

## MANDATORY AND DEFAULT REGULATION IN SLOVAK COMMERCIAL LAW / Mária Patakyová, Barbora Grambličková

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This article is a result of the project  
implementation: APVV-16-0553  
"Meta-morphoses and innovations  
of the corporations' concept under  
con-conditions of globalisation"  
„Premeny a inovácie konceptu  
kapitálových spoločností  
v podmienkach globalizácie“.

**Abstract:** *The aim of this article is to provide the reader with an understanding of the concept of mandatory and default regulation within the Slovak commercial law. Private law regulation is in the Slovak Republic quite specific, as the Commercial Code does not only cover companies (and cooperatives), but contractual aspects of commercial law as well which interferes with the contractual regulation stipulated in the Civil Code and causes duality. The Commercial Code and the Civil Code regulate the matter of mandatory and default regulation differently and therefore we found it crucial to provide the reader, who (most likely) does not have detailed knowledge about these specificities of Slovak law, with a more theoretical and descriptive introduction. Such an introduction is crucial in order to understand the following contextual analysis of the issue of mandatory and default regulation in the Slovak commercial law. The main aim of this article is to tackle the specific angles of the topic, to be more exact, a possible judicial interference with the mandatory and default regulation of the commercial law and its impact on this concept. The authors address the matter of possible avoidance of mandatory regulation in commercial law with the contract for sale of an enterprise and shareholders' agreements, which are only regulated in the Commercial Code. The article addresses a hypothesis, that despite the need for simplification of commercial law, the latest amendments of the Commercial Code go the opposite direction by introducing new mandatory provisions into the Code, due to the abuse by companies as a legal form.*

**Key words:** *mandatory regulation, default regulation, judicial intervention, circumvention of mandatory regulation, commercial law, Slovak law*

### **Suggested citation:**

Patakyová, M., Grambličková, B. (2020). Mandatory and Default Regulation in Slovak Commercial Law. *Bratislava Law Review*, 4(1), 93-112. <https://doi.org/10.46282/blr.2020.4.1.176>

**Submitted:** 16 April 2020

**Accepted:** 23 June 2020

**Published:** 31 August 2020

### 1. MANDATORY AND DEFAULT REGULATION IN THE SLOVAK COMMERCIAL LAW – GENERAL INTRODUCTION

Commercial law within Slovak law, as part of Slovak private law, is regulated by the Commercial Code.<sup>1</sup> The Commercial Code together with the Civil Code,<sup>2</sup> regulating

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<sup>1</sup> Slovak Act no. 513/1991 Coll. Commercial Code as amended of 5 November 1991 (hereinafter referred to as the "Commercial Code").

<sup>2</sup> Slovak Act no. 40/1964 Coll. Civil Code as amended of 26 February 1964 (hereinafter referred to as the "Civil Code").

civil relationships, constitute the core of Slovak private law. The Commercial Code is *lex specialis* to the Civil Code.<sup>3</sup>

The principle of default regulation is a key element of Slovak private law, based on Section 2 Subsection 3 of the Civil Code. Participants in these relations may regulate their mutual rights and obligations by an agreement derogating from the law, unless it is expressly prohibited by the law, or unless the nature of the provisions of the law indicates that they cannot derogate from it. The notion of this section of the Civil Code is also reflected in the principle of contractual freedom of entities which presupposes that the parties adjust their mutual rights and obligations according to their preferences. The above-mentioned norm of the Civil Code is the essence of the perception of Slovak private law as an aggregation of default regulation (Csach, 2007b, p. 105, for further discussion on the topic see 2007a; for contextual analysis of mandatory and default regulation in law see Knapp, 1995).

The Commercial Code does not set any general rule for mandatory and default regulation in commercial law, therefore, it is necessary to look for a specific regulation on this matter relevant to particular sections of the Commercial Code (for more details on the Slovak company law see Patakyová & Grambličková, 2019b). The Commercial Code is divided into four sections: (i) first part: general provisions, (ii) second part: companies and cooperatives, (iii) third part: business contractual relationships and (iv) fourth part: common, transitional and final provisions.

The Commercial Code, in its third part, regulates the matter of business contractual relations. Under Slovak commercial law, it is possible to distinguish between four types of business contractual relationships:

- (i) relative business contractual relationships<sup>4</sup> (based on a subjective criterion),
- (ii) absolute business contractual relationships<sup>5</sup> (based on an objective criterion),

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<sup>3</sup> Relationship between the Civil Code as *lex generalis* and the Commercial Code, which is *lex specialis* is stipulated in the Commercial Code, Section 1 Subsection 2, which states: "The legal relations specified in Subsection 1 above are regulated by the provisions of this Act. Should it prove impossible to resolve certain issues according to the provisions of this Act, such issues shall be resolved in accordance with civil law. Should it prove impossible to resolve such issues in accordance with civil law provisions, they shall be assessed based on commercial practice and, in the absence of such, then on the principles upon which this Act is based."

<sup>4</sup> Relative business contractual relationships are regulated in the Commercial Code, Section 261 Subsections 1 – 5. In order to consider a business contractual relationship as a relative business contractual relationship, the contractual relation has to be between entrepreneurs, and it concerns their entrepreneurial activity, with respect to all the circumstances. The entrepreneurial status of the subjects is relevant for the time the business relation was established. Another subtype of business contractual relationship is a business contract entered into by an entity governed by public law, if it concerns the securing of public needs or its own operation, and an entrepreneur during its entrepreneurial activity. Thus, for relative business contractual relationship we need to assess the subject (relation between entrepreneurs, or relation between an entrepreneur and an entity governed by public law) and the object (relation between entrepreneurs during their entrepreneurial activity and entity governed by public law, if it concerns the securing of public needs or its own operation).

<sup>5</sup> Absolute business contractual relationships are regulated in the Commercial Code, Section 261 Subsection 6, which stipulates that: "Notwithstanding the nature of the participants, this Part of the Act governs the contractual relations: a) between the founders of companies, between a shareholder/member and the company, and between the shareholders/ members themselves where relations regarding participation in the company are concerned, as well as relations from contracts under which the share of a shareholder/member is transferred between the statutory body or member of statutory bodies and supervisory bodies of the company and the company, as well as the relations between the shareholder/member and the company when arranging the company's affairs, and contractual relations between the proxy and the company when the proxy is performing his/her authority, b) between the founders of a cooperative and between the member and the cooperative if these relations follow from the membership relationship in the cooperative, as well as from

(iii) combined business contractual relationships<sup>6</sup> and

(iv) voluntary business contractual relationships.<sup>7</sup>

Section 263 of the Commercial Code is the key section for regulation of the matter of mandatory and default regulation for commercial contracts (for more details on the theoretical aspects of the topic see Patakyová & Grambličková, 2019a). Section 263 Subsection 1 of the Commercial Code puts forward that it is possible to derogate from or exclude the application of all provisions of the third part of the Commercial Code, except for those specified here. The above stated means that the parties to the contracts, which are considered to be in a/an (i) relative business contractual relationships, (ii) absolute business contractual relationships, (iii) combined business contractual relationships and (iv) voluntary business contractual relationships, cannot derogate from the norms listed in this section. Moreover, based on Section 263 Subsection 2 of the Commercial Contract, parties to these contracts cannot derogate from the basic provisions stated in the commercial contract for individual contractual types or from the provisions that stipulate the mandatory written form of the legal act based on Section 263 Subsection 1 of the Commercial Code.

Section 263 of the Commercial Code, being the general rule for determining the mandatory and default regulation for commercial contracts, is considered problematic as it is neither accurate nor definitive (Ovečková, 2017, p. 69). One of the co-authors claims that the enumeration of these mandatory provisions in Section 263 Subsection 1 of the Commercial Contract is not definite and it is essential to assess other provisions of the third part of the Commercial Code in the light of the grammatical and systematic interpretation, while keeping in mind the principles of unity of legal order and separation of powers (Patakyová, 2016b, pp. 4–5). Moreover, it is possible to detect that the Supreme Court of the Slovak Republic interfered into the consideration of mandatory and

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*contracts on the transfer of membership rights and obligations, contractual relations between a member of the statutory body and the cooperative's controlling body, and contractual relations between the proxy and the cooperative when the proxy is performing his/her authority, c) emanating from exchange operations and their intermediation (Section 642) and from paid contracts concerning securities, d) emanating from a contract on the sale of an enterprise or its parts (Section 476), credit contract (Section 497), controlling contract (Section 591), forwarding contract (Section 601), contract on operating a means of transport (Section 638), contract on silent partnership (Section 673), contract on opening a letter of credit (Section 682), collection agreement (Section 692), agreement on the deposit of items at a bank (Section 700), current account agreement (Section 708) and deposit account agreement (Section 716), e) emanating from a bank guarantee (Section 313), from a traveller's cheque (Section 720) and from a promise of indemnification (Section 725).*" Thus, in order to consider the contract an absolute business contractual relationship the crucial point is, that the contract is subsumed under the Commercial Code, Section 261 Subsection 6 letters a) to e), despite the nature of the contracting parties (subject) and the matter of the contract (object). As stipulated earlier, subject and object of the contract need to be assessed for the determination of the relative business contractual relationships.

<sup>6</sup> Combined business contractual relationships are regulated in the Commercial Code, Section 261 Subsection 9. The combined business contractual relationships can be considered as a subcategory of relative business contractual relationships, as they are contracts between entrepreneurs (during their entrepreneurial activity), or contracts between an entrepreneur (during its entrepreneurial activity) and an entity governed by public law (if it concerns the securing of public needs or its own operation) and these contracts are not regulated by the Commercial Code but are regulated as a contractual type in the Civil Code. In such a scenario, these contracts shall be governed by the respective provisions on this contractual type in the Civil Code and in the rest by the Commercial Code. An example for a combined business contractual relationship is a contract of sale of immovable property.

<sup>7</sup> Voluntary business contractual relationships are regulated in the Commercial Code, Section 262. Parties to the contract may voluntarily agree that their contractual relationship will not fall under the regulation of the Commercial Code, as it is neither a relative business contractual relationship (combined business contractual relationship) nor an absolute business contractual relationship. The above-described agreement of the parties to the contract must be in writing.

default regulation of the provisions included in the third part of the Commercial Code and extended the enumeration of the mandatory provisions listed in Section 263 Subsection 1 of the Commercial Code. We will analyse this matter on an example of a specific decision of the Supreme Court of the Slovak Republic later in this article.

Regarding the second part of the Commercial Code, which is dealing with provisions regulating companies and cooperatives, determining mandatory and default regulation is more complicated as there is no such provision as Section 263 for the third part of the Commercial Code. Articles of association and bylaws of companies and cooperatives are considered as *sui generis* contracts,<sup>8</sup> therefore it is crucial to resolve the problem of mandatory and default regulation of the second part of the Commercial Code in order to identify the limits of contractual freedom. Articles of association and bylaws, being *sui generis* contracts, raise legal effects not only between the parties to this contract (founders of the companies and cooperatives), but they raise legal effects on the company and cooperative and third parties, which enter into a contractual relationship with a particular company or cooperative (Šuleková, 2013, p. 274).

Due to the fact that there is no such specific rule, in order to assess whether the particular provision of the second part of the Commercial Code is mandatory or default, it is necessary to go back to the Civil Code as it is *lex generalis* to the Commercial Code. As it was stated above, the Civil Code specifies the determination of mandatory or default character of provisions in Section 2 Subsection 3 as follows: *"The participants of civil legal relationships may regulate their mutual rights and duties by an agreement deviating from the act unless it is explicitly prohibited by an act or unless the impossibility of such difference follows from the nature of the relevant provision of the act."* This rule for an assessment of mandatory and default regulation of the provisions in civil matters is, due to the absence of the specific rule, applicable on the second part of the Commercial Code (provisions regulating companies and cooperatives).

Determination of mandatory and default regulation for company law based on Section 2 Subsection 3 of the Civil Code leads to the conclusion that legal provisions of company law are/were considered primarily as mandatory (Eliáš, 2016, p. 181; Ronovská & Havel, 2016, p. 33; Štenglová, Plíva, & Tomsa, 2009, p. 3).<sup>9</sup> One of the co-authors (partially) agrees with the above-mentioned consideration, as under the rule stipulated in Section 2 Subsection 3 of the Civil Code, norms located in the second part of the Commercial Code shall be read as imperative, and therefore mandatory, considering the character of these provisions, which contain individual rules (Patakyová, 2016b, pp. 4–5). Following this line of argumentation, one of the co-authors partially corrects this approach when she states that: *"In the sphere of private law it is also adequate, in this context, to require a restriction, and not to search for a permission for autonomous regulation, whereby in a case of an absence of restriction, the permission is implicitly given by law and participants of legal relationships may express their relevant will (praeter legem). I consider it necessary to highlight that the prohibition of certain autonomous regulation may arise from all 'sources' of the legal regulation of relationships, which are subject to the Commercial Code and also from principles, on which the Commercial Code is built."* (Patakyová, 2016b, pp. 4–5). This correction, resulting from the statement, that the provisions in the second part of the Commercial Code are more of a default nature

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<sup>8</sup> The nature of the bylaws of the company as *sui generis* contract was also confirmed by the judgment of the CJEU, judgement of 10 March 1992, *Powell Duffryn plc v Wolfgang Petereit*, C-214/89, ECLI:EU:C:1992:115.

<sup>9</sup> The Commercial Code and the Czech Act no. 513/1991 Coll. *Commercial Code* (hereinafter referred to as the "Czech Commercial Code") applicable until the end of 2013 were following the same rule regarding the determination of mandatory and default regulation for companies and cooperatives, therefore it is possible to use argumentations from the Czech academic discourse.

under the interpretation of Section 2 Subsection 3 of the Civil Code, was supported by Ronovská and Havel (2016, p. 33). Ronovská and Havel also agree that determination of the company law norms included in the second part of the Czech Commercial Code as mandatory provisions is incorrect and these provisions shall be primarily perceived as default (2016, p. 33).

The assessment of mandatory and default provisions within the second part of the Commercial Code regulating the companies and cooperatives differs based on the different legal form of a company and cooperative. Under Section 56 Subsection 1 of Commercial Code the types of companies and one type of cooperative in the Slovak Republic are the following: (i) an unlimited company, (ii) a limited partnership, (iii) a limited liability company, (iv) a joint stock company, (v) a simple joint stock company and (vi) a cooperative (Patakyová & Grambličková, 2019, pp. 77–79). Provisions regulating the joint stock company, especially the public joint stock company, have a prevalence of mandatory provisions over default provisions, especially if compared with the limited liability company. The abovementioned is described by Eliáš as “statutory rigidity” not only towards the joint stock company stemming from the German law pattern, but towards all of the company types (2016, p. 181). The described pattern of “statutory rigidity” may be detected in connection with transposition of the company law directives in the process of accession of the Slovak Republic into the European Community too. These directives were transposed into the Commercial Code excessively as regards to their scope, which usually covered public joint stock companies. Within the provisions regulating the limited liability company, it is possible to determine more provisions that can be considered as default. In connection with this, it is crucial to point out that within each company type, it is not possible to apply an analogy of law – meaning that more flexible regulation, stemming from the default regulation of the limited liability company, will be applicable on the joint stock company, as such a wide cross-application of provisions regulating different company types will lead to wiping the differences between the types of companies (Černá, 2011, p. 3).

On the other hand, due to the specific emergency situation caused by the current Coronavirus disease (COVID-19) pandemic, the Slovak legislator needed to step-in in order to allow functioning and decision-making of the collective bodies of legal persons created under civil law and commercial law in order to minimize the necessity of gatherings of these bodies.<sup>10</sup> The need for the legislative intervention was due to the fact that not all of the types of legal persons, whether incorporated under the Civil Code, another civil law act or the Commercial Code, do have a possibility for a distant gathering of their collective bodies. “Lex Corona”<sup>11</sup> stipulates in Section 5 that collective bodies of legal persons incorporated under civil law or commercial law may, at the time of an emergency situation or state of an emergency, use correspondence voting or allow their members to participate in meetings of such a body by electronic means, even if it is not stipulated in their articles of association or bylaws and the provisions of Sections 190a to 190d of the Commercial Code shall apply accordingly. The above-mentioned legal solution in the matter of distant decision-making of the collective bodies of the legal persons incorporated under the Slovak private law is an example of allowance of cross-application of rules in companies as well as other legal persons. The approach of the legislator was clearly to facilitate the functioning of collective bodies through distant

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<sup>10</sup> Explanatory report to the Act no. 62/2020 Coll. on Certain Emergency Measures in Relation to the Spread of Dangerous Contagious Human Disease COVID-19 and in the Judiciary and Amending Certain Laws.

<sup>11</sup> Slovak Act no. 62/2020 Coll. on Certain Emergency Measures in Relation to the Spread of Dangerous Contagious Human Disease COVID-19 and in the Judiciary and Amending Certain Laws of 25 March 2020.

decision-making and the legislator did not want to leave the solution only on the possibility of application of analogy of law in private law (which is limited as we explained above) in order to provide legal certainty.

In the upcoming parts of the article, the authors address the matter of mandatory and default regulation in the Slovak commercial law from the angle of the judicial interference with these matters and assessment of contractual solutions to avoid mandatory regulations.

## 2. JUDICIAL INTERFERENCE WITH MANDATORY AND DEFAULT REGULATION IN COMMERCIAL LAW

In the following part of the article the authors will deal with selected case law in order to analyse the question of judicial interference with mandatory and default regulation in commercial law. In connection with the commercial contracts, the authors selected a case dealing with the contract on silent partnership and in connection with the regulation of companies the authors selected a case dealing with the regulation of election and removal of the members of the board of directors by the supervisory board in a joint stock company.

### 2.1. *Judicial interference with mandatory and default regulation in commercial contracts – Contract on silent partnership*

Contract on silent partnership is regulated in Sections 673-681 of the Commercial Code and is considered as an absolute business contractual relationship under Section 261 Subsection 6 letter d) of the Commercial Code, meaning that the contractual relationship in this case must be governed by the Commercial Code despite the nature of the contracting parties and the subject matter of the contract, as explained in the previous part of the article. Contract on silent partnership is concluded between a silent partner and an entrepreneur. Silent partner may be natural as well as legal person, it can be domestic and as well as foreign person. Under the contract on silent partnership: *"the silent partner undertakes to provide the entrepreneur with a certain investment contribution and participate in their entrepreneurial activity through such investment contribution, and the entrepreneur undertakes to pay a part of the profit arising from the silent partner's share in the result of the entrepreneurial activity."*<sup>12</sup> Contract on silent partnership is considered to be a "non-subjective form" of participation of the silent partner on the entrepreneurial activity of the entrepreneur as this contract does not create a new separate legal entity and the legal personality of the silent partner and the one of the entrepreneur are kept separate (Grambličková, 2019, p. 464; Patakyová & Grambličková, 2018b, p. 147).

As it was explained above, in order to determine mandatory and default regulation in the contract on silent partnership it is necessary to analyse Section 263 of the Commercial Code as this contract is located in the third part of the Commercial Code. Section 263 Subsection 1 of the Commercial Code determines that it is not possible to derogate from the following sections regulating the contract on silent partnership:

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<sup>12</sup> Commercial Code, Section 673 Subsection 1.

Section 675<sup>13</sup> and Section 676 Subsection 1<sup>14</sup> and 2<sup>15</sup> of the Commercial Code. Moreover, Section 673 of the Commercial Code regulating the contract on silent partnership is considered to be a mandatory provision based on Section 263 Subsection 2 of the Commercial Code as Section 673 Subsection 1 is the basic provision and Section 673 Subsection 2 stipulates the mandatory written form of the legal act.

The above-described determination of mandatory provisions within the contract on silent partnership based on Section 263 of the Commercial Code was modified by the Decision of the Supreme Court of the Slovak Republic, dated 8 November 2007, file reference 1 Obdo 7/08, in which it is stipulated that: „[...] *within the contract on silent partnership, there cannot be derogation from Section 678 Subsection 2 (principle of public policy and necessary protection of third parties), Sections 680 and 681 (early return of the investment contribution is contrary to the conceptual character of the obligation) and Section 679 Subsection 1 of the Commercial Code (Section 2 Subsection 3 of the Civil Code), which are, despite the fact that they are not enumerated in Section 263 of the Commercial Code, considered as mandatory provisions and there is no possibility to derogate from these provisions. Based on the above-stated, if the parties of the contract drafted their rights and obligations in section 3 of the contract (contract on silent partnership) contrary to Section 673 of the Commercial Contract, in this section in the contract on silent partnership is invalid.*” The decision of the Supreme Court of the Slovak Republic described above extended the mandatory provisions of the contract on silent partnership regulated in Sections 673-681 of the Commercial Code, thus expanding the mandatory provisions listed in Section 263 of the Commercial Code, however (and unfortunately) without deeper reasoning and argumentation. The decision of the Supreme Court of the Slovak Republic therefore extended the notion of the mandatory regulation of the provisions in a contract on silent partnership beyond the general rule for the commercial contracts stipulated in Section 263 of the Commercial Code. Such an approach of the Supreme Court of the Slovak Republic is supported by one of the co-authors, as we already mentioned above, as she stipulates that: *“Despite this explicit legal regulation (referring to Section 263 of the Commercial Code), which was opted for due to predictable clarity of the legal regulation, it is obvious, that in this part (referring to third part of the Commercial Code) there are other provisions which are mandatory. Application of these provisions in legal practice as mandatory provisions is required, and there is a need for not only grammatical interpretation of the particular norm but, as well as, systematic*

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<sup>13</sup> Commercial Code, Section 675 stipulates the following: *“(1) The silent partner is entitled to inspect all business documents and accounting records related to the entrepreneurial activity in which they participate through their investment contribution under the agreement on silent partnership. (2) The entrepreneur is obliged to provide the silent partner upon request with information on the business plan for the following period and on expected developments in terms of property and finances relating to the entrepreneurial activity in which the silent partner participates through their investment contribution under the agreement on silent partnership. The entrepreneur is obliged to provide the silent partner upon request with a copy of the financial statements if the law imposes on the entrepreneur an obligation to have the financial statements audited, and the annual report. (3) Unless a different manner of providing the information and documents under Subsection 2 follows from the agreement between the entrepreneur and silent partner, the entrepreneur is obliged at their own expense, to send the required information or copies of documents to the silent partner, upon the silent partner’s request, to the address stated by the silent partner, otherwise the entrepreneur is obliged to provide them at the place of the entrepreneur’s registered office.”*

<sup>14</sup> Commercial Code, Section 676 Section 1 stipulated following: *“The annual financial statements are decisive for determining the silent partner’s share in the result of the entrepreneurial activity.”*

<sup>15</sup> Commercial Code, Section 676 Section 2 stipulated following: *“The silent partner becomes entitled to a share in profit within 30 days from drawing up the annual financial statements. If the entrepreneur is a legal entity, this period shall run from the approval of these financial statements in accordance with its articles of association, agreement of association or the law.”*

*interpretation of other concerned provisions, with respect for the principle of integrity of legal system and distribution of powers.*" (Patakyová, 2016b, p. 4).

To conclude, the judicial interference with mandatory and default regulation in the context of commercial contracts, for which the Slovak legal system does have a specific regulation in Section 263 of the Commercial Code, is possible. However, such interference and extension of the mandatory provisions outside the scope of the Section 263 of the Commercial Code shall be well-argued by the court in order to respect the principle of integrity of the legal system and the distribution of powers.

## *2.2. Judicial interference with mandatory and default regulation in Slovak company law – Election and removal of the members of the board of directors by the supervisory board in a joint stock company*

Members of the board of directors in a joint stock company are elected and removed by the general meeting from among the shareholders or from among other persons based on Section 194 Subsection 1 of the Commercial Code. Bylaws of the joint stock company may determine that members of the board of directors are elected and removed by the supervisory board in the manner stated therein.<sup>16</sup> The abovementioned rule regarding the election and removal of the members of the board of directors is located in the second part of the Commercial Code and thus, the mandatory and default regulation of the provisions contained in this section are determined by the rule stipulated in Section 2 Subsection 3 of the Civil Code as explained above. Section 194 Subsection 1 of the Commercial Code, opening the possibility of the election and removal of the members of the board of directors by the supervisory board and not by the general meeting, is rather general and vague and only stipulates that this way of election and removal of the members of the board of directors by the supervisory board needs to be determined in the bylaws of the company together with the manner of this election and removal. It is possible to consider the norm as a default, giving the founders the possibility to opt for this specific way of election and removal of the members of the board of directors by the supervisory board. However, the norm can be considered subsequently as mandatory – once the founders opt for a derogation from the standard elections and removal of the members of the board of directors by the general meeting of the company<sup>17</sup> and place the power in the hands of the supervisory board in the bylaws, the manner of such an election shall be stated therein.

The problematic aspect of the abovementioned possibility to opt for election and removal of the members of the board of directors by the supervisory board is the vague wording of Section 194 Subsection 1 of the Commercial Code as it "only" requires to state the manner of such an election in the bylaws of the company without any specification. The decision of the Supreme Court of the Slovak Republic, dated 20 February 1998, file reference Obdo V 23/97, stipulated that if the bylaws of the company do not contain the manner of election and removal of the members of board of directors by the supervisory board – the bylaws are in this part contrary to the law (the Commercial Code) – the members of the board of directors are appointed and removed by the general meeting (Žitňanská, Pala, & Palová, 2017). In this particular case, the uncertainty of the bylaws was stemming from the unclear determination of who and in what way could propose the election and removal of the members of the board of directors, because "it does not stem from them [bylaws], based on whose proposal it is possible to elect and remove the

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<sup>16</sup> Commercial Code, Section 194 Subsection 1, last sentence.

<sup>17</sup> Commercial Code, Section 187 Subsection 1 letter c).



members of the board of directors, that means shareholders, whose will shall be represented by the supervisory board. If, in the case of delegated powers of the election and removal of the members of the board of directors by the supervisory board, they do not contain the manner of election and removal of a member of the board of directors, they are contrary to law and then the members of the board of directors are elected and removed by the general meeting.<sup>18</sup> (Patakyová, 2016a, p. 584). Moreover, the Supreme Court of the Slovak Republic stated the following: "The supervisory board is therefore entitled to elect and remove members of the board of directors if, in accordance with Section 187 Subsection 1 letter c) and Section 194 Subsection 1 of the Commercial Code, such is determined in the bylaws of a joint stock company, including the manner of such an election and removal. Thus, it will be mainly a matter of determining who and in what way proposes the election or removal of a member of the board of directors because the decision-making rules of the supervisory board, regulated in Section 201 Subsection 3 of the Commercial Code, are mandatory." Therefore, when drafting the bylaws, they must be specific and detailed regarding the manner of the election and removal of the members of the board of directors by the supervisory board, because merely a general description of such a way of election and removal of members of board of directors might cause invalidity of this part of the bylaws and the members of the board of directors will be elected and removed by the general meeting. The Supreme Court of the Slovak Republic did not specify the needed extent of the specification of the manner of the election and removal of the members of the board of directors by the supervisory board in the bylaws as it states in its decision that the specification shall "mainly" contain the listed matters.

Based on the above stated, vague and general description of the possibility of the election and removal of the members of the board of directors by the supervisory board in the joint stock company stipulated in Section 194 Subsection 1 of the Commercial Code, leaving the need for the regulation of such an election and removal on the bylaws of the particular joint stock company is causing legal uncertainty for companies which opted for this way of election and removal of the members of the board of directors. The legal uncertainty in this matter was strengthened by the judicial interference of the Supreme Court of the Slovak Republic with a declaration that if the manner of this way of election of the members of the board of directors is too vaguely drafted in the bylaws, it causes invalidity of this provision in them and the members of the board of directors will be elected by the general meeting. Such an outcome might be highly unwanted by the joint stock company in question, in which the founders or the shareholders of the company decided to depart from the general rule of the election and removal of the members of the board of directors by the general meeting based on Section 194 Subsection 1 of the Commercial Code (being a default provision). Thus, more specific and detailed regulation of this possibility of the election and removal of the members of the board of directors directly in the Commercial Code might bring more legal certainty for the companies which opted for this modification of their corporate governance.

Another important point regarding the mechanism of election and removal of the board of directors by the supervisory board is that this mechanism is available in the Commercial Code only for joint stock companies and not for limited liability companies.<sup>19</sup>

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<sup>18</sup> Slovakia, Supreme Court of the Slovak Republic, Obdo V 23/97 (20 February 1998).

<sup>19</sup> The members of the board of directors may be elected and removed by the supervisory board as it is in the joint stock company as the application of the Commercial Code, Section 194 is not excluded from the application on the simple joint stock company based on the Commercial Code, Section 220h, Subsection 3. A simple joint stock company is a separate company type under the Commercial Code, which is neither

When analysing the academic literature, Blaha (in Patakyová et al., 2016, p. 784) stipulates, that: *"The Commercial Code does not allow delegation of the power of the general meeting on election and removal of the members of the board of directors [in the limited liability company] to the supervisory board. This power lies exclusively within the general meeting."* The same is determined by Pala, Frindrich, Palová and Majeriková (in Ovečková et al., 2017a, p. 953): *"This power [referring to the power to elect and remove members of the board of directors in the limited liability company] cannot be delegated to the supervisory board, as it is in the joint stock company."*

The same conclusion regarding the impossibility of the delegation of the power to elect and remove members of the board of directors from the general meeting to the supervisory board in connection with limited liability companies was detected in the Czech academic discourse but to the knowledge of the authors it was shifted after the new code regulating the companies was adopted and this shift was caused by a more open-minded approach towards the conception of mandatory and default regulation in the Czech company law. As for now, it is possible to conclude that the Slovak company law considers the company types separately and we follow the argumentation presented by Černá, that a wide cross-application of rules regulating different company types will lead to an (unwanted) wiping of the differences between the types of companies (2011, p. 3).

### 3. CONTRACTUAL SOLUTIONS TO AVOID MANDATORY REGULATION

#### 3.1. Contract for sale of an enterprise as a contractual solution to avoid mandatory regulation on the limits on transferability of the business share in the limited liability company

In this part of the article the authors would like to address the contractual solutions to possibly circumvent mandatory regulation on the limits on transferability of the business share in the limited liability company through a contract for sale of an enterprise.

A business share in the limited liability company does not have a form of security, the same way as a share in a joint stock company (or a simple joint stock company). As it is stipulated in Section 114 Subsection 1 of the Commercial Code: *"A business share represents the shareholder's rights and obligations and their corresponding participation in the company. The amount of the business share is determined by the proportion of a particular shareholder's investment contribution to the company's registered capital, unless the agreement of association stipulates otherwise."* Transferability of this business share might be limited contractually or by the Commercial Code itself (statutory limitation on the transferability). Section 115 of the Commercial Code stipulates the general (statutory) limitations on the transferability of the business share in the limited liability company. If the shareholder wants to transfer his/her business share to another shareholder, the consent of the general meeting is required unless the agreement of association stipulates otherwise.<sup>20</sup> On the other hand, if the shareholder wants to transfer his/her business share to another person than a shareholder, this must be permitted by

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subordinated to the joint stock company nor a limited liability company. The regulation of the joint stock company is not complete and the provisions regulating the joint stock company are applicable to the simple joint stock company unless otherwise provided in the Commercial Code.

<sup>20</sup> Commercial Code, Section 115 Subsection 1.

the articles of association,<sup>21</sup> otherwise the business share is not transferable to a person standing outside of the company – to make such transfer of the business share possible, firstly, the articles of association of the company need to be amended. Based on the above stated, the general (statutory) limitations on the transferability of the business share stipulated in Section 115 Subsection 1 and 2 of the Commercial Code are binding<sup>22</sup> unless the founders or the shareholders decide to derogate from it in the articles of association. Additionally, there might be other contractual limitations on the transferability of the business share in the limited liability company specified in the articles of association, shareholder's agreements and other documents (for more details regarding the transferability of the business share and its limitations please see Šuleková, 2015).

Moreover, under Slovak law there is a difference whether the object of the transfer is a minority or a majority business share.<sup>23</sup> If the object of the transfer is a majority business share, the company is obliged to provide consent from a tax administrator (under a special regulation) for the purpose of the entry of a change of shareholder into the commercial register and the company is obliged to apply to the tax administrator for such confirmation.<sup>24</sup> The above-mentioned obligation is applicable only if a majority business share is transferred and the shareholder or acquirer is listed in the list of tax debtors (under a special regulation), the company is obliged to present the tax administrator's consent in respect of the shareholder as well as the acquirer.<sup>25</sup> Additionally, transfer of the majority business share shall become effective upon its entry into the Commercial Register.<sup>26</sup>

Under Slovak law, there is a specific contractual type which is a contract for sale of an enterprise. Contract for sale of an enterprise is regulated in Sections 476 – 488 of the Commercial Code. This contract is an absolute business contractual relationship as it is listed in Section 261 Subsection 6 letter d) of the Commercial Code. As stipulated in Section 476 Subsection 1 of the Commercial Contract: *"Under a contract for sale of an enterprise, the seller undertakes to transfer to the buyer the ownership right to items, other rights and other property values that serve in the operation of the enterprise, and the buyer undertakes to assume the seller's obligations relating to the enterprise and to pay the purchase price."*

A business share in another company might be a part of the transfer under the contract for sale of an enterprise. Csach states, *"that the transfer of the business share,"*<sup>27</sup> (on the legal nature of the business share see Blaha, 2016, p. 502) *"will be primarily governed by the rules regulating the contract for sale of an enterprise and the general limitations on the transferability of the business share will not be applicable due to the transfer of the enterprise."* Moreover, Csach, continues: *"If for the transfer of the contractual obligation there is no requirement for the consent of the debtor and the creditor,*

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<sup>21</sup> Commercial Code, Section 115 Subsection 2.

<sup>22</sup> Knapp stipulates that the default norms are binding if the addressee of the norm subordinates himself/herself under this norm (this subordination may happen passively as well if the addressee of the norm does not derogate from this norm or exclude the application of this norm to his/her relations) (1995, p. 5).

<sup>23</sup> Commercial Code, Section 115 Subsection 8: *"... majority business share shall mean a business share that awards the shareholder, with regard to the proportion of the value of the shareholder's investment contribution to the amount of the registered capital of the company, at least half of all votes or a business share to which the agreement of association attaches at least half of all votes."*

<sup>24</sup> Commercial Code, Section 115 Subsection 6.

<sup>25</sup> Commercial Code, Section 115 Subsection 7.

<sup>26</sup> Commercial Code, Section 115 Subsection 11.

<sup>27</sup> Under the Slovak law, the business share is considered to be another property value based on the Commercial Code, Section 118 Subsection 1.

*there is no reason to require the consent of any other entity in the place, where it otherwise shall be granted.*" (in Ovečková et al., 2017b, p. 691) Thus, Csach states that the general limitations on transferability of the business share stipulated in Section 115 Subsection 1 (requirement for the approval of the general meeting if the business share shall be transferred to other shareholder and the articles of association do not regulate otherwise) and Subsection 2 (transfer of the business share to another person than the shareholder must be permitted by the articles of association) of the Commercial Code, will not be applicable. Additionally, Csach continues with this argumentation in the commentary to Section 483 of the Commercial Code, where he states, that the limitations on transferability of the business share under the Commercial Code in connection with the majority business share (consent from a tax administrator) shall be applicable as the aim of these rules is the protection of the public good (tax evasion and prevention of the transfer of the business share to the strawman structures) (2017a).

The authors agree that the abovementioned limitations on transferability of the business share in connection with the majority business share shall be applicable in this transaction. On the other hand, the authors would like to suggest that according to their point of view, it would be appropriate to differentiate between the general (statutory) limitations on the transferability of the business share by the Commercial Code in Section 115 Subsections 1 and 2 and contractual limitations on such transferability. The authors agree that the contractual limitations on the transferability of the business share will not be applicable in the process of transfer of the enterprise. However, Section 115 Subsection 1 (requirement for the approval of the general meeting if the business share shall be transferred to another shareholder and the articles of association do not regulate otherwise) and Subsection 2 of the Commercial Code (transfer of the business share to another person than a shareholder must be permitted by the articles of association), which are considered binding if the founders or the shareholders do not opt for the possibility to derogate from these regulation in the articles of association, should not be circumvented through the contract for the sale of an enterprise. The presented argumentation by Csach opens a place for debate, as a conclusion, that though through a contract for sale of an enterprise general (statutory) limitations on transferability of the business share might be avoided, it can disrupt the concept of a closed limited liability company.

### 3.2. Shareholders' agreement as a tool to avoid mandatory regulation

Regulation of the shareholders' agreements was introduced into Section 66c of the Commercial Code by the Act no. 389/2015 Coll. Amending and Supplementing the Act no. 513/1991 Coll. Commercial Code as amended<sup>28</sup> (e. g. Csach, 2017b; Houdek, 2016; Janáč, 2017, 2018; Mamojka et al., 2016, pp. 244–247; Mašurová, 2017, 2018b; Patakyová, 2016c, pp. 308–309; Suchoža, 2016, p. 243). This provision expressly stipulates the possibility for shareholders in the companies to conclude agreements whereby shareholders will determine their mutual rights and obligations arising from their participation in the companies. As it is stipulated in the Explanatory report to the Act No. 389/2015 Coll.<sup>29</sup> regarding the Section 66c of the Commercial Code, the aim of this explicit regulation was to encourage investments into start-up companies and to support their incorporation in connection with explicit allowance of such agreements (e. g. Suchoža, 2016, pp. 242–244). It is important to point out that shareholders' agreements

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<sup>28</sup> Hereinafter referred to as the „Act no. 389/2015 Coll.“

<sup>29</sup> Explanatory report to the Act no. 389/2015 Coll.

were admissible under Slovak law even before the amendment to the Commercial Code by the Act No. 389/2015 Coll. on the basis of Section 261 Subsection 6 of the Commercial Code but sometimes, the courts did not accept them.<sup>30</sup>

Under Section 66c Subsection 1 of the Commercial Code, the shareholders as parties to the shareholders' agreement may determine their mutual rights and obligations arising from their participation in the company. To be more specific, shareholders may for example determine (i) the manner of and conditions for the exercise of rights connected with their participation in the company, (ii) the manner of the exercise of rights connected with the administration and management of the company, (iii) the conditions for and extent of participation in changes to the registered office, and (iv) the collateral agreements relating to the transfer of participation in the company.<sup>31</sup> Section 66c Subsection 1 of the Commercial Code requires a written form of the shareholders' agreements. As Csach states, if the shareholders fail to comply with written form of the shareholders' agreement under Section 66c of the Commercial Code, it will not result in invalidity, but the act will be considered as a different legal act (e.g. association agreement, mandate agreement) (2017b, p. 484).

In the case of the new legal regulation of the shareholders' agreements in the Commercial Code, the legislator clearly defined the possibility of applying the institute of invalidity of the decision of company's body which is contrary to the shareholders' agreement. In Section 66c Subsection 2 of the Commercial Code it is stipulated: "*A conflict between a decision of a body of the company and the agreement between the shareholders or members shall not invalidate the decision.*" (see also Csach et al., 2017, pp. 75–84). For example, the general meeting as the company's body, which gathers all of the shareholders, must make its decisions (resolutions) in compliance with the law, articles of association and bylaws (company's constitutional documents), otherwise such a resolution of the general meeting may be challenged in order to be invalidated under Section 131 of the Commercial Code in the limited liability company and Section 183 of the Commercial Code for joint stock company and simple joint stock company (e. g. Baňacká, 2006; Mašurová, 2018a; Patakyová & Grambličková, 2018a; Šuleková, 2016). However, if a resolution of the general meeting is not in compliance with the shareholders' agreement, such a resolution cannot be invalidated based on the merit of its inconsistency with the shareholders' agreement. According to one of the co-authors, such approach of the legislator resulting in the impossibility of invalidating a decision/resolution of a company's body which is contrary to the shareholders' agreement, shows an inclination towards a corporate model, in particular, if the agreement was placed outside the company's constitutional documents – into the shareholders' agreement. The same conclusion can be drawn if the agreement in question was placed in the company's constitutional documents but that agreement is only of a contractual nature (Patakyová, 2016c, p. 309).

Shareholders' agreement concluded under Section 66c of the Commercial Code may cover different matters and it is not excluded that the shareholders' agreement may be contrary to mandatory provisions stipulated in the Commercial Code. The outcome of the above-stated situation will differ based on the mandatory provision in question. Csach and Havel stipulate that the mere fact that some provision is considered mandatory does not necessary lead to a conclusion that a shareholders' agreement contrary to this provision is invalid, as the basis of the mandatory provision in question needs to be assessed. Csach and Havel continue, that if the mandatory provision stipulates a status

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<sup>30</sup> Explanatory report to the Act no. 389/2015 Coll.

<sup>31</sup> Commercial Code, Section 66c Subsection 1.

question for a company – for example rules regulating foundation aspects of company types (such as minimal requirements for legal capital and for individual contribution of a shareholder, rules on non-monetary contribution, etc.), contractual arrangements in shareholders' agreement contrary to these provisions shall be generally invalid. However, Csach and Havel follow up with their argumentation stating that there is a possibility that there might be arrangements in the shareholders' agreement which will be contrary to other mandatory provisions of the Commercial Code and they will not be directly invalid only on this merit and may remain to have contractual effects between parties, but the mechanism of sanctions need to be assessed in connection with these contractual arrangements in the shareholders' agreement (2017, p. 13). According to the point of view of the authors, it is important to assess the enforceability of such a contractual arrangement in the shareholders' agreement which is contrary to a mandatory provision. A decision of some company's body will need to happen in order to create a will of the company (Havel, 2010, pp. 82–84; Patakyová, Grambličková, & Barkoci, 2017, pp. 17–18) which will reflect the aim stipulated in the shareholders' agreement, and as we declared above, such a decision needs to be in compliance with the law and company's constitutional documents (articles of association and bylaws) as otherwise an invalidity of this decision might be caused. Moreover, the enforcement and power of the shareholders' agreement is declined by Section 66c Subsection 2 of the Commercial Code, meaning if the company's body decides in compliance with the law and the company's constitution documents but contrary to the shareholders' agreement, such decision cannot be invalidated (cf. Csach et al., 2017, pp. 75–84).

#### 4. UNANIMOUS RESOLUTION OF THE GENERAL MEETING AND ITS IMPACTS

In the last part of the article the authors would like to point out the problem of default provisions in company law and the different outcomes caused by departing from these provisions. Section 123 Subsection 1 of the Commercial Code stipulates that: *"Shareholders are entitled to a profit share in proportion to the amount of their paid-up contribution, unless the articles of association stipulate otherwise."* This provision is located in the second part of the Commercial Code and thus for considering whether the provision is a mandatory or default regulation, the rule stated in Section 2 Subsection 3 of the Civil Code shall apply. Therefore, based on the wording and the aim of this provision, this provision is considered as to be default.

Let's presume that the articles of association of a particular limited liability company stipulates that the general meeting may, with the approval of all shareholders, also decide on the distribution of profit in a ratio other than the ratio of the proportion of shareholders' paid-up contribution. Shareholders and their share on a (specific) profit, that the company has recognized and decided for distribution in a particular year, should be established differently for each year. By the fact, that the articles of association of the company stipulate, that the general meeting, with an approval by all of the shareholders may decide on the distribution of profit also in a ratio other than the ratio of the proportion of shareholders' paid-up contribution, the abovementioned shall not affect the rights of the shareholder. However, it is interesting to analyse whether such a decision of the general meeting – departing from the arrangement stipulated in the articles of association – may be interpreted as a permanent change of the articles of association. At the same time, the above-described decision of the general meeting, which departs from the ratio of the distribution of the profits, may have an impact on the status of the ultimate beneficiary owner within the company which has to be filed separately and thus, a new obligation for the company is created.

## 5. CHANGES IN COMMERCIAL LAW – SHALL SLOVAK COMMERCIAL LAW BE MORE LIBERAL OR MORE RESTRICTIVE?

The current changes of the concept of mandatory and default regulation especially in connection with the company law need to be assessed in the light of the recent amendments to the Commercial Code. In order to make company law more attractive for entrepreneurial activities and to eliminate the obstacles for entrepreneurship, the legislator tried to make changes in company law in order to make the regulation more liberal. Especially the new legal form – simple joint stock company – introduced into the Slovak legal system by Act no. 389/2015 Coll. – was supposed to become a flexible facilitator for start-up companies and to support the entrepreneurial activities. The simplifications of the simple joint stock company were reflected in (i) lowering the legal capital to 1 EUR, (ii) voluntary creation of supervisory board, which is otherwise an obligatory company's body in a joint stock company, (iii) more variable rights, that can be attached to shares,<sup>32</sup> etc. Moreover, the new legal form of the simple joint stock company enabled to conclude tag-along/drag-along agreements in a form of registered rights, which will help with their enforcement (Mašurová, 2017, and 2018b). However, the empirical research concluded on the Faculty of Law of the Comenius University in Bratislava showed that the new legal form is not primarily used for start-up companies (Patakyová, Kačaljak, Grambličková, Mazúr, & Dutková, 2020).

On the other hand, in connection with the amendments to the Commercial Code in the last five years it is possible to detect excessive amendments of the code via mandatory regulation due to the abuse of company legal forms especially of private companies. On one side, the legislator introduced legal transplants, such as (i) company in crisis (Csach, 2017c; Dolný, 2016; Grambličková, 2016; Kačaljak & Grambličková, 2016), (ii) regulation of shadow directors / de facto directors (Csach, 2018, 2019; Mašurová, 2018c), (iii) concept of piercing the corporate veil (Csach, 2019; Kalesná & Patakyová, 2019, pp. 214–217) and (iv) unlawful distribution of assets into the Commercial Code (Čukerová, 2017; Kačaljak & Grambličková, 2019). On the other side, the amendments to the Commercial Code introduced the specific national regulation as the approvals from tax authorities in connection with the transfer of a majority business share in a limited liability company into the Slovak legal system. All the above-mentioned recent changes in the development of the Commercial Code indicate stricter understanding of these new provisions in connection with the companies and thus result in more mandatory provisions based on interpretation under Section 2 Subsection 3 of the Civil Code. These mandatory provisions were introduced into the Commercial Code due to the misuse of the companies as legal forms, despite the fact that the entrepreneurial boost requires more simplification and default regulation in Slovak commercial law.

According to the authors, it is necessary to consolidate Slovak commercial law and in particular company law regulation in connection with insolvency law and criminal law as the regulation of companies, cooperatives and business contractual relationships shall be aimed to be more flexible. Mandatory regulation shall be focused on public joint stock companies and in connection with other company types and cooperatives mandatory regulation shall be focused on the protection of the weaker parties and elimination of negative externalities.

It will also be crucial to follow the impacts of the current crisis of the pandemic on commercial law in the Slovak Republic (as well as other countries) and reactions of

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<sup>32</sup> Commercial Code, Section 220i.

the legislator in order to facilitate flexible functioning during the crisis and the recovery of the entrepreneurship and markets after the crisis.

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