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RECODIFICATION OF CORPORATE LAW IN SLOVAKIA

Introduction

The basis of the Slovak corporate law is the original legislation from 1991 [1]. Since then, it has been amended almost 50 times, mainly (although not only) to transpose the EU directives. 30 years ago, the corporate law was inspired by German and Austrian laws. However, there was a lack of personal experience with the functioning of an economy based on market principles. In the legal sphere there was (and still is) no private law basis for the regulation of legal persons.

After 30 years, the situation is fundamentally different. The Slovak economy is governed by the market principles. More than 300,000 business companies operate in Slovakia at present. Thus, we have our own experience with the corporate law. Today we are aware that if we are to compete economically, we need a good business environment for entrepreneurs, which includes modern corporate law.

The corporate law must reflect the social and economic situation, provide for as free as possible framework for pursuing business and tackle the most frequents issues and conflict of interests related to companies.

The aim of this paper is to present the current discussions on the recodification of the Slovak corporate law, in relation to the already approved legislative intent of the Act on Corporations and the state of the debate on the draft recodification of the Civil Code.

The Government of the Slovak Republic approved the legislative intent to recodify the corporate law in 2021. It was approved following the discussions with business associations and legal interest associations, and commented on by the academia. In line with this plan, the working group will prepare a new Act on Corporations. This paper is therefore based on the text of the legislative plan for the recodification of corporate law, of which the author of this paper is a co-author in her capacity as the head of the working group on the new corporate law.

1. Economic determinants of new Slovak corporate law

The Slovak market is dominated by limited liability companies, most of which have a single shareholder. According to the data as of 15 December 2020 presented in the legislative intent for the recodification of corporate law, 1,104 public companies, 1,440 limited partnerships, 297,512 limited liability companies, 7,998 joint-stock corporations, 258 simple joint-stock corporations and 2,386 cooperatives were registered in the Commercial Register.

Groups of companies and concern structures are quite common. Among joint-stock corporations, the so-called private joint-stock corporations, whose shares are not traded on the public market, dominate. Slovakia is characterised by a close and closed structure of shareholders in companies, which means a high degree of interdependence between shareholders and company management and the associated risk of the owners' interest being prioritised at the expense of creditors. Other legal forms of companies and cooperatives are represented to a minimum extent.

The economic functioning of business companies in Slovakia is predominantly based on external financing and companies are not equipped with significant equity capital. In recent years, we have seen an increase in private investment (venture capital in the form of equity) in start-ups and project companies (start-ups and scale-ups), as well as the raising of foreign funds outside the traditional banking sector, mainly in the form of issuing corporate bonds and other securities.

The closed shareholder structures determine the prevailing internal structures of the business companies being reflected in the type of predominant corporate disputes dealt with by the courts.

The disputes are often held between two or among several shareholder groups. The groups promote their interests through business management. This results in litigations, where a smaller shareholder group seeks its rights.

Another frequent type of disputes includes the disputes between the company, representing the interests of shareholders and management, and its creditors. Most often, such disputes come to court only at the stage of imminent bankruptcy or insolvency, when the assets of the company should no longer belong (exclusively) to its shareholders from an economic viewpoint.

"One-man" companies with limited liability (where a shareholder is a natural person or where such company is a part of the concern structure) represent a special issue that must be addressed. Their objective is to obtain the privilege of "limited liability". In their structures, however, non-compliance

with the rules protecting the property of companies is a frequent problem. This is manifested in particular by efforts to redistribute the company's assets in various ways for the benefit of the shareholders outside the framework of profit distribution. They also fail to include liability mechanisms, in particular the liability of members of the company's bodies for damage caused. Both manifestations are detrimental to the creditors of companies and are thus extremely harmful to the business environment.

Therefore, the recodification of corporate law must also address the issue of protecting the creditors of business companies. It is an issue closely associated with the law of obligations, related to insolvency law, but must also be reflected in corporate law. It is of utmost importance for creditors that the corporate law and insolvency law complement each other. This concerns in particular the fiduciary responsibility of statutory bodies, property transactions for the benefit of shareholders and the definition of insolvency.

2. Law determinants of new Slovak corporate law

From the aspect of systematics of law, the recodification intent perceives the corporate law as a part of the private law [2, p. 42 – 45, 62 – 64]. The idea is to consider the conduct of business in the legal form by a company as an expression of autonomy of the will [2, p. 52 – 55]. This should be reflected in the entire legal regulation of companies. In particular, the use of dispositive legal rules wherever possible will be a tool to strengthen the autonomy of will in corporate law. Where this is not possible and mandatory legislation is necessary, its enforcement should remain available to the actors in the relationships that arise within the company.

It will concern the corporate law issues, such as establishment, preparation and creation of the constituent documents of companies, the establishment of bodies, the regulation of the duties and responsibilities of the members of the bodies, the solution of conflicts of interest within the company and the solution of creditor and investor protection [3, p. 58 – 64].

Naturally, the public law instruments, in particular the mandatory character of legal regulation and instruments of administrative law have their place in the capital companies, notably in the public companies (the shares of which are traded at the capital market). However, they have no place where the desired objective can be achieved by private law instruments instead of an administrative law [4, part B].

With regard to the private law basis of the recodification plans, the working group for recodification of corporate law perceives the need to coordinate legislative work on the new corporate law with an ongoing legislative work

on the recodification of the civil law. The progress of the works is therefore parallel and the emphasis will also be placed on the interconnectedness of the proposals.

The second indispensable legal basis for the recodification of corporate law includes the European corporate law frameworks harmonising the regulation of companies within the European area.

3. Legal forms of companies and their regulation

The new corporate law will include four legal forms of companies: the partnership, the limited partnership, the limited liability company and the joint stock corporation. The Act on Corporations will also regulate a cooperative. The legal regulation of European forms of companies will be left to separate legislation, as is the case in Slovak legislation at present.

Given that the Slovak market is dominated by the capital business companies, in particular the limited liability company, the most extensive changes, resulting from the new legal regulation, will be made to the limited liability companies and joint stock corporations.

Naturally, in order to make starting a business easy, the legislation presumes that even Slovakia will allow establishment of a limited liability company with registered capital of EUR 1. The discussion is prone to the solution inspired by the German law. We also want to reflect new communication tools and create a legal environment for business companies to make decisions using the latest communication technologies. All of the above represent the requirements of entrepreneurs to facilitate performance of the business activities.

However, in terms of trust in entrepreneurs we perceive the most important to be setting the protection of assets of capital companies, setting the framework of fiduciary responsibility of statutory bodies or their members in the interest of protecting investors and creditors of companies.

Protection of assets of a business company

The objective of the rules for creation and protection of assets of the capital companies is to protect not only the registered capital, but also the entire property so that the shareholders can use only the shares in profit from the company's estate and so that the rule is not avoided. This will be done through the revised rules on the non-refundability of deposits, which covers any unreasonable consideration in excess of the company's permissible distributions of profits, as well as the rules on the prohibition of circumvention [5, p. 529 – 548]. Special rules will also apply to transactions with related

parties, in particular transactions between the company and the shareholder, as well as to members of the company's bodies and their relatives.

Special rules for the protection of capital, which under European legislation are imposed only on the public limited companies, will apply only to public limited companies and will in principle not be extended to limited liability companies [4, part E. 3. 3. c)].

Fiduciary responsibility of business company's bodies

Legal status of members of the capital companies' bodies will be based on the recodified legal regulation of legal persons in the Civil Code that will regulate the duty of loyalty and duty of care by a member of the body in the exercise of their powers as a basis for their fiduciary responsibility. Unlike the general legal persons, the legislation concerning the business companies will regulate only the specific rules. However, the new Act on Corporations will reflect the fact that business decision-making involves a certain degree of risk. It will therefore explicitly provide for the application of the business judgment rule to business decision-making (in particular by the statutory body). If in business decision-making a company complies with the duty of loyalty and duty of care by a member of the statutory body, then, even if the business decision proves to be disadvantageous to the company in the future, there will be no illegality of conduct [6, p. 3 – 9], [7, p. 15 – 26].

Fiduciary responsibility as well as liability of a company's body member will result from law and in this extent it will be the mandatory legal regulation. However, the possibility of negotiating a contractual regime for performing the functions of a member of the body with regard to other issues concerning the relationship between the member of the body and the company will not be excluded. The civil law basis will be gratuitous performance of the function, unless the parties agree otherwise.

The legal regulation should expressly reflect the practice of using the option of insuring the liability of a member of the body against damage caused to the company, with the premium being paid by the company itself, while at the same time imposing a compulsory level of deductible on the insured member of the body.

In particular, the limitation period for claims of the company against members of the bodies should be regulated, which should commence from the date on which they cease to hold office, and/or should not expire earlier then certain time after they cease to hold office, taking into account the introduction of an objective limitation period [4, part E. 3. 3. d)].

Concern law

One of the noticeable shortcomings of the Slovak corporate law is the absence of concern law, such as rules regulating relations within a group of companies subject to unified management. The exceptions are the liability of the controlling person towards the creditors of the controlled company if it causes the bankruptcy of the controlled company and the liability of the so-called de facto statutory officer (director).

However, the Slovak environment is also familiar with situations where the bodies of a business company operating within a concern have to take into account the concern's interest at the expense of the company they manage, which imposes certain risks on them. Therefore, the new legislation will also regulate the area of concern law, including the requirement for publicity of the so-called contractual concern (control agreement), as well as the conditions under which a member of the controlled person's body may take into account the concern's interest to the detriment of the business company of which they are a member of the body, in such a way as to avoid damage to the creditor or public duties, and with the obligation to make compensation within the concern. The aim of introducing concern rules is to weaken the dogmatic approach based on strict respect for the formal separateness of entities (and their liability) and to reflect in a regulatory manner the economic reality of the operation of property and/or personnel related and uniformly managed structures (concerns) which form economic units, despite being constituted in corporate terms by a number of formally separated entities (capital companies) [4, part E. 3. 3. e)].

4. Simple joint stock corporation

The legislative intent of corporate law no longer envisages a simple joint stock corporation.

Simple joint stock corporation is a relatively new legal form of a business company in the Slovak law. It is a legal form with elements of a joint stock corporation and a limited liability company. The legislation is largely dispositive. It allows for the creation of specific types of shares issued by the company and the internal organisation of the company to be flexible according to the purpose of establishing a simple joint stock corporation.

The aim of regulating simple joint stock corporations was to create a legal framework to facilitate the entry of venture capital, in particular into joint-venture structures and start-up companies or companies in innovative sectors that have more difficult access to bank financing. The reason for adopting this legislation was in particular that the legal regulation of the existing legal

forms, namely a joint stock corporation and limited liability company was not sufficiently flexible. Without deep and extensive reform, it does not allow to flexibly create such individual parameters of a business company which would suit certain areas of business or a particular way of financing a business company while preserving the interests of investors. Given the fact that at the time it exceeded the options of legislation to fundamentally rewrite the legal framework of joint stock corporations and limited liability companies in a short period of time, the legislator chose the path of a flexible hybrid legal form in order to meet the requirements of practice.

However, in view of the background of the recodification of corporate law, it will be an effort to ensure that the standard legal forms provide a wide scope for the private autonomy of founders compared to the current situation. In particular, the legal regulation of limited liability companies will in future allow for the scope for the creation of the internal organisation of the company and the scope of various forms of collection of own resources and differentiation of the status of shareholders that the legal form of a simple joint stock corporation should become redundant. At the same time, however, many elements of the regulation of a simple joint stock corporation [5, p. 1492 – 1604] will be taken over into the legal regulation of a (private) joint stock corporation or a limited liability company (abolition of the numerus clausus of shares, regulation of the conditions of transferability of shares linked to effective shareholders' agreements, more flexible structure of the bodies, etc.). Therefore, the drafters of the legislative plan believe that the Slovak entrepreneurs will not be missing this legal form, as they will find its advantages in either a limited liability company or a joint stock corporation [4, part E. 2.].

The existing simple joint stock corporations will be allowed to transform into the limited liability company, and those, which will not use this option, will be governed by the provisions applicable to the joint stock corporations.

Conclusion

The corporate law as a part of the private law as well as the field of law creating foundations for the constantly evolving business environment may meet the expectations only with the high quality case-law practice reflecting the development of the business environment. Therefore, alongside recodification, the specialisation of courts must be an essential part of creating a new framework for corporate law. Specialisation of courts and judges in this area of law is foreseen in the reform plan rendering changes to the judicial map of the Slovak Republic.

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Lucia Žitňanská. Recodification of Corporate Law in Slovakia

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The basis of the Slovak corporate law is the original legislation from 1991. After 30 years, the situation is fundamentally different and the corporate law must reflect the social and economic situation, provide for as free as possible framework for pursuing business and tackle the most frequents issues and conflict of interests related to companies.

The new legal regulation shall follow several determinants. Firstly, corporate law is part of the private law and must follow the principle of private autonomy. Secondly, the prevalence of limited liability companies determines the focus of regulation. Thirdly, the regulation shall include a comprehensive and consistent regulation on protection of corporate assets, fiduciary duties of corporate bodies and the regulation on group of companies. Moreover, the corporate law may meet the expectations only with high quality case-law practice reflecting the development of the business environment. Therefore, alongside recodification, the specialisation of courts must

be an essential part of creating a new framework for corporate law. Specialisation of courts and judges in this area of law is foreseen in the reform plan rendering changes to the judicial map of the Slovak Republic.

Keywords: system of commercial companies, corporate law, recodification, Slovak law