possibility that one person, independently, or with other persons acting jointly with him, carries out the controlling influence on the business operations of a company. The CA specifies that the control may be achieved by means of having a share in the share capital, a contract, or right to appoint the majority of directors, that is, supervisory board members.¹⁷⁴

7.4.2. Conflicts of Interest and Self-Dealing

Three special duties specified in the CA aim to mitigate the potential negative consequences of the conflict of interest and self-dealing: the duty to report transactions in which a subject of the special duties has a personal interest, the duty to avoid conflict of interest, and the duty not to compete with the company. All three duties are grounded on the same assumption: they encompass acts and transactions that are only potentially harmful to the company. For that reason, they are only provisionally prohibited; in other words, they must be reported to the company, which may approve their conclusion.

The Serbian notion of “transactions with personal interest” covers the typical, most common, and most obvious cases of conflict of interest between the subject of special duties and a company, as well as others, sometimes less common, disguised cases which are, owing to its concealed nature, perhaps more important for the adequate enforcement of the conflict-of-interest rules. Among those typical and hard-to-conceal transactions, the CA prescribes that a personal interest of the person subject to the special duties exists in case of i) entering into a legal transaction between the company and that person (or its affiliated person) or b) legal action (taking actions in court and other proceedings, waiving the rights, and similar) that the company undertakes toward this person (or its affiliated person). Remaining cases in which the CA presupposes the existence of the personal interest of the subject of the duties concern legal transactions and actions where the subject of the duty does not directly take part (as a contracting party). On the contrary, the law here has in mind situations in which there is a legal transaction between the company and a third party, or where the company undertakes a legal action toward a third party. These cases are considered as transactions with a personal interest under two conditions: I) if such a third party is in a financial relationship with the subject of the duty (or with its affiliated person); and II) if it can be expected that the existence of such a relationship affects its actions. Finally, provided that both conditions are satisfied, the CA considers the subject of the duties to have a personal interest if the company enters into a legal transaction or undertakes a legal action from which a third party has *only* a commercial interest.¹⁷⁵

173 Article 61, Section 1, CA.

174 Article 62, Section 5, CA.

175 Article 65, Section 4, CA.

If a specific transaction is to be considered to have a subject of the duty with a personal interest, the following procedure must be followed: I) notification of the competent body about the transaction; II) assessment of the fair value of assets or rights that are the object of a transaction, conducted by a certified independent expert; III) approval of the transaction by the competent body; IV) notification of the general meeting about the approval; and V) publishing on its internet page or on the internet page of the BRA that it intends to enter into a legal transaction, that is, to undertake a legal action which needs an approval. The influence of the Shareholders Rights Directive II on the depicted procedure is apparent. The CA also contains the so-called safe harbour rule. In that vein, even when the requested procedure was not carried out, there will not be a breach of duty if in the relevant court proceedings brought against the subject of the special duties, that subject proves that the legal transaction or legal action was in the interest of the company.¹⁷⁶

The duty to avoid conflict of interest prohibits the subjects of the duty from using their personal interest or the interest of their affiliated persons in relation to: I) the company's assets, II) the information they had access to in that capacity, which was otherwise not publicly available, III) corporate opportunities.¹⁷⁷ The duty to avoid conflict of interest exists regardless of whether the company was able to use the assets, information, or conclude transactions. As previously indicated, use of assets, information, and corporate opportunities may be allowed provided the company approves it. Meanwhile, the subjects of the duty are strictly prohibited from abusing their position in the company,

The duty not to compete prescribes a rather long list of positions in competing companies that the subject of the duty may not pursue without approval. It even (provisionally) prohibits that subject from engaging in any other way position (beyond those strictly listed) in a competing company, when the company does not allow it.¹⁷⁸

7.4.3. *Liability*

Liability for violation of the duties of care and loyalty has three forms: I) civil liability; II) the consequences to the status of a person in breach, and III) criminal liability. The consequences of a concrete breach largely depend on the specific duty that was breached. In other words, the CA relates specific consequences and specific civil actions that may be (or not) brought for breach of each duty.

The civil liability rules entail the company's right to seek the damage compensation, as well, in certain cases (breach of the duty to avoid conflict of interest or the duty not to compete), the right to disgorgement of profits. In case of a breach of duty to report a transaction with personal interest, the company may also demand the annulment of such transaction.¹⁷⁹

176 Article 68, CA.

177 Article 69, CA.

178 Article 75, Section 1, CA.

179 Article 67, Section 1, CA.

The violations of the duty of loyalty may substantially affect the status of the person who breaches that duty. Most strikingly, the CA recognises a sanction of disqualification, that is, of the temporary suspension in performing the functions of a director, supervisory board member, representative, or procurator of a company. This sanction applies to the person who derelicts his duty to report transactions with personal interest. The disqualification lasts 12 months, and the court must order it if it finds the infringement of the duty in question.¹⁸⁰ Regarding the status, the shareholder's breach of the duty not to compete is a justified reason for the expulsion of that shareholder.¹⁸¹

Adequate lawsuits to effect the explained forms of liability are to be primarily lodged by a company. The CA also allows minority shareholders to bring derivative lawsuits, if the company did not react to their request to file a lawsuit (within the specified time limit of 30 days from the date of submission of said request). The right to bring a derivative lawsuit belongs to one or more shareholders who hold at least 5% of the company's legal capital.¹⁸²

Subjects of the special duties may be criminally liable either because of committing a crime embedded in the Criminal Code (e.g. abuse of trust in performing an economic activity, and abuse of the position of a responsible person) or committing a crime prescribed in the CA (concluding a transaction in the case of personal interest without adequate approval, thereby violating the duty to avoid a conflict of interest).¹⁸³

8. Slovenia

8.1. Structure (Boards), Appointment, Mandate, and Remuneration

8.1.1. The Limited Liability Company

The manager performs the function of management and representation in an LLC. The company can have one or more managers who, at their own liability, manage the company's affairs (Article 515(1), ZGD-1). If there are more managers, it must be specified in the articles of association whether they act collectively or as individual managers (Article 515(5), ZGD-1). The managers are appointed by the shareholders. A shareholder who is designated as a manager is also entitled to vote on decision-making.¹⁸⁴ The requirements that an individual must meet to be appointed as a member of the management or supervisory body in a JSC (Article 255(2,3), ZGD-1) apply *mutatis mutandis* when determining requirements for an individual to become a manager in an LLC (Article 515(6), ZGD-1). The general meeting of shareholders can

180 Article 67, Section 2, CA.

181 Article 76, CA.

182 Article 79, Section 1, CA.

183 Articles 582–583, CA.

184 Ivanjko, Kocbek, and Prelič, 2009, p. 938.

remove the manager at any time, regardless of whether they were appointed for a specific or indefinite period. However, the articles of association may specify that the general meeting can only revoke the manager for reasons determined in the articles of association (Article 515(3), ZGD-1).

In an LLC, the manager, along with the general meeting of shareholders, is a mandatory body, whereas the existence of a supervisory board in an LLC is optional and is determined by the shareholders through the articles of association. If the articles of association specify that the LLC has a supervisory board, the provisions regarding the supervisory board in a JSC are applied *mutatis mutandis*, unless the articles of association state otherwise (Article 514, ZGD-1).

8.1.2. *The joint-stock company*

The ZGD-1 allows a JSC to choose between a two-tier system of company management with a management board and a supervisory board, or a one-tier system of company management with a board of directors (Article 253(2), ZGD-1). The law collectively refers to these bodies as management or supervisory bodies and regulates them in Articles 253–264 of the ZGD-1.

A management or supervisory body consists of at least three members (Article 254(2), ZGD-1). This applies to the supervisory board and the board of directors, but not to the management, which, according to a specific provision of the ZGD-1, can have one or more members (Article 265(2), ZGD-1). If a management or supervisory body has multiple members, one member is appointed as the chairman (Article 254(3), ZGD-1). Members of management or supervisory bodies are appointed for a period which does not exceed 6 years, with the possibility of reappointment (Article 255(1), ZGD-1). Any legally competent natural person can be a member of a management or supervisory body, except a person who:

- a) is already a member of another management or supervisory body of the same company;
- b) has been convicted in a final judgement of a criminal offense against the economy, against employment relations and social security, against legal transactions, against property, against the environment, space, and natural resources. Such a person cannot be a member of a management or supervisory body for 5 years from the finality of the judgment and 2 years after serving a prison sentence;
- c) has been subject to a preventive measure prohibiting the exercise of a profession, as long as the prohibition is in force; or
- d) who, acting as a member of the management or supervisory body of a company for which bankruptcy proceedings had been initiated, has been convicted in a final judgement and is thereby required to compensate the creditors in accordance with the Act governing financial operations of companies and damage liability. This prohibition applies for 2 years after the court ruling became final (Article 255(2), ZGD-1).

If, for any reason, one or more members of management or supervisory bodies are missing, the court may, in urgent cases, appoint them upon the proposal of interested parties (Article 256, ZGD-1). The ZGD-1 stipulates the obligation to convene a meeting of the management or supervisory body at least once a quarter, and at the request of each member of the management or supervisory body, who specifies the purpose and reason for convening the meeting, the chairman must immediately convene a meeting, which must be held within 2 weeks of the convening. Each member of the management or supervisory body has one vote when making decisions. The quorum for decision-making is set to at least half its members, unless the articles of association provide otherwise. Generally, a majority of the votes cast is required for the validity of a resolution of the management or supervisory body. In the event of an equal number of votes, the chairman of the management or supervisory body has deciding vote. However, a member of the management or supervisory body shall be deprived of his voting rights when deciding on matters relating to him (Article 257, ZGD-1).

The management board is a body in a JSC that combines two functions: the management function and the representation function. Management refers to the internal relationship and the direct and current management of affairs, while representation refers to external relationships, namely, relationships with third parties.¹⁸⁵ There is a restriction for a member of the management board that they cannot simultaneously be a member of another management or supervisory body of the same company, which means they cannot be a member of both the management board and the supervisory board of the company. There is also a prohibition on simultaneous membership in the management board of a subsidiary company and the supervisory board of a controlling company (Article 273(1), ZGD-1). Members of the management board are appointed for a maximum of 6 years with the possibility of unlimited reappointment, provided that reappointment cannot take place earlier than 1 year before the expiration of the term. An individual member of the management board or its president can be recalled by the supervisory board in the following cases specified in Article 268(2) of the ZGD-1:

- a) if they seriously breach their obligations;
- b) if they are incapable of managing the company's affairs;
- c) if the general meeting expresses a vote of no confidence, except if the vote of no confidence is based on obviously unfounded reasons; or
- d) for other economic and business reasons (significant changes in the structure of shareholders, reorganisation, etc.).

The main function of the supervisory board is to oversee the management of the company's affairs. The supervisory board is a collective body consisting of at least three members (Article 254, ZGD-1). The supervisory board has two types of members: those representing the interests of the shareholders and those representing the employees, through whom employee participation in the management of the company

185 Ibid., p. 590.

is implemented, and they are elected in accordance with the Workers' Participation in Management Act (*Zakon o sodelovanju delavcev pri upravljanju*; ZSDU). Members of the supervisory board representing shareholders are elected by the general meeting with an ordinary majority (Article 274(1), ZGD-1). Regarding the eligibility criteria for members of the supervisory board, Article 273(1) of the ZGD-1 stipulates that a member of the supervisory board cannot be:

- a) a member of the management board or the board of directors of a subsidiary company;
- b) a procurator or representative of that company;
- c) a member of the management board of another JSC, where they are a member of the supervisory board of that company;
- d) a person who is already a member of the supervisory board or board of directors in three companies; or
- e) a person who does not meet the requirements specified in the articles of association.

The term of office for a member of the supervisory board is legally limited to a maximum of 6 years, with the possibility of multiple reappointments (Article 255(1), ZGD-1). The General Meeting can recall the members of the supervisory board it has elected before the expiration of their term. A resolution on recall requires a majority of at least three-quarters of the votes cast, with the articles of association being able to specify a higher majority and other requirements (Article 275(1), ZGD-1). Members of the supervisory board can be appointed by the court upon the proposal of the management board. The court can also decide on the recall of a member of the supervisory board upon the proposal of shareholders whose shares represent at least 10% of the share capital, if there are well-founded reasons (Article 276, ZGD-1).

The board of directors is a body holding a unique position in companies with a one-tier management system. Compared to bodies in companies with a dualistic management system, the board of directors serves as both the executive and supervisory body, as it leads the company and supervises the execution of its operations in accordance with Article 285(1) of the ZGD-1. In comparative corporate legislation, it is referred to differently, for example, as the "board of directors" in Anglo-American systems and as *Verwaltungsrat* in Germanic systems.¹⁸⁶ The board of directors is a collective body consisting of at least three members (Article 254, ZGD-1) of which some members represent the interests of shareholders, as well as at least one member representing employees, who is elected in accordance with the ZSDU. The general meeting elects the members of the board of directors who represent the shareholders. Regarding the conditions for the election of board of directors, elections, and their removal, the provisions applicable to members of the supervisory board are applied *mutatis mutandis* (Article 288, ZGD-1).

186 Ibid., p. 581.

In relation to the remuneration of individual members of the management board (salary and reimbursement of expenses, benefits, performance-related rewards, e.g. stock and option-based incentive programs, and profit sharing), the supervisory board must ensure that the total remuneration is proportionate to the tasks of the management board members and the financial condition of the company (Article 270(1), ZGD-1).

The law stipulates that severance pay can only be paid in the event of premature termination of the contract and cannot be paid in certain cases, such as when a management board member has been recalled in accordance with Article 268(2) of the ZGD-1 or when a management board member has voluntarily terminated the contract. The general meeting can determine the maximum amount of severance pay (Article 270(2), ZGD-1).

If the business performance of the company deteriorates after the remuneration has been determined, which could endanger its economic condition or cause damage, the supervisory board can reduce the remuneration. The reduction in remuneration does not affect other provisions of the contract, and a management board member has the right to terminate the contract at the end of the next quarter with a 2-month notice period (Article 270(3), ZGD-1). If the members of the supervisory board fail to reduce the remuneration when they should have done so based on the abovementioned conditions, they are liable for damages caused to the company. The supervisory board also has the right, within 3 years of the date of payment of the performance-related reward, to demand the return of the already paid reward or its proportionate part (Article 270(4), ZGD-1), namely in the following cases:

- a) if the annual report is definitively declared void, and the grounds for nullity relate to items or facts that formed the basis for determining the reward; or
- b) based on a special auditor's report determining that criteria for determining the reward were incorrectly applied or that decisive accounting, financial, and other data and indicators were not correctly determined or considered.

Regarding the payment to members of the supervisory board, Article 284 of the ZGD-1 stipulates that they can be remunerated for their work, which must be determined in the articles of association or by a resolution of the general meeting. The remuneration must be proportionate to the tasks of the supervisory board members and the financial position of the company, whereby the participation of supervisory board members in profits is strictly prohibited.

In a company whose securities are traded on an organised market, the remuneration of individual members of the management board and the payment to members of the supervisory board must be determined and harmonised in accordance with Article 294a of the ZGD-1, which specifies the obligation of such a company to establish a remuneration policy for the of management and supervisory bodies and executive directors. The policy is formulated by the company and submitted to the general meeting for approval.

The remuneration policy is clear, understandable, and contains a detailed description of the components of remuneration, including their proportion and performance criteria. It specifies the conditions for the payment of variable remuneration, deferral periods, and repayment options. In the case of remuneration in the form of shares or stock options, the policy determines the allocation periods, ownership requirements, and their contribution to the business strategy. The policy also covers legal transactions related to remuneration, including notice periods and severance payments. The remuneration policy is regularly reviewed and considers the opinions of shareholders. In exceptional circumstances, the company may temporarily deviate from the remuneration policy. The remuneration policy is publicly disclosed on the company's website along with the voting results and must be accessible for at least 10 years (Article 294a, ZGD-1).

8.2. Powers (also for Supervisory Boards) and Shaping the Powers

8.2.1. The Limited Liability Company

In the case of the LLC the relevant rules were presented above, when examining the structure, appointment, mandate, and remuneration in these types of companies.

8.2.2. The Joint-Stock Company

The management board shall direct the business operations of the JSC independently and at its own liability (Article 265(1), ZGD-1). Management involves making daily decisions on individual matters related to the company's operations. The management can consist of one or more members, called directors. If there are multiple members in the management, decisions are made unanimously, unless the articles of association state otherwise. However, the articles of association cannot stipulate that in case of differing opinions, the vote of an individual member or members prevails over the majority (Article 265(2,3,4), ZGD-1).

Additionally, the management represents and acts on behalf of the company. In the case of multiple members in the management, they represent the company collectively, unless the articles of association state otherwise. In collective representation, a statement of will made by any member of the management is binding on the company as a whole if all members are authorised. The company's articles of association or the supervisory board, if provided for in the articles of association, can determine that individual member of the management board or at least two members of the management or a member of the management together with a procurator are authorised for representation (Article 266, ZGD-1).

The management also has certain powers related to the shareholders' meeting, namely:

- a) preparing measures within the competence of the general meeting upon its request;
- b) preparing contracts and other acts that require the approval of the general meeting for validity; and

- c) implementing resolutions adopted by the general meeting (Article 267, ZGD-1).

The powers of the management cannot be revoked, either by the articles of association or by a decision of the general meeting or the supervisory board. However, the articles of association or the supervisory board may stipulate that certain types of transactions can only be conducted with the consent of the supervisory board (Article 281(5), ZGD-1).

The management must also report to the supervisory board at least once per quarter on matters relating to the planned business policy, the profitability of the company, the course of business, and the financial condition of the company (Article 272(1), ZGD-1).

The fundamental function of the supervisory board in a JSC is to perform the function of overseeing the management of the company's affairs. Within this framework, the supervisory board examines and reviews the company's books and documentation, its cash register, its securities and inventory of goods, and other matters. The supervisory board can request any information necessary for carrying out its supervision and has the right to convene the general meeting.¹⁸⁷

The supervisory board also has the authority to appoint one or more committees, such as the audit committee, the nominations committee, and the remuneration committee, which prepare proposals for resolutions of the supervisory board, ensure their implementation, and perform other professional tasks (Article 279, ZGD-1). If it is a company of public interest,¹⁸⁸ the supervisory board must establish an audit committee.

As stated below,¹⁸⁹ the supervisory board has important powers regarding giving consent to transactions entered into by the members of the management board of a JSC or their family members with the company, and giving consent to transactions entered into by the company with related parties.

The supervisory board is authorised and responsible for reviewing the prepared annual report and the proposal for the use of the balance sheet profit submitted by the management, and confirming both proposals based on a written report on the findings (Article 282, ZGD-1).

In addition to its supervisory functions, the supervisory board also has managerial functions when it comes to the relationship between the company and the members of the management board; in other words, the chairman of the supervisory

187 Ibid., pp. 301–602.

188 A public-interest entity is a company whose securities are traded on a regulated securities market, a credit institution as defined by the law governing banking, an insurance company as defined by the law governing insurance and a pension company as defined by the law governing pension companies. A public-interest entity is also a company subject to statutory audit under the criteria of the law governing companies in which the State or the municipalities, jointly or severally, directly or indirectly, have a majority ownership interest. A public-interest entity may also be another legal entity subject to statutory audit, if so provided by another law (Article 3(1), ZRev-2).

189 See the following subsection.

board represents the company vis-à-vis the members of the management board (Article 283, ZGD-1).

In a one-tier system, the board of directors of a JSC assumes the powers of both the management and the supervisory board, thus combining the functions of management, representation, and oversight. The provisions governing the powers of the supervisory board are *mutatis mutandis* applied to the supervisory powers of the management board (Article 289(1), ZGD-1).

The management functions are delegated to the executive directors appointed by the board of directors. They are usually appointed from among the members of the board of directors, but it is not necessary. However, an explicit legal provision specifically prohibits the chairman of the board of directors from being an executive director (Article 289(2), ZGD-1).

Although there are several similarities between the position of the members of the management board and the executive directors, there are fundamental differences between them. The management independently and at its own liability conducts the company's affairs, while the executive directors, despite their management function, have significantly more limited powers. They must comply with the instructions and restrictions set by the general meeting, the management board, the articles of association, and the rules of procedure for executive directors in the performance of their duties (Article 290(5), ZGD-1).

The executive directors are accountable to the board of directors that appointed them and the board of directors is authorised to recall them at any time (Article 290(8), ZGD-1). There are no prescribed, well-founded reasons for their recall, while the members of the management board and the chairman of the management board cannot be recalled without well-founded reasons. An executive director who is also a member of the board of directors retains the position of a member of the board of directors despite being recalled.¹⁹⁰

It should be emphasised that in a one-tier system of corporate governance, the powers and functioning of the management board or executive directors are not as extensively regulated by law as they are for the supervisory board and management board in a two-tier system of governance. Therefore, many issues related to the governance of a JSC may be subject to autonomous statutory regulation.¹⁹¹

8.3. Conflict of Interests and Self-Dealing

The general provision of Article 38a of the ZGD-1 applies to the management or supervisory body, procurator, executive director of a JSC, as well as to the manager, member of the supervisory board, and procurator of an LLC. It imposes an obligation on these individuals to avoid any conflict between their personal interests or duties and the interests or duties of the company they manage or oversee (Article 38a (1), ZGD-1).

¹⁹⁰ Ivanjko, Kocbek and Prelič, 2009, p. 614.

¹⁹¹ Ibid.

A conflict of interest exists when the impartial and objective performance of tasks or decision-making within the scope of their functions is compromised as a result of personal economic interest, the interest of family members, special favouritism, or any other interests associated with another natural or legal person (Article 38a(3), ZGD-1).

In the event of a conflict of interest, the person mentioned in the previous paragraph must notify the body of which they are a member and the supervisory body in writing within 3 working days. If the company does not have a supervisory board (e.g. in an LLC), they must inform the shareholders at the next general meeting (Article 38a(2), ZGD-1).

The provisions regarding the avoidance of conflicts of interest do not apply to management personnel and members of management, control, and supervisory bodies in companies where the state or self-governing local community holds a majority share or dominant influence, which is regulated by the Integrity and Prevention of Corruption Act.¹⁹²

In addition to the aforementioned regulation on the prevention of conflicts of interest, members of management or supervisory bodies must also comply with provisions that restrict transactions between the company and members of the management board (Article 270a, ZGD-1), members of the supervisory board (Article 284a, ZGD-1), executive directors from the board of directors (Article 290a, ZGD-1), and transactions with managers and procurators in an LLC (Article 515a, ZGD-1). Furthermore, transactions between the company and related parties¹⁹³ are also regulated (Article 281b, ZGD-1).

Regarding transactions carried out by the company with members of the management board or their family members,¹⁹⁴ the consent of the supervisory board is required. The same consent is required when dependent companies enter into such transactions. Additionally, if the member of the management board or their family member indirectly or directly controls a legal entity or is involved in its joint control, the consent of the supervisory board is necessary. The supervisory board must also approve transactions with a company in which the member of the management board or their family member serves as a member of the management or supervisory body, an executive director, or a shareholder in the case of an personal company, and to

192 *Zakon o integriteti in preprečevanju korupcije* (ZIntPK) (Official Journal of the Republic of Slovenia, Nos. 69/11, 158/20, 3/22, 16/23).

193 Related parties are related entities or individuals as defined in International Accounting Standard 24, adopted in Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council.

194 A family member is a member of the family who can be expected to influence or be influenced by the board member in his or her dealings with the company. These may include a spouse or a person with whom the member of the management board has a long-standing relationship which has the same legal consequences as marriage, children, parents, or siblings. Children of the spouse or partner and persons dependent on the member of the management board, spouse or partner are also considered as family members (Article 270a(2), ZGD-1).

transactions with another legal entity in which a member of the management board or a member of his/her family is a legal representative or member of the supervisory board (Article 270a(3), ZGD-1).

Consent from the supervisory board is required regardless of the value of the transaction, except when the transaction is carried out within the regular course of the company's activities and under market-standard conditions or when the companies involved are affiliated companies (Article 270a(3,4), ZGD-1).

A member of the supervisory board who is involved in the transaction as an interested party or where there is a potential conflict of interest owing to their relationship with the related party involved in the transaction does not participate in the decision on consent, unless the company has an established audit committee (Article 270a(5), ZGD-1).

The aforementioned regime is also applied *mutatis mutandis* to transactions concluded by the company with members of the supervisory board or management board and executive directors. In the case of executive directors, consent is decided by the management board if none of the executive directors is simultaneously a member of the management board. Otherwise, the consent is decided by the general meeting (Articles 284a, 285(2), 290a, ZGD-1).

The abovementioned rules apply *mutatis mutandis* in the case of an LLC as well, for the company's transactions with the manager, the procurator or their family members to the transactions, but only if the LLC fulfils the criteria for medium-sized¹⁹⁵ and large¹⁹⁶ companies under the ZGD-1. If the company does not have a supervisory board, the general meeting decides on the consent (Article 515a, ZGD-1).

8.4. Duty of Care and Loyalty

According to Article 263 of the ZGD-1, members of the management or supervisory body of a JSC have a general duty to act in the best interest of the company with the care of a diligent and honest entrepreneur and to protect the company's business secrets. If the company incurs damages owing to a breach of their duties, the members of the management or supervisory board are jointly liable for the incurred damages, unless they can prove that they have diligently and faithfully fulfilled their duties (Article 263(2), ZGD-1).

To prevent moral hazard in the case of insurance contracts insuring member of the management or supervisory body against risks arising from their functions in the company, Article 263(2) of the ZGD-1 introduces a mandatory provision for a

¹⁹⁵ A medium-sized company shall be a company other than a micro company, as referred to in paragraph 2 of Article 55(4) of the ZGD-1, or a small company, as referred to in the preceding paragraph, and shall meet two of the following criteria: a) its average number of employees in a financial year does not exceed 250; b) it has a net turnover of less than 40,000,000 EUR; and c) the value of its assets does not exceed 20,000,000 EUR.

¹⁹⁶ A large company is a company that is not a micro, small, or medium-sized company (Article 55(5), ZGD-1).

franchise deductible of at least 10% of the damages but not exceeding 1.5 times their fixed annual remuneration.

A member of the management or supervisory body is exempt from compensating the mentioned damages if the act causing damage to the company is based on a lawful resolution of the general meeting. However, their liability is still established even if the controversial act was approved by the supervisory board or the management board. The company can waive the right to claim damages or offset them only 3 years after the claim arises, with the consent of the general meeting and without objection from a minority shareholder (s) of at least 10% of the share capital (Article 263(3), ZGD-1). Waiving a claim for damages or offsetting it does not have legal effect against the company's creditors if the company is unable to repay them, as they are entitled to enforce it. Moreover, with the aim of exempting the claim for damages, it is not possible to rely on the fact that the controversial act is based on a resolution of the general meeting in relation to the creditors (Article 263(4), ZGD-1). If bankruptcy proceedings are initiated against the company, the claim for damages is enforced on behalf of all creditors who have the right to payment of their claims in the bankruptcy proceedings against the company, meaning that the liable person must pay the compensation to the company as the bankruptcy debtor. The bankruptcy administrator and any creditor who has the right to perform procedural acts in the bankruptcy proceedings are entitled to assert the claim for damages (Article 263(5), ZGD-1).

The ZGD-1 also establishes a specific prescription period of 5 years from the occurrence of the damage for the aforementioned claims for damages (Article 263(6), ZGD-1). However, this period is extended to 10 years from the occurrence of the damage if the companies are under the dominant influence¹⁹⁷ of the Republic of Slovenia or self-governing local community (Article 263(7), ZGD-1).

The presented rules are contained in Article 263 of the ZGD-1, which falls under the subsection of the law regulating common provisions for the management or supervisory bodies of a JSC. However, it should be emphasised that the aforementioned regulations are also applied *mutatis mutandis* to the manager in an LLC (Article 515(6), ZGD-1) and the supervisory board, if the company has one (Article 514, ZGD-1).

8.5. Employee Participation

Within the Slovenian economic system, the issue of employee participation in the management of economic entities is regulated by the ZSDU. This law is of a general nature and governs employee participation in the management of all economic entities, as well as in public companies providing economic public services in banks, insurance companies, and institutions. For this reason, this section collectively addresses both LLCs and JSCs. However, the law does not stipulate the rights of

197 Dominant influence shall mean that the Republic of Slovenia or a self-governing local community has individually or mutually, directly or indirectly through another body governed by public law, held the majority interest of the subscribed capital, the majority of voting rights or the right to appoint or remove the majority of members of the management or supervisory boards (Article 263(8), ZGD-1).

employees to participate in the management of the (individual) sole trader (*s.p.*) with fewer than 50 employees. Similarly, micro¹⁹⁸ and small companies¹⁹⁹ are not obligated to apply the provisions of the ZSDU relating to employee participation in the company's bodies (Article 84a, ZSDU).

According to Article 2 of the ZSDU, employee participation in management is realised through the following means:

- a) the right to make proposals and receive responses to those proposals;
- b) the right to information,
- c) the right to express opinions and make suggestions, and the right to receive responses to them;
- d) the possibility or obligation of joint consultations with the employer;
- e) the right to co-decision; and
- f) the right to withhold the employer's decisions.

The rights related to employee participation in management are exercised by individual workers or collectively through:

- a) a workers' council or workers' representative,
- b) assembly of workers, and
- c) employee representatives in the company's bodies.

Employee participation in the company's bodies is realised through employee representatives in the management and supervisory bodies of the company. The ZSDU distinguishes between different methods of realisation depending on whether the company has a one-tier or two-tier governance system. In a two-tier system, employee representatives can sit on the supervisory board as well as the management board of the company (Article 78, ZSDU). A company with a one-tier governance system can have employee representatives on the board of directors and in the committees of the management board, or even employee representatives among the executive directors of the company (Article 78, ZSDU).

The ZSDU provides for specific forms of collective organisation of employees depending on their number in the company. In companies with fewer than 20 employees, their collective rights of participation are exercised through a workers' representative (Article 9(1), ZSDU), while in companies with more than 20 employees, employees participate through a workers' council (Article 8, ZSDU). The election procedures for the workers' representative and the members of the workers' council

198 A company that meets any two of the following criteria shall be deemed a micro company: a) its average number of employees in a financial year does not exceed 10, b) it has a net turnover of less than 700,000 EUR, and c) the value of its assets does not exceed 350,000 EUR.

199 A small company shall be a company other than a micro company and shall meet any two of the following criteria: a) its average number of employees in a financial year does not exceed 50, b) it has a net turnover of less than 8,000,000 EUR, and c) the value of its assets does not exceed 4,000,000 EUR.

are detailed in the law. The workers' representative has the same rights, obligations, and responsibilities as the workers' council (Article 9(3), ZSDU).

The right to be elected to the workers' council is granted to all employees who have active voting rights under this law and have been continuously employed by the company for at least 12 months, while the right to vote for representatives in the workers' council is granted to all employees who have been working for the company continuously for at least 6 months (Articles 12(1), 13, ZSDU).

Article 10 of the ZSDU precisely determines the number of members in the workers' council based on the number of employees in the company, as follows:

- a) in companies with up to 50 employees, 3 members;
- b) in companies with more than 50 and up to 100 employees, 5 members;
- c) in companies with more than 100 and up to 200 employees, 7 members;
- d) in companies with more than 200 and up to 400 employees, 9 members;
- e) in companies with more than 400 up to 600 employees, 11 members;
- f) in companies with more than 600 up to 1,000 employees, 13 members; and
- g) in companies with more than 1,000 employees, the number of members of the workers' council increases by two members for every additional 1,000 employees.

The term of office for members of the workers' council is 4 years, with the possibility of re-election (Article 10, ZSDU). Members of the workers' council have the right to 3 paid hours per month for consultations with workers and the right to 40 paid hours per year for education necessary for the effective work of the workers' council (Article 63, ZSDU). Additionally, members of the council have certain immunity. The salary of a workers' council member cannot be reduced, disciplinary or compensation proceedings cannot be initiated against them, and they cannot be placed in a less favourable or subordinate position if their actions are in accordance with the law, collective agreement, and employment contract (Article 67, ZSDU).

In the case of affiliated companies, a workers' council of the affiliated company is established, in which representatives of all affiliated companies participate (Article 73, ZSDU). The members of the workers' council of affiliated companies are appointed jointly by the workers' councils of the affiliated companies. The workers' council of affiliated companies is responsible for addressing issues related to workers in all affiliated companies (Article 75, ZSDU).

The workers' council has the right to convene an assembly of workers, composed of all employees of the company except for the management, to discuss matters within the competence of the workers' council or its committee (Article 69, ZSDU). However, the assembly of workers cannot decide on matters within the competence of the workers' council or its committee (Article 69(3), ZSDU). Experts, management representatives, as well as representatives of the company, trade unions, and employers can also be invited to the assembly (Article 70, ZSDU). The director must be informed of the convocation of the general assembly of workers, and the company representative has the right to participate in the general assembly of workers (Article 70(2),

ZSDU). The general assembly of workers can be convened once a year during working hours, taking into account the needs of the work process (Article 72(1), ZSDU).

Worker participation in management is most effective when their representatives participate in management or supervisory bodies. The number of worker representatives on the supervisory board is determined by the company's articles of association but must not be less than one-third of the members and no more than half of all members of the company's supervisory board (Article 79(1), ZSDU). In the management board, at least one of the members must be a worker representative. The number of worker representatives on the management board is determined by the company's articles of association but must not be less than one worker representative out of every three completed members of the management board (Article 79(2), ZSDU).

Employee representatives who are members of the supervisory board or management board or its committees are elected and dismissed by the workers' council, and this is communicated to the company's general meeting (Article 79(6), ZSDU).

In a two-tier management company with more than 500 employees, an employee director is proposed to the company's management board by the workers' council (Article 81(1), ZSDU). In a one-tier management company with more than 500 employees, upon the proposal of the workers' council, one of the employee representatives on the management board is appointed as an executive director (Article 81(2), ZSDU).

Employee participation in the management of the company is realised by ensuring that employees are directly informed and can directly provide suggestions, opinions, initiatives, and responses to such initiatives, if they relate to their workplace or their work or organisational unit. They are timeously informed about changes in their work area and can demand that the employer or an authorised employee explain matters related to wages and other areas of employment relationships. It should be noted that the employer or an authorised employee must respond to initiatives and questions from employees within 30 days at the latest (Article 88, ZSDU).

Furthermore, the employer must inform the workers' council and hold joint consultations regarding the company's status and personnel matters, as well as matters of occupational health and safety, before making decisions in those areas (Article 91(1), ZSDU).

The employer can adopt certain decisions with prior consent of the workers' council. These decisions relate to:

- a) bases for deciding on the use of annual leave and decisions on other absences from work;
- b) criteria for evaluating employees' work performance;
- c) criteria for rewarding innovation activities in the company;
- d) disposal of housing funds, holiday facilities, and other employee welfare facilities; and
- e) criteria for employee promotion (Article 95(1), ZSDU).

Disputes between the workers' council and the employer are resolved through arbitration. The arbitration panel consists of an equal number of members appointed by the

employee council and the employer, and a neutral chairperson agreed upon by both parties (Article 99, ZSDU).

8.6. Liability (General and in Case of Insolvency)

8.6.1. The Limited Liability Company

The LLC has one or more managers (directors) who independently manage the company's affairs and represent it (Article 515(1), ZGD-1). The provisions of Article 263 of the ZGD-1, from the chapter on JSCs, which determines the obligation to perform their duties in the best interests of the company with the care of a diligent and fair businessman and the managerial liability (Article 515(6), ZGD-1), applies *mutatis mutandis* to the manager. Refer to Chapters VI, D, and VI, F, II.

8.6.2. The Joint-Stock Company

According to the Article 263 of the ZGD-1, members of the management or supervisory body of a JSC have a general duty to act in the best interest of the company with the care of a diligent and fair businessman and to protect the company's business secrets (Article 263(1), ZGD-1). If the company incurs damages owing to a breach of their duties, the members of the management or supervisory board are jointly liable for the incurred damages, unless they can prove that they have diligently and faithfully fulfilled their duties (Article 263, paragraph 2, ZGD-1). For more on the duty of care according to the ZGD-1, see Chapter 6.

In recent years, Slovenian court practice and literature have adopted the business judgment rule.²⁰⁰ The meaning of “managing business” and the level of honesty and due care required from the members of the management board are both to be established on a case-by-case basis and interlinked. Excessively strict demands from the members of a management board could act as a deterrent to entrepreneurship that is inevitably linked also to risks.²⁰¹ Based on the business judgment rule, any business decision that proves to be harmful does not yet act contrarily to the required standard of due diligence. The obligation of members of management and supervisory bodies can be defined as an obligation of endeavour and not an obligation of result.²⁰²

In addition to the regulation of the liability of members of the management and supervisory bodies under the ZGD-1, their liability is specifically regulated also under the Act on Financial Operations, Insolvency Proceedings and Compulsory Dissolution (*Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju*; ZFPPIPP). The liability for damages according to the ZFPPIPP shall not exclude the liability for damages of members of the management under other acts (Articles 42–44, ZFPPIPP). In other words, the liability for damages according to the ZFPPIPP is not

200 Podgorelec, 2013, p. 98; Podgorelec, 2015, pp. 445–460.

201 Decision of the Supreme Court of the Republic of Slovenia, No. III Ips 75/2008, 21 December 2010.

202 Decision of the Supreme Court of the Republic of Slovenia, No. III Ips 97/2015, 9 December 2015; see also Dugar, 2020, p. 62.

characterised by the liability for the origin of the financial position of insolvency of the company, but only for the breach of the prohibitions and duties according to the ZFPPIPP after the company has become insolvent. The liability for damages according to the ZFPPIPP, therefore, does not exclude the liability for damages of the management for becoming insolvent, that is, when the company has become insolvent because the members of the management did not follow their duties with regards to managing the operations of the company with due professional care.²⁰³ The main obligations of the management under the ZFPPIPP in the event of insolvency are (a) the duty of equal treatment of creditors (Article 34, ZFPPIPP); and (b) the duty to analyse the causes for the insolvency and implement adequate measures (Article 35, ZFPPIPP). If the management or supervisory board breaches the aforementioned obligations at the entry of the insolvency, they would be liable for damages to the creditors which suffered in the form of lower payments of their claims in the bankruptcy proceedings (Articles 42–44, ZFPPIPP). For the management to be liable for damages, the following four conditions have to be fulfilled:

- a) a bankruptcy proceeding is initiated against the LLC;
- b) the management acted unlawfully;
- c) damages actually occurred; and
- d) there is a causal link between the unlawful acting of management and the damages.²⁰⁴

9. Slovakia

9.1. Structure (Boards), Appointment, Mandate, and Remuneration

9.1.1. Limited Liability Company

The LLC is obliged to create two corporate bodies. The formation of a general meeting and the appointment of the managing director (*konateľ*) are mandatory.²⁰⁵ The establishment of the supervisory board is optional and may be determined in the articles of association.

Acting on behalf of the company can be entrusted only to one or more managing directors of the LLC. The managing director can be a natural person only, at the minimum age of 18 years, with full capacity and legally defined integrity. The integrity of a person becoming a managing director is assessed differently depending on whether the LLC is being formed via simplified online incorporation with a template of the articles of association,²⁰⁶ in which case the full integrity of the designated

203 Plavšák, 2017, p. 215.

204 Ibid., pp. 215–216; see also Dugar, 2020, pp. 63–64.

205 Sections 133 and 125, Commercial Code.

206 It has been in force since 1 February 2023 as a result of the implementation of the Digitalisation Directive.

managing director is required, or if it is formed via standard online incorporation procedure, where the integrity is determined by certain specific crimes, such as economic crimes, crimes against property, or crimes committed intentionally, the essence of which is related to the object of the business.²⁰⁷ Thus, the online simplified incorporation places stricter requirements on the integrity of a natural person intending to become a managing director of an LLC. Moreover, a person may become a managing director only if they have not been disqualified of holding this position for a certain period of time by a court or other public authority.²⁰⁸ Information from the Register of Disqualification is verified by a certificate issued by the District Court of Žilina, which registers this type of data for all of Slovakia.²⁰⁹ Moreover, the managing director may only be a person who, at the time of registration in the commercial register, is not listed as an obligated person in the registry of authorisations for enforcement (*Register poverení na vykonanie exekúcie*).²¹⁰

When forming an LLC, the articles of association must contain the names, addresses of residence, and social security numbers of the first directors, as well as the manner in which they act on behalf of the company.

The general meeting decides on the appointment and dismissal of managing directors by a simple majority resolution of the shareholders' votes, unless the articles of association provide for a higher number of votes. Unlike in a JSC, the authority of the shareholders' meeting to appoint a managing director may not be transferred to the supervisory board if formed in the company. Besides the abovementioned personal requirements, a successful appointment also requires the consent of the person who shall become the company's managing director. Although the law does not explicitly mandate it, consent is required, as no one can be forced into such a position. Consent can also be given in advance, prior to the vote at the general meeting. The managing directors do not have to be experts in the business activities of the company, but they must act professionally with management skills and abilities.²¹¹

Dismissal of a managing director is possible at any time and is effective upon a decision by the general meeting. A managing director may resign from office at any time by sending a resignation notice. The resignation of a director may have an immediate effect when the director resigns at the general meeting or on the date of the first general meeting held after the resignation. The Slovak Commercial Code provides for a safeguard in case the general meeting fails to hold a meeting within 3 months after the receipt of the resignation notice. In this case, the resignation is effective after the expiration of the 3-month period.²¹² The articles of association may stipulate other criteria or conditions for the appointment or dismissal of the managing director.

207 Section 6(2), Act No. 455/1991, Trade Licensing Act.

208 Section 13a, Commercial Code.

209 Section 82i(5), Act No. 757/2004.

210 Section 133(2), Commercial Code.

211 Ovečková, Csach, and Žitňanská, 2020, p. 259.

212 Ovečková et al., 2022, p. 542.

9.1.2. Joint-Stock Company

Only a two-tier model of corporate board structure is available to JSCs, with the mandatory formation of the board of directors and the supervisory board (*dozorná rada*). The executive body of a JSC is the board of directors (*predstavenstvo*). The board of directors decides on all matters of the company, unless such matters are reserved to the authority of the general meeting or the supervisory board, either by the Commercial Code or the articles of association.²¹³ The board of directors is a collective body, however, the law does not prohibit the creation of a sole executive director to manage company's activities and act on behalf of the company. Same personal requirements apply to members of the board of directors as for the LLC.

Each member of the board of directors can act on behalf of the company, unless the articles of association stipulate otherwise. Restrictions on acting on behalf of the company may be imposed by the articles of association or the general meeting's decision, but they have no effect on third parties. Members of the board of directors are appointed by the general meeting for a term no longer than 5 years.²¹⁴ The articles of association may stipulate that the general meeting appoints members of the board of directors in cumulative manner²¹⁵ or that the members of the board of directors are appointed by the supervisory board.

9.1.3. Simple Joint-Stock Company

A simplified two-tier governance system composed of the obligatory board of directors (*predstavenstvo*) and the optional supervisory board is a statutory standard for the simple JSC.²¹⁶ Although the regulation of the JSC applies in general, there are several specificities provided for the corporate bodies of simple JSCs. For instance, the members of the board of directors may be appointed for an unlimited time. The articles of association may also determine that members of the board of directors are appointed and dismissed by the supervisory board.

9.1.4. Performance Contract and Remuneration

Slovak corporate law distinguishes between the corporate act of appointment of a managing director and the contractual relationship set forth by a performance contract (*zmluva o výkone funkcie*). The directors' positions and their duties are regulated by the Commercial Code,²¹⁷ and thus, the relationship between the company and a director is in principle a commercial one. The Commercial Code explicitly provides for formal requirements for the performance contract, which must be made in writing and approved by the general meeting. If the performance contract or any other similar agreement is not concluded between the parties, the relationship is appropriately

213 Section 191(1), Commercial Code.

214 Section 194(1), Commercial Code.

215 Section 194(3), Commercial Code.

216 Section 220ze, Commercial Code.

217 Section 261(6), Commercial Code.

regulated by the corporate provisions and the provisions on the mandate contract.²¹⁸ However, entering into the service contract is not obligatory for the managing director, as all of his corporate duties come into being upon his appointment.²¹⁹ A person appointed as a director may simultaneously be an employee of the company, however according to Slovak case law, only in cases for which the job description under the employment contract differs from the duties of the director.²²⁰

It is widely recognised in Slovak legal doctrine that the performance by a managing directors/members of board of directors is remunerated. The remuneration is derived from the appropriate application of the provisions governing mandate contracts. The Supreme Court of the Slovak Republic has stated that if there is no written agreement for the performance of duties or any similar contract between the company and a member of its corporate body, or if compensation for the performance of duties is agreed upon but the amount of remuneration is not specified directly in the contract, the member of a corporate body is entitled to so called the customary remuneration, as determined under Section 571(1) of the Commercial Code.²²¹ If the office of a member of a corporate body is to be performed without remuneration, this fact should be expressly stated. Legal doctrine recognises that it is not strictly necessary to conclude a performance contract in order to determine the gratuitous nature of the office; rather, gratuitousness may also be established by a resolution of the general meeting, provided that the member of the corporate body gives their express consent upon accepting the office.²²² However, the Supreme Court of the Slovak Republic, in a recent decision,²²³ articulated the position that if the performance of the office of a member of a corporate body is to be without remuneration, a specific agreement is required. Such an agreement must meet the formal requirements set forth for a performance contract under Section 66(6) of the Commercial Code, that is, it must be in writing and approved by the general meeting.

The Slovak Commercial Code contains specific provisions on the remuneration of corporate body members of public JSCs that are obligated to pay remuneration to in accordance with the approved remuneration rules.²²⁴ The rules must be published on the company's website for the entire duration of their validity, and access to them must be free of charge. The board of directors must also prepare a clear remuneration report, which provides a complete overview of all remuneration, including any benefits granted or payable in any form, and present it to the general meeting once a year as part of the annual report.

218 Legal provisions on mandate are stipulated in Sections 566 to 576 of the Commercial Code.

219 The Supreme Court of the Slovak Republic, No. 5Cdo 92/97, 26 November 1997. See also Ovečková et al., 2022, p. 558.

220 The Supreme Court of the Slovak Republic, No. 1 Sža 27/2015, 1 December 2015.

221 The Supreme Court of the Slovak Republic, No. 1 Obdo V 118/2005, 28 November 2007; The Supreme Court of the Slovak Republic, No. 5Obdo/32/2022, 25 October 2023.

222 Ovečková, Csach, and Žitňanská, 2020, p. 263.

223 The Supreme Court of the Slovak Republic, No. 5Obdo/32/2022, 25 October 2023.

224 Sections 201a–201e, Commercial Code.

9.2. Powers and Shaping the Powers

The power to act on behalf of the company in all its matters is entrusted to the managing directors (or board of directors in a JSC or a simple JSC), who are also entitled to conduct the management of the business on a day-to-day basis. Compared to laws on LLCs in the Czech Republic or Germany, where the managing directors act as representatives of the company, according to Slovak law, acts of directors are considered direct acts of the company as a legal entity. Each managing director is entitled to act on behalf of the LLC individually, unless otherwise stated in the articles of association.²²⁵ The company itself is bound by the acts of the managing directors, which exceed the scope of the subject of business. Thus, the ultra vires theory is not applicable in Slovak corporate law.²²⁶ However, if the directors' performance exceeds the powers which the law entrusts or enables to entrust to the executive body, the acts of managing directors are not binding for the company. The actions of the managing directors can be restricted internally, for example, by requiring approval from the supervisory board for certain matters or by setting financial limits that necessitate the involvement of at least two managing directors. These restrictions can be established through an appropriate amendment to the articles of association or by a resolution of the general meeting. However, such internal limitations have no legal effects on third parties.²²⁷ These restrictions cannot be registered in Commercial Register.²²⁸

For a decision-making process, the consent of the majority of all appointed managing directors is required.²²⁹ In the event of a violation of the rules for quorum and decision-making by the managing directors, such a decision cannot be challenged for its invalidity, as is the case with a resolution of the general meeting.

9.3. Directors' Duties and Conflicts of Interests

9.3.1. Limited Liability Company

Managing directors of LLCs have several specific duties that they are obliged to perform. Pursuant to Section 135a of the Slovak Commercial Code, the managing directors must exercise their powers with professional due care (duty of care) and always in accordance with the best interests of the company and all its shareholders (duty of loyalty). In particular, when taking a decision, managing directors are under an obligation to obtain and consider in their decision-making all objectively possible and reasonably available information regarding the subject of their decision. The Commercial Code does not provide an explicit definition of professional due care, but it is understood as a certain quality of professional approach and expertise. Certain actions, the performance of which can be considered consistent with professional care, are stipulated in the legal provisions. The duty of care encompasses

²²⁵ Section 133(1), Commercial Code.

²²⁶ Patakyová et al., 2022, p. 73.

²²⁷ Section 133(3), Commercial Code.

²²⁸ Section 13(4), Commercial Code.

²²⁹ Section 134, Commercial Code.

an assessment by the directors as to whether they are able to properly evaluate the necessary information and, if needed, seeking the assistance of a professional advisor or expert in the field, such as a tax or legal advisor.²³⁰ When selecting a professional advisor, they must ensure the choice meets a sufficiently high-quality standard (*culpa in eligendo*).

Moreover, the directors are obliged to verify the legality of the general meeting resolution. If an inappropriate resolution is adopted, they must inform the shareholders about the inappropriateness of the instruction. The risky business decisions of the managing directors are protected by the case law-derived doctrine of the business judgment rule, provided they act on an informed basis within the scope of their position, and in good faith they act in the interest of the company. Whether the director acted in a sufficiently informed way and in good faith is always assessed retrospectively, based on the information that the director had or could have had at the time of the decision (*ex-ante* assessment).²³¹

As stated above, another obligation of the managing directors is the duty of loyalty, that is, to act in accordance with the interests of the company and all its shareholders. They cannot prioritise their own interests, the interests of only certain shareholders, including those who appointed a person to an executive position by the weight of their votes, or the interests of third parties over the interests of the company itself. The duty of loyalty also includes the obligation not to disclose confidential information or facts whose disclosure to third parties could cause damage to the company or endanger its interests or those of the shareholders.²³² In case of a conflict of interests between those of the company and those of its shareholders, the director's preference shall be given to those in favour of the company.²³³

The duty of loyalty also encompasses the duty to avoid a conflict of interest (no conflict duty) and the prohibition to enrich oneself or create profit at the expense of the company (no profit rule). The content and scope of the duty of loyalty depend both on specific circumstances and on the real ownership structure of the company. The duty of loyalty affects all conflicting transactions of board members and, to a limited extent, also applies to former board members.²³⁴ For example, upon termination of his office, the former board member has a duty to notify the company of the threat of damage and specify the measures needed to be taken to prevent it.

Moreover, the Commercial Code expressly stipulates certain competitive conducts which are prohibited for the company's directors and, to the same extent, may be stipulated in the articles of association for members of the supervisory board, if established in the company.²³⁵ The test of potential conflict of interest or other disloyal behaviour of members of the corporate body toward the company is a strict

230 Patakyová et al., 2022, p. 674.

231 Mrázová, 2021, p. 146.

232 The Supreme Court of the Slovak Republic, No. 1 Obo 16/2008, 19 February 2009.

233 Csach, 2019, p. 191.

234 Ovečková et al., 2022, pp. 546–547.

235 Section 139(4), Commercial Code.

ban on competition conduct applied with special legal consequences thereto.²³⁶ The managing director may not conclude in his own name or own account deals associated with the company's business activities, participate in the business of a partnership as a shareholder with unlimited liability, or perform as an executive director of another legal entity having a similar scope of business. The articles of association may stipulate other restrictions on competitive conduct; however, their scope cannot be narrowed down. The current mandatory anti-competition clause does not allow for more flexible rules in the articles of association of LLCs.

Besides the general rules, the Commercial Code provides several specific duties for the managing director, which, in the event of their breach, results in the director's liability for damages suffered by the company. These duties include, among others, duties in case of economic difficulties, such as a crisis, to take necessary steps to avert it in accordance with the requirement of professional care, duties relating to the maintenance of the share capital or the repayment of contributions,²³⁷ and duties related to the proper payment of profit to the shareholders, including the duty to recover illegally paid-up profits.²³⁸ In relation to the general meeting, the managing director is obliged to call the general meeting at least once a year and submit an individual financial statement to the general meeting for its approval. Other directors' duties may result from the performance contract, articles of association, decisions of the general meeting, or other private or public law regulations.

9.3.2. *Joint-stock Company and Simple Joint-Stock Company*

Both the duty of care and the duty of loyalty are imposed on members of the board of directors by the Commercial Code. Regulation on JSCs, particularly Section 194 of the Commercial Code, contains separate provisions on general duties, director's liability, and exemptions from the directors' liability for damages and its limitations. The mandatory provisions provide for a demonstrative list of those obligations the breach of which gives rise to the company's claim for the damages against the board members.²³⁹

Regarding the related party transactions, the JSC may grant a loan or credit, transfer or allow the use of company assets, or secure an obligation for a member of the board of directors or any other person authorised to act on behalf of the company, as well as for persons close to them or persons acting on their behalf, only with the prior approval of the supervisory board and under conditions customary in ordinary commercial practice.²⁴⁰ Apart from the expressly regulated anti-competitive clause and strict requirements of prior approval of the supervisory board and an arm's-length basis in related party transactions, Slovak corporate law does not provide for a general protective measures applicable in the event of a conflict of interests as available in

236 Section 65, Commercial Code.

237 Sections 67f and 67j, Commercial Code.

238 Section 123(4), Commercial Code.

239 Section 194(6), Commercial Code.

240 Section 196a, Commercial Code.

other legal jurisdictions. However, some authors argue that the board member's duty to inform the company when a transaction involving a conflict of interest takes place derives from the general duty of loyalty.²⁴¹

In case of simple JSC, the prohibition on competitive conduct applicable to other forms of corporations is replaced by a written notification of the board's members addressed to the company. Members of the board of directors are obliged to inform the company if they enter in their own name or on their own account into agreements related to the company's business activities, intermediate company's business for third parties, participate in another company as a shareholder with unlimited liability, or are members of the corporate body of another legal entity with a similar subject of business activity.²⁴²

9.4. Liabilities

Among the basic private law consequences of breaching the duty of a corporate body member, are liability for the damages, claims for breaching the prohibition of competition, guarantees, and a statutory contractual penalty. The liability of a corporate body member for damages can be divided into internal liability toward the company, and external liability toward creditors²⁴³ and shareholders.

9.4.1. Liability for Damages

Section 135a(2) of the Commercial Code stipulates the legal consequences of breaches of general directors' duties. The managing directors who fail to comply with their duties while exercising their powers are under the obligation to compensate the damage caused to the company. The directors are liable for damages when three main elements are met. First, there must be a breach of the directors' duty, the occurrence of damage, and a causal link between the breach of duty and the damage caused. Directors who breached their duties are jointly and severally liable to compensate the damages caused.²⁴⁴

According to 135a (4) of the Commercial Code, any agreements between the company and its managing directors excluding or limiting the director's liability for damages are prohibited. If concluded, such an agreement would be considered void. However, the company may waive claims for damages it has against its directors or enter into a settlement agreement with them, but only 3 years after such claims arose and only under the condition that it is approved by the general meeting and no objection against such a resolution is raised by any shareholder whose contribution amounts to 10% of the share capital.

The Slovak Commercial Code also states exemptions from the directors' liability for damages. According to Section 135a(3) of the Commercial Code, the directors are

241 Csach, 2020, p. 19.

242 Section 220zd, Commercial Code.

243 See above.

244 Section 135a(2), Commercial Code.

not liable for the damages caused to the company if they can prove that they were acting with due professional care and in good faith that they were acting in the interest of the company. If both conditions – acting with professional care and acting in good faith – are met, the directors' liability for damages does not arise.²⁴⁵ The Slovak Commercial Code stipulates a reverse burden of proof. To avoid liability, the directors must prove that their action or omission did not constitute a breach of duty, thus, the burden of proof lies on the managing directors. Whether the managing directors acted in accordance with their duties is to be determined from an objective point of view. There is no need for an intention to be proven by the plaintiff.

Moreover, managing directors are not liable for any damages caused to the company when carrying out a resolution of the general meeting. However, these exemptions shall not apply when the general meeting's resolution is contrary to the legal regulation or articles of association, or is related to the statutory duty to file a petition for bankruptcy. The managing directors, acting with due professional care, are obliged to refuse to execute instructions imposed by the general meeting or a single shareholder that, while in compliance with the legal provisions and articles of association, are contrary to the interests of the company.²⁴⁶ The abovementioned rule shall apply if, according to the given instruction, the company must perform a disadvantageous act. Nevertheless, in such a case, the business judgment rule could apply²⁴⁷ if the managing director, when making a risky business decision, might reasonably believe that, based on proper information, he is acting for the benefit of the company.

9.4.2. *Claims for Damages*

The person authorised to claim damages caused to the company that arose as a result of the director's breach of duty is the company itself, but any shareholder is entitled to make such a claim on behalf of the company.²⁴⁸ If a shareholder does so, he bears the costs associated with the lawsuit, which may be compensated only in the event that the company has been successfully granted compensation for the costs of the court's proceedings. The main purpose behind this rule is to eliminate spurious lawsuits by shareholders against the company's managing directors. It is noteworthy that the company's creditors may also claim damages that the company has against its directors, but only under the condition that they cannot satisfy their receivables from the company's assets. In this case, the creditors' claims against directors are asserted directly on their behalf and for their own account. The creditors' claims shall not be limited if a waiver or settlement agreement between the company and the director has been concluded. However, these types of creditors' actions are very rare in practice

245 Ovečková et al., 2022, p. 1269.

246 Ibid., p. 1155.

247 Ibid.

248 Section 122(3), Commercial Code.

because they require a significant burden of proof on the part of the creditors. In the event of insolvency, the creditor's claim is exercised by the insolvency trustee.

9.4.3. Other Liability Regimes

If the managing directors of the company breach the prohibition on competition, they must surrender to the company any benefits accruing from the business transaction that resulted in the violation of this duty or transfer the rights corresponding to those benefits. Additionally, they must compensate the company for damages caused by the prohibited competitive conduct.²⁴⁹

One of the main obligations of the managing directors is to file a bankruptcy petition within 30 days from the moment they become aware or could have become aware with due professional care, of its insolvency.²⁵⁰ The primary purpose of this duty is to timeously identify the situation when the company is no longer able to fulfil its obligations properly, and therefore, action must be taken to satisfy creditors' claims to the greatest extent possible. A violation of this obligation gives rise to a special duty to pay the contractual penalty imposed by insolvency law.²⁵¹

9.4.4. Liability of De Facto Directors

Since 2018, the Slovak Commercial Code has provided for the concept of a *de facto* director. Slovak legislation has not taken over the common-law concept of a shadow or de facto director, but has instead set its own legislative solution with inspiration taken from German and Austrian case law and common-law concepts. A person who effectively exercises the powers of a managing director without being appointed to the office has the same duties as the formally appointed director. This person is obliged to act with professional care and in accordance with the interests of the company and all the company's shareholders. All relevant facts must be taken into account in determining whether or not the person is deemed to be a *de facto* director, as these may include general managers, creditors, key employees, or professional advisors. A former managing director could also be considered a *de facto* director if he continues to perform on behalf of the company even after resigning or being dismissed from office.²⁵² However, a mere position in the company does not make a person a *de facto* director. In the event of a breach of statutory duties, the *de facto* director is personally liable to the same extent as the formally appointed director of the company. It is assumed that the *de facto* director cannot carry out all the duties of a managing director, such as a public law duty to file a petition for bankruptcy, and therefore, he should not be subject to sanctions associated with breaching of this duty.²⁵³

249 Section 65, Commercial Code.

250 Section 11(2), Act on Bankruptcy and Restructuring.

251 Section 74a, Act on Bankruptcy and Restructuring.

252 Ovečková et al., 2022, p. 570.

253 Ibid., p. 575.

9.5. The Supervisory board

9.5.1. Limited Liability Company

As mentioned, Slovak corporate law does not require an obligatory supervisory board for the LLC. The supervisory board may be formed and provided for by the articles of association. The managing director may not become a member of the supervisory board.²⁵⁴ In case the articles of association stipulate the optional supervisory board, the law expressly stipulates a minimum number of three members, who must be appointed by the general meeting. The optional supervisory board carries out monitoring and controlling duties and responsibilities. Each member of the supervisory board is entitled to request information for the managing directors and to inspect all business and accounting books. Following the recent judgment of the Slovak Supreme Court, the supervisory board has a wider authority to be informed compared to the information rights of individual shareholders, even if the supervisory board is not formed.²⁵⁵ The supervisory board also has a duty to review financial statements and the directors' proposal on the distribution of profits, and to submit its opinion on the financial documentation to the general meeting.²⁵⁶ Moreover, the supervisory board reports on the results of its control to the general meeting at least once a year, unless the articles of association stipulate otherwise. The optional supervisory board is authorised to convene an extraordinary general meeting any time the interests of the company require so and to present to the shareholders proposals for resolutions to be adopted outside the general meeting (*per rollam*).

If the articles of association do not specify otherwise, the supervisory board has a quorum if at least half the members are present, and the decision of the supervisory board generally requires a simple majority of the votes cast. The resolutions are passed at the supervisory meetings; however, the articles of association may provide for resolutions to be passed outside the meeting, either in writing or using other means of communication, such as phone, email, or videoconference.²⁵⁷ The law does not stipulate legal consequences of defective supervisory board resolutions.

9.5.2. Joint-Stock Company

In contrast to the LLC, a JSC is obliged to create a supervisory board. The main task of the supervisory board is to supervise and control the activities of the board of directors. Only a natural person with full legal capacity can become a member of the supervisory board. Neither a member of the board of directors, nor an authorised signatory, nor a person authorised to act on behalf of the company according to the entry in the Commercial Register may become a member of the supervisory board (an incompatibility rule).²⁵⁸

254 Section 139(2), Commercial Code.

255 The Supreme Court of the Slovak Republic, No. 3 Obdo 21/2019, 29 May 2019.

256 Ibid., paragraph 138.

257 Ovečková et al, 2022, p. 678.

258 Section 200(4), Commercial Code.

Member of the supervisory board are elected by a simple majority of the votes cast by the general meeting. The term office for members of the supervisory board is limited to maximum of 5 years. In contrast to the appointment of the member of the board of directors, a different method of voting is applied for the appointment of the supervisory board members. This is referred to as cumulative voting. In such a process, a list of candidates is made from the submitted proposals for members and the shareholders vote on the proposals of individual persons at the same time. Each shareholders specify a number of votes out of the votes they cast in favour of individual candidates, while the maximum number of candidates is equal to the number of supervisory board members to be appointed. The candidates who received the largest number of votes will become members of the supervisory board.²⁵⁹ Cumulative voting provides real protection for minority shareholders only if all or at least several members of the supervisory board are elected at the same time.²⁶⁰ Furthermore, the articles of association may stipulate that the supervisory board may co-opt substitute members, provided that the number of supervisory board members has not dropped below one half. However, substitutes' term of office is limited, they may be co-opted only until the next general meeting which shall appoint a regular member of the supervisory board. Slovak law does not provide for a possibility to appoint a corporate board member by court order.

On December 28, 2024, the new Act No. 300/2024 Coll. on certain measures related to the governance of listed companies came into effect, implementing EU Directive on improving gender balance among directors of listed JSCs²⁶¹ into Slovak legal order. From a practical perspective, it is worthy to mentioning that this new legal framework applies to only a very limited number of entities.

The main responsibility of the supervisory board is primarily to control the conduct of company's business and the manner in which the board of directors is performing their duties. In particular, members of the supervisory board are entitled to inspect and audit the company books and, in contrast to the powers of the supervisory board of an LLC, to monitor whether the business of the company is in compliance with the law, articles of association and the instructions of the general meeting.²⁶² Shareholders with a qualified participation of at least 5% in the share capital may request the supervisory board to review the performance of the board of directors. The supervisory board take decisions by a simple majority of the votes of its members, or otherwise by the majority of votes determined by the articles of association. Minutes of the supervisory board meeting are drawn up and signed by its chairman and must include the opinions of a minority of members, if they request it.²⁶³ The articles of

259 Section 200(2), Commercial Code.

260 Ovečková et al., 2022, p. 1606.

261 Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJ L 315.

262 Ovečková, Csach, and Žitňanská, 2020, p. 340.

263 Section 201(3), Commercial Code.

association may extend the powers of the supervisory board, but such extension cannot interfere with the mandatory powers of other corporate bodies.

Only in JSCs it is possible to entrust the supervisory board with the right to appoint and dismiss the members of the board of directors, and approve the service contract concluded with the members of the board of directors and the remuneration rules. In exceptional cases, members of the supervisory board may act on behalf of the company; for instance, they may represent the company in legal actions taken vis-à-vis the members of the board of directors.²⁶⁴

9.5.3 Simple Joint-Stock Company

For simple JSCs the establishment of the supervisory board is optional. The articles of association may provide for the establishment of a supervisory board, which oversees the performance of the duties of the board of directors and the conduct of the company's activities. The members of the supervisory board are elected and dismissed by the general meeting.²⁶⁵ In case the supervisory board is not created by the articles of association, Slovak law extends shareholders' statutory right to obtain information and explanations on company matters at the general meeting by providing for an additional right to request information on the affairs of the company from the board of directors in writing.²⁶⁶

9.6. Employee Participation

The supervisory board of the JSC must have at least three members. If there are more than 50 full-time employees at the time of the election, two-thirds of the supervisory board is appointed and removed by the general meeting and one-third by the company's employees. The articles of association may determine a higher number of supervisory board members elected by the company's employees, even when a lower number of full-time employees is present. The board of directors is obliged to organise the election in cooperation with the trade union in such a way that the highest possible number of eligible voters (employees employed by the company at the time of the election) can take part in the election. If the board of directors does not organise an election within 60 days of receiving such a proposal, the trade union or other authorised representative of eligible voters is authorised to organise the elections itself. The articles of association may determine a higher number of supervisory board members appointed by employees, but this number may not exceed the number of members appointed by the general meeting. The prescribed method of voting is considered very cumbersome and organisationally demanding. Even experience from practise shows that the employees' representatives as supervisory board members do

264 Section 199, Commercial Code.

265 Section 220ze(1), Commercial Code.

266 Section 220zc(4), Commercial Code.

not create functional mechanism of communication between the managing director and the company's employees.²⁶⁷

The provisions on codetermination are not applicable to the supervisory board of the simple JSC.²⁶⁸

10. Conclusions

Viewed side-by-side, the eight jurisdictions share a civil-law template that divides corporate organs into an shareholders' assembly and managerial and supervisory bodies and then builds creditor-protective and market-integrity safeguards around that template. However, the details, board architecture, appointment and removal mechanics, reach of representation, placement of employee voice, and calibration of director liability diverge in meaningful ways. Those divergences reflect each system's dominant policy instincts about how best to control agency costs while keeping firms agile.

The Czech Republic is emblematic of formal optionality paired with pragmatic constraints. Since 2014, JSCs can opt between one-tier and two-tier structures, while LLCs operate in practice as one-tier bodies even when a supervisory board may be added in special cases. The choice carries real governance consequences: the two-tier option introduces a separated supervisory organ, whereas the one-tier *správní rada* consolidates execution and oversight and may even be single-member, prompting doctrinal anxiety about monitoring and shareholder information rights. Therefore, the Czech debate has turned to private ordering and strengthening information rights in the articles to offset the accountability deficit that concentration of power can generate. The allocation of powers itself is carefully designed: extraordinary matters remain with the general meeting; strategic questions can be steered in constitutive documents; and day-to-day management is insulated from instructions, although the ever-present possibility of removal without cause tempers managerial independence. In insolvency's shadow, Czech law becomes powerful: courts may claw back benefits and order contribution up to the asset-debt shortfall, coupled with disqualification – tools that unmistakably price risky conduct once the firm's solvency perimeter is breached.

Croatia's architecture also allows monistic and dualistic options for JSCs, but the dualistic model remains the default in practice. The supervisory board appoints management for renewable, time-limited terms, and may recall only for "important reason", a standard that respects decisional space while preserving an internal corrective when trust or capacity collapses. Where a monistic board of directors is used, executive directors exist as function-holders rather than as a separate organ; the statute insists on a minimum and odd number of board members, and

267 Mrázová et al., 2021, p. 40; Ovečková et al., 2022, p. 1608.

268 Patakyová et al., 2020, p. 228.

re-appointment rhythms seek to stabilise horizons without entrenching. Liability scales with the breadth of harm: where shareholders suffer losses independent of harm to the company, management and supervisory board members may be jointly liable alongside those who, wielding influence, intentionally induced harmful acts. Employee participation has been pared back to labour-law channels; a single employee representative may sit on a supervisory body where one exists, but general co-determination has otherwise been abandoned. The overall effect is to rely more heavily on *ex ante* appointment discipline and cause-based removal, leaving transactional validity intact while routing most enforcement inside the firm.

Hungary puts the executive officer at the centre and then builds layered oversight and representation rules around that focal point. Management may be one-person, joint, or collegial (“corporate”), with the executive officer’s competence residually defined against the supreme body’s reserved matters. Representation is notably elaborated: internal limits or consent requirements cannot be asserted against third parties under the harmonised regime, and procuration rules tie the form of procuration to the form of representation to preserve clarity toward outsiders. Companies may grant written, case-group-specific representation to employees to reduce bottlenecks. Oversight can be configured via a supervisory board, mandatory in public limited companies and in larger employers, or via a one-tier board of directors (an alternative the dualist system only in the case of public limited companies) that combines management and control, with an independence majority to avoid managerial self-review. The statutory auditor can trigger a duty to convene the supreme body and, if ignored, notification to the registry court, an institutional lever that integrates financial supervision with corporate governance.

Poland’s Companies Code sits closer to a classic continental model but sharpens personal gatekeeping. Only natural persons with full capacity may serve as management or supervisory board members or liquidators, with post-conviction “cooling-off” periods excluding offenders from office. In the LLC, the management board may be single- or multi-member; appointment and dismissal ordinarily lie with the shareholders unless the articles provide otherwise; and intricate rules tie the expiry of mandates to the approval cycle of financial statements, permitting joint terms and synchronised turnover. These mechanics produce a tight coupling between periodic financial accountability and status tenure, thereby aligning incentives without over-reliance on *ex post* liability.

Romania’s most distinctive contribution to the comparative picture lies in its insolvency-adjacent accountability regime. Article 169 of the Romanian Companies Act allows courts to reach managers and others who contributed to insolvency through defined misconduct, asset diversion, ruinous financing, fictitious bookkeeping, or reckless continuation of loss-making operations, imposing joint and several financial liability limited by causation, backed by asset freezes, professional disqualification, and coordination with criminal law where warranted.

Serbia blends structural freedom with a dense duty-and-remedy toolkit. LLCs must declare either one-tier or two-tier governance, but boards as such are not

mandated in LLCs; directors act as individual bodies, and a supervisory board appears only in the dual system. Substantively, a web of special loyalty duties governs conflicts, related-party transactions, and competition, with safe-harbour approvals available but backed by sharp consequences: damages and disgorgement, annulment of non-approved self-dealing, and a distinctive, court-ordered 12-month disqualification for failure to report personal-interest transactions. Minority enforcement is real: shareholders holding at least 5% may bring derivative actions if the company does not respond to demand. Thus, the Serbian model imposes thick loyalty obligations *ex ante* and equips insiders and minorities with credible *ex-post* levers to ensure they bite.

Slovenia, under the ZGD-1, offers a clean choice between a two-tier management/supervisory split and a one-tier board of directors, with 6-year renewable terms and detailed disqualification grounds that police both capacity and integrity. Appointment and removal rules emphasise flexibility in the LLC: managers are appointed and may be removed at any time by the general meeting unless the articles restrict removal to stated reasons, and supervisory boards are optional. For JSCs, the baseline is collegiality (at least three members in management or supervisory bodies) with court power to fill urgent vacancies. This framework privileges orderly succession and institutional redundancy, thereby reducing vacancy risk without sacrificing shareholder control over composition.

Slovakia rounds out the analysis with robust director-duty language and a comparatively narrow, transaction-specific conflicts regime. Managing directors who breach duties owe damages on a joint-and-several basis, cannot contractually limit liability, and bear a reverse burden of proof: they must show due professional care and good-faith pursuit of the company's interest to avoid liability. Related-party transactions in JSCs are fenced by supervisory-board pre-approval and arm's-length terms, but Slovak law otherwise lacks a general, codified conflicts framework; doctrine tends to derive disclosure obligations from the broader duty of loyalty. A mandatory anti-competition clause further restricts outside engagements, although its rigidity has prompted calls for greater contractual flexibility. The special simple JSC relaxes some prohibitions by requiring notice rather than outright bans, signalling a willingness to tailor governance to venture-style firms.

Two important themes emerge. First, optionality in organ architecture is widespread, but it is not neutral. Where powers are fused in one-tier boards, systems either contractually bolster information rights (the Czech Republic) or structurally counterbalance with independence majorities and audit committees (Hungary). Meanwhile, two-tier defaults, as in Croatia and Slovenia, internalise supervision at the cost of slower decision cycles. The law's task is to ensure that whichever choice is made, monitoring is credible.

Second, all eight jurisdictions protect third-party reliance by confining most internal limits and consent requirements to the internal plane. Hungary makes this most explicit by rendering internal restrictions on representation ineffective against outsiders and by carefully yoking procurator to representation so counterparties know who binds the firm; the Czech Republic, Croatia, and Romania have a similar

outcome functionally, preserving external validity while shifting consequences to internal remedies, removal, or damages. Poland's mandate-linked tenure rules complement this approach by aligning status turnover with financial reporting, harnessing routine corporate cycles to sustain discipline without destabilising transactions.

Employee participation illustrates another axis of differentiation. Czech co-determination is mandatory only for large two-tier JSCs and tolerates pragmatic arithmetical solutions to the one-third rule; Hungary compels supervisory-board establishment in larger employers for employee representation; and Croatia relies primarily on general labour-law representation and has otherwise abandoned broader worker participation. The overall trend is targeted, threshold-based workers' voice rather than a universal model, with scope and intensity linked to firm size and form. Instead, Romania has no rules on co-determination.

What, then, should the comparative lawyer take forward? First, convergence on a duty-of-care/loyalty core is real, but enforcement toolkits matter more than doctrinal labels. Systems that combine internal appointment discipline with insolvency-proximate remedies and minority enforcement produce a more credible deterrent mix than those that rely on any single lever. Second, one-tier flexibility and two-tier separation are not substitutes in practice; they are governance choices that require complementary adjustments, enhanced information rights, or independence majorities to remain functionally equivalent in oversight. Third, representation law is the support of transactional certainty; where internal limitations cannot be asserted against third parties, clear public signals (registrations, procuration forms, and signature specimens) and auditor- or court-mediated escalation ensure that external certainty does not become internal impunity. Hungary's pairing of representation and procuration rules and the Czech and Polish anchoring of status turnover to transparent cycles are instructive examples of this logic.

Finally, the eight systems are not drifting toward uniformity so much as they are iterating around a shared problem set with different emphases. The comparative lesson is not that there is a single "best" model, but that effective governance in civil-law company forms depends on how well the system aligns information rights, monitoring structures, and liability rules with the moments when managerial discretion most threatens the firm's residual claimants.

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Creditors*

1. Introduction

by Emőd Veress

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by Kateřina Eichlerová

3. Croatia

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10. Conclusions

by Emőd Veress

1. Introduction

The corporate form drives investment and innovation, but it also shifts part of the risk onto persons outside the company. Creditors lend on the promise that they will be repaid, yet they cannot monitor all choice managers make, and they cannot hedge every risk created by limited liability or a sudden turn toward insolvency. Company law is built around that tension. Its basic aim is to let businesses take risks but put guardrails in place so that insiders cannot drain value at the expense of those who supplied goods, services, labour, or money in reliance on the company's commitments. It also begins from a practical insight: "creditors" are not one group. A bank with collateral and a negotiated covenant package is not in the same position as a small supplier extending trade credit, or a tort victim who never chose to deal with the firm at all. Rules that ignore such differences tend to protect the powerful and leave the vulnerable exposed.

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Before trouble appears, the law tries to keep assets inside the company and to reduce the information gap between insiders and outsiders. Capital maintenance rules¹ and solvency tests limit distributions that would hollow out the firm (dividends, share buybacks, redemptions, or disguised transfers to insiders) when those payments would render the company unable to pay its debts as they fall due or leave it with liabilities exceeding its assets. Some systems still tie such restrictions to legal capital; many now rely on solvency tests framed in plain terms: do the numbers balance on the balance sheet, and can the company meet bills when they come due? To make those tests meaningful, companies must report honestly and on time. Proper accounts, independent audits, and (where securities are listed) continuous disclosure help outsiders price the risk they are taking. Private ordering sits alongside public rules. Lenders use covenants to limit leverage or require early warnings when ratios slip; they take security over assets and register those interests so that priority is clear; sellers use retention-of-title clauses to avoid becoming unpaid unsecured creditors when a buyer collapses. Each of these devices works only if the market can see them, which is why registries and notice systems matter.

Limited liability remains a core promise of company law. It encourages people to invest by capping their loss at the amount they put in. However, that promise is not a licence to abuse the corporate form. Courts can and do disregard separate legal personality in narrow, fact-specific situations in which the company is used as a façade to evade obligations, assets are commingled so thoroughly that the entity has no real life of its own, or under-capitalisation is tied to sharp practice and the shifting of foreseeable losses onto others. “Veil-piercing” is not routine – and should not be; if it were, businesses would struggle to plan. Nevertheless, its very existence disciplines behaviour at the margins, reminding controllers that the corporate veil is a shield, not a sword. As shown,

‘the benefit of limited liability is not granted on an unrestricted basis but is instead tied to certain requirements, at least in theory, corresponding to interests of shareholders and creditors in relation to the existence and creditworthiness of the enterprise, which prevent the complete externalisation of risks, of speculation on the part of the shareholders, or from influential shareholders at the costs of others. If this fundamental consensus is violated, the legal system may pierce the corporate veil for the benefit of the creditors and reach through to the personal assets of responsible shareholders.’²

As the company moves toward insolvency, the law asks directors to switch focus. When continuing to trade would plainly worsen the position of creditors as a group, directors cannot use the excuse that shareholders would prefer ‘one last roll of the

1 See Chapter 2 on corporate finances of the present book.

2 Roth and Kindler, 2013, pp. 66–67.

dice'. Many systems require directors in this period to take creditor interests seriously and to act to preserve value rather than burn it. As it was stated,

'the directors do not have the right to gamble with the creditors' money. This does not mean that directors must sit on their hands or refrain from seeking to take the company forward; their only obligation is to refrain from taking action that cannot be calculated overall to be in the interests of the creditors. The degree of financial instability and the degree of risk are interrelated and the latter must be determined by the former.'³

Wrongful trading rules capture situations in which managers continue to incur debts when there is no reasonable prospect of avoiding insolvency and fail to take all sensible steps to limit the fallout. Fraudulent trading goes further to deal with conduct carried on with an intent to cheat creditors. The consequences are personal: contribution orders to make good the shortfall; disqualification from board service; fines; and, in extreme cases, criminal liability. These rules are tough but are not meant to punish good-faith rescue attempts. Where directors inform themselves properly, take advice, and pursue credible restructuring that offers creditors better recoveries than an immediate collapse, many jurisdictions protect those efforts through variants of the business-judgment principle or explicit safe harbours. Delay is what the law fears most at this stage: late disclosure and wishful thinking tend to deepen the deficit and shrink the pot for everyone.

When formal insolvency proceedings begin, creditor protection becomes a collective project. A stay on individual enforcement stops the scramble for assets and prevents the first mover from grabbing value at the expense of others. An insolvency practitioner (liquidator, administrator, or the debtor in possession, depending on the system) takes the helm under court or creditor supervision. From that point, priority rules determine who gets paid and in what order. Secured creditors are paid from their collateral; certain preferential claims, like employee wages or specified taxes, may come next; unsecured creditors share what remains; subordinated claims and, finally, shareholders stand at the back of the queue. This ordering is not an abstract exercise, because it shapes behaviour long before any filing, as parties know where they stand if "the music stops". The law also looks backward to undo transactions that drained value in the run-up to insolvency. Preferences that favour a select creditor at the last minute, under-value transfers that put assets out of reach, and fraudulent conveyances can be set aside so that value returns to the pool for all.

Modern systems do more than liquidate. They aim to rescue viable businesses when that produces better outcomes for creditors and communities. For this reason, statutes increasingly provide tools that let a court approve a plan even if some creditor classes vote against it, provided that the plan is fair in substance and procedure. New money can be prioritised so that fresh lenders fund a turnaround. Clauses that would

3 Keay, 2007, p. 212.

automatically terminate essential contracts on insolvency are sometimes restricted so that a struggling firm does not lose the very services it needs to survive. None of this is about favouring debtors for their own sake. It is about recognising that a going concern is often worth more than the sum of its parts and that an orderly restructuring can increase what creditors ultimately receive.

Group structures and cross-border operations add another tier. Credit sits at different levels of the group, and creditors of an operating subsidiary usually have first call on the subsidiary's assets, leaving parent-level creditors structurally behind. Courts are cautious about collapsing entities into one pool, but some systems allow limited consolidation where records are hopelessly entangled or separateness has been ignored in practice. Cross-border cases raise questions about which court has the lead role, how judgments are recognised elsewhere, and how to coordinate parallel proceedings. Frameworks that focus on the company's centre of main interests and promote cooperation between courts aim to reduce value-destroying conflict and duplicate costs.

If the law protects creditors insufficiently, insiders have room to shift losses onto those least able to avoid them, especially tort creditors and small suppliers. If the law protects creditors too much, entrepreneurs become cautious, finance becomes more expensive, and some projects that would have created jobs and value never get off the ground. Company law governs that space by combining mandatory rules (needed to protect the weak and to keep the system honest) with contractual freedom for professional parties who can look after themselves. The result is not a perfect shield – and cannot be – but provides a framework that aims to keep the risk where it belongs, encourage timely action when trouble looms, and deliver a fair, collective resolution when failure can no longer be avoided. The sections that follow trace how different jurisdictions draw these lines in practice, maintain the asset base and information flow in ordinary times, expect directors to behave when distress approaches, and run collective processes that maximise value and distribute it according to clear, publicly known rules.

2. The Czech Republic

2.1. Creditor Protection Rules

Limited liability companies (LLCs) and joint-stock companies (JSCs) make a significant contribution to business development. Their form enables significantly more people to go into business than otherwise. As the primary creators of the company, the shareholders are in principle protected against the failure of the company's business, to which they would have been fully exposed if they had gone into business on their own. Business corporations, by virtue of the concept of asset separation and legal autonomy, allow the shareholders to limit the business risk of the business corporation to the loss of the share (loss of investment). Asset segregation and legal autonomy mean that the shareholders do not have to pay the debts of the business

corporation. Therefore, the company's risk of business failure is borne entirely by its creditors. Large voluntary creditors are able to secure their position by means of the law of obligations, often by making the company's loans or long-term business contracts with small companies conditional on the security of directors in the form of a guarantee and that of the shareholders. However, small and involuntary creditors do not have this option to protect their own position. For this reason, the seemingly zero liability for failure must be balanced by mechanisms to protect creditors. These are designed to prevent the misuse of the company for dishonest purposes and reckless management of the company.⁴

Creditor protection instruments can be classified into obligation, insolvency, and company protection instruments.

Obligation instruments that apply generally and not only to business companies include means of securing debts (pledge, guarantee, etc.), consolidation of debts (contractual penalty, etc.), regulation of relative ineffectiveness, and special cases of protection of the weaker party, as well as the system of tort law.⁵

Company and insolvency instruments are to some extent intertwined. Some company rules are linked to bankruptcy, while some are not.

The general protection of creditors in insolvency law in the event of a debtor's insolvency, regardless of whether the debtor is a company, is ensured by the obligation of the debtor in its capacity as an entrepreneur to timeously initiate insolvency proceedings if it is insolvent. According to Section 98(1) of Act no. 182/2006 Sb., the Insolvency Act (*insolvenční zákon*), a debtor who is a legal person or a natural person (entrepreneur) is obliged to file an insolvency petition without undue delay after he became aware or, with due diligence, should have become aware of his insolvency. The obligation to file an insolvency petition in due time applies to managing directors of the legal person, or to the liquidator if the legal person is in liquidation, or to the guardian (Section 98(3), Insolvency Act). The debtor and the persons who are obliged to file the insolvency petition on their behalf are also subject to the obligation to compensate for the damage caused by the late filing of the petition.

The breach of the obligation to file a petition timeously for the commencement of insolvency proceedings is connected with the obligation to compensate the creditor for the damage incurred as a result. According to Section 99(1) of the Insolvency Act, the debtor and, as a rule, the managing directors or the liquidator are liable to the creditor for the damage caused to the creditor by the breach of the obligation to file an insolvency petition timeously.⁶ The act defines the damage as the difference between the amount of the claim established in the insolvency proceedings and the amount received by the creditor in the insolvency proceedings in satisfaction of that claim

4 Pokorná et al., 2022, p. 150.

5 Ibid., p. 151.

6 There is no consensus on whether the liability is subjective, where fault is required, even if presumed, or strict liability with the possibility of exoneration. The courts have long been inclined to hold that it is a subjective liability (judgment of the Supreme Court case No. 29 Cdo 2356/2016). Other opinions are also noted in the doctrine (Sprinz et al., 2023, marg. 14).

(Section 99(2), Insolvency Act).⁷ The debtor and the managing directors or the liquidator may be exempted from liability for damage or other injury if they prove:

- a) that the breach of the obligation to file an insolvency petition did not affect the extent of the amount intended to satisfy the claim filed by the creditor in the insolvency proceedings; or
- b) that they have failed to perform that duty by reason of facts which arose independently of their will and which they could not have avoided even if they had made every effort which could reasonably be required of them (Section 99(3), Insolvency Act).

The threat of potentially overwhelming civil liability of the managing directors seeks to minimise the period between the actual bankruptcy and the opening of formal insolvency proceedings. In practice, however, this threat has not yet been seen to work sufficiently. Significantly, the right to compensation arises for a specific creditor and is not a benefit that managing directors are obliged to provide to the estate (unlike the replenishment of liabilities under Section 66, Business Corporations Act (BCA); see below). The right to compensation is conditional on the creditor's claim being filed in the insolvency proceedings and can be decided only at the end of the insolvency proceedings after the final satisfaction rate has been established.

The protection of creditors in insolvency proceedings, which is based on the principle of proportional and equal satisfaction, is also provided *ultima ratio* through criminal law. Act no. 40/2009 Sb., the Criminal Code, provides for the criminal offences of damaging a creditor (Section 222, Criminal Code), favouring a creditor (Section 223, Criminal Code), causing bankruptcy (Section 224, Criminal Code), breach of duty in insolvency proceedings (Section 225, Criminal Code), and insolvency fraud (Section 226, Criminal Code)

2.2. Company Creditor Protection Tools

Company creditor protection tools can be classified according to different aspects. A useful classification is that of J. Šilhan, who distinguishes between direct and indirect protection instruments according to whether creditors can be satisfied from a substitute source.⁸ Direct protection instruments, protective rules in the strict sense, include guarantees. Indirect instruments of creditor protection, protective rules in the broader sense, include rules relating to the segregation of company assets and their protection from shareholders.⁹ These follow a fundamental principle of company law, namely, that a shareholder cannot be preferred to a creditor in the queue for the company's assets.

⁷ Richter interprets this rule as an assumption. The case law on the application of the rule on the liability of managing directors for damage caused by late filing of an insolvency petition is not yet sufficiently settled (Richter, 2017, Chapter 4.4).

⁸ Pokorná et al., 2022, p. 152.

⁹ The division of creditor protection rules into a broader and narrower sense is also used by Černá et al., 2021, pp. 225, 228.

Among the company rules designed to protect creditors is the fundamental duty of directors to perform due care, which is at the heart of company law because the proper functioning of the company and thus the protection of its creditors depends on it (the background is discussed in detail in Chapter 5).

Czech company law also recognises a number of rules governing the disposal of company assets, which are aimed at creditor protection.

The first worth mentioning is the solvency test (Section 40(3), BCA), which the managing board must apply whenever it decides to pay out profits or other funds. This holds for the payments of a dividend and a settlement share (e.g. on the withdrawal or expulsion of a shareholder from an LLC) or for a reduction of share capital. In any such decision, the managing board must assess, based on sufficient evidence, whether the payment to the shareholder would lead to the company's bankruptcy. If the board concludes that the payment could worsen the economic situation of the company to such an extent that bankruptcy could occur, then a prohibition on making the payment to the shareholder should be enforced. The same test must be applied by the managing board when considering financial assistance or when an employee acquires shares on preferential terms.

Section 40(5) of the BCA expressly prohibits the provision of gratuitous benefits to shareholders. This prohibition could be inferred even without express provision. The provision of gratuitous benefits is in principle contrary to a fundamental principle of company law, according to which a shareholder may only receive benefits from the company which the company law provides for and only if the prescribed manner is followed, otherwise it is a violation of the prohibition on the return of contributions (Section 16, BCA). Thus, the prohibition on gratuitous benefits can be seen as a manifestation of the prohibition on the return of contributions. The provision of gratuitous consideration is then nothing more than an evasion of the rules on the distribution of profits or other resources. Thus, Section 40(5) of the BCA can also be viewed in the opposite way, namely, as identifying cases in which the provision of a gratuitous benefit to a shareholder is not contrary to the rules on the distribution of profits or other own resources.

Pursuant to Section 40(5) of the BCA, a company may provide a shareholder or a person close to the shareholder with

- a) the usual occasional gifts,
- b) a donation made in a reasonable amount for a public benefit purpose,
- c) performance in compliance with a moral obligation or considerations of decency; or
- d) a benefit provided by a company under the act.

Violation of the rule would create an obligation by the managing directors who participated in the provision of gratuitous benefits to compensate the company for the damage caused. At the same time, a breach of the rule would create an obligation by the shareholder or person close to them to return the unjustified benefit as gratuitous

gratification. J. Dědič and J. Lasák suggest that breaching the rule does not invalidate the juridical act.¹⁰

The usual nature of occasional gifts must be considered from the perspective of the company, not from the perspective of family and close relationships. The usual occasional gifts include souvenirs and promotional items, and free participation in events organised by the company for customers or business partners, such as attending a concert or theatre performance.¹¹ Thus, custom should be treated as a standard gratuitous benefit provided by a company in similar cases to anyone in a certain position, the position of the shareholder not being the decisive criterion.

When assessing a case of donating for a public-benefit purpose, it is necessary to assess the specific circumstances of the case in the context of the company's overall approach to making donations for public benefit purposes. The inclusion of this case in the list of permissible gratuitous transactions should be seen in the sense that the shareholder or a person close to him should not be burdened by being a shareholder and should not exclude the company from the circle of donors. However, this must not be a case of favouring one shareholder at the expense of another. In other words, if a company makes regular donations of certain amounts to certain public purposes, there is no reason to prohibit it from doing so simply because the donor is a shareholder (e.g. organising a public collection) or is in a close relationship with them, if the circumstances are otherwise similar to other cases in which neither the shareholder nor a person close to him is involved. In our view, if this were an isolated case, the conditions for this exception would not be met.

Compliance under a moral obligation or considerations of decency depends entirely on the particular circumstances of the case and the assessment of the case as justifiable.

An advantage under a benefit provided by a company may be, for example, an advantage provided in connection with the conversion of a company.

The rules governing the fair creation and maintenance of capital, which also serve to protect creditors, are discussed in detail in Chapter 3.

As far as liability is concerned, in the case of a JSC, the shareholders are not liable for the company's debts. In the case of an LLC, the shareholders are jointly and severally liable to the extent of the aggregate outstanding contributions. Once the contribution obligation has been fulfilled, which is almost always the case, and this fact is entered in the Commercial Register, their liability obligation ceases.

In both companies, liability for the debts of the company after its dissolution is enforced if the liquidation balance has been distributed among the shareholders. Then, each shareholder is liable for the debts of the dissolved company that were not paid before its dissolution up to the amount of their share of the liquidation balance.

The rule enshrined in Section 159(3) of the Czech Civil Code also serves to protect creditors. It can be applied even outside the bankruptcy of the company. According

¹⁰ Lasák et al., 2021, p. 277.

¹¹ Ibid., p. 278.

to this rule, directors are liable for the debts of the company to the extent that they have failed to reimburse the company for the damage caused by their breach of the duty to perform their duties with due care. The condition is that the creditor cannot enforce the debt against the company. This rule is more of an incentive. It is intended to induce a director to compensate for the damage to the company and thus avoid liability to creditors. The widespread use of the rule is hampered by significant information asymmetry on the part of the creditor (in most cases, the creditor does not know anything about the damage caused by the director).¹²

Section 71(3) of the BCA gives creditors a tool to “break through” the corporate shield of a company and, by reason of liability, seek to enforce a debt against an influential person who is actually behind certain harmful conduct.

Under Section 71(1) of the BCA, anyone who, by means of their influence in a company (an “influential person”), substantially influences the conduct of the company (an “influenced person”) to its detriment, shall indemnify the influenced person for that detriment unless they prove that they could reasonably have believed in good faith that they were acting knowledgeably and in the defensible interests of the influenced person. Under Section 71(3) of the BCA, the influential person is liable to the creditors of the influenced person for the performance of those debts which the influenced person is unable to pay to them in whole or in part as a result of the influence under subsection (1). An influential person does not have to be just a shareholder, but in principle it can be anyone. The liability of an influential person for the debts of a company can be considered as the Czech concept of the piercing the corporate veil doctrine.¹³

This rule can be enforced in a group of companies (*ovládaná skupina*), that is, one that is not subject to unified management and therefore, does not reach the quality of a group of companies named concern (*koncern*). We distinguish two kinds of concerns, disclosed and undisclosed. A disclosed concern is a concern whose companies have declared their affiliation to the concern on their websites. An undisclosed concern is one in which the companies have not done so. The law provides for two privileges in the case of a disclosed concern: (a) the right of the parent company to give instructions to the subsidiary’s business management and (b) in principle, exemption from the influential person liability regime.

Finally, it is not impossible that the liability of an influential person also falls on the controlling person in a disclosed concern. Even a parent company in a concern may be in the position of an influential person and may be subject to liability under Section 71(3) of the BCA if any of the following situations arise:

- a) It is an undisclosed concern. An undisclosed concern means a concern that has not published a concern declaration on its website pursuant to Section 79(3) of the BCA. An undisclosed concern is subject to influential person liability without more.

¹² Pokorná et al., 2022, p. 160.

¹³ Štenglová et al., 2023, p. 193; Lokajíček, 2016, p. 135.

- b) Although the controlling and the controlled companies have published a concern declaration, there is no material concern because the group of companies is not subject to a unified management (Section 72(1), in relation to Section 79, BCA).
- c) The controlled company is insolvent (Section 72(3), BCA).
- d) The exercise of influence is not carried out in the interest of the concern (Section 72(1), BCA).
- e) The controlled company has not received adequate compensation for the harm caused as a result of the unified management (Section 72(2), BCA).

Problematically, the creditor must bear the burden of alleging and proving that a person is an influential person under Section 71(1) of the BCA, exercised influence in a qualified manner, and that this resulted in a limitation on the company's ability to pay the creditor, resulting in liability for debts that the company failed to pay to the creditor.

If a managing director is disqualified by a court order under Section 63 of the BCA from office for a specified period of time, they are prohibited from office as a managing director for a specified period of time in all business corporations, unless the court specifically exempts a particular business corporation from the prohibition. If such a person violates the prohibition imposed, in particular, by acting as a *de facto* or shadow director, they shall be unlimitedly liable for the debts of the business corporation in whose management they participate. Liability for debts shall be unlimited. Thus, it is sufficient for the creditor to allege and prove that a person has been disqualified from office by a court decision, that they held the office *de facto* or covertly during the period of disqualification and that their claim arose during the period of disqualification.

Particularly powerful instruments for the protection of creditors in the event of a company's insolvency are the institution of liability top-up and clawback (Section 66, BCA).¹⁴

Both institutions have in common their sole application to (former) managing directors, *de facto* and shadow directors, and, if the managing director is a legal person, to the natural person who is its representative. Therefore, they do not apply to members of controlling bodies, such as the supervisory board. Both institutions have the following common features:

- a) They can only be used in the event of bankruptcy.
 - b) They are decided by the insolvency court solely on the insolvency administrator's motion.
 - c) The condition is that the person on whom the obligation is to be imposed has contributed to the insolvency of the company by breaching his obligations.
- Thus, the rules are aimed at protecting creditors only if managing directors

14 This relatively new regulation was added to the Business Corporations Act with effect from 2021. Therefore, case law has not yet developed. For the wording of the rule, see Chapter 5.

or persons equal to them (the de facto and shadow manager) have failed in the performance of their duties, and not at protecting creditors in the event of bankruptcy which occurred independently of the breach of duties of the managing directors, or despite the fact that they performed their duties properly. This is because a managing director is liable for the proper performance of their duties, not for the result.

- d) It is a kind of sanction for breach of the duty to perform the function properly.

The institutions have the following differences. The replenishment of liabilities is linked to the declaration of bankruptcy, while clawback is also applicable in other bankruptcy resolution methods (reorganisation). This may motivate members of the statutory body to seek reorganisation.¹⁵ The replenishment of liabilities may be used regardless of whether the insolvency proceedings were initiated at the request of the debtor or the creditor. By contrast, the insolvency court can rule on a clawback only if it is a creditor's insolvency petition. Therefore, additional sanctions are imposed for the debtor's failure to file a petition or to provide an incentive to file an insolvency petition on time.¹⁶ The insolvency court must decide on the clawback, although it has discretion whether to claim the recovery of the benefit for a maximum period of 2 years prior to the opening of the insolvency proceedings or for a shorter period. Regarding the addition of liabilities, the obligation of the insolvency court is not so strictly worded, with the law using the term "may". However, if the conditions laid down by law are met, it is not conceivable that the court would not decide on the addition of liabilities, as this would deny protection to creditors.

3. Croatia

3.1. *Creditor Protection Rules*

It is possible to summarise the traditions of creditor protection in JSCs and LLCs as a capital-oriented and a solvency-oriented system, respectively.¹⁷ In the first system, which is based on German law, the interests of shareholders may not prevail over the protection of their creditors. As creditors have much more limited means of protecting their interests than shareholders, the provisions of the CA place creditors in a more privileged position than shareholders.¹⁸ According to this approach, which is accepted in most countries of the continental legal circle, and also in the Republic

¹⁵ Pokorná et al., 2022, p. 157.

¹⁶ Ibid., p. 157.

¹⁷ For more on this, see Höfer, 2016, p. 405.

¹⁸ This is the so-called *stakeholder approach*. For more information, see Ivkošić, 2020, pp. 110 et seq.

of Croatia, the category of share capital,¹⁹ that is, the principles of entering and maintaining capital, are a counterweight to the privilege of non-responsibility for the company's obligations, and share capital must not fall below the minimum set by law. Creditor protection through these principles is the main support of the entire system, both for JSCs and LLCs.²⁰ Accounting regulations are adapted to this concept and are worded in such a way that the presentation of the value of income and assets is as credible as possible.²¹ The share capital is protected by a harmonised system of rules, starting with the prohibition of taking over share contributions below nominal value, professional audit and judicial supervision in the case of contributions of movables, real estate and rights to the company, rules on the prohibition of returning shares, profit sharing, illegal income, loans replacing capital, among other requirements.

The rules that protect the company's share capital and assets have been criticised, both from the point of view of company law and from the accounting point of view, as being rigid and out of touch with the needs of modern business.²² It is emphasised that the fixed share capital does not provide creditors with a certain amount of protection against, for example, bad business decisions by the company, and that the capital protection threshold does not need to be aligned with the company's individual business risk. Financial reporting rules promote timely creditor protection, and their informational function weakens the financial basis of traditional rules on capital contribution and maintenance.²³ Critics of the conventional "German system" of capital input and maintenance argue that it should be abandoned in favour of a solvency-based system of capital protection. However, the emphasis on financial reporting and the requirement that national accounting law be fully subject to the requirements of International Financial Reporting Standards creates a legal vacuum, manifesting as a significant difference in the calculation of the fair value of the company's assets, which has a direct impact on both the company's creditworthiness and the protection of its creditors. Despite two decades of external "pressure", the Federal Republic of Germany has retained the category of share capital in JSCs and LLCs in its legal system, and consistently protects the principles of capital input and

19 In Germany, the share capital of the JSC (German: *Grundkapital*) is designated differently from that of the LLC (German: *Stammkapital*), and in the doctrine, is also designated as *gezeichnetes Kapital*. In countries that adopt the *common-law* system, share capital is designated as *legal capital*, *stated capital*, and *subscribed capital*.

20 Protection of creditors through the principle of capital preservation is a leading principle of German company law. For more on this, see Bezzenger, 2005, p. 72.

21 Ibid.

22 The traditional rules on the entry and maintenance of capital were established by the Second Directive 77/91/EEC of 13 December 1976, with further amendments from 2002 and 2006. The rules have been subjected to criticism, both by the institutions of the European Union and by international business and banking circles. For more on this, see Merkt, 2004, p. 1409.

23 In addition to resistance from the point of view of the Company Law, the traditional rules on the entry and maintenance of share capital also experience strong resistance from the accounting positions or trade balance point of view. The International Accounting Standards (IAS Regulation) determine how to prepare annual financial reports according to the requirements of the International Financial Reporting Standards.

capital maintenance; most countries of the Central European legal circle follow the correct model in this regard.²⁴ Such an attitude certainly facilitated the conclusion of the Expert Group for Company Law that the functioning of the common market does not require abolishing the share capital category, and nor is it necessary to prescribe it as mandatory.²⁵

LLCs and JSCs have inherited the continental European tradition of preventive protection of the company's capital base.²⁶ It serves to protect creditors, which, together with the protection of minority shareholders, is at the core of the rights of capital companies.²⁷ Counterweighing the fact that in corporations, the members are in principle not liable for the company's obligations, based on the contribution in share capital, the company may dispose of the assets it needs for the organisation of the company and its appearance on the market.²⁸ Coercive rules protecting the company's own capital serve to protect creditors. The company's own capital (net or g assets), which consists of the share capital, company reserves, retained earnings, and annual surplus, serves primarily to cover losses.²⁹ If the value of the total assets falls as a result of the company's loss, the debt capital remains unaffected and the position and claims of the creditors remain unchanged. However, if the company makes a profit in the assets of the balance sheet, the assets of the company increase, and in the liabilities, the same amount is attributed to own capital. A contribution to the company (own capital) and a loan (external capital) are legally different types of capital. Based on the legal transaction with the company, the creditor has a binding legal demand for some action or payment, and for the use of other people's money, the

24 The reporting subject to the provisions on the preparation of annual reports from the German Commercial Code (German: *Handelsgesetzbuch*) is more conservative than the rules of the International Accounting Standards, resulting in a difference of up to 30% in the estimated fair value of the company's assets. Merkt, 2004. p. 1049. In the Republic of Croatia, commercial balance sheet law is governed by the Accounting Act, Official Gazette Nos. 78/15, 134/15, 120/16, 116/18, CA, Croatian Financial Reporting Standards (HSFI) and IFRS.

25 High Level Group of Company Law Experts, 2002, p. 82.

26 For more on this, see Goette and Fleischer, 2018, § 5 rbr. 27.

27 In German jurisprudence, it is emphasised that 'in the law of the capital company, the strict implementation of the principle of entry and maintenance of nominal capital is particularly important' (German: *Nennkapital*; BGH, 24.10.1988- II ZR 176/88, BGHZ, 28/88, p. 77), as 'the core of the rights of a limited liability company that must be ensured unconditionally' (BGH, 14.3.1977-II ZR 156/77, BGHZ, 68, p. 191). For that part of comparative German law, see Lieder, 2018, p. 1116.

28 In the German doctrine, the company's own capital is given picturesque names, such as the zone of resistance against overindebtedness (German: *Pufferzone der Überschuldung*) or the company's property reserve (German: *Betriebsvermögensreserve*). For more on this, see Goette and Fleischer, 2018, note 20, § 5 rbr. 27.

29 Instead of own capital (German: *Eigenkapital*), one can talk about the company's net or pure assets (German: *Reinvermögen*, *Nettovermögen*), and in the literature, these terms are used synonymously. Net or pure assets are the difference between assets and liabilities, provisions, and deferred payment of costs and income of the future period, as well as capital reserves and reserves for own share contributions if the company must have them. See Bezzenberger, 2005, p. 14.

company pays interest, which in principle does not depend on whether the company is operating at a profit or loss.³⁰ The shareholders, as investors or providers of own capital to the company, are included among those remaining after the company meets the creditors' demands (i.e. pays the debts). Their claims cannot be legally equated with those of the creditors against the company. If a company fails to pay a debt to a creditor and the creditor loses his capital and interest, this is a violation of rights. If the company gets into difficulties because of bad business decisions and loses its own assets contributed by its members, this is an entrepreneurial risk inherent in the membership of a corporation. Unlike shareholders, creditors should be shielded from the company's entrepreneurial risk. If the company has adequate capital in its operations for its financial needs, and if the ratio of internal to external capital is healthy, creditors should not be harmed. Conversely, if the company's operations are predominantly financed by other people's (external) capital and there are liquidity and/or solvency problems, creditors' claims may remain unsatisfied.

3.2. Specific Rules Applicable in the Vicinity of Insolvency

The management board is obliged to convene general meeting immediately if it finds that the company has lost assets equivalent to half of its share capital.³¹ The purpose of such an obligation is twofold. Before the reasons for bankruptcy appear, the shareholders are warned of the crisis so that they can take appropriate measures to remedy it, such as increasing the company's share capital or changing or ceasing certain business activities. The company's creditors are indirectly protected in this way. The shareholders are not obliged to make additional investments in the company to eliminate the loss. In addition to the obligation of the directors to convene a general meeting and inform the shareholders of the loss, they are also obliged to inform the shareholders of the state of the company, its capabilities, and prospects for recovery, in accordance with the diligence of an orderly and conscientious businessman in the management of the company's affairs. The company loses half of its share capital when the company's net assets (assets minus liabilities) do not cover half the share capital of the company, as determined in the statute. Valuation rules from the company's financial statements are relevant for determining the company's net assets.³² First, the net assets are valued as if the enterprise were going into liquidation. Only in the case of a negative forecast for the continuation of the business should the assets be valued as if the company were being liquidated. Hidden reserves may be considered to

30 Ibid., p. 78. The company member, as an investor or provider of own capital to the company, is entitled to what is left (German: *Residuum*) after the company fulfils the creditors' demands, that is, pays the debts, and cannot be legally equated with the claim that the creditors have against the company.

31 The obligation is stipulated in the provisions of Article 442, paragraph 2 of the CA and Article 10, Section 1, paragraph 3 of the Act on Financial Operations and Pre-bankruptcy Settlement, Official Gazette No. 108/12, 144/12, 112/13, 71/15, 78/15, 114/22.

32 See Barbić, 2010, p. 458.

the extent that they are disclosed in the financial statements.³³ The loss to the company in the amount of half the share capital does not have to be disclosed in the financial reports. In keeping with the attention of an orderly and conscientious businessman in managing the affairs of the company, the members of the board are obliged, in accordance with the diligence of an orderly and conscientious businessman in the management of the company's affairs, to organise the company in such a way that they have a constant insight into its financial and economic situation and to ensure that financial reports are prepared during the financial year, that is, extraordinary financial reports that will review the company's financial situation. The obligation to convene an assembly ends if a proposal to open bankruptcy proceedings is submitted or if all members of the company, who are aware of the actual situation, refuse to hold the assembly.

As soon as serious economic difficulties occur in the business of the company, the members of the board are obliged to check whether the company is over-indebted or unable to pay. The level of scrutiny of over-indebtedness will depend on the extent and depth of the crisis. When it becomes clear that the crisis is serious, orderly and conscientious board members should determine the company's asset status and predict whether and for how long it will be insolvent. Board members have a duty to provide accurate and comprehensive information to shareholders about the company's prospects for recovery. If the shareholders take no decision at all on whether to rescue the company, they are obliged to take such a decision themselves with the care of a proper and conscientious businessman. If they decide on a rescue that had no chance of success from the outset, or if they propose the opening of bankruptcy proceedings prematurely because there were objective circumstances for saving the company, a positive assessment of the company's ability to continue as a going concern requires the will or presumed will of the shareholders for the company to continue as a going concern and for the company to be highly likely to meet its obligations in the future period. The forecast cannot be based on the thoughts and hopes of the board members, but their rescue plan, which includes the assets, finances and income of the company, must be acceptable to an expert.³⁴ The board members forecasts is covered by the rule of free business judgment. To overcome over-indebtedness, additional capital investment in the company is sometimes necessary, whether it is internal or external financing of the company. The rescue of a company works only in the future, and thus, cannot undo the harmful consequences that occurred as a result of bad business decisions. If the management submitted a proposal to open bankruptcy proceedings

33 The value of the shares is not taken into account when determining the assets of the company. A company member's loan that replaces the company's capital must be placed on the liability side of the balance sheet, as in the financial statements. This does not apply if the member of the company undertakes not to collect the claim until the net assets of the company, including the member's loan, are greater than half of the share capital (*pactum de non petendo*).

34 See Lutter and Hommelhoff, 2023, § 43 rbr. 29.

too quickly (i.e. before it tried to rehabilitate the company), it would be liable to the company for damages according to the provisions of Article 252, paragraphs 1 and 2 and Article 430 of the CA, because she violated the obligation to run the company with the attention of an orderly and conscientious businessman. In addition to protecting the interests of the company and its shareholders, creditors, employees and the public interest, the time limit for rescuing the company also benefits the members of the board of directors, as their decisions to rescue the company are implemented *ex ante* according to the circumstances that existed at the time the decision was taken. The time limit for initiating bankruptcy proceedings runs from the date on which the members of the board of directors should have become aware of the company's over-indebtedness or insolvency.³⁵ The management's board obligation to request the opening of bankruptcy proceedings is mandatory, and therefore, the members management's board cannot be released from it by agreement with individual shareholders or creditors.

3.3. Limited Liability and Veil-Piercing

Like any other legal entity, a company is liable for its obligations with all its assets. There are no exceptions to the above rule on a company's liability for obligations. The company is not liable for its obligations with its share capital, because the company's liability extends to all the company's assets, not only those created by the contributions with which the share capital was created. Article 10 of the CA defines in detail how its members are liable for the obligations of the company. Unlike members of a general or limited partnership, shareholders in JSC and LLC are generally not liable for the company's debts.³⁶

Article 10, paragraph 3 of the CA provides an exception to this principle. For the sake of legal certainty, it has been established that a person who, as a member of a

³⁵ Article 110, paragraph 2, Bankruptcy Act.

³⁶ Members of a general partnership are liable for the company's obligations personally, jointly, and severally with their entire assets (Article 10, paragraph 1, CA). The general partners in a limited partnership are also liable in the same way (Article 10, paragraph 1, CA). The limited partners, if they have paid the contribution to which they committed themselves in the memorandum of association, are not liable for the company's obligations (Article 10, paragraph 2, CA). When the limited partner's contribution is not paid in full, his liability toward the company's creditors is direct and joint with the members of the company who are personally liable (general partners), up to the amount of the contribution determined by the partnership agreement, less the part paid by the limited partner (Article 143, paragraphs 1 and 2, CA). Creditors of a limited partnership are given special protection in the event that none of the general partners of the company is a natural person, a JSC, or a limited partnership with at least one general partner who is a natural person (Article 143, paragraph 7, CA). Then, the limited partners are considered not to have paid their contribution to the company. In other words, they are always liable for the obligations of the company to creditors up to the amount of their share, jointly with the general partners of the company, so that the illusion is created that their share has not been paid, even when it has been. This, in fact, increases the assets with which the creditor may be satisfied by the amount of the limited partner's contribution. For details, see Petrović and Ceronja, 2019, pp. 54 et seq.; Jurić, 2019, pp. 59 et seq.

company, abuses the fact that he is not liable for the company's obligations, cannot rely on the fact that he is not legally liable for those obligations. This is a case in which the legal personality or the wall of legal subjectivity of a company is breached. This ignores or does not consider that a company is a separate legal entity, distinct from its members. Thus, the protection of the company's creditors takes precedence over the fundamental rule that the members of a company are not liable for its obligations.

There are various ways of abusing the fact that shareholders are not liable for the company's obligations, and Article 10.4 of the CA, for example, defines when an abuse is deemed to have occurred: a) if a shareholder uses the company to achieve a goal that is otherwise prohibited; b) if a shareholder uses the company to damage creditors; c) if a shareholder, contrary to the law, manages the company's property as if it were his own; or d) if a shareholder reduces the company's assets for his own benefit or for the benefit of another person, even though he knew or should have known that the company would not be able to meet its obligations.

A common abuse is for the sole member of LLC to create the appearance of legal identity between himself and the company through his actions. Such an appearance is created vis-à-vis third parties, for example, when a member acts as the company's representative and this is not made sufficiently clear, but it appears that he is taking legal action and concluding legal transactions in his own name and on his own account. Equally, the semblance of legal identity arises if there is a mix-up, that is, if there is not a sufficiently obvious demarcation between the assets of the company and its members. The question of the responsibility of a company member for the obligations of the corporation can also be raised when the company has more than one member. It is not important in what way the fact that a member of the company is not liable for the company's obligations is abused, but rather, it is important to establish objectively that there has been an abuse. The broad wording of the provision of the CA provides maximum protection to the creditors of the corporation against the actions of shareholders who abuse their principled non-responsibility for the company's obligations.

Piercing the corporate veil usually arises in cases in which the company is undercapitalised, in relations between parent companies and subsidiaries, and in mixing of company assets by shareholders.³⁷

3.4. Legal Protection of Creditors in Case of Insolvency

The purpose of bankruptcy proceedings is to remove from economic and legal circulation a legal entity that is unable to carry out its economic activity in an economically justifiable manner. If the company is unable to perform its function properly and there are sufficient funds available to satisfy creditors voluntarily and through enforcement proceedings, creditors try to collect as quickly as possible according to the principle of priority, as there is a risk that no one would be able to realise

37 Examples include the High Commercial Court of Croatia, 2003, Pž-1522/03, Pž-1760/02, 2004, Pž-6369/03.

their claims. To avoid this race to the bottom, a bankruptcy procedure is set up in which the principle of first in time is replaced by the principle of equality.³⁸ The two basic grounds for bankruptcy provided for by the Bankruptcy Act³⁹ are insolvency and over-indebtedness. According to the general definition in Article 6, paragraph 1 of the Bankruptcy Act, the debtor is insolvent if he is no longer able to meet his financial obligations as they fall due. According to the general definition in Article 6, paragraph 1 of the Bankruptcy Act, the debtor is insolvent if he is no longer able to meet his financial obligations as they fall due. In doing so, it is assumed that the debtor is unable to pay if, in the register of the order of basis for payment maintained by the Financial Agency, outstanding obligations have been recorded for a period longer than 60 days, and which, based on valid grounds for collection, should have been collected without the debtor's further consent of any of his accounts (i.e. if he has not paid three consecutive wages due to the worker according to the employment contract or another act). The debtor must prove the payment of the debt with a public document, a notarised document, or a certificate from the Financial Agency. The company's inability to pay must be objective and therefore, it is not sufficient that the debtor does not want to pay the due obligations, although it could do so according to the available means. The fact that the debtor has settled or can settle all or part of the claims of some creditors does not mean that it is solvent.⁴⁰

Based on the provisions of Article 7, paragraphs 1 and 2 of the Bankruptcy Act, The debtor is over-indebted if its liabilities are greater than its assets, unless, according to certain circumstances, such as the development programme, the available sources of funds, the nature of the assets and/or insurance, it can be reasonably assumed that in the continuation of business it will properly discharge its obligations as they fall due.

The members of the board of directors may not make any payments to the shareholders, creditors or third parties after the reason for the company's bankruptcy has been declared. The legal provisions on the prohibition of payments oblige the members of the board of directors to repay to the company the amounts that they

38 Creditors register their claims and compete for a collective and proportional settlement from the debtor's property; in other words, a collective mechanism as a general execution replaces the individual rights to enforcement that the creditors had before bankruptcy was initiated. For more about this, see Vuković and Bodul, 2012, p. 634.

39 Bankruptcy Act, Official Gazette, No. 71/15, 104/17, 36/22.

40 According to the provisions of Article 6, paragraphs 4 and 5 of the Bankruptcy Act, the existence of the company's inability to pay is proven by a certificate from the Financial Agency, which, at the request of the creditor, is obliged to issue a certificate without delay; otherwise it is liable for the damage the creditor suffers as a result. Non-payment of three consecutive salaries is proven by calculating the unpaid salary.

have paid to anyone after the reason for opening the bankruptcy.⁴¹ The purpose of the legal ban on payments after the grounds for opening bankruptcy proceedings against the company have been established is to preserve the company's assets in the interests of all creditors and to prevent one creditor from being satisfied at the expense of other creditors. It serves to treat all creditors equally. In doing so, a distinction should be made between compensation because of payments made after the onset of bankruptcy grounds and compensation for damage caused by the delay in submitting a proposal for opening bankruptcy proceedings. That it is a request for compensation of impermissible payments *sui generis* and not a request for compensation of damages follows from the text of the provisions of Article 469 of the CA, which does not refer to compensation for damage, but to payment to the company for the amounts that were paid after the reason for opening bankruptcy proceedings against the company. The company may demand compensation from the members of the management board for the amounts that were illegally paid after the emergence of bankruptcy reasons. The amount of the request is determined by deducting from the paid amounts the compensation received by the company for the payment made. The eligibility of individual payments is assessed *ex ante*, that is, at the time the payment is made. The ban on payments applies from the date on which the grounds for opening bankruptcy proceedings against the company are established. Once the company has been declared bankrupt, the insolvency administrator may bring an action in the bankruptcy proceedings to recover unlawful payments from the board of directors. In addition to the company itself, pursuant to Article 252, paragraph 5 of the CA, the company's creditors have the right to claim compensation for unlawful payments.⁴²

Upon the opening of bankruptcy proceedings, the rights of the bankrupt debtor to manage and dispose of the assets forming part of the bankruptcy estate, as well as the rights of the bankrupt debtor's bodies, the bankrupt debtor's procurator, representative, and attorney are transferred to the insolvency administrator.⁴³ The insolvency administrator is obliged to draw up a list of all the debtor's creditors that he has learned about from the books and business documents of the bankrupt debtor

41 Article 252, paragraph 3 of the CA stipulates that the members of the management board are particularly liable for damages if they make payments after the occurrence of bankruptcy reasons. Article 469 of the CA prescribes the appropriate application of Article 430 of the CA, which refers to the application of Article 252 of the CA. The obligation to pay compensation that was made after the occurrence of bankruptcy grounds depends on the compensation for damages due to the delay in submitting the proposal for opening bankruptcy proceedings, and thus, it is only an individual item of the total damages that occurred owing to the delay in opening bankruptcy proceedings. This is an obligation and is an integral part of the general responsibility of the members of the board for the damage caused to the company as a result of their actions. See Schmidt, 2004, p. 663.

42 After falling into bankruptcy, the creditor's claim can be realised by the bankruptcy trustee by acting as a plaintiff on behalf of the bankrupt debtor and requesting payment into the bankruptcy estate of the company.

43 Article 159, Bankruptcy Act.

or from the declaration of their claims. Filing a claim is an act of will on the part of the creditors, by which they unequivocally announce their participation in the bankruptcy proceedings and the distribution of the bankruptcy estate.⁴⁴ The filing of the creditor's claim is examined by the bankruptcy judge at the examination hearing, after which the court compiles a table of examined claims.⁴⁵ Settlement of bankruptcy creditors can begin after the general examination hearing, and is carried out according to the inflow of cash.⁴⁶

4. Hungary

4.1. *Piercing the Corporate Veil*

The 2013 Hungarian Civil Code, basing the JSC and LLC regimes on the idea of limited liability, has explicit rules on piercing the corporate veil, continuing similar rules from the previous legislation. According to § 3:2. (2), if a legal person's member or founder has abused their limited liability, and as a result, unpaid creditor claims remain upon the termination of the legal entity (in our case, company) without a legal successor, the member or founder is fully liable for these debts.⁴⁷ This text is a special application of the general prohibition of abuse of rights (§ 1:5, Civil Code). To pierce the corporate veil, specific conditions are needed.

From a conceptual standpoint, the principal difficulty in the Hungarian framework concerns the normative characterisation of §3:2(2) of the Civil Code: is veil-piercing a sanction-like residual-debt liability attaching to all unsatisfied claims upon dissolution without legal successor, or is it a fault-based compensatory regime that requires proof of causation and quantification of loss? This ambiguity permeates later Sections (4.1.3–4.1.5) and affects the allocation of the burden of proof, the scope of defence, and contribution among wrongdoers. A careful exposition, therefore, should make explicit (I) the cumulative gateways (abuse, termination without successor, unsatisfied claims); (II) the standard of proof (civil balance of probabilities); and (III) the remedial metric (all unpaid debts vs. proven asset shortfall).

4.1.1. *Who is liable?*

The focus of this section is on whether liability falls on the member of an LLC (Kft.) or the shareholder of and company limited by shares (Rt.). It is irrelevant whether the member or shareholder holds a majority or minority interest in the company.

Nonetheless, veil-piercing analysis must reckon with group realities. Where the member/shareholder is a parent company or a controlling affiliate, indications of

44 Based on Article 257, paragraph 1 of the Bankruptcy Act, the claim is submitted to the insolvency administrator on the prescribed form.

45 Article 264, Bankruptcy Act.

46 Article 273, paragraphs 1 and 2, Bankruptcy Act.

47 For details, see Mohai, 2022, pp. 21–28.

abuse include: (I) centralised cash-pooling without arm's-length safeguards,⁴⁸ (II) systematic extraction of value (intragroup loans on non-market terms, upstream guarantees without compensation), and (III) policy imposition that externalises risk onto the controlled entity. The more the parent's group policy directly dictates the debtor's perilous course, the easier it is to attribute abuse of separateness to the controller for piercing the corporate veil purposes, without collapsing the distinct personhood of affiliates.

4.1.2. What is the basis of liability?

The basis of liability lies in unlawful actions that constitute an abuse of limited liability. Legislation does not currently provide an enumerative list of specific instances that would qualify as such abuse. Instead, it deliberately delegates the task of defining the scope of such cases to judicial practice. Although the omission of a detailed list from prior regulations might suggest otherwise, examples remain relevant and serve as guiding precedents. For this reason, we can state that the liability of the members (shareholders) may be established particularly if they treated the assets of the company as their own, and reduced the company's assets for their own benefit or the benefit of others in such a way that they knew, or should have known with the exercise of generally expected diligence, that this would result in the company being unable to fulfil its obligations to third parties.

Therefore, we can articulate non-exhaustive factors that courts weigh when assessing abuse of limited liability: (a) systematic commingling of personal and corporate assets; (b) asset siphoning or value-destroying dividends/related-party transfers at a time of looming illiquidity; (c) deliberate under-capitalisation given the foreseeable risk profile; (d) use of the entity as a liability shield to perpetrate legal wrongs; and (e) non-observance of corporate separateness (books, decisions, intra-group pricing).

Judicial practice has clarified that participating in the adoption of a resolution that later proves economically flawed does not, in itself, amount to an abuse of limited liability.⁴⁹ In other words, such a scenario does not automatically constitute abuse; additional elements must be present to establish liability. For instance, liability may arise if the member acted deliberately or, in cases of gross negligence, should have been aware that the resolution would lead to consequences, such as the company's assets diminishing to the detriment of creditors, rendering the company incapable of fulfilling its obligations.

4.1.3. The Need for Actual Damage to Creditors

Abuse in this context does not require a separate illegality; it is enough that conduct violates good faith/abuse-of-right principles (§1:5, Civil Code) and misuses limited

48 This refers to replicating the discipline of dealing with an unrelated, economically self-interested party.

49 BH2012. 124. I.

liability (§3:2, Civil Code). However, the mere fact of abuse is insufficient to establish liability. Actual harm must have occurred to the company's creditors, for personal liability of members or shareholders to be invoked. As long as no damage exists on the part of the creditors, personal liability does not arise, even if abuse has occurred. For instance, if the company fulfils its obligations toward the creditor, the legal framework governing liability need not be applied.

The disputable issue is whether "actual harm" is a prerequisite in the tort sense or not. Under §3:2(2) of the Civil Code, the existence of unpaid claims at dissolution functions as the relevant harm proxy. Requiring proof of individualised loss beyond the residual-debt condition risks collapsing the veil-piercing remedy into a conventional delict claim and undermines its deterrent function. A more coherent reading is that, once abuse is established and the entity has been dissolved without successor, the creditor's non-satisfaction supplies the actionable detriment.

4.1.4. Liability is Contingent upon the Dissolution of the Company Without Legal Succession

Liability can only be enforced if the company ceases to exist without a legal successor. Judicial practice has correctly established that lawsuits brought prematurely – such as claims by creditors against shareholders on grounds that they abused their limited liability to the detriment of creditors – must be dismissed (BH2011. 72). The relevant liability rule applies exclusively to the former members (or shareholders) of companies that no longer exist.

4.1.5. Consequences of Liability

The legal consequence of liability is that, following the dissolution of the company without a legal successor, members or shareholders bear unlimited liability for the unsatisfied claims of creditors that remain after dissolution. The subject of the debate is whether a member who abuses their limited liability should bear responsibility for all debts as a sanction,⁵⁰ or whether the legislation is regulating a classic case of tort liability. In the latter interpretation, the unlawful act consists of the abuse of the absence of liability, and the extent of compensation is determined by the amount of damage causally linked to the unlawful act. In our view, the second interpretation is correct.⁵¹

If §3:2(2) is read as sanction-based full liability, several corollaries follow: (I) liability is joint and several among abusing members/founders; (II) causation relates to the abuse–termination–non-payment nexus rather than to the quantum of each creditor's specific loss; (III) the liable person may pursue contribution against

50 This is a rigid, very textual interpretation, because the law states that if a member/founder abuses limited liability or the legal-person form, and the company is terminated without a legal successor, the member/founder is 'subject to full liability for the legal person's debts that remain unpaid'. This reads as sanction-like, full (unlimited) liability for all unsatisfied debts, not merely damages measured by a causation analysis.

51 Veress, 2024a, pp. 4–5.

co-wrongdoers internally; and (IV) set-off against claims of the debtor's estate should be tightly confined to preserve *pari passu*. By contrast, on a compensatory reading, the defendant may contest the quantum of shortfall by showing that non-payment would have occurred irrespective of the impugned conduct (adequate causation). Given the structurally informational advantage of controllers, a rebuttable presumption of causal contribution upon proof of abuse and dissolution would be normatively justified.

4.2. Specific Rules Applicable in the Area of Insolvency

If a company ceases to exist without a legal successor, the Hungarian Civil Code allows creditors to seek compensation for unmet claims directly from the company's executive officers (§ 3:118, Civil Code). The law specifically applies when an executive officer fails to consider creditors' interests after the company enters a situation where insolvency is imminent. This liability is governed by the rules for extracontractual damages.

The duty-shift in §3:118 of the Civil Code presupposes objective foreseeability of non-payment at maturity (a cash-flow-oriented test tempered by balance-sheet signals). Relevant markers include: serial roll-over of overdue trade debt, persistent negative operating cash flow, covenant breaches, and regulatory non-filings. Directors are not insurers of success; nonetheless, once these markers materialise, they must turn from shareholder-wealth maximisation to loss-minimisation for the general body of creditors.

The legal framework ensures accountability for decisions made by executives in the critical period when financial stability is at risk. The provision recognises that insolvency represents a radical shift in corporate governance priorities. Normally, executive officers are expected to act in the best interests of the company. However, once the threat of insolvency becomes apparent, their responsibilities turn toward protecting the interests of creditors. Failure to adapt to this shift – whether by continuing risky financial practices, mismanaging company resources, or disregarding signs of financial collapse – can result in personal liability for the damages caused to creditors.

As stated above, liability in this context is based on tort law (extra-contractual) principles, meaning the executives may be held accountable for harm caused by their actions or omissions, in the absence of a direct contractual relationship with the creditors. The regulation ensures that creditors are not left entirely without recourse when a company dissolves and its assets prove insufficient to cover outstanding claims.

Importantly, this rule does not apply when a company undergoes termination through voluntary liquidation. In such cases, a separate regulatory framework governs the responsibilities of executive officers and the treatment of creditors' claims. In general, under voluntary liquidation, all claims of external creditors are satisfied, and therefore, the executive officers' liability exists only on a contractual basis toward the company.

The Hungarian articulation of managerial liability near insolvency should be understood as qualified deference to informed, good-faith decisions that rationally aim at value-preserving restructuring. Deference recedes where the decision (I) prefers insiders, (II) exacerbates the deficit without a credible turnaround pathway, or (III) breaches procedural duties (information-gathering, documentation, and timely escalation to the supreme body).

4.3. Legal Protection of Creditors in Case of Insolvency

The Hungarian Insolvency Act no. XLIX of 1991 has detailed rules on managerial liability in case of insolvency (33/A. §).

The essence of the current Hungarian regulation is discussed in the following sections.

4.3.1. Who is liable?

Primarily, those who served as executives of the company during the 3 years preceding the commencement of liquidation are liable. Judicial practice has established that liability based on executive responsibility can be enforced not only against current executives of the company but also against former executives.⁵² An individual qualifies as an executive of a company if they exercised a decisive influence over the decision-making processes of the company (shadow director). In the context of shadow directors, the Hungarian Supreme Court has examined the liability of a bank-appointed trustee and, through them, the bank itself as a “shadow director”. According to the Supreme Court, if the creditor and its agents effectively took control of the debtor’s management as shadow directors and directed the business in such a manner that the debtor became unable to repay its debts or used the assets for purposes other than the debtor’s reorganisation, this could form the basis for a claim for damages, provided such conduct is established.⁵³

If multiple parties jointly cause harm, their liability is joint and several. The corporate law does not recognise the concept of a nominal executive; therefore, an executive who does not actively participate in the operations of the company is also liable for damages caused to creditors.⁵⁴

4.3.2. What is the basis of liability?

Liability arises if, following the onset of a situation threatening insolvency, the executive failed to perform their duties with due consideration for the creditors’ interests, and, as a causal result, the assets of the company diminished, or the full satisfaction of creditors’ claims was frustrated for other reasons.

The onset of a situation threatening insolvency refers to the point at which the executives of the company either foresaw or, with the level of care expected of

52 BDT2013. 2897.

53 Gfv.X.30.150/2011/3.

54 BDT2010. 2282. II.

someone in their position, should have foreseen that the company would not be able to meet its obligations as they fell due.

If, prior to the commencement of liquidation, an executive negligently or improperly failed to fulfil the statutory obligation to deposit and publish the company's annual financial statements (or consolidated (group) financial statements) or failed to comply with the preparation, document, asset transfer, or reporting obligations stipulated by the Hungarian Insolvency Act, they must demonstrate that no situation threatening insolvency arose during their tenure or, if such a situation did arise, that they took creditors' interests into account in performing their executive duties.

Activities that disregard creditors' interests include the failure to comply with statutory obligations to prevent environmental damage, halt ongoing damage, or undertake remediation. Such failures may result in the full satisfaction of creditors' claims being jeopardised.

An impressive body of case law has provided substantive interpretation of these legal norms. For instance, if an executive of a company facing a situation threatening insolvency uses the company's liquid assets to satisfy a member's claims, prioritising these over other existing, due, and subsequently unpaid debts, this conduct contravenes creditors' interests. Such behaviour can serve as sufficient grounds to establish the executive's liability under Section 33/A(1) of the Hungarian Insolvency Act.⁵⁵

The Supreme Court has further argued that an executive can only subsequently be exempted from liability if they can demonstrate that the repayment of the member's loan occurred when the debtor was still able to meet its obligations to external creditors. Under civil law, loans from members are treated equivalently to loans from external creditors. However, when a company repays a loan to a member, it must be considered that the member typically has greater insight into the debtor's operations and financial status. Therefore, after the onset of a situation threatening insolvency, the member must also bear responsibility for the continuation of the company's activities, which the executive must take into account. If the executive makes a payment to a member, they are liable to the creditors of the company that is subsequently placed under liquidation.⁵⁶

The fact that a business decision made by an executive after the onset of a situation threatening insolvency later proves to have been mistaken does not, in itself, establish liability under Section 33/A of the Hungarian Insolvency Act. Liability arises only when the specific decision involves additional factual elements, such as fraudulent collusion among the parties to the transaction to serve their own economic interests or to circumvent creditors, or when the transaction violates explicit legal provisions. Liability may also be established if the decision involves unreasonable or foreseeably unachievable transactions, made with a fundamentally flawed assessment of the company's position or market environment.⁵⁷

55 BDT2024. 4844.

56 Gfv.VII.30.193/2013/8.

57 BDT2016. 3499. I.

In a situation threatening insolvency, the primacy of creditor interests is violated by loans, intended to finance a borrower's project, which bring no benefit to the debtor, offer no prospect of recovery for creditors, and serve only the indirect personal interests of the debtor and the borrower's private owner.⁵⁸ The executive of a company under liquidation can be held liable if, after the issuance of a liquidation order, they fail to account for incoming funds, thereby reducing the debtor's assets.⁵⁹ Liability is also established if an executive facilitates the assumption of a company debt by another party, knowing the new debtor cannot repay it, resulting in the debt becoming uncollectible after the new debtor's liquidation.⁶⁰ Furthermore, if an executive explicitly waives repayment of a loan previously provided to a third party without taking any action to collect it, this waiver establishes liability for the resulting loss of assets equal to the waived amount.⁶¹

In assessing the liability of an executive, the critical factor is not the specific harm incurred by an individual creditor or whether the debtor's assets can satisfy their claim. Instead, the focus is on the extent to which the executive's failure to act in accordance with creditor interests, considering the claims of all creditors, caused a reduction in the debtor's assets. Therefore, the decisive factor is not what specific claim the plaintiff creditor holds in the liquidation process. If, however, the actual asset reduction of the debtor exceeds the amount claimed, the court is required only to establish liability for the asset reduction corresponding to the claimed amount.⁶²

To summarise the lawful conduct expected of an executive during a corporate crisis, the following considerations are essential: to convene the supreme decision-making body, inform it of the situation, and urge it to either finance the debtor or initiate liquidation proceedings (executives themselves are not authorised to initiate liquidation); and to refrain from actions that would further deplete the debtor's assets or exacerbate creditors' losses. The Hungarian Supreme Court has clarified that 'if an executive proposes a resolution to the members, but the members reject the proposal and adopt a different resolution, the executive officer – in their capacity as such – bears no liability for the outcome'.⁶³

Asset-reduction findings under §33/A must be coordinated with avoidance remedies so as to prevent double counting. Where a challenged transaction is successfully unwound and value re-enters the estate, the residual shortfall attributable to managerial breach should be net of claw-back recoveries. Conversely, unsuccessful avoidance (e.g. owing to transferee of good faith) may still be grounds for managerial liability if the original decision violated creditor-regard duties.

58 BDT2016. 3436.

59 BDT2010. 2376.

60 BDT2021. 4302.

61 BDT2021. 4289.

62 BDT2014. 3241.

63 Gfv.VII.30.081/2013/6.

4.3.3. *Who can request a finding of liability and when?*

A creditor or the liquidator, acting on behalf of the debtor during the liquidation process, may file a lawsuit requesting the court to establish liability. Note that this is a declaratory action, meaning its purpose is solely to determine liability; it does not result in a directly enforceable court judgment. In its decision, the court may determine that, following the onset of a situation threatening insolvency, the defendant failed to perform their executive duties with due regard for the creditors' interests, causing the debtor's assets to decrease by a specified amount. The statement of claim must reflect this by specifying the exact amount of the asset reduction in the petition itself, as merely referencing it in the factual part of the claim is insufficient. The court is bound by the petition's terms.

The liquidator is required to inform the creditors about the circumstances and details of the liability and the initiation of the lawsuit. If the claim is filed by a creditor, the court will notify the liquidator by sending them a copy of the claim. The number of lawsuits cannot be artificially increased; the court will reject a claim if a liability action regarding the same executive's identical actions has already been initiated, has been conclusively adjudicated, or is still pending with a first-instance judgment expected soon.

Both the liquidator, acting on behalf of the debtor, and the creditors are entitled to initiate a liability action. When such a lawsuit is filed, it is pursued in the interest of the collective body of creditors. This declaratory action forms the foundation for all creditors to subsequently initiate individual enforcement proceedings or claims for damages. Therefore, if an intervenor requests to join the proceedings based on their individual creditor position, this does not conflict with the plaintiff's interest, which is brought on behalf of all creditors.⁶⁴ In the declaratory action, the court quantifies the extent of the asset reduction caused by the executive's actions.

The liquidator's statutory notification duty reflects the collective character of §33/A claims; courts should police duplicative litigation by applying a *litis pendens*/issue-preclusion filter. Intervening creditors do not subvert collectivity; rather, they enhance procedural economy and ensure that the declaratory quantum mirrors the true estate deficit.

4.3.4. *What are the grounds for exemption from liability?*

An executive is exempt from liability if they can prove that, following the onset of a situation threatening insolvency, they did not take on business risks that were unreasonable given the debtor's financial situation. Additionally, they must have taken all actions that could reasonably be expected of someone in their position to prevent or mitigate creditor losses and initiated measures by the company's supreme (decision-making) body to address the situation.

Per a contrario, no exemption applies if the executive undertook unreasonable business risks relative to the debtor's financial position, failed to take all reasonable

64 BDT2023. 4721.

measures to prevent or mitigate creditor losses, or did not initiate actions by the supreme body. If these omissions caused a decrease in the company's assets, liability cannot be avoided.

To give directors *ex-ante* guidance, we should crystalise a safe-harbour for actions that (I) are duly documented, (II) rest on professional advice proportionate to the risk, (III) do not prefer insiders, and (IV) are realistically capable of loss minimisation (e.g. bridge financing conditional on credible restructuring milestones). The safe-harbour would not immunise conduct tainted by selective payments to insiders or opaque value transfers.

4.3.5. *What tools does the law provide to ensure compensation for damages?*

As noted earlier, the declaratory action establishes liability, but the actual enforcement of compensation occurs in a subsequent phase. To prevent the executive from concealing their assets during this period, the Hungarian Insolvency Act regulates the provision of security to satisfy creditors' claims.

In a motion requesting the provision of security, the applicant must substantiate the circumstances that justify the necessity of security. The security must take the form of a monetary deposit paid into a deposit account at the court's economic office.

The court evaluates such motions on an expedited basis. Any decision on the provision of security may be appealed, and the appeal must also be decided expeditiously, within a maximum of 15 days.

The statement of claim, the notice regarding the right to intervene, the motion for security, and any decisions issued during the proceedings must also be sent to any majority-influencing member of the debtor (in the case of a single-member company, the member; or in the case of a Hungarian branch of a foreign company, the foreign parent company) who held a majority influence at the time of the claim's submission or during the period following the onset of insolvency risk. If the security cannot be recovered from the executive, the aforementioned member or foreign parent company is liable as a guarantor. However, the foreign parent company cannot satisfy its guarantor obligations using assets allocated to its Hungarian branch.

If the court ultimately dismisses the claim with finality, and no liability proceedings are pending against the same executive for other actions at the conclusion of the liquidation, the court must refund the security *ex officio* within 15 days.

The security mechanism and the majority-influence guarantor rule respond to acute risks of asset flight and judgment proofing. Their justified stringency is tempered by procedural safeguards (reasoned motion, expedited appeal, and automatic refund upon dismissal). From a policy perspective, these tools should be coupled with asset disclosure orders and freezing injunctions calibrated to the declaratory quantum to prevent over-deterrence.

4.3.6. *How is liability enforced?*

After the declaratory action is concluded and the executive's liability is established, it is necessary to await the publication of the final decision closing the liquidation

process in the official gazette, *Cégközlöny*. Once this publication occurs, any creditor may file a lawsuit requesting the court to order the former executive of the debtor to pay the creditor's registered but unpaid claim from the liquidation process, up to the amount of the financial loss caused and determined in the declaratory action.

According to judicial practice, in the enforcement action (*marasztalási per*) following the establishment of the executive's liability, the only issue to be examined is whether the combined amount of the creditor claims not satisfied from the debtor's assets, and which are subject to the enforcement action, exceeds the amount determined in the declaratory action. If so, the court may order payment up to the amount established in the declaratory action, allocated proportionally among the creditors based on their unsatisfied claims (BDT2016. 3467).

The Supreme Court has clarified that

'the lawsuit does not seek to enforce the totality of unsatisfied creditor claims against the executive but rather the amount that constitutes the asset reduction resulting from the defendant's misconduct at the debtor company. This asset reduction is the consequence of failed economic decisions following the executive's omission.'⁶⁵

Furthermore, in case law it was established that in the enforcement action following the declaratory judgment, neither the legal basis nor the amount of creditor claims registered by the liquidator may be disputed.⁶⁶

If multiple creditors initiate enforcement actions, the court consolidates the cases and, in the event of a favourable ruling for the creditors, orders proportional satisfaction of creditor claims without applying the usual rules of payment priority. Any security provided must also be distributed proportionally among the creditors' claims.

The next important issue refers to qualified majority shareholders' special liability.⁶⁷ According to Section 3:324(1) of the Civil Code, a qualified majority exists if a member of a limited liability company or a limited liability company limited by shares – either directly or indirectly – holds at least three-quarters of the votes. Naturally, single-member companies also fall within this category. Thus, majority ownership in itself does not trigger the possibility of this special liability (for majority or minority owners, there is a need for more, i.e. the abuse of limited liability, as discussed above). The legal and judicial frameworks provide a detailed examination of the responsibility and accountability of qualified majority members/shareholders in cases where their business decisions lead to the dissolution or insolvency of a company without a legal successor. These frameworks aim to hold qualified majority stakeholders accountable for harmful business practices that jeopardise creditors' rights and the economic stability of the company.

65 Gfv.X.30.047/2011/3.

66 BDT2021. 4405.

67 Ibid., pp. 5–7.

Under §3:324(3) of the Civil Code, a specific liability mechanism is established for situations in which a company ceases to exist without a legal successor. This provision imposes responsibility on the member holding a qualified majority if the dissolution is a direct consequence of their detrimental business practices. The liability applies to unpaid claims and can be enforced through creditor action. This provision explicitly excludes cases where dissolution occurs through voluntary liquidation. The term “detrimental business practices” is not limited to specific (isolated) actions but encompasses a series of decisions or policies that are economically unjustifiable, risky, or negligent, leading to the financial collapse of the company.

In parallel, Hungarian Insolvency Act §63(2) addresses the liability of qualified majority members in insolvency proceedings. It provides that in cases involving companies under the influence of a qualified majority, sole proprietorships, or single-member companies, the qualified majority member or sole shareholder bears unlimited liability for any debts that cannot be satisfied using the company’s assets. The liability arises when the court determines that the qualified majority member’s sustained and detrimental business practices have contributed to the financial distress or insolvency of the company. Unlike the Civil Code, this provision explicitly refers to “sustained” detrimental business practices, emphasising a pattern of behaviour rather than isolated actions.

The legal threshold for determining detrimental business practices involves an assessment of whether the qualified majority member’s actions, omissions, or policies were consistent with the principles of sound and economically reasonable management. According to judicial interpretations, detrimental business practices generally include decisions that are economically unfeasible, involve undue risk, or lack sufficient diligence in their implementation. For instance, failure to ensure adequate financial support for the company’s operations, neglect in maintaining liquidity for critical obligations, or the diversion of company resources for personal or related-party benefit are cited as indicative examples. Courts also recognise that detrimental business practices may arise from both active decisions and passive omissions, such as failing to address evident financial or operational issues, or intentionally allowing the company to accumulate debts without a viable plan for repayment.

Judicial practice further elaborates on the causative link between detrimental business practices and the company’s insolvency or dissolution. It is insufficient for creditors to establish that a company failed or was mismanaged; they must demonstrate that the qualified majority member’s specific conduct directly caused or significantly contributed to the financial harm. Courts have emphasised that detrimental business practices must align with a sustained pattern of behaviour that undermines the company’s economic interests, violates prudent management principles, and directly results in financial losses or creditor harm. Examples include maintaining contracts unfavourable to the company but beneficial to the qualified majority member, systematically diverting company assets, or prioritising personal financial interests over corporate sustainability.

While the majority shareholder's liability is significant, judicial practice also draws a clear distinction between mere inefficiency or lack of profitability in company operations and actionable detrimental business practices. For example, isolated errors in judgment or occasional lapses in financial prudence do not meet the threshold for liability. Additionally, courts have clarified that failing to comply with certain statutory requirements, such as restoring the company's equity to meet legal capital adequacy standards, does not automatically constitute detrimental business practices unless such failure is part of a broader, harmful strategy.

The judicial approach to successive qualified majority members indicates that their liability is not joint and several. Instead, each qualified majority member is responsible only for their actions during their period of influence. This approach reflects the principle that liability for detrimental business practices must be individually assessed based on the specific conduct of the qualified majority member. Furthermore, courts have applied these principles to companies with public functions or those linked to government projects, affirming that the same standards of accountability apply irrespective of the company's nature or purpose.

A particularly contentious issue involves the characterisation of these provisions as either a liability for damages or a broader obligation to provide recourse. Judicial interpretations lean toward recognising these provisions as a *sui generis* form of delictual liability. Under this framework, the qualified majority member assumes a compensatory obligation to cover creditors' claims that cannot be satisfied through the company's assets. This obligation does not require the creditor to prove direct causation in every instance but rather focuses on the existence of detrimental business practices and their broader impact on the company's financial viability. The liability is effectively sanction-based, with the qualified majority member compelled to use personal assets to fulfil creditors' claims when the company's resources are inadequate.

Finally, the courts have articulated that detrimental business practices involve not just individual creditor actions or selective payments but broader strategies aimed at the systemic depletion of the company's resources. These strategies may include asset stripping, maintaining unfavourable contractual relationships, and directing benefits to other entities under the qualified majority member's influence while neglecting the financial health of the controlled company. Courts have emphasised that isolated contractual disputes or preferential treatment of certain creditors do not constitute detrimental business practices unless they are part of a sustained, intentional strategy to harm the company or its creditors.

A combined interpretation of the Civil Code and the Hungarian Insolvency Act highlights the Hungarian legal system's approach to the principle of limited liability and the need for accountability. Qualified majority members with qualified majority influence are held to a high standard of care, particularly in managing the company's affairs in a manner consistent with economic prudence and creditor protection.

The final question, which is particularly relevant from a creditor protection perspective, concerns how Hungarian law regulates the order of satisfaction of creditor

claims in cases of insolvency (liquidation). The satisfaction of creditors is conducted within strictly regulated frameworks, as stipulated in Section 57 of the Hungarian Insolvency Act. The debts of the debtor company are settled from the assets subject to liquidation in a specified order of priority. Below, I provide an outline of the steps involved in the order of satisfaction.

a) *Liquidation costs*

At the top of the hierarchy, liquidation costs must be covered, as they are essential for the proper execution of the liquidation procedure in compliance with legal requirements. These costs include wages and wage-related benefits owed to employees of the debtor, as well as reasonable economic costs arising after the commencement of liquidation, such as asset preservation, environmental damage remediation, and addressing the consequences of unauthorised activities. Additionally, costs related to the sale of the debtor's assets and the enforcement of claims are included, along with the remuneration of the liquidator. These costs are granted priority under the law, because they ensure the smooth progression of the procedure.

b) *Secured claims*

In the second rank are secured claims, which are satisfied exclusively from the proceeds of the sale of the pledged asset, net of value-added tax. If multiple security interests encumber the same asset, the satisfaction order follows the rules outlined in Sections 5:118–5:122 of the Civil Code. The proceeds from the pledged asset are primarily allocated to the claims of secured creditors, ensuring their rights are fulfilled in accordance with the legal provisions.

c) *Maintenance and life annuities*

The third category includes maintenance obligations and life annuities. These debts encompass obligations owed to beneficiaries for the entirety of their lives, such as child support, life annuities, or compensation annuities. These claims receive particular protection, as they provide social security for the beneficiaries.

d) *Claims arising from non-business activities of individuals*

This category includes claims arising from non-economic activities of individuals, such as those deriving from defective performance, compensation, or moral damages. Additionally, claims by small and micro-enterprises, agricultural primary producers, and certain claims of cooperative credit institutions are included here. These claims are prioritised to support socially and economically vulnerable groups.

e) *Social security contributions and public charges*

The fifth rank includes debts associated with public charges, such as social security contributions, including the social contribution tax, tax obligations, and other public dues enforceable as taxes. It also covers the repayment obligations of European Union and other international subsidies. The law provides a specific sub-order for the satisfaction of these claims, ensuring that higher-priority claims within this group are addressed first.

f) *Other claims*

This broad category includes all claims not falling into the previous classifications. Typical examples are claims arising from regular commercial transactions. These claims are satisfied only after the higher-priority claims have been settled.

g) *Late payment interests, penalties, and fines*

Claims in this category rank seventh, reflecting their low priority as per the statutory framework. This group includes late payment interest, surcharges, and any fines imposed. Such claims are treated as subordinate to other financial obligations because they are not directly related to the debtor's core business activities.

h) *Claims connected to the debtor's stakeholders*

At the lowest level are claims related to the debtor's stakeholders, such as loans provided by the debtor's majority shareholders, executive officers, or their close relatives. These claims, such as shareholder loans, are satisfied only if all other creditors' claims have been fulfilled.

The statutory cascade balances procedure-sustaining costs (a) and property-based entitlements (b) against socially sensitive claims (c–e), before reaching residual contract creditors (f) and *penalties/insider* claims (g–h). Two corollaries merit emphasis: first, secured creditors bear the realisation risk of their collateral but not the estate-wide deficit; second, stakeholder loans occupy the last stair (thus, owners cannot re-label their at-risk investment as “debt” to jump the queue and make outside creditors bear the losses). Pro-rata distribution within each class vindicates formal equality, while the overall ordering reflects substantive policy choices about risk-bearing in corporate failure.

If the available assets are insufficient to fully satisfy a specific category, the creditors within that category are compensated proportionally. For example, if multiple creditors in a category have valid claims that exceed the available funds, each receives a proportional share based on their claim size. The strict prioritisation of creditor claims serves the principles of legal certainty and fairness. Hungarian insolvency law reflects a deliberate ranking of creditor interests, granting stronger protections to certain creditors over others. This ensures that the assets of an insolvent company are distributed equitably while considering social and economic priorities.

5. Poland

The concept of “creditor” is one of the key terms of civil law. A creditor is a party to a legal obligation relationship, and is the one toward whom the other party to this relationship is obliged to perform the undertaking. A contractual legal relationship is a legal relationship *inter partes*, in principle – without a creditor there can be no relationship of obligation, because such a relationship cannot be unilateral, and

the creditor is one of the parties to this relationship – an exception to this rule was adopted precisely in connection with the need to ensure protection of creditors of companies.

For capital companies, the circle of their creditors can be defined very broadly, and the legal position of individual groups of creditors (the principles of their protection) are not the same. The basic category of creditors of companies is so-called contractual creditors, or contractors of companies who conclude agreements that form the basis for possible claims. These are voluntary creditors, that is, they become creditors of the company by deciding to conclude a contract with it, and generally, civil law creditors are treated the same way, regardless of the source of the liability (contract, tort).⁶⁸ In Polish law, there are many tools for the protection of creditors of capital companies, chief among them instruments serving all creditors (not only creditors of capital companies). This is primarily an *actio pauliana*, a claim that a creditor may make against the debtor's counterparty if the debtor's performance of a specific juridical act has led to his insolvency or helped worsen its state of insolvency. In this case, therefore, the company's creditor would seek to invalidate a legal transaction performed by the company with a third party, as a result of which the company became insolvent (or became insolvent to a greater extent). Another instrument is security proceedings (Articles 730 et seq., Code of Civil Procedure). By submitting an application for precautionary measures, the creditor may prevent the debtor from disposing of a specific asset, which would later prevent him from satisfying himself from the debtor's assets. Protection of creditors is introduced by bankruptcy law⁶⁹ and restructuring law,⁷⁰ where a number of provisions render juridical acts of the bankrupt ineffective in relation to the bankruptcy estate if they prevent or hinder the attainment of the objective of the bankruptcy proceedings (e.g. Articles 84, 123, 125, 127, 128, 128a, 129 et seq., Bankruptcy Law; Articles 248, 304 et seq., Restructuring Law).

The regulations concerning an LLC contain a regulation requiring the management board to immediately convene a shareholders' meeting in order to adopt a resolution regarding the continued existence of the company. If the balance sheet prepared by the management board shows a loss exceeding the sum of supplementary and reserve capital and half of the share capital (Article 233 § 1, Commercial Companies Code – CCC), this provision is intended to protect the interest of the company and the interest of the company's shareholders and creditors.⁷¹ Convening a shareholders' meeting pursuant to Article 233 of the CCC does not free the management board from the obligation to file a bankruptcy petition in accordance with the requirements of the Bankruptcy Law. Pursuant to Article 10 of this law, bankruptcy is declared in relation to a debtor who has become insolvent. The concept of insolvency is described in

68 Osajda, 2017, pp. 8–19.

69 Bankruptcy Law of 28 February 2003 (Journal of Laws No. 60, item 535).

70 Restructuring Law of 15 May 2015 (Journal of Laws of 2015, item 978).

71 Szumański, 2005, p. 650.

Article 11 of the law. A debtor is considered insolvent, particularly if it has lost the ability to perform its due pecuniary obligations (Article 11(1), Bankruptcy Law). It is presumed that the debtor has lost the ability to perform his due pecuniary obligations if the delay in the performance of pecuniary obligations exceeds 3 months (Article 11(1a), Bankruptcy Law). A debtor who is a legal person is also insolvent if its pecuniary obligations exceed the value of its assets, and this situation persists for a period exceeding 24 months (Article 11(2), Bankruptcy Law). Therefore, if there are grounds justifying filing a bankruptcy petition, the management board is obliged to file it, regardless of whether the obligation under Article 233 of the CCC has been fulfilled. A management board that fails to file a bankruptcy petition on time exposes itself to both criminal liability (Article 586, CCC) and civil liability (Article 21(3), Bankruptcy Law; Articles 293 and 299, CCC). A similar regulation is contained in the regulations concerning JSCs, in accordance with Article 397 of the CCC, if the balance sheet prepared by the management board shows a loss exceeding the sum of supplementary and reserve capital and one-third of the share capital, the management board is obliged to immediately convene a general meeting to adopt a resolution regarding the continued existence of the company. Similarly, a breach by the management board of the obligation to file a bankruptcy petition justifies criminal liability of management board members under Article 586 of the CCC, as well as liability for damages toward a JSC under Article 483 § 1 of the CCC. In addition, the management board is liable to creditors under the provisions of the Bankruptcy Law.

The Criminal Code also contains provisions penalising actions that may harm creditors. Such a provision is, such as Article 300 of the Criminal Code,⁷² which describes the act of not satisfying the creditor's claims by stipulating that whoever, in the event of imminent insolvency or bankruptcy, frustrates or depletes the satisfaction of his creditor by removing it, concealing, disposing of, donating, destroying, actually or apparently encumbering or damaging his assets, shall be punished with imprisonment for up to 3 years. More severe penalties are imposed on a person who frustrates the enforcement of a decision of a court or other authority, or causes damage to several creditors. If the aggrieved party is not the State Treasury, the prosecution of the offence specified in § 1 shall take place at the request of the aggrieved party. The crime of apparent bankruptcy (tactical bankruptcy) typified in Article 301 of the Criminal Code on the basis of paragraph 1 of this provision is also punishable who, being a debtor of several creditors, prevents or limits the satisfaction of their receivables by creating a new business unit based on the law and transferring its assets to it, is subject to imprisonment from 3 months to 5 years. The same penalty applies to anyone who, being a debtor of several creditors, causes his bankruptcy or insolvency. A debtor of several creditors who recklessly causes his bankruptcy or insolvency, in particular, by squandering assets, incurring liabilities, or concluding transactions clearly contrary to the principles of management, is subject to a fine, restriction of liberty, or imprisonment for up to 2 years (Article 301, paragraph 3, Criminal Code).

72 Criminal Code of 6 June 1997 (Journal of Laws No. 88, item 553).

From a criminological point of view, it can be assumed that part of the bankruptcy results from the deliberate action of the perpetrator, who is focused on the desire to remove assets, so as to protect himself in any way against possible failure at later stages of activity.⁷³ Similarly, punishable acts include favouritism toward creditors (i.e. paying only some creditors in the event of imminent insolvency or bankruptcy) and bribery in the form of granting or promising financial benefits for acting to the detriment of other creditors in connection with bankruptcy proceedings or aimed at preventing bankruptcy (Article 302, Criminal Code).

Because capital companies have legal personality, the rule is that they are liable only from their own assets, and the possibility of satisfying from other assets is exceptional. One of the basic provisions that introduces such liability is Article 21 of the Bankruptcy Law. Under paragraph 1, the debtor is required, no later than 30 days from the date on which the grounds for bankruptcy arose, to file a bankruptcy petition with the court.

Paragraph 2 provides that if the debtor is a legal person or another organisational unit without legal personality to which a separate law confers legal capacity, the obligation referred to in paragraph 1 shall be incumbent on anyone who, under the law, articles of association or articles of association, has the right to manage the debtor's affairs and to represent him, alone or jointly with other persons. These persons are liable for damage caused by failure to apply on time, unless they are not at fault. These persons may be released from liability, particularly if they prove that restructuring proceedings have been opened in time or that the arrangement has been approved in the procedure for the approval of the arrangement.

The obligation to file a bankruptcy petition for the debtor does not apply to so-called *shadow directors*, that is, persons who manage the debtor's assets. These persons may respond under the general principles of civil law. Article 422 of the Civil Code provides that not only the person who directly caused the damage is liable for the damage, but also the person who persuaded or helped another person to cause the damage, as well as the person who knowingly benefited from the damage caused to the other. In addition to liability under Article 21(3) of the Bankruptcy Law, the following further cases of liability can be indicated, which refers to the state of insolvency and the issue of bankruptcy: Articles 299, 300(132) of the CCC and 586 of the CCC, Article 31 of the Act on the Social Insurance System,⁷⁴ Article 116 of the Tax Ordinance.⁷⁵ Article 116 of the Tax Ordinance concerns tax claims, stipulating first of all that for tax arrears of an LLC, an LLC in organisation, a simple JSC, a simple JSC in an organisation, a JSC or a JSC in an organisation, members of its management board are jointly and severally liable with all their assets, if the execution against the company's assets turned out to be ineffective in whole or in part, and the member of the management board did not prove that a bankruptcy petition was filed in due time or restructuring proceedings

73 Pawluczuk-Bućko, 2022, p. 69.

74 Act on the social insurance system of 13 October 1998 (Journal of Laws No. 137, item 887).

75 Tax Ordinance of 29 August 1997 (Journal of Laws No. 137, item 926); Strzelczyk, 2001, p. 648.

were opened at that time, or that the failure to file a bankruptcy petition was without his fault. Article 31 of the Act on the Social Insurance System also applies to public law receivables, because the provisions of the Tax Ordinance apply accordingly to the liability of third parties, including members of the management board of capital companies, for receivables from contributions to the Social Insurance Institution resulting from the decision on the transfer of liability.⁷⁶

Further tools to protect creditors are included in the CCC. Pursuant to Article 586 of the CCC, whoever, being a member of the company's management board or liquidator, does not file a petition for bankruptcy of a commercial company despite the conditions justifying the bankruptcy of the company being created according to the regulations, is subject to a fine, restriction of liberty or imprisonment for up to 1 year.

One of the most important provisions concerning the liability of a member of the management board in an LLC is Article 299 of the CCC. Article 299 § 1 provides that if enforcement against the company proves ineffective, the members of the management board are jointly and severally liable for its obligations. A member of the management board may be released from the liability referred to in Article 299 § 1 of the CCC if he proves that a bankruptcy petition was filed in due time or a decision on opening of restructuring proceedings or approval of the arrangement in the proceedings for the approval of the arrangement, or that the failure to file a bankruptcy petition was not his fault, or that despite the failure to file a bankruptcy petition and the failure to issue a decision to open restructuring proceedings or the failure to approve the arrangement in the proceedings for the approval of the arrangement, the creditor did not suffer any damage.

Pursuant to Article 299 § 3 of the CCC, the analysed provision does not violate the provisions establishing further liability of members of the management board. This applies in particular to the provisions of the Civil Code and the provisions on the principles of liability in the event of damage, but also to Article 21 paragraph 3 of the Bankruptcy Law or Article 116 of the Tax Ordinance. The choice of the legal basis of the claim, therefore, depends largely on the facts cited in the grounds of the claim.⁷⁷ Article 300(132) of the CCC is similarly structured, regulates the liability of members of the management board (or board of directors) of a simple JSC for the company's obligations in the event that execution against its assets turned out to be ineffective. If enforcement against the company proves ineffective, the members of the management board are jointly and severally liable for its obligations. The liability provided for in Article 300(132) of the CCC is personal (persons liable with all their personal property), unlimited, subsidiary (arises only when the execution against the company's assets proves ineffective), and joint and several.

The provisions on simple JSCs contain a regulation on civil liability, which applies to members of bodies. Pursuant to Article 300(123) of the CCC, if the members of the

⁷⁶ Charkiewicz and Chilimoniuk, 2022, pp. 9–10.

⁷⁷ Tomczak, 2018, p. 39.

management board intentionally or negligently provided false data in the statement referred to in Article 300(12) § 3 point 3 or Article 300 (107) § 2 point 3, they are liable to the company's creditors jointly and severally with the company for 3 years from the date of registration of the company or registration of the issue of new shares. Article 300(123) of the CCC regulates the liability of members of the management body of a simple JSC for providing false data in statements confirming the payment of the required contributions. The provision's aim is to ensure that the company is given the property provided for as initial capital in the articles of association or with the property that should be contributed to cover the new shares in accordance with the resolution on the issue of shares or agreements on the subscription of shares. At the same time, the commented provision aims to ensure compliance of the information disclosed in the register on the amount of share capital with the value of property contributed to the company to cover shares, performing a protective function against creditors of a simple JSC.

The introduction of a new type of capital company into legal circulation on 1 July 2021: a simple JSC, entailed the codification of the business judgment rule. The rule of business judgment of the situation, appearing in the US doctrine of company law at the beginning of the 19th century, makes it possible to free members of the governing bodies of capital companies from liability for the consequences of unsuccessful economic decisions, as long as they acted loyally to the company when making them, and the decisions were within the limits of justified business risk and were supported by appropriate information and analysis.

Linking responsibility with the correctness and reliability of the decision-making process and the duty of loyalty to the company is a positive response to the postulates formulated by both representatives of the doctrine and managers directly interested in reducing risk exposure. According to Article 300(125) § 1 of the CCC, a member of the supervisory body is liable to the company for damage resulting from non-performance or improper performance of his duties, including failure to exercise due diligence resulting from the professional nature of his activity or failure to maintain loyalty to the company, unless he is not at fault. Under Article 300(125) § 2, a member of the authority does not violate the duty of care if, acting loyally to the company, he acts within the limits of justified economic risk, including on the basis of information, analyses and opinions that should, in the circumstances, be considered when making a careful assessment.⁷⁸

Pursuant to Article 300(127) § 1 of the CCC, if the company does not bring an action for compensation for damage caused to it by a member of the body or shareholder within 1 year of the date of disclosure of the act causing the damage, each shareholder may file an action for compensation for damage caused to the company. Article 300 (127) of the CCC governs the institution known as *actio pro socio*. It consists in granting simple JSC shareholders standing to bring an action for compensation for damage caused to a simple JSC in the event of failure to pursue a claim for damages by the

78 Przybyła and Kucinoglu, 2023, p. 62.

injured company itself, a similar regulation is contained in the regulations concerning an LLC and a JSC (cf. Articles 295 and 486, CCC). At the request of the defendant, made at the first procedural step, the court may order the lodging of a security to cover the damage threatened to the defendant. The amount and type of security is determined by the court at its discretion. If the deposit is not lodged within the time limit set by the court, the claim is dismissed. On bail, the defendant has priority over all the plaintiff's creditors. If the action proves to be unfounded and the claimant acted in bad faith or was grossly negligent in bringing it, he is obliged to compensate for the damage caused to the defendant.

Article 300(132) of the CCC regulates the liability of members of the management board (or board of directors) of a simple JSC for the obligations of the company of the execution against its assets turns out to be ineffective. Pursuant to Article 300(134) of the CCC, the provisions of Chapter 6 of the CCC do not affect the rights of shareholders of a simple JSC and third parties to seek compensation for damage on general principles. This provision, as well as the regulation of Article 300 of the CCC relating to an LLC in this respect, and similarly to the regulation of Article 490 of the CCC relating to a JSC in this matter (which uses the term "other person" instead of the phrase "third party"), provides in a simple JSC for the principle of cumulation of rights to seek damages, in particular, claims due to shareholders as well as third parties (it can be assumed that they are primarily this company's creditors), on the basis of the regulations of Title III, Section Ia, Chapter 6 of the CCC, with claims based on the general principles provided for in the Civil Code.

In the case of a JSC, there is no equivalent of Article 299 of the CCC (LLC) or 300(132) of the CCC (simple JSC). However, members of the management board of a JSC may still be liable for damage on general principles, that is, on the basis of the provisions of the Civil Code, and more specifically Article 415 of the Civil Code, according to which a person who, by his culpable action, caused damage to another person, is obliged to redress it, moreover, they are also affected by the abovementioned Article 21 paragraph 3 of the Bankruptcy Law. Moreover, pursuant to Article 483 § 1 of the CCC, a member of the management board, supervisory board and liquidator of a JSC is liable to the company for damage caused by an act or omission contrary to the law or the provisions of the company's articles of association, unless he is not at fault. However, that person does not infringe the duty of care resulting from the professional nature of his activity if, acting loyally to the company, he acts within the limits of reasonable economic risk, including on the basis of information, analyses and opinions that should be considered in the circumstances when making a careful assessment (paragraph 3). This provision introduces the principle of business judgment rule based on a JSC. Originally, the provisions concerning the business judgment rule were introduced only for members of the governing bodies of a simple JSC (Article 300(125), CCC). The principle of business assessment is a manifestation of the recognition that business decisions are often made in conditions of uncertainty or

risk.⁷⁹ Pursuant to Article 486(1) of the CCC, if the company does not file an action for compensation for the damage caused to it within 1 year of the date of disclosure of the act causing the damage, any shareholder or person who is served by a different title to participate in profits or division of property may file a lawsuit for compensation for damage caused to the company. At the request of the defendant, made at the first procedural step, the court may order the lodging of a security to cover the damage threatened to the defendant. The amount and type of security is determined by the court at its discretion. If the deposit is not lodged within the time limit set by the court, the claim is dismissed.

Article 479 of the CCC provides that if members of the management board intentionally or negligently provided false data in the statement referred to in Article 320 § 1 items 3 and 4 of the CCC or in Article 441 § 2 item 5 of the CCC, they are liable to the company's creditors jointly and severally with the company for 3 years from the date of registration of the company or registration of the share capital increase. The liability introduced in Article 479 of the CCC is coupled with the fact of providing false data in:

- a) a statement of all members of the management board, which is submitted when the company is registered with the register, that the payments for shares and in-kind contributions required by the statute have been made in accordance with the law (Article 320 § 1 item 3, CCC);
- b) a statement of all members of the management board, which is submitted when the company is registered with the register, that the contribution of contributions to the company is ensured in accordance with the provisions of the articles of association before the deadline specified in Article 309 § 3 of the CCC – if the statutes provide for covering the share capital with in-kind contributions after registration (Article 320 § 1 point 4, CCC);
- c) a statement of all members of the management board, which is submitted when submitting an increase in the share capital to the registry court, that contributions to shares have been made, and if contributions in kind are to take place after the registration of the capital increase, that the transfer of these contributions to the company is ensured within the time limit specified in the resolution on the share capital increase (Article 441 § 2 point 5, CCC).

Article 479 of the CCC introduces a sanction in the form of liability of management board members in the event of submitting false data in statements related to making contributions. This sanction is motivated by the need to ensure the reality of the contributions made to the company's share capital. This is dictated by the interest of the company itself, which, because of measurable contributions, has the property instruments necessary to conduct business activity and the company's creditors, who gain a chance to satisfy their claims against the company.

79 Bolesta-Kukuła, 2003, p. 137.

The principle of functioning of capital companies is the lack of personal liability of shareholders for liabilities incurred by the company. This principle is expressed directly in Article 151 § 4 of the CCC in the case of an LLC, which provides that shareholders are not liable for the company's obligations, in Article 300(1) § 4 of the CCC in the case of a simple JSC and in Article 301 § 5 of the CCC in the case of a JSC, similarly stipulating that shareholders are not liable for the company's obligations. However, this principle, both in normative practice and in case law and doctrine, also allows the liability of the shareholder for the obligations in question. It should be emphasised that on the basis of legal transactions separate from the articles of association (e.g. for granting a surety or guarantee or establishing a mortgage or pledge), a shareholder is liable, like any other person performing these activities with the company's creditors.⁸⁰

However, this principle is not unconditional and the personal liability of the shareholders is not always excluded. Considering the need to protect creditors against the effects of shareholders' actions, the legislation allowed for certain situations in which shareholders may be held personally liable. These exceptions include: Article 13 § 2 of the CCC – a shareholder who has not made a contribution to the company in whole or in part declared by him before entering the company in the relevant register; Article 175 § 1 of the CCC – a shareholder who has made a contribution in kind (applicable to the situation of both making a contribution in kind before the registration of the company, but also after the registration of the company, may be held liable, when the company's share capital is increased) with an overstated value in relation to the transferable value of the contribution, he is obliged to compensate the company for the missing value; and Article 292 of the CCC – the shareholder is also liable in the event of damage during the formation of the company, if his action was unlawful and culpable.

At this point, in the context of piercing the corporate veil, it is also worth mentioning the provisions of the holding law, which provide for the so-called qualified relationship of dominance and dependence, enabling the parent company to exercise uniform management over its subsidiaries mainly by issuing binding instructions to its subsidiaries. If the subsidiary has suffered damage owing to the execution of a binding instruction, the parent company shall be liable to its creditors of the subsidiary for compensation for the damage caused, unless it is not at fault. In conclusion, the legislation abandoned the introduction of the concept of piercing liability. Instead, a different, although essentially similar in effect to the piercing of the corporate veil, concept of the parent company's liability for damages toward the subsidiary's creditors in a situation where the damage arose owing to the subsidiary's compliance with the parent company's binding instructions was introduced. The most important mechanism for the protection of the subsidiary's creditors is the regime of the parent company's liability for damage caused to the subsidiary's creditor specified in Article 2114 § 1 of the CCC. This provision, clearly modelled on Article 299 § 1 of the CCC,

80 Gurgul, 2010, p. 1146.

directly concerns liability for damage caused to the creditor – in contrast to Article 299 § 1 of the CCC, which is shaped in a manner similar to the model of guarantee liability for the company's debt.⁸¹ If enforcement against a subsidiary participating in a group of companies is unsuccessful, the parent company shall be liable for the damage caused to the creditor of the subsidiary, unless it is not at fault or the damage did not arise as a result of the subsidiary's execution of a binding instruction. The parent company may release itself from liability by showing that it is not at fault or that the damage did not arise because of the subsidiary's execution of a binding instruction. The presumption also covers the amount of damage corresponding to the amount of the outstanding claim. The amendment also added point 9 to Article 20(2) of the Bankruptcy Law, which authorises the parent company to file a petition for declaration of bankruptcy of a subsidiary, which will allow the parent company in certain situations to release itself from liability for damage caused to the creditor of the subsidiary by demonstrating the absence of fault.

According to the justification for the amendment, the legislation departed from accepting the liability of the piercing parent company because, in its opinion, the introduction of the discussed concept would contribute to the violation of the fundamental principle of capital companies law under Articles 151 § 4 and 301 § 5 of the CCC.

6. Romania

6.1. *Creditor Protection Rules*

The Romanian Companies Act creates a specific procedural tool for creditors which allows them to seek the help of the courts in necessary (Articles 61–62).⁸²

Creditors harmed by decisions of the company's associates regarding amendments to the articles of incorporation may file an opposition request with the court. This request aims to compel, as appropriate, the company or its members to compensate for the damages caused. Decisions also include resolutions adopted by the statutory bodies of the company, and the term “members” encompasses shareholders unless the context indicates otherwise.

Judicial practice regards opposition as a mechanism for protecting third parties from corporate acts that infringe upon their rights and interests. Opposition serves as a legal means through which third parties can seek redress for damages resulting from a corporate decision, such as the amendment of the articles of incorporation. For instance, the Bucharest Court of Appeal⁸³ has affirmed that opposition is a tool to secure compensation rather than annul or amend the resolution of the general meeting of associates.

⁸¹ Michalak, 2022, p. 747.

⁸² Piperea, 2014, pp. 228–232.

⁸³ Bucharest Court of Appeal, 6th Commercial Section, Decision No. 1376/2010.

Opposition seeks not to invalidate or alter the resolution of the general meeting but only to ensure that damages caused to specific groups, such as social creditors and other affected individuals, are remedied. For example, in a decision by the Ploiești Court of Appeal⁸⁴, the court highlighted that the appellant must demonstrate the nature of the damage caused, such as through the alteration of the company's name or its area of activity.

The opposition must be filed within 30 days of the publication of the associates' resolution or the amending additional act in the Official Gazette of Romania, Part IV, unless a different deadline is stipulated by law. In the case of LLCs, where resolutions are not subject to publication, the deadline begins from the date the resolution becomes known. The opposition is submitted to the trade registry office, which records it within 3 days and forwards it to the competent court. The opposition is adjudicated in the council chamber with the parties being summoned, and the ruling is subject only to appeal.

Specific provisions also apply in the context of voluntary liquidation. During this procedure, liquidators cannot distribute any sums to associates from the liquidation proceeds until the company's creditors have been fully paid. In this context, creditors may also file opposition against the liquidators' decisions.

Other rules of creditor protection are related to capital maintenance, capital reduction, fusions, divisions etc.

6.2. Piercing the Corporate Veil

The Romanian Companies Act (Article 237/1 introduced in 2007) implements the corporate veil piercing doctrine.⁸⁵ Practically, at a more general level, Article 193(2) of the Romanian Civil Code sets a substantive limit on the opposability of legal personality: the corporate form may not be invoked against a good-faith third party where doing so would conceal fraud, constitute an abuse of rights, or offend public order. In such circumstances, courts may disregard the separate personality *pro hac vice* (via inopposability, recharacterisation, or veil-piercing) so that liability and remedies reach the real actors, subject to proof of the illicit purpose and proportionality. Thus, the rule operationalises *fraus omnia corrumpit* and prevents the legal form from being weaponised against legitimate interests.

Typical patterns include asset “phoenixing”⁸⁶ to frustrate creditors, deliberate under-capitalisation coupled with commingled accounts, chains of interposed nominees to evade transparency or conflict-of-interest rules, and sham related-party

84 Ploiești Court of Appeal, 2nd Civil Section, Administrative and Fiscal Litigation, Decision No. 2359/2011.

85 Ibid., pp. 801–809.

86 Phoenixing is an abusive practice whereby controllers transfer a company's business or assets to a new related entity for little or no value, leaving the original insolvent and creditors unpaid while continuing essentially the same business. The term alludes to the mythical phoenix that rises from its ashes – here, a new company reborn from the collapsed one to evade liabilities.

transactions that strip value from the company. The operative test asks whether there is an artificial arrangement lacking economic substance, deployed under controlling influence to mask or facilitate wrongdoing, with a causal link between invoking legal personality and the harm, and whether the counterparty acted in good faith; if so, proportional disregard of the entity's separateness is warranted.

Of course, the limited liability principle is a cornerstone of modern corporate law, designed to encourage entrepreneurship and investment. When, during the operation of a company, a shareholder is liable for its obligations within the limits of their contribution to the share capital, their liability remains limited to this contribution, even in the event of the company's dissolution and, where applicable, liquidation. The principle of limited liability shields shareholders from personal responsibility beyond their investment in the company. While this encourages business risk-taking, it can be abused to evade responsibility, particularly in cases of insolvency or dissolution. Shareholders may exploit this limitation to defraud creditors, raising concerns about the adequacy of safeguards against such behaviour.

However, a shareholder who, to the detriment of creditors, abuses the limited nature of their liability and the separate legal personality of the company becomes fully liable for the unpaid obligations of the dissolved or liquidated company.⁸⁷ This concept aligns with "piercing the corporate veil", a legal mechanism whereby courts disregard the company's separate legal personality. This occurs when shareholders act in bad faith, treating the company as an extension of themselves. This liability is an *ex-post-facto* remedy. The problem lies in the subjective nature of proving abuse and fraud, often requiring substantial evidence of intent or negligence, which is challenging and time-consuming for creditors, and therefore, is not widely used in practice.

Under the Romanian Companies act, the shareholder's liability becomes unlimited, particularly when they handle the company's assets as if they were their own or reduce the company's assets for personal benefit or for the benefit of third parties, knowing or having reason to know that, as a result, the company is no longer able to fulfil its obligations.

6.3. Specific Rules Applicable in the Area of Insolvency

The Romanian Companies Act introduced Specific rules in 2022.⁸⁸ Executive officers are typically required to act in the company's best interest, balancing short-term and long-term goals for profitability, growth, and stability. When a company faces financial distress, the focus shifts beyond the immediate interests of the company to include those of stakeholders most vulnerable to insolvency, such as creditors, employees, and shareholders. This shift underscores the managers' fiduciary obligations during crises, recognising the broader impact of potential insolvency. The new

⁸⁷ The legal text uses only the term member of the company, but it would be a misinterpretation to limit the applicability of this doctrine only to LLCs, and to exclude JSCs – more specifically, to exclude the shareholders of JSCs abusing their limited liability.

⁸⁸ Act No. 216/2022.

legal text introduces the concept of heightened managerial responsibility during periods of financial difficulty and establishes a dual-layered framework for liability.

When the company faces financial difficulty, managers/directors must consider at least the following:

- a) the interests of creditors, shareholders, and other stakeholders;
- b) the need to take reasonable and appropriate measures to avoid insolvency and minimise the losses suffered by creditors, employees, shareholders, and other stakeholders; and
- c) the need to avoid adopting, either intentionally or through gross negligence, any conduct that threatens the viability of the enterprise.

Stakeholders include creditors (owed debts), shareholders (owners of equity), employees (dependent on salaries and pensions), and other parties affected by the company's survival, such as suppliers and customers. In financial distress, stakeholder interests often conflict. For example, creditors may prioritise debt repayment, while shareholders may push for risky strategies to recover their equity value. Managers have a complicated task to act under these high standards. Managers are expected to adopt proactive measures to stabilise the company's financial health. Examples include restructuring operations, renegotiating debt terms, or seeking additional financing. However, if avoiding insolvency is not possible, they must file for insolvency to make these rules to govern to company's fate. Managers must not engage in actions that worsen the company's financial condition, such a fraudulent conveyance of assets or entering high-risk contracts that could jeopardise the company's remaining viability. Managers also have a duty to ensure that decisions taken during distress do not irreversibly harm the company's ability to recover or restructure. Certainly, managers are placed in a morally and legally complex position.

Violation of these obligations gives rise to liability. However, if the company does not enter insolvency proceedings, the violation of these obligations may give rise to liability toward the company itself (managers are accountable to the company for any breach of duty under company law). If the company enters insolvency, the violation of these obligations triggers liability under the conditions imposed by insolvency legislation, as discussed below. Meanwhile, if insolvency is inevitable, managers must act to reduce the impact on stakeholders – for example, by ensuring creditors recover as much as possible through orderly liquidation, maintaining transparent communication with employees, and very importantly, avoiding asset-stripping or preferential treatment that undermines creditor recovery.

Other pre-insolvency rules can be identified in the Romanian Insolvency Act no. 85/2014, which has rules on prevention of insolvency as well. Romanian insolvency law has undergone significant development to address financial distress more effectively, particularly following the 2008 economic crisis. Before 2009, Romanian law lacked mechanisms to prevent insolvency, which led to a sharp rise in insolvency cases during the crisis. The introduction of legal tools like the *preventive concordat* and *ad hoc mandate* in 2009 represented an important shift in approach, focusing on

pre-emptive measures beside reactive insolvency proceedings. These mechanisms were further refined in subsequent reforms, aiming to rescue struggling companies, preserve jobs, and ensure creditors are paid through structured settlements outside formal insolvency processes.

A key preventative measure was the *ad hoc mandate*, which allowed debtors to initiate confidential negotiations with one or more creditors under the guidance of an ad hoc manager appointed by the court. This process sought to create agreements on debt restructuring, forgiveness, or rescheduling, enabling the debtor to overcome financial difficulties. Creditors were central to this framework, as their participation and consent were needed for the success of the negotiations. The ad-hoc manager acted as a mediator, proposing measures that balanced the interests of both the debtor and the creditors. However, this mechanism faced challenges, particularly when debtors failed to cooperate fully or creditors were unwilling to compromise. In 2022, the ad-hoc mandate was replaced by a restructuring procedure aligned with European Union directives, which introduced broader frameworks for company rescue and creditor involvement.⁸⁹

The introduction of early warning mechanisms in Romanian law in 2022 marked another significant step toward insolvency prevention. These mechanisms aim to detect financial difficulties at an early stage, enabling timely intervention to avoid insolvency. Creditors benefit directly from these tools, as they provide an opportunity to assess risks and take protective measures, such as renegotiating payment terms or initiating recovery efforts before the debtor's situation deteriorates further. The early-warning system also empowers the tax authorities to notify debtors about missed payments or potential financial risks, creating additional safeguards for creditors by promoting transparency and proactive management of financial challenges.

The preventative measures are primarily aimed at legal entities that are experiencing financial difficulties but are not yet insolvent. In such cases, the debtor remains capable of meeting their obligations but faces declining economic viability. The law's focus on this phase allows creditors to be involved in structured negotiations and restructuring efforts, thereby increasing their chances of recovering debts without the need for formal insolvency proceedings. However, strict conditions apply to these preventative measures. For example, debtors who have completed a preventative procedure cannot initiate another for 12 months, ensuring that creditors' interests are not jeopardised by repeated delays or abuses of the system.

The role of creditors in these preventative mechanisms differs from their role in formal insolvency proceedings. While insolvency typically involves collective actions, preventative measures emphasise individual negotiations. Creditors are directly engaged in discussions with the debtor or through a restructuring manager, who mediates disputes and oversees the development of restructuring agreements. In cases in which collective decision-making is required, creditor meetings may be convened to approve plans that affect the interests of all involved parties.

89 Veress, 2024b, pp. 245–250.

These negotiations allow creditors to influence decisions about debt restructuring, asset sales, or other measures designed to restore the debtor's financial stability.

The preventative framework provides a range of restructuring tools, including operational reorganisations, changes to the debtor's asset or liability structure, and capital modifications. These tools aim to align the need for debtor rehabilitation with the protection of creditor rights. Creditors are given the opportunity to vote on restructuring plans, and their approval is required for the plans to be implemented. When unanimous agreement is not achieved, the restructuring manager may seek court approval to enforce the plan, provided it meets legal requirements and garners sufficient support from affected creditors under the condition of applicable law.⁹⁰

6.4. Legal Protection of Creditors in Case of Insolvency

6.4.1. Overview

As the insolvency procedure as a whole is essentially a desperate attempt to protect creditors, it is obviously impossible to comprehensively present the entire procedure in this section of the chapter. However, three key areas must be examined. First, the debtor's fraudulent transactions aimed at asset diversion and other transactions that unlawfully reduced the debtor's assets must be scrutinised. Second, in cases in which the insolvent company's assets are insufficient to cover its debts, it is crucial to explore how the responsible managers can be held accountable. Third, the preferences of creditors regarding conditions in the insolvency rules in Romania are explored.

6.4.2. Fraudulent transactions

The insolvency of a debtor may arise from fraudulent transactions intended to favour certain creditors over others before the insolvency proceedings, contrary to the collective nature of the process.⁹¹ Additionally, certain assets may be removed from the company's assets before insolvency to shield them (fraudulent conveyance). This makes it crucial to investigate the debtor's past actions. As insolvency approaches, there is an increased tendency for the debtor's members or certain creditors to improve their position at the expense of others, necessitating mechanisms that allow

90 Only creditors whose claims are affected by the restructuring plan are eligible to vote. Claims are grouped into separate categories, such as priority claims, wage claims, essential creditor claims, budgetary claims, and other claims, each voting independently. A category is deemed to have approved the plan if an absolute majority of its claims' value votes in favour. For debtors with annual revenues below 500,000 euros (EUR), categorising claims is optional, and the plan is approved if the absolute majority of affected claims supports it. After voting concludes, the debtor must file a confirmation request with the court within 3 days of finalising the voting record. A court may reject the confirmation of a restructuring agreement only on legal grounds. For the agreement to be valid, it must be approved by an absolute majority of creditors within each claims category. However, the court may approve the agreement if at least 30% of all affected claims vote in favour, provided either a majority of claim categories, including priority claims, or at least one category likely to receive payment in bankruptcy, also approves it.

91 For a monographically conducted research on the topic, see Moțu, 2015.

for easier sanctioning of fraudulent transactions compared to the general rules of civil law.

Under the Romanian Insolvency Act, the sanction for such transactions is more severe than in general civil law, where fraudulent transactions are voidable. By contrast, the Insolvency Law applies the stricter sanction of nullity.

The basis for nullity lies in the fraudulent, immoral, or illegal purpose of the transaction.⁹² In the Romanian civil law system, a transaction's purpose (*causa*) is an essential element of its validity. This purpose answers why the parties entered into the transaction, what obligations they undertook, and what interests motivated their actions. The purpose reflects the inner intent driving the transaction, providing insight into not only the psychological aspect but also its economic function. Consent and purpose together form the contractual will (*voluntas*). The goal of an annulment action is to restore the debtor's assets for the benefit of all creditors, including the property that was fraudulently conveyed. Therefore, this action is specific to insolvency proceedings with distinct characteristics; for example, it is not open to any interested person, there are timeframes in which it can be filed, and the specificities of the procedure render this tool closer to actions seeking voidability of a contract.

To clarify the debtor's financial situation and protect creditors, the Romanian Insolvency Act grants insolvency administrators and liquidators tools to restore legality. They can file lawsuits before the bankruptcy judge (Articles 117 et seq., Romanian Insolvency Act) to:⁹³

- a) Annul fraudulent transactions that harmed creditors' interests, executed within the 2 years preceding the proceedings. Such actions could include asset transfers or other arrangements designed to obscure or reduce the debtor's available resources.
- b) Annul gratuitous transactions made within 2 years before the proceedings (with exceptions for humanitarian donations). The purpose of this rule is to prevent the debtor from depleting their assets without receiving anything of value in return, thereby undermining the potential recovery for creditors. By excluding humanitarian donations, the act recognises the social importance of charitable contributions.
- c) Annul transactions where the debtor's performance significantly exceeded the consideration received, executed within 6 months before the proceedings. Such transactions may include selling assets far below market value or providing services without fair compensation. This provision ensures that creditors are not disadvantaged by inequitable dealings.
- d) Annul any transaction executed within 2 years before the proceedings, where all parties involved aimed to evade creditor enforcement or otherwise violate creditors' rights.

92 As established in Constitutional Court Decisions 2002/106, 2005/416, and 2005/608.

93 Turcu, 2015, pp. 314–320; Veress, 2024b, pp. 245–257.

- e) Annul payments or property transfers made within 6 months before the proceedings to favour one creditor over others, resulting in reduced recovery for other creditors in the event of bankruptcy. This ensures equitable treatment of creditors and discourages preferential treatment that disrupts the orderly distribution of the debtor's estate.
- f) Annul preferential security interests or liens created in favour of a general creditor within 6 months before the proceedings. These actions, if left unchecked, could unfairly enhance the position of specific creditors at the expense of the broader creditor pool.
- g) Annul payments for debts not yet due, executed within 6 months before the proceedings. Such payments, if annulled, help preserve the assets of the debtor for equitable distribution and prevent preferential treatment of certain creditors over others.
- h) Annul payments or obligations undertaken within 2 years before the proceedings, with the intent to conceal or delay the insolvency. This provision targets deliberate efforts to obscure the true financial state of the debtor.

These annulment provisions collectively aim to ensure fairness in insolvency proceedings, prevent abuse of legal and financial processes, and maximise the value of the debtor's estate for the benefit of all creditors.

A different path is the problem of transactions with specific parties closely connected to the debtor. The annulment of transactions executed within 2 years before the proceedings may also be requested if they harmed creditors and were conducted with closely connected persons. Therefore, it is possible to seek the annulment of the following types of transactions.

- a) *Transactions with members holding at least 20% of the company's capital or voting rights in an LLC*
Members with significant influence in an LLC can potentially engage in transactions that favour their own interests over those of creditors. If such transactions harm creditors' rights, they can be annulled. This ensures that individuals with substantial control over the company cannot exploit their position to the detriment of the broader creditor pool.
- b) *Transactions with shareholders holding at least 20% of the capital or voting rights in a JSC*
Shareholders with significant stakes in a JSC are similarly scrutinised. Their ability to influence company decisions makes it critical to evaluate transactions that could benefit them disproportionately or otherwise disadvantage creditors. Annulment provisions deter such practices, maintaining fairness in the distribution of assets during insolvency.
- c) *Transactions with executive officers, directors, or supervisory board members*
High-level company officials, including executives and board members, often possess decision-making authority and access to confidential information. This position of power could be abused to execute transactions that shield

assets, prioritise certain creditors, or enrich themselves. The annulment mechanism ensures these parties cannot act in self-interest at the expense of creditor recovery.

- d) *Transactions with persons exercising control over the debtor or its activities*
Control over a debtor's operations provides an opportunity for individuals or entities to manipulate transactions in ways that could compromise creditor rights. This includes indirect control through influence or dominant power, emphasising the need to evaluate and potentially annul any harmful transactions involving such parties.
- e) *Transactions involving co-owners of jointly owned property*
Co-ownership can lead to complex legal and financial arrangements. Transactions involving co-owners may sometimes be designed to obscure the true value or disposition of shared assets, disadvantaging creditors.
- f) *Transactions with spouses or relatives up to the fourth degree of relatedness*
Family members are often involved in transactions that might not be at arm's length, raising concerns about preferential treatment or collusion. By including relatives up to the fourth degree, the act casts a wide net to ensure that familial ties do not undermine the equitable treatment of creditors.

Article 119 of the Romanian Insolvency Act provides a safeguard against indiscriminate annulments by exempting transactions conducted in the ordinary course of the debtor's business.⁹⁴ This provision recognises that routine business activities are necessary for maintaining operations and should not automatically be considered suspect. For a transaction to qualify as "ordinary", it must align with the typical practices and commercial needs of the debtor's business.

To ensure expediency, the law sets strict deadlines for filing annulment actions. These must be initiated by the insolvency administrator or liquidator within 1 year of preparing the report on the causes of insolvency, and no later than 16 months from the start of proceedings (Article 118, Romanian Insolvency Act). Judicial practice has deemed these deadlines preclusive⁹⁵. If the insolvency administrator or liquidator fails to act, the creditors' committee (or creditors' meeting, if no committee exists) may file such actions. The creditors' committee (or creditors' meeting) have secondary rights to initiate such actions, conditioned to the inaction of the insolvency administrator or liquidator. Individual creditor does not have standing in such actions.

The Constitutional Court of Romania dealt several times with the constitutionality of the rules on fraudulent transactions. The Insolvency Law equips the practitioner with a targeted avoidance action to unwind fraudulent juridical acts concluded during the "suspect period", grounded in the maxim *fraus omnia corrumpit*. The legislative aim is restorative: to reconstitute the debtor's patrimony so that all creditors bear the risk of insolvency proportionally. Constitutional challenges argued that such

94 Cărpenaru, 2019, p. 745.

95 E.g., Bucharest Court of Appeal, Decision No. V/2161 of 2005.

avoidance endangers transactional security and infringes the property rights of the debtor and transferees. The Constitutional Court has consistently rejected these objections, distinguishing the insolvency avoidance action from the classical *actio pauliana*: standing lies with the court-appointed administrator or liquidator acting for the collective, and the challenged acts are those tainted by bad faith to the detriment of creditors.⁹⁶ Questions about whether a particular act was fraudulent or parties acted in good faith are matters of judicial application, not constitutional validity.⁹⁷

Doctrinally, nullity in this context flows from the illicit cause of the transaction: where the parties' (or at least the debtor's) purpose was to defraud creditors, the act lacks a lawful cause and cannot produce effects under the Civil Code's general validity rules.⁹⁸ Thus, Article 117 of the Romanian Insolvency Act is procedural in character: it does not invent a new ground of nullity but supplies a special action with calibrated conditions (look-back windows, standing, burdens) to operationalise a general civil-law sanction against fraud.

6.4.3. *Liability of Executive Officers*

Articles 169–173 of the Romanian Insolvency Act regulate a special case of liability in which the official managers of a debtor (e.g. executives or members of supervisory or auditing bodies) or shadow managers (e.g. majority shareholders who participate in management beyond the powers of the general meeting and treat official managers as mere executors of their own decisions) are held personally liable for the debts of the insolvent debtor.⁹⁹

A key issue in insolvency law is ensuring that the managers who caused or failed to avoid the state of insolvency, or who benefited from it, can be held accountable. Judicial practice has established that a manager can be held liable even if they performed their duties without compensation. The Insolvency Law governs a specific case of civil liability, which does not exclude the possibility of sanctioning acts that fall under criminal law.

When filing a lawsuit (or even afterward) to prevent the responsible person from disposing of their personal assets, the protective measures provided by the Code of Civil Procedure can be initiated.

Under the Romanian Insolvency Act, if the insolvency is caused by a manager or another person (shadow manager), the bankruptcy judge can order them to cover the debts of the insolvent entity, in whole or in part, from their personal assets. Previously, there was debate over the punitive nature of this rule, particularly regarding the extent to which a manager must cover the debtor's liabilities if their actions justified such liability. In some cases, courts required managers to pay the entirety of the debtor's debts. The law now clearly stipulates that causation must exist between

96 Constitutional Court of Romania, No. 748/2006.

97 Constitutional Court of Romania, No. 849/2006.

98 Constitutional Court of Romania, No. 106/2002.

99 Veress, 2024b, pp. 261–263.

the manager's actions and the damages. A manager cannot be held liable for debts unrelated to their actions and is only responsible for the harm caused to creditors.

Damages are defined as the reduction of the insolvent debtor's assets (which serve as collateral for creditors' claims) and the resulting inability to fulfil creditors' claims.

The request for establishing liability must be made by the insolvency administrator or liquidator to the bankruptcy judge. This liability is not toward the company but toward creditors, applying exclusively within insolvency proceedings. It is a critical tool for creditor protection, as corporate assets are often insufficient to cover claims. By holding managers accountable, creditors may recover their claims or at least part of them.

If the insolvency administrator or liquidator does not initiate such a claim, the chair of the creditors' committee may act based on a resolution of the creditors' meeting. A creditor holding more than 50% of the claims can also independently initiate a lawsuit.

Liability is established if the individual's actions contributed to insolvency through such acts as:¹⁰⁰

- a) Using the company's assets or credit for personal or third-party benefit (e.g. using the company's bank card for personal expenses, purchasing building materials for a privately owned property, or paying personal legal fees with company funds).
- b) Engaging in production, commercial, or service transactions under the guise of the company but for personal benefit.
- c) Ordering activities that clearly led to insolvency.
- d) Maintaining fictitious accounting records, hiding documents, or failing to comply with legal accounting standards.
- e) Diverting or concealing company assets, or artificially inflating liabilities.
- f) Using harmful methods to obtain funds, delaying the declaration of insolvency.
- g) Preferring certain creditors over others shortly before insolvency by ordering payments that disadvantage other creditors.
- h) Any other deliberate act leading to insolvency, with the law allowing courts to address actions not explicitly listed.

If the person responsible for insolvency is a limited liability partner, shareholder, or member of a limited partnership, liability pierces the corporate veil, extending to personal assets.

If multiple individuals are responsible (e.g. members of a collective management body), liability is joint and several if their terms or actions coincide with the insolvency. Managers are not liable if they rejected decisions leading to insolvency or abstained from participation, provided they formally recorded their dissent in meeting minutes.

100 Turcu, 2015, pp. 473–488.

Enforcement against responsible individuals falls under the jurisdiction of court bailiffs, following civil procedure codes. Recovered amounts are distributed according to the consolidated claims table prepared during insolvency proceedings.

The statute of limitations for liability claims is 3 years from the identification (or possible identification) of the responsible person, but no earlier than 2 years from the start of insolvency proceedings. Funds recovered are used for business restructuring or debt payment in the case of bankruptcy.¹⁰¹ A significant corporate law sanction is that individuals found liable under the Romanian Insolvency Act are prohibited from holding managerial positions in companies for 10 years.

6.4.4. Payments to Creditors from the Estate of the Insolvent Company

The last problem to be treated is the position of creditors from the perspective of payments in the context of the insolvency proceedings. The distribution of funds to creditors adheres to specific rules under the insolvency framework. When the assets sold also served as collateral, the proceeds are first allocated to cover the costs of the sale. Then, claims from priority creditors that arose during the reorganisation process, including accrued interest, are settled. Next, the full principal amount owed to priority creditors, along with any associated interest, is paid. If the proceeds from the sale of the collateralised assets are insufficient to cover the secured claim, the remaining balance becomes an unsecured claim with a lower priority. Conversely, if the proceeds exceed the secured claims, the surplus is incorporated into the debtor's general estate. Secured creditors may also participate in distributions made prior to the sale of the collateralised assets.

The distribution of payments is governed by a hierarchy set out in the Insolvency Law.¹⁰² First, procedural costs, including the fees of administrators or liquidators, are covered. Next, claims arising from financing provided to the debtor with creditor consent during the observation period are paid, followed by employment-related claims. Claims incurred after the commencement of the insolvency proceedings are settled next, followed by budgetary claims. General claims, such as those resulting from bank loans, the delivery of goods, and leases, are addressed thereafter, along with other general claims. Claims arising from loans made by shareholders holding at least 10% of the company's capital or voting rights are subordinated and paid subsequently. Lastly, claims arising from gratuitous transactions are addressed.

Available funds are used to fully satisfy the claims in a higher-ranking category before moving on to the next category. Within the same category, if the available funds are insufficient for full repayment, the claims are satisfied proportionally based on their respective amounts. If the debtor's estate cannot cover certain categories of claims, the creditors in those categories bear the loss of the unpaid amounts. This hierarchical order reflects policy priorities, such as giving employment-related and

101 Cărpănu, 2019, p. 784.

102 Ibid., pp. 775–777.

budgetary claims precedence over general claims arising from the debtor's economic activities.

Historically, there was uncertainty regarding the application of this hierarchy for cases in which collateralised assets were sold. Some courts incorrectly prioritised the costs of the insolvency proceedings, including administrator or liquidator fees, over secured creditors' claims. The law currently provides a compromise by granting administrators or liquidators priority for their fees – but only proportionally to the value of the collateralised assets relative to the total estate value. This adjustment discourages secured creditors from initiating insolvency proceedings, as significant portions of the collateral's value may be consumed by procedural costs, exceeding those incurred in standard enforcement actions.

Judicial practice has also grappled with the ranking of shareholder loans and other claims from shareholders. In general, shareholder loans are treated as general claims unless the shareholder holds at least 10% of the company's capital or voting rights, in which case they are subordinated.¹⁰³ Claims secured by collateral are treated as guaranteed claims, even if provided by shareholders with significant equity stakes, unless the collateral agreement is successfully challenged and invalidated. Contracts with shareholders unrelated to loans are categorised as general claims. Unpaid dividends, while debated, are often treated as shareholder loans and subordinated claims. However, unpaid shareholder loans, despite their subordinated status, grant the shareholder the right to initiate insolvency proceedings.¹⁰⁴

Finally, the assignment of a claim does not alter its original ranking. This principle ensures consistency in the treatment of claims regardless of ownership changes, as confirmed in judicial decisions.¹⁰⁵

7. Serbia

7.1. *Creditor Protection Rules*

There are three main categories of creditor protection rules in Serbia: I) rules on the protection of capital and finances of the company, II) rules regarding different disclosure obligations imposed to the companies aiming to enable prospective creditors to assess the risk of payment of their potential claims, and to inform current creditors about the certainty of paying off existing claims, and III) rules granting specific, concrete rights, and/or powers to the creditors in a strictly defined situation which *per se* puts them in an unfavourable position.¹⁰⁶ The common trait of the first set of rules is the imposition of certain mandatory standards of conduct in different stages of the company's formation and operation, which oblige the company's shareholders

103 Cluj-Napoca Court of Appeals, Decision No. 544/2017.

104 Cluj-Napoca Court of Appeals, Decision No. 588/2015.

105 Cluj-Napoca Court of Appeals, Decision No. 1623/2015.

106 On the instruments of creditor protection, see Jevremović–Petrović, 2011, pp. 244–252; Jevremović–Petrović, 2012, pp. 150–151.

and management. These rules have already been discussed in previous chapters, most notably in Chapter 4. As a reminder, we recall some of those rules: legal capital rules, rules on distributions to the shareholders, rules on contributions to the legal capital, evaluation of in-kind contributions, prohibition of financial assistance, etc. The second category of creditor protection rules is mostly relevant for listed JSCs, considering their ability to reach investors at the largest possible scale and gather necessary capital from the public in general. These rules are part of capital markets law, and as such they are beyond the scope of this book. This chapter analyses the third category of rules. The creditors' rights triggered on specific occasions in Serbian company law may be classified as follows:

- a) rules on the creditors' protection in case of capital reduction;
- b) rules on creditors' rights once the company conducts status change, change of legal form and once it concludes an agreement on control and management;
- c) creditor protection during the liquidation of a solvent company;
- d) specific rules applicable in the vicinity of insolvency; and
- e) piercing the corporate veil.

In this section, we analyse the first three groups of rules mentioned in this paragraph, while the last two groups will be part of separate sections.

The Serbian system of creditor protection in case of capital reduction is based on two companies' obligations established to enhance transparency and two specific creditors' rights introduced to strengthen their position if the company's status deteriorates. The company is obliged to publish the resolution on reducing the company's share capital in the register for a continuous period of 3 months starting from the day of registration of that resolution.¹⁰⁷ Additionally, the company must send a written notice to creditors known to the company whose individual claims amount to at least 2,000,000 dinars (RSD) on the day of registration of the resolution on the reduction of the share capital no later than 30 days after the registration of that resolution.¹⁰⁸ Creditors, meanwhile, have the right to require the company to secure their claims until the expiration of the period of publication of the resolution on the reduction of the share capital, provided that, irrespective of the maturity date, these claims were created before the expiration of the time limit of 30 days from the day of publication of the resolution.¹⁰⁹ The CA introduces another mechanism of creditor protection when the company, upon the request to secure the creditor's claim(s), neither secures it nor settles the claim, and the settlement of their claims is jeopardised by the reduction in the share capital in question. In this situation, a creditor may file a lawsuit to establish adequate security. The court will establish such security, taking particular care of whether the demanded security is necessary to protect the creditors bearing in mind

107 Articles 147a and 319, Section 1, CA.

108 Article 147a, Section 2, CA.

109 Article 147a, Section 3, CA.

the assets of the company.¹¹⁰ The creditors, whose claims are *per se* not jeopardised, are not entitled to demand the security of their claims (creditors whose claims belong to the first or second rank of payment priority in the insolvency proceedings, and already secured creditors).¹¹¹ Besides the depicted exception, which applies only to the creditors' right to file a lawsuit to establish a security interest, the CA recognises another exception with a far broader scope of application. Generally speaking, the CA's rules on creditor protection in case of capital reduction (two companies' obligations and two creditors' rights) are entirely not applicable when the capital reduction does not result in an actual diminution of companies' net assets (e.g. annulment of own shares which the company has acquired without compensation and for which the contributions were fully paid) or when the company reduces the capital in order to pay creditors' claims (e.g. reduction due to covering companies' losses).¹¹²

Serbian law confers to creditors specific rights once the company conducts significant structural changes that result either in the change of legal form or the change of its status (merger, acquisition, division, and separation). In both cases, the company is obliged to individually notify known creditors whose claims are higher than 2 000 000 RSD about the change of legal form or status change no later than 30 days prior to the day of the general meeting at which the relevant decision is made. The notification must contain the main information about the planned change (participants in the status change, objectives and conditions for the change, reasons for choosing another legal form, etc.). In case of a status change because of more significant consequences that arise from such change, the CA predicts some additional rules aiming to enhance creditor protection. The company is obliged to publish, in addition to personal notification of known creditors, the draft agreement on status change, that is, draft division plan on its internet page, as well as to deliver it to the Business Registers Agency (BRA; *Agencija za privredne registre*) for publication on the internet page of that register no later than 60 days prior to the day of holding the general meeting at which the decision on status change is to be made.¹¹³ The adoption of such a resolution at the general meeting triggers the emergence of creditors' right to enhanced protection. This right entails one of the following measures: I) the securement of the creditor's claim, II) change of the contract terms or termination of the contract, III) separate management of the assets of the transferring company until the settlement of the claim, and IV) taking any other actions and measures which place the creditor in a position which is not less favourable than the position he enjoyed prior to the status change.¹¹⁴ The right to enhanced protection is subject to four conditions: I) the claim ensued prior to the registration of the status change; II) the financial standing of the companies participating in the status change is such that the implementation of the status change compromises the satisfaction of her claim, and therefore, the

110 Article 147a, Section 4, CA.

111 Article 147a, Section 6, CA.

112 Article 147b, Section 1, CA.

113 Article 495, Section 1, CA.

114 Article 509, CA.

provision of such protection is necessary for placing the creditor in a position which is not less favourable than the position he enjoyed prior to the status change; III) creditors claims are not yet secured and they do not belong to the first or second rank of payment priority in the insolvency proceedings; and IV) the creditor must submit a request for enhanced protection not later than 30 days from the day of publication of the notification on the status change by the company (her debtor).¹¹⁵ A creditor who, within 15 days of the date of filing a motion for the provision of protection, is not provided with the relevant protection, is entitled to file an action against its debtor with the competent court seeking the provision of relevant protection.¹¹⁶ The right to enhanced protection also applies to the bondholders and other holders of debt financial instruments, including convertible bonds and warrants.¹¹⁷

Serbian company law recognises agreements on control and management, which result in the creation of a group of companies based on their contractual relations. In this contract, a company grants the management and conduct of business operations to another company.¹¹⁸ The directors of a control company, after concluding the agreement, acquire significant powers regarding the controlled company, most notably the right to impose mandatory instructions to their management.¹¹⁹ This influence obviously has considerable impact on the creditors' rights, because the settlement of their claims becomes dependent on the decisions of the control company – a party with whom they did not enter a contractual relationship. For that reason, the CA prescribes specific liability of the control company toward creditors of the controlled company upon the termination of the agreement on control and management. In other words, creditors are entitled to submit a written request for adequate protection of their claims incurred before the registration of the termination of the agreement on control and management.¹²⁰ The creditor does not have to provide proof of the decreased possibility to settle his claim with the controlled company. It is only necessary to submit the request within 6 months of the termination of the agreement on control and management (unless the claim is already sufficiently secured by separate means or owing to its ranking in the potential insolvency proceedings).¹²¹

The CA contains rules for the voluntary (by the resolution of the general meeting) and compulsory (automatic) dissolution of solvent companies. Such dissolution occurs entirely out-of-court, while the liquidator is most often the company's former director (in any case, a person appointed by the company in liquidation).¹²² The CA's rules on the liquidation of dissolved companies, not surprisingly, pay particular attention to the interests of creditors. The very basic principle applicable in liquidation is that

115 Article 510, CA.

116 Article 511, Section 1, CA.

117 Article 512, CA.

118 Article 554, Section 1, CA.

119 Article 557, Section 1, CA.

120 Article 566, Section 1, CA.

121 Article 566, Section 2, CA.

122 Article 529, Section 1, CA.

any payments to the shareholders (the liquidation surplus) may be made only after creditors' claims are fully settled. Those claims may be settled only if the creditors timeously file their claims under the threat of being precluded to settle if they fail to make the requested filing. With that in mind, the CA prescribes that a notification on initiation of liquidation must be published for 90 days on the internet page of the BRA and it particularly includes the invitation to creditors to file their claims, as well as a warning on the consequences of late filing or utter failure to file (loss of the right to settle the claim).¹²³ In addition, the company is requested to individually inform the known creditors about the initiation of the liquidation.¹²⁴

Creditors' rights are protected even after the liquidation of the company. The CA differentiates the rules applicable to liquidation as a result of voluntary and mandatory dissolution. As regards voluntary dissolution, shareholders are jointly and severally liable for the obligations of the company even after its extinction (de-registration), up to the amount received from the liquidation surplus, and for 3 years after the extinction.¹²⁵ In the case of mandatory dissolution, the CA provides a far stricter rule that effectively unfolds in a specific instance of "statutory" veil piercing. For that reason, this rule is addressed separately below.

7.2. Specific Rules Applicable in the Area of Insolvency

Serbian law does not contain, from a comparative law perspective, any of the main legal mechanisms used to address specific legal issues inherent in the vicinity of insolvency (change in the regime of directors' duties of care and loyalty, references to the concept of "wrongful trading", or the duty to file for bankruptcy once the company is insolvent). The absence of specific legal rules may create additional legal uncertainty in this, from a business perspective, which operates on an already hazy stage. Despite this, two remarks are needed to fully describe the Serbian legal framework on this issue.

First, Serbian law may have an unintended and indirect solution for the problems imminent in the vicinity of insolvency. That solution entails a different interpretation of the standard of directors' duty of care in this stage of business operation.¹²⁶ In other words, the standard of the duty of care anyhow requires its construal on a case-by-case basis, depending, among other factors, on the current status of a company. Because the economic and financial status in the vicinity of insolvency is substantially changed, and owing to a lack of indicators what is the interest of a company, courts may apply different interpretations to the standard of care in different stages of its operation. For instance, they may apply a progressive approach, meaning that the importance of creditors' interest gradually increases as the company's financial conditions deteriorate.¹²⁷

123 Article 533, Section 1, CA.

124 Article 534, CA.

125 Article 545, Sections 2 and 3, CA.

126 Mihajlović, 2019, pp. 211–212.

127 Ibid.

Second, modelled upon Article 58 of Directive (EU) 2017/1132, the CA recognises the obligation to convene an extraordinary general meeting, both in LLCs and JSCs, once a company suffers serious loss.¹²⁸ According to the CA, such loss exists when the company's net assets fall below 50% of the company's legal capital. The extraordinary meeting in question clearly has a preventive effect.¹²⁹ Moreover, the law requires concrete action from the shareholders. The outcome of the meeting must be either a proposal of a resolution on the dissolution of the company or a proposal of a decision on other measures.

7.3. Limited Liability and Veil-Piercing

The principle of limited liability is the cornerstone of the Serbian company law of LLCs and JSCs. It has been accepted as the main shield from shareholders' personal liability for companies' debts. This principle has been restricted by the well-known rules on veil-piercing that are present in Serbia since the inception of the development of modern company law rules. Serbian rules on veil piercing are scarce, and they are found in only one provision of CA. However, this does not present an obstacle but rather testifies to the principle-based approach of the Serbian legislation to veil piercing. Very few rules leave room for a creative and broad interpretation of the statutory principle among the myriad of possible situations. The rule on veil piercing has several elements, as discussed in this section:

- a) the addressees of the rule,
- b) the essence (content) of the rule, and
- c) the consequences of its application.

Serbian legislation precisely defines the circle of persons to whom the rule of veil piercing may be applied. It comes as no surprise that the rules apply to the shareholders who are generally not personally liable for the company's debt, that is, to the shareholders of LLCs and JSCs (as well as to the limited partners in limited partnerships). Even though the law neither makes a difference between majority and minority shareholders nor between controlling and non-controlling shareholders, from a practical point of view, there seems to be little doubt that the veil may be more easily shifted in its part that shields the former.¹³⁰ Minority shareholders have fewer possibilities to abusively act toward creditors owing to their limited influence on the company's business operations.

The essence of the rule is very straightforward – the shareholders are prohibited from abusing rules on their limited liability. In other words, if they commit such abuse, they may become personally liable for the company's debt. After the general clause, the CA prescribes several situations that are to be considered the most prominent cases of abuse. The veil is shifted if a shareholder:

128 Article 371, Section 2, CA.

129 Radović, 2009, pp. 307–310.

130 Vasiljević et al., 2020, p. 94.

- a) uses the company to achieve a goal that is otherwise forbidden to him,
- b) uses the company's assets or disposes of them as if they were his own,
- c) uses the company or its assets to damage the company's creditors, or
- d) reduces the company's assets to obtain personal gain or gain for third parties, although the person in the breach was aware or had to be aware that the company would not be able to fulfil its obligations.¹³¹

This list of examples should represent no more than that. The list is not exhaustive, and the general clause may encompass other cases that are not on the list on the basis of a case-by-case approach. Serbian courts tended to understand the reasons and rationale for veil piercing in the context of the criminal law concept of fraud.¹³² The legal theory, however, deems this understanding as flawed, as piercing the veil originated from the civil law concepts of good faith and prohibition of abuse of one's rights. Some recent case law follows this academic understanding when asserting that mentioned civil law principles are to be applied in finding whether the shareholder abused the rule on limited liability.¹³³

The main consequence of veil piercing is the shareholder's personal liability. Several remarks deserve special consideration in this regard. First, this consequence ensues only after bringing an action against the shareholder who abused the limited liability.¹³⁴ The action has to be filed within 6 months of the date of finding out about the abuse (subjective time limit), and no later than 5 years from the day of abuse (objective time limit).¹³⁵ Second, the action is to be filed against the particular shareholder who committed abuse. There is no universal veil piercing applicable to all company's shareholders. Third, each creditor must individually file a lawsuit to demand the settlement of the claim. There is no automatic application of veil piercing for all company's creditors. Fourth, the CA does not make a difference as regards the basis of the claim. The right to file a lawsuit for veil piercing belongs to any creditor, notwithstanding neither when the claim arose nor whether it was due when the abuse occurred. If the creditor's claim was not due at the moment the creditor found out about the abuse, the 6-month deadline starts running as of the day the claim becomes due.¹³⁶

Despite its broad and open formulations, suited to the application in different cases, Serbian rules on veil piercing are rarely applicable. Lawsuits for veil piercing are sparse, although the practical situations in which shareholders abuse the limited liability, especially before the company's insolvency, are not uncommon. The exact reasons for the failure of these important rules could not be easily determined.

131 Article 18, Section 2, CA.

132 Vasiljević et al., 2020, p. 131.

133 Judge of the Commercial Appellate Court, Prev. 4749/20, 14 January 2021.

134 Marjanski and Dudás, 2020, p. 137.

135 Article 18, Section 3, CA.

136 Article 18, Section 4, CA.

Perhaps because of the insufficient application of rules on “traditional” veil piercing, the CA introduced a specific case of veil piercing pertaining to the controlling shareholder of a company liquidated upon compulsory dissolution. In general, compulsory dissolution of a solvent company is conducted once the company no longer fulfils some of the statutory requirements for its formation and existence.¹³⁷ In such a case, the controlling shareholder is jointly and severally liable without limits for the company’s obligations 3 years after the de-registration.¹³⁸ Two main features of this provision are as follows: I) it applies only to the controlling shareholder and II) it applies under the operation of law. Both features have invoked some criticism in the legal scholarship, questioning even its constitutionality, because it deviates from the well-known assumption about the exclusion of the limited liability, namely, abuse of such liability. Here, the creditors do not have to file a specific lawsuit to prove the abuse if it appears that they have claims against the de-registered company. It is sufficient, according to the case law, that a creditor can enforce her claim against a company only with the statement from the BRA confirming the de-registration of a company owing to compulsory dissolution.¹³⁹

7.4. Legal Protection of Creditors in Case of Insolvency

The legal protection of creditors in case of insolvency is subject to the special Insolvency Act. Serbian law recognises two types of insolvency proceedings: liquidation and reorganisation. Liquidation comprehends creditor satisfaction from the value of the debtor’s whole assets, and/or from the value of the debtor as a legal entity.¹⁴⁰ Reorganisation comprehends creditor satisfaction accomplished in the manner and under the conditions contained in the plan of reorganisation by redefining relations between the debtor and the creditor, or changing the debtor’s legal status, or in another manner provided by the plan.¹⁴¹ The common feature of both proceedings is their main goal. Insolvency proceedings in Serbia aim to ensure the most favourable collective settlement of creditors by achieving the highest possible value of the debtor or its assets.¹⁴² The objectives of insolvency proceedings testify that Serbian insolvency law is creditor-oriented. In principle, there is no room for the achievement of other social or economic goals in insolvency proceedings but the protection of creditors. This is equally true even in the reorganisation with a preventive character (initiated owing to the debtor’s imminent insolvency). Besides the objectives, many provisions of the Insolvency Act expectedly showcase the legislation’s endeavour to protect creditors.

137 Article 546, CA.

138 Article 548, Section 3, CA.

139 Position of the of the Supreme Court of Cassation of the Republic of Serbia, Civil Section from 16 March 2021..

140 Article 1, Section 3, IA.

141 Article 1, Section 4, IA.

142 Article 2, IA.

The creditor-oriented focus is clearly visible in the way how the insolvency law principles are defined and structured. A basic insolvency law principle is the collective settlement of creditors: insolvency proceedings should ensure the collective and proportional settlement of creditors under the law.¹⁴³ This principle is closely related to the principle of universality, which implies that in insolvency proceedings the whole assets of the debtor, acquired before the commencement of the proceedings and during these proceedings, serve the purpose of creditors' settlement.¹⁴⁴ The focus of insolvency proceedings on the protection of creditors is also reflected in the principle of creditor autonomy, which paves the way for the significant participation of creditors in the proceedings. The creditors' participation may be achieved either through participation in the bodies formed in the insolvency proceedings or by exercising their individual rights as parties to the proceedings.¹⁴⁵ Regarding the latter, the creditors may have an active role from the very beginning of the proceedings, as they are entitled to initiate the opening of the proceedings. When it comes to the opening of the proceedings, Serbian insolvency law uses a combination of balance sheet and cash flow tests as the relevant commencement standards.¹⁴⁶

Regarding the creditors' role in the bodies formed upon the commencement of insolvency proceedings, there are two bodies whose members are exclusively the creditors: the creditors meeting, and the creditors committee. In case of less than five creditors, all the creditors will be merged into one common body of creditors with the powers assigned by the law to both bodies.

The creditors meeting is comprised of all creditors but secured creditors. The meeting has some substantial competencies that crucially influence the course and outcome of the proceedings. First, it is for the creditors meeting to decide whether the insolvency proceedings will be conducted as a liquidation or reorganisation.¹⁴⁷ Therefore, as a matter of principle, it is up to the creditors to rule whether the debtor deserves a second chance. The meeting also has a decisive role in the appointment of the insolvency representative. Even though the primary power to appoint the representative belongs to the court, he may not be finally elected without the consent of the creditors' meeting. If the meeting does not provide such consent, it must at the same time propose the dismissal of the representative and the appointment of the new one.¹⁴⁸ After the appointment, the creditors meeting oversees the insolvency representative, while the creditors committee may initiate her dismissal (the final decision on dismissal is to be made by the court). The creditor's right to vote at the meeting depends on the proportion of the amount of her claim.

143 Article 3, IA.

144 Radović, 2020, p. 30.

145 Ibid., p. 33.

146 Article 11, Section 2, IA.

147 Article 36, Section 4, IA.

148 Article 35, Section 5, IA.

The creditors committee is elected by the creditors meeting. The creditors committee includes a representative of secured creditors.¹⁴⁹ It consists of no more than seven creditors, and their number in any case must be odd. Contrary to the meeting, the voting is organised according to the principle of one creditor – one vote. The creditors committee has significant powers that affect the course of the proceedings and the implementation of powers of the insolvency representative. For instance, the creditors committee's consent is necessary for certain actions of the insolvency representative (e.g. the sale of the debtor as a legal entity, and actions of exceptional importance).

Another important principle of the insolvency proceedings is the principle of equal treatment of creditors. The equal treatment of creditors allows all creditors to settle according to the same insolvency quota, and receive a certain amount according to that quota. This principle applies in the context of the priority rankings established by the Insolvency Act, that is, equal treatment implies its application only compared to the creditors who are part of the same priority ranking. Furthermore, the Serbian insolvency law provides, as a matter of principle, that a secured creditor has the right to be paid before any other creditors out of the proceeds of its collateral. The list of priority rankings starts with the costs of the proceedings and the obligations of the insolvency estate. Afterward, the law prioritises the employees, then the public revenues, and finally the unsecured creditors. The Insolvency Act recognises as well a group of subordinated creditors, consisting of the parties related to the debtor for the claims arising from the loan agreements they concluded with the debtor in the last 2 years before the opening of the insolvency proceedings.¹⁵⁰

Nevertheless, several other measures aim to protect creditors and the bankruptcy estate during the insolvency proceedings. These measures apply as early as during the preliminary proceedings until the closure of the proceedings. They aim to protect the insolvency estate and to enhance its value through many measures and obligations imposed on the insolvency representative, or specific rights attached to the creditors' bodies or individual creditors.

8. Slovenia

8.1. Creditor Protection Rules

8.1.1. Limited Liability Companies

As compensation for the lack of personal liability of the shareholders, the *Zakon o gospodarskih družbah* (ZGD-1; The Companies Act of Slovenia) provides some rules regarding the minimum amount and the maintenance of the share capital. The maintenance of the share capital is ensured by the prohibition of paying out the assets

149 Article 38a, IA.

150 Article 54, IA.

which cover the subscribed capital (Article 495, ZGD-1), special rules regarding loans to the LLC instead of own assets (Article 498, ZGD-1), and the prohibition of repayment of a loan prior to the commencement of bankruptcy or compulsory settlement (Article 499, ZGD-1).¹⁵¹

8.1.2. Joint-Stock Companies

In the case of a JSC, just like in an LLC, the principle of capital maintenance with a prohibition on the return of contributions applies.¹⁵²

8.2. Specific Rules Applicable in the Area of Insolvency

8.2.1. Limited Liability Companies

The current regulation of corporate law in the ZGD-1 and insolvency law in the *Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju* (ZFPPIPP; The Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) does not contain specific rules that apply in the event of the likelihood of the insolvency. During the period before the onset of company insolvency, certain general rules regarding the financial operations of companies and other legal entities, as stipulated in Chapter 2 of the ZFPPIPP, apply. These fundamental rules apply not only to commercial companies but also, by analogy, to entrepreneurs, institutions, public institutions, cooperatives, and public funds (Article 27(1), ZFPPIPP). A company must manage its resources and investments in a way that it is capable of fulfilling all its due obligations at any given time (Article 31(1), ZFPPIPP). The company must establish and implement a policy for regular liquidity management to manage liquidity risk, which is approved by the management and includes:

- a) planning expected known and potential cash outflows and sufficient cash inflows for them, taking into account the normal course of business and potential liquidity crisis situations,
- b) regular monitoring and management of liquidity, and
- c) identification of appropriate measures to prevent or eliminate the causes of illiquidity and the definition of other options for addressing them (Article 31(1), ZFPPIPP).

The company must also ensure that it always has sufficient long-term sources of financing in relation to the scope and types of operations it conducts, as well as the risks to which it is exposed in performing them (Article 32(1), ZFPPIPP). Monitoring capital adequacy, in accordance with the ZFPPIPP and the rules of business and

151 Ivanjko et al., 2009, p. 899. The relevant rules are presented in the chapter of the capital maintenance, Chapter III, C, I.

152 The relevant rules are presented in the chapter on rules for the capital maintenance, Chapter III.

financial practice, is one of the fundamental tasks of the management (Articles 28(1), 32(2), ZFPPIPP).

It is worth noting that a proposal to amend the ZFPPIPP (hereafter, ZFPPIPP-H proposal) is currently in the legislative process.¹⁵³ The proposal will, among other things, implement the EU Directive on Restructuring and Insolvency.¹⁵⁴ With the adoption of the ZFPPIPP-H proposal, the institution of the likelihood of insolvency would be introduced into Slovenian insolvency law. Likelihood of insolvency would refer to a situation where it is probable that the debtor will become insolvent within 1 year (Article 6, ZFPPIPP-H proposal). According to the new Article 33a of the ZFPPIPP (Article 16, ZFPPIPP-H proposal), the management and other bodies of the company must constantly monitor developments that could jeopardise the company's continued existence. If they identify such developments, they must take appropriate countermeasures and immediately report to supervisory bodies. If the measures to be taken are not within the competence of or fully within the competence of the management, the management must make efforts and undertake all activities to have them addressed by supervisory or other competent bodies (Article 33a(1), ZFPPIPP-H proposal). In the event of likelihood of insolvency, the management and other bodies of the company must:

- a) avoid actions that would result in unequal treatment of creditors who are in an equal position with respect to the company, unless such actions are taken to prevent insolvency;
- b) take into account the interests of creditors, shareholders, and other stakeholders in their decision-making; and
- c) avoid actions that endanger or reduce the assets of the company or otherwise jeopardise the company's ability to survive (Article 33a(1), ZFPPIPP-H proposal).

8.2.2. Joint-Stock Companies

The current regulation of corporate law in the ZGD-1 and insolvency law in the ZFPPIPP does not contain specific rules that apply in the event of the likelihood of the insolvency. During the period before the onset of company insolvency, certain general rules regarding the financial operations of companies and other legal entities apply, as stipulated in Chapter 2 of the ZFPPIPP. These rules apply to all forms of commercial companies (Article 27(1), ZFPPIPP), and thus, they apply equally to a JSC as well as to an LLC (see Chapter VII., B., I).

¹⁵³ *Zakon o spremembah in dopolnitvah Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju* (Law on Amendments and Additions to the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act).

¹⁵⁴ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt, and amending Directive (EU) 2017/1132.

8.3. *Limited Liability and Veil-Piercing*

8.3.1. *Limited Liability Companies*

Commercial companies, as legal entities, are liable for their obligations with all their assets (Article 7(1), ZGD-1). The law specifies when and how shareholders are also liable, in addition to the company (Article 7(2), ZGD-1). An LLC falls under the category of capital companies, characterised by the fact that shareholders are not personally liable for the company's obligations. Therefore, the ZGD-1 stipulates that shareholders of an LLC are not liable for the company's obligations (Article 472, ZGD-1).

Even though shareholders of an LLC are not personally liable for the company's obligations, Part I of the ZGD-1, which covers general provisions of the company law, regulates the doctrine of piercing the corporate veil. Shareholders of an LLC are liable for the company's obligations if:

- a) they have abused the company as a legal entity to achieve a goal that is prohibited for them as individuals;
- b) they have abused the company as a legal entity to harm their own or its creditors;
- c) they have acted contrary to the law by treating the assets of the company as their own personal assets; or
- d) they have diminished the assets of the company for their own benefit or the benefit of another person, knowing or having the obligation to know that the company will not be able to fulfil its obligations to third parties (Article 8(1), ZGD-1).

The doctrine of piercing the corporate veil applies only to the company's obligations toward its creditors, and it is not possible to enforce claims of the company against its shareholders.¹⁵⁵

Because piercing the corporate veil is an exception to the fundamental rule of corporate law that shareholders are not liable for the obligations of the (capital) company, the exception should be narrowly interpreted.¹⁵⁶ A typical example in practice whereby the doctrine of piercing the corporate veil comes into play is when shareholders treat the assets of the company as their own personal assets or transfer the company's assets into their personal ownership.¹⁵⁷

The condition for invoking the doctrine of piercing the corporate veil in relation to a shareholder is the existence of a proven and matured claim. The ZGD-1 does not require the company to be insolvent or that bankruptcy proceedings are initiated to assert a claim against shareholders. The literature emphasises that the purpose of the doctrine of piercing the corporate veil is not based on the insolvency of the company,

¹⁵⁵ Zabel, 2006, p. 161.

¹⁵⁶ Judgment of the Higher Court in Ljubljana, No. VSL I Cp 296/2022, 15 March 2022.

¹⁵⁷ Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 186/99, 1 December 1999.

but rather on the abuse of the legal entity. An interpretation that makes insolvency or even the initiation of bankruptcy proceedings a prerequisite for invoking the doctrine of piercing the corporate veil would not be in line with the purpose and rationale of the doctrine. Therefore, the literature accepts the view that if there are grounds for piercing the corporate veil, creditors can assert a claim against shareholders even if the company has not fulfilled its obligations or is unwilling to do so.¹⁵⁸

8.3.2. Joint-Stock Companies

A JSC is a capital company in which shareholders are not liable for the company's obligations (Article 168(3), ZGD-1). An exception to this rule is the doctrine of piercing the corporate veil, which is regulated in Part I of the ZGD-1 under the general provisions applicable to all types of commercial companies. Therefore, shareholders are liable for the obligations of a JSC under the same conditions as shareholders in an LLC (see Chapter VII., C., I).

8.4. Legal Protection of Creditors in Case of Insolvency

8.4.1. Limited Liability Companies

The protection of creditors in the event of a company's insolvency is regulated in the ZFPPIPP. This law governs the financial operations of legal entities, insolvency proceedings for legal and natural persons, and procedures for compulsory dissolution of legal entities (Article 1, ZFPPIPP). Although the ZFPPIPP is the main source of legal protection for creditors in case of a company's insolvency, the ZGD-1 also contains some specific rules in this regard. Regarding the maintenance of the capital of an LLC,¹⁵⁹ the ZGD-1 stipulates that a shareholder who, during the period when shareholders, as prudent entrepreneurs, should have provided the company with own capital, instead granted a loan to the company, cannot enforce a claim for loan repayment against the company in bankruptcy or compulsory settlement proceedings. Such a loan is considered as part of the company's assets in bankruptcy or compulsory settlement proceedings (Article 498(1), ZGD-1). If, during the aforementioned period, a third party granted a loan to the company instead of the shareholders providing own capital, and the shareholder provided collateral for the loan or guaranteed it as a guarantor, the third party can only claim payment of the difference that it did not receive or would not have received from the collateral or guarantee (Article 498(2), ZGD-1). If the company repaid the loan in the last year before the initiation of bankruptcy or compulsory settlement, the shareholder who granted the loan or the shareholder who provided collateral or acted as a guarantor must compensate the company for the repaid loan amount. The shareholder's obligation exists only up to the amount of the loan or the amount for which the shareholder assumed the guarantee, or up to the value of the collateral upon loan repayment. The shareholder is exempt from

¹⁵⁸ Zabel, 2006, pp. 161, 162.

¹⁵⁹ For more on the capital maintenance rules in an LLC, see Chapter 3.

this obligation if the items given to the creditor as collateral are made available to the company for repayment (Article 499(1), ZGD-1).

Regarding a claim for damages that can be asserted against members of the management or supervisory body for their breach of the duty of due care and responsible conduct in performing their duties in the event of a company's bankruptcy, such a claim can also be pursued by the company's creditors (see Chapters VI, D, and VI, F, II).

8.4.2. Joint-Stock Companies

The protection of creditors in the event of a company's insolvency is regulated in the ZFPPIPP. This law governs the financial operations of legal entities, insolvency proceedings for legal and natural persons, and procedures for the compulsory dissolution of legal entities (Article 1, ZFPPIPP). Although the ZFPPIPP is the main source of legal protection for creditors in case of a company's insolvency, the ZGD-1 also contains some specific rules in the chapter on JSCs. If there has been a violation of the prohibition on the return of contributions, shareholders or third parties must return any payments they have received from the company. However, if the payments were received as dividends, they are required to be returned only if the recipients knew or should have known that they were not entitled to such payments (Article 233(1), ZGD-1). The company's claim for the return of prohibited payments can also be enforced by the company's creditors if the company is unable to make the payment. In the event of bankruptcy proceedings, the bankruptcy administrator exercises the rights of the company's creditors against the shareholders (Article 233(2), ZGD-1).

Regarding a claim for damages that can be asserted against members of the management or supervisory body for their breach of the duty of due care and responsible conduct in performing their duties in the event of a company's bankruptcy, such a claim can also be pursued by the company's creditors, see (Chapters VI, D, and VI, F, II).

9. Slovakia

9.1. Creditor Protection Rules

Creditor protection has been one of the most discussed topics in Slovak corporate discourse lately. It is undeniable that in the normal course of business, the interests of shareholders are protected first, and corporate laws only exceptionally regulate protection mechanisms and claims in favour of creditors. The situation differs when the company runs into financial problems and distress. Then, the interests of creditors take precedence over those of shareholders. The Slovak Commercial Code contains a number of special provisions regulating the protection mechanisms for creditors, which apply in cases of mandatory creation and maintenance of the share capital, reduction and increase of the share capital, the process of changing a legal form, mergers of companies, disqualification of board members, and returning payments

to shareholders. As the protective rules apply to both LLCs and JSCs (as well as simple JSCs), we discuss them further in general and point out only the specificities for each corporate form. The board members' or shareholders' liability regime is governed by the provisions of the Commercial Code. In addition to the Commercial Code, the creditors' protection rules in the event of imminent insolvency (*hrozba úpadku*) or insolvency (*úpadok*) of a company are provided for in Act No. 7/2005 on Bankruptcy and Restructuring.

9.1.1. Share Capital Regulation and Protection of Creditors

Legal provisions governing the share capital changes are aimed at protecting the company's creditors interests. If the share capital is reduced, the Commercial Code formulates the right of unsecured creditors of LLCs and JSCs to have their outstanding claims secured.¹⁶⁰

Further protective mechanisms are stipulated in the JSC legal framework. If a JSC makes unlawful payments to shareholders in connection with a reduction of the share capital, the members of the board of directors are liable as guarantors to the company's creditors for the satisfaction of their unsecured claims if they cannot be satisfied from the company's assets. With the payment of the management board member, the creditor's claim against the JSC ceases and the board member should have a recourse right against the shareholder who received the unlawful payment as the primary debtor of the company.¹⁶¹

Similarly, the managing directors of any capital company are obliged to give notice to all known creditors of the company about the change of corporate form, publish such a notice twice and issue adequate security. If, following the change of corporate form, there is lower registered share capital than prior to the change of corporate form, the managing directors are liable jointly and severally toward the company's creditors whose debts receivable from the company have not been secured.¹⁶²

Creditor protection rules are also formulated in the event of an increase of the company's share capital, if the board of directors makes a false statement of the amount of contributions paid up. In this case, two types of liabilities arise. On the one hand, the managing directors are liable to the company for ensuring the payment of the shareholders' contributions. On the other hand, they are also directly liable to creditors for the company's debts up to the difference between the share capital actually paid up and the amount stated by the board of directors in the statement of the amount of contributions paid up.¹⁶³

160 Sections 215(6) and 147, CC.

161 Csach, 2019, p. 222.

162 Section 69b(8) in connection with Section 215(6), CC.

163 Ovečková et al., 2022, p. 1645.

9.1.2. *Protection of Creditors in Corporate Mergers*

The massive practice of fraudulent mergers, primarily aimed at avoiding the repayment of debts and weakening the position of creditors resulted in stricter regulation of the conditions for corporate mergers in 2017. The new Act No. 309/2023 on Transformation of Companies and Cooperatives currently stipulates that managing directors must refrain from actions aimed at a merger, division, or conversion of the company, or its cross-border equivalents, if it can reasonably be expected that the successor company would be in a state of insolvency or the imminent insolvency, or if the dividing company would become insolvent or be in the vicinity of insolvency. This also applies if the effects of the declaration of bankruptcy, restructuring proceedings, liquidation, or dissolution apply to a company participating in such a corporate transformation.¹⁶⁴ If the managing directors breach their duties and carry out acts aimed at merging the company, although the legal conditions for doing so are not met, they are directly liable to the creditors for damages caused to them by the breach of this duty.¹⁶⁵

9.1.3. *Creditors' Claims Against the Acts of Disqualified Board Members*

Creditor protection is also ensured in the case of actions by persons who have been disqualified from serving as corporate board members (disqualified board members). With effect from 1 January 2016, the Slovak legislation contains Section 13a of the Commercial Code, according to which a disqualified person who acted on behalf of the company after his disqualification and before the disqualification was registered in the Commercial Register shall be liable for the company's debts to its creditors. Thus, this rule protects the company as well as third parties. This sanction in the form of a guarantee is reinforced by the exclusion of recourse of a managing director against the company. Because of the mandatory nature of the provision, the abovementioned rule cannot be modified, even if the consent of a third party is provided.¹⁶⁶

9.1.4. *Other Creditors' Protection Rules*

The Slovak legislation also contains other mechanisms to prevent shareholders from taking out the company's assets to the detriment of creditors. These include the prohibition on repayment of contributions, strict conditions for the distribution of profits, the prohibition on the acquisition of own shares, and the obligation to create a reserve fund.¹⁶⁷ The protection rules include those governing the concept of a company in crisis (*spoločnosť v kríze*), which we discuss below.

A special feature of the Slovak legislation is the so-called creditor's derivative action. If a company has suffered damage as a result of a breach of duty by a board member, the creditor may enforce a claim for damages against the board member

164 Section 6, Act No. 309/2023 on Transformation of Companies and Cooperatives and on Amendments and Supplements to Other Acts.

165 Mrázová et al., 2021, p. 162.

166 Ovečková et al., 2022, p. 192.

167 For the rules on the maintenance of share capital, see Chapter 2.

by bringing an action directly against the company's board member. In practice, however, such an action is rarely brought because the creditors have a strict burden of proof. Creditors must not only prove that the company has a claim for damages against the board member, but also that their claim against the company exists and that it is impossible to satisfy it from the company's assets.¹⁶⁸ The impossibility of satisfaction is of an objective nature owing to a lack of company assets rather than a subjective reluctance by the company to fulfil its obligations toward its creditors. Creditors' claims against board members do not expire if the company enters into a settlement agreement with board members or waives its claims for damages.¹⁶⁹ In bankruptcy proceedings, the creditor's claims against the management board members are exercised by the bankruptcy trustee.

9.2. Specific Rules Applicable in the Area of Insolvency

The amendment to the Commercial Code, which entered into force on 1 January 2016, has expressly stipulated the situations in which a company does not have sufficient capital and is in crisis. The concept of the company in crisis applies to LLCs, JSCs, and simple JSCs, but not to specially regulated entities, such as banks, insurance companies, and stock exchanges. The Slovak regulation on this matter has been highly influenced by the Austrian definition of a company in crisis and German legislation. A crisis is the financial situation of a company when it is insolvent or at risk of becoming insolvent (imminent insolvency).¹⁷⁰ A company is also in crisis if its equity-to-debt ratio is less than 8:100. The aim of the later regulation is to protect creditors in a period when the company is not yet insolvent, but its economic indicators are not pointing in a positive direction. The company's accounting records are used to determine this ratio.

Section 4 of the Bankruptcy and Restructuring Act provides that a company is at the stage of imminent insolvency if it can reasonably be expected to become insolvent within 12 calendar months. The company, as a debtor, is obliged to prevent insolvency. If insolvency is imminent, the company must act proactively and take appropriate and reasonable measures without undue delay to avert it and overcome the crisis. Informing creditors about the crisis is part of the management board's professional duty of care.¹⁷¹ Members of the management board are obliged to take into consideration the common interests of creditors, take measures to overcome the distress situation and, if they do not have sufficient expertise and experience, seek expert advice to assess whether the company is at imminent risk of becoming insolvent and what measures should be taken to avoid it.¹⁷² The Bankruptcy and Restructuring Act does not specify what particular steps should be taken to achieve the economic recovery of a company. However, it is possible to consider convening a general meeting at which solutions

¹⁶⁸ Patakyová et al., 2021, p. 679.

¹⁶⁹ Ibid., p. 680.

¹⁷⁰ Section 67a(1), CC.

¹⁷¹ Ovečková et al., 2022, p. 652.

¹⁷² Section 4a, Act on Bankruptcy and Restructuring.

would be presented, such as an increase of the share capital or other capital funds, a change in the business strategy that would adjust the equity-to-debt ratio so that the company could overcome the crisis, or further steps in order to reach an agreement with creditors to resolve the insolvency in the form of an informal restructuring.¹⁷³

A company in imminent insolvency can resolve it through preventive procedures regulated by Act No. 111/2022 on the resolution of imminent insolvency, the result of the implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Effective from 17 July 2022, these preventive tools comprise public preventive restructuring and non-public preventive restructuring. The preventive procedures should become an effective tool for timely resolution of the debtor's unfavourable financial situation, allowing them to continue their operations, maintain their viability, and avoid insolvency. It aims to maximise the total value for creditors compared to the outcomes of the bankruptcy proceedings.

If the company is already insolvent, the special rules of Bankruptcy and Restructuring Act apply. The act distinguishes two insolvency situations: when the company has excessive debt (*platobne neschopná*); and when it is over-indebted (*predĺžená*). A legal entity is considered insolvent if it is unable to fulfil at least two pecuniary obligations to more than one creditor within 90 days after the due date. To assess the debtor's solvency, all claims that originally belonged to only one creditor during the 90 days preceding the filing of the bankruptcy petition are considered as one claim.¹⁷⁴ A company is over-indebted if it has more than one creditor and the value of its debts exceeds the value of its assets (negative equity). These debts do not include subordinated debts and debts to related parties. However, the expected results of the continued management of the assets and the expected results of the continued operation of the business are taken into account.¹⁷⁵

9.2.1. *Requalification of Related Creditors' Loans to Equity*

During a company's crisis, two significant changes take place. Besides the above-mentioned extended duties of management board members during crisis, the rules on equity substitution apply. If the company is at risk of becoming insolvent, the Slovak legislation encourages the shareholders to resolve the imminent insolvency primarily by increasing the share capital and not by granting a loan to the company, because as creditors, they could demand early repayment from the company. This is achieved in such a way that a payment made to the company in the form of a loan by the related creditors is requalified by means of a legal fiction to equity and thus

173 Mrázová et al., 2021, p. 175; Ovečková, Csach, and Žitňanská, 2020, p. 121.

174 Section 3(2), Act on Bankruptcy and Restructuring.

175 Mrázová et al., 2021, p. 172.

subject to a different repayment regime. Hence, loans or similar payments made by shareholders or other related creditors specified by law, to the company during the crisis are temporarily requalified as the company's equity until the crisis is over. The temporary prohibition on the repayment of these loans applies.

For a particular loan to be requalified as equity, several conditions must be met. First, the payment must be in the form of a loan or other payment in cash or in kind that the related creditor expects to be repaid. The related creditor is a person who fulfils the characteristics specified by law, in particular, it can be a shareholder, a member of the management board, a member of the supervisory board, a silent partner or another related party.¹⁷⁶ Moreover, the payment must be made to the company in crisis and the creditor must know or should have known about this fact, as the information about the crisis is apparent, for example, from the company's annual or extraordinary financial statements. The law explicitly provides for exceptions to the requalification of loans as equity. These include, in particular, payments made to a company during a crisis to overcome the crisis as part of a restructuring plan, a short-term loan, a supplier loan with deferred repayment, or payments made to the company gratuitously.¹⁷⁷

9.2.2. *Prohibition on Repayment of Requalified Loans*

The Slovak legislation not only sets out the conditions for requalification of loans to equity if the payment was made during the company's crisis, but also clearly formulates the consequences thereof. A requalified loan cannot be repaid to the person who made the payment in a time of crisis or if the company would be in crisis as a result of the repayment of the payment in question together with related charges (e.g. default interest) and contractual penalties.¹⁷⁸ There are no time limits set for the repayment during this period. This means that a loan granted by a shareholder to the company becomes a loan with deferred repayment for as long as the company is in crisis, so that the company does not default.¹⁷⁹ Prohibited methods of repayment include set-off, realisation of a pledge by sale of the pledged assets, enforcement, or any similar method of repayment of such payments.¹⁸⁰

9.2.3. *Consequences of a Breach of the Prohibition on Repayment of Requalified Loans*

If a requalified loan is unlawfully repaid, the person who receives the payment is obliged to return the value of the payment to the company. The members of the management board are obliged to recover the unlawfully repaid payment. Those members who were in office at the time when the payment was repaid in breach of the prohibition on repayment are jointly and severally liable for returning it to the company. In addition, they are liable jointly with former members of the management board

176 Section 67c(2), CC.

177 Section 67e, CC.

178 Section 67f(1), CC.

179 Patakyová et al., 2021, p. 517.

180 Section 67f(2), CC.

who were in office during the period in which the company did not claim returning the payment and who, having regard to all the circumstances, knew or could reasonably have known of this obligation.¹⁸¹ This liability also applies to any subsequent members of the management board who are in office at the time when the claim for returning the unlawful repayment exists. The essential difference in the liability of these persons lies in the possibility of exemption from liability. While the members of the management board who were in office at the time of the unlawful repayment cannot be exempted from their liability, subsequent members of the management board can be exempted if they prove that they did not know or could not have known of the obligation to make the claim.¹⁸²

The statutory guarantee of the management directors is a form of security for the company's primary claim for returning a payment unlawfully repaid to a related party; thus, the managing directors are guarantors toward the company itself as well as toward external creditors. If external creditors claim liability against the management board, the management board is obliged to pay exclusively to the company. The liability to the company's external creditors is extinguished by returning the unlawful repayment to the company.¹⁸³

9.2.4. Security Provided by Related Creditors

The Slovak legislation also provides for a situation in which a related party does not grant a credit (loan) to the company during a crisis, but instead secures the company's debt to an external creditor by a guarantee, a pledge or other security that can be used to satisfy the external creditor. The external creditor can then claim payment of the debt directly from the party providing the security (the related party guarantor) without having to make a written demand on the debtor company to repay the debt.¹⁸⁴ Such a legal concept, in principle, overrides the principle of subsidiarity of security, because a claim can be asserted directly against a shareholder or other related creditor who provided the security in question, irrespective of its assertion against the company as the primary debtor.¹⁸⁵

In addition, if a company has repaid a debt secured by a shareholder directly to an external creditor (while the security was provided during the company's crisis), the company is entitled to demand compensation from the shareholder (as the related party) for the repayment of the secured debt. The management board of the company is obliged to comply with such a demand without undue delay. Thus, the shareholder is obliged to compensate the company for the value of the security in the form of a payment in cash or in kind.

181 Ibid.

182 Ovečková et al., 2022, p. 672.

183 Csach, 2019, p. 222.

184 Section 67g, CC.

185 Ovečková et al., 2022, p. 674.

9.3. *Limited Liability and Veil-Piercing*

The Slovak Commercial Code regulates the shareholder's liability for the company's debts during the company's existence and after the company's dissolution. Shareholders of an LLC are liable for the company's debts only up to the amount of their unpaid contribution. The extent of shareholders' liability is determined as the difference between the registered amount of the contribution paid up by the shareholder and the total amount of the shareholder's contribution.¹⁸⁶ After the winding up of the company, the shareholders are liable for the company's debts up to the amount of their share in the liquidation surplus.

The general concept of piercing the corporate veil, which is applied in foreign jurisdictions, is not generally regulated in Slovak law and has not been established by case law. As of 1 January 2018, there has been a slight change in this respect, when the Slovak legislation provided for a special concept for piercing the corporate veil by introducing external liability of the controlling entity (majority shareholder) for damages caused to the creditors of the controlled entity (the company) as a result of causing the company's insolvency.¹⁸⁷ This particular Slovak concept was inspired partly by German case law on the destructive interference of a shareholder in a company and partly by Czech legislation.

Pursuant to Section 66a (1) of the Commercial Code, a controlled entity is a company in which a certain person has a majority of the voting rights based on the number of shares in the company to which a majority of the voting rights are attached, or based on a voting agreement, regardless of the validity or invalidity of such an agreement. Hence, factual control suffices.

The Commercial Code explicitly formulates the conditions under which a creditor may have claims directly against a shareholder as a controlling entity. The burden of proof lies on the claimant – the creditor. Therefore, it is burdensome for the creditors, who are not aware of the internal circumstances of the company, to bear the burden of proof. For the controlling person – the shareholder – to be directly liable for damages to creditors, several conditions must be met.

First, the external liability toward the creditor must be linked to the actions of the controlling person that have significantly contributed to the company's insolvency. In other words, the controlling person must have actively contributed to the company's insolvency. These acts may include instructions given by the general meeting to the members of the management board, actions of the controlling person relating to the business strategy or *vis-à-vis* third parties.

The second requirement for the liability claims against the controlling person is the insolvency of the controlled person, or the presumption of insolvency, for instance, where bankruptcy is not declared for lack of assets. The causal link between the controlling person's actions that have contributed significantly to the insolvency of the controlled company and the insolvency of the company must be proven. Moreover,

¹⁸⁶ Patakyová et al., 2022, p. 506.

¹⁸⁷ Section 66aa, CC.

the creditor must have suffered damages as a result of the company's insolvency. There is also a rebuttable presumption as to the estimated amount of damages. In the absence of proof of a different amount, the creditor's estimated amount of damages is the amount of the creditor's unsatisfied claims after the suspension of bankruptcy proceedings.¹⁸⁸

The controlling person is freed from its liability if it is proven that it acted in an informed manner and in good faith in accordance with the interests of the controlled company. The grounds for exemption are formulated differently in this case than in the case of the management board's liability for damages. Some scholars point out that the current legislation is deficient as the controlling shareholder cannot exempt himself from his liability by invoking the interests of the group and the mechanism of compensation for negative interference.¹⁸⁹

Furthermore, if the controlling person directly carries out activities that fall within the powers of the management board, he shall also be liable as the *de facto* director.¹⁹⁰ In this situation, the controlling shareholder has the same responsibility as a member of the management board and the same liability associated with breaching the statutory duty of care and duty of loyalty.

9.4. Legal Protection of Creditors in Case of Insolvency

As already stated, a company is obliged to monitor, control and evaluate its financial situation on an ongoing basis and to take appropriate measures to avoid its insolvency. The worse the economic situation of the company, the more frequently the management board should monitor its economic situation. The longer the debtor waits to file a petition for bankruptcy, the more difficult it is to recover the debtor's assets for subsequent distribution to the debtor's creditors in accordance with the *pari passu* principle. The company as debtor and its management board are obliged to file a petition for bankruptcy within 30 days of becoming objectively aware, or from the date when they could have become aware, of the company's insolvency. As already mentioned, the Act on Bankruptcy and Restructuring distinguishes two insolvency situations. Insolvency (*platobná neschopnosť*) is related to the debtor's ability to pay their monetary debts as they become due, and is tested through the liquidity test (cash flow test). Problems with liquidity are generally easier to identify externally. The second form of insolvency – over-indebtedness (*predĺženie*) – is typically tested through the balance sheet test, which compares the value of the entrepreneur's assets against the amount of their debts. In case the obliged persons fail to duly file bankruptcy petition, they can face several civil and criminal law consequences. The bankruptcy law stipulates two legal consequences for the member of the management board: (I) liability for damage caused to the company's creditors and (II) duty to pay a contractual penalty pursuant to Section 11 (2) of the Bankruptcy and Restructuring Act. Aiming to prevent

188 Section 66aa(4), CC.

189 Ovečková et al., 2022, p. 605.

190 Ibid., p. 571.

the threat of satisfying creditors, criminal liability under the Slovak Criminal Code may also be triggered by the failure to file a bankruptcy petition in time.¹⁹¹

9.4.1. Liability for Damages Caused by a Breach of the Duty to Duly File a Petition for Bankruptcy

In force from 1 January 2018, the Bankruptcy and Restructuring Act also provides for the special liability of the management board members (and other persons authorised by law to file a petition for bankruptcy) for damages directly caused to creditors as a result of failure to comply with the duty to duly file a petition for bankruptcy. Pursuant to Section 11a of the Bankruptcy and Restructuring Act, liability for damages affects only those persons obliged to file a petition for bankruptcy on behalf of the debtor company, not the company itself. The liability also arises when there is not even a declaration of bankruptcy owing to the company's prior removal from the Business Register or when the proceedings are discontinued because of insufficient assets.

According to Section 11a of the Bankruptcy and Restructuring Act, the creditor's damage is the difference between the amount the creditor received based on the distribution of assets and the amount the creditor would have received if the bankruptcy petition had been duly filed.¹⁹² However, determining the amount of such damage can be extremely difficult in practice. Apparently for this reason, the legislation has provided for a rebuttable presumption of the amount of damage in Section 11a(3) of the Bankruptcy and Restructuring Act. This section sets the amount of the damage equal to the creditor's claim that has not been satisfied after the insolvency proceedings were discontinued or set aside owing to insufficient debtor's assets, or the enforcement proceedings were closed because of insufficient debtor's assets. The burden of proof as to the amount of damage caused is thus shifted to the obliged person (in practice, mostly a member of the management board). As this is a rebuttable presumption, the creditor can prove a different amount of damage. The creditors must not only prove that they have suffered damage, but also that their claim was duly filed.

Liability for damages also comes into consideration if the bankruptcy petition was filed by another person and it is proved that the management board failed to fulfil its duty to file for bankruptcy. The Slovak bankruptcy regulation stipulates a limitation period of 1 year for the exercise of the creditor's right to claim damages. In addition to liability for damages, the person obliged to file a petition for bankruptcy is disqualified from holding office as such a court's decision also qualifies as the disqualification decision.

A person obliged to file a petition for bankruptcy on behalf of a company may be exempted from liability if it is proven that the person (a) acted with professional due care, (b) was appointed as a member of the management board during the insolvency for the purpose of overcoming the bankruptcy and filed a petition for bankruptcy without undue delay thereafter, or (c) instructed the trustee to prepare a restructuring

¹⁹¹ Section 242(1), CC.

¹⁹² Ďurica, 2019, p. 87.

report and filed a petition for restructuring, on the basis of which the court authorised the restructuring.¹⁹³

9.4.2. *Duty to Pay a Contractual Penalty to the Company*

Breach of the duty to file a bankruptcy petition on time is sanctioned by a contractual penalty stipulated by law. The bankruptcy law sets forth the obligation of a management board member (or other person obliged to file a bankruptcy petition) to pay a legal contractual penalty equal to half of the lowest value of the share capital of a JSC. Because the minimum share capital is currently 25,000 euro (EUR), half of this amount (i.e. 12,500 EUR), constitutes the board member's penalty for unduly filing the bankruptcy petition. In the case of larger companies, this sanction is disproportionately low, and the actual damage caused by the management board in the event of a failure to file a petition for bankruptcy in a timely manner is often much greater.¹⁹⁴ Because the creditor of the claim is the company itself, it is the company that is entitled to recover it from the members of the management board. Any agreement between the company and management board members that limits or excludes the payment of the penalty is prohibited. The company may not waive its claim to payment of the contractual penalty or enter into a settlement agreement in respect of that claim. Where the actual damage is higher than the contractual penalty, the creditor's right to claim actual damages exceeding the contractual penalty is not affected. The court's decision on a contractual penalty is also the decision on the disqualification of the corporate board member.

9.4.3. *Transaction Avoidance in Bankruptcy*

In financial distress, the company may transfer its assets to third parties, or the company's creditors, upon being informed of the imminent insolvency of the company and can attempt to recover their claims before the actual bankruptcy proceedings. However, as bankruptcy law is based on the principle of proportional satisfaction of creditors (*pari passu* principle), fraudulent transfer actions seek to avoid certain pre-bankruptcy transactions so that the value of such transactions can be recovered and redistributed to the company's creditors. Thus, the main purpose of such a protection mechanism for creditors is to achieve a higher degree of satisfaction of the creditors' claims against the company that performed the fraudulent acts prior to the bankruptcy proceedings. The specific prerequisites for the voidability of juridical acts in bankruptcy proceedings include (I) the declaration of bankruptcy; (II) the existence of a juridical act performed by the debtor (the company) concerning the company's assets; and (III) the deprivation of the claim of one of the bankruptcy creditors, that is, the creditors who lodged their claims in bankruptcy.

A bankruptcy creditor is deprived of his claim if the claim cannot be satisfied from the company's assets. Depriving juridical acts are mainly gratuitous juridical

193 Section 74a(5), Act on Bankruptcy and Restructuring.

194 Mrázová et al., 2021, p. 183.

acts without an adequate consideration, by which the company has provided a performance of a higher value than the usual price that the company received or would receive on the basis thereof.¹⁹⁵ A juridical act without adequate consideration is voidable if it caused the company's insolvency or was performed during the company's insolvency. In general, only juridical acts without adequate consideration which were performed within 1 year prior to the opening of bankruptcy proceedings are voidable. If a juridical act was performed without an adequate consideration in favour of a party related to the debtor company, it is voidable if performed within the 3 years prior to the start of bankruptcy proceedings.

Another specific type of transactions which are voidable are preferences.¹⁹⁶ It is a juridical act by which a company has paid, in whole or in part, a pecuniary claim otherwise payable only after the declaration of bankruptcy, has secured a debt later than the date on which it arose, has agreed to modify or substitute a debt to its detriment, or has otherwise unjustifiably favoured some of the company's creditors over other company's creditors. Similarly, where a company has wholly or partly waived its right, has wholly or partly discharged a debt of its debtor, has agreed to modify its right to its detriment or has otherwise unreasonably disadvantaged itself to the detriment of its creditors, such juridical acts are also voidable if they caused the company's insolvency or were performed during the company's insolvency.¹⁹⁷ Preferential juridical acts performed within the year prior to the opening of bankruptcy proceedings may be successfully avoided. For related party preference transactions, the period of 3 years applies.

Additionally, the law recognises the so-called depriving juridical act in a narrower sense. It is a juridical act performed by the debtor with the intention of depriving his creditors of their claims, and this intention was or should have been known to the other party.¹⁹⁸ However, only depriving juridical acts performed within the 5 years prior to the opening of bankruptcy proceedings are voidable.

The right to avoid a juridical act may be exercised by the trustee or the creditor, the latter only if he has requested the trustee to avoid the juridical act and the trustee has not complied with the request within a reasonable time. The right to avoid a juridical act may be exercised by *actio pauliana* or against the obliged person in writing and must be exercised within a mandatory period, otherwise it lapses.

If the court decides that a juridical act is null and void, it is declared *vis-à-vis* all the bankruptcy creditors. Thus, the bankruptcy trustee is entitled to enter the property acquired by such a null-and-void act in the bankruptcy estate inventory. The trustee or the creditor may demand that the obliged person provide monetary compensation in the bankruptcy estate for the property, right or other property value which he has acquired from the voidable juridical act.

195 Section 58, Act on Bankruptcy and Restructuring.

196 Section 59, Act on Bankruptcy and Restructuring.

197 Dolný, 2021, p. 27.

198 Ibid., p. 42.

The protection of creditors, who have the right to satisfy their claims in a manner consistent with the principles of bankruptcy and restructuring proceedings, is also ensured by criminal law. Act No. 300/2005, the Criminal Code includes two property offenses, which focus on a situation in which the satisfaction of the creditor is even partially thwarted. This includes the criminal offense of harm done to a creditor (Section 239, Criminal Code) and the criminal offense of preferential treatment of a creditor (§ 240, Criminal Code).

10. Conclusions

Across the eight systems surveyed, creditor protection in limited liability and JSCs converges on a mixed architecture that couples *ex-ante* capital-maintenance/protection disciplines, analysed in detail in Chapter 2, with *ex-post* insolvency controls and targeted personal liabilities. The equilibrium each jurisdiction creates between these pillars varies, but some common threads are evident: limited liability for equity is preserved as the default, yet ring-fenced by tests on distributions; avoidance powers in collective proceedings; and calibrated pathways to reach insiders (directors, dominant shareholders, shadow controllers) when conduct, timing, or structure places creditors at abnormal risk.

The classic capital-maintenance model remains most programmatic in Croatia and, in a different doctrinal register, Poland and Slovenia. Croatia defends a capital-oriented paradigm in which fixed share capital and its maintenance are the principal counterweight to shareholders' non-responsibility, notwithstanding sustained criticism that static thresholds poorly track firm-specific risk. Poland preserves robust maintenance rules while grafting modern governance tools, such as the business-judgment rule for board members, thereby seeking to discipline payout and formation-stage misstatements without unsettling informed risk-taking. Slovenia reinforces the prohibition on return of contributions with a general statutory veil-piercing clause applicable across company forms, allowing courts to look past form where shareholders appropriate corporate assets or externalise losses. By contrast, the Czech Republic combines traditional maintenance with a pervasive solvency test: distributions, financial assistance, and analogous value outflows are screened against the company's ability to avoid bankruptcy on the evidentiary record before the managing body; gratuitous benefits to shareholders are narrowly carved out and, if misapplied, unwound through managerial liability and restitutionary duties.

Pre-insolvency governance duties, those that operate "in the vicinity of insolvency", show meaningful divergence but also clear signs of Europeanisation. Croatia and Poland require the board to convene the owners when accumulated losses erode stipulated fractions of capital, a signalling device meant to mobilise remedial equity or strategic retrenchment. Romania's 2022 reform pushes further by articulating an explicit duty to consider creditor and stakeholder interests and to adopt reasonable loss-minimising measures once financial difficulty emerges, with breach feeding

either corporate claims *ex ante* or insolvency-based liability *ex post*. Hungary and Slovakia refine the moment of duty-shift with statutory markers: Hungarian law centres on the objectively foreseeable inability to pay and reorients managerial obligations toward creditor-regard; Slovakia's "company in crisis" regime operationalises both a liquidity horizon and a balance-sheet ratio, hardwiring early-warning obligations and, crucially, re-characterising related-party finance to prevent debt-equity substitution when equity support would be the norm. Serbia stands out for not codifying a duty-shift; nonetheless, its requirement to convene an extraordinary meeting upon serious loss functions as a pre-insolvency checkpoint, and courts can recalibrate the standard of care contextually as distress deepens.

The most potent outer perimeter of creditor protection lies in insolvency law. All systems embrace *pari passu* within creditor classes and empower an estate representative to attack pre-petition transactions that skew equality or deplete the common pool. Romania's catalogue is exacting: gratuitous acts, undervalue transfers, late-stage preferences, premature payments of unmatured debts, and collusive arrangements within 2 years (with shorter windows for certain categories) are voidable, subject to an "ordinary course of business" safe harbour. Slovakia's avoidance regime maps a similar terrain with calibrated look-back periods, distinguishing undervalue acts, preferences, and intentional creditor-defeating transactions, and also allows a creditor to act if the trustee stands idle after being asked to proceed. Hungary integrates avoidance with managerial liability by insisting that any asset-reduction quantum used to ground personal liability be net of claw-back recoveries, thereby avoiding double counting. These tools are complemented in multiple systems by criminal prohibitions on frustrating enforcement, tactical bankruptcy, and preferential payments close to insolvency (visible most explicitly in Czech and Polish criminal codes and mirrored in Slovak law), underscoring the public interest in the integrity of collective proceedings.

Personal exposure of managers for late filing or loss-exacerbating conduct is the shared workhorse of creditor protection, but it is structured differently. Czech law couples a duty on the debtor's officers to file "without undue delay" upon insolvency with a creditor-specific damages action pegged to the delta between the admitted claim and the dividend received; separately, in formal insolvency, courts may order replenishment of liabilities or claw-back from former and *de facto* directors who contributed to failure, with proceeds augmenting the estate for the benefit of all creditors. Poland's architecture layers civil, administrative, and criminal levers: a short, mandatory filing window in the Bankruptcy Law; joint and several exposure of LLC and simple JSC managers when enforcement against the company proves ineffective unless statutory defences are met; and specialised rules, including tax and social-security regimes, which pierce managerial shields when public claims go unpaid. Hungary's two-step mechanism initially crystallises liability through a declaratory judgment quantifying the asset shortfall attributable to breach after the onset of insolvency risk; only once liquidation closes do creditors pursue proportional money judgments up to that amount, with interim security and a guarantor backstop

against majority influencers to prevent judgment-proofing. Slovakia couples a creditor damages action for late filing, assisted by a rebuttable presumption pegged to the unsatisfied claim, with a statutory penalty owed to the company and automatic managerial disqualification, and it gives teeth to the “company in crisis” regime through director guaranties to recoup unlawful repayments of requalified insider loans. Serbia and Slovenia both allow creditors to leverage corporate claims where the estate or company fails to act, and Serbia’s insolvency law reinforces equal treatment with prohibitions on payments after the bankruptcy trigger has arisen, enforceable by the administrator and, in certain configurations, by individual creditors.

Veil-piercing and group-law analogues provide a heterogeneous picture of how far each system will go to reach behind the entity when corporate separateness is instrumentalised against creditors. Romania, Slovenia, Croatia, and Serbia codify general veil-piercing standards that focus on abuse of legal personality, asset commingling, or deliberate depletion in the shadow of foreseeable non-payment. In many cases, the law additionally disables repeat offenders from holding managerial positions (for a decade in the case of Romania) once liability is judicially established. The Czech Republic’s “influential person” regime is a functional veil-piercing device: anyone who substantially influences the company’s conduct to its detriment faces both a duty to indemnify the company and a secondary, creditor-facing liability when influence causes non-payment. The system has important carve-outs for properly disclosed and genuinely unified groups and with targeted exceptions where disclosure is absent, unified management is a sham, or insolvency or uncompensated harm intervenes. Poland’s recent holding-law reform takes a different path: instead of general veil-piercing, it imposes parent-company damages liability to the subsidiary’s creditors where loss flows from binding instructions, and, when enforcement fails, presumes damage equal to the unpaid claim unless the parent disproves fault or causation, functionally convergent with veil-piercing while preserving the formal logic of group instructions. Hungary layers two vectors: a general abuse-of-limited-liability clause activated on dissolution without successor when unpaid claims remain, and a special liability for qualified majority owners whose sustained detrimental practices precipitate failure; both regimes are calibrated by causation and proportionality, but allow joint and several exposure among wrongdoers and *post-hoc* contribution claims. Slovakia, long an outlier without a general veil-piercing doctrine, now recognises external liability of the controlling shareholder where its conduct significantly contributes to insolvency, with a rebuttable presumption of loss measured by the unsatisfied claim after proceedings stall or terminate for lack of assets.

Insider finance is a recurring fault line, and the systems have moved decisively to align incentives. Slovakia’s requalification of related-party loans to equity during crisis, paired with a moratorium on repayment and restitutionary and guaranty-style obligations for directors who permit breach, is the most explicit anti-arbitrage device. Slovenia’s rules analogously subordinate shareholder loans by treating them as equity substitutes in bankruptcy or compulsory settlement and claw back repayments made in the twilight period. Poland’s hierarchy pushes shareholder loans down

the waterfall when the lender holds a significant stake, and Romania subordinates loans from 10% of shareholders while preserving secured status where collateral was properly created, thereby curbing last-minute relabelling of risk capital while respecting reliance interests of bona fide secured creditors. Hungary and Serbia both treat insider repayments in the vicinity of insolvency with particular suspicion, allowing them to ground managerial exposure where they prefer insiders over general creditors without a credible turnaround rationale.

Two persistent implementation challenges are evident across the region. The first is information asymmetry: many creditor-facing liabilities either require proof of causal contribution to insolvency or hinge on a creditor's ability to show abuse, influence, or asset diversion that is often opaque to outsiders. Jurisdictions have responded by reallocating some burdens – through presumptions of damage in Slovakia and Hungary, through per se subordination or recharacterisation of insider finance in Slovakia and Slovenia, and through procedural devices that centralise standing in an insolvency administrator but allow creditor substitution when the fiduciary fails to act, as in Romania and Slovakia. The second implementation challenge concerns timing: late filings, twilight repayments, and value-destructive gambles are difficult to police if the legal trigger points are either too nebulous or too rigid. Here the trend is toward objective or semi-objective markers, from the Czech Republic's solvency test for distributions, through Hungary's and Romania's articulation of creditor-regard duties once non-payment looms, to Slovakia's defined "crisis" thresholds; even Serbia's absence of a codified duty-shift is offset by hard triggers to convene owners on serious loss and by strong post-trigger payment prohibitions in insolvency.

The eight systems reflect a maturing Central- and Eastern-European creditor-protection ecosystem that is converging on a hybrid model: capital rules that discipline ordinary-course payouts; early-warning and duty-shift frameworks keyed to cash-flow realities; strong avoidance powers to restore the estate; targeted civil, administrative, and criminal liabilities to individual decision-makers and controlling actors; and anti-subordination regimes that neutralise insider opportunism when equity support is warranted. Differences remain, in the locus of standing, in the breadth of veil-piercing, in the precision of pre-insolvency duties, and in remedial metrics, but the functional equivalence is striking. Each system recognises that limited liability is a means, not an end: it catalyses enterprise only when matched by credible mechanisms ensuring that, at the point at which business risk metamorphoses into creditor harm, those who controlled the risk cannot externalise the loss with impunity.

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