Shareholder and the company. Three centuries of evolution.

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The development of business organisations and commercial law as such in the Kingdom of Hungary was gradual. We may add that it was belated, as compared to other Western European countries, but also Austria. This is also documented by historical events, where the onset of the modern age in the Kingdom of Hungary dates back to 1526; the Industrial Revolution has also begun later, given the rural character of Hungary, that also preserved its nature during the Austro-Hungarian Monarchy. After the end of World War I and the formation of Czechoslovakia, intensive reform and unification efforts were underway in the law of business organisations. World War II frustrated these efforts. The period that followed after the end of the war was not a propitious time for the commercial law either. The monopoly held by the Czechoslovak Communist Party meant liquidation of private businesses and a centrally controlled economy. Changes were not brought before the events after 1989, or 1993 (associated with the formation of an independent Slovak Republic).

Key words: *The Kingdom of Hungary, Austro-Hungarian Empire, corporate law, partnerships and corporations, shareholders, creditors protection, start-ups, simple joint-stock company*

Introduction

Back in the medieval Kingdom of Hungary, commercial law did not exist as a separate field of law,[1]as follows from the relatively late theoretical structure of dividing the legal system into fields of law. However, some aspects of trading were regulated by royal decrees and statute articles of the Diet. Most of the fundamental questions related to the commercial legal relationships was subject to regulations of city rights and guild statutes. Merchant rights were, back then, subjective, regarded as status[2] and were originally not objective rights understood in the context of a set of legal rules or standards in a fixed form and enforceable by a steady system of authorities. It was only gradually that the merchant law evolved as an objective right. But even then, the law of merchants did not take the form of written rules of law and not even occasionally explicit provisions in city books contain provisions of substantive law, much rather questions of jurisdiction – primarily in the form of exemption (privileged status) of merchants from common

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[1] Pozri GÁBRIŠ, T. Návrh obchodnoprávnej úpravy regnikolárnej deputácie in juridicis. In: *Stát a právo v období absolutismu*. Zost. K. Schelle a L. Vojáček. Brno: Masarykova univerzita, 2005, pp. 175 – 194. The introduction and the first four chapters of the present text are based on this earlier paper by the first author.

[2] DILCHER, G. *Bürgerrecht und Stadtverfassung im europäischen Mittelalter*. Cologne: Böhlau Verlag, 1996, p. 29.

jurisdiction of royal, or regional bodies for the benefit of the jurisdiction of the merchant's hometown.

1. The Modern Period and Enlightenment Absolutism in the Kingdom of Hungary

In Austria that was ahead of the Kingdom of Hungary in the development of commerce and commercial law, state rules regulating commercial law were adopted several centuries before they were in the Kingdom of Hungary, as early as the late 17th century. Trading books were introduced as early as 1693; in 1717, the law on bills of exchange and a regulated structure of the commercial judiciary was introduced, insolvency law was regulated by Insolvency Code of 1734. In 1787, a court decree ordered that merchants must be registered in a commercial court.[3]

Due to abrupt boom of trade and the attraction of foreign models, even in spite of defiance of Austrian law that was also forcefully spread in the Kingdom of Hungary in the age of enlightened absolutism, Hungarian elites had come to understand the necessity of statutory regulation of this area of social life, although naturally with deviations that accounted for Hungarian circumstances and legal traditions. Curia regis, as the supreme court of the Kingdom of Hungary, was concerned with own provisions of commercial law and bills of exchange under the reign of Joseph II and drafted a bill of the respective code (Codex Cambio-Mercantilis) in 1781.[4] In 1787, also the Tabula Regia (Royal Table) (a lower bench of the supreme court)[5] drafted a new Codex Cambio-Mercantilis according to the German model. A special codification committee entitled *deputatio in juridicis* (for legal questions), established under Law No. 67/1790, thus had a basis to rely on, when working on projects of the merchant and bill of exchange law and the code of commercial justice as one of the tasks vested in it by a statute article.

According to the regulation, bigger (*dittal*) and smaller (*minutary*, All-Ingrosso) merchants were obliged to be registered in a commercial court, whereby under the bill of exchange bill, the record had to comprise of the following: a) name and type of business activity; b) age supported by an authentic document; c) capital (under Section 10 of Article 1, bigger merchants had to document a capital of least 10 thousand Florens to be recorded, while the smaller ones had to prove they had 4 thousand); d) list of members, including the dormant ones; e) year and date of formation; and f) contents of the deed of foundation. Even minors could become businessmen, provided they had a tutor, and also noblemen if they fulfilled the capital requirement (not subject to *aviticity*). Any person

[3] *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte. 2. Band Neuere Zeit (1500–1800). 2. Teilband*. Ed. Helmut Coing. Munich: C. H. Beck´sche Verlagsbuchhandlung, 1977, pp. 655, 657, 667, 678, 691, 699 and 708.

[4] Elenchus Actorum et Elaboratorum… In: *Projecta et Elaborata Excelsae Regnicolaris Deputationis in Juridicis articulo 67. Anni 1790 ordinatae*. Posonii: Typis L. Weber, 1826, p. 57 – dossier 16. The said Elenchus entails the content of 18 dossiers of the in juridicis deputation activity, dossiers 15 – 17 deal with commercial and bill of exchange law.

[5] Ibid, p. 56.

who would not obtain the official consent, that is obtained a dissent to their registration, would have the right to appeal to the ruler through the court office of the Kingdom of Hungary. Soldiers, sensals (business intermediaries) and the clergy were explicitly exempt from the capacity to be recorded. At the end of every year, the commercial court had a duty to submit a list of all recorded and expunged businessmen to the king's governor under Section 16 of Article 1.

Under Section 13 of Article 1, businessmen with the exception of dormant partners were generally bound to be liable for obligations with their entire assets, unless special forms of business organisations provided otherwise. Creditors whose claims were intabulated in a land book had a priority in settling claims receivable (under Section 15, claims could only be intabulated with respect to immovable property, while under the law, Article 107/1723, claims towards a businessman's personal property, i. e. privately-owned immovable property, were not capable of intabulation). Other creditors were to be satisfied according to the quality and weight of their proof of debt against the debtor and the rest of them were to be satisfied from what was left, on a "pro rata" basis.

The Commercial-Bill of Exchange Bill drafted by the *in juridicis* deputation also addressed specific types of business organisations – three major types were distinguished – 1.) open companies whose members were recorded by the court under the undertaking in their name and surname and were also publicly identified in the deed of foundation (according to Section 4, they would be liable for the company's obligations jointly and severally, with their entire property); 2) silent companies whereby one or more members was identified on the deed of foundation, i. e. publicly known (liable with their entire property), while others were only known to the court (and were only liable up to the amount of the recorded capital investment under Section 5) – those companies used the supplement „& Compagnie", 3.) so-called higher companies (*accomandita*) in which one or more private persons participated in the company with a specified amount of capital (stake). Neither those entrusted with the company governance, nor those participating with capital investment only, would be liable in excess of their investment (Section 6), as was supposed to be set out in the deed of foundation (*obligatoriis literis*). If, however, one of the members alone had committed in his name, or inflicted damage to the company purposefully or upon grave omission, such member would have been liable with his entire property.

All companies would come into existence by recording the written deed of foundation (with no distinction made between formation and the beginning of existence) that would contain the names of the members, their obligations, capital, distribution of surplus, questions of damage and liability. The company would not be liable for the members' private debts incurred outside the business domain, but would be liable for debts incurred by one of the members when conducting business operations within the company's business purpose, or as stated in the bill: "it is fair to also jointly bear the loss if it is profits that they share" (Section 7).

The procedure of adopting the regulation of commercial law could not be successfully concluded, even not towards the end of the 18th century, or during the following two sessions of the Diet of Hungary (1830, 1832–36). In 1836, only Statute Article 18/1836 on Market Courts was passed. It was as late as the Diet assembly in 1840 that the statute articles regulating the substance of commercial law were passed, however in a more modern form, different from the initial bills of the *deputation in juridicis* – along the Statute Articles on Businessmen (16/1840) and Business Organisations (18/1840) that regulated the same substance (but in a mode different) from the first two parts of the original bill of the Code of Commerce and Bills of Exchange; because the statute articles on Legal Situations in Factories (17/1840), Chambers of Commerce and Brokers (19/1840) and Freight Carriers (20/1840) were passed as well which did not fall within the scope of the bills of 1795.

Out of the mentioned commercial statute articles prepared by the Vienna lawyer Ignác Wildner, Statute Article 16/1840 on Businessmen is the main centre of our interest here. This statute article typically relied on the concept of a businessman undertaking under a trade name and keeping business accounting books, with the exception of the persons defined in Section 2.[6] Statute Article 18/1840 recognised two types of business organisations – 1) own trade companies whose shareholders were either explicitly defined or included under „*et Comp*.“; any potential silent members invested a certain amount of contribution, but had no control over business operations; and 2) joint-stock companies (bearer shares were not allowed). The commercial law lasted in this torso form during the following centuries, with additions of German commercial law models.

2. First codification of commercial law in the Kingdom of Hungary

Historically, the first more comprehensive codification of commercial laws in our territory was the *Corpus Juris Hungarici* of 1875. This law, same as the law applicable in the Czech countries (Austrian Commercial Code of 1863), had its roots in the German Commercial Code of 1861, however, it did not take over the provisions on limited partnerships with participations, silent companies and marine law.[7] The Commercial Code was comprised of general provisions (2 sections) and of two parts:

1. businessmen and business organisations; and
2. commercial obligations.

A trader under the Code was anyone who in their own name engaged in deals “in a trade mode” (Section 3). The persons allowed to operate a business as trade licence and the terms were provided for in the Trade Act (Statute Article 17/1884, formerly Statute Article 8/1872) and special laws.

[6] Statute Article 16/1840 on Businessmen recognised as a proper and due businessman any person who had their undertaking recorded and kept due business books. Recording an undertaking was not available to a) persons under 20 years of age; b) clerics and monks; c) soldiers; d) brokers (sensals); e) persons subject to a bankruptcy order and excluded from trading by a court; f) persons punished for fraud; g) persons under social custody due to psychical illness; and h) wives of persons specified in d), e) and f). See DAUSCHER, A.: *Das ungarische Civil- und Strafrecht nach den Beschlüssen der Judex-Curial-Conferenz*, pp. 221 – 222.

[7] KARMÁN, J.: *Slovenský obchodný zákon*. Prague: Nakladateľstvo Československého Kompasu, 1926, pp. 1 – 2. For the Hungarian teaching of commercial law, see ZLINSZKY, János: *Wissenschaft und Gerichtsbarkeit*. Frankfurt am Main: Vittorio Klostermann, 1997, pp. 60 – 68.

As for business company types, the Commercial Code recognised:
a) a public company;
b) a limited partnership company;
c) a joint-stock company (i. e. a stock corporation) and
d) a cooperative.

Verejná obchodná spoločnosť (general partnership) (Section 64) was formed by two or more persons running a business under a joint trade name (firm) with unlimited joint and several liability. Its legal status was however marked by the controversies in the theory and judicial practice as to whether the general partnership has a separate legal personality in addition to the persons of its members who were liable for the company debts with their entire property. It was not before the interwar Czech and Slovak Republic that the concept of the Commercial Code (1937) articulated the conclusion that a general partnership possesses a separate legal personality. Due to failure of any recast attempts in the interwar period and the failure to pass the prepared concept of the Commercial Code, this issue remained unclear and was not resolved in favour of a separate (divided) legal personality of the general partnership until after the Second World War.

Komanditná spoločnosť (limited partnership) (Section 125) was formed when on carrying a business under a joint firm (trade name), one or more of the members (partners) were liable only up to the amount of the agreed capital contribution (without determining a minimum threshold), while one or more personally liable members (general/unlimited partners) were liable without limitation and jointly and severally.

For *joint-stock companies (stock corporations)*, the Code did not provide for any minimum amount of share capital. The supreme body of a joint-stock company was the general meeting, convened at least annually. Other bodies were the board of directors and the supervisory board. As compared to the provisions applicable in Austria, the benefit of the Hungarian provisions of law on joint-stock companies was that the founders' liability for transactions conducted with a view to forming the joint-stock company was clear-cut.[8] The liability for omissions of the board of directors and the supervisory board of a joint-stock company in managing the business affairs and overseeing the business of the company was provided for separately.

The provisions on a *cooperative* had their basis in Austrian Act No. 70/1873 of the Austrian Code, but some Hungarian provisions were substantially derogating from the Austrian ones. Under the Hungarian Commercial Code, a cooperative was a company composed of an indefinite number of members, formed for the purpose of supporting its members in terms of credits, income and economy through a joint management of business, i. e. mutuality. The Hungarian regulations considered the cooperative a type of business organisation and all cooperatives were thus automatically deemed business entities.[9] The liability of supervisory board members was introduced in cooperatives, and like in other types of business organisations, the option for a creditor to induce termination

[8] ŠVAMBERG, G.: *Sjednocení obchodního práva československého*. Prague: Nákladem spolku posluchačů vysoké školy obchodní v Praze, 1921, p. 73. They had joint and several liability.

[9] Ibid, pp. 91 – 92.

of a debtor's membership in the cooperative by notice of termination on the debtor's behalf to be satisfied from the share in repayment.[10]

3. The era of interwar Czechoslovakia

Legislation in the Kingdom of Hungary did not recognise a separate type of business companies known today as limited liability company (*spoločnosť s ručením obmedzeným*); nor did it contain provisions on limited partnerships for shares or silent companies. It was not before Act No. 271/1920 of the Collection of Laws and their Amendments in the period of the interwar Czechoslovakia that the scope of application of the originally Austrian law on limited liability companies spread to the territory of Slovakia and the Subcarpathian Rus. Although these provisions reduce creditor protection, they were seen as legal support of the members' readiness to enter profit-generating risky deals.[11] In the interwar Czechoslovakia, also a separate decree on forming limited liability companies and joint-stock companies, increasing the share capital and founding branches was passed (465/1920 of the Collection of Laws and their Amendments). In general, limited liability companies did not gain popularity in Slovakia, quite the opposite, they were confronted with suspicions on the part of potential creditors and business partners. Therefore, the interwar commercialism was already aware of the need to give strength to the creditors with respect to the members of such a business organisation, which was to be addressed by the reform of the limited liability company law[12] that did not take place due to the division of Czechoslovakia in 1939. On the other hand, special status of the shareholders and their protection against creditors was to be maintained and strengthened in joint-stock companies.[13]

In the interwar Czechoslovak Republic, there were intensive reform and unification attempts in this area. Even a bill of a part of the Commercial Code was drafted (first two books of the Commercial Code concept), printed and brought to public in 1937. To a great degree, the Code relied on the commercial law applicable until then across the Czech countries and in Slovakia.[14] The preparation of the draft was vested in the "**Scientific Committee for the Drafting and Commenting on the New Commercial Law**", established in the Ministry of Justice and headed by Professor Hermann-Otavský, that worked since February 1930. The Committee has held a total of 173 sessions and 15 wider meetings.[15]The outcomes of the Committee's work were – through the Ministry of

[10] Ibid, p. 103.

[11] SCHMOECKEL, M. Einleitung: Die industrielle Revolution als Produkt einer neuen Rechtsordnung. In: MAETSCHKE, M. – MAYENBURG, D. von – SCHMOECKEL, M. (eds.). *Das Recht der Industriellen Revolution*. Tübingen, 2013, p. 13.

[12] *Osnova obchodního* zákona. Prague: Nákladem Ministerstva spravedlnosti, 1937, p. 153.

[13] Ibid.

[14] See SKŘEJPKOVÁ, P. Pokusy o unifikaci v oblasti obchodního práva v letech 1918-1938. In *Československé právo a právní věda v meziválečném období (1918-1938) a jejich místo ve střední Evropě. Volume 2.* Prague: Karolinum, 2010, pp. 974 – 994.

[15] GÁBRIŠ, T. Obchodné právo v procese unifikácie práva v rokoch 1918-1938. In *Acta historico-iuridica Pilsnensia 2006*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2007, pp. 215 – 233.

Unification – gradually submitted to the **Slovak Committee on Private Law in Bratislava**, whose meetings were presided by Dr. Fajnor and Dr. Záturecký. But as in parallel, a second book of the commercial code was drafted by Councillor Smitko on ground of the Ministry of Justice with provisions on the general partnership, limited partnership and the silent company, along with the explanatory report, the Ministry decided to co-publish it with the first book, even though the second book had not yet been submitted to the Committee. Thus, both books could become subject of public discussion at once. However, the reform of the stock corporation law, the cooperative law and the law of limited liability companies, would be purposefully restricted to special laws within partial unification and would not form a part of the Commercial Code under drafting.[16]

Regulations as regards liquidation of business organisations with a view to taking into account interests of other persons in addition to the shareholders – specifically creditors, but also shareholders' private creditors – constituted "more significant novelties". The private creditors' position would be strengthened by requiring their consent to a shareholders' agreement on continuation of the company (Section 170); unlike the creditors of a business organisation, private creditors would obtain a concurrent right with the shareholders to instruct the liquidator in conducting the liquidator's business (Section 179).

The draft took a clear position on a question disputed in theory – as to whether the general partnership can be given the status of a body corporate. In liability relationships with the creditors of a general partnership, the concept provided for a rule in its Section 148 under which the shareholders of the general partnership were liable towards the creditors with their entire property, and that jointly and severally with the company itself.

In limited partnerships, limited partners would be liable for the company's debts up to the limited amount that would be published in a companies register in the interest of creditor protection – the shareholders would also be held responsible for the accuracy of the records.[17] Creditor protection was also increased by the creditors being able to challenge the valuation of the limited partner's in-kind investment in the company, when they believed that the value of such contribution had been misstated by the company. General partners, on the other hand, were traditionally liable for the company's debts with their entire property. Would, however, a limited partner agree to company transactions executed before the company was registered in the companies register, such partner was to be liable for the company's obligations with their entire property, unless they proved that the creditor had actual knowledge that the acting entity was "only" a limited partner of the company being formed.

Special provisions on the silent company in the concept (that were absent in the Hungarian law until then) also introduced the silent shareholder's liability explicitly up to the amount of their contribution, with the exception of cases, when his name was used in the company's trading name, in which case the shareholder was to be liable up to their total amount of property, jointly and severally with the businessman.

[16] Ibid.

[17] *Osnova obchodního* zákona. Prague: Nákladem Ministerstva spravedlnosti, 1937, p. 199.

4. Legal evolution of commercial law after 1950

Neither provisions on limited liability companies nor stock corporations were included in this draft, as has been said above, and these were envisaged to be regulated by special regulations – which, however, were not introduced to the public until the outbreak of World War II. Therefore, we cannot evaluate the shapes of the reform in these two company types in further detail.

In the legal evolution of commercial law, a breaking point was the Civil Code, Act No. 141/1950 Zb. in 1950. The Code repealed the General Civil Code (*Allgemeines Bürgerliches Gesetzbuc*h), transposed Hungarian civil law, along with both commercial codes. The New Civil Code only maintained the Trade Law that was later repealed by the Labour Code in 1965, but in fact, the field of trades had been practically eradicated a long time before – private businesses had no place in the society after 1948. From the traditional commercial law, the people's democratic and later socialist rule of law only maintained the form of the stock corporation. The Stock Corporation Act – Act No. 243/1949 Zb. – degraded this form to a concealed form of national enterprise. A state permission and approval of the articles of association was necessary for company formation, a ministry's approval was required for every amendment to the articles of association. Strictly seen, commercial law did not exist back then.

Only at the international level with respect to countries with market economy, certain continuity of otherwise removed commercial law was maintained, specifically with the International Trade Code, Act No. 101/1963 Zb. on Legal Relationships in International Trade Exchange whose provisions were not applicable to the legal relationships between domestic entities, with a few exceptions. On closer inspection, the own International Trade Code rather introduced provisions and regulations on the law of trade obligations than corporate matters, often in a form we find today in the commercial and civil code of the Slovak Republic. After 1989, both contemporary codes relied to a great degree on the provisions of the International Trade Code, which thus served as covert continuity of the commercial law in Slovakia, yet without addressing specific questions of the corporate law which therefore had to be built in the current Commercial Code in 1991 from the old basis from before 1950 and on foreign models.

5. Thirty years of evolution of the Slovak commercial law

The period between the post-November 1989 events until the entry into effect of the Commercial Code (1 January 1992) was filled with amendments to the Economic Code[18]. But the basis of Slovak law of business organisations has remained the legislation of the Commercial Code (Act No. 513/1991 Zb. as amended).

On 1 January 1993, the independent Slovak Republic was formed. In January 2023, the Republic is celebrating its 30th anniversary.

[18] This comprised a series of amendments, specifically Acts No. 98/1988 Zb., 103/1990 Zb., 403/1990 Zb., 63/1991 Zb. and 539/1991 Zb.

5.1. The period of economic transition of the national economy and coupon privatization

As was the case in other Central European countries, Slovak corporate law was marked by social changes and the transformation of the national economy from the centrally planned economy towards market economy. The era of the economic transformation that occurred at the turn of the 80s and the 90s was perhaps the most noticeably represented by the **process of voucher privatization**.[19] During a very short period, state-owned enterprises were transformed to stock corporations with publicly traded stock. Under the privatization process, the ownership of shares of privatized companies was conveyed for free through vouchers to the citizens, or investment funds that bought out the vouchers from the citizens. The voucher privatization meant a hard capitalist lesson. In English, the process can be described with one simple sentence that "*it was a sad story"*. The voucher privatization did not bring any influx of funds to the enterprises that were so necessary for their development. In most cases, they even failed to find suitable strategic partners capable of restructuring. The enterprises had no experienced management and were not prepared to play by the standard capital market rules; what they lacked most was information openness. The government had its part in the failure, too. In the first half of the 90s, the state was unable to clearly define the game rules, legal standards were not efficient enough and neither was the government supervision over the functioning of the capital market.[20] The legal setting was not prepared for such a process. In the outcome, the privatization led to a significant scattering of the ownership structures of privatized enterprises. This made the managing of the enterprises even more difficult for the management, while creating breeding ground for siphoning off the assets from the enterprises. The majority of the privatized enterprises then ended up in bankruptcy. Thousands of Slovaks and Czechs wanted to make their fortune on the voucher privatization at the beginning of the 90s. But only some businessmen and financial groups were eventually able to make money. The "free float" was left with coins only or nothing at all.[21] A functioning capital market acting as a potential source of funding entrepreneurial plans could not be established in the conditions of the Slovak Republic.

[19] is a method of privatizing state-owned assets where many citizens can inexpensively or symbolically buy vouchers they can later trade for shares in previously state-owned enterprises. In Czechoslovakia, the voucher privatization had a specific format of privatization with vouchers officially called investment coupons and defined as non-transferrable registered securities entitling to acquire shares in state-owned enterprises specifically designated for sale in exchange for the investment coupons.

[20] NÝVLTOVÁ, R., REŽŇÁKOVÁ, M.: Mezinárodní kapitálové trhy – zdroj financování. Prague: GRADA Publishing, a.s., 2007, ISBN 978-80-247-1922-1

[21] ODKLADAL, M. Kupónová privatizácia: Bola to krádež storočia? 2019. [online]. [Accessed on 6/12/2022] Available on the internet: https://www.aktuality.sk/clanok/514266/25-rokov-slovenska-kuponova-privatizacia-bola-to-kradez-storocia/

5.2. Continued development of the law of business organisations. The process of European integration and harmonization of law.

As time passed by the law of corporations continued to develop in Slovakia. The post-millennium period was –from the viewpoint of Slovak law of business organisations– characterised primarily by its Europeanisation within the EU pre-accession process in the Slovak Republic[22] and other process of harmonization that followed the accession of the Republic to the European Union (EU). The harmonization primarily focused on regulating the efficient implementation of the primary and secondary freedom of establishment and the removal of the related barriers to the free movement of persons, coordination of "safeguards" that the Member States require to protect the shareholders and third parties (creditors) against (limited) business organisations as regards the creation, maintenance and changes to the share capital and the coordination of guarantees that are required to protect the shareholders' and third parties' interests against (limited) companies in terms of data and document disclosure (i.e. primarily the harmonization of the scope of registered data and documents held on the document registry, the effects of disclosure and other aspects and rules of keeping a Business Register) and the invalidity of corporations (such as, without limitation, the harmonization of the grounds for invalidity of a business organisation and its consequences).[23] In the next phases, the adopted legislative rules concentrated on the harmonization of the transformation processes in corporations, i. e. both domestic and cross-border mergers and demergers and –currently highly relevant– cross-border conversions, again in the interest of an efficient implementation of the primary freedom of establishment.[24] The harmonisation process in Member States is carry out by EU directives. The directives represent the legal tool, which impose a minimal standard to be achieved by the legislation of each Member State. The choice and method of how this objective is to be achieved is already left to the choice of the Member State concerned.[25] In the harmonisation process, Slovak corporate law has not avoided the phenomenon of gold-plating[26]. As a good example, we can mention legal form of limited liability company (*spoločnosť s ručením obmedzeným*). While the European regulation was only supposed to apply to public and private joint-stock companies, under gold-plating, in Slovakia, we have implemented many regulations on limited liability companies as well. This has made the corporate regulation of this entity unnecessarily rigid.

In the domestic conditions, as part of the legal reforms of corporations, corporations clearly dominated to the detriment of unlimited companies. The key factor why the realm

[22] The Slovak Republic became an EU Member State as of 1 May 2004.

[23] Ministry of Justice, [online] https://www.justice.gov.sk/dokumenty/2022/02/Legislativny-zamer-ZoOSaS_2021.pdf [6/12/ 2022]. p. 10

[24] Ibid, p. 10

[25] HODÁL, P., ALEXANDER. J. Evropské právo obchodních společností. Praha : Linde Praha, a.s. 2005. p. 23

[26] process whereby the powers of an EU directive are unnecessarily extended when being transposed into the national laws.

of business organisations is dominated by corporations (not only in Slovakia), can be attributed to the doctrine of the shareholders' limited liability for the company's obligations (**so-called corporate shield or corporate veil**). It is a key definition trait of a corporation denoting an actual separation of the corporate assets from other shareholder's private assets, which substantially lead to the implementation of this tool of pursuing shareholders' business plans. As there was be the corporate shield to protect them against the creditors in terms of the risk of business failure.[27] A special subcategory of corporations (prevailing in the domestic conditions) is the single-member private limited liability companies (regardless of whether the shareholders are natural persons or part of a group structure). The limited liability of the sole shareholder for the liabilities of a limited liability company in tandem with a separate tax and charge treatment lead to a massive use of this form of corporations by entrepreneurs.[28] However, it is true that even when the shareholders' limited liability is introduced, the risk of business failure does not vanish, it is only shifted.[29]

This burden is primarily borne by the corporation *per se* (liable for obligations with its entire property), along with other stakeholders with interest in the corporate business (such as creditors, employees, etc.). In this context, the corporate shield is a good example to reasonably document how individual legal relations formed in a corporation interact and how the law is seeking to moderate them. To reiterate, the corporate shield protects the shareholder against the creditors, thereby increasing the moral hazard on the shareholders' part who –with a view to generating the highest possible profits– are prepared to take increasingly bigger investment risks. This again leads to an increased risk of the overall business failure. And by implication jeopardizes the creditors' interests. With corporations, legislation could not grant the creditors the liability of their shareholders (as is the case of partnerships) which is why creditors have been offered by legislation forcing the shareholders in corporations to create the institution of share capital which is bound for as long as the corporation exists and that cannot be withdrawn by the shareholders during the company's existence.[30] In the beginning, the share capital concept relied on the idea of untouchability of the capital; but this concept soon proved to be unsustainable. Thus, continental law chose the path of drafting a great amount of mandatory rules of law intended to ensure the efficiency of the share capital fulfilling its functions, by ensuring that the company actually receives the full value of the contributions

[27] It will probably not catch anyone by surprise that the concept of shareholders' limited liability did not originate in the conditions of the Austro-Hungarian Monarchy, but in countries where the industrialization and industrial revolution first began. In Great Britain, limited liability was directly introduced by law in 1855 and 1856 when the UK Parliament passed the Limited Liability Act and the Joint Stock Companies Act. In Germany, the limitation of the shareholders' liability was introduced under the Limited Liability Act in 1892. Then, the limited liability company was introduced in other continental legal systems.

[28] Ministry of Justice, [online] https://www.justice.gov.sk/dokumenty/2022/02/Legislativny-zamer-ZoOSaS_2021.pdf [6/12/ 2022].

[29] HORVÁTHOVÁ, A. Doktrína „piercing the corporate veil" a zodpovednosť materských obchodných spoločností. Exkurz svetovými právnymi systémami a možná aplikácia na Slovensku (1. časť). *In* Bulletin slovenskej advokácie 11/2012, ročník XVIII. 2012. p. 42

[30] DOLNÝ, J.: Základné imanie vs. doktrína primeranej kapitalizácie. Právny obzor, 103, č. 1, p. 54

paid by the shareholders (the principle of creation of the share capital) while forcing the corporation to maintain its assets at least at the share capital and reserve fund level for the entire term of its existence (the principle of maintaining the share capital).[31] Hence the treatment of share capital during the company's existence has departed from the doctrine of untouchability of the share capital and is now entailed in the doctrine of actual creation and retaining of the share capital.[32] Focal rules of law that are intended to ensure the implementation of the capital preservation doctrine are legal standards preventing generous payments by the corporation to its shareholders to the creditors' detriment, while providing for the duty to return financial contributions received without authorisation.[33] The starting point of turning such imperative to a rule of law is the universal **principle of prohibition to withdraw the contribution** dictating that the contribution provided by shareholder to the company shall not be returned during the company's existence.[34] The narrowing interpretation of the rule of no returns of contributions insofar as the prohibition only applies to the repayment of contributions made by the shareholders under Section 58 (2) of the Commercial Code or to the pay-out of funds from the company's reserve fund, was deemed correct for a rather long time. A clearcut resolution in this respect was only introduced with the new legislation under the Amendment to the Commercial Code, Act No. 87/2015 Z. z.[35]

Even the corporate veil is not bulletproof and the protection of the shareholders' personal property is not absolute. The US doctrine known as the „*piercing of corporate veil*" is a good example. The doctrine has been created with a view to combatting the injustice and situations where a stringent application of the limited liability caused a violation of the principal values of the legal system.[36]As from 1 January 2018, the doctrine was implemented into the Slovak corporate law by adopting the new provision of the **so-called parent company liability for the subsidiary bankruptcy** (Section 66aa of the Commercial Code).[37]

[31] VRÁBLOVÁ, S. Ochrana majetku kapitálových spoločností. Bratislava: EPOS, 2003, p. 76

[32] DOLNÝ, J.: Základné imanie vs. doktrína primeranej kapitalizácie. Právny obzor, 103, č. 1, p. 54

[33] VRÁBLOVÁ, S. Ochrana majetku kapitálových spoločností. Bratislava: EPOS, 2003, p. 110

[34] Ibid, p. 110.

[35] The provisions of Section 67j of the Commercial Code thus complement the initial provisions of law on the prohibition to return contributions so as "*even a payment without an equitable consideration, made by the corporation under a legal transaction agreed between the company and the shareholder or to the shareholder's benefit, irrespective of the form of arrangement or validity, shall also be deemed a repayment of the contribution. This equally applies to the payment made by the company on grounds of guaranty, intercession, pledge, or other security provided by the corporation to secure the shareholder's obligations to the shareholder's benefit.*"

[36] HORVÁTHOVÁ, A. Doktrína „piercing the corporate veil" a zodpovednosť materských obchodných spoločností. Exkurz svetovými právnymi systémami a možná aplikácia na Slovensku (1. časť). *In* Bulletin slovenskej advokácie 11/2012, ročník XVIII. 2012. p. 43

[37] Pursuant to Section 66aa (1) of the Commercial Code: *„The controlling entity shall be liable towards the controlled entity's creditors for damage caused by the controlled entity's bankruptcy where the controlling entity materially contributed to the controlled entity's bankruptcy with its actions.* The controlled entity may be relieved of the liability upon proving that it was acting in an informed manner and in good faith and that it acted for the controlled entity's benefit. For more see also JANÁČ, V. Ochrana veriteľov pred oportunizmom spoločníkov v kapitálových spoločnostiach [Creditors' protection agaibist shareholders' oportunism in corporations]. In *Právo, obchod, ekonomika IX. : zborník príspevkov z medzinárodného vedeckého sympózia*.

5.3 From start-ups up to date

Over time, also government officials started to realize that the key to a long sustainable economic growth and enhancement of competitiveness is productivity increase based on innovations. Start-ups have become the domestic symbol of driving innovations in the industry[38]. The maximum potential of start-ups can be used by creating a proper legislative and regulatory environment, providing their access to other than financial tools and creating a suitable ecosystem and financial schemes for funding the critical phases in the life of start-ups.[39]

The simple joint-stock company (the "SJC"), that is a purely national and limited liability form of a company[40] and has been introduced into the Slovak corporate law with Act No. 389/2015 Z. z. (Amendment to the Commercial Code), has become the legislative expression of the state support of start-up ecosystem in Slovakia. The amendment came into force on 1 January 2017. The direct intent of the new legislation was the legislator's effort to create a new form of a corporation *"that will offer a complex solution for venture investments into the companies. An example of such investing are the investments into start-ups, as business initiatives with a high innovation and growth potential that are unable to raise the capital from bank funding.[41] With risk investing into the share capital of a corporation, flexible arrangements as for an investor's entry, co-existence and exit from the corporation are necessary in addition to what the corporate forms currently existing in the Slovak jurisdiction allow."* The simple joint-stock company is a company limited by shares with minimum share capital at 1 euro only. The simple joint-stock company may issue solely book-entered shares. It must also be noted that the SJC is a purely private company. The private character of this type of company is also manifested in the fact that the SJC cannot be formed upon a public offering (Section 220t (3) of the Slovak Commercial Code) and after the incorporation, its shares cannot be listed on a regulated market.[42] So a shareholder exit via IPO is not admissible. Nevertheless, the provisions on SJC have also introduced a number of modern elements of a corporate

Jozef Suchoža, Ján Husár, Regina Hučková (eds.) ; Gabriela Dobrovičová, Alena Krunková, Miroslav Štrkolec (rec.). - Košice: UPŠ, 2019, pp. 152 – 162. ISBN 978-80-8152-775-3

[38] Start-ups are business initiatives with a high growth and innovation potential, capable of triggering and fuelling an intelligent and inclusive economic growth in the long term. The term start-up was first defined in Act No. 290/2016 Z. z. on the Promotion of Small and Medium-sized Enterprises, as last amended. Under the cited laws, a start-up means the setting-up and development of business organisations with a duty to create share capital, with registered office in the Slovak Republic, that are not older than 36 months and are governed by natural persons as founders, that are an innovation enterprise, a microbusiness, a small business or a medium-sized business.

[39] Ministry of Economy, [online] https://www.mhsr.sk/uploads/files/pTlqvAqi.pdf [6/12/ 2022]

[40] The Company is liable for a breach of its obligations with its entire assets. The shareholder is not liable for the company's obligations. The corporate business name must include the designation "jednoduchá spoločnosť na akcie" (simple joint-stock company), abbreviated as "j. s. a.".

[41] One must be aware that before the start-up era, the tradition of investing into equity in domestic conditions practically did not exist. It was rare. Instead, traditional debt funding forms prevailed, such as bank funding by reason of credit products which were unreachable for enterprises in their early stage.

[42] ŠULEKOVÁ, Ž. Jednoduchá spoločnosť na akcie – nová forma obchodnej spoločnosti. *In* Súkromné právo 6/2016. 2016, p. 2-10

governance that have undoubtedly had and impact on the shareholder's status. Most importantly, the share unity principle had been broken, and replaced by the plurality of shares. Thus, the SJC may issue various classes of shares in addition to the common shares. In practice, these are predominantly shares with a different level of the preference rights (i.e. preferred dividends, liquidation preference, etc.), or non-voting shares, etc. The possibility to differentiate the quality of shares, as a demonstration of shareholders' free will, is not obvious in Slovak corporate law; on the contrary, the other forms of corporations –the limited liability company or the stock corporation– do not have such practical opportunity[43]. The articles of association of a SJC may also provide for a restriction, conditioning or exclude share transfers. In excess of the continental law, the clauses such as the drag-along right and the tag-along right have been codified and registered, which on the one hand strengthens the position of the shareholders in their enforcement, but on the other hand, the solution is rather a non-standard one, as such clauses are commonly regulated with the law of obligations rather than by the corporate law. Despite the undisputed flexibility of corporate governance, the duty to issue only book-entered shares is sadly a significant pitfall of this corporate form. It is not this requirement *per se* that causes problems, the real problems are caused by the registration process for shares as the type of securities in the Slovak Republic, which is inflexible, with too much administration and bureaucracy behind. This makes the choosing of the SJC, as a legal form, less attractive in practice, which is regrettable.

Another reason why we so emphasize the role of SJCs and the start-ups in Slovak corporate law is that mainly because of start-ups, shareholders' agreements have begun to be more widely used in domestic conditions. Through the law of obligations, shareholders' agreements, helped better shape the corporate governance of companies, which is still predominantly framed by rules of the Commercial Code and the articles of association. In the past, shareholders' agreements (SHA) were practically used in partial privatization of strategic enterprises only, when the minority share in a state-owned enterprise was acquired by a private investor and the relations by and between the private investor and the government as shareholders were to be regulated. A wider use of SHAs within small and medium enterprises SMEs was only brought by the said start-up era. This also helped to overcome the prevailing taboo that the law of obligations must not be used to moderate the corporate governance and the monopoly for such a regulation should be preserved for corporate law solely.

Instead of a conclusion

The corporation has evolved as a legal tool of managing the risk of doing business and administering the assets used in doing business. The Commercial Code remains the fundamental act in corporate law even after 30 years. The Commercial Code was amended more than 50 times during that period, while the amendments often only had

[43] Not at all in limited liability company and only to a limited extent in a stock corporation in regarding to the preference shares.

the character of case interpretation, without deeper systematic solving of the problems of corporate law which arose during that period. Recodification work of corporate law is underway in Slovakia. So let us all hope that after 30 years of existence, the new, modern, conceptual and business-attractive corporate law will be adopted.

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