

Management*

1. Introduction

by Emőd Veress

2. The Czech Republic

by Kateřina Eichlerová

3. Croatia

by Marko Ivkošić

4. Hungary

by Judit Barta

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

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.
https://doi.org/10.54171/2025.ev.jsllcece_chapter5

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).

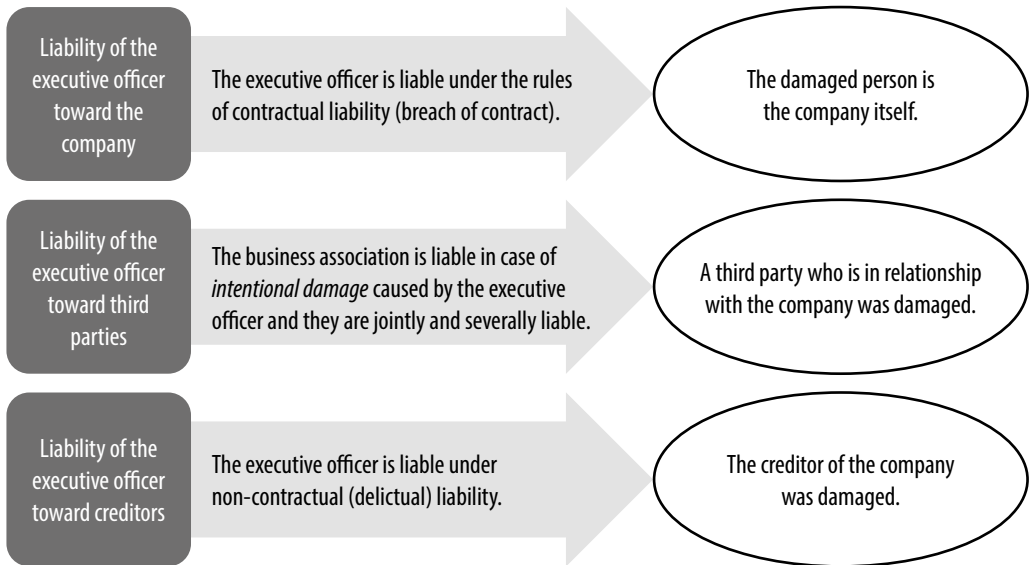


Figure 1.: The system of liability for damage caused by an executive officer in the Civil Code (Source: created by the author)

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.

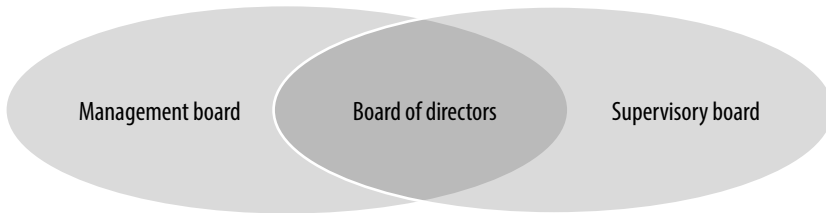


Figure 2. (Source: created by the author)

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 Moskale, 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 (*directori*). 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 Cărpenaru, 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 Cărpenaru, 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 questions 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 Cărpenu 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.

References

- Angheni, S. (2013) *Drept comercial. Profesioniști-comercianți*. București: C.H. Beck.
- Barbić, J. (2010) *Pravo društava: Društva kapitala, Svezak I. i II.* Zagreb: Organizator.
- Bercea, L. (2006a) 'Regula judecătii de afaceri: un transplant legal imposibil', *Pandectele Române*, (3), pp. 201–208.
- Bercea, L. (2006b) 'Regula judecătii de afaceri: despre involuția instituției înainte de nașterea sa', *Pandectele Române*, 2006/6, pp. 159–166.
- Bercea, L. (2007) 'Regula judecătii de afaceri: despre noul regim al răspunderii administratorilor societăților pe acțiuni', *Pandectele Române*, 2007/8, pp. 26–38.
- Bercea, L. (2014) 'Noi standarde de comportament în afaceri? Business judgment rule și răspunderea administratorilor pentru insolvența societăților comerciale', *Curierul Judiciar*, 2014/7, pp. 412–417.
- Bercea, L. (2019) 'O analiză a leziunii în contractele de afaceri', *Revista Română de Drept Privat*, (1).
- Cărpenu, St.D. (2014) in Piperea, Gh., David, S., *Legea societăților. Comentariu pe articole*, 5th edn. București: C.H. Beck, pp. 198–234, 235–259.
- Cărpenu, St.D., Hotca, M.A., Nemeș, V. (2014) *Codul insolvenței comentat*. București: Universul Juridic.
- Catană, R. N. (2007) *Dreptul societăților comerciale. Probleme actuale privind societățile pe acțiuni. Democrația acționarială*. Cluj-Napoca: Sfera Juridică.
- Čech, P., Šuk, P. (2016) *Právo obchodních společností: v praxi a pro praxi (nejen soudní)*. Praha: Bova Polygon.
- Černá, S., Josková, L. (2020) 'Vyžaduje se péče řádného hospodáře i od likvidátora a faktického (stínového) vedoucího?' in Havel, B., Žitňanská, L. (eds.) *Fiduciární povinnosti orgánů společnosti na pomezí korporálního, insolvenčního a trestního práva*. Praha: Wolters Kluwer ČR, pp. 29–42.
- Černá, S., Štenglová, I., Pelikánová, I. et al. (2021) *Právo obchodních korporací*, 2nd edn. Praha: Wolters Kluwer.
- Csach, K. (2019) 'Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia (1. časť)', *Súkromné právo*, 5(5), pp. 182–198.
- Csach, K. (2020) 'Povinnosť lojality člena orgánu obchodnej spoločnosti' in Havel, B., Žitňanská, L. (eds.) *Fiduciární povinnosti orgánů společnosti na pomezí korporálního, insolvenčního a trestního práva*. Praha: Wolters Kluwer ČR, pp. 15–27.
- David, S. (2014) in Cărpenu, St.D., Piperea, Gh., David, S., *Legea societăților. Comentariu pe articole*, 5th edn. București: C.H. Beck, pp. 260–461.
- Dědič, J., Štenglová, I. (2023) 'Způsobilost k výkonu funkce člena voleného orgánu obchodní korporace po novele ZOK k 1.7.2023' in Zoufalý, V. (ed.) *Karlovarské právní dny 2023*. Praha: Leges, pp. 32–60.
- Dědič, J., Šuk, P. (2017) 'Nad novelou zákona o obchodních korporacích (aneb sporné otázky nové úpravy zaměstnanecké participace)', *Obchodněprávní revue*, 2017/4, pp. 97–104.

- Dugar, G. (2020) 'Limited Liability Companies in Slovenia', *Central European Journal of Comparative Law*, 1(1), pp. 51–67 [Online]. Available at: <https://doi.org/10.47078/2020.1.51-67> (Accessed: 10 October 2025).
- Dvořák, T. (2020) 'Participace zaměstnanců v některých dualistických akciových společnostech po 1.1.2021', *Obchodní právo*, 29(9), pp. 2–9.
- Eichlerová, K. (2009) 'Kde končí působnost představenstva a začíná působnost valné hromady' in Pauknerová, M., Tomášek, M. (eds.) *Nové jevy v právu na počátku 21. století. IV. Proměny soukromého práva*. Praha: Karolinum, pp. 75–79.
- Eichlerová, K. (2015) 'Jednatelé – kolektivní, nebo individuální orgán?', *Rekodifikace & praxe*, (7), [Online]. Available at: <https://www.sagit.cz/info/rekodifikace-praxe-c-7-8-2015> (Accessed: 10 October 2025).
- Eichlerová, K. (2022) 'Duty of care in Czech company law', *Acta Universitatis Carolinae. Iuridica*, 2022/3, pp. 23–35.
- Ekkenga, J., Winner, M. (eds.) (2024) *Sustainable Finance in the EU*. Tübingen: Mohr Siebeck.
- Georgescu, I. L. (2002) *Drept comercial român*, vol. II. București: All Beck.
- Gheorghe, C. (2020) *Tratat de drept comercial român*. București: C.H. Beck.
- Gower, L.C.B., Davies, P.L. (2008) *Gower and Davies' principles of modern company law*, 8th edn. London: Sweet & Maxwell.
- Havel, B. (2010) *Obchodní korporace ve světle proměn*. Praha: Auditorium.
- Havel, B. (2019) 'Chiméra neproniknutelnosti obchodního vedení ve společnosti s ručením omezeným (?)', *Obchodněprávní revue*, 2019/6 [Online]. Available at: <https://app.beck-online.cz/bo/chapterview-document.seam?documentId=nrpte mbrhfpw64s7gzpxgxzrguyq> (Accessed: 10 October 2025).
- Hopt, K. J. (2011) 'Comparative Corporate Governance: The State of the Art and International Regulation', *American Journal of Comparative Law*, 59(1), pp. 1–73 [Online]. Available at: <http://dx.doi.org/10.5131/AJCL.2010.0025> (Accessed: 10 October 2025).
- Hurychová, K. (2016) 'Schvalování odměn členů řídicích orgánů akciových společností', *Obchodněprávní revue*, 8(11–12), pp. 305–314.
- Ivanjko, Š., Kocbek, M., Prelič, S. (2009) *Korporacijsko pravo*. Ljubljana: GV Založba.
- Jaszczyk, K. (2017) 'Realizacja obowiązku lojalności członków zarządu w świetle nowelizacji art. 209 oraz 377 KSH', *Monitor Prawa Handlowego*, 4, pp. 32–41.
- Josková, L. (2022a) 'Zásady a pokyny valné hromady a jejich dopad na odpovědnost členů volených orgánů', *Obchodněprávní revue*, 2022/1, [Online]. Available at: <https://app.beck-online.cz/bo/chapterview-document.seam?documentId=nrpte mbsgjpw64s7gfpxgxzrgq> (Accessed: 10 October 2025).
- Josková, L. (2022b) 'Business Judgement Rule in the Czech Republic', *Acta Universitatis Carolinae. Iuridica*, 68(3), pp. 37–47 [Online]. Available at: <https://doi.org/10.14712/23366478.2022.34> (Accessed: 10 October 2025).
- Jovanović, N., Radović, V., Radović, M. (2021) *Kompanijsko pravo – Pravo privrednih društava*, 2nd edn. Beograd: Pravni fakultet u Beogradu, Centar za izdavaštvo i informisanje.

- Lasák, J. (2023) *Kontrola řízení a správy akciové společnosti a postavení dozorčí rady*. Praha: Wolters Kluwer.
- Lasák, J., Dědič, J., Pokorná, J., Čáp, Z. et al. (2021) *Zákon o obchodních korporacích. Komentář*, 2nd edn. Praha: Wolters Kluwer ČR.
- Lavický, P. et al. (2022) *Občanský zákoník I. Obecná část (§1–654)*. Komentář, 2nd edn. Praha: C. H. Beck.
- Marszałkowska-Krześ, E. (2001) in Jacyszyn, J., Krzyś, J., Marszałkowska-Krześ, E. *Kodeks spółek handlowych: komentarz, orzecznictwo, ustawy dodatkowe: ustawa – Prawo działalności gospodarczej, ustawa o Krajowym Rejestrze Sądowym*. Warszawa: Librata.
- Mihajlović, B. (2018) *Dužnost lojalnosti prema privrednom društvu*. Doctoral thesis. Kragujevac: Pravni fakultet Univerziteta u Kragujevcu.
- Moskała, P. (2020) *Prawne instrumenty zarządzania zgrupowaniem spółek kapitałowych*. Warszawa: Wydawnictwo C.H. Beck.
- Mrázová, Ž. (2021) in Patakyová, M., Ďurica, M., Husár, J. et al. *Aplikované právo obchodných spoločností a družstva – ťažiskové inštitúty*. Bratislava: Wolters Kluwer SR.
- Mrázová, Ž., Husár, J., Dolný, J. et al. (2021) *Volené orgány kapitálových spoločností. Vybrané otázky*. Košice: ŠafárikPress.
- Nász, Cs. B. (2019) *Drept societar. Curs universitar*. București: Universul Juridic.
- Nemeş, V. (2015) *Drept comercial*, 2nd edn. București: Editura Hamangiu.
- Ovečková, O. et al. (2022) *Obchodný zákonník. Veľký komentár*, vol. I, 2nd edn. Bratislava: Wolters Kluwer SR.
- Ovečková, O., Csach, K., Žitňanská, L. (2020) *Obchodné právo: obchodné spoločnosti a družstvo*. Bratislava: Wolters Kluwer SR.
- Pál, E. (2024) 'A vezető tisztségviselő' in Fegyveresi, Zs. (ed.) *Román társasági jog*, 3rd edn. Cluj-Napoca: Forum Iuris.
- Patakyová, M. et al. (2020) 'Slovak Simple Joint Stock Company – Critical Review and Preliminary Assessment', *European Company and Financial Law Review*, 17(2), pp. 205–230.
- Patakyová, M. et al. (2022) *Obchodný zákonník. Komentár*, 1st edn. Bratislava: C.H. Beck.
- Pelikánová, I. (2015) 'Problémy nové kodifikace, právnické osoby, jejich orgány, zastoupení a forma právních jednání', *Rekodifikace a praxe*, 2015/10, pp. 2–12.
- Petrović, S., Ceronja, P. (2019) *Osnove prava društava*. Zagreb: Narodne novine.
- Piperea, Gh. (2014) in Cărpenaru, St.D., Piperea, Gh., David, S., *Legea societăților. Comentariu pe articole*, 5th edn. București: C.H. Beck, pp. 483–584.
- Plavšak, N. (2017) *Komentar Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju*. Ljubljana: Tax-Fin-Lex.
- Podgorelec, P. (2013) 'Odškodninska odgovornost članov uprave delniške družbe po ZGD-1', *Pravosodni bilten*, 2013/1, pp. 89–103.
- Podgorelec, P. (2015) 'Pravilo podjetniške presoje in odškodninska odgovornost članov uprave banke', *Podjetje in delo*, 2015/3–4, pp. 445–460.

- Pokorná, J., Lasák, J., Kotásek, J. et al. (2022) *Obchodní společnosti a družstva*, 2nd edn. Praha: C. H. Beck.
- Raglewski, J. (2008) *Kodeks spółek handlowych. Komentarz do przepisów karnych. Stan prawny na 1 lipca 2008 r.* Warszawa: Wolters Kluwer.
- Roth, G.H., Kindler, P. (2013) *The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe*. Baden-Baden, Oxford, and Munich: Nomos, Hart, C.H. Beck.
- Schiau, I., Prescure, T. (2007) *Legea societăților comerciale nr. 31/1990. Analize și comentarii pe articole*. București: Editura Hamangiu.
- Stanca, I. A. (2009) *Administrarea societăților pe acțiuni*. București: Editura Hamangiu.
- Štenglová, I., Šuk, P. (2021) ‘Některé důsledky porušení péče řádného hospodáře (nejen) v judikatuře českých soudů’, *Obchodněprávní revue*, 2021/3, pp. 153–164.
- Štenglová, I., Dědič, J., Lasák, J., Pihera, V., Lála, D., Josková, L. (2023) *Akciové společnosti*, 1st edn. Praha: C. H. Beck.
- Štenglová, I., Havel, B., Čileček, F., Kuhn, P., Šuk, P. (2020) *Zákon o obchodních korporacích. Komentář*, 3rd edn. Praha: C. H. Beck.
- Szumański, A. (2008) in Sołtysiński, S., Szajkowski, A., Szumański, A., Szwaja, J. (eds.) *Kodeks spółek handlowych. Komentarz. Tom III: Spółka akcyjna*. Warszawa: C.H. Beck.
- Todică, C. (2011) *Statutul juridic și puterile administratorului în societatea comercială*. București: Universul Juridic.
- Todică, C. (2012) *Răspunderea juridică civilă a administratorului societății comerciale*. București: Editura Universitară.
- Vasiljević, M. (2023) ‘Kompanijskopравни režim razrešenja direktora pre isteka mandata “ad nutum”’, *Pravo i privreda*, 61(2), pp. 239–256 [Online]. Available at: https://doi.org/10.55836/PiP_23201A (Accessed: 10 October 2025).
- Veress, E. (2022) ‘The Duty of Care in Romanian Company Law’, *Acta Universitatis Carolinae. Iuridica*, 68(3), pp. 75–86.