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EU STATE AID LAW AS A PASSEPARTOUT: SHOULDN'T WE STOP TAKING THE EFFECT ON TRADE FOR GRANTED? / Bernardo Cortese

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The paper draws on a presentation given at the international conference "Bratislava Legal Forum 2020" held by Comenius University in Bratislava, Faculty of Law, on 6th and 7th February 2020 in. Bratislava, Slovakia.

Abstract: *The present contribution addresses the excessive amount of discretion left to the EU Commission (and Courts) in defining the enforcement priorities in the field of EU State aid Law, by singling out one element of the (inherently vague) the notion of State aid, namely the effect on trade between member States. The approach taken by the Commission's practice and the ECJ case law in this field ends up building a rather unpredictable legal framework. This risks unreasonably undermining both member States' legislative choices in fields not necessarily falling under an EU competence, and undertakings' legitimate expectations.*

Key words: *EU Law, EU Competition Law, EU State Aid Law, EU Internal Market, Notion of State Aid, EU Commission, Self-Restraint*

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1. INTRODUCTION

In my contribution to the EU Law section of 2020 Bratislava Legal Forum I tried to address the excessive amount of discretion left to the EU Commission (and Courts) in defining the enforcement priorities in the field of EU State aid Law. During the conference, I referred to some cases where the vagueness of several elements of the notion of State aid, together with the approach taken by the Commission's practice and the case law of the European Court of Justice, ends up building a rather unpredictable legal framework. This risks unreasonably undermining both member States' legislative choices in fields not necessarily falling under an EU competence, and undertakings' legitimate expectations. For reasons of both time and space, I will frame this written contribution under a somehow narrower perspective, by addressing the interpretation of the effects on trade clause as a clear example of how giving too much discretion to the interpreter (basically, but not exclusively to the Commission) risks overexposing EU State aid law, and puts at risk far more important goals of the European integration.

In the next paragraph I will first of all try to put the inherent vagueness of the notion of State aid as resorted to by art. 107 TFUE in its overall framework, shortly highlighting some pros and cons of a vague notion in this field (¶ 2). Then, I will address the presumption of interstate trade effects, recalling first of all some of the cases in which that presumption was originally affirmed (and worked properly) (¶ 3), to highlight then

two exemplary cases where this approach proved extremely problematic (¶ 4). In the next paragraph, I will try to signal some consistency issues arising from the case law where the effect on trade plays not the usual substantive role, but a procedural one (¶ 5). As I will show, any possible explanation of the different approaches based on a formal distinguishing between substantial and procedural applications would be just misleading. If one looks just a bit under the surface of the formal appearances, a unifying fil rouge emerges: that of giving green light to the most extensive application of EU State aid law. In the end, however, using State aid law as a *passepartout*, permitting EU law (and the Commission in particular) to have a the largest possible say in framing member State choices is rather problematic as it runs counter some fundamental, structural principles upon which the European integration process rests (¶ 6). *En guise de conclusion*, I'll try to make the case for a form of rule of reason to be adopted in this field, too (¶ 7), to avoid allowing room to Europscepticism.

A caveat before continuing: the reader will not find here a systematic and in-depth analysis of the relevant practice and case law, and…*surtout pas* an exegetic and apologetic one, but just a line of (somehow piquing) arguments based on some cases I found particularly interesting (and problematic). Lots of manuals, treatises, articles and… Commission's guidelines will however help the reader restoring faith in "*dell'umana gente le magnifiche sorti e progressive*"[1].

2. VAGUENESS OF THE STATE AID NOTION: PROS ANS CONS

The starting point to be stressed is the inherent vagueness of the concept of State aid included in art. 107 TFEU: it is surely a legal concept, but it is also a political one, in that so much discretion is left to the interpreter (in general, see Piernas López, 2015). This state of things has, of course, both "pros" and "cons".

That vagueness ends up giving the Commission a very wide margin of appreciation in deciding its enforcement priorities. No wonder, therefore, that it is in the Commission's interest to leave the State aid concept an open one, in order to be able to adapt it to possible modifications in member States' practices that might be detrimental to the good functioning of the internal market. Along the same lines it is well understandable that, at least to a certain extent, the General Court and the Court of Justice acquiesce to that vision. It may be in fact a sound approach to leave the controller of such a complex and ambitious project as the internal market some space of manoeuvre. That may sound all the more reasonable when the public body entrusted with that control is also called upon to balance the internal market goals with different ones, thus giving green light to member States' choices rendering the …playing field rough, rather than levelled.

The problem with maintaining a too big marge in the definition of what State aid is, however, manifold.

A non-exhaustive appraisal of the "cons" starts with the hollow linkage between the State aid law enforcement practice of the Commission and the internal market goals: very often the EU State aid control appears to be meant as a tool to modernize (i.e. render more free market oriented) member States' policies, giving rise to the delicate situation where a (*de facto*) non-democratically accountable institution substitutes its discretionary choices to the ones of (at least partially) democratically-accountable

[1] «Dipinte in queste rive / son dell'umana gente / „Le magnifiche sorti e progressive" » [„ Depicted on these hills / are the human race's / ‚Magnificent and progressive fate'. "]. Giacomo Leopardi, Canti, 1831, Canto XXXIV, La Ginestra (The Wild Broom), where the Poet hironically refers to the ruins of the ancient roman towns annihilated by the Vesuve. The translation of the verses here is that of Willet (2015).

national legislators and governments. That list continues with the disturbing possibility that the Commission chooses not to step in *ex ante* and clarify its priorities in normative or para-normative acts, but to keep its choice intact for the more or less casual emerging of a "good" case from a complaint or even a national court request for information: a sort of... angling the State aid case[2] – a kind of fishing that would be different from the "fishing expedition" of 101 enforcement cases,[3] but would still be somehow problematic, in terms of legal certainty.

That list of "cons" is further supplemented by the non-exclusive character of the public enforcement side of State aid law, which makes the non-foreseeability of the State aid character of a given national measure even more disturbing, as it may leave its application in the individual case not to the political discretion of the Commission, but to the technical discretion of a national court: whereas the former is submitted to some form of political accountability, this is (and should not be) the case of courts.

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.

3. THE INFLUENCE ON TRADE BETWEEN MEMBER STATES CONCERNING LOCAL TAX REGIMES: THE LANDMARK CASES

The risks inherent in a too vague concept of State aid are in my view confirmed by the Commission's practice, and by the EU courts' case law, concerning the requirement that a measure, in order to be classified as State aid under art. 107 TFEU, should affect trade between member States, thus risking to disrupt the smooth functioning of the internal market.

When is trade between member States affected?

Essentially, one can rely on the recurring *dicta* of the ECJ, consolidated in the Commissions' Notice on the Notion of State aid of 2016, to affirm that "where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid".[4]

Now, one is surely at ease to find such a principle applied to schemes inherently affecting, because of their object or of their reasonably foreseeable effects, the internal market competitiveness of a given sector (by favouring an individual big player, or a national industry considered as a whole). That was actually the case in *Philip Morris*, a leading 1980 case where that principle was clearly affirmed. The Dutch measure involved,

[2] Imagine that you go angling along the river: you just sit down there, relax and, well, if the reels start turning, you got something! And imagine you take anything gets caught on you hook, no matter whether big fish or not, good or less good, just for the sake of telling friends you've got a great day at the river...

[3] For what might be fine in private enforcement cases in some jurisdictions is not necessarily admitted in public enforcement ones in the EU. Cf., on one side, the volume edited by Basedow (2007), in particular for the reference to the US Supreme Court dictum in *Hickman v Taylor* (Basedow, 2007, p. 71); on the other side see Court of Justice of the European Union, judgment of 18 June 2015, Case C-583/13 P *Deutsche Bahn*, paras. 55-60. For an overall assessment see a paper by Michalek (2014).

[4] European Commission, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19 July 2016, pp. 1-50, para. 190.

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in fact, granted a premium for major investment projects, and it was applied to a project involving the actual increase of cigarettes production in that State by 13%, thanks to an increase by 40% of the production capacity of the local subsidiary of a tobacco multinational.[5]

One is moreover convinced by the relaxing of statement of reasons requirements relating to actual effect in *Boussac,*[6] because the peculiarities of that case rendered evident that a real risk of perturbing the internal market was there: *ad hoc* subventions benefitting the third largest French textile producer had reached by the time an amount of almost 1 billion ECU…

Another situation of straightforward application of that principle is that of *Unicredito Italiano*, a 2005 judgment rendered in a case involving a major tax reduction for State controlled banks entering merging operations, giving rise to a selective advantage capable of reaching a theoretical amount of 2.7 billions euros: such an advantage, in an area of operation where internal market operations are routine, is clearly capable of affecting trade between member States.

4. …AND TWO EXAMPLES OF HOW THAT PRACTICE JUST…TURNED SOUR

A completely different thing, however, is to find that *dictum* referred to by the Commission in cases where the possibility that the interstate trade be affected is essentially theoretical, and to continue finding justifications to such an approach in the relevant case law, based on a presumption that becomes rather difficult to sustain.

A good example of such a mechanical application is the case of the social security relief for firms having their operative seats in the Venetian lagoon.[7] According to the applicable Italian legislation, small enterprises based in the islands of the Venetian lagoon were granted a reduction in their social security charges, taking into consideration the high costs they face because they do business in such a complex environment. In that case, the Commission qualified the relevant scheme, considered on its general terms, as a State aid regime, and that on the basis of a general presumption of involvement of the beneficiaries in the inter State trade. On that basis, however, the Commission found it appropriate to proceed to an individual analysis for some municipal undertakings benefitting that measure, and excludes any effects on the intra-Community trade. All's well that ends well? Not really, because at the same time the Commission did not find it necessary to proceed to the same analysis for other undertakings and sectors allegedly in identical situations,[8] and the ECJ found that all that posed no problem, as any "false positive" cases could essentially be … discovered and corrected in the recovery phase.[9]

[5] Court of Justice of the European Union, judgment of 17 September 1980, Case 730/79 *Philip Morris v. Commission*, para. 11.
[6] Court of Justice of the European Union, judgment of 14 February 1990, Case C-301/87 *France v Commission*, para. 33.
[7] European Commission, Commission Decision of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos. 30/1997 and 206/1995, 2000/394/EC (notified under document number C(1999) 4268), OJ L 150, 23 June 2000, pp. 50-63 (hereinafter "*Venetian lagoon decision*").
[8] *Venetian lagoon decision*, para. 49, according to which "competition and trade between Member States is affected, in that all companies benefit from reductions in social security contributions, including those operating in *areas where there is trade* between Member States" (italics added).
[9] Court of Justice of the European Union, judgment of 9 June 2011, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato 'Venezia vuole vivere'*,: paras. 105 et seq.

Another example of the mechanical application of the presumption of effects in the interstate trade, that shows all too well some cons of the indiscriminate application of the interstate trade presumption, is that of the Italian earthquake damages scheme against which the Commission issued a negative decision in 2015.[10] In what was a State aid "angling" decision,[11] an earthquake damages scheme - involving a temporary reduction of the general taxation viz. social security charges for undertakings having establishments in the geographical areas actually affected by a disruptive earthquake that caused more than 300 deaths and 80.000 displaced – was declared to be State aid incompatible with the internal market. In that case, again, the Commission considered that the tax and social security temporary reductions regime at stake may affect trade between member States as it "cover[ed] undertakings that can be supposed to be involved in trade between Member States".[12]

The unavoidable question raised by the consideration of similar cases of essentially local tax advantages regimes – besides the bold approach to local selectivity, which is *de facto* unchanged even after *Azores*[13] - is whether the influence on the internal market can continue being presumed.[14]

Can we just presume, as the Commission essentially did in the venetian lagoon case, that hotels and bars and groceries in the historical city centre of Venice islands are in competition for the general touristic market of the EU, without analysing whether this is true, whether that offer is really substitutable with, say, that of Costa Brava, or Vienna or Berlin?

More than that. The real question is whether it is tolerable that the Commission practice on State aid regimes be essentially erratic, on the illusory assumption that everything can still be redressed on the next step – that of the recovery order

[10] European Commission, Commission Decision (EU) 2016/195 of 14 August 2015 on State aid measures SA.33083 (12/C) (ex 12/NN) implemented by Italy providing for reduced taxes and contributions linked to natural disasters (all sectors except agriculture) and SA.35083 (12/C) (ex 12/NN), implemented by Italy providing for reduced taxes and contributions linked to the earthquake in Abruzzo in 2009 (all sectors except agriculture), (notified under document C(2015) 5549), OJ L 43, 18 February 2016, (hereinafter "Abruzzo earthquake decision").

[11] In the sense I tried to evoke in the final part of para. 2 above. Here the Commission just jumped on a... possible case revealed by a request for information of a national court, arising from a case that showed no real (nor reasonably foreseeable) connection with the internal market.

[12] *Abruzzo earthquake* decision, para. 111.

[13] Court of Justice of the European Union, judgment of 6 September 2006, Case C-88/03, *Portugal v. Commission*. The conditions set to accept that the reference framework be infra-national, set the bar very high. It is in fact required that the local government adopting the tax measure enjoys both constitutional and economic autonomy. This means that an inextricable link is set between local tax measures and federalism, so that a centralized government decision to mold its tax or social security legislation according to different areas is in any case selective.

[14] A connected but slightly different question seems to be that of affirming a principle according to which "there's no threshold or percentage below which it may be considered that trade between Member States is not affected" (Court of Justice of the European Union, judgment of 20 September 2003, case C-280/00, *Altmark Trans*, para. 81; judgment of 14 January 2015, case C-518/13, *Eventech*, para. 68). Once that said, it remains in fact for the judge to establish whether that effect is there or not: one thing is to say that such an effect "is conceivable" (*Eventech*, § 70), a completely different one is to say that is presumed. The different procedural setting in which the principle plays in both *Atlmark* and *Eventech* makes the finding of the effect depending on the procedural rules of the forum. On the shift between an initially rigorous approach, and a subsequent relaxed attitude both in the Commission's practice and in the ECJ case law on these two connect issues, and on the links of this shift with the changing policies pursued by the Commission in the field, see work of Piernas López (2015, p. 12 et seq.).

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implementation before national authorities and courts.[15] That was, however, the way the ECJ chose to go through in the *Venetian lagoon* case: we should content ourselves that, before ordering a recovery based on such a regime decision, national authorities should assess "*in each individual case, whether the advantage granted was, in the hands of its beneficiary, capable of distorting competition and affecting intra-Community trade…*".[16]

I don't think this is a workable model.

Despite the "modernization", in fact, national authorities and courts essentially lack the expertise to go through such complex assessments. Essentially, it is the same ECJ case law that stresses the opportunity to concentrate State aid litigation before the General Court, as national courts are not the most appropriate forum to discuss such a complex and politically sensitive matter, in particular when validity issues might arise: the ECJ Grand Chamber decision in *Georgsmarienhütte* goes strikingly in that direction.[17]

5. FURTHER ON EFFECTS ON TRADE: SOME CONSISTENCY ISSUES

Moreover, if one looks at other segments of the case law, a question of consistency arises.

Why should the application of such rules be based on (highly unlikely but still) presumed effects in the Venetian lagoon case, while in *Greenpeace Energy*[18] the same General Court and ECJ take an extremely rigorous approach, and ask the complainants - a group of small renewable energy community producers – not just to show the foreseeable (indeed, almost certain) consequences in terms of modification of output prices in the highly interconnected market for electric energy, but to further define the relevant market, and to show the actual consequences of the contested measure in terms of modification of their market share, when it comes to check their legitimation to attack a Commission decision approving the aid to a giant nuclear project in another member State?

We are dealing in both cases with competition and internal market law rules, as State aid law is part of the more general framework of competition law of the EU and has to be construed as a tool to ensure the proper functioning of the internal market.[19] Effects should therefore matter more or less the same way in both cases. To be provocative, one could ask whether the Commission and the EU Courts are influenced by the … culture of the member State or area to which their decisions apply: competition and internal market law would then consequentially be applied as farce in the venetian lagoon in homage to Goldoni' *Baruffe Chiozzotte,* while when applying to some German renewables *Papagenos* those same rules would transform to adapt to the mysteric drama atmosphere, in homage to Schikaneder and Mozart's *Zauberflöte*!

An easy, and maybe technically correct (as of today) answer to this piquing question, could be that the very different approaches followed in the cases I am referring to are justifiable on the basis of the different goals they serve in the respective litigation: the definition of the applicable substantive law in the first case, the procedural law issue

[15] On the recovery phase see in general the exhaustive study of Merola (2018), in particular on the non-satisfactory state of the matter as regards the recovery aids on the basis of regime decisions (Merola, 2018, p. 147 et seq.).

[16] Court of Justice of the European Union, judgment of 9 June 2011, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato 'Venezia vuole vivere'*, paras. 105 and 113-115.

[17] I shall refer to my analysis of that decision (Cortese, 2020, p. 259 et seq.).

[18] Court of Justice of the European Union, order of 10 October 2017, Case C-640/16 P *Greenpeace Energy*.

[19] On the need to read State aid law as an internal market law tool see the work of Biondi (2010).

of admissibility of an individual action for annulment of a decision of direct and individual concern for the complainant in the second.

Still, that distinction has not always been relevant, and justifying the different approach on that basis is therefore tantamount to avoid the problem. In fact, before *Boussac* the Court *did* require the Commission to define the relevant market and the effects on the interstate trade in the statement of reasons of its State aid decisions (see Piernas López, 2015, p. 193).

Furthermore, if one looks at some other developments in the area of admissibility of individual actions of annulment against State aid decisions, a further element of perplexity emerges. If the effects to be proven were so concrete and specific in *Greenpeace Energy*, why then the question of admissibility in the *Scuola Montessori* case was again resolved on the basis of a presumption of interstate effects? It is perplexing to see such an automatism operate in a case where not only the beneficiaries and the complainants of the contested measure, but also all the 80 parties having presented observations in the formal procedure, had their seat in a single member State, and none of them had any actual connection with a different member State.[20]

Surely again, the very different approaches followed in the *Greenpeace Energy* and *Scuola Montessori* cases are technically justifiable on the basis of the different kind of litigation in which the issue of admissibility arises. In the former case the Court dealt with an action for annulment brought by an individual against a compatibility decision in favour of an *ad hoc* aid measure. Therefore, the admissibility had to be assessed on the basis of the existence of a direct and individual concern for the complainant.[21] In the latter case, however, the Court was confronted with an action for annulment brought by an individual against a (*non-recovery*) regime decision, and it chose somehow astonishingly to apply the different admissibility test introduced in Lisbon for regulatory acts.

Nonetheless, if one considers all the above-mentioned cases from a broader perspective, the question of consistency of the approaches followed is there. Sometimes the effects in the interstate trade are presumed, even in cases where there is little evidence of such effects, and the risk they can actually produce is particularly limited, due to the temporary dimension of the contested scheme, or to the actual compensatory nature of that scheme, or due to the actual limitation of the markets concerned, which do not attract any activity from outside the interested local area.[22] Sometimes, to the contrary, a clear risk of such effects is not considered enough to trigger the only real chance of control over a Commission decision.[23]

6. STATE AID LAW AS A *PASSEPARTOUT*?

What unifies the cases shortly discussed above, however, is the net outcome, which is paradoxically always the same: it gives free way to the effective application of EU State aid law. This is a hardly surprising trend, but still a problematic one, in light of many principles that should govern the use of public powers in the EU.

[20] Court of Justice of the European Union, judgment of 6 November 2018, Joined Cases C-622/16 P to C-624/P, *Scuola Elementare Maria Montessori*.

[21] Cf. the criticism I raised, in the framework of a wider analysis of the access to court (Cortese, 2020, p. 267 et seq.).

[22] See, to different extents, the Italian natural disasters' compensatory measures; the Venetian lagoon case; the fiscal reduction for charities in Italy, all referred to above in this contribution.

[23] I refer to the order of the Court of Justice of the European Union of 10 October 2017 in Case C-640/16 P Greenpeace Energy, referred to above in this contribution.

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In the end, one could say, State aid law becomes a tool permitting the Commission to participate in the shaping of member State decisions in fields where harmonization tools are not so easily available. In particular, the Commission is given a say on how member States frame their fiscal policies to pursue general interests which do not in principle fall under the EU competences; in any case, it becomes possible for the Commission to interfere with such choices well above the level of intervention of the EU concurrent competences[24] and without any need to prove a breach of internal market rules.

To remain in the areas covered by the cases referred to above, the approach described above determines the involvement of the Commission in fundamental national choices relating, inter alia, to the following: the adoption of policies to foster socioeconomic recovery after natural disasters; a choice of favour for charitable or religious activities of NGOs;[25] the fostering of economic activities in islands which are in part depopulating areas and in part the object of aggressive gentrification phenomena; the choice of the mix between renewable energies and nuclear energy, as well as the role of consumers' communities in the switch to an environmentally sound model of development …

Now, the fact that such a development has not been covered up, but has been substantially endorsed by the Commission in its policy documents[26] does not detract from the fact that such *procedere* has significant shortfalls in terms of opportunity, in light of some fundamental principles governing the EU: subsidiarity, and proportionality, just to start with. That's why the generalized recourse to the interstate effect presumption, which is the magic wand transforming State aid control in a *passepartout* for the Commission to influence national policies, should definitely leave place to a more balanced approach.

7. EFFECTS ON THE INTERSTATE TRADE: BETWEEN PRESUMPTIONS AND … RULES OF REASON

In order to revert to a more balanced and acceptable approach to State aid law, it is for the EU Courts to stop understanding the effect on trade between member States as just a fictional element of the State aid notion. Just as in *Keck* the ECJ finally conceded that not any commercial measure is relevant under art. 34 TFEU, it is time to concede that not any selective advantage granted by the State on the local dimension is capable of triggering the application of art. 107 TFEU.

What is needed is a kind of a rule of reason approach, based on the need (for the Commission, or any private enforcer) to prove a sufficiently real threat to trade in the internal market trade.

This does not mean doing away with any presumption of interstate effects. Such a presumption cannot, however, be framed as a general one, but should be based on some peculiarities of the relevant cases.

I refer to cases where some factual elements could suffice to presume an internal market effect. This can be the case when the place of establishment of the

[24] On the ineffectiveness of such an approach in the tax law area see Graetz & Warren (2006).
[25] Not involving an element of discrimination capable of harming the internal market functioning. For the ECJ case law dealing with cases where such an element was there, see Faulhaber (2014).
[26] Think of the 2005 State Aid Action Plan, referring openly to the necessity for State aid law to induce member States to prioritize choices, when using taxpayers money – European Commission, State Aid Action Plan - Less and Better Targeted State Aid : A roadmap for State Aid Reform 2005-2009 (Consultation document), (presented by the Commission) {SEC(2005) 795}, COM/2005/107 final, 7 June 2005.

complainant / negatively affected undertaking lies in a different member State than the beneficiary of the advantage. Further, a presumption might be drawn from the fact that either the negatively affected competitor(s) or the beneficiary are controlled by a mother company established elsewhere. Again, it would be wise to presume effects on the interstate trade when there's actual evidence that the beneficiary is either involved in interstate trade, as the relevant market extends over several member States, or when it enjoys a non-negligible market position in a single member State geographical market.

All such elements could justify a presumption that an interstate effect is there, and leave to the other interested party the burden to rebut the presumption.

To the contrary, I feel that a stronger burden of proof should be required in other cases, where no such *prima facie* elements justify the operation of a presumption.

The reasons are quite evident, if one interprets the relevant treaty provisions in light of the principles of subsidiarity, proportionality and, in the end, democracy: unless the Commission (or a private enforcer) is capable of showing a strong case of a real risk of internal market perturbation, the better place to weigh *pros* and *cons* of using the public money is not in Brussels, nor in Luxembourg, nor in a court of justice of a member State, but it is rather where the taxpayers send their elected representatives to decide such measures.

In any case, for what concerns the role of the Commission as an independent EU authority in this field, any intervention in cases not clearly giving rise to internal market concerns should be thoroughly discussed from a political point of view in the college of Commissioners.

If incorrectly managed, in fact, State aid tools can be dangerous for the European integration like magic for a *Zauberlehrling*: should we fear more the risk of overcompensation of some marginal undertaking established in an underdeveloped Italian region hit by an earthquake… or the political earthquake the Commission provokes imposing the restitution of the individual aid possibly disguised under the Italian compensation regime? Does it make political sense to offer such an assist to anti-European populist movements?

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POST-MORTEM PROTECTION OF HUMAN DIGNITY: GERMAN SUPREME COURT OF JUSTICE CASE LAW ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW / Manfred Dauster

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Abstract: *After a long development, Rome Statute represents a codification of customary international humanitarian law. Despite of her own national history with respect to war crimes, Germany finally promotes prosecution of offences against crimes as set forth by the Rome Statute through national authorities based upon the German Criminal Code of Crimes against International Law which mirrors the Rome Statute. Desecration of dead adversaries has become outraging practice in armed conflicts of international and non-international character. The German Federal Supreme Court of Justice in its case law has stated the criminal illegality of such wrong-doing by not only referring to the Rome Statute, but either implementing international case law when it comes to desecration of corpses according to Section 8 paragraph 1 No 9 of the German Criminal Code of Crimes against International Law.*

Key words: *Post-Mortem Protection; Human Dignity; International Criminal Law; Rome Statute; German Criminal Code of Crimes; International Humanitarian Law*

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1. INTRODUCTORY REMARKS

1.1 A Short Look back into History

Since the Federal Republic of Germany came into existence in 1949, German courts were challenged to adjudicate war crimes as a legacy of the former Third Reich. Working off this legacy has not come to an end yet. A 93 years old German citizen Bruno D. is currently sitting in the docks of the Hamburg regional court[1] (Landgericht Hamburg), where he faces trial as of the part he played in the Stutthof concentration camp[2] during war times as a member of SS (= Schutzstaffel).

[1] Case no 617 Ks 10/19 jug. The trial is being scheduled until May 2020. The defendant was juvenile at the time when he allegedly committed the crime. Therefore, the trial is not public as foreseen by Section 48 paragraph 1 of the German Law on Juvenile Courts (latest promulgation of December 11th, 1974 [BGBl. 1974 I p. 3427]).

[2] Situated in the vicinity of Gdańsk (Poland).

Resuming all those years of searching the truth in the Nazi history of Germany, the NS trials before German courts have unfortunately not been a full success, e. g. the perversion of the German criminal judiciary into a key tool of the NS terror regime remains a dark whole. None of the judges or of the prosecutors in prominent NS judicial or prosecutorial positions have been ever held responsible or have faced trial (Müller, 2014). History of German NS prosecution and adjudication is a different and very complex story which has filled entire libraries.[3] Even the worst NS law academic Carl Schmitt who famously evolved constitutional law under the Führer's will only lose his position as professor (see Mehring, 2009, p. 304). Many of his or his NS colleagues' disciples went on in the Federal Republic of Germany as law professors in prominent positions at universities (Mehring, 2009, p. 504). With view on the NS history of the personnel of the Federal Ministry of Justice ([nowadays] and Consumer Protection) see work of Görtemaker & Safferling (2016), with respect to the personnel of the Federal Foreign Office see work of Conze, Frei, Hayes, Zimmermann (2010); regarding the personnel of the High Court of Appeal at Munich see Ludyga (2012). Ludyga unfortunately did not go into the post-NS-time of the High Court of Appeal.

In the frames of this paper, there is not enough place or space to elaborate on that issue in detail. However, summarizing the post-war history of Germany it may be said that unlike other countries having been part of the atrocities, which happened under the rule of Nazis and allied fascist partners, Germany has held herself responsible for that legacy.

However, the rewards for having worked off the really sinister side of the 20th century's history have to go to others. The Nazis and their allies committed their atrocities under the watchful eyes of global observers, especially the Allies. Even they had put their heads in the sand for a (too) long period of time when it came to save endangered life of Jewish people from extinction (e.g., Bajohr & Pohl, 2006).[4]

When the Quadripartite Agreement of August 8th, 1945, was set up to regulate German affairs under the Allies' responsibility "for Germany as a whole"[5], the Allies also established the London Statute, which set up the Nuremberg Military Tribunal (Berber, 1969, pp. 252–261; Satzger, 2018, § 11 recital 5). The London Statute and the Nuremberg Court applying the principles of the Statute to "major figures of the NS-Regime", nowadays known as the "Nuremberg Principles".[6] They may be regarded as the corner

[3] See footnote 1 (see also Maas, 2017).

[4] Regarding the Roman-Catholic Church see Goldhagen (2002).

[5] Erklärung in Anbetracht der Niederlage Deutschlands und der Übernahme der obersten Regierungsgewalt hinsichtlich Deutschlands durch die Regierungen des Vereinigten Königreichs, der Vereinigten Staaten von Amerika und der Union der Sozialistischen Sowjet-Republiken und durch die Provisorische Regierung der Französischen Republik vom 5. Juni 1945 (Dahm, Delbrück, & Wolfrum, 1989, p. 14).

[6] A Nuremberg Principles Academy has been established on November 22nd, 2004 in the city of Nuremberg (see International Nuremberg Principles Academy, 2014). The purpose of the foundation according to Section 2 of the Statute is (1) *"to promote scholarship and research, and furthermore to promote education. In particular, it will endeavour to implement what are known as the "Nuremberg Principles," and to promote international criminal law and support the struggle against impunity for the most serious crimes that are of concern to the international community as a whole. (2) To achieve this goal, the Foundation is to promote the legitimacy, acceptance and legality of international criminal law. It will achieve this goal in particular through educational programmes, through research, and will support the implementation through scholarly consultation. It is intended in particular to become an international forum for practitioners and theoreticians in international criminal law, as well as for diplomats, multipliers, and civil society, on current questions of international criminal law. The purpose of the Foundation is to be achieved in particular by the following measures: - Specially tailored programmes of training, consultation and advanced education for groups of professionals working in international criminal law;*

stones and the genesis of modern international criminal law. However, the Nuremberg trial and its prosecution were seen controversial (Werle, 2018, Einl. VStGB rec. 8).

Less prominent NS perpetrators were dealt by Military Courts in the four occupied zones of Germany (see Werle, 2018, Einl. VStGB recital 10) or by German courts with authorization of the Allies only.[7]

Nuremberg Principles as customary rules of law did not play major role in national court proceedings of other countries as well, except in Israel (Eichmann trial), France (Barbie trial) and Canada (Finta trial) (Werle, 2018, Einl. VStGB recital 11 footnote 32). It is to be noted that German courts in trying NS-crimes related cases never applied the „Nuremberg Principles" in their domestic arena and referred to common crime regulations as set up by the German Criminal Code of 15 May 1871.[8] In this context, it may be worth discussing whether the principle of "nulla poena sine lege"[9] really hindered German authorities to apply "Nuremberg Principles" retroactively when German courts adjudicated NS atrocities (Ambos, 2018, §1 recitals 11-12; Satzger, 2018, pp. 205–208; 267–268; Werle, 2018, Einl. VStGB recital 21).

Due to biological developments, this kind of discussion is not anymore of practical or forensic relevance. Possible perpetrators of Nazi crimes living unidentified in Germany have aged up and it is quite improbable that new indictments might reach the courts. We are experiencing the beginning of legal history. It is noteworthy again that other post-conflict countries were faced exactly to the same legal problem of "nulla poena sine lege" but reached a differing solution in a different constitutional background. Criminal Code of Bosnia and Herzegovina, which turned the Rome Statute regulations on international crime into national Bosnian law in 2003, applied those rules although respective crimes against international humanitarian law had been committed during the wars in Yugoslavia from 1991 until 1995 and prior to the entry into force of the BiH CC.[10] For view of the activities of the War Crime Chamber of the (State) Court of Bosnia and Herzegovina see Ivanisevic (2008); Kreso, Kreho, Vukoje, & Jukić (2015); Dauster (2019, p. 76).

At the beginning of the 50ties of the 20th century, the Allies slowly withdrew and permitted Germany to prosecute war criminals by her own national authorities. While Germany attempted to comply with her post-Nazi duties, on the international level, various contributors tried to reach consensus on codifying crimes against International

- Conducting conferences and symposia in the area of international criminal law and related fields;
- Promoting and conducting research work in international criminal law and related fields;
- Projects for education in human rights;
- Organizing discussion forums on current issues in international criminal law.
(3) The measures listed in subsection 2 above may be carried out in alternation or cumulatively. If the financial situation so requires, the Foundation may limit itself to a single measure. (4) The Foundation may pursue its purposes both in Germany and in other countries. In so doing, it is to collaborate with other institutions with a similar focus."
The foundation is a non-profit civil organization under German Civil Law, founded by the Federal Republic of Germany, the Free State of Bavaria and the City of Nuremberg.

[7] E. g. Bayerisches Gesetz Nr. 22 zur Ahndung nationalsozialistischer Straftaten of May 31st, 1946 (BGBl. Teil III no 450-2c), Hessisches Gesetz zur Ahndung nationalsozialistischer Straften of May 29th, 1946 (BGBl. Teil III no 450-2h); Bremisches Gesetz zur Ahndung nationalsozialistischer Straften of May 27th, 1946 (BGBl. Teil III no 450-2e) and Württemberg-Badisches Gesetz zur Ahndung nationalsozialistischer Straftaten of May 31st, 1946 (BGBl. Teil III no 450l).

[8] RGBl. p. 127, in the version, which had been effective on the day of unconditional surrender on 8 May 1945.

[9] Section 1 CC; Article 103 paragraph 3 BL; BVerfGE 71, 115; 73, 235; see also Fischer (2019, Einl. recital 20), Hecker (2019, § 1 recital 9), von Heintschel-Heinegg (von Heintschel-Heinegg, 2015, § 1 recital 11)].

[10] The problems related are complex; see ECHR case no 2312/08 and 34179/08 Maktouf and Damjanovic vs. Bosnia and Herzegovina Judgement of July 18th, 2013 with concurring opinions.

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Humanitarian Law (hereinafter "IHL"), but those attempts all failed to become effective (Werle, 2018, Einl. VStGB recital 11)[11] until the days when Europe and the rest of our world faced new international crimes in dimensions that everybody of us thought of having had become part of humanity's dark history.

1.2 Moving forward to International Criminal Law

In 1991 in the decline of communist regimes all over Europe, The Federal Socialist Republic of Yugoslavia (hereinafter "FSRY") began to dismantle. The process began in Slovenia - briefly followed by Croatia. Both countries sought independence from Yugoslavia and declared their independent sovereignty in June 1991. The independence process resulted in wars[12] which affected almost all former Yugoslavia. The conflict reached the boiling point in Bosnia and Herzegovina.[13] Strange enough and as a sinister remainder: Ordinary citizens of this world were sitting in their parlours and could watch on TV for the first time the war crimes committed "live": e. g. snipers shot civilians to death in besieged Sarajevo or women and children were segregated from men in Srebrenica before the men in July 1995 became victims of the first European genocide since 1945.[14] At the time, Cold War had had already become history and this new era impacted the voting situation in Security Council of United Nations. The permanent members of the council used their veto more wisely as it was the case prior to the collapse of the iron curtain. Faced to brutal killings and to other serious crimes having been committed in the conflict zones of FSRY, UN Security Council established the International Tribunal for the Former Yugoslavia (hereinafter "ICTY") and provided the new international judicial institution for material criminal law, which formed the basis to prosecution and adjudication of war crimes "having been committed between 1 January

[11] When interested parties vainly discussed codifications of "rules in war", atrocities globally kept on happening. Prior to and in the war of independence of East Pakistan, today Bangladesh, unbelievable cruelties were committed in 1971 when Pakistan's militaries oppressed the Awami-League movement for Bangladesh's independence, and those crimes remained unatoned. Some years later, Red Khmer in Cambodia assumed power. Between 1975 and 1979, when Vietnam militarily intervened and put an end to the regime, the Red Khmer mass-murdered up to 2.2 million Cambodians in the attempt to turn back Cambodia into a purely agricultural society. These are only few examples of violations of Humanitarian International Law, which happened under the watchful eyes of International Community. International Community, however, was not able to terminate the cruelties and to set up a system of prosecution. It was the "Cold War", which split the International Community into two parts, which both were busy defending "their interests". Nowadays, same phenomena can be observed when mass-violations of human rights are happening without any response or intervention of the "big" global players or the International Community as a whole, despite of the UN's engagement for the Rule of Law in post-conflict and fragile States (see Marshall, 2014). With respect to the history see also Ambos (2018a, § 6 recitals 3-20).

[12] Slovenia could reach cease of fire after a 10-day-armed conflict. Croatia was at war between 1991 and 1995 (Calic, 2016, pp. 565–605; Hösch, 2002, pp. 266–297).

[13] By referendum of February 29th/March 1st, 1992, the majority of voters voted for independence of BiH. On March 2nd, 1992 BiH declared her independence and seceded from Yugoslavia. As the Serbian part of the population did not agree on the newly established State of Republic of Bosnia and Herzegovina, armed conflicts broke out. The BiH-war ended on December 14th, 1995, when the so-called Dayton Peace Accord was signed in Paris.

[14] ICJ Judgement of February 26th, 2007 (BiH vs. Serbia and Montenegro) I.C.J. Reports 2007, 43 (no 179) also clarifying that genocide is not a crime which only individuals can commit. It is rather an offence which a State, under public international law, can commit. This comment was exactly the point of view that the Nuremberg Military Tribunal presented in its verdict (Fink, 2015; Werle, 2018, Einl. VStGB recital 7). See also BGHSt 46, pp. 292.

1991 and a date to be determined by the Security Council after restoration of Peace".[15] The establishment of such an international judicial body as a sub-agency of the Security Council was unheard and unprecedented.[16] After ICTY having been established, the Rwanda Civil War drew the world's attention to Africa, especially when genocide on Tutsi, Twa and moderate Hutu people was committed between April 7th, 1994 and December 31st, 1994. As a consequence, UN Security Council installed the "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the territory of neighbouring States, between 1st January, 1994 and 31st December, 1994", briefly the International Tribunal for Rwanda in Arusha[17] (hereinafter "ICTR"). Those two steps of UNO focused on Yugoslavia and Rwanda represent generally the turning points in a decades-long struggle on codifying crimes against "Rules in War" (Werle, 2018, Einl. VStGB recital 13). That turn finally resulted in the Rome-Statute[18] of July 17th, 1998, which upon entering into force, established the International Criminal Court (hereinafter "ICC") at The Hague/Netherlands (Geiß & Bulinckx, 2006). It should be noted that the ICC, unlike ICTY and ICTR, is not an UN body but an independent new international organization with its own legal identity[19] and with criminal jurisdiction subsidiary vis-à-vis national war crime prosecution which precedes.[20]

Germany supported and favoured the efforts towards IHL codifications and towards a permanent international war crime court very much; and, besides Japan, she is still contributing most to the court's budget.[21] So, Germany became one of the founding and signatory States when the Rome Conference enacted the Statute, which entered into force on 1st July 2002. It is necessary to briefly comment on interrelations between the public international and national laws. In the international and national legal theory, there is a long-lasting discussion going on related to such correlation between the public international law and the national law of the land (Berber, 1975, § 10 with the comment that the discussion on correlation is not having any practical effect; Geiger, 2018, § 7; Sauer, 2018, § 6; Schorkopf, 2017, § 1 B; Seidl-Hohenveldern, 1987, pp. 132–142; Stern, 1977, pp. 353–354; Verdross & Simma, 1984, §§ 71-74). With view on Germany, Article 59 paragraph 2 sentence 1 of the German Constitution, the Basic Law of May 23rd, 1949 (hereinafter "BL"), follows dualistic views and requires for international treaties and other international arrangements affecting the matters of internal German legislation to be

[15] Resolution No 827 of May 25th, 1993. ICTY terminated its functions on December 31st, 2017. For the time after closure of ICTY as well as ICTR Security Council installed, by Resolution 1966 an "International Residual Mechanism" supporting both courts in resolving outstanding legal and other case related questions (Ambos, 2018a, § 6 recital 21; Satzger, 2018, p. 228).

[16] In particular, the right wing publicists and politicians in Serbia and later in Croatia also debated the courageous step of UN Security Council very controversially. The tribunal was criticized as a manifest of the "winners' justice", which was mainly directed against the Serb people. Later, when the ICTY's "completion strategy" was implemented by installing the War Crime Chamber at the Court of BiH, same arguments were used in order to discredit the national jurisdiction of BiH over war crimes. During the existence of ICTY, the tribunal was criticized because of the robust approaches which the Prosecutor, a body of the Tribunal, undertook in order to press countries, in particular Serbia, to extradite prominent figures like Slobodan Milosević, Ratko Mladić and Radovan Karadžić. Other voices finally raised the issue of the court's efficiency and long-lasting trials together with the costs incurred due to t the court's activities.

[17] Resolution no 995 of November 8th, 1994; (see also Williamson, 2006).

[18] UN Treaties Series vol. 2187 no 38544.

[19] Article 2 of the Statute (Ambos, 2018a, § 6 recital 25).

[20] Article 1 phrase 1; Article 4 paragraph 1 of the Statute.

[21] About 12 % out of about 145 Million Euros in 2018; (see also Ambos, 2018a, § 6 recital 30).

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transformed into national law by (a consenting) Act of parliament. By Act of Parliament of December 4th, 2000, Germany incorporated the Rome Statute into its national law.[22]

With regards to the ICC's substance criminal jurisdiction on genocide, crimes against humanity, war crimes and the crime of aggression[23] pursuant to Article 5 of the Statute and in view of subsidiarity of such international jurisdiction, Germany was called upon to enact adequate national legislation in order to preserve her preceding national jurisdiction on serious crimes as set up by the Statute. By Federal Act of 26 June 2002[24], Germany enacted "*Völkerstrafgesetzbuch*" (= Code of Crimes against International Law [hereinafter "CCIL"]), which is complementary to the German Criminal Code of 15 May 1871[25] (hereinafter "CC"). CCIL now represents the basis for German authorities to prosecute crimes from the Rome Statute, nationally. So far, Germany reclaims universal jurisdiction.[26]

1.3 Competent German Authorities for CCIL Crimes' Prosecution and Adjudication

Few words on the authorities of Germany taking care of war crime prosecution seem to be adequate: Germany has concentrated war crime prosecution on the Federal level. The Federal Prosecutor General and his office are challenged to conduct war crime investigations[27] and prosecution[28], while adjudication of such crimes is enshrined in the jurisdiction of High Courts of Appeal on the States' level, according to Section 120 of the Courts Constitution Act (hereinafter "CCA")[29] as first instance trial courts. Appeals against those High Courts' decisions (verdicts and other procedural decisions) are allowed and to be decided by the Federal Supreme Court of Justice[30] (hereinafter "FSCoJ") in

[22] BGBl. 2000 II p. 1393. See Ambos (2018a, § 6 recitals 22 – 33).
[23] Amendment to the Statute of December 15th, 2017.
[24] BGBl. 2002 I p. 2254 amended by Act of December 22nd, 2016 (BGBl. 2016 II p. 3150).
[25] Promulgated last version of 13 November, 1998 (BGBl. 1998 I p. 3322) with the last amendment by Article 2 of the Federal Act of 19 June 2019 (BGBl. 2019 I p. 844). CC remains applicable besides CCIL to which CC is supplementary. A criminal act committed e. g. in armed conflicts may represent a war crime according to CCIL and simultaneously murder according to CC. – Other countries applied a different methodology. Bosnia and Herzegovina e. g. that was mostly affected by war crimes committed during the Yugoslavian wars (the armed conflict was terminated by Dayton Peace Accord of 14 December, 1995). When the country had to prepare for replacing the ICTY in its so-called "completion strategy", Bosnia and Herzegovina enacted a new Criminal Code in 2003 (BiH Official Gazette no 3/03 [with recent amendments Official Gazette no 40/15]) and incorporated the Rome Statute material crimes in that new code. Parallel to this code, Bosnia and Herzegovina gave jurisdiction over war crime prosecution to the Court of Bosnia and Herzegovina (Dauster, 2006). A War Crime Chamber was established within the court and became effective in March 2005.
[26] Section 1 CCIL – regardless by whom and where such crimes were committed. With respect to the four major aims of CCIL see Werle (2018, Einl. VStGB recital 34). With regards to the universality of German jurisdiction see Ambos (2018b, § 1 VStGB recitals 1).
[27] In view of the Police, Germany has concentrated investigations within the Federal Bureau of Investigation by Section 4 paragraph 1 no 4 of the Act on the Federal Bureau of Investigation etc. of 1 June 2017 (BGBl. 2017 I p. 1354; BGBl. 2019 I p. 400). The Federal Bureau of Investigation itself concentrated this challenge within a Central Office on Combating War Crimes.
[28] Section 142a paragraph 1 sentence 1 of the Courts Constitution Act in the version published on 9 May 1975 (BGBl. 1975 I p. 1077 – last amended by Article 10 paragraph 6 of the Act of 30 October 2017 [BGBl. 2017 I p. 3618]).
[29] See footnote 18 (Dauster, 2017).
[30] FSCoJ is Germany's highest court in civil and criminal matters. Besides the FSCoJ, the German Constitution of 23 May 1949 established four more Supreme Courts, for Tax and Customs Matters (Bundesfinanzhof in München), for Administrative Matters (Bundesverwaltungsgericht in Leipzig), for Labor Matters (Bundesarbeitsgericht in Erfurt) and for Social Welfare Matters (Bundessozialgericht in Kassel). A Federal Supreme Court above all those highest federal courts was never established, although it was originally foreseen by the constitution.

Karlsruhe.[31] The review of verdicts by FSCoJ is not organized as a full appeal trial with new evidence.[32] The review is limited to issues of law. FSCoJ examines whether the first instance trial court has correctly applied procedural rules of the Criminal Procedure Code (hereinafter "CPC") when establishing the facts of the case, and whether the first instance court has correctly applied the invoked provisions of the Criminal Code to the facts of the case.[33]

2. CASE LAW

Case law of FSCoJ generally is setting up guidelines, which the Federal Prosecutor General and the High Courts of Appeal ought to take into account when they prosecute and adjudicate CCIL crimes. This presentation is limited to two guide-line-decisions of FSCoJ on post-mortem protection of human dignity of persons under the protection of international humanitarian law. Respective case law demonstrates FSCoJ's methodology in the theatre of interrelations between national and international "Rules in War". Each case in discussion will start with the established facts before the presentation turns into legal qualifications as set up by FSCoJ.

2.1. Case no 3 StR 57/17

In 2013, the accused departed to Syria in order to join the "armed jihad" there. In Idlib province in the Northwest of Syria he then joined a group of fighters, one out of so many, which were characterized by extremist Islamic ideology and which aimed to replace the ruling Assad-regime by an Islamic theocracy under the rule of Sharia. In April 2014, the group around the accused attacked a Regime checkpoint in the vicinity of the city of Binish and captured and subsequently killed two Regime soldiers. During or after the killing, the soldiers were beheaded and their heads were put on metal bars, which were arrayed in front of a school building in Binish. The accused then posed between the bars together with one of his co-fighters and was photographed. He then published those photos showing the gruesome scenery on the Internet.

[31] One of the FSCoJ's senates is seated in Leipzig. This second seat of FSCoJ in Leipzig may be explained by the historical background of the German court system, as FSCoJ is considered a successor of the former Reichsgericht, which the Courts Constitution Act of 27 January 1877 (RGBl. 1878 p. 41; the law entered into force on 1st January 1879) had established as Germany's Supreme Court on civil and criminal matters with its seat in Leipzig. When the German Reich collapsed and the unconditional surrender was signed on 8 May 1945, the Reichsgericht ceased its operation and was formally dissolved by Article 1 paragraph 2 of Law No 2 of the Military Government for Germany (Official Gazette No 3 [1945] p. 4). Germany's division during the Cold War hindered the Reichsgericht's re-establishment. The second seat of FSCoJ is a historical reminder of the former Reichsgericht. The Reichsgericht's Palace of Justice now houses the Federal Supreme Administrative Court and can be visited as a tourist sight.

[32] Section 333 of the German Criminal Procedure Code (in the version published on 7 April 1987 [BGBl. 1987 I p. 1074; 1319] – as most recently amended by Article 3 of the Act of 23 April 2014 [BGBl. 2014 I p. 410]).

[33] FSCoJ also controls pretrial custody in cases as referred to by Section 120 of the Courts Constitution Act be it upon appeal, be it *ex officio,* if custody is lasting longer than 6 months prior to the trial's commencement. It also has jurisdiction on appeals against decisions of the investigative judge of FSCoJ and of the trial court preceding the verdict.

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2.2. Case no StB 27/16 [34]

The accused was member of a terror group, which was active in the armed conflict in Syria. When they were around Aleppo, the accused and other members of the group found the corpse of a fallen Regime-soldier. The group then decided to humiliate the body of the fallen soldier. One non-identified group member cut off nose and ears of the corpse whilst the accused filmed the scene and made comments like "you shall burn in hell". Then the accused urged another group member to shoot his Kalashnikov in the head of the fallen soldier what he then did. The bullet made the skull burst. The accused filmed the open skull with the brain calling the fallen soldier "Kuffar" (= non-believer).

2.3. Case law in Details

In addition to membership in a foreign terrorist organization according to Sections 129a, 129b of the CC, FSCoJ also applied Section 8 paragraph 1 No 9 of the CCIL in both cases.

By verdict of July 27th, 2017[35] when considering the appeal, FSCoJ elaborated on the history or on the genesis of the German CCIL. The verdict takes the argument that the goal of the German Parliament, when adopting CCIL, was to enable Germany to prosecute all crimes under the jurisdiction of the International Criminal Court pursuant to the rules as set forth by the Rome Statute by her own national authorities (legal idea of subsidiary jurisdiction of international institutions). Guided by Rome Statute, CCIL transformed the consolidated international customary law into the German national law, because the German lawmaker was of the opinion that such customary law simply was enshrined in the Rome Statute.[36] FSCoJ accepts such view as legally valid. However, the FSCoJ's point of view on Germany's interrelation to the Rome Statute and to the International Criminal Court has an impact on the interpretation methodology of CCIL: Germany reclaims prosecution priority on crimes against international law as a national prerogative. Up to now, it is not very clear how such prerogative priority will affect the daily forensic practice. It will not make international jurisdiction carried out by ICC obsolete, but will limit its jurisdiction with special view on Germany. This again is completely in line with Article 1 of the Rome Statute, which sets forth ICC's subsidiary jurisdiction.[37] Not surprisingly, such views on the national jurisdiction on crimes against international criminal law covered by CCIL have increased the number of CCIL-cases.[38] The increasing number of CCIL-cases, which steam from all conflict areas but in particular from Afghanistan, Syria and from the Horn of Africa, represent a national endeavour for German authorities to build up cases properly, especially with regards to collecting solid and admissible

[34] In this case, FSCoJ decided upon procedural appeal the legality of an arrest warrant. The proceeding is different from reviewing a verdict upon verdict appeal. Such appeals lead to a "summary proceeding" before a three-judge-bench without oral hearing. Although the legality of the warrant/custody is being reviewed, the major focus of FSCoJ refers to the principle of speedy proceeding before the trial court in accordance with Article 6 paragraph 1 ECHR. When it came to the legality of custody, FSCoJ referred to the principles that the court had already developed to Section 8 paragraph 9 CCIL and upheld them.

[35] BGHSt 62 pp. 272.

[36] BGHSt 62 p. 272/ 277; (see also Henckaerts, 2005; Werle, 2018, Einl. VStGB recitals 35 in particular recital 41).

[37] See additionally Article 17 paragraph 1 item a and b of the Rome Statute.

[38] Specification given by the Federal Government in Deutscher Bundestag Drucksache 19/12354 (submitted by letter of the Federal Ministry of Justice and for Consumer Protection of August 9th, 2019.

evidence from the conflict zones. Although this is a different matter – difficult, complex[39] and not matching our present subject, such procedural problems shall not be kept outside our observations or remain unspoken.

In view of the guilty verdict of the High Court in case number 3 StR 57/17 FSCoJ confirmed the verdict´s legal qualification according to Section 8 paragraph 1 No 9 CCIL. In the context of an armed conflict of non-international character, the accused was lawfully found guilty of having gravely humiliated or degraded persons protected under international humanitarian law.[40] FSCoJ qualifies the events in Idlib province of Syria as an armed conflict of non-international character, as various groups used armed force against the Syrian regime and its representatives and against each other. By contrast, an international armed conflict, so FSCoJ, is characterized by use of armed force between states. However, the events in Idlib in 2014 were carried out and organized by well-organized hierarchical (para-) military groups and the conflict they had been involved in was timely lengthy and of a certain intensity.[41] FSCoJ accepts the High Court's findings with regards to an armed conflict of non-international character.[42]

FSCoJ went on in its verdict examination and found that the two soldiers concerned, the victims, were to be considered as persons protected under international humanitarian law. So far, the court refers to Section 8 paragraph 6 no 2 CCIL and qualifies the two captured soldiers as being "hors de combat". In their captivity, they are defenceless and in the hands of the adversary party (which is the organization that the accused was a member).[43]

Despite of being dead at the time of humiliation and degradation those soldiers "hors de combat" remained "persons to be protected under international humanitarian law". According to FSCoJ, such qualifications finds its justification in the principle of post-mortem dignity of human beings and the fact that human dignity does not cease by death.[44] FSCoJ explicitly disagrees with some academic voices, who are of the opinion that desecration of corpses does not fall under Section 8 paragraph 1 no 9 CCIL because when the German lawmaker adopted CCIL, he only aimed to incorporate consolidated customary international law. However, so those academics, neither the wording of the Geneva Conventions nor international law practice had produced any post-mortem protection of human beings. Moreover, such post-mortem protection would contravene Article 103 paragraph 2 of the German Constitution, i.e. the prohibition of analogy in criminal matters. FSCoJ clearly rejects those arguments by referring to the Rome Statute's genesis when the creators of the Statute explicitly elaborated on desecration of

[39] On the one hand, evidence collected under obscure circumstances in conflict zones by foreign militaries, foreign intelligence authorities, by participants in the armed conflict themselves, by non-governmental organizations being active in the combat areas with differing goals and standards or simply by private persons is only one (major) example and causes various legal problems at trial. Those legal problems, e. g. result in issues on proper procedural regime to be applied to evidence gathered in conflict zones, in particular when the national Criminal Procedure Code does not cover that topic. On the other hand, the German constitution, as well as Article 6 paragraph 1 of the European Convention on Human Rights, demand guarantees for potential defendants with regards to a minimum standard of human rights in a criminal proceeding.

[40] BGHSt 62, p. 272/274.

[41] BGHSt 62, p. 272/274 and 275, (see also Ambos, 2018b, Vor § 8 VStGB recitals 21 – 36).

[42] BGHSt 62, p. 272/275: FSCoJ makes it clear that developments, which occurred after 2014 and which internationalized the conflict in Idlib, had not any impact on the given legal qualification for the time of commitment of crime in 2014.

[43] BGHSt 62, p. 272/276; (see also Ambos, 2018b, Vor § 8 VStGB in particular recital 38 and § 8 VStGB recitals 221 – 229).

[44] BGHSt 62, p. 272/276.

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corpses as element of international crime.[45] Additionally, FSCoJ quotes the Rulebook of the International Committee of the Red Cross (hereinafter "ICRC"), which collects international customary rules of warfare and respective State practice. No 113 of ICRC-Rulebook clearly states, according to FSCoJ, that conflicting parties are obligated to prevent dead soldiers from being looted and humiliated.[46] FSCoJ also finds its view confirmed by case law of international courts, e. g. for the Former Yugoslavia and for Rwanda, which also accepted post-mortem protection of persons.[47] Finally, FSCoJ cannot see any contravention to Article 103 paragraph 2 of the German Constitution. Section 8 paragraph 1 no 9 CCIL refers to "persons" and "persons" are an equivalent to "human beings". Thus, the element of "human beings" covers living and dead men in the same way.[48]

This case law of FSCoJ including dead human beings under the protection of Section 8 paragraph 1 no 9 CCIL is not only lawful, but represents the German contribution to domestication of bewildering and disgusting excesses, which happen on the battle grounds all over the globe when adversarial corpses have become, and are still becoming, objects of the winners' perversions. Desecrated corpses are abused for propaganda on social media and on channels-, which those perverted winners manage. By displaying those corpses, winners show their insane superiority over the adversaries even after they had passed away. Civilized societies may no longer tolerate any form of perverted excesses as desecration of dead bodies. Human beings keep their dignity after death and take their dignity into their graves.[49] If civilized nations tolerate desecration of dead bodies, the warfare returns to practices which we thought had long gone. At the end of this avenue, the international humanitarian law will be at risk.

Punishing desecrators of persons under protection of international humanitarian law might become a sentencing problem. Section 8 paragraph 1 No 9 CCIL requires a minimum penalty of imprisonment for not less than one year.[50] When we consider those desecrations, which have become public on the Internet and elsewhere, the minimum penalty of not less than one year appears to be adequate and proportional. This is also the view of FSCoJ. The court explicitly states that the lawmaker did not disrespect the constitutional principle of proportionality and that within the range of possible penalties trial courts might find the justified penalty.[51]

Desecration in the case was focused on the heads of the killed soldiers. FSCoJ ruled that in terms of guilt, according to Section 8 paragraph 1 No 9 CCIL, it does not matter whether the criminal act was related to the entire body or to the parts thereof.

[45] BGHSt 62, p. 272/277 – 278.
[46] BGHSt 62, p. 272/279.
[47] BGHSt 62, p. 272/280.
[48] BGHSt 62, p. 272/280; (see also Geiß & Zimmermann, 2018, § 8 VStGB recital 204). For view of the national criminal law see Section § 168 paragraph 1 CC. This section protects firstly piety of mourning relatives but also post-mortem dignity of the deceased person (Fischer, 2019, § 168 recit. 2) and public peace (order), (Schönke & Schröder, 2019, Vor §§ 166 ff. recital 2; von Heintschel-Heinegg, 2015, § 168 recital 1).
[49] *Sedes materiae* of this view is Article 1 paragraph 1 of Basic Law of 23rd May 1949 (BVerfGE 30, p. 173/194 and since then consolidated jurisprudence of the Federal Constitutional Court; BGH NJW 2009, p. 751; (Herdegen, 2009, Art. 1 Abs. 1 in particular recital 57-58; Sprau, 2020, § 823 Rn. 89; Stern, 1988, pp. 1050–1053, 2006, pp. 50–51); with view on Article 100 of the Bavarian Constitution of December 2nd, 1946 see Pestalozza (2003, recital 11).
[50] Up to 15 years according to Section 38 paragraph 2 of the German CC, the maximum penalty unless the law foresees lifelong imprisonment.
[51] BGHSt 62, p. 272/281.

Nevertheless, the court highlights the importance of the human head as the most important identification feature of men and underlined its bond to human dignity.[52]

FSCoJ also ruled that taking photos of chopped off heads put on bars represents an illegal "treatment" of the protected person.[53] The common and natural understanding of this legal term does not require any physical impact on the corpse concerned. "Treatment" does only mean that someone is handling someone or something. It can happen without any physical effect on the victim. The legal understanding of the said term follows the natural meaning, according to FSCoJ. The court lawfully points to the argument that "treatment" can be realized by omission of a legally demanded action. Moreover, the court in its argumentation refers to examples from the national Criminal Code, where no physical impact is a legal prerequisite. The court then finds its interpretation confirmed by case law of international courts, in particular for the Former Yugoslavia and Rwanda. This international case law accepted "degrading treatment" when persons under international protection were forced to do humiliating things.[54] "Treatment" under Section 8 paragraph 1 no 9 CCIL only needs to be focused to victim in a specific way.

Finally, FSCoJ decided that the crime element of a "grave" humiliation or degradation" was lawfully established by the verdict under revision. In view of the minimum penalty of not less than one year, FSCoJ recalls the lawmaker's intention to criminalize only the more severe actions of desecrators, but not all forms of disrespect or of insult vis-à-vis dead adversaries. In this context, FSCoJ invokes the constitutional principle of proportionality[55] and demands restrictive interpretation of Section 8 paragraph 1 No 9 CCIL. In justifying its request for restrictive interpretation, the court once more returns to the CCIL's genesis in the Rome Statute's Article 8 paragraph 2 lit. (xxi) and lit. c (ii), which guided the German lawmaker's orientation. With respect to Article 8 Rome Statute, the court invokes the English crime element of "outrage", which the court conceives as the severest form of desecration, which cannot be well understood without taking the cultural background of the victim into consideration. Explicitly, the court states that the crime element of "outrage" is only realized, if the desecration provokes "horror" and "disgust". The German court so far found once more confirmation of its views in the international criminal case law of the ICTR.[56] Simple insults and vituperations do not match the crime element. Showing off with chopped off heads is lawfully regarded as expression of inadequate superiority above the dead soldiers whose heads had been displayed in public like trophies. This represents a "grave humiliation". Taking photos of the heads chopped off together with the accused himself demonstrates not only inadequate superiority, but equally inhuman mercilessness.[57]

[52] BGHSt 62, p. 272/282: The ruling does not discuss the question how only "minor parts" of the body might be seen in the light of Section 8 paragraph 1 No 9 CCIL. If the focus of the Section is human dignity any differentiation between "minor" or "major" body parts is not legally possible. Beforehand such a differentiation would be unethical.

[53] BGHSt 62, p. 272/282 – 284.

[54] E. g. prisoners of war were forced to dance nakedly on tables or were forced to urinate in their own clothes.

[55] BGHSt 62, 272/284 and 285.

[56] Bagasora case – verdict of 18 December 2008 ICTR-98-41 no 2219 and no 2222 and of 14 December 2011 ICTR 98-41 no 729.

[57] By the verdict, FSCoJ spoke in general terms about the trial's court obligation to pay attention to the cultural background of the culture of the *locus criminis* when assessing the desecration. In the very case, neither FSCoJ nor the trial court entered into that matter. It is the question what that element of "culture of the *locus criminis*" is to be understood. Is it necessary to establish facts about that culture by the trial verdict?

3. CLOSING REMARKS

Since 2002 the German CCIL represents the corner stone of Germany's endeavour in prosecuting crimes against international humanitarian law. By enacting CCIL, Germany has given her national authorities priority in this arena, and the increasing number of cases, which are based on CCIL is already giving evidence for the importance of that challenge. Those cases are legally difficult and indeed complex in their own rights, as far as establishing facts and collecting supporting evidence are concerned. Nevertheless, German authorities shoulder the challenge. The German FSCoJ revising the verdicts of 1st instance trial courts is on a good way to guide lining the case law e. g. on post-mortem protection of human dignity of persons under protection of international humanitarian law. However, more case law covering different topics is to come: illegal expropriation of civilian belongings and estates in crisis areas, plundering and extorting civilian population in combat regions, enslaving members of ethnic or religious minorities, mass deportations from parts of the population in terms of cleansing entire regions in crisis countries are some more examples that German authorities will have to tackle on their way of strengthening the international humanitarian law in the future.

In implementing the will of the German Parliament to prioritize national prosecution on international criminal matters, the German FSCoJ does not compete with the international criminal institutions. Competition is not the point and, moreover, is not within the range of FSCoJ's jurisdiction as such competition would have a more political character. Bearing the genesis of the German CCIL in mind, the FSCoJ's approach in interpreting CCIL rules is also focused on making the best use of the international case law for the sake of quality in the national case law. This perspective beyond the national plate of daily verdict reviews might surprise judicial authorities of such countries, which have a different legal or cultural environment in terms of using international instruments within their internal, national case work. Hence, Germany's does use international case law as a source of law. However, this should not be an exclusive one-way-street. International judicial institutions should also take notice of the German FSCoJ case law on international criminal matters so that a process of reciprocal fertilization might start.

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Apparently, it is not mandatory, as FSCoJ in the very case did not find a legal default in the trial court's verdict, or the disrespect to such culture was self-evident, as beheading corpses contravenes Islamic burial rites. There is a bit of darkness in the FSCoJ's verdict.

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LOYALTY IN CIVIL-LAW RELATIONSHIPS AS FOUND IN THE POLISH LAW / Ewa Lewandowska

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Abstract: *This paper discusses manifestations of loyalty as found in selected civil-law regulations, as well as the possible consequences of disloyalty, either during negotiations or for the duration of the obligation relationship, and as exemplified by Actio pauliana. Furthermore, it explores situations where 'contractual' loyalty stands in conflict with behaviour loyal towards other participants in the economy. It has been established that the categories of norms wherein broadly understood loyalty plays a special role are a part of the civil-law principles. It has been demonstrated that due to the unique nature of each situation, the introduction of the duty of loyalty as a general directive would be undesirable.*

Key words: *loyalty, culpa in contrahendo, obligation, form of juridical acts, Actio pauliana, simulation, simulated authorship, civil law principles, Polish law, civil law*

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1. INTRODUCTION

The matter of loyalty in the law raises many interesting questions discussed even today in world literature (Luo & Ye, 2019; Rauterberg & Talley, 2017; Sørensen, 2010). The old Polish saying 'easier promised than done' still holds true (Świerczyńska, 2001, p. 172).[1] Civil-law entities assume various obligations which they sometimes fail to perform properly or at all. Such failures have many reasons – starting from an honest mistake, through an unfortunate coincidence, ignorance, or impossibility to complete all formalities, and ending with a lack of need or even deliberate acts e.g. when a debtor operates from day one on the assumption that their creditor will not take legal action. Loyalty is a fuzzy term that nevertheless occupies a major position in ethics, philosophy, sociology, economy and the law. As such, it is subject to multiple interpretations.

Loyalty and consequences of the reverse are discussed in many civil-law regulations. Faithfulness is brought up explicitly in legislation on spousal relationships (Art. 23 of the Polish Family and Guardianship Code[2]) which intuitively construes the

[1] Incidentally – in copyright, a proverb included in publication title is regarded as a common good in the public domain (that can be used); such standpoint was adopted by the Supreme Court in the judgment of 4 March 2002, case reference No. V CKN 750/00 (lex database, No. 56851), (Grzybczyk, 2012, p. 161; Trzebiatowski, 2011); compare also: judgment of the Administrative Court in Warsaw from 23 December 2014, case reference No. I ACa 703/14 (lex database, np. 1768748).

[2] Act of 25 February 1964, Family and Guardianship Code, Dz.U. 2017, item 682, hereinafter: the FGC.

notion as a commitment of the spouses to refrain from engaging in extramarital sexual activity. However, judicial practice suggests that it is not only adultery which may be regarded as unfaithfulness (cf. Winiarz, 2010, p. 291), which implies a broader understanding of marital faithfulness as a duty of mutual loyalty (cf. Witte, 2001). Aspects of loyalty may be found in several areas, i.a. in rulings based on general clauses such as social and economic purpose of rights, the principles of community coexistence (compare: Art. 5 of the Polish Civil Code, hereinafter referred to as the CC[3]) and good faith (compare: Art. 172 et seq. of the CC); (see also Wirtz, 2018). Loyalty may be interpreted in keeping with the principle of *pacta sunt servanda* or abstractly as loyal behaviour towards the other party, 'the contracting party' (Lekkas & Tzanakopoulos, 2014). Disloyalty and a breach of contractual fairness are declared if the services rendered by both parties are of glaringly unequal value (compare: Art. 388 of the CC); (see Lewaszkiewicz-Petrykowska, 1973, p. 180 et seq.; Veljanovski, 2007, p. 151).

Loyalty appears to be a major theme in civil law, even though not referred to *per se* in any general provision of the law. This paper presents selected legal regulations that manifest the obligation to uphold loyalty. The main aim is to show that loyalty is understood in more than one sense depending on the relevant facts of the case and therefore requires no separate *lex generalis*.

2. NEGOTIATION STYLE

Polish legislation invokes loyalty as early as at the level of pre-contractual negotiations between parties. The legitimacy of pre-contractual liability relies on the fact that the legal relationship between the parties, based on the mutual duty of loyalty, is established at the moment of initiating the negotiations. Art. 72.2 of the CC sets forth that the party which commenced or conducted negotiations in violation of good practices, in particular with no intention of concluding the contract, shall be obliged to redress the damage that the other party suffered as a result of their reliance on the conclusion of the contract.

The Civil Code addresses one special case, i.e. the provision of information with the preservation of confidentiality. According to Art. 72^1 of the CC, the duty of loyalty requires the receiving party to neither disclose said information, hand it over to other persons, nor use it for the party's own purposes unless the parties agreed otherwise.

In this case, legislation establishes the duty of loyalty in the form of a general clause of good practices, construed as a negotiation principle grounded in contractual fairness and customarily accepted ethical norms. A violation of good practices occurs i.e. when a party has no real intention of concluding the contract (and simply misleads the other party), breaks off negotiations at the last minute without reason, or conducts competitive negotiations (Czub, 2018, p. 685). Thus, legislation requires fair play even before a definitive, legally binding arrangement is created. Initiating and conducting negotiations in bad faith, i.e. knowing that an agreement will not be reached, constitutes a basis for seeking damages to the extent of the so-called negative contractual interest, i.e. a loss incurred by expecting the conclusion of the promised contract, under the concept of *ex culpae in contrahendo* (see also Colombo, 1993; Erp, 2004; Han, 2014; Köhler, 2004, p. 82).

[3] Act of 23 April 1964, Civil Code, Dz.U. 2018, item 1025, hereinafter: the CC.

3. OBLIGATION

An obligation consists in that the creditor may demand performance from the debtor and the debtor shall render the performance (Art. 353 of the CC). In obligation law, loyalty is by design a vague term that burdens the debtor with an indefinite obligation (precisely defined in the context of particular situations that occur during obligation performance); (see Opalska, 2013, pp. 231–232; Pokrzywniak, 2003, p. 885). A loyal debtor performs their obligation according to its content and in a manner corresponding to its social and economic purpose and to the principles of community coexistence, and where there exist customs in that regard – also in a manner corresponding to these customs (Art. 354 of the CC). The consequences of non-performance or improper[4] performance of the obligation may vary depending on the type of breach, its causes, and effects (see Veljanovski, 2007, p. 109 et seq.). Contractual liability is governed chiefly by the provisions of Art. 471–486 of the CC, but also by specific provisions of the norm outlined in Art. 487–497 of the CC, and by other statutory regulations applicable to the particular relationship of obligation (Zagrobelny, 2008, p. 844).[5]

In practice, it is common to apply Art. 471 of the CC which sets forth that a debtor who fails to keep their promise to the creditor (to perform or properly perform the obligation) is obliged to redress the damage arising from non-performance or improper performance of said obligation.[6] The provision has a rather broad wording and allows to take into account the type of service when applied. Article 471 of the CC may give rise to liability for breaches of non-competition clauses that prevent a party from competing against the other, in an agreed time frame and scope, after their legal relationship has expired[7]. In principle, the restraint of competition has a correlate in the payment of an adequate sum of money by the other party for the duration of the non-compete (though the pecuniary aspect is not materially important and may be excluded by the parties). Legislation neither defines non-competition nor provides examples thereof. Thus, it actually refers to loyal behaviour which may involve an abstention from competitive interests, competitive activity, or non-disclosure of particularly important information. Ideally, the parties should from time to time precisely stipulate the premises and the terms of non-competition.

The duty to uphold loyalty for the duration of the obligation is also exemplified by provisions on the impossibility of performance, i.e. Art. 387.2 and Art. 493 of the CC. The former sets forth that the party which, at the moment of the conclusion of the contract knows of the impossibility of the performance, should inform the other party thereof (put the other party right). This is precisely the behaviour expected of a loyal counterparty. Taking any other course of action obliges the party in question to redress the damage

[4] For instance, improper performance of an obligation may involve failure to meet a deadline, the manner of performance, or the quality of the service rendered.

[5] For more information on liability see e.g. works of Jugastru (2012) and Mangu (2015).

[6] This regulation was invoked e.g. by the Supreme Court in the judgment of 7 July 2017. The Court ruled that a failure to perform obligations in a timely fashion constitutes non-performance, which gives rise to compensation liability for the loss incurred (Art. 471 of the CC), see: judgment of the Supreme Court of 7 July 2017, case reference No. V CSK 660/16 (lex database, No. 2350004); compare also: judgment of the Supreme Court of September 18, 2014, case reference No. V CSK 625/13 (lex database, No. 1515459), in which the Supreme Court declared that pursuant to Art. 471 of the CC, the renter's failure to return the object of rent in a timely fashion entitles the owner to claim damages for the gain he could have obtained, had the property been returned in time.

[7] With reservation to regulations *lex specialis*, such as: Art. 764^6 of the CC (activity of an agent), Art. 211 of 15 September 2000, Code of Commercial Companies, Dz.U. 2017, item 1577, Art. 101^1 et seq. of the Act of 26 June 1974, Labor Code, Dz.U. 2018, item 917.

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which the other party incurred by having entered into the contract oblivious of the impossibility of the performance (initial impossibility). In turn, Art. 493 of the CC refers to the situation in which one of the parties causes or contributes to the impossibility of performance (is liable for the circumstances that have produced the impossibility) after the contract has effectively been concluded (subsequent impossibility). Such behaviour is an even more glaring case of disloyalty. The injured party may, according to their own choice, either demand the redress of the damage resulting from the non-performance of the obligation or repudiate the contract. In reciprocal contracts, in the event of partial impossibility to render performance by one of the parties, the other party may terminate the contract if partial performance would not have significance for it given the nature of the obligation or on account of the purpose of the contract intended by that party and known to the party, whose performance has become partially impossible.

4. THE FORM OF JURIDICAL ACTS

Art. 353[1] of the CC stipulates that the main principle governing obligation law shall be the freedom of contract (*libertas contrahendi*), which emphasizes the competence of the parties to shape their reciprocal relations *inter partes* (see also Kaczorowska, 2011, p. 15). However, the principle has its limitations. For instance, the scope of competence varies depending on several factors, i.e. the characteristics of the entity[8] and the type of civil-law relationship in question[9]. Additionally, the freedom of contract is limited by provisions requiring a specific form of juridical act (compare e.g.: Art. 158, 660, 720 of the CC). However, since the said regulations are exceptions, in all other situations the parties are free to conclude contracts in the form of their own choice, also in speech.

Oral contracts are commonly and effectively concluded in the course of normal daily-life activities. Without a doubt, they streamline civil-law procedures thanks to the absence of any formalities involved and their performance is usually instantaneous. However, should the performance be postponed, an oral contract entails a significant risk. In the event of a dispute, and particularly a non-performance of an obligation, oral form of the contract creates difficulties in proving the contents of the contract or even its conclusion. In principle,[10] the parties may produce evidence by calling witnesses, presenting documents which imply the conclusion of the relevant contract, etc. Problems start in the absence of said evidence. If one of the parties renounces the contract (behaves disloyally), the unofficial character of the contract may prove disadvantageous, not due to the lack of any specific regulation, but as a consequence of the choice made by the parties in selecting the form of the contract. Mutual trust in civil-law relationships, though impossible to fully eliminate, has its limits.

The form of juridical act is of material importance during the disposition of property in case of death (*mortis causa*). Contractual titles to inheritance are not honoured in Polish law.[11] Legislation stipulates that disposition of the property in case of death may only be made by way of a testament (Art. 926, 941 et seq. of the CC) drawn up in a specific manner. Failure to preserve the required form invalidates the testament (Art. 958 of the CC). In the absence of a testament, legislation foresees an order of succession according to the hypothetical will of an abstract decedent, i.e., it sets forth

[8] For instance, the requirement to meet certain criteria.
[9] In particular, the scope is broader in relationships governed by obligation law and narrower in the case of property law (Machnikowski, 2006, p. 420).
[10] For instance, compare: Art. 74 of the CC.
[11] Compare: Art. 926, 941, 1047 of the CC.

statutory succession (Pazdan, 2011, p. 982 et seq.). Thus, formless agreements on inheritance (that fail to meet formal requirements) have no binding legal force. Meanwhile, in practice the bequeather sometimes neglects to draw up the testament, trusting the assurances of their future heirs as to the possible division of the inheritance after death. It also happens that the bequeather, while preparing the testament, additionally reserves something outside of it or receives an oral assurance from the potential heir (devoid of an adequate form, not included in the testament, e.g. given as an instruction).[12] The bequeather, acting out of trust, fails to predict the legal consequences of their actions. Yet after their death, in the light of a possible material gain, some people may seek a disposition in compliance with the testament, despite promises made to the descendant. Legislation does not foresee liability for the failure to perform agreements regarding inheritance. The lack of required form is penalized by the invalidity of such arrangements. Disloyal behaviour and assurances made to the deceased do not fall within the scope of Art. 928 of the CC, i.e. do not fit into the strict category of the heir's unworthiness. Assurances regarding succession should be treated only as a gentleman's agreement whose performance depends on the goodwill and honourable behaviour of the heirs. Established form of property disposition upon death is intended to ensure that the decedent had *animus testandi* and drew up the testament with due care. The form shall prove the contents of the testament in an attempt to avoid misunderstandings and conflicts. Thus, it appears that building relationships on trust in civil-law entities and their loyalty, without completing legal formalities, involves risk. Civil-law entities should consider that the laws on inheritance secure the rights of heirs (protect the interests of the parties).

5. ACTIO PAULIANA

If a debtor shows glaring disloyalty, i.e. not only fails to perform obligations but also parts with assets that could be subject to debt enforcement, the creditor is protected by the instrument of *Actio pauliana*, recognized in many legal systems (Art. 527 et seq. of the CC); (see also Carballo Piñeiro, 2012). The creditor may use *Actio pauliana* if the debtor acts in a nefarious manner, i.e. being aware of the detriment to the creditor(s) sells or otherwise disposes of their property or its part in order to reach insolvency and prevent debt recovery or render it difficult.[13] As a result of the effective use of *Actio pauliana* (demonstration of the circumstances required), the creditor is entitled, with priority over other creditors, to satisfaction from the assets belonging to a third party. However, according to Art. 530 of the CC, if the third party has obtained a non-gratuitous property-related benefit, the creditor may demand the juridical act to be found ineffective only when the third party knew of the debtor's intent. A juridical act of the debtor carried out to the creditors' detriment remains effective for persons who failed to oppose it by bringing legal action, particularly in relations between the debtor and a third party who obtained material gain, and for other creditors (see also Jasińska, 2006, p. 61 et seq.).

[12] For instance, the bequeather has appointed his ex-wife as heir to his entire estate, receiving her assurance that after his death, she will provide for his current wife and their children. In the eyes of the law, the ex-wife is the sole heir. If she behaves disloyally and goes back on her assurance, the current wife is not entitled to protection.

[13] Compare: Judgment of the Supreme Court of 6 October 2017, case reference No. V CZ 68/17, Lex No. 2407352.

6. A DECLARATION OF INTENT MADE FOR THE SAKE OF FALSE APPEARANCES

In the context of discussing loyalty, the institution of appearances deserves special attention. At present, acting only for appearances is quite common in many areas of social life, not only in economic relationships.[14] Pursuant to Art. 83 of the CC, a declaration of intent made to another party for the sake of false appearances shall be invalid (absolute simulation). Where such a declaration was made to conceal another juridical act, the validity of the declaration shall be judged according to the nature of this juridical act (relative simulation). Simulation is a peculiar defect in that the declarant of intent makes an informed decision to express particular intent and decides that the declaration of intent will not have the legal consequences that it normally entails. A defect in the form of a simulation can, therefore, be declared in a situation where the declaration of will is made to the other party for false appearance's sake, i.e. without any intention to produce legal effects, and the other party is aware of the fictitious nature of the declaration and accepts the absence of intention to produce legal effects.[15] Polish legislation does not question the legality of simulation since its legal consequences are indicated only in the event of disclosure.

Simulation involves two aspects of loyalty. On one hand, contract loyalty arising from the agreement between parties, on the other, disloyalty towards other participants in the economy. If the agreement regarding simulation is not disclosed, i.e. nobody learns of its fictitious nature, the juridical act in question will be regarded as fully effective in terms of economic exchange. Mutual 'contractual' loyalty between the parties leads to a situation where the legal environment has a misconception regarding the facts (appearances are made). Without a doubt, such behaviour is disloyal to other participants in the economy. From this perspective, simulation is undesirable in the economy, but often harmless.

The current judicial practice in Poland shows that simulation and the application of Art. 83 of the CC result not only in the invalidation of the declaration of intent made for the sake of false appearances but also, in case of relative simulation, in the invalidation of the concealed juridical act.[16] Legal consequences foreseen in legislation do not recognize 'contractual' loyalty. To prove that, let us observe that 'contractual' loyalty of parties involved in the simulation usually falters in the face of a conflict of interest, e.g. if a party sees an opportunity for gain by renouncing the fictitious contract[17]. The civil-law party then transfers their loyalties by renouncing the agreement, and Art. 83 of the CC is applied. The ruling usually favours the party which renounced the agreement (the original arrangements). It could be inferred that Art. 83 of the CC is a punishment for the party which behaved loyally, i.e. honoured the agreement. This perspective points to a conclusion, or at least a need for discussion, that legislation should treat such cases in a special manner, i.e. strive to respect the original agreements between parties, while regulating the factual state so as to prevent any violation of the law and the rights of third parties (cf. Lewandowska, 2018b, p. 165 et seq).

[14] Simulated acts and states include diseases, pregnancy, death, marriage, profitable trades, judgments, and even crimes.

[15] Judgment of the Supreme Court of 13 August 2015, case reference No. I CSK 786/14 (lex database, No. 1866880).

[16] Judgment of the Supreme Court of 12 October 2001, case reference No. V CKN 631/00, OSNC 7–8 (2002), p. 91.

[17] The simulation may be disclosed also if it is known to a third party or in another manner.

7. SIMULATED AUTHORSHIP

A similar problem arises in case of the so-called simulated authorship (for this term, see Lewandowska, 2018a), often referred to as ghostwriting (see also Bassett, 2015; Lerman, 2001, p. 476). Simulated authorship involves creative work, i.e. the domain governed by copyright law, which *de facto* includes no provisions on the issue. Since the phenomenon encompasses a series of situations and forms, reference books distinguish several forms, i.e. ghost-writing, ghost painting, ghost composing (Czub, 2016, p. 126) and speechwriting (Wojnicka & Giesen, 2013, p. 325), legal ghost-writing[18]. In the framework of simulated authorship, the author gives their informed consent for the authorship to be ascribed to another person and to the distribution of the work without disclosing the contribution of the actual author or as joint authorship (despite the lack of contribution of the other person). In principle, this leads to the transfer of a non-transferable moral right (the right to authorship is a moral right) in breach of the applicable law[19]. A case in point is the issue of dissertation purchases by students, which not only constitutes a violation of Art. 16.1 of the Act on Copyright and Related Rights[20], but also is forbidden under Art. 76 of the Law on Higher Education and Science[21]. Similarly to the simulation governed by Art. 83 of the CC, if the entities involved in simulated authorship behave loyally (avoid a conflict)[22], the reality established normatively (compare: Art. 8 of the Polish Act on Copyright), as perceived by the legal environment, shall remain as agreed by the parties. In this situation, loyalty to the informal agreement is illegitimate. The parties act in breach of the law, which implies that their will cannot be recognized on account of 'contractual' loyalty.

8. CONCLUSION

The conducted analysis shows that loyalty in civil-law regulations refers to decency, which is expected from civil-law entities. This fuzzy but fundamental term gains more clarity in particular regulations. In this manner, the legislation considers the differing scope or level of loyalty in various situations, for example at the stage of pre-contractual negotiations and for the duration of the contract.

In some cases, the disloyalty of civil-law entities is not penalized. Not for the lack of relevant regulations, but as a consequence of the choices made by the parties, e.g. regarding the form of their juridical acts. By discussing the issue of simulation and simulated authorship, it was demonstrated that some of the current legislative solutions fail to consider all aspects of loyalty, which calls for treating such situations in a special manner.

It could be argued that categories of norms, wherein broadly understood loyalty plays a special role, are a part of the civil-law principles (e.g. prohibition on the abuse of rights, party autonomy, or protection of trust). Loyalty, reconstructed with reference to a series of legal norms, points to the values that should be enshrined in legislation, sets a direction for future legislative activity and law application, defines the boundaries limiting civil-law entities in the use of their rights. Therefore, the introduction of the duty of loyalty,

[18] If a given procedural document contains e.g. an original and creative interpretation of the law, it meets the conditions required of a work as defined in the Polish Copyright Law (see Piszczek, 2013, p. 819).
[19] Some cases of simulated authorship are socially accepted, which does not change the fact that there is no legal resolution concerning their acceptability (cf. Jankowska, 2014).
[20] Act of 4 February 1994 on Copyright and Related Rights (Dz.U. of 2018, item 1191).
[21] Act of 20 July 2018 on Higher Education and Science (Dz.U. 2018, item 1668).
[22] Unless the simulation is disclosed by a third party or another special situation occurs.

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imposed in a general directive regarding conduct (*lex generalis*) would be undesirable. Such a regulation, devoid of any practical application, would raise nothing but a litany of doubts regarding its proper interpretation.

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MANDATORY AND DEFAULT PROVISIONS IN COMPANY LAW: EDITORIAL / Mária Patakyová, Martin Winner

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This special section of the volume of Bratislava Law Review Journal focusses on the issue of freedom of contract in company law in different European countries. One of the crucial issues is the role of mandatory and default provisions in company law. While in the case of mandatory provisions the legal entity and its shareholders or members cannot deviate from the rule, in the case of default provisions the articles of the company may contain deviating rules. The relative prominence of rules of either the one type or the other is one defining characteristic of a company law system and also of different forms of companies. While the UK system tends to prefer default rules, company law systems following the German example typically distinguish between a company law form characterised by mandatory rules for listed companies (of the *Aktiengesellschaft*-type) and a more liberal regime for closed companies (*GmbH*).

Both default and mandatory provisions are legal provisions of the legislative system. However, they work differently and fulfil different functions. The mandatory provision binds its addressee to something, while the default provision is just a suggestion. In relation to freedom of contract, the mandatory provision clearly limits the freedom of contract and thereby disrespects the wishes of the shareholders as contracting parties. Quite clearly, there must be some type of justification for such rules. Typically, such justifications can be found in externalities (e.g. negative effects of freedom of contract on third parties, such as creditors) or the protection of the weaker contractual party.

Default provisions do not limit freedom of contract but give preference to the human will. They enable participants of legal relationships to derogate from the regulation based on an affirmative expression of their will. But they do not force the parties, in our context the shareholders or members, to do so as they can still rely on the provisions contained in the law. Hence, such default provisions help to minimise transaction costs.

The following contributions address these issues for selected countries in Central and Eastern Europe. They are the result of a conference held at Comenius University in Bratislava on November 8, 2019. We hope that they help in strengthening the international scholarly discussion of this core issue of company law.

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MANDATORY AND DEFAULT REGULATION IN COMPANY LAW IN CZECH REPUBLIC / Kateřina Eichlerová

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Abstract: *The distinction between mandatory and default rules is very important. If default rules are considered mandatory, this leads to a restriction of freedom. Conversely, if mandatory rules are considered default, this leads to a violation of the law and undesirable interference in the sphere of persons who should be protected by law. The article focuses on the development of the nature of company law in the Czech Republic and shows the current state of discussion and case law in this area. The author concludes that the scope for private autonomy has increased considerably with the recodification of private law. This is caused not only by a more liberal regulation of companies contrary to pre-recodification, but also by the intense discussion that the new regulation has provoked. Thanks to the new legislation, the institutes of company law can be rethought. This then allows the start of a teleological interpretation of rules in searching their natures.*

Key words: *mandatory rule; default rule; company law; joint representation of the managing director and the proctor officer [prokurista], commercial law, Czech law*

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1. INTRODUCTION

The key question of whether the regulation of company law is rather mandatory or default is closely related to the question of the nature of a company. If we consider company a *nexus of contracts* (Davies, 2002, p. 9 et seq.; Havel, 2010, pp. 40–62; Kraakman et al., 2017, p. 5 et seq.; Pelikánová & Pelikán, 2015, pp. 30–32; Pihera & Dědič, 2010, pp. 72–89), we can come to conclusion that the constitutional general principle "what is not prohibited, is allowed" is applicable.[1] If we consider company an *institution*,[2]

[1] Czech Resolution No. 2/1993 Coll. on Proclamation of the Charter of the Fundamental Rights and Freedoms (hereinafter referred to as the "Charter of the Fundamental Rights and Freedoms"), Article 2, para 3: *"[e]veryone do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon them by law."* This rule constitutes basis for freedom, including freedom of contracts.
[2] When using the term "institution", I refer to a legal entity created by law in the sense of a theory of fiction.

we can arrive at a different conclusion; what is not allowed by the law is prohibited, unless the question has a purely contractual character without relevance to the functioning of the company as a legal entity (e. g. conditions for transfer of shares). It is really important to consider that the search for the nature of a rule is not only related to a process of interpretation but by the first step of our values. What would we prefer: freedom or legal certainty? The balance between these fundamental approaches of lawmakers is the basis for searching and finding the nature of rules whether a certain rule is mandatory,[3] semi-mandatory,[4] default (Bachmann, Eidenmüller, Engert, Fleischer, & Schön, 2013, p. 18)[5] or enabling.[6] Frankly, it should be added that lawmakers use more forms of regulation in company law than these. They use standards with instruction to apply or explain different approach or instruction to regulation of some issues in the articles of association. They sometimes offer a draft of the articles of association (Bachmann et al., 2013, pp. 18–27).

Another relevant circumstance is a depth of company law regulation. A brief regulation is rather more mandatory than a very detailed one which also contains reassuring rules (e.g. Eichlerová, 2016, p. 48; cf. Šuk, 2019, p. 526).[7]

[3] Mandatory rule is automatically applied. To derogate such rule by private autonomy is not allowed. Consequences to derogation are invalidity, ineffectiveness, nullity, etc.

[4] Semi-mandatory rule is a rule from which derogation is limited. To illustrate this, we can take a look at the Czech Act No. 90/2012 Coll. on Business Corporations and Cooperatives (Business Corporations Act) (hereinafter referred to as the "Business Corporations Act"), Sec. 171 which requires qualified majority of the general meeting in a limited liability company for some matters. The memorandum of association can increase the qualified majority. Decrease is forbidden.

[5] The default rule is only applied in case that a private autonomy is not used (opt-out).

[6] Enabling rule is only applied if a user chooses it (opt-in). For example, a limited liability company can create a supervisory board (Business Corporations Act, Sec. 201). Majority of the limited liability companies are not obliged to create the supervisory board, however, if a company opt to create a body with supervisory power, it creates the supervisory board and its members shall be registered with the Commercial Register. Another example is the creation of shares with no voting rights assigned to them. The joint-stock company is not obliged to create them. However, if the company decided to create them, it must follow the related statutory rules.

[7] By reassuring rules, I mean such rules which do not constitute a change of law. Their purpose is not to stipulate that some behaviour is allowed or prohibited as opposed to a latter regulation, but only to announce that the lawmaker considers some behaviour as allowed or forbidden. The same conclusion shall be made without an explicit provision by interpretation.
As an example of this serves the discussion on the possibility to create a specific type of share containing the right to appoint and dismiss one or more managing directors or members of the supervisory board in a limited liability company or in a joint-stock company. Some scholars consider it possible because it is not prohibited by the Business Corporations Act. Other scholars consider it not possible without explicit regulation. Before this question could be answered by a court, the lawmaker modified the Business Corporations Act. Now, the Business Corporations Act contains explicit conditions for creation of this type of share (Business Corporations Act as amended by Act No. 33/2020 Coll., Sec. 194a, 438a, 448b a 458). What is the nature of these rules? In my opinion, they are mandatory in determination of restrictive condition (majority of directors shall be appointed and dismissed by general meeting) but not in allowing them to be created. The basis of this right is an abolition of restrictive share types under the Business Corporations Act as opposed to the Czech Act No.. 513/1991 Coll. Commercial Code (hereinafter referred to as the "Commercial Code") and the fact that the appointment and dismissal of the managing directors by decision of the general meeting does not have the mandatory nature.

The level of legal culture, development in society, historical circumstances and approach of courts[8] (Hopt, 2016, p. 16) also influence the discussion on the nature of a certain rule. It depends on the circumstances, what is perceived as fair. In Czechoslovakia in the 20th century, the approach to law sometimes changed. Before the World War II, we can describe judges' activities in decision-making mainly as legalistic and dogmatic, but in exceptional cases the judges were not afraid to deviate from the wording of the law and to look for its rational meaning (Kühn, 2005, p. 22). During the Stalinist era (the 1950s), we were faced with the activist judicial application of law on the one hand and dogmatism on the other (Kühn, 2005, pp. 34 et seq., 196). A possible paradox is that this approach not only led to criminalization of (possible) opponents of the regime in the "social interest" (interest in maintaining the socialism), but at the outset to the elimination of certain inequalities as well[9] (Kühn, 2005, pp. 35–36).

Subsequently, a formalistic approach to law had been established. Strict adherence to the diction of the law protected the judge from being blamed of a solution inconsistent with the party line. To some extent, it also protected the addressees of legal norms, because the predictability of the law was ensured by the binding application of the law. Z. Kühn concludes the analysis of the period of the 1960s to the 1980s with the idea that, in the context of a simple social life, so typical for the socialist regime, the binding application of law could have been functional to some extent (Kühn, 2005, pp. 109, 113, 116).

The formalistic approach to law persisted in the general judiciary in the 1990s, and it gradually changed due to the value judgments of the Constitutional Court (Kühn, 2005, pp. 117–149). The recodification of private law, which was based on the value and not on the formalistic interpretation of the law, was an important impulse for a change in consideration which rules are mandatory and which are default.[10]

Another example is the question of creation of shares with no right to profit assigned to them. The discussion was similar. In the end, the Supreme Court concluded in its judgment, that it is possible (Supreme Court of the Czech Republic, 27 Cdo 3885/2017 (27 March 2019)). Then, the lawmaker clarified this question in the amendment to the Business Corporations Act (Business Corporations Act as amended by Act No. 33/2020 Coll., Sec. 256, para 1).

[8] The role of the courts in determining which rules are mandatory is quite unique.

[9] Z. Kühn mentions the elimination of inequalities between married and non-married children by direct application of the constitution against the explicit wording of the Civil Code or judicial decisions promoting gender equality.

[10] The recodification was not only a response to the lack of regulation, but also to numerous formalistic judgments of the courts, which had been criticized. One example is the judgement of the Supreme Court of the Slovak Republic, 33 Odo 1117/2003 (17 March 2005) in which the court concluded that default interest of a different amount than that determined by law cannot be negotiated. This interpretation with regards to the legal license enshrined in the Charter of Fundamental Rights and Freedoms was not justifiable even before the recodification.

Another case sufficiently illustrating the difficulty of assessing the nature of a statutory rule is the issue of granting a power of attorney for representation at a meeting of unit owners' associations in the absence of the explicit regulation in the statute. In the judgment of the Supreme Court of the Czech Republic, 26 Cdo 1657/2018 (16 October 2019), the Supreme Court admitted that under the Czech Act no. 89/2012 Coll. Civil Code (hereinafter referred to as the "Civil Code 2012"), it is possible to grant a power of attorney, but that it was not possible before 2014 if the charter of unit owners´ associations explicitly(!) did not allow it. See judgment of the Supreme Court of the Slovak Republic, 29 Cdo 3399/2010 (25 May 2012). It is interesting that

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The lawmaker has two basic approaches to distinguish between the mandatory and default rules. One possibility is the general clause as an open concept which is fulfilled by doctrine and case law. The criteria can be nature of rule, good morals, public order, etc. There are two main advantages: stability of legal wording and flexibility. Change of content can be made by a change of interpretation as a reaction to changes in society. There are also two disadvantages: the difficulty of interpretation and the reduced predictability of judicial decision-making. Another approach is an explicit provision stipulating which rules are mandatory and which are default. For example, the repealed Act No. 513/1991 Coll. Commercial Code in the Sec. 263 stipulates the list of mandatory provisions regulating obligations. As an example of an explicit default provision is using the supplement "unless the statutes stipulate otherwise" (see chapter 2). The advantage of this approach is clarity. The disadvantages are lawmaker´s errors, rigidity and misinterpretation of other rules. In my opinion, it is advisable to combine both approaches.

2. THE MODERN HISTORY OF LEGAL FRAMEWORK (1992 – 2013)

Companies, regulated by Commercial Code, Part II, did not have its own rules for determination of the nature of rules similar to the regulation of obligations in the Part III[11] (see sec. 263 containing an enumeration of mandatory provisions). Criteria for distinguishing of the nature of the provisions in company law are to be found in the Czech Act No. 40/1964 Coll. Civil Code.[12] Section 2, para 3 of the Civil Code 1964 stipulates: *"[t]he parties to civil relations may regulate their mutual rights and obligations by agreement derogating from the law, unless the law expressly prohibits it and unless the nature of the legal provisions imply they cannot be derogated from."*

The discussion on the nature of rules regulating companies was not too intensive. The majority approach was that rules were mostly mandatory excluding some rules regulating mutual relationships between (former) shareholders (e. g. agreement on share purchase). In my opinion, this approach has three main reasons. Firstly, an inappropriate legislative technique. Many provisions contained the supplement "*unless the statutes stipulate otherwise*". Many provisions without this supplement were considered to be mandatory with the argument *a contrario*. Those supporting the mandatory nature of company law argued, that if the lawmaker wanted the rules to be default he would use this supplement. Such approach is opposite to the current view.[13]

the constitutional framework did not change since 1993. The principle of private autonomy and the principle of what is not prohibited, is allowed (legal license), were the basis for private regulation under constitutional order. This rigid approach to legal interpretation was, in my view, a relic of the socialist era and it shows that the interpretation of law can have long-standing inertia of approach.

[11] Commercial Code, Sec. 263 containing the enumeration of mandatory provisions.

[12] Hereinafter referred to as the "Civil Code 1964".

[13] However, it is honest to admit that the uncertainties can still persist. The process of adoption of amendment to the Business Corporations Act is good example. The Senate returned the draft of amendment to the Business Corporations Act with one change posing an addition of the supplement *"unless the statutes stipulate otherwise"* into the provision sec. 161 para. 3, second sentence, of the Business Corporations Act regulating the maturity of the fixed share of profits in a limited liability company. In my opinion, the provision

Secondly, it was a paternalistic judiciary which supported this interpretation in a reaction to a very excessive approach to law in the 1990s for business.[14] Thirdly, in the background there was a dispute on the task of company law, especially whether the legal regulation shall be the main and actually the only tool of the design of company law or if company law is the result of other influences (soft tool such as e.g. market of directors and their reputation). This dispute escalated during the preparation for the recodification of private law (Pelikán & Pelikánová, 2009; Richter, 2008). The question can be posed in another way: who is cleverer – the lawmaker or practice? Or, who can give better rules? Is it the lawmaker or the practice? Thus, the nature of rules is also about confidence that practice will find a suitable solution in the certain case rather than the opportunity for misuse of law.

3. CONSTITUTIONAL FRAMEWORK

The basis of company law on the constitutional level is constituted by three fundamental freedoms: protection of ownership under the Article 11 of the Charter of the Fundamental Rights and Freedoms, freedom of business under the Article 26 of the Charter of the Fundamental Rights and Freedoms and freedom of association under the Article 20 of the Charter of the Fundamental Rights and Freedoms. The last one is subject to discussion as to whether it is a basis for political associations, or civic associations, or even associations in the form of business corporations. The question is really important because at the constitutional level it defines limits to lawmaker´s regulation of companies.

The key question is whether the lawmaker is free by setting up the regulation of companies as legal persons or it is limited by the Article 20 of the Charter of the Fundamental Rights and Freedoms. Under the Article 20 para 1 of the Charter of the Fundamental Rights and Freedoms: *"[t]he right to associate freely is guaranteed. Everybody has the right to associate with others in clubs, societies and other associations*. Under the Article 20 para 3 of the Charter of the Fundamental Rights and Freedoms: *"[t]he exercise of these rights may be limited only in cases specified by law, if measures are involved, which are essential in a democratic society for the security of the state, protection of public security and public order, prevention of crime or for protection of the rights and freedoms of others."* This article is placed under section called "Political Rights". This is a reason why some scholars interpret it narrowly using the argument *a rubrica*.

The interpretation given to another part of doctrine is broader. V. Šimíček argues that the freedom of association cannot be limited only to political associations, but this right is evidenced by the associations established for non-political purposes including

is default without the supplement and the supplement is useless. However, senators were concerned about its interpretation because this supplement is found in similar sec. 348 para. 3, second sentence, of the Business Corporations Act regarding the same question in a joint-stock company, so they were afraid of different interpretation of both rules on the basis of the argument a contrario.

[14] In the Czech Republic in the 1990s tunnelling (asset confiscation) as an extensive financial fraud appeared and the lack of regulation was one of the causes for their numerous occurrences. For example, financial assistance had not been regulated until 2001, thus many companies thought that it had been possible under any conditions. Often a company controlled by privatization took over the debts from credit agreements concluded by shareholders in order to control the company.

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business corporations (2012, p. 476). The same approach can be seen in case law of the Constitutional Court of the Czech Republic.[15]

Nobody can create a business corporation as a legal entity without its existence in a legal form set out by written law. It is given by *numerus clausus* types of business corporations.[16] The question is whether the lawmaker can freely decide to abolish one of the types of business corporations or it can make this decision only in cases listed in the Article 20 para 3 of the Charter of the Fundamental Rights and Freedoms. I am a supporter of constitutional protection of business associations as legal entities associating persons to conduct business. This means that once the legislature creates a form of business corporation, it cannot abolish it without a reason anticipated by the Charter of the Fundamental Rights and Freedoms and without meeting the principle of proportionality (Wagnerová, 2012, p. 26). The abolition of, for example, a limited liability company would thus run counter to the concept of the principle of the material rule of law.[17] If we continue to consider the constitutional framework of company law, the open question is whether the lawmaker can make a flexible law more rigid at any time or can do so only if reasons under the Article 20 para 3 of the Charter of the Fundamental Rights and Freedoms are given.[18] However, the constitutional framework would not for example preclude the legal requirement for the dissolution of unipersonal companies, as they do not exercise the right to associate and it is a fiction that they are business corporations.[19]

4. CURRENT LEGAL FRAMEWORK

If we compare the regulation of companies under the Business Corporations Act and under the Commercial Code, we must conclude that new regulation is more liberal, flexible and full of possibilities for choice (enabling rules). For example, in a limited liability company, the ban for chaining of companies was lifted, the minimum share capital was reduced to 1 CZK per share, shares can be created as securities. In a joint–stock company, there is choice of dualistic or monistic model of governance, all elected bodies can be unipersonal, the possibility of the creation of specific types of shares is almost unlimited. There is no doubt that the scope for autonomous regulation of companies as a result of the recodification has expanded.

The Business Corporations Act does not have its own general clause on mandatory criterion. The reason is simple. The Business Corporations Act contains only a part of the regulations regarding business corporations. The basis of regulation is found

[15] The Constitutional Court of the Czech Republic considers that the hunting association is an association under the Article 20 of the Charter of the Fundamental Rights and Freedoms (Constitutional Court of the Czech Republic, Pl. ÚS 74/04 (13 December 2006)). From the reasoning it is obvious that the Constitutional Court puts the hunting association as a legal entity on the same level as other legal entities created as associations of persons including business corporations.

[16] Business Corporations Act, Sec. 1 para 1.

[17] It is interesting to state that repealing all types of business corporations except joint–stock companies and cooperatives had occurred by the Czech Act No. 141/1950 Coll. Civil Code at the beginning of the socialist era. At that time, we could not consider the application of the principle of the material rule of law.

[18] The question can be expressed in another way. Is flexible company law the lawmaker´s "gift" which cannot be required to be returned without serious reasons?

[19] Under the Civil Code 2012, Sec. 210 para 2 a legal person composed of a sole member is considered to be a corporation. In this case the constitutional protection is given by protection of ownership.

in the Civil Code 2012 in the section regulating legal persons.[20] According to the lawmaker, the mandatory provisions in the Civil Code 2012 should be exceptional, since the civil law is essentially default.[21]

The key rule for distinguishing the mandatory and default rules can be found in the Civil Code 2012, Sec. 1 para 2: *"[unless expressly prohibited by a statute, persons can stipulate rights and duties by way of exclusion from a statute; stipulations contrary to good morals, public order or the law concerning the status of persons, including the right to protection of personality rights, are prohibited."* Thus, we can conclude that under this rule in company law there are mandatory rules which contain direct explicit prohibition (using wording "*is forbidden*"),[22] which are protecting good morals[23] or public order,[24] or rules regarding status issues of a company. The last one is the most difficult for interpretation.[25] The Supreme Court of the Czech Republic confirmed that indirect prohibition is also mandatory for reasons. The prohibition is not expressed in the words "*it is forbidden*", but the unlawful derogated arrangement is legally invalid, apparent, etc. The key example of an indirect prohibition is hidden in the sense and purpose of a statute under Sec. 580 para 1 of the Civil Code 2012.[26] Under Sec. 580 para 1 of the Civil Code 2012:"[*a] juridical act is also invalid if it is contrary to good morals or contrary to a statute, if so required by the sense and purpose of a statute*." According to the explanatory report to the Civil Code 2012, this provision was formulated in response to an entirely formal interpretation of Sec. 39 of the Civil Code 1964, according to which any infringement of the law caused absolute invalidity.[27] In Sec. 580 para 1 of the Civil Code 2012 the lawmaker intended to establish (absolute or relative) invalidity only in cases of a qualified breach of law. Thus, the Supreme Court interpreted this legal provision as follows: requiring the sense and purpose of the statute that a legal act contradicts it is invalid, such a statutory provision is mandatory.[28]

5. CURRENT DOCTRINE

The discussion on the nature of civil law rules, especially company law rules, is very intense after the recodification (e.g. Eichlerová, 2016, p. 42; Eliáš, 2015; Havel, 2013, 2014,

[20] Civil Code 2012, Sec. 118–418.
[21] Czech explanatory report to the Act No. 89/2012 Coll. Civil Code, House Press No. 362, Chamber of Deputies of the Parliament of the Czech Republic, 6th parliamentary term 2010–2013, pp. 582–583.
[22] For example, under sec. 116 of the Business Corporations Act the transfer of a member's business shares in an unlimited partnership is forbidden. Beyond the essay, there is the question if this rule is reasonable and constitutionally conforming.
[23] In my opinion, protection of creditors of a company or protection of minority shareholders fall within this category.
[24] For example, under the Civil Code 2012, Sec. 145 it is forbidden to form a legal person the purpose of which is to violate the law or achieve a goal in an unlawful manner. .
[25] See further.
[26] Supreme Court of the Czech Republic, 29 Cdo 5719/2016 (19 September 2017). Supreme Court of the Czech Republic, 29 Cdo 387/2016 (31 October 2017).
[27] Czech explanatory report to the Act No. 89/2012 Coll. Civil Code, House Press no. 362, Chamber of Deputies of the Parliament of the Czech Republic, 6th parliamentary term 2010–2013, p. 690.
[28] Supreme Court of the Czech Republic, 29 Cdo 5719/2016 (19 September 2017). Supreme Court of the Czech Republic, 29 Cdo 387/2016 (31 October 2017).

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2019; Hurychová, 2016; Lavický, 2014; Melzer, 2013; Melzer & Tégl, 2013; Pelikán, 2012; Pelikán & Pelikánová, 2014; Ronovská & Havel, 2016; Šuk, 2019). However, it cannot be said that there is a complete consensus as for which issues in company law are mandatory and which are default.

The most difficult issue is the determination of status rules. In my opinion, there is consensus on the following matters: legal personality, types of legal persons and forms of business corporations, establishment and termination of legal persons, including transformations, business name, seat and the scope of business, determination of the governing body and determination of the basic manner of acting on behalf of a company (Eliáš, 2015, p. 79; Šuk, 2019, pp. 517–518). There is no consensus on the conclusion that all the rules governing the internal organization of capital companies are mandatory with argumentation that they are generally status rules. An extensive discussion is being held, for example on the competence of the general meeting. Can the competence of the general meeting defined by law only be extended by the articles of association or can it be narrowed? We can find the opinion refused by the narrowing of legal competence.[29] Some scholars admit delegation of some competence of the general meeting to another body in specific cases (e. g. appointment and removal of a managing director by a supervisory board in a limited liability company (Eichlerová, 2016, p. 47; Pokorná, 2016; Šuk, 2019, p. 525),[30] or approval of remuneration by a supervisory board to members of a board of directors elected by a general meeting in a joint-stock company (Hurychová, 2016).

I consider the rules on the status of persons only those which define the essential characteristics of a legal person in general or a specific form of business corporations so that it can be functional, distinguishable from other forms of legal persons and it does not violate legal certainty about its nature. Frankly, other scholars consider status rules more broadly. However, the distinguishing mandatory and default rules is not only about whether the rule is a status rule or not.

I agree with K. Ronovská and B. Havel that the regulation of a company is based on private autonomy and broad default (2016, pp. 38–39). The mandatory rule is an exception which must be based on relevant reasons (Hopt, 2016, p. 5).[31] K. Ronovská and B. Havel consider test of *mandatory matrix*. Under the mandatory rules fall the rules ensuring good morals (fairness), public order, maintaining the essential legal nature of a legal person in general and essential specifics for specific forms of legal persons, including business corporations, protection of creditors, incl. employees, protection of the legitimate rights of third parties, incl. minority shareholders (2016, pp. 38–39).

[29] In the opinion of the Civil and Commercial Division of the Supreme Court of the Czech Republic, Cpjn 204/2015 (13 January 2016) on certain issues concerning the registration of business corporations in the Commercial Register the Supreme Court stated without explanation, that status issues, which are mandatory, include, "*for example, the definition of bodies of business corporations and their competence, decision-making of bodies (ie, in particular, convocation, quorum, voting majorities, certification of decisions by majority*)" (para I of the opinion).

[30] Šuk´s opinion deals with the interpretation of the Civil Code 2012, Sec. 1 para 2; he argues that all arrangements derogating from the status regulation are not prohibited. Only those derogations that violate status regulation are prohibited. This approach allows it to maintain a broad perception of status, including the competence of the bodies, if it is reasonable.

[31] The reason for the mandatory regulation can be insolvency, securities regulation and regulated industries (e. g. the energy industry).

Each rule in company law shall be interpreted by an aid question. Does this rule regulate essential company characteristics? If the answer is positive, the rule is mandatory. If the answer is negative, we must ask further questions. What is the purpose or meaning of the law? Protection of creditors? Protection of minority shareholders? Protection of employees? Is a specific protected interest a rational reason for limiting private autonomy? If the answer is positive, the interpretation rule is mandatory. This choice of questions is not complete. It should show that the conclusion on the nature of a rule is a result of complex interpretation.

The issue of mandatory and default rules are not so serious if we consider that Czech legal order, like other legal systems in the EU, offers different standard forms of legal entities with different organization and position of members to choose the most suitable one for an individual case (Kraakman et al., 2017, p. 19). We should not forget the possibility of choosing legal forms from foreign jurisdiction, either (Hopt, 2016, p. 15).

6. CURRENT CASE LAW

In case–law regarding mandatory / default nature of the company law recodification, we have two relevant court decisions.

The first decision is the judgment of the Supreme Court of the Czech Republic, 29 Cdo 5719/2016 (19 September 2017) published in the Collection of Judgments and Judicial Opinions under no. R 152/2018. The core of the dispute was the nature of Sec. 207 para 1 of the Business Corporations Act[32] and whether it is possible to completely exclude the transferability of shares in a limited liability company by the memorandum of association. The Supreme Court did not find any reasons for the mandatory nature of the provision interpreted, so it considered the rule default. I can add that forming a fully closed-end limited liability company is not contrary to the nature of a limited liability company because a it stands on the line between personal and capital companies and it depends on the private autonomy of members whether the limited liability company will be rather personal or capital. The protection of members is sufficiently ensured by the legal requirement to a member´s approval to changes in a memorandum of association which influences his or her position. The form of closed-end company cannot be imposed on a member against his or her will.

The second decision is the judgment of the Supreme Court of the Czech Republic, 29 Cdo 387/2016 (31 October 2017) published in the Collection of Judgments and Judicial Opinions under No. R 10/2019. The core of the dispute was whether it is possible to define the manner of representation in a limited liability company in the memorandum of association as joint representation of the managing director and the proctor officer. This question is neither explicitly provided in the Civil Code 2012 nor in the Business Corporations Act. Both Acts contain neither the explicit prohibition nor the explicit permission. Before the judgment was given, this question was intensively discussed (Eichlerová, 2015; Josková, 2013; Pokorná, 2020, p. 1089) (cf. Čech & Šuk, 2016, pp. 31–

[32] Business Corporations Act, Sec. 207 para 1: *„[e]very member may transfer his or her business share to another member"*..

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35; Hurychová, 2014, p. 35),[33] Havel concluded that joint representation of the managing director and the proctor officer shall be admissible under the Commercial Code (2010, p. 101).

The court assessed whether the manner of representation to register in the Commercial Register is allowed as follows: "*At least two managing directors act together on behalf of the company, or one managing director together with one proctor officer. If the company has only one managing director, the joint action of the managing director and the proctor officer is excluded.*" The Supreme Court concluded that the part of this provision of the memorandum of association regarding the proctor officer is absolutely invalid, since it is contrary to the status rule on representation of a company by a governing body. Under Czech law, the statutory regulation presupposes the independent representation of each member of the governing body, unless the articles of association stipulate otherwise.[34] The Supreme Court concluded that "otherwise" admits only modification with participation of the member of the governing body.

The Supreme Court based its decision on many arguments, of which I have chosen three key ones to comment on. The decision is analysed in detail by P. Čech, who fully agrees with the court´s conclusions (2019). The main argument was that the representation of a legal entity externally is one of the essential competences of the governing body which cannot be removed from the governing body. In general, I agree with this conclusion. However, I do not agree with application of this conclusion in this case. In this case the joint representation of the managing director and the proctor officer is not a removal of representation competence of the managing directors. It was the only alternative to joint representation of two managing directors.[35]

The second argument was that the scope of representation of the managing director and the proctor officer is not the same. I agree that the scopes are not the same. The managing director is entitled to represent a company in all matters. The proctor officer is entitled to represent the entrepreneur in all matters regarding the operation of business. Although the scope of representation of the proctor officer is narrower than the scope of representation of the managing director, it cannot be a reason for refusal of their combination. I agree that without explicit statutory regulation it is disputable that in joint representation the proctor officer´s scope of representation extends to the scope of representation of the managing director. However, the result of it shall be the conclusion that the scope of joint representation is within the limits of the scope of the proctor officer.

[33] There has not been consensus on this question yet. Some scholars support the admissibility of joint representation of the managing director and the proctor officer, while some oppose it.

[34] Civil Code 2012, Sec. 164: *"(1) A member of a governing body may represent the legal person in all matters. (2) Where the competence of the governing body is entrusted to several persons, they form a collective governing body. If the forming juridical act does not determine the way in which its members represent the legal person, each member shall do so individually. If the forming juridical act requires the members of a governing body to act jointly, a member may individually represent the legal person as an agent only if he has been authorized to make a specific juridical act."*

[35] The inadmissible removal of representation competence of a governing body was for example this manner of representation: "*In all cases the managing director acts on behalf of the company together with the proctor officer.*" This provision makes it impossible to act for the members of the governing body without the participation of persons who are non-members. It is contra essential competence of the governing body and therefore it is absolutely invalid.

The last important argument was that if it could be inferred that joint representation of the managing director and person out of a governing body is admissible then this person can be anyone. It would be against the certainty of legal relations and that is a reason for the refusal of this possibility. This argument is serious. However, in my opinion, a suitable solution can be the admission of joint representation of a managing director and a representative who is obligatorily registered with the Commercial Register and with whom the principle of material publicity is connected. There are two typical representatives – the proctor officer and the head of branch (branch manager).

In summary, the Supreme Court dealt with the matter in great detail, but as a result interfered more with the private autonomy of a limited liability company than it was necessary. In my opinion, to be allowed as an alternative is justifiable, but not exclusive, joint representation of a managing director and another representative of a company regularly registered with the Commercial Register. These assumptions were also met in the provision of representation in the memorandum of association. In my opinion, this provision should not have been declared absolutely invalid, on the contrary, this manner of representation should have been registered with the Commercial Register.[36]

7. CONCLUSION

The distinction between mandatory and default rules is very important. If default rules are considered mandatory, this leads to a restriction of freedom. Conversely, if mandatory rules are considered default, this leads to a violation of the law and undesirable interference in the sphere of persons who should be protected by the law. In my opinion, the scope of the private autonomy has increased considerably with the recodification of the private law. This is caused not only by a more liberal regulation of companies contrary to pre–recodification state, but also by the intense discussion the new regulation has provoked. Thanks to the new legislation, the institutes of company law can be rethought. This then gives rise to the teleological interpretation of rules in the search for their natures.

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[36] It cannot be assumed that the Supreme Court of the Czech Republic will change its mind. The reason is that this was the second time that it has dealt with it. Firstly, the Supreme Court accepted this conclusion in connection to the publication of judgment of the High Court in Prague, 14 Cmo 184/2014 (4 August 2015) in the Collection of Judgments and Judicial Opinions under no. R 42/2016. The only option would be an intervention of the lawmaker and addition of the explicit provision of joint representation in the Civil Code 2012. However, this is not too likely.

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MANDATORY AND DEFAULT RULES IN PRIVATE LAW / Tomáš Gábriš

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Abstract: *The paper summarizes philosophical, historical and doctrinal background of the differentiation between mandatory and default rules in private law in general and in company law in particular. The conclusion of the author is the plea to provide for a clear guidance in the respective doctrine and legislation as to the criteria and principles applicable to distinguishing between the two types of regulations.*

Key words: *mandatory rules, default rules, permissive rules, legal realism, private law, company law, Slovak law*

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1. INTRODUCTION

The paper summarizes philosophy, history and theory (doctrine) of mandatory and default rules in private law in general and in company law in particular. Based on analysis of the two types of norms, along with the third type of so-called permissive norms, prescriptive guidance is hoped to be provided for both legal scholars and practitioners in their attempt at distinguishing between the respective types of norms. Of course, the best guidance would be an explicit regulation here. The problematic distinction between the two types of regulations together with challenging the traditional approaches favouring mandatory nature of company law may thereby be perceived as a realistic approach to the issue and to related legal problems.

2. PHILOSOPHY AND HISTORY

Legal rules or legal norms can be categorized based on numerous criteria. One of them is the traditional differentiation between mandatory rules and default rules. This distinction is taking into account the degree to which the rule-making authority is vested with the state or – in contrast – reserved to the parties. This distinguishing of norms is hence clearly interconnected with another categorization of legal norms into

autonomous and heteronomous rules. The heteronomous ones are thereby the rules laid down by officially enacted laws (Acts of Parliament, etc.), while the autonomous regulation is the one being set by the contracting parties themselves. An interesting middle category is thereby allegedly represented by collective labour agreements that are being made generally binding by the state, while being created by the autonomous contracting parties – hence showing both the characteristics of autonomous as well as heteronomous regulation. In addition to distinction between mandatory and default rules, however, a third category of rules can also be discerned – so-called permissive rules, which will be discussed infra, being situated at the crossroads between autonomous a heteronomous rule-making as well.

In private law in general, a relatively high degree of autonomy (freedom) is considered to be one of its philosophical backbones, at least since the times of victory of liberal political and legal thought. From a broader historical perspective, however, the recognition of "private autonomy" in modern law is all but a modern element. In fact, it can be rather perceived as a relic of a much broader historical concept of autonomous rule-making, which was very much characteristic of pre-modern and pre-liberal era, when the state and state-made law played only minor role in regulating various aspects of everyday life. It was namely only with the emergence of legislative monopoly of the state that autonomous rule-making has shrunk to what we know nowadays as private autonomy recognized by the state-made law. In other words, autonomy is generally not considered to be "law-making", but only making use of the possibility granted to the people by the state recognizing their contractual autonomy – which is in fact manifested inter alia by the existence of default legal regulation.

The current situation is thereby a heritage of the 19th century legal scholarship, in Central Europe being mostly influenced and inspired by German legal thought, witnessing back then a clash between **Pandectists and Historical School of Law**.[1] In this battle, the German Historical School of Law emphasized the importance of autonomous communities and their ability to create the "law". Thus, at the beginning of the 19th century, Karl Friedrich Eichhorn (1781–1854) distinguished between *ius scriptum* as denoting state-created laws, and *ius non scriptum* as being autonomous normative systems, or rules created by the judiciary in the form of a judge-made law (Meder, 2009, p. 44). These terms were similarly used by Joseph Anton Mittermaier (1787–1867) and Romeo Maurenbrecher (1803–1843); (Meder, 2009, p. 115). In addition, Georg Beseler (1809–1888), Otto Bähr (1817–1895) and Otto von Gierke (1841–1921) all jointly accepted the normative competence of societies and communities, due to their underlying element – the autonomy. Georg Friedrich Puchta (1798–1846) thus spoke of autonomy as a distinct source of power that corporations exert over their members, which is not of a contractual nature (Puchta, 1862, p. 28; quoted from Meder, 2009, p. 64).

These views were, however, overcome and abandoned in the German legal scholarship because the Pandectist approach was victorious in the end of the day, refusing autonomous law-making and limiting autonomy only to an element of law of obligations – to the extent recognized and allowed for by the state. It was specifically the figures and personalities such as Carl Friedrich von Gerber (1823–1891) and Paul Laband (1838–1918) who embraced the concept of legal thought which hoped to change the German Empire into a monolithic "*Anstaltsstaat*", not recognizing any non-state-based

[1] A similar battle took place between Romanists and Germanists within the Historical School itself, especially with regard to the nature of legal persons – on the one hand, there was a theory of fictitious existence of legal persons, while on the other, Germanists such as Otto von Gierke were rather inclined to the idea of a real existence of legal persons.

normative autonomy. Thus, Gerber explicitly rejected autonomy as the source of law, claiming there is a difference between law-making and law enforcement – and autonomy thereby only means the power to act legally, but not to create law (Gerber, 1854, pp. 36, 46; see also Jhering, 1893, p. 320; both quoted from Meder, 2009, p. 60-61). Autonomy should thus not be considered a separate source of "non-state law", but rather only a source of contractual relations and legal acts, and therefore, a part of the law of contracts, Gerber claimed (Meder, 2009, p. 53). Otherwise, according to Laband, normative autonomy would necessarily conflict with the sovereignty of the state. Laband also quoted here Savigny, who claimed that legal acts are only sources of subjective rights, not of objective law (cf. Laband, 1911, p. 106; quoted from Meder, 2009, p. 63). Savigny even demanded that the term "autonomy" be abandoned altogether (Savigny, 1840, p. 12; cf. Meder, 2009, p. 64). In this spirit, Wilhelm Eduard Wilda (1800–1856) in 1842 transferred the notion of "*Privatautonomie*" from legislative and law-creating process into law of contracts too (Wilda, 1839, p. 547; quoted from Meder, 2009, p. 164). From then on, it was only a step from positivists such as Carl Bergbohm (1849–1927) and Hans Kelsen (1881–1973) to demand the recognition of the sole monopoly of state to create law. As an outcome, an exclusively state-based law-making was accepted. The concept of law without a state, and the notion of "autonomous" law were to be completely abandoned. Autonomy as a source of law thus shared the same fate as legal custom and legal science – they ceased to be considered a source of law altogether.

Based on the above-mentioned overview it is clear that this evolution represents a dramatic change and shift in the understanding of law, influencing our modern perception of law in continental Europe. However, the idea of state-independent rule-making never died away completely even in the 20th century. The Italian theorist of the 1930s, Santi Romano, a forerunner of the modern idea of legal pluralism, was one of those who proposed the idea that law is primarily a social phenomenon, and that each and every social institution forms its own social norms, thus creating its own "law" (Romano, 1975, pp. 44–45; cf. Di Robilant, 2006). Although this simple solution may not necessarily convince all opponents, the use of the term "law" to designate non-state-made standards was not at all uncommon in the 20th or 21st centuries: for example, in 1933, a German lawyer Hans Grossmann-Doerth used the phrase "*selbstgeschaffenes Recht der Wirtschaft*" (autonomous law of economy) as a synonym for general contract terms and conditions; similarly, the label of "*autonomes Recht*", "*private Normenordnungen*", "*autonome Rechtsordnungen*" or "*Privatgesetzgebung*" is still being used nowadays to denote non-state-based normative systems (Vec, 2004, pp. 96–97, 2008, pp. 155–166), such as *lex mercatoria*, *lex informatica* (*lex digitalis*, *lex tecnica*) (cf. Walter, 2004, pp. 48–49), *lex sportiva* (Ipsen, 2009, p. 32; Teubner, 1996, p. 255, 1997), or *lex constructionis* (the international construction standards); (see Kadelbach & Günther, 2011, pp. 19–21). Finally, the famous German lawyer Helmut Coing recognized similarly that in addition to state-formed law, there is also specific religious and international law, being actually examples of a "non-state" law (Coing, 1985, pp. 283–285; quoted from Meder, 2009, p. 78). One might, however, still be skeptical and believe that even these normative systems represent only a transitional stage, and in the future they will be subject to state control and to state-made norms as well (Ipsen, 2009, p. 246). In contrast, however, there is also a growing number of authors supporting the idea of non-state law and legal pluralism (de Sousa Santos, 1987), believing that states usurped throughout the 17th to 19th centuries powers which do not necessarily belong to a state, while claiming that states are now gradually withdrawing from the field, allowing once again for resurfacing of the autonomous "non-state" law (Zippelius, 2004, p. 161).

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Be it as it may, at this point, state-made law surely still plays an important role in continental Europe, even in private law and company law – mostly with regard to safeguarding social functions of the law and of the state, such as guaranteeing minimum standards of human rights. The growing importance of autonomy is nevertheless also present, which leads to the need to re-assess the distinction between mandatory rules on one hand, and space for autonomy manifested in default norms on the other.

3. DOCTRINE EVOLVING: EXAMPLE OF THE SLOVAK REPUBLIC

Moving now from the philosophy to positivist doctrinal approaches in continental Europe with regard to mandatory and default rules, current situation is mostly that of lacking proper criteria for distinguishing between the mandatory and default rules. This problem thereby emerges both on a more general level of private law, as well as on the more specific level of company law – together with the discussions on the degree of autonomy for the parties to be recognized in these branches of law. To quote Petri Mäntysaari: "*If one wants to increase the discretion of the parties and limit the scope of state regulation, one can regard the corporation as something similar to a contract and argue that freedom of contract should prevail. Alternatively, one can argue that the corporation is not a contract and that mandatory standardisation reduces transaction costs and benefits the society as a whole*" (2012, p. 61).

The problem of relationship and distinguishing between mandatory and default legal rules is thereby not a new one and not without a properly evolved doctrine, as we shall explain shortly. However, due to the constraints of this paper, let us formulate a caveat for the reader here that we shall focus solely on doctrinal evolution in the territory of Slovakia, including historical predecessors of the Slovak Republic. Let us therefore start with the pre-1918 approach in what was then known as the Hungarian Kingdom (a part of Austria-Hungary), where the doctrine made a distinction between **inner and outer relations** of a business company (Horváth, 2006, p. 397). The inner relations were considered to be regulated predominantly by default rules, and it was made possible to have the relationship between partners (shareholders) regulated autonomously. In contrast, external relations were considered to be regulated by mostly mandatory rules with no possibility to deviate from them (unless explicitly allowed); (Horváth, 2006, p. 397).

A similar approach was taken over by the Czechoslovak Republic and its legal scholarship in the interwar period. In the – nowadays almost forgotten – 1937 draft of Commercial Code, separate chapters on internal relations among shareholders and external relations of the business company were included in case of public company and partnership company.[2]

In case of a public company, Sec. 114 of the draft stated that within internal relations, default rules apply predominantly, with some explicitly stated exceptions. In contrast, under Sec. 152, external relations were regulated in principle by mandatory rules, again with some explicitly stated exceptions.

In case of a partnership company, under Sec. 199, in principle default rules were introduced with regard to regulation of internal relations, with the exception of explicitly specified Sections of the draft. Interestingly, even with respect to the specific type of silent company, which was only briefly regulated in the draft of 1937, the internal relations were also to be regulated by default rules (Sec. 225).

[2] The unfinished draft only dealt with these two basic forms of companies, and additionally contained some rules on the so-called silent company.

This general concept making distinction between explicitly specified internal and external relations was thereby explicitly explained and confirmed in numerous places of the explanatory memorandum to the draft of 1937 (*Osnova obchodního zákona*, 1937, pp. 161, 172, 182, 208), accepting and streamlining the doctrinal approach under which **default rules were considered as a standard and mandatory rules as a specific deviation with respect to regulating (enumerated) internal relations of a company, while the opposite was true for external relations between company and its business partners or general public.**

Unfortunately, this draft project was never enacted by the parliament of Czechoslovakia, and instead the formerly Austrian and Hungarian law (commercial codes) applied in the territory of Czechoslovakia up until 1950. Only in 1950, under completely different circumstances of one-party (Communist Party) rule, new Civil Code was enacted, which abolished the two (originally Austrian and Hungarian) Commercial Codes valid in two parts of Czechoslovakia, and instead partial commercialization of the Civil Code was introduced. Under the Communist Party regime, no company law was namely considered necessary – private entrepreneurship was completely abolished and only state-owned companies were allowed, which were regulated by specific governmental regulations and acts of the parliament. The doctrine on mandatory and default rules in company law thus sunk into oblivion.

Commercial Law remained in existence only with respect to international commerce, being regulated in the Code of International Commerce (Act No. 101/1963 Coll.). This Code, however, regulated only law of commercial obligations and no company law proper. Under its Sec. 5, it was simply stated that: "*The Parties may agree to provide for a derogation from the provisions of this Act, unless expressly provided that they may not be derogated from*." Hence, a general rule on default nature of rules was introduced in this Code, but without any underlying doctrine or theory, simply as a concession made to the foreign business partners.

In contrast, a different doctrinal principle was laid down in the new Civil Code of 1964 (still applicable in Slovakia even nowadays, albeit being heavily amended), where no specific rule on relationship between default and mandatory rules was originally expressed in the wording of the Civil Code at all. In practice, severe ideological constraints on the possibility to deviate from the rules of the Code applied, making thus the Code a rather mandatory system of rules where even the distinction between private law and public law was explicitly rejected.

It was only after 1989 that changes were introduced in this regard, emphasizing again the autonomy and freedom of natural and legal persons in a democratic and liberal regime, especially in the private law branches. A new Sec. 2 (3) was introduced in the Civil Code, which has provided for some guidance with respect to the relationship between mandatory and default rules. It namely allowed to derogate from the provisions of the Civil Code by mutual agreement, unless "*the law expressly prohibits it or unless the nature of the provisions of the law implies that they cannot be derogated from*." However, as may be seen from this wording, the Civil Code unfortunately provides in no way a clear guiding principle to distinguish between the two types of norms – mandatory and default rules.

In contrast to the Civil Code, Sec. 263 of the Commercial Code (enacted in Czechoslovakia in 1991) explicitly enumerates the mandatory provisions from which the contracting parties may not deviate in adjusting their rights and obligations. However, this only applies to the law of obligations in the Commercial Code. The Code does not provide for any special criteria for determining the mandatory or default standards in other parts of the Commercial Code (notably in the part on company law), where therefore only the

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unclear rule contained in Sec. 2 (3) of the Civil Code applies instead, leaving much to be wished for.

Precisely due to this type of uncertainty, there are radically differing approaches taken by Slovakian scholars nowadays as to the prevailing nature of legal norms in the Commercial Code (and broadly speaking in commercial law, including company law) in Slovakia. Šuleková (2015, p. 19) summarizes that according to Kolániková, "*it can generally be stated that the provisions of the Commercial Code governing companies are predominantly mandatory, given their nature. However, a default nature of a provision is unquestionable if it contains, for example, the wording such as "unless the articles of association or statutes state otherwise"*." (2013, p. 123) Unlike Patakyová, who also considers the nature of rules in the Slovak company law to be predominantly mandatory (2013, p. 4), Mamojka Jr. differentiates between the inner and outer relations of business companies, stating that "*while a particular external world of each company is more or less mandatorily given by law (company's establishment, formation, abolition) their internal life is made up of a number of legal ties mainly operating on the above-mentioned principle of default rules*." (2008, p. 15). Unfortunately, this doctrinal explanation lacks an explicit provision in the Slovak legal system, making thus this view to be only one of many possible doctrinal views on the nature of the Slovak company law.

Instead of clear doctrinal and legislative guidance, the final word in discerning mandatory and default rules is therefore currently being given into the hands of judiciary. However, relying only the piecemeal judicial interpretation is not really the most convenient solution in the branch of commercial or company law – due to the obvious lack of legal certainty. Thereby, it is precisely the legal certainty, hand in hand with the need of a fast dispute resolution process (notably via arbitration) and some elements of speculation, that together lie at heart of modern commercial (company) law in its capitalist form and shape (cf. Coing, 1989, p. 535).

A clear and definite solution of the issue should thus be sought for, to provide clear guidance to the business companies and their business partners not only in the Slovak Republic.

4. POLICY AND RECOMMENDATIONS: REALISTIC STANCE

In addition to the "realistic" view of solely judicial (and often non-systematic) determination of company law rules as mandatory or default, some other traditional doctrines are also being challenged by sceptical and realistic views of company law and its standards. Thus, on top of the distinction between mandatory ("shall") and default ("unless") standards, the doctrine currently discusses also the existence and importance of a third type of norms, very often found in current wordings of legal texts of company law – the so-called permissive ("may") rules. Unlike the default rules, which apply provided that the addressees of the standards do not depart from these (opt-out mechanism), the permissive rules contain no default rule, only refer to the possibility of introducing specific rules of autonomous law. Permissive standards thus require the addressee of the standard to exert his or her will (opt-in mechanism) to reach the effects envisaged by this standard (Šuleková, 2015, pp. 71–72), which hence serves as a sort of a "nudge" for the recipient of company law norms.

Thereby, permissive rules are often being introduced in legislative practice in a rather haphazard way, throughout the ongoing process of amendments to the binding texts, usually in reaction to a one-time (casuistic) problem in legal practice – mostly where even the experts were not quite sure whether the practice was allowed on the

principle of default regulation or not, and therefore they rather opted for an explicit permission instead.

Still, this third type of norms only adds to the complexity of the overall situation and is in fact not helpful in any way in identifying which rules are mandatory and which apply by default. In contrast, they are further blurring the duality of mandatory and default rules.

The problem but potentially also the solution to the problem thus seems to be hidden in the very **legislative technique and instruments used in legislating on company law**. A better theory of legisprudence thus seem necessary to master the criteria of distinction between the mandatory and default rules by both practicing lawyers as well as by business entities themselves, which should then also lead to a more predictable judicial decision-making.

Thereby, the already mentioned "nudging" and other similar concepts of Law&Economics or Law&Behavioral Economics movements are recently being invoked in this context.

The Law&Economics stream of legal thought namely suggests that the state can sensibly specify default rules when a large number of parties face the same problem and the state-supplied solution costs less than the total benefit to the affected class of parties – i.e., if the benefit of the parties prevails over costs imposed by default rules (Scott, 2000, p. 160). In other words, Law&Economics approach suggests that the role of the legislation is to bring about a result that the parties would be likely to achieve if the transaction costs were zero or at least minimal. Default rules are thus claimed to be reducing transaction costs that would otherwise have to be incurred.

However, this view can be agreed with only partially, since the default legal rules often do not introduce the best option for the parties, and do not represent what sufficiently informed parties would potentially agree upon. According to Šuleková, the default rules are instead often formulated so as to balance the conflicting interests of the parties to the legal relationship. She speaks of the so-called "penalty default rules", i.e. default rules causing effects that the parties would normally not want to achieve, making thus the parties motivated to deviate from the default rules (2015, p. 68).

In any of the two interpretations it still holds true that besides economic aspects, the psychology of the addressees of law plays an important role too. This is the point where instead of the classical Law&Economics movement, rather the Law&Behavioral Economics line of legal thought steps in.

The role of psychology with respect to the problem of mandatory and default rules is thereby in no way a new idea. Already the prominent 20th century communist legal scholar from Czechoslovakia, Viktor Knapp, stated frankly that default and mandatory norms are usually not recognizable from the wording of the law itself; instead, lawyers recognize the nature of the norm through intuition, Knapp suggested (1995, p. 2).[3]

This claim, being close to the ideas of sceptical legal realism, is thereby nowadays being scholarly backed also by recent research outcomes in the field of behavioural economics. Behavioural economics namely works with the concept of cognitive biases, which can be witnessed also in company law, even with respect to distinguishing mandatory and default rules: Any wording of the law, be it mandatory or default, namely poses a challenge to the independence of human judgment and decision-

[3] Šuleková thereby adds that: Lawyers often forget that law is the result of an individual's creative activity and not just the standardized will of the legislator. This is potentially one of the reasons why lawyers are intuitively in favour of the mandatory nature of corporate law, although the nature of these standards is not recognizable at first sight (2015, pp. 69–70).

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making. The person is rather inclined to stick to the wording at hand, instead of phrasing other solution. This is a so-called "status quo" or a related "anchoring" cognitive bias, which causes us to remain at the regulation introduced by the law, and to consider this as a guiding, mandatory rule. Therefore, it is claimed that even the judges with many years of practice often (mis)interpret the autonomous rules created by contracting parties (shareholders) rather in the light of the notions used in the law, instead of going into deeper analysis of what and how the parties themselves intended to regulate. In words of Robert E. Scott, "*while the state presumably knows what it means by the default rules that it implies in every contract, it does not know the intended meaning of the express terms chosen by the parties. Thus, privately formulated express terms are always subject to an additional risk of unpredictable (or nonuniform) interpretation. Contracting parties face an inherent risk that an express term that was designed to trump the default terms of the contract will be interpreted instead as merely supplementing the default understanding*" (2000, p. 164).

Still, knowing and realizing this inclination (bias) is the first step in the right direction to be taken by both the judges as well as by business companies. In fact, this again has to do with the behavioural economics, distinguishing between three possible approaches to take in a society – (1.) descriptive ("positive"), (2.) normative, and recently added so-called (3.) "prescriptive" approach as a third stance found in the middle between the former two. Taking economy as a subject matter to explain these three approaches to society, descriptive economy only describes the behaviour of individual actors, especially in psychological, behavioural (nowadays rather "cognitive"), or institutional ("institutionalist") terms. Normative economy, on the other hand, prescribes ideal economic standards for an ideal world – this approach, however, is often accused of being detached from "reality". Therefore, a third way of so-called prescriptive economy is being developed, which "prescribes" behaviour to real actors in the real world (cf. Pearlman, 2009). Normatively correct answers may namely not always be also "prescriptively" correct in specific situations. Searching in similar terms for a prescriptive guidance in legal practice – specifically with respect to mandatory and default rules in company law, a working "prescriptive" legal guidance is to be offered for both enacting effective laws on one hand and for actual implementation and application of such laws on the other.

At this point, an efficient prescriptive guidance in former case (at the level of law-making) thereby seems to be to introduce a combination of explicitly given mandatory rules and explicitly identified default rules (or explicit criteria for their discernibility) in the legal texts of company law – as for example in the Czechoslovak draft of commercial code of 1937. Still, until this materializes in the legislative form, practical "prescriptive" recommendation would be to take into account the overall inclination to interpret legal rules as rather mandatory, and to attempt to argue against this attitude with the help of the doctrinal arguments employed in this paper – until a legally binding guidance with clear criteria will be provided for by the legislator. Of course, a realistic prescriptive approach would also require taking into account the actual case law developed in this area while shaping the argumentation – instead of arguing stubbornly against the already accepted judicial practice...

5. CONCLUSION

A counterpart to the mandatory rules of law is traditionally being seen in the so-called default rules. However, the current situation in drafting legislative texts is that of exploiting not only these two types of rules, but also a specific sub-type of so-called

permissive rules. These are rules which are not default rules in the proper sense of leaning on default regulation in case the parties do not agree otherwise. Just the opposite is true – permissive rules are not applicable by default. They rather "nudge" the parties (or a judge) to accept a regulation they might not have thought of as permissible. Thus, in fact, this type of norms serves to clarify the extent to which the autonomous rule-making by the parties or shareholders is to be accepted. This necessity on its own proves on the one hand the fact of general inclination towards considering all legal norms as mandatory (due to the status quo and anchoring biases forcing everyone to stick to the rules known and explicitly given), while on the other hand, the use of permissive rules is also a very prescriptive (albeit at the same time very casuistic) tool to guide the parties to the area of autonomy in company law. An explicit wording and explicit rules hence still seem to play the greatest role in identifying the borders between mandatory and default rules, and between heteronomy and autonomy in company law. All of this is finally pointing to the general need for clear and explicit guiding principles expressed in legislation (or at least in a generally accepted doctrine) on how to discern which norms (or sectors of regulation) are mandatory and heteronomous, and which can be deviated from, based on the principles of freedom and autonomous governance…

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MANDATORY AND DEFAULT REGULATION IN POLISH COMPANY LAW / Bartłomiej Gliniecki

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Abstract: *Company law regulations provide opportunity for individual shaping of some of companies and partnerships rules of operation. Proper determination of those regulations which may be modified by adopting different rules in articles of association (company statues, partnership agreements) is important as far as legal safety of corporate regulations is concerned. Abusing or misunderstanding of company law regulations may lead to invalidity of contractual arrangements that would infringe mandatory regulation of company law. The article provides a general view on the principle of freedom of shaping company articles of association in the Polish company law as well as the ways of distinguishing between mandatory, semi-mandatory and default rules in the Polish company law. Apart from general remarks and indications helpful in understanding the Polish law, it also provides specific examples of company regulations in Poland and references to company rules of law in other European countries.*

Key words: *company law, Poland, freedom, default rules, mandatory rules, semi-mandatory rules, articles of association, company statutes, transferring shares*

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1. INTRODUCTION

One of the major dogmas of company law, which is true in various legal systems across Europe and beyond, is that operation of companies is partly based on the common regime (domestic regulations of company law), however, some rules of operation of companies may be shaped individually and determined by company statues (articles of association). This would apply also to other types of corporations such as partnerships, cooperatives or societies. The abovementioned principle originates from the contractual freedom constituted by civil law and may be further derived from the concept of a free-market economy. It has been implemented into company law by grouping its norms (rules) into mandatory and default categories. The latter are recognised as standard and adjustable regulations that can be effectively amended in individual cases by contracting parties – founders or shareholders of the companies. Thus, default rules provide flexibility and adaptation of company operation rules to business expectations. This can be used to deliver autonomous solutions that may result in higher effectiveness of an organisation constituted by a company.

The Polish company law, which is historically based mainly on the German company law, as well as the company regulations in other CEE countries, has fully incorporated the opportunity to modify some of the out-of-the-box rules governing companies, mainly those applied to internal relations. This paper is intended to provide general perception of the mandatory and default rules in the company law of Poland, indicating some imperfections of the current corporate regulation in the field. The final conclusions will include suggestions that would make it easier to distinguish between default and mandatory rules in the company law.

2. CONTRACTUAL FREEDOM IN COMPANY LAW

The Polish company law[1] provides regulations applied to formation, governance, winding-up and transformation of 4 types of companies[2] and 4 types of partnerships, as well as the rights and obligations of their shareholders (partners). Their legal concept is based on the civil law regulations, especially implementing contractual freedom as a general principle. In the company law, it has been projected to the opportunity to shape company statutes (articles of association, partnership agreement) according to the expectations of the founders, however with some limitations described hereinafter.

The Polish CCC does not provide any explicit rule, applicable to all types of commercial companies that would allow to divide company law norms strictly into mandatory and default ones. However, that division, as well as possibility to dissent from some rules governing companies which have been provided by the CCC, is widely acknowledged and has not been contested. The core of this concept is represented by art. 2 of the CCC, which explicates subsidiary role of the Civil Code in the matters which have not been strictly covered by the CCC. As there is no general regulation of the level of individual adjustments than can be made to company statues, art. 2 of the CCC allows using the principle of contractual freedom expressed by art. 353^1 of the Civil Code. It provides that contracting parties may shape their contracts (deals) according to their free will, as long as its contents or aims are not contrary to its nature, the acts of law or the rules of social coexistence. Thus founders, shareholders or partners may benefit from general competence to influence corporate rules of operation, which however cannot be recognised as unlimited.

Moreover, the wording of some provisions of the CCC provides clearly that rules expressed by them may be amended contractually.[3] However, this cannot be assumed as a reliable guidance in distinguishing between mandatory and default rules of the Polish company law, as there are more rules which are recognised as default, even though they have not been explicitly marked as adjustable in such way.

Considering the above, the character of the company law regulations has to be clarified mostly using legal textual interpretation techniques. It is mostly done by analysing the role and aim of certain regulations in question, their placement and relation to other rules of the company law and possible impact on third-parties and/or company law principles in case of recognising a certain regulation to be mandatory or default. The practical determination is made by jurisprudence and doctrine, and focuses mostly on specific cases, often taken to court by disputing shareholders.

[1] The act Commercial Companies Code of 15 September 2000, hereinafter "CCC".
[2] Including *Societas Europaea* and a simplified joint-stock company with no share capital (*prosta spółka akcyjna*, art. 301-300 CCC).
[3] By meaning of a commonly used phrase: „[…]unless company statutes provides otherwise", or a phrase with a similar wording. Less than 10% of the CCC provisions include such a phrase.

3. DIFFERENT LEVEL OF FREEDOM IN DETERMINING PARTNERSHIPS' AND COMPANIES' RULES OF OPERATION

From the wording of certain provisions of the CCC it can be noticed that there is a notable difference between partnerships and companies when it comes to the scope of statutory freedom provided to their partners or shareholders. The partners are more free to arrange internal rules of operation of their partnership in general compared to the shareholders in companies.

The first reason for such observation is the content of art. 37 of the CCC, which provides general rules applicable to all internal affairs in a general partnership, but is also applicable to other types of partnerships, including limited liability partnership (or professional partnership)[4] and limited partnership.[5] The abovementioned regulation states that provisions of Chapter 3 titled „Internal affairs in a general partnership" (art. 38-57 CCC) shall be applied unless the partnership agreement states otherwise. Hence, it gives clear information on the default character of the forthcoming rules, however art. 37 § 2 CCC states additionally that a partnership agreement may not limit nor exclude rights expressed by art. 38 CCC – the right to manage the affairs of the partnership by at least one of the partners and the right of every partner to personally inquire about the state of the assets and business of the partnership and view the books and documents of the partnership (the right to get information on the partnership). In the regulation referring to companies there is no such solution that would explicitly declare default or mandatory character of a certain group of provisions.

Secondly, the potential impact of contractual modifications on corporate values which are protected by the CCC regulation is less visible in partnerships. Especially, there are no specific regulations that would protect minority shareholders (or partners), with exception of the guarantees of the essential rights provided to all partners such as the right to participate in gains, the right to get information on the partnership or the right to withdraw from the partnership. Also, because of unquestionable personal liability of partners for partnership debts, affecting creditors by individual arrangements made in a partnership agreement is less likely.

In companies, the principle of contractual (statutory) freedom has to be confronted with core values of the corporate law, which include corporate nature of companies, mechanisms ensuring effective management and protection against abusing a company by managers (rules of corporate governance), protection of creditors, safety and reliance of business operations and trust of third parties, as well as protection of minority shareholders. If one of those values were affected by a regulation introduced into company statutes, that would diverge from the rules expressed by the CCC, most likely it would be recognised as violating the mandatory rule, thus null and void, even though the respective provision of the CCC would not state clearly whether it is default or mandatory.

In a joint-stock company,[6] the freedom of setting company statutes is further limited by the rule expressed in art. 304 § 3 CCC. It follows the *Grundsatz der Satzungsstrenge* concept, featured also in art. 23 § 5 of German *Aktiengesetz*.[7] Its main

[4] Polish: *Spółka partnerska*, art. 86-101 CCC.
[5] Polish: *Spółka komandytowa*, art. 102-124 CCC.
[6] Polish: *Spółka akcyjna*, art. 301-490 CCC.
[7] *"Die Satzung kann von den Vorschriften dieses Gesetzes nur abweichen, wenn es ausdrücklich zugelassen ist. Ergänzende Bestimmungen der Satzung sind zulässig, es sei denn, dass dieses Gesetz eine abschließende*

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aim is to provide solid and stable rules of operation of joint-stock companies in most of their internal and external affairs, thus protecting creditors and shareholders (Sołtysiński & Moskwa, 2016, p. 9). This approach has been criticised over recent decades as too limited and opposed to the less intrusive American regulation, providing more space for individual arrangements in company statutes. However, companies frauds and economic slowdowns (i.e. crisis started in 2008 in the USA) proved weaknesses and possible poor consequences caused by abuse of statutory freedom and mostly default corporate regulation (Sołtysiński & Moskwa, 2016, pp. 10–23). Hence, in case of a joint-stock company, the default character of the CCC regulation may not be deemed nor interpreted, unless a provision explicitly states that company statutes may provide a different regulation (Sołtysiński & Moskwa, 2016, pp. 9–10).[8] Therefore, it may be said that those regulations have rather mandatory character and the statutory freedom faces much more limitations here than in other types of companies and partnerships.

4. MANDATORY, SEMI-MANDATORY AND DEFAULT RULES IN POLISH COMPANY LAW

The company law rules that are essential for determining a legal framework of certain types of companies and partnerships, their founding process as well as regulations possibly affecting third parties, especially creditors, are recognised as mandatory, even though the wording of the rules often does not state clearly whether its sense could be modified by the company statutes or not. Rarely, the provisions of the CCC provide mandatory character of the regulation explicitly, usually stating that a certain wording of the company statutes (contrary to the wording of the rule) would be null and void.[9]

Usually, those rules whose main role is to provide protection to third parties, thus securing trust and reliability of business transactions, or provide minimum guarantees to shareholders, especially protecting minor shareholders may be considered as mandatory.[10] In particular, this would refer to the company law regulations that address company founding and registration process, liability for company debts,[11] winding-up and company liquidation, basic corporate governance regulation protecting against the conflict of interests,[12] appeals against shareholders' resolutions, M&As, transformation

Regelung enthält." (The articles may contain different provisions from the provisions of this Act only if this Act explicitly so permits. The articles may contain additional provisions, except as to matters that are conclusively dealt with in this Act.)

[8] An explicit authorisation to provide a different regulation in the company statutes has been expressed e. g. in art. 340 § 2 and 347 § 3 CCC.

[9] E. g. art. 38 § 2, art. 60 § 2, art. 62 § 2, art. 63 § 3, art. 73 § 3, art. 108 § 2, art. 443 § 1 CCC.

[10] Art. 177 CCC (a shareholder's duty to contribute with supplementary payments raised accordingly to shareholders' resolution) has been recognised as mandatory in the judgment of the Court of Appeal in Warsaw, I ACa 68/11 (3 October 2013). Art. 247 § 2 CCC (deployment of secret voting in election and revoking of company officers) has been recognised as mandatory in the judgments of the Court of Appeal in Gdańsk, I ACa 714/14 (13 March 2015); and the Court of Appeal in Szczecin, I ACa 234/13 (6 June 2013).

[11] Art. 299 CCC (personal liability of management board members for unpaid debts of a limited company) has been recognised as mandatory in the judgment of the Supreme Court, II CSK 446/13 (15 May 2014); the judgement of the Supreme Court, III CSK 46/10 (9 December 2010); and the judgement of the Court of Appeal in Cracow, I AGa 137/18 (14 June 2018).

[12] Art. 209 CCC (duty of management board members to refrain from making decisions on behalf of the company that could be biased by interfering with their personal interest or interests of persons related with them) has been recognised as mandatory in the judgment of the Court of Appeal in Cracow, I ACa 1413/15 (12 January 2016); art. 210 CCC (rules of making representations by the company in relations with member

and split processes, as well as the rules of company representation (Tarska, 2012, pp. 93–94). Obviously, one of the basic statutory freedom limitations is represented by numerus clausus principle of the CCC (art. 1) which does not allow to establish any other type of a partnership or a company which has not been foreseen by the acts of law (Tarska, 2012, pp. 96–97).

On the contrary, the CCC regulation that would affect mostly internal affairs are deemed as default, as far as their modification would not infringe the core rights of shareholders (i.e. the right to dividend, the right to sell shares), or would not lead to their unequal treatment.[13] The examples of the corporate areas that are governed mostly by default rules of the CCC include the process of making decisions within a company (shareholders' resolutions, scope of freedom in making business decisions provided to a management board etc.), transferring shares, or raising share capital of a company.

It has been acknowledged that in the Polish company law, apart from mandatory and default rules, some regulations have a semi-mandatory character (Tarska, 2012, pp. 96–97). They are deemed to set out a minimum standard that must be obeyed in order to provide an effect assumed by introducing a particular regulation. Thus, they may be amended by company statues, however, in one direction only: a statutory regulation may not deliver any worse resolution compared to the one provided by a semi-mandatory CCC regulation. They often provide protection e. g. to minor shareholders, that is why the foreseen level of protection may only be increased.

The semi-mandatory rules are usually not clearly marked in the CCC as well. Their character can be usually ascertained as semi-mandatory, if there are no strict premises that would consider the rule as mandatory, however allowing its free modification would lead to infringement of at least one of the core values of the company law. As an example, art. 238 § 1 CCC provides that invitations (notices) concerning a general meeting in a limited liability company shall be sent out to shareholders 2 weeks in advance.[14] Although the regulation does not state its character clearly, it is widely considered that the period may be extended (e. g. to 30 days), however not shortened (e. g. to 7 days) by the articles of association. Thus, the rule shall be recognised as semi-mandatory (see, e. g. Kidyba, 2005, p. 674; Namitkiewitz, 1994, p. 190; Pabis, 2018; Sołtysiński, Szajkowski, Szumański, Tarska, & Herbet, 2014).

This, however, is not the only one and true understanding of the regulation in question. Some opinions consider it as mandatory or "generally mandatory".[15] An example of art. 238 gives a great view on the problem of understanding the character of certain norms of the CCC. While it is doubtless to consider this regulation as rather mandatory than only default, there are disputes related to its elements that could be – under some circumstances – effectively amended by an agreement (company statutes). The regulation itself does not give any clues on its character, making it troublesome to apply it correctly and safely.

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of the management board) has been recognised as mandatory in the judgment of the Supreme Court, I CSK 122/16 (3 October 2019); the judgment of the Supreme Court, II PK 124/13 (29 January 2014); the judgement of the Court of Appeal in Łódź, III AUa 707/13 (10 February 2014); and the judgement of the Court of Appeal in Lublin, III AUa 833/12 (6 November 2012).

[13] Unequal treatment of shareholders in companies is generally prohibited by art. 20 CCC.

[14] Art. 238 § 1 CCC: *„The general meeting shall be convened by means of registered letters or courier mail, sent out at least two weeks prior to the date of the general meeting. Instead of a registered letter or courier mail, the notice may be sent to the shareholder by electronic mail if the shareholder has earlier agreed thereto in writing and provided the address to which the notice should be sent."*

[15] Judgement of the Court of Appeal in Warsaw, VII AGa 220/18 (15 March 2018).

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5. EXAMPLE: LIMITATIONS OF TRANSFERRING AND ENCUMBERING SHARES IN A LIMITED LIABILITY COMPANY

The general presentation of mandatory and default rules in the Polish company law described above has showed that i) there are no general rules or principles on the character of company law regulations that would be applicable universally, ii) the character of certain company law regulations is determined by jurisprudence or doctrine, typically by means of legal interpretation, iii) practical determination of statutory freedom limitations may be tough and lead to ambiguous conclusions, especially in companies other than a joint-stock company.

The operation of the abovementioned model can be presented using the example of a regulation that allows introducing the limitations of transferring and encumbering shares in limited liability companies.[16] According to the wording of art. 182 § 1 CCC, the articles of association may stipulate that a transfer of share, its part or a fraction of share and a pledging of share shall be subject to the consent of the company, or otherwise restricted. Consequently, art. 182 § 2 CCC provides that if the transfer of shares is subject to the consent of the company, the provisions of § 3-5 shall apply, unless the articles of association provide otherwise.

The first provision introduces an opportunity to provide limitation in transferring or encumbering shares, the second provides the choice between the rules determined by the CCC and those determined by articles of association of the company. While the second provision has a clear default character, the role and meaning of art. 182 § 1 CCC was doubtful, leading to various conclusions and abuses of contractual freedom in the company law. Potentially, an introduction of rules that would provide limitations to the transfer of shares would infringe one of the basic rights of shareholders. Practically, art. 182 CCC was often understood as an opportunity to "lock" shareholders in a company by introducing severe limitations into articles of association. The reason for that was a general impression of a default wording of this regulation, which would allow its free modifications.

Jurisprudence and company law doctrine have interpreted this regulation as providing an exception to the general freedom of selling shares (see e. g. Opalski, 2018),[17] although the latter has not been explicitly expressed in the provisions applicable to a limited liability company, contrary to e. g. art. 337 CCC which applies to a joint-stock company,[18] or the German law.[19] Thus, exceptions shall not be interpreted in a way leading to their extended application (exceptiones non sunt extendendae). A shareholder may not become a "prisoner" in a company, as its nature allows generally unrestricted transfer of shares. Any limitations shall be explicitly provided by regulations, they can also be introduced into articles of association complying with art. 182 CCC, however this regulation allows only to limit, but not to prohibit the sale of shares. Hence, both – an explicit prohibition or an intense limitation that would make the sale of shares practically

[16] Polish: *spółka z ograniczoną odpowiedzialnością*, German: *Gesellschaft mit beschränkter Haftung*, Slovak: *spoločnosť s ručením obmedzeným*.

[17] See also verdict of the Supreme Court, I CSK 132/11 (1 December 2011); the verdict of the Court of Appeal in Szczecin, I ACa 418/14 (30 October 2014).

[18] Shares shall be transferable (art. 337 § 1 CCC).

[19] *"Die Geschäftsanteile sind veräußerlich und vererblich"* (Shares shall be transferable and inheritable) (§ 15 sec. 1 *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*).

impossible[20] – shall be recognised as violating scope of freedom in the company law and as such – null and void.

As a result, art. 182 § 1 CCC, although having no explicitly stated character, shall not be deemed as default and shall allow introduction of the articles of association terms that would directly or indirectly make it impossible to sell shares. On the contrary, its character is mandatory in providing an opportunity only to possibly introduce limitations into the articles of association that would not basically contradict the right to sell shares.

6. SUMMARY

The Polish company law follows an acknowledged and the civil law derived principle of freedom of a partnership of company founders to determine its rules of operation. However, this freedom may be abused and may infringe statutory rights of shareholders or third parties, leading to violation of virtues other than contractual freedom which are considered as absolutely protected by the civil law and corporate law regulations – the safety and ease of transactions or the core rights of corporate members (shareholders).

Unlike corporate regulations in some other CEE countries (e. g. Hungary[21]), the current provisions of the Polish law do not provide clear, general rules due to the distinction between default, semi-mandatory, and mandatory norms in the company law. This makes their application difficult, in particular in terms of certainty as to the formulation of provisions of the statutes of companies differing from the content of the Code of Commercial Companies. The determination of a regulation character results from an interpretation of legal norms, which may be more or less complicated, and also has various effects as to the unambiguity – depending on the case. First of all, there is no clear general rule that would be specific to the CCC, and not recited from the principle of freedom of contracts defined in the Civil Code.

However, attempts can be made to formulate some more general principles in this respect in the provisions on joint-stock companies and general partnerships, which indicates inconsistency of the legislator on one hand, and on the other – it is neither an unambiguous and complete solution, nor does it solve problems in the entire CCC for all companies.

Such an approach often makes exact and undoubtful assessment of regulations complicated, leaving space for interpretation of the doctrine and jurisprudence. Similarly to other legal systems, an interpretation is usually based on confronting possible default of the mandatory character of a regulation with the company law principles, which would be recognised as privileged due to the protection of third parties or the shareholders' rights.

In my opinion, the current CCC regulation requires improvements that would make determination of default, semi-mandatory and mandatory regulations easier and

[20] E. g. allowing one of the shareholders to block transaction of the sale, allowing shareholders to determine the sale price of shares (and block the transaction by setting it too high than its market or fair price), providing a distant deadline for a company to give consent for the sale of shares.

[21] The Hungarian Civil Code of 2013, Section 3:4. § (1)-(3): *"In the articles of incorporation, the members of the legal person may diverge from the prescriptions of Hungarian Civil Code on legal persons when regulating their relations with one another and the legal person, as well as when regulating the organisational structure and operation of the legal person, except as provided hereinafter, the members of a legal person shall not diverge from the prescriptions of the Civil Code, if the divergence is prohibited by the Civil Code; or if it manifestly violates the rights of the creditors, the employees, or a minority of the members of the legal person, or in case it undermines the efficient supervision on the lawful operation of legal persons."*

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would provide clearer results. The most effective way to achieve it seems to be an introduction of general regulations referring separately to partnerships and companies. They should determine a general character of the CCC regulations in different fields of issues covered by this legal act, possibly introducing presumptions that would be helpful in difficult cases. Those general rules could be further overridden by specific regulations applicable to certain types of partnerships or companies (e. g. a narrower field of modifications allowed in joint-stock companies due to the principle of uniformity of operation rules for joint-stock companies), or introducing some reasonable exceptions.

Currently, determination of the character of the specific CCC regulations is often based on the views and opinions expressed in legal literature and jurisprudence, rather than on the solid rules. As a result, in some cases, it may be doubtful to make clear conclusions and safely adopt a rule that would not be in line with the CCC regulation. This violates safety of business operations and exposes shareholders to higher transactional costs.

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MANDATORY AND DEFAULT RULES IN SERBIAN COMPANY LAW / Branislav Malagurski

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Abstract: *The matter of company law in Serbia is regulated by the Law on Companies, which, unlike the Law on Obligations, does not contain a general provision defining whether it is based on the freedom of will. Therefore, it can be concluded that the rules of the Law on Companies are mandatory in general. Such a conclusion only confirms an exceptionary provision in its part regulating limited liability companies, which defines that founders of a limited liability company can regulate their mutual relations and their relations with the Company on a free basis, unless it is otherwise defined by this Law. So, only the rules regulating mutual relations of founders and their relations with the limited liability company, are default in general, unless otherwise provided in a particular case. Other rules of the company law in Serbia, including those related to joint-stock companies, are mandatory in general. However, even when the provisions regulating certain matters are mandatory, it does not mean that there is absolutely no space for deviations, i. e. an expression of company founders´ will, like in the cases of special duties described below; or in cases where founders can choose between offered mandatory alternatives (selecting bodies to govern the company); or, in a case if the founder´s consent is needed when diminishing his rights; or when special rights of dissenting shareholders are introduced. The deviations from the mandatory rule in such cases do not necessarily mean that the rule has become a default one.*

Key words: *default rules, mandatory rules, Serbian company law, Serbian law*

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1. INTRODUCTION: CONCEPT OF AUTONOMY OF WILL IN SERBIAN CIVIL AND COMPANY LAW

In Serbian positive law, there is no Civil Code[1] or a Commercial Code as such. Currently, the key laws regulating civil and commercial matters are the Law on

[1] Serbia had enacted the Civil Code in 19th Century (The Civil Code for the Kingdom of Serbia, text as of 11 March 1844), however, only some of its rules, in case of legal gap, are still applicable nowadays. Serbia has opted to implement in that matter the laws of former SFRY, whose system was based on Swiss concept not to have a civil code, but to have separate law on obligations and laws regulating other civil law matters.

Obligations[2] and the Law on Companies.[3] The first of them regulates contracts (of civil and trade law). The second one regulates legal persons that participate in commercial transactions, having the status of merchants. Thereby, this law regulates limited liability companies, joint-stock companies, general and limited partnerships, as well as entrepreneurs.

It is indisputable that the freedom of concluding a contract is a principle of Serbian contract law according to the Law on Obligations – in its art. 10. The question may be raised whether it is also a constitutional principle. In Vladimir Vodinelić's opinion, the autonomy of the will is guaranteed within the framework of the guarantee of freedom of a person´s development proclaimed in art. 23, paragraph 2 of the Constitution of Serbia (2012, p. 86). Therefore, it can be expected that the LoO is also based on the principle of autonomy of the free will of the respective parties. Further, it will be discussed whether this principle is transferred to the entities that are holders of the rights and obligations in trade.

According to the provision of art. 10 of the LoO, the parties to the obligations are free within the bounds of compulsory regulations, public order and good customs to regulate their relations at will. The article does not specifically regulate contracts on the foundation of legal persons. In order to better specify the scope of this article, it is necessary to recall that the contract autonomy is manifested in the contract law through three major principles: the freedom to contract, the principle of binding contract strength, and the principle of the relative effect of the contract (Đurđević & Pavić, 2016, pp. 46–47).[4]

In addition to these provisions, in art. 20, titled "The dispositive character of the provisions of the law", the LoO determines that its provisions are default in principle, which means that the parties to the contract may regulate them differently than provided by the LoO. However, in the same article, the LoO stipulates that the contracting parties do not have a possibility to regulate the relationship differently when: 1) it follows a particular provision of the law; or 2) it is derived from the general meaning of that particular provision. In other words, in such cases the particular provision is mandatory. The parties cannot exclude its application by contract and regulate their relationship differently (Đurđević & Pavić, 2016, p. 49).

Hence, the freedom to contract is the general principle of the contract law and it is an abstract. It involves only the basic option whether or not to contract. In other words, it is the freedom of contractors to regulate the content of their contract by their own free will. The LoO classified the disposition of the subjects as a principle and gave it perhaps too broad marginal title – Autonomy of Will (Antić, 2013, p. 6).

The situation is not expected to be changed after a Draft Serbian Civil Code enters into force. As for the obligations, it is defined that: "Parties can regulate their obligations otherwise than defined by this Law, if not followed otherwise according to particular legal

[2] Law on Obligations, Official Journal of the SFRY no. 29/78, 39/85, 45/89 and 57/89, Official Journal of the FRY no. 31/93 and Official Journal of Serbia and Montenegro no. 1/2003 – Constitutional Charter and Official Journal of Serbia no. 18/2020 (hereinafter "LoO").

[3] Law on Companies, Official Gazette of Republic of Serbia no. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018 and 91/2019, hereinafter "LoC".

[4] The principle of relative effect, i.e. that "contract creates rights and obligations for contracting parties" is established in art. 148 of the LoO, while the principle that the contract has binding force "binds the parties as a law" is defined in art. 17 of the LoO. According to that, the parties are in a contractual relationship, regardless of the source from which it comes out. They are obliged to execute the obligation and they are responsible in case of their failure with the execution. However, the freedom to contract means also that the content of the agreement is limited by mandatory regulations, as well as by public order and customs, terms introduced in the LoO by the Law on Amendments to the Obligations Act of 1993.

provision, or its sense".[5] In addition to this, it is provided that: "Contractual parties are free, in frames of the mandatory rules, the public order, and good customs, to regulate their relationship according to their own will. The mandatory provisions referring to the content of particular contracts are an integral part of these contracts, complement them or take place of the contractual provisions, which do not comply with them".[6] As related to its subjects, i.e. the persons of civil law, it is determined that: "The civil rights subjects are free to regulate their relations according to their own will, within the limits of the mandatory rules, the public order and good customs".[7] Therefore, the principle of the autonomy of will is to be applied to the subjects of civil law in the matter regulating their relations. The impact of this provision to the subjects of trade law (including companies) is yet to be evaluated.

This work is further focused to the situation with default and mandatory provisions of the company law in Serbia.

2. MANDATORY AND DEFAULT PROVISIONS OF THE LAW ON COMPANIES

As for the legislation which defines legal subjects that are active in trade and regulates their relation to contracts, the Serbian Law on Companies does not contain a general provision defining whether its provisions are default or mandatory. Instead of that, it starts with the provision that "this Law regulates the legal position of companies and other forms of organization in accordance with this Law, in particular their establishment, management, status changes, changes in legal form, dissolution and other issues relevant to their status, as well as the legal position of entrepreneurs".[8] Having in mind the content of this provision, it is possible to conclude that, the provisions of this law are prevailingly mandatory, as: 1. the law regulates the legal position of companies, i. e. contains precise determinants of a company; and 2. it regulates the status matters of a company in Serbia (the prerequisites for its foundation and particular acting, its bodies and management, status changes, the conditions for its dissolution etc.), which all need to be defined without a possibility to change the provision of the law by the will of company's founders, employees, business partners, creditors, etc. The view that the provisions of the corporate law are mandatory can be found in the Serbian literature, too. One of the key authors says, that in the area of corporate law, especially in the domain of a joint-stock company and a limited liability company, the imperative norms dominate (*ius imperium, ius cogens*) (Vasiljević, 2017, p. 299).

However, it does not mean that all provisions of the Law on Companies (hereinafter as LoC) are mandatory. In particular, the companies as legal persons conducting business should have certain degree of discretion and autonomy in arranging their affairs, i.e. adjusting the norms to their specific needs.

2.1. Does the Academic Discourse and Jurisprudence on the Issue Reflect on the Function of Company Law or of the Specific Rule when Deciding Whether it is Mandatory?

When deciding whether the particular rules of the company law in Serbia should be default or mandatory, the focus is laid more on the specific rules and interest being under its protection, than on the function of company law. In the Serbian company law

[5] Art. 160 of the Draft Serbian Civil Code, as of 28 5 2019, (hereinafter "Draft Serbian Civil Code").
[6] Art. 164 of the Draft Serbian Civil Code.
[7] Art. 6 of the Draft Serbian Civil Code.
[8] Art. 1 of the Law on Companies, Official Gazette of Republic of Serbia no. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018 and 91/2019).

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there is no general provision defining which matter is regulated by the default and which by the mandatory rules. Moreover, since the autonomy of will is not explicitly set as the principle in the LoC, it can be concluded that the mandatory provisions dominate in this matter. In particular, this law regulates the matters of status of companies, such as the prerequisites for foundation of companies, creation and functioning of its bodies, the minimum conditions to act in a particular way, the conditions of its dissolution, etc.

2.2 General Rule in the Matter of Relations of Founders and Limited Liability Company

For some matters, even in LoC, the "dispositive nature" of the rule is expressively determined. That is the case, for example, with the art. 140 LoC, which states that founders of a limited liability company (hereinafter as "LLC") define their mutual relations, as well as their relations with the Company freely, unless it is otherwise defined by this Law. This provision is of general nature for the relations between founders of an LLC, as well as for LLC's relations with its founders. This does not mean that the said rule (art. 140) is a general principle for everything concerning LLCs, i. e. all matters of the company law. That´s because there are other matters beside the relations between a company and its founders, which are regulated by LoC (such as status matters, its bodies, minimum equity capital, transfer of shares, dissolution of company, etc). So, unlike being "silent" at the beginning, when it should have defined the rules for the overall company law (whether rules are default or mandatory), as far as an LLC is concerned, the LoC defines that the provisions which regulate the relations between founders, as well as their relations with LLC, are default "unless otherwise defined by this law". Therefore, a general rule for LLCs is that their rules are mandatory. But, the rules applying to the mutual relations of founders of an LLC and between an LLC and its founders, are default by an exception, unless otherwise defined (for particular cases). So, there is still one general rule in this matter.

In order to be able to define on your own the rules for relations between the founders of the LLC and their relations with the company, this principle is very important, almost crucial for arranging partnerships in an LLC, and it is of paramount importance when a business is run in a partnership between two or more legal and/or natural persons, giving an LLC a great advantage. This feature combined with low minimum capital requirements and the "privilege" of limited liability makes LLCs the most widely used form of a company in the Serbian economy. Specifically, the founders of LLCs regulate their mutual relations in LLCs, as well as their relations with those LLCs by their own will, unless stated otherwise by the LoC incertain situations. In spite of the overall mandatory character of the LoC, the rule in question means that almost every issue in an LLC related to the relations between founders and an LLC is governed by the principle of the autonomy of will of LLC founders, with relatively few mandatory provisions. These provisions refer to the matters that cannot be put at founder's absolute discretion (to abuse their rights against minority shareholders, or to offend the public interest).

There is also an interesting issue, why the only rule of general nature defining the autonomy of will for the particular matter is incorporated in the part that relates to LLCs. Does it mean that shareholders of a joint-stock company (hereinafter as "JSC") cannot in general regulate mutual relations and their relations with a JSC at free will, or that they can do so upon the *mutatis mutandis* principle? Having in mind that the mandatory rules are regulating JSCs more stringently than LLCs, the conclusion might be rather that the autonomy of will can exceptionally regulate the relations between shareholders of a JSC, and between them and the company itself, too. But in general, the rules regulating the

relations between shareholders and a JSC have mandatory character. So, the rule of art. 140 of LoC does not apply *mutatis mutandis* to JSCs (cf. Novaković, 2018, p. 129).[9]

It´s a pity that the prominent commentaries of the Serbian LoC devote so little space to an important and unique art. 140 of LoC. One of them only paraphrases the article, adding that the will of founders is limited by mandatory rules. Thereby, this article gives them an opportunity to resolve some questions of functioning of an LLC in another way (for example, the division of profit disproportionately to the percentage of their shares), or certain questions of relations of founders and a company to be resolved differently to what LoC has defined (Stefanović & Stanivuk, 2012, pp. 152–153). The other commentary, besides paraphrasing the same provision, only adds that it differs an LLC to a JSC, where mandatory provisions predominantly regulate the relations of shareholders (Novaković, 2018, p. 129). Even turning to the commentaries of the same provision, included in the former Law on Companies, does not help much (cf. Vasiljević, 2006, p. 251).[10]

2.3. Rules for LLC Status and Other Matters

In the basic status matters, without which the functioning and existence of LLCs would not be possible, though there is no explicit general rule, it is clear that the rules here are mandatory. Such cases refer to the mandatory minimum cash equity capital of LLCs, the type of deposits, the statutory bodies of LLCs and other similar issues, which are of a nature that they cannot be completely regulated at the discretion of the founders of LLCs. Therefore, the mandatory provisions become important where the status and organization of LLCs is concerned. But even then, these mandatory provisions leave room for founders to choose from several offered options. It would be absurd and lead to legal uncertainty if every LLC had its bodies set up and installed by each founder of a given LLC. Therefore, the provision on LLC bodies should be mandatory. However, even in such matters, the law provides for a number of exceptions that favour the freedom to contract. For example, the law stipulates that mandatory governing bodies of an LLC are either a board or a director, but still leaves the founders to decide for themselves whether they want the governing body to be a director or a board.

In addition, there is a number of matters and topics that cannot be observed as being at free disposition of the founders of an LLC. For example, a special regime for nullity in the company law rests on the increased need to protect security in legal transactions. A special protection of the stated interests through a specific concept of nullity of the company law goes hand in hand with the system of registration and publication of information on business entities, more precisely with the principles of publicity and trust in the registered and published data (Jevremović-Petrović, 2017, pp. 71–72).The nullity of the articles of association envisaged by the provisions of the LoC is the essence of the provisions on nullity (of founding) of company and their content is shaped to a large extent under the influence of the EU law, albeit with certain peculiarities,

[9] Though not so clear in all commentaries on the art. 140 LoC, in certain Serbian literature, there still can be found a statement that the freedom to freely regulate mutual relations of founders and their relations with an LLC differs them from a JSC, where the law itself (mandatory provisions) predominantly regulates the relations of shareholders.

[10] Art. 105 of former Law on Companies (Official Gazette of Republic of Serbia no. 125/2004) had the same provision. The most prominent commentary of that Law, after paraphrasing the provision, only mentions the matters where mandatory provisions limit it, and then it is necessary to have articles of association, or the founders may have only a single share, or the founders are liable for their obligations, etc. (Vasiljević, 2006, p. 251).

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mostly in relation to the conceptual determination of nullity. Specifically, the Serbian law concentrated the regime of nullity of incorporation on the nullity of articles of association (Jevremović-Petrović, 2017, p. 75). The Serbian law regulates nullity of articles of association in two articles of the LoC, in which it specifies, the reasons for nullity in the first article, while in the second one it regulates the procedure for establishing nullity and its effect.[11]

An application of the institute of nullity in Serbian practice is not a last resort, but a regular mechanism for resolving numerous irregularities in the establishment of companies. This indicates weaknesses within the established control system. Therefore, the main task of the reform of company law in Serbia should be taking the changes in the existing system of control over the establishment of companies into account (Jevremović-Petrović, 2017, p. 93).[12] However, that would not impact these rules to remain mandatory ones.

The Serbian jurisprudence also confirmed that the rules defining the rights of LLC founders are mandatory ones. For example, as referred to the provision of art. 142 paragraph 2 part 1 of the LoC, the decision to amend the founding act that diminishes the rights of a founder of an LLC can only be made with a consent of the respective founder.[13] Or, referring to the provision of art. 195 of the LoC, the decision of the general meeting of shareholders may exclude a member of the company only in case of non-payment or not entering the contributions, and thus within a given timeframe or an extended deadline. [14]

2.4. Rules for Shareholders' Relations and Their Relations with a JSC

Though there is no explicit general default rule regulating relations of shareholders and JSCs, there are still bylaw provisions stating that shareholders may limit the right of any of shareholders, i.e. on their free will. Closer defined, LoC entitles shareholders to limit the right of a shareholder to personally participate in general meetings, if such a shareholder does not dispose with the minimum number of shares of particular class. This rule leaves space for the will of shareholders and it might be considered to be a default rule. However, even this mandatory rule nevertheless stipulates that the minimum number of shares of such a shareholder may not exceed 0.1% of shares of the class he disposes with (see Radovic, 2014, p. 71).[15]

When it comes to shareholders asking questions at a JSC general meeting, the literature provides comments on the boundaries of autonomous regulation in that matter, too. It is stated that these rules are of a mandatory character, to the extent in which a minimum degree of protection is guaranteed to those shareholders (see Radovic, 2014, p. 78).[16] On the other hand, the same author emphasizes that the right of shareholders to ask questions during a JSC general meeting can also be extended to the time before the particular meeting, although the rule itself does not explicitly provide for it. Such provision

[11] Arts. 13 and 14 LoC.
[12] In addition, it would be desirable for the Serbian law to regulate the existing system of nullity more clearly. It should primarily be conceptually defined as the nullity of establishing a company. The nullity thus defined would have to cover all the defects in the creation of a company without limiting itself to either the legal basis (the founding act) or the registration process itself.
[13] The Decision of the Commercial Court of Appeal, PZ 7243/13 (20 September 2013) Bilten sudske prakse Privrednih sudova (Practice of Commercial Courts Bulletin) 3/2015, p. 206.
[14] Decision of the Commercial Court of Appeal, PZ 541/13 (24 January 2013 Bilten sudske prakse Privrednih sudova (Practice of Commercial Courts Bulletin) 4/2013, p. 90.
[15] See also art. 328 para. 3 LoC.
[16] See also art. 335 para. 2 pt. 1 in connection with art. 335 para. 1 pt. 7 LoC.

is named as a relative imperative rule, where shareholders can otherwise agree on more strict solution compared to the one defined by the law (Radović, 2010, p. 118). This attitude is justified, if it is kept in mind that the limits of this mandatory rule create a minimum degree of protection that should be provided to each shareholder.

The whole cluster of mandatory rules of the LoC relates to the protection of rights of minority shareholders. The principle of having mandatory rules in regulation of JSCs is in particular applicable to the protection of the rights of minority shareholders, because if these norms were default, the shareholders would need to rely on general company acts enacted by majority shareholders, which would jeopardize their position (Novičić, 2012, p. 115). This protection of minority rights includes: the right of minority shareholders to request a court in a non-contentious procedure to order holding of a regular session of the general meeting; the right of personal participation of minority shareholders in the work of the general meeting as an important right in the exercise of voting rights; the right of minority shareholders to propose amendments to the agenda (Novičić, 2012, p. 116);[17] the right of minority shareholders to access acts and documents of the particular company (Novičić, 2012, p. 117);[18] the rights of minority shareholders to withdraw from the company. The latter right is exercised in several ways: through the right of dissenting shareholders, the right to sell shares to the majority shareholder, and the forced purchase of shares (Novičić, 2012, pp. 118–119).[19]

From the point of view of mandatory or default rules, the matter of dissenting shareholder in a JSC is very interesting.[20] The special rights of dissenting shareholders can be defined as the right of any shareholder who does not agree with the decision that was brought at the general meeting by shareholders to ask his shares to be purchased by the JSC. And thus under the condition that there will be a fundamental change in the company control.[21] However, starting from the general rule which defines that

[17] The provision of art. 372 LoC stipulates that one or more shareholders holding at least 5% of voting shares may propose additional agenda items (without limitation of number) to the board of directors or the supervisory board for the meeting of the company for discussion and decision-making at the general meeting of the company, with the proposal of decisions and the explanation of the proposal.

[18] The law accepts the principle of the First Directive of the European Union on the transparency of operations of a JSC. The provision of art. 81 LoC gives the right of access to the acts and documents of the company to each shareholder, regardless of the amount of the share capital he holds, provided that he requests in writing from the company the access to the acts and documents of the company, and is obliged to make the request in the manner prescribed by the above provision to indicate the purpose for which he or she is seeking access to the acts and documents of the company, as well as to provide the JSC with information on the third parties to whom he or she intends to communicate the document, the act or information to which he or she accesses.

[19] The dissenting shareholders are the shareholders who voted against or abstained from voting in favour of the decision or were not present at the general meeting at which the issues referred to in art. 474 para. 1 pt. 1-7 Companies Act. The way of exit of shareholders can also be executed by forced purchase of shares, which implies the right of a majority shareholder to provide the general meeting with a proposal of a decision on the forced purchase of all shares with payment. Accordingly, the right of a minority shareholder to sell shares to a majority shareholder, who is obliged to buy the shares of each minority shareholder at his written request, also applies.

[20] Arts. 474-476 LoC regulate the following issues pertaining to the special rights of dissenting shareholders: art. 474 – the domain of application of the institute (in respect of which decisions of the assembly taht a shareholder may require the buyback of shares), art. 475 – the procedure and deadlines for the exercise of rights, including the manner of determining the value of shares payable to shareholders, and art. 476 – judicial protection of shareholders rights. All these rules are mandatory.

[21] The dissenting shareholder can ask his shares to be purchased, or start proceedings to get adequate compensation for his shares applied in a number of cases. For example, in cases when due to such a decision the change of the status of the company has occurred, having negative impact on the shareholders´ voting rights, or the rights to get their dividend, or the rights to have priority in getting company shares, etc. (art. 474 in conjunction with art. 251 pt. 1-4 LoC).

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a shareholder of a JSC cannot demand return of shares, nor can at its sole discretion request buyback of shares from the particular JSC, it can be concluded that the provision defining the domain of an application of the rights of dissenting shareholders as an exception to the general rules should be very clear and unambiguous (Veličković, 2017, p. 162). Thus, the relative mandatory rule which prevents certain actions of a JSC shareholder upon his free will creates a deviation. In the respective literature, the special rights of dissenting shareholders are additionally seen as the right of minority shareholders to exit the company, as a way to resolve conflicts between minority and majority shareholders, which may arise during the decision-making process in the company (Veličković, 2017, p. 160). It is therefore clear that a shareholder cannot exit the company if only being unsatisfied with the decision of the state bodies, or any external circumstances (Radović, 2017, p. 53). Anyway, in order for the majority shareholders´ decision to be a sufficient reason for exiting of a minority shareholder from the company, the decision needs to be a fundamental one (Radović, 2017, pp. 54–60).[22] The literature is also critical both towards the difficulties in determination of what is the fair price for shares of a shareholder´s exit, as well as to the complicated procedural conditions that a shareholder needs to fulfil to exit a JSC. Therefore, it is considered to be inefficient in practice (Vasiljević & Radović, 2017, pp. 20–21).

As for this matter, it is also interesting that the provision of art. 477 of the LoC defines that its provisions on rights of dissenting shareholders on the *mutatis mutandis* principle can be applied to LLCs, unless its articles of association provide otherwise. This provision and its application can cause a lot of practical problems, as LLC founders can anyway exit the company based on arts. 187 and 188 of the LoC. The practice of application of these mandatory rules as the default rules in cases of dissenting LLC founders is therefore strongly criticized in literature with justification (cf. Radović, 2017, pp. 67–69).

In addition, to confirm that in the field of mutual relations of shareholders, there is also a lot of mandatory rules, the provisions of the former Law on Companies[23] can be cited providing that a shareholder who had personal interest in the legal business of disposing the property of a high value of a JSC had no right to vote at the general meeting of a JSC at making decision on the approval of that legal transaction. Such a view based on the same article of the former Law on Companies was also confirmed in practice at the Serbian courts.[24]

Concerning the compulsory sale of shares, which is regulated by art. 447 of the LoC, when a person buys at least 95% of the company's shares in relation to the total number in the process of a takeover made by a public offer, he has the right to buy the shares to which the offer relates to, and thus even from those shareholders who did not accept the sale of shares under that offer (dissenting shareholders). The court shall, upon the motion of the dissenting shareholder, prohibit the purchase of shares of the dissenting shareholders only if the conditions are different from those of the public takeover bid.[25] This is clearly a mandatory rule.

[22] Thereby, the decisions related to changes of the status or legal form of the company, the time for which the company is founded, the disposition of properties of high value, the amendments of bylaws diminishing the rights of shareholders, delisting of shares or the decisions impacting the rights of shareholders defined in bylaws as the reasons on which the shareholder can reason his exit from the company due to his dissent in the particular matter are deemed findamental (art. 474 LoC).

[23] Art. 34 Law on Companies, Official Gazette of Republic of Serbia no. 125, 2004.

[24] Decision of the Commercial Court of Appeal, PZ 665/10 (03 March 2010) Bilten sudske prakse Privrednih sudova (Practice of Commercial Courts Bulletin) 1/2010, pp. 93-94.

[25] Decision of the Commercial Court of Appeal, PZ 95/10 (12 February 2010) Bilten sudske prakse Privrednih sudova (Practice of Commercial Courts Bulletin) 2-3/2015, p. 238.

All the facts mentioned above confirm that in JSCs, the relations between shareholders and between shareholders and their company are regulated by mandatory rules, while the narrow space for the will of shareholders is mostly filled with relative mandatory rules, allowing them to choose between two options, or to opt for a more strict solution.

2.5. Rules Related to JSCs in Other Matters

As to the rules related to the mutual relations of shareholders, and their relations with JSCs, it could not be expected from the situation with default rules to be more liberal with the rules regulating JSCs in other matters. Therefore, the status law matters of JSCs are subject to mandatory rules, with very few exceptions of relative mandatory rules, as opportunities to deviate from the strict provisions of the law.

The mandatory provisions of the LoC in the matter of regulating JSCs are numerous. They define shares, their type and classes, their division, the foundation of JSCs, the articles of incorporation and their content, the minimum equity capital, how to increase or decrease an equity capital, the registration of shares issued, JSC bodies and their nomination, internal and external supervision bodies and procedures, liabilities for keeping and granting an access to the documentation, the change of a legal form and dissolution of JSCs. In certain matters, however, there is still space for deviation from strict the provisions of the LoC, in particular as far as the content of articles of association and bylaws or the choice of bodies when given as options (a board or a director), or the transfer of shares when not limited by the bylaws etc. are concerned.

It should be noted here that the provisions of the LoC which are mandatory can also be used as an instrument to support the limited freedom of contracting. Such exception might be the case of special duties of directors, where the freedom of contracting is essentially manifested in two ways, i.e. in two forms: as the strengthening of the legal regime of special duties and as the mitigation of the same regime. Tightening of the statutory regime of the director's special duties towards the company can be achieved in two ways. Shareholders of the company may expand the scope of the existing directors' duties as provided for by the law. They may also specify other, additional duties that the director would have towards the company that are not provided for by the law (Mihajlović, 2015, p. 162). In addition, mitigation is achieved by limiting the liability of directors in case of breach of a specific duty to the company. This kind of a legal-regime-mitigation does not change the rules on duties, but only limits the liability of directors in the event of the breach of a duty (e.g. limitation of the amount of compensation). The legal regulation of special duties, according to certain authors, is necessary only because it is impossible to cover all the rights and obligations of the parties by any contract (cf. Mihajlović, 2015, p. 163).

The articles of association may also designate other persons which are not mentioned by the LoC as persons having special duties towards a company, and thus the legal regime of special duties can be strengthened. The founding act may specify the jobs, manner, or place of their performance that do not constitute breach of the duty in respect to the prohibition of competition. This rule represents the possibility of mitigating the legal regime of special duties towards the company in the Serbian company law, and it can also be seen as a hint of slight transition to contractual understandings (Mihajlović, 2015, p. 169).

The provisions in the JSC law regulating this matter, though mandatory, indicate that the line between mandatory and default provisions is sometimes not absolute and clear, but rather curvy and dispersed, and it varies depending on the subject matter in

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question. The institute of special duties itself requires to be defined by mandatory provisions. And some of the cited reasons support this opinion. However, there are some reasons requiring elasticity and possibility to deviate from the strict mandatory provision.

3. CONCLUSIONS

In the Serbian law, the companies were traditionally seen as entities that need to be strongly controlled by the state and after the collapse of communism, though the system evolved towards more liberal views of companies as the subjects of trade, the autonomy of will has cautiously and partly entered into the LoC in the sections related to LLCs and into the matter of relations between its founders. As for JSCs, it can be said that in the LoC, the majority of provisions regulating them are mandatory, and the space for default rules is narrower. It leads more frequently to relative mandatory rules then to default ones.

Why are the rules defining JSCs more stringent, containing substantially more mandatory provisions even in the matter of relations between the founders of the company? Some of the key reasons may come from the fact that on one hand, the shareholders are more depersonalized from their JSC compared to the founders from their LLC, while on the other hand, JSCs are under stronger surveillance than LLCs. The reasons come from: higher minimum equity capital necessary for the foundation of a JSC; the legal nature and easier transferability of JSC shares; a more complex structure of bodies governing JSCs; usually more fixed bonds of founders of LLC than of JSC shareholders; the fact that the most of large companies with high equity capital are formed as JSCs. These differences in characteristics of LLCs and JSCs inspire the legislator to be more cautious when deciding whether to allow more or less space for the free will of shareholders of JSCs to bring decisions on behalf of their companies.

4. SPECIFIC QUESTIONS AND ANSWERS:

4.1. How do you determine whether a rule is default or mandatory in the Serbian legal system?

In most cases, it is determined by the wording of the particular provision of the law. It can also be concluded from the general provision defining whether the provisions of the law are regulated by the will of parties or by mandatory rules, if such a provision is included in the law. In addition, it can also be concluded by answering of the following question: is there the need for the protection of common/public interest prevailing in the respective matter, or is it the matter which may be defined by free will of the parties?

The majority of provisions of the company law in Serbia are mandatory, with a few exceptions, where the provisions regulating certain matters are default (e.g. regarding LLCs, the relations between the founders themselves and between founders and an LLC). As for JSCs, the mandatory rules are substantially more frequent than those for LLCs, as shareholders usually have less bonds with the company and its business than the LLC founders do with their company. LLC founders are often close friends or relatives, while shareholders of JSCs often barely know each other, frequently vote by proxies, have no interest in all details of doing business of the company (in the first line, they are usually interested in gaining the profits at the end of the year).

4.2. Is there a difference between rules affecting third parties and rules having effect only on the founders?

The key difference between the rules affecting third parties and the rules having an effect only on the company founders is that the rules affecting third parties include a requirement that the particular fact is to be registered or put to the insight of the public, i.e. published, in order to have full effect on them. For example, if the decision brought by the founding members is not registered in the public register, i. e. published, a third party can always make an objection that it does not concern him/her. In that sense, third parties are protected by an introduction of subjective deadlines (lasting from the moment a third party has been acquainted with such a decision) to enable them to sue longer time than the founding members in the company, who should be aware of the decisions of the company body from the moment they are made.

However, there are mandatory rules that prevent validity of the decisions and actions of company founders/bodies, unless they are dully registered, thus protecting the third parties. For example, a decision on decrease of equity capital of an LLC not being registered into the public register within three months, becomes null and void.[26] Or, a decision to register issuance of shares for an increase of the equity capital of a JSC is null and void, unless properly registered within six months period. This provision applies also to LLCs, e. g. to a decision to increase the capital of an LLC, if it is not registered within six months from the date of its adoption with the Business Registers Agency. In such cases it shall be void according to the latest decision of the Serbian Court of Appeal.[27]

Third parties are in general protected by mandatory provisions of the company law, while founders of LLCs in general are free to define their mutual relations with other company founders and company itself autonomously, unless certain mandatory provisions prevent them from doing so.

4.3. Is there a difference between private/public Ltd. companies?

No, there is no substantial difference, as far as the status provisions are concerned. These rules are mandatory for both types of a company. However, if private interest of the parties in the particular matter prevails, the rules should be default ones: for example, in the case when the relations between founders of an LLC and their relations with the LLC itself are concerned and the public interest is not jeopardized.

4.4. Has the approach become more liberal/more restrictive over the last years? What are the reasons for such a development (if any)?

The LoC itself, and its provisions, did not go in the direction of being more restrictive. The practice, however, tends to become more restrictive, as far as the control of articles of association (and their changes) on deviations from default rules is concerned. The Business Registers Agency is intervening more than registration courts earlier did, when they were competent for the registration of companies and registration of changes in their articles of association. As a public administrative body, the Business Registers Agency is more active, trying to prevent founders or legal representatives of companies to abuse their rights, offending publicly protected interests. However, this

[26] This is based on the provision of art. 147 para. 4 LoC.
[27] According to art. 294 LoC and the decision of the Commercial Court of Appeal, PZ 7120/16 (21 February 2018) Bilten sudske prakse Privrednih sudova (Practice of Commercial Courts Bulletin) 1/2019, p. 90.

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is good for the sake of the implementation of the LoC, and does not mean that recently, there cannot be observed more liberal approach to its implementation. On the contrary, through the harmonization of Serbian legislation and the practice of its implementation with the EU law in the field of the company law, it has become more liberal.

4.5. Have corporate governance codes taken over the role of default law lately?

In the literature, there are views that economic regulation is the area of law that should not be dominated by a zone of mandatory rules - hard law, but a zone of legal authorization (soft law, a zone of contract and freedom of contract). The authors put forward the argument that provisions of the LoC give enough space for implementation of Corporate Governance Codes, which contain recommendations and suggestions. Thereby, the authors are referring to foreign literature on EU law rather than analysing the particular provisions of the Serbian LoC (Vasiljević, 2013, pp. 17–18).

Corporate Governance Codes are not as developed in Serbia as in the EU member states. In Serbia, this topic is of recent date, and with weak support in business practice, especially when it comes to the most widespread categories and forms of companies (LLCs). Additional reason for that is the fact that according to the LoC, only public JSCs have the obligation to adopt code of corporate governance. In the area of corporate governance, Serbia has managed to reach international standards and good regulatory practice, but it still lacks effective enforcement of law. It is prevailingly in hands of Chamber of Commerce and few other institution (such as Belgrade Stock Exchange), which have no substantial impact on the practice of doing business in Serbia.

4.6.If/where company law is mandatory, can the parties find contractual solutions in areas not explicitly regulated by company law?

In Serbia, it cannot be deemed that the whole company law is mandatory, as there are explicit provisions and matters where parties have freedom to define how they will act or regulate their relations. Therefore, they can find contractual solutions in areas of company law which are not explicitly regulated by mandatory company law rules. This in particular relates to the mutual relations between founders of LLCs and their relations with the LLC itself.

4.7. Can you avoid mandatory rules via shareholders' agreement? Is this done in practice?

No, the parties can only agree on avoiding the implementation of the default rules, defining that they will act otherwise than foreseen by the default rule of the law. However, they cannot change the mandatory rules of law. The acts brought by founders or company bodies, e. g. decisions/agreements on the foundation of companies, as well as their changes, are to be registered by the Business Registers Agency. If something stipulated in these acts is evaluated to be against the law by agency officers, such acts/agreements will not be registered and must be changed, or they will not have effect.

However, in practice, if the behaviour that is contrary to the mandatory rules is not sanctioned by the public supervising bodies, or is not disputed in front of the courts of justice, this situation may occur.

5. FINAL NOTE

As for the mandatory and default rules in the Serbian company law, it can be concluded that this issue has not been sufficiently and adequately discussed, neither in

literature nor in jurisprudence. However, it can be said that the majority of rules in this matter are mandatory as the consequence of the fact that the company law regulates mainly the status law matters. It can also be said that the rules regulating LLCs are more open to default rules approach, compared to those regulating JSCs. This in particular refers to the matter of mutual relations between the founders of an LLC and between an LLC and its founders. It is actually the only matter which LoC defines as regulated in general by default rules, though there are numerous exceptions here, too.

However, it should not be forgotten that the area between the mandatory and default rules is not sharply delineated. This is confirmed by a number of rules in the status law matter, which are basically mandatory, but also leave space for deviations from strictly defined rules, and thus creating an impression of freedom at least.

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

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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*

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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.[1] The Commercial Code together with the Civil Code,[2] regulating

[1] Slovak Act no. 513/1991 Coll. Commercial Code as amended of 5 November 1991 (hereinafter referred to as the "Commercial Code").
[2] 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.[3]

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 & Gramblička, 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[4] (based on a subjective criterion),

(ii) absolute business contractual relationships[5] (based on an objective criterion),

[3] 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."*

[4] 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).

[5] 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[6] and
(iv) voluntary business contractual relationships.[7]

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

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.

[6] 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.

[7] 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.

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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,[8] 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).[9] 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

[8] 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.
[9] 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 form 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 minimalize the necessity of gatherings of these bodies.[10] 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"[11] 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

[10] 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.
[11] 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.

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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."*[12] 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 (Gramblička, 2019, p. 464; Patakyová & Gramblička, 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:

[12] Commercial Code, Section 673 Subsection 1.

Section 675[13] and Section 676 Subsection 1[14] and 2[15] 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*

[13] 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."*

[14] 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."*

[15] 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."*

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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.[16] 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[17] 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*

[16] Commercial Code, Section 194 Subsection 1, last sentence.
[17] 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."[18] (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.[19]

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

[19] 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

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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.[20] 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

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.

[20] Commercial Code, Section 115 Subsection 1.

the articles of association,[21] 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[22] 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.[23] 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.[24] 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.[25] Additionally, transfer of the majority business share shall become effective upon its entry into the Commercial Register.[26]

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,"*[27] (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,*

[21] Commercial Code, Section 115 Subsection 2.

[22] 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).

[23] 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."*

[24] Commercial Code, Section 115 Subsection 6.

[25] Commercial Code, Section 115 Subsection 7.

[26] Commercial Code, Section 115 Subsection 11.

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

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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[28] (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.[29] 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

[28] Hereinafter referred to as the „Act no. 389/2015 Coll."
[29] 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.[30]

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.[31] 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

[30] Explanatory report to the Act no. 389/2015 Coll.
[31] 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 form 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,[32] 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 & Patakyova, 2019, pp. 214–217) and (iv) unlawful distribution of assets into the Commercial Code (Cukerová, 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 externalises.

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

[32] Commercial Code, Section 220i.

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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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DISCUSSION PAPERS AND COMMENTARIES

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LIQUIDATION OF THE BANKRUPTCY ESTATE IN POLAND / Rafał Adamus

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Abstract: *The purpose of this study is to present the general principles and general issues of liquidation of the bankruptcy estate under Polish law. It should be stressed that liquidation of the bankruptcy estate is intended to satisfy the creditors of the insolvent debtor. Therefore, the manner of liquidation of the bankruptcy estate has an obvious impact on the final bankruptcy dividend for the creditors. The rules governing the liquidation of the bankrupt's assets are of the key-importance for the theory of law and the practice. The article defines the directional principles of liquidation of the bankruptcy estate, procedure of liquidation of the bankruptcy estate. The subject of this paper there is the liquidation of the bankruptcy estate in dealing with insolvent consumers and the so-called prepared liquidation (pre-pack), which is to simplify and accelerate the liquidation of the debtor's assets. The issue of the liquidation of the bankruptcy estate became seriously important because of the crisis after SARS-CoV-2 epidemy.*

Key words: *Bankruptcy, insolvency, liquidation, bankruptcy estate, trustee, prepared liquidation, lex concursus, bankruptcy law, civil law, commercial law, Polish law*

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1. PRELIMINARY REMARKS

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings stipulates in Article 7 section 1, 2 b,c that as a rule the law applicable to insolvency proceedings (*lege non distinguente* procedural and material provisions) and their legal effects shall be that of the European Union Member State within the territory of which such proceedings are opened (*lex concursus* : the "State of the opening of proceedings"). *Lex concursus* determines the assets which form part of the bankruptcy estate and the treatment of assets acquired by or devolving on the debtor after the opening of the bankruptcy proceedings and the respective powers of the debtor and the insolvency practitioner. Thus, Polish Bankruptcy Law Act[1] regulates the rules of liquidation of the bankruptcy estate in proceedings opened in Poland.

Liquidation of the bankruptcy estate (liquidation of assets could be defined as follows: selling out assets belonging to the bankrupt on the day of declaration of

[1] Bankruptcy Law Act of February 28, 2003, Official Journal No. 60 item 535 as amended.

bankruptcy and acquired by the bankrupt in the course of bankruptcy proceedings; liquidation is mainly a competence of the trustee) to satisfy creditors is one of the basic stages of bankruptcy proceedings. "Liquidation of the bankruptcy estate" is also the wording of Title VII, Part I of the Bankruptcy Law Act of February 28, 2003, including the provisions of art. 306 - 334 B.L. (Cieślak, 2004, p. 15; Horosz, 2013, p. 67; Janda, 2005, p. 63; Lewandowski & Wołowski, 2011, p. 189; Pannert, 2010, p. 16; Podel & Olszewska, 2012, p. 302). This study is a general commentary on the indicated legal regulation.

An application for the declaration of bankruptcy may be accompanied by an application for approval of the terms of sale of the debtor's enterprise or its organized part or assets constituting a significant part of the enterprise. The court shall accept the application for approval of the terms of sale, if the price is higher than the amount that can be obtained in bankruptcy proceedings on liquidation under general rules, less the costs of proceedings that should be incurred in connection with liquidation in such mode. The court may accept the application if the price is close to the amount possible to obtain in bankruptcy proceedings on liquidation under general rules, reduced by the costs of proceedings that should be incurred in connection with liquidation in this mode, if there is an important public interest or the possibility of preserving the enterprise of the debtor. Taking into account the application, the court in the decision on the declaration of bankruptcy approves the terms of sale, specifying at least the price and the buyer of the assets being the subject of the sale referred to in this chapter. In the order, the court may also refer to the terms of sale specified in the draft contract.

The bankruptcy estate is property belonging to the bankrupt on the day of declaration of bankruptcy and acquired by the bankrupt in the course of bankruptcy proceedings, which serves to satisfy the creditors of the bankrupt (A. 61 - 62 B.L.). In civil law, assets are sometimes understood as assets and liabilities. Nevertheless, the mass of bankruptcy - as is rightly accepted in the science of law - is only the assets of the bankrupt. The provisions on the liquidation of the estate of bankruptcy do not apply to assets belonging to the bankrupt but not included in the estate (see Articles 64 – 67 B.L, Articles 70 - 74 B.L.). As a matter of fact, non-property rights do not form part of the bankruptcy estate and are not subject to liquidation by the trustee. Non-property rights (personal rights) may still be exercised by the bankrupt themselves.

2. BANKRUPTCY PROCEEDINGS AND ITS COMPARISON TO OTHER PROCEDURES

The liquidation of the bankruptcy estate has certain **similarities to enforcement proceedings**, which may also involve forcing the debtor's assets forcibly cash by the enforcement body to satisfy the creditor (or creditors) for whom enforcement was initiated. The liquidation of bankruptcy estate - by virtue of law (*ipso iure*) - covers all assets of the bankrupt, referred to as the estate. It is a kind of "general" enforcement proceedings. Enforcement, in principle, extends to those assets that will be seized by the enforcement authority at the request of the entitled creditor. At the same time, the bankruptcy proceedings cover all the creditors of the bankrupt who have filed their claims to the trustee or who are subject to the list of claims *ex officio*, irrespective of whether those creditors have a valid court ruling or a decision of a proper administrative authority confirming their claim. In bankruptcy proceedings, private and public law claims are satisfied on equal rules. In turn, the Polish legal system provides for separate judicial (for private claims) and administrative enforcement (for public claims). For the purposes of the bankruptcy proceedings, a number of enforcement law institutions have been

adopted (e.g. the structure and effects of the so-called enforcement sale). Bankruptcy proceedings are sometimes referred to as so-called general execution.

The liquidation of bankruptcy estate also has certain similarities to the **internal liquidation proceedings** of a legal person or an organizational unit (Adamus, 2010, p. 51; Kidyba, 2010, p. 53; Kopaczyńska-Pieczniak, 2010, p. 68; Michalski, 2010, *passim*; Sołtysiński, 2010, p. 877, 2016, p. 830; Witosz, 2011, *passim*), in which - as a rule - the assets of the liquidated entity are credited (with which the assets of the liquidated entity may be taken over by its shareholders).

The **liquidation of bankruptcy estate consists** - in principle - of cashing in the components of the bankruptcy estate in order to satisfy the claims of creditors whose claims have been recognized during the bankruptcy proceedings. In other words, the term 'liquidation' can (with certain exceptions) be replaced by 'cash'. The liquidation of the bankruptcy estate does not apply to funds at the disposal of the bankrupt at the time the bankruptcy is declared (cash on bank accounts, cash on hand). These funds will be used to cover the costs of bankruptcy proceedings and their distribution among creditors under the so-called subdivision proceedings. From a theoretical point of view, if the only (exclusive) component of the bankruptcy estate were cash, then in such proceedings the liquidation (cash) phase of the bankruptcy estate would be superfluous. The liquidated assets are primarily covered by the costs of bankruptcy proceedings (see Art. 230, 231 para. 1, 342 sec. 1 B.L.). The consequence of the liquidation (monetization) of the bankruptcy estate is the distribution among creditors of funds obtained from the sale of assets under the so-called division proceedings (Articles 335 - 360 B.L). Under bankruptcy proceedings involving the liquidation of assets of the bankrupt (however it is possible to conclude an arrangement and stop the liquidation of the estate – Article 266a B.L.), it is not possible to satisfy creditors by providing them with individual components of bankrupt's property (*in natura*).

In some cases, liquidation of assets may involve indirect, two-step cashing of assets. For example, if the subject of the benefit is recovered from non-monetary claims, the trustee "liquidates" the claim. The trustee then sells (in other words, cashes) the subject of a non-cash benefit. If one exercises some of third-person rights, they may not be cashed in.

The issue of **initiating the liquidation stage** (Jankowski, 1999, p. 245; Strus-Wołos, 2011, p. 25) of the bankruptcy estate has been regulated in the content of Art. 308 - 310 B.L.

The course of the liquidation of the bankruptcy estate is independent of the procedure for determining the list of claims by the trustee (see Article 244 B.L.). In other words, the liquidation of the bankruptcy estate by the trustee may take place before the deadline for filing claims. *De lege lata* submission of claims is addressed directly to the trustee. Completion of the list of claims and its final approval by the judge-commissioner - in principle - enables the start of the so-called subdivision proceedings, which is a consequence of monetizing the assets included in the estate.

The liquidation of the bankruptcy estate does not have to be fully completed for the bankruptcy proceedings to enter the so-called subdivision proceedings. On the contrary, the legislator aptly adopted a flexible regulation model allowing for partial division plans as the liquidation of the bankruptcy estate progresses. In accordance with art. 337 section 1 B.L. the distribution of bankruptcy estate funds is made once or several times as the bankruptcy estate is liquidated. As a rule, the liquidation of the bankruptcy estate should be carried out in full, which means that all assets in the bankruptcy estate should be monetized. It should be assumed that the limit of liquidation (cashing) of the bankruptcy estate is the state of satisfaction of all creditors within the meaning of Art.

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189 B.L. The above conclusion should be drawn from the content of art. 368 section 2 B.L, pursuant to which the bankruptcy court declares the termination of bankruptcy proceedings involving the liquidation of the assets of the bankrupt also when all creditors have been satisfied.

In this context, it is worth referring to the decision of the Supreme Court of 22 January 2010[2]. The ruling indicated the view that if the bankruptcy proceedings involving the liquidation of the assets of the bankrupt led to satisfaction of all creditors and remained the company's assets, "there are not always grounds to remove the company [from the National Court Register] and deprive the company of legal existence. The company, which collects the remaining assets after the bankruptcy proceedings, decides about its fate. There are no obstacles to object being removed from the register and to take up business again. In such a situation, there are grounds to depart from the literal interpretation of Art. 477 sec. 1 and sec. 2 of the Code of Commercial Companies and Partnerships, because it is difficult to remove a company [from the court register] after conducting proceedings in which its creditors were satisfied, but it still has its assets and in accordance with the law stipulates the will to continue existence". Further, the Supreme Court consistently argued that after the company has restarted its activities, its removal from the register may take place after liquidation or, if applicable, subsequent bankruptcy. In the examined case, the Supreme Court stated that the entity "subject to liquidation bankruptcy, would exceptionally only want to renew its activity under the same company". According to the Supreme Court, "if after the bankruptcy proceedings of a joint-stock company remain the company's assets, its removal from the register does not have to be preceded by the announcement and liquidation." The Supreme Court allowed the transfer of assets remaining after the end of the bankruptcy proceedings and after full satisfaction of the creditors of the company's shareholders. The opinion expressed by the Supreme Court deserves approval.

The legal actions of the person who performed the functions of a trustee, consisting in the sale of assets that were included in the bankruptcy estate, made after the final termination, cancellation and revocation of the bankruptcy proceedings will be invalid.

The liquidation may not be carried out in full: the bankruptcy proceedings may be discontinued (Article 266a B.L.), annulled (Article 371 B.L.). It is possible – as an exception to the general rule - to conclude an arrangement in the course of insolvency proceedings involving the liquidation of assets of the bankrupt (Article 361 B.L.). In such a case liquidation of assets should be stopped. In accordance with art. 368 section 1 B.L. a bankruptcy court will conclude that the bankruptcy proceedings have been completed after the final division plan has been completed.

The liquidation of the bankruptcy estate is a fragment of the court proceedings, which is the bankruptcy proceedings. Therefore, it is subject to significant formal requirements. Because bankruptcy law consists of substantive and procedural norms, provisions on the liquidation of the bankruptcy estate are of different legal nature.

As part of the liquidation of the bankruptcy estate, two basic functions of insolvency proceedings should be implemented, expressed in Article 2 B.L. First, liquidation should lead to satisfaction of creditors as much as possible. In other words, the liquidation of the bankruptcy estate should be carried out in such a way as to cash its components in the most favourable way from the point of view of the interests of all creditors. Secondly, the liquidation of the insolvency estate should take into account, as far as possible, the salvation of the current debtor enterprise. The content of Article 2 B.L.

[2] V CSK 208/09.

should be the basis for settling any emerging legal problems related to the liquidation of the estate.

The liquidation of the bankruptcy estate is carried out by single-source sale or auction of the bankrupt enterprise in its entirety or its organized parts, real estate and movables, claims and other property rights included in the bankruptcy estate or by collecting debts from the bankrupt debtors and executing other property rights.

After the declaration of bankruptcy, a bankrupt enterprise may be continued if it is possible to enter into an arrangement with creditors or it is possible to sell the bankrupt enterprise in its entirety or its organized parts. If the trustee runs a bankrupt enterprise, they should take all actions ensuring the company's position at least in a non-deteriorated condition. The bankrupt enterprise should be sold as a whole unless it is not possible. The sale of a bankrupt enterprise may be, after the consent of the judge-commissioner, preceded by a fixed-term lease contract with a pre-emptive right, if economic reasons support it.

The sale made in the bankruptcy proceedings has the effects of the execution sale. The buyer of the components of the bankruptcy estate is not responsible for the bankrupt's tax liabilities, also arising after the declaration of bankruptcy. The sale of real estate results in the expiration of the rights and land personal claims disclosed by the entry in the land and mortgage register or not disclosed in this way but reported to the judge-commissioner within the prescribed period of time. In the place of the expired law, the right holder acquires the right to be satisfied through the sale of the encumbered property.

The liquidation of the bankruptcy estate in the bankruptcy proceedings involving the liquidation of the assets of the bankrupt belongs to the **trustee** (Feliga, 2013, p. 114; Gil, 2007, p. 39), (Articles 173, 308 B.L.). When liquidating the bankruptcy estate, the trustee is subject to supervision by the judge-commissioner (Article 152 B.L.).

Certain powers, in connection with the liquidation of the bankruptcy estate, were reserved directly for the benefit of the judge - commissioner, the board of creditors, the bankruptcy court. This will be shortly discussed in further parts of this study.

When carrying out activities related to the liquidation of the bankruptcy estate, the trustee is obliged to take actions with due diligence in a manner enabling the use of the bankrupt's assets to satisfy creditors to the highest extent, in particular by minimizing the costs of bankruptcy proceedings (Article 179 B.L.).

3. LIQUIDATION OF BANKRUPTCY ESTATE DUE TO THE CRITERION OF THE SUBJECT OF LIQUIDATION

Due to the criterion of the subject of liquidation, liquidation of the bankruptcy estate may consist, first of all, in selling the bankrupt enterprise as a whole (enterprise in the meaning of a subject of legal action, not a person; (Adamus, 2011b, p. 49; Bielski, 1999, p. 29; Habdas, 2007, p. 63; Katner, 2007, p. 1221; Kidyba, 2009, p. 1221; Komosa & Tropaczyńska, 1996, p. 27; Litwińska, 1993, p. 7; Norek, 2007, p. 29; Pełczyński, 1998, p. 71; Strzępka, 2005, p. 1393, 2007, p. 5, 2004, p. 23; Świderski, 1999, p. 82; Szydło, 2002, p. 72; Widło, 1997, p. 30, 2004, p. 9; Wilejczyk, 2004, p. 16). The sale of the bankrupt enterprise as a whole is due to, among others on the content of Article 2 B.L., a model way of liquidation, and also the most favourable from the point of view of the economic environment of the bankrupt to avoid the so-called domino effect, where the bankruptcy of one entity in the chain of economic connections results in the bankruptcy of other entrepreneurs. At the same time, the liquidation of the bankruptcy estate may consist of selling the bankrupt enterprise as a whole, but excluding some components of the

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enterprise, e.g. cash accumulated on bank accounts and in hand, claims, etc. The sale of the bankrupt enterprise without some of its components is subject to the bankruptcy law applicable to the sale of a business. The question arises here about the limit of exclusions so that one can still deal with the sale of the enterprise without some components. The literature aptly indicates that a functional criterion should be used, and as a consequence, the subject of the activity should constitute a certain whole that enables conducting business activity. This view is adopted in the practice of applying the law. In turn, the auxiliary criterion is the criterion of the type of ingredients that make up the enterprise, with the most important elements of the individualization of the enterprise, such as the name, clientele or reputation. The criterion determining the recognition of a given activity as having the whole enterprise (Poźniak-Niedzielska, 2003, p. 229) as its object is the objective criterion and not the subjective one. There is an opinion expressed in the literature that a bankrupt enterprise does not include money obtained from running the enterprise. Cash consists of insolvency funds with the sole purpose of satisfying creditors. Other authors also express the view that as part of the sale of an enterprise in bankruptcy, no legal title may be transferred to the buyer for cash at hand and in bank accounts, although this issue is not clearly assessed. When assessing this issue, however, one should refer to the content of art. 311 section 1 B.L.

Secondly, liquidation of the bankruptcy estate may consist in selling the so-called an organized part of the enterprise. The sale of an organized part of the enterprise is not directly subject to the provisions on the sale of the bankrupt enterprise as a whole but is largely based on their content.

Thirdly, as part of the liquidation of a bankruptcy estate, the sale of an "unorganized part of an enterprise", or groups of assets of a "former" bankrupt enterprise, may take place. The sale of unorganized parts of an enterprise (e.g. several devices) is subject to such rules as the sale of individual components of the estate. In practice, it happens that individual components are combined when sold in larger groups. This is due to various practical reasons, e.g. to sell attractive market components together with unattractive mass components.

Fourthly, liquidation of a bankruptcy estate may consist of the sale of individual components of the bankruptcy estate, which are subject to a separate legal regime than the sale of the enterprise. The above distinction has practical significance from the point of view of Article 6 section 1 of the VAT Act. In accordance with Article 6 section 1 of the VAT Act, the provisions of this Act shall not apply to "the sale of an enterprise or organized part of an enterprise."

4. RULES FOR LIQUIDATION OF BANKRUPTCY ESTATE

Further on, there should be pointed out the guiding principles governing proceedings aimed at the liquidation of the bankruptcy estate.

The first rule to be mentioned is the principle of maximizing the satisfaction of creditors. The programmatic purpose of insolvency proceedings, and also the sense of its conduct, is to satisfy creditors' claims to the highest possible extent (Article 2 B.L.). Research shows that the amount of the liquidation dividend (i.e. the amount of money obtained by the creditor based on the distribution plan) is not high in the practice of bankruptcy proceedings in Poland. This state of affairs is influenced by a number of factors, e.g. late submission of bankruptcy petitions, under-capitalization of entrepreneurs, etc. Liquidation of the bankruptcy estate plays a key role in implementing this rule. The more profitably the trustee sells the assets of the bankrupt, the greater the liquidation dividend for the bankrupt's creditors. If the trustee organizes a tender or

auction for the sale of the assets of the bankrupt, the only criterion for selecting bids is the price. In accordance with Article 179 B.L., the trustee is obliged to take action with due diligence in a manner enabling the use of the assets of the bankrupt in an optimal way, in order to satisfy creditors as much as possible.

It should be remembered that sales made as part of the liquidation of the bankruptcy estate are so-called forced sales (quick sales). In fact, the prices obtained by the trustee may be lower than the prices obtained for the sale of similar assets, if the sale price is not forced (Baran, 2009, p. 143).

Reference should be made to the principle of the bankrupt enterprise's survival. The principle of preserving a bankrupt enterprise also follows from the content of Article 2 B.L. In the insolvency proceedings, the debtor's enterprise should be preserved, insofar as reasonable reasons allow it. A bankrupt enterprise cannot be run at the expense of reducing the prospects of satisfying creditors. In other words, the trustee cannot run a bankrupt enterprise if such activity is loss-making. If it is more beneficial for creditors, the trustee will sell individual components that are part of the enterprise instead of municipalities selling the enterprise as a whole.

The speed of liquidation proceedings is important. The principle of speed is the rule of all proceedings of economic value. Bankruptcy proceedings, which are aimed at satisfying creditors' claims, should also be conducted quickly. It should be remembered that interest on the claim to the bankrupt for the time after the declaration of bankruptcy cannot be satisfied from the bankruptcy estate (Article 92 section 1 B.L.), subject to the exception referred to in Article 92 section 2 B.L. Creditors in connection with the bankruptcy of the debtor are deprived of compensation for lack of capital. In addition, the liquidation dividend is usually much lower than the nominal value of the debt. From an economic point of view, the speed of obtaining a liquidation dividend is of key importance. In addition, the longer the insolvency proceedings last, the higher the costs it generates. Consequently, it may sometimes be more beneficial to lower the selling price of assets than continuing the bankruptcy proceedings for a longer time. It should be remembered that the sooner the trustee cash the assets of the bankrupt, the lower will be the expenses for protection, maintenance and insurance of the assets included in the estate. It should be added that, pursuant to Article 162 section 5 B.L. the trustee's remuneration is increased to 10% if the final division plan is carried out within a year of the expiry of the deadline for submitting claims or full satisfaction of the second, third and at least half of the fourth category (excluding the period of arrangement bankruptcy proceedings). In practice, there are cases when assets that are part of the insolvency estate become the subject of security in other proceedings. For example, according to Art. 755 sec. 1 (2) of the Code of Civil Procedure if the subject of security of other proceedings is not a monetary claim, the court shall provide security in such a way as it deems appropriate, and in particular, the court may impose a ban on the sale of items or rights covered by the proceedings. *De lege ferenda*, it would be appropriate to prohibit the provision of security in other proceedings regarding the components of the bankrupt's estate.

Another principle is the principle of minimizing decommissioning costs. From the provision of Article 179 B.L. the obligation to "minimize the costs of proceedings" clearly indicates that this means that the trustee should conduct liquidation proceedings with austerity policy.

Finally, the principle of complete liquidation of the components of the estate should be pointed out. In other words, all assets that are part of the insolvency estate should be liquidated. As a rule, the trustee should liquidate all assets. As mentioned earlier, the limit determining the liquidation of the bankruptcy estate is the state of satisfaction of all creditors of the bankrupt. As a rule, the bankruptcy trustee's liquidation

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efforts should not lead to the accumulation of more cash than is needed to satisfy creditors. In other words, if the trustee were able to cover all costs of bankruptcy proceedings and satisfy all creditors, and the assets were not liquidated, there is no justification for further liquidation of the remaining components of the estate. Finally, it should be added that the fact that the trustee is able to satisfy all creditors does not mean that the trustee may sell assets below their liquidation value. In other words, the determinant of the sale price of assets included in the estate may not be the sum needed to satisfy creditors, but the actual value of these assets resulting from the assessment. It should be noted that any assets that may remain after the insolvency proceedings are transferred to the bankrupt (Article 364 B.L.).

Establishing a trustee and entrusting them with the right of management for property, as well as the right to dispose of this property, constitutes an exception to the principle of the right to property (Article 140 of the Civil Code). Consequently, it can be argued that the bankrupt, upon the final cessation of insolvency proceedings, has a vindication claim for surrendering the assets remaining after the insolvency proceedings. In addition, creditors of a former bankrupt may satisfy their assets after the bankruptcy proceedings. It should be remembered that in accordance with Art. 263 B.L. refusal to recognize a claim in bankruptcy proceedings (in bankruptcy proceedings, claims are dealt with in a simplified way) does not prevent it from being properly asserted. Recovery of the claim, recognition of which was refused, is possible only after the discontinuation or termination of the bankruptcy proceedings. In addition, in the event of liquidation bankruptcy, in accordance with Art. 92 section 1 B.L., interest on the debt due from the bankrupt may be satisfied from the bankruptcy estate for the period up to the day of declaration of bankruptcy. Consequently, the assets remaining after the bankruptcy proceedings have ended may serve to satisfy interest on claims that could not be satisfied in the bankruptcy proceedings.

5. CIVIL LAW CONTRACT AS A CARRIER OF LIQUIDATION OF THE BANKRUPTCY ESTATE

It should also be noted that the carrier of liquidation of the assets of the bankruptcy estate is not an enforcement action but a civil law contract to which the bankruptcy trustee is a party (who, on their own behalf but on the bankruptcy account of the bankrupt, decides on the right of ownership of the bankrupt) and the buyer of the bankruptcy estate. The "sales contract" is explicitly mentioned in the content of Article 321 section 1 B.L. The civil law agreement under which the trustee sells the assets of the bankruptcy estate is an agreement that is subject to the provisions of the Civil Code relating to the sale agreement (Article 535 of the Civil Code). Nevertheless, account should be taken of the fact that the general principles relating to the sales contract are modified by bankruptcy law. This applies, for example, to the procedure for concluding the contract, but also to its content in relation to the initial acquisition of the components of the estate under this contract (e.g. exclusion of the seller's liability under the warranty). It should be noted that the Vienna Convention on Contracts for the International Sale of Goods does not apply to sales by auction, on execution or otherwise by the authorities of law (Article 2 (b) and (c) of the Convention). It should be assumed that the trustee is "authority of law" within the meaning of this Convention and therefore will not apply to bankruptcy sales. At the same time, the trustee should shape the content of the sales contract in this way - as a party to the civil law relationship - so as not to violate the rules of bankruptcy proceedings (Article 2 B.L.). Some aspects of the contract concluded by the trustee as part of the liquidation of the bankruptcy estate are subject to the mandatory provisions of the Bankruptcy Law Act.

The sales contract is concluded in the form specified in the provisions of civil law. The sales contract (e.g. movable items) may be concluded orally (the trustee issues an invoice and receives prepayment from the buyer). The agreement on the sale of components of the bankruptcy estate also has certain effects in the area of tax law.

6. PREPARED LIQUIDATION (PRE-PACK)

The prepared liquidation (pre-pack) is a relatively new legal structure in Polish law (it has been in force since 1 January 2016), which aims to accelerate and simplify the course of bankruptcy proceedings. In this case, the liquidation stage of the bankruptcy estate (within the scope of the liquidation) will not take place separately after the declaration of bankruptcy. An application for the declaration of bankruptcy may be accompanied by an application for approval of the terms of sale of the debtor's enterprise or its organized part or assets constituting a significant part of the enterprise (Brulard & Huevelle, 2011, p. 18; Finch, 2006, p. 568; Frisby, 2007, p. 4; Hoffman, Hrycaj, Kubiczek, Pilitowski, & Tatara, 2017, *passim*; Kaliński, Tatara, & Trela, 2019, p. 119; Moulton, 2005, p. 2; Shuttleworth, 2015, p. 1; Walton, 2006, p. 113). The purpose of this arrangement is to speed up bankruptcy proceedings. At the same time, the scope of future duties of the trustee is reduced in connection with the preparation of liquidation even before the announcement of bankruptcy. In the literature as well as in practice, the pre-pack design raises mixed assessments. From a practical point of view, an economic alternative for negotiation between a debtor and a potential buyer is negotiating a future lease agreement with a potential buyer, however, the conclusion of the lease contract itself falls within the competence of the receiver and requires the consent of the judge-commissioner (Article 316 section 2 B.L).

The problem of possible abuse of pre-pack has at least two faces. First of all, the provisions of Art. 56a B.L. cannot be a patent for unlawful activities such as "indebt property and buy it without encumbrances". In view of the potential for abuse of pre-pack institutions, special emphasis should be placed on adequate control, which is expressed by: a) description and estimation of the subject of the sale prepared by an expert from the list of court experts (Article 56a section 3 B.L.); b) limited trust in relation to purchasers as related persons (Article 56 b B.L.); c) control of the bankruptcy court of the application for approval of the terms of sale (Article 56c B.L.) d) the possibility for each creditor to lodge a complaint against the order to approve the terms of sale (Article 56d section 2 B.L.);e) the possibility for the trustee to submit an application for repealing or changing the decision on the approval of the terms of sale (Article 56h B.L.).

Second, the pre-pack institution cannot be used by the creditor to a hostile takeover of the debtor's property. The provision of Article 56 section 2 B.L. does not provide for the possibility of challenging the decision on the approval of the bankrupt's terms of sale. To the extent that the legislator does not provide for a complaint against a bankrupt, regulation of Article 56d section 2 B.L. is probably contradictory at least with Article 21 of the Constitution on the protection of property.

The subject of the prepared liquidation can therefore be an enterprise of the bankrupt within the meaning of Art. 55 [1] of the Civil Code, an organized part of a bankrupt enterprise or organized parts of a bankrupt enterprise, assets that constitute a significant part of the enterprise, which do not have the quality of an organized part of the enterprise, whereas the subject of liquidation may also be one asset. The term "a significant part of the enterprise" may refer to the property, technology, etc. criterion. Assets may include, for example, shares or shares in other commercial companies, etc.

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According to Article 2 section 1 B.L. the priority should have a pre-pack of the company as a whole. For obvious reasons, the subject of the acquisition may not be shares in possession of the owners of the debtor. The question arises as to whether the subject of liquidation can be assets that do not form part of the enterprise (e.g. assets of a general partnership partner). As it seems, *mutatis mutandis*, the commented provisions can apply to assets that are not part of the enterprise.

The provision of Article 55 [2] of the Civil Code states that the legal act whose object is an enterprise covers everything that is part of an enterprise, unless the legal act or special provisions state otherwise.

In practice, when making a business valuation for pre-pack purposes, special attention should be paid to components with variable amounts, such as materials and utilities for production, production in progress, stocks, etc. It can be suggested that either this type of components on the basis of Article 55 [2] of the Civil Code may be released from the pre-pack transactions and make them the subject of "ordinary" liquidation or determine their quota of releases under the transaction and assess the value of this contingent in the estimate. Handing over of a significant amount of materials, production in progress, inventories disregarding the valuation to the buyer (as a result of Article 55 [2] of the Civil Code) could cause damage in the bankruptcy estate.

The conclusion regarding the liquidation can be submitted simultaneously with the application for bankruptcy, but also later during the proceedings for the declaration of bankruptcy. The regulations do not provide any procedural preclusions in this respect. The debtor and any of their creditors may file a petition regarding the liquidation. Whoever may be the first to file for the bankruptcy of the debtor and someone else for liquidation. The fact that there is a need to submit an application for liquidation does not in any way justify the failure to meet the deadline referred to in Article 21 sec. 1 B.L. One should defend the view that the application for liquidation is autonomous. The formal shortcomings of this application should not result in the return of a full-fledged bankruptcy petition. Examination of the files should lead to establishing whether or not a legislative adjustment which could clarify the applicable provisions is needed in this area.

It is unacceptable to submit an application for approval of the terms of sale in respect of property components covered by a registered pledge if the agreement on establishing a registered pledge provides for taking over the subject of the pledge or its sale pursuant to Art. 24 of the Act on Registered Pledge unless the application is accompanied by a written consent of the pledgee. The provision of Art. 330 B.L. is used accordingly.

The application for approval of the terms of sale shall be accompanied by a description and estimation of the component covered by the application prepared by a person entered in the list of court experts. Unfortunately, neither the specification of the scope of specialization in the Act regarding the entry into the list of experts (it should be assumed that specialization should be adequate to the subject of liquidation) nor the obligation to select transparently the person for the valuation is specified. The literature on the subject aptly claims that the bankruptcy court may also hear the debtor, the creditor - the applicant, the buyer, the expert. The hearing may take the form of receipt of statements in writing.

The application for the approval of the terms of sale must contain the terms of sale by indicating at least the price and the buyer. The terms of sale may be specified in the submitted draft contract to be concluded by the trustee.

First of all, according to Article 56c section 1 B.L. the selling price should be higher than the amount possible to obtain in bankruptcy proceedings upon liquidation on general principles, less the costs of proceedings that should be incurred in connection

with liquidation in such mode. Secondly, the sale price may be close to the amount that can be obtained in bankruptcy proceedings on liquidation under general rules, reduced by the costs of proceedings that should be incurred in connection with liquidation in this mode, if there is an important public interest or the ability to preserve the debtor's enterprise (Article 56c section. 2 B.L.). Finally, the sale price to the entities in a personal or capital relationship closer indicated in Article 128 B.L. cannot be lower than the estimated price (Article 56b section 1 B.L.).

An application for the approval of the terms of sale may provide for the issuing of the business to the buyer from the date of the bankruptcy of the debtor. In this case, the application shall be accompanied by proof of payment of the full price to the court's deposit account. Issuing the buyer's business may also take place at a different date, for example after the bankruptcy order has become final.

It could be assumed that the later a bankrupt enterprise will be sold, the lower the selling price will be. The bankruptcy court grants an application for approval of the terms of sale if the price is higher than the amount that can be obtained in bankruptcy proceedings on liquidation, reduced by the costs of proceedings that should be incurred in connection with liquidation in such mode. However, the bankruptcy court may grant the application if the price is close to the amount that can be obtained in bankruptcy proceedings on liquidation under general rules, less the costs of proceedings that should be incurred in connection with liquidation in this mode, if there is an important public interest or the ability of the debtor's enterprise to be preserved. The legislator does not require the debtor's consent to the liquidation. The consent of the debtor is not, moreover, required when liquidating the assets included in the bankruptcy estate.

Taking into account the application for liquidation is possible only in the event of the bankruptcy of the debtor. The bankruptcy court, having regard to the application for liquidation, decides in the bankruptcy resolution the terms of sale, specifying at least the price and the buyer of the assets being the subject of the sale referred to in this chapter. In the order, the court may also refer to the terms of sale specified in the draft contract.

The ruling of the bankruptcy court rejecting the application for approval of the terms and conditions of sale may be appealed to the applicant, and the order granting the application to each of the creditors. A complaint may be filed within one week of the date of the announcement.

The trustee concludes a sale agreement with a buyer under the conditions specified in the court ruling (conditions may be defined in general terms but the contract form may also constitute an attachment to the ruling) not later than within thirty days from the day this order becomes final unless the terms agreed by the court provided for a different date. This period may be longer or shorter than 30 days. The trustee is in principle related to selecting the buyer, the object of sale, and selling price.

It could be defended an opinion that the trustee may conclude a valid and effective contract also after the deadline specified in the commented provision. The contract should be concluded with respect for general rules regarding the form of legal transactions (e.g. Article 75^1 Sec. 1, 155 Sec. 1 of the Civil Code).

Conclusion of a sales agreement incorporating the disposing effect may take place only after the buyer has paid the whole price to the bankruptcy estate or after the receiver has been given a price previously paid into the deposit. The entire price is the gross price including VAT. Depending on the object of sale referred to in Article 56 a section 1 B.L. the transaction may benefit from the subject VAT exemption.

The sale made as part of the liquidation has consequences of bankruptcy (enforcement) sale. The effects of sales apply to Articles 313, 314 and 317 B.L. depending on the type of the object of sale.

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Handing over the buyer's business takes place directly to the buyer's hands, with the trustee's share. The provision of Article 174 B.L. is used accordingly. This means that the introduction of the buyer into the assets of the bankrupt may be made by the bailiff based on the court's decision on the declaration of bankruptcy without the need to obtain the enforcement clause.

Until the terms of sale and conclusion of the sale agreement become valid, the buyer "manages the purchased assets" within the limits of ordinary management at their own risk and responsibility. The legislator used here a bizarre phrase "manages acquired assets" because the scope of the designations of the term "assets" is not identical to the scope of the designations of the term "enterprise" used in the other part of the Act, and the form made is logically inconsistent with the whole regulation. This regulation also raises specific substantive doubts in the taking over of an "economic living" organism, as in question about: a) the right to collect benefits, b) bearing costs, c) "taking over" contracts, d) transfer of a workplace within the meaning of Art. 23 [1] of the Labour Code, etc.

By repealing the decision approving the terms of sale, the court obliges the buyer to return the enterprise to the receiver or the debtor. The decision is a writ of execution against the buyer. Theoretically, in the mode of Article 788 of the Civil Procedure Rules, it is possible to give an enforcement clause against a third party. Irrespective of the debt collection claim, the receiver may, depending on the circumstances, claim for reimbursement or compensation claims.

Once the order approving the terms of sale becomes valid, the court, *ex officio* or at the request of the receiver, decides to issue the price to the receiver with deposit. Secondly, on the issuance of the price, it adjudicates at the request of the buyer of the court within thirty days from the day of handing over the business to the trustee or debtor. The trustee or debtor may submit an application to keep the deposit price for the next two weeks needed to submit an application for securing an action for damages in accordance with general provisions. After this date, the court will immediately decide to issue a deposit price, unless a security application has been submitted.

The trustee may submit an application to the court for annulment or change of the decision approving the terms of sale if after the issuance of the order the terms and conditions of the sale agreement have been changed or circumstances have been disclosed that have a significant impact on the value of the asset being the subject of the sale.

It should be considered admissible, taking into account the nature of the purchase of the property with enforcement effect, to specify in the sales contract that if during the bankruptcy proceedings (or at another date specified in the contract), after signing the contract the circumstances existing before the date of the contract will be disclosed, which have a significant impact on the value of the asset being the subject of the sale, the receiver may demand an appropriate surcharge according to the appraiser's valuation (security clause).

The latest great novelization of Bankruptcy Law Act made confirmation by *expresis verbis* that a prepared liquidation regarding significant assets in consumer bankruptcy is possible; confirmation that pre -pack can be addressed to more than one buyer at a time; confirmation of the admissibility of submitting an application for approval of the terms of sale in the course of bankruptcy proceedings (after filing for bankruptcy), and by each of its participants; enabling the investor to take over management of the sale item more quickly after the court issues its decision in this respect, but before it becomes final; unifying the position of trustee and buyer (investor) by enabling the buyer to submit an application for a change in the resolution on prepared liquidation, when the value of

the subject of sale changes significantly. All of the above-mentioned changes relate to improving the detailed elements of the prepared decommissioning mechanism.[3]

7. LIQUIDATION OF THE BANKRUPT ESTATE IN BANKRUPTCY PROCEEDINGS AGAINST NATURAL PERSONS NOT CONDUCTING ECONOMIC ACTIVITY

Consumer bankruptcy has been a part of the legal landscape in Poland since 2008 (Adamus, 2011a, 2019c, 2019b, 2019a). Liquidation of assets in consumer bankruptcy is simplified. The trustee shall notify the creditors and court on the choice of the method of liquidation of real estate and the choice of the method of liquidation of the assets of the bankruptcy estate, whose value indicated in the inventory exceeds five times the average monthly salary in the enterprise sector without payment of awards from profit in the third quarter of the previous year, announced by the President of the Central Statistical Office. In the notification, the trustee indicates the method of liquidation and the minimum price (Article 491^{12} B.L.). The trustee may authorize the bankrupt in writing to sell the property belonging to the bankruptcy estate. The power of attorney provisions shall apply accordingly.

8. CONCLUSIONS

The regulation regarding the liquidation of a bankruptcy estate is important from the point of view of the key objectives of the bankruptcy proceedings. This article presents the main principles of liquidation performed by the trustee.

Liquidation of the bankruptcy estate should be a compromise between: a) the need to follow transparent procedures and b) the need for flexible sale of the components of the estate.

Regulation of liquidation of the bankruptcy estate is not heterogeneous. In addition to the general procedure, simplified liquidation methods are provided for consumer bankruptcy. In the study, a lot of attention was devoted to the issue of a new institution of prepared liquidation, which is a *novum* in the Polish bankruptcy law. The Polish legislator reacts flexibly to the need to modernize the rules on liquidation of the bankruptcy estate.

Due to the high costs of maintaining assets and protecting them, the faster the liquidation of the bankruptcy estate is, the cheaper are bankruptcy proceedings. The liquidation system is subordinated to the common goal of bankruptcy proceedings: satisfying creditors as fully as possible.

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[3] A project of the bill proposed to introduce Article 317 section 1a of the Act according to which the buyer of the bankrupt enterprise enters into the place of the bankrupt in the rights and obligations arising only from those contracts that were mentioned in the contract of sale of the company. Unless the special provision provides otherwise, the other party to the contract will be able to withdraw from it within 30 days of the date of the notice on the sale of the enterprise, without the right to compensation. This regulation would have made bankruptcy sales more attractive, as the investor would be able to take over the bankrupt's order book. The above project referred to the model adopted in Art. 46 of the Commercial Code of 1934. The provision of Art. 46 Sec. 1 Commercial Code of 1934 stated that "*if, at the time of the sale of the enterprise, the contract obliged the seller and the third to provide mutual benefits, the third may terminate the contract for important reasons connected with the change of the person's owner. A declaration of termination must be made within one month of receiving the information on the sale* (Article 23)."

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THE NATIONAL COURT FOLLOW-UP IN THE CJ EU CASE "SINDICATUL FAMILIA E.A." REGARDING THE WORKING TIME OF FOSTER PARENTS IN ROMANIA / Răzvan Anghel

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Abstract: *The CJEU judgement in Sindicatul Familia case (C-147/17) is a steppingstone for the working time Directive 2003/88 interpretation and application and for the European debate regarding the foster carer for children statute, the remuneration and working time. The article presents the national court decision following the CJEU judgement accompanied by the author´s commentaries. The purpose of the article is to provide legal professionals with the information on the practical results of the dialog between CJEU and national courts and the way national courts use European legislation interpretations given in the preliminary ruling procedure aiming at its uniform application in the EU member states.*

Key words: *working time, foster carer, children, workers, labour law, Romanian law, EU law*

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1. BACKGROUND OF THE CASE AND NATIONAL LEGISLATION

One of the means of protecting abandoned or orphan children in Romania is placing them in foster families until the age of eighteen. The same type of protection is granted to the children who have been withdrawn from the custody of their parents, permanently or temporarily, due to the fact that the natural parents are unfit or have no means for taking care of their children. The foster parents act as natural parents, taking care of those children full-time. This is a system of care that is spread in European Union in different forms, the statute of such foster parents being different from state to state.

In Romania, the statute of a public employee is recognised for foster parents and they conclude a labour contract before having children placed in their care. Such a contract has a special regulation in Romania, derogatory to the Labour Code (Law no. 53/2003), comprised in Law No. 272/2004 on the protection and promotion of the rights of minors, Government Decree No. 679/2003 concerning the conditions for obtaining authorisation, the certification procedures and the regulations for professional foster parents. The special regulation and the labour contract provide for a presumed eight hours working time per day and 40 hours weekly, and regulates the right to annual paid

leave, with or without the child accompaniment, despite the legal obligations of the foster parents to permanently take care of the children placed in their families.

Law No. 272/2004 provides:

Article 4
"For the purposes of this law, the following terms and expressions shall have the following meaning: […]
(d) foster family — persons other than those belonging to the extended family, including relatives by marriage up to the fourth degree and foster parents, who are legally responsible for the upbringing and care of the child."
Article 116
"(1) The existing public service specialised in the protection of minors under the control of the provincial councils and the local councils of the districts of the municipality of Bucharest [Romania], as well as the public service of social assistance at the level of the provinces and districts of the municipality of Bucharest, are hereby reorganised as the Directorate-General for Social Assistance and the Protection of Minors.
(2) The Directorate-General for Social Assistance and the Protection of Minors is a public institution with legal personality, created under the responsibility of the provincial council and the local councils of the districts of the municipality of Bucharest; it shall take over the social assistance functions of the public service at provincial level and also the social assistance functions of the public service at the level of the districts of the municipality of Bucharest.
(3) In protecting the rights of minors, the body referred to in paragraph 2 shall perform the tasks laid down in this law and other legislative acts in force. […]"
Article 117
"In order to protect and promote the rights of minors, the Directorate-General for Social Assistance and the Protection of Minors shall perform the following principal tasks:
(a) coordinate the activities of social assistance and protection of the family and the rights of minors at the level of provinces and districts of the municipality of Bucharest; […]"
Article 121
"Family services are services provided, within the home of a natural person or family, for the upbringing and care of a minor separated temporarily or permanently from his or her parents, following a measure placing the child in foster care in accordance with the present Law."
Article 122
"1) Minors may be fostered by families and persons who are at least 18 years of age, have full capacity, are resident in Romania and have the moral qualities and material conditions necessary for the upbringing and care of a minor separated temporarily or permanently from his or her parents. […]
(3) The activity of the person appointed as foster parent, in accordance with the law, shall be performed on the basis of a special contract for the protection of the minor, concluded with the Directorate-General or with an accredited private body, which shall include the following stipulations:
(a). activities for the upbringing, care and education of minors in care shall be performed at home;
(b) the programme of work shall be determined on the basis of the needs of the minors;
(c) free time shall be arranged in accordance with the programme of the family and of the minors in foster care;

(d) the continuity of the work performed shall be guaranteed during the statutory leave period, unless during that period separation from the minor fostered with the family is authorised by the Directorate-General.
(4) The individual employment contract shall be drawn up as of the date of issue of the director's measure adopting an urgent fostering measure or of the decision of the board for the protection of minors/the court with regard to the fostering measure. […]"

Government Decree No. 679/2003 provides:

Article 1
"A professional foster parent is a natural person authorised in accordance with the present Decree. The foster parent shall provide, by means of activities performed in his or her own home, for the upbringing, care and education necessary for the harmonious development of the minors in his or her foster or other care."
Article 8
"(1) The activities of persons authorised as professional foster parents shall be performed on the basis of a special individual employment contract, specifically intended for the protection of the minor, which shall be concluded with a public service specialising in the protection of minors or with an authorised private body that is under a duty to supervise and support the work performed by professional foster parents.
(2) The individual employment contract shall be concluded for the period of validity of the authorisation.
(3) The performance of the individual employment contract shall begin from the date of receipt of the placement decision or decision to place the child in the care of the professional foster parent. […]"
Article 9 of that decree states:
"(1) For every minor received into foster or other care the professional foster parent shall conclude an agreement annexed to the individual employment contract with the employer.
(2) The agreement shall be concluded with the written consent of the husband or wife of the professional foster parent and shall be notified to the board for the protection of minors that ordered the fostering or other care of the minor.
(3) The agreement shall include the following: […]
(g) specific rights and obligations of the parties."
Article 10
"(1) Professional foster parents shall have the following obligations with regard to the minors received into their foster or other care:
(a) provide for the upbringing, care and education of the minors in order to ensure their harmonious physical, mental, intellectual and emotional development;
(b) provide for the integration of the minors into their own family, guaranteeing them equal treatment with the other family members;
(c) provide for the social integration of the minors;
(d) contribute to preparations for the minors' return to their natural family or their integration into an adoptive family;
(e) permit public service specialists in the protection of minors or the authorised private body to supervise their professional activity and assess the minors' development;
(f) ensure the continuity of their activity during statutory leave, unless separation from the minors in foster or other care is authorised for that period by the employer; […]
(2). Professional foster carers must immediately inform the specialist public service for the protection of minors or the private body which supervises their activity of any change to

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their personal, family or social situation that is capable of affecting their professional activity."

These national regulations combined with the reality of full-time care provided by foster parents created a contradictory situation that led to numerous claims brought to the Romanian courts by foster parents and their trade unions. In such cases, the foster parents asked the courts to award them additional salary rights for overwork and for the work performed on weekly rest days, public holidays and other non-working days, and a compensation for the annual leave they could not benefit from, as they are supposed to keep children under their permanent supervision without any rest periods.

The national courts in Romania faced real difficulty in solving those cases, as they had to deal with an obvious contradiction between the evidence that the work of foster parents is continuous by its nature, and the legal statute of foster parents under the national law that presumed a normal working program for them; the courts also faced the impossibility to determine the foster parents' working time accurately, as the work is done under no continuous supervision of an employer, according to enormously varied needs of a child, mainly in their own home.

Many questions arise regarding the working time of foster parents: are they working when the child is sleeping? Or when the child is away from home, at school? Is working time the time when foster parents passively supervise the child?

The national and European legal framework could not answer those questions, as they were not tailored for such situations.

In Romania, this situation resulted in contradictory jurisprudence sanctioned recently by the European Court of Human Rights in the case of Dumitru v. Romania.[1] In many cases, the courts have granted foster parents' claims, but many others dismissed those claims, as the Romanian High Court of Cassation and Justice noted as well.[2]

2. THE DISPUTE IN THE MAIN PROCEEDINGS

The type of claims explained above were also brought to Constanţa Court of Appeal in the case that led to the request for a preliminary ruling of the Court of Justice of European Union. Those foster parents and the Sindicatul Familia Constanţa trade union representing them brought an action before the Constanţa Regional Court (Tribunalul Constanţa) against the Directorate-General for social assistance and protection of the family and the rights of minors, for additional payments equal to 100% increase of the base salary in respect of the work performed on weekly rest days, public holidays and other non-working days, as well as the compensation equivalent to the allowance *in lieu* of the paid annual leave for the years from 2012 to 2015. As their action was dismissed by the first instance, they appealed against that judgment to Constanţa Court of Appeal (Curtea de Apel Constanţa).

3. THE QUESTIONS ADDRESSED TO THE CJEU FOR PRELIMINARY RULING

Even though the national court[3] addressed no less than seven questions to the CJEU, the main issue in the case was whether the Directive 2003/88 applies to the

[1] European Court of Human Rights, *Dumitru and others v. Romania*, app. no. 57162/09, 25 June 2019.

[2] In its decisions no. 29 of 17 October 2016, pronounced in the procedure of preliminary judgment of the Panels for Clarification of Legal aspects, and decision no. 25 of 26 November 2018, given on the appeal in the interest of law procedure, published in Romanian Official Journal no. 1018 din 19/12/2016 and no. 135 din 20/02/2019 respectively.

[3] The author of this article was a member of the panel that made the preliminary question to the CJEU.

claimants, and that was the first question. The rest of the six questions were only addressed in the case that the CJEU would have answered positively to this first question; those six subsequent questions were actually reflecting insolvable problems generated by application of the Directive 2003/88 provisions in the case of foster parents (see Anghel, 2017b, and 2017a).

The questions addressed were as follows:

"(1) Must Article 1(3) of Directive 2003/88 in conjunction with Article 2 of Directive 89/391 be interpreted as excluding from the ambit of the directive activity such as the activity of foster parents performed by the applicants?

(2) If the answer to the first question is in the negative, must Article 17 of Directive 2003/88 be interpreted to the effect that an activity such as the activity of foster parents performed by the applicants, may be the object of a derogation from the provisions of Article 5 of the directive in accordance with paragraphs 1, 3(b) and (c) or 4(b)?

(3) If the answer to the second question is in the affirmative, is Article 17(1) or, if applicable, Article 17(3) or (4) of Directive 2003/88 to be interpreted to the effect that such a derogation must be explicitly laid down, or may it also be implicit as a result of the adoption of special legislation laying down other rules for organising working hours for a particular professional activity? If such a derogation need not be explicit, what are the minimum conditions for it to be considered that national legislation introduces a derogation, and may such a derogation be expressed in the terms deriving from Law No 272/2004?

(4) If the answer to Questions 1, 2 or 3 is in the negative, must Article 2(1) of Directive 2003/88 be interpreted to the effect that the period spent by a foster parent with the assisted minor, in his own home or in another place of his choice, constitutes working time even if none of the activities described in the individual employment contract is performed?

(5) If the answer to Questions 1, 2 or 3 is in the negative, is Article 5 of Directive 2003/88 to be interpreted as precluding national provisions such as those in Article 122 of Law No 272/2004? And if the answer should confirm that paragraph 3(b) and (c) or paragraph 4(b) of Article 17 of the directive is applicable, must that article be interpreted as precluding that national legislation?

(6) If the answer to Question 1 is in the negative and the answer to Question 4 is in the affirmative, may Article 7(2) of Directive 2003/88 be interpreted to the effect that it does not, however, preclude the award of compensation equal to the allowance that the worker would have received during annual leave, because the nature of the activity performed by foster parents prevents them taking such leave or, even though leave is formally granted, the worker continues in practice to perform that activity if, in the period in question, he is not permitted to leave the assisted minor? If the answer is in the affirmative, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?

(7) If the answer to Question 1 is in the negative, the answer to Question 4 is in the affirmative and the answer to Question 6 is in the negative, does Article 7(1) of Directive 2003/88 preclude a provision such as that contained in Article 122(3)(d) of Law No 272/2004 in a situation in which that law gives the employer discretion to decide whether to authorise separation from the minor during leave and, if so, is the inability de facto to take leave as a result of the application of that provision of the law an infringement of EU law that meets the conditions for the worker to be entitled to compensation? If so, must such compensation be paid by the State for infringement of Article 7 of that directive or by the public body, as employer, which has not provided for separation from the assisted minor during the period of leave? In that situation, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?"

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As the CJEU resumed, the referring court expressed doubts as to whether Directive 2003/88 is applicable to the dispute pending since, on the ground that the activity of foster parenting which falls within the field of public administration and in the respective view, it has peculiar characteristics within the meaning of Article 2(2) of Directive 89/391 which inevitably precludes the application of Directive 2003/88, as such activity is comparable to the role of a parent and must be performed on a continuous basis in accordance with the needs of the child and therefore, the activities of a foster parent cannot be planned with precision, but must be organised in a very general way; as a result, the amount of working time inherent in such activities is difficult to calculate and is not compatible with an obligatory period of rest.[4]

4. THE ESSENCE OF THE CJEU PRELIMINARY RULING

By its judgement of 20 November 2018,[5] the CJEU decided that '*Article 1(3) of Directive 2003/88/EC concerning certain aspects of the organisation of working time, read in conjunction with Article 2(2) of Council Directive 89/391/EEC of 12 June 1989, must be interpreted as meaning that the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88.*'

The reason why the Court decided to exclude the foster carer of children from the material scope of Directive 2003/88 is of great importance.

Such exclusion can be based on two reasons: either the claimants do not meet the requirements to qualify as *workers* within the meaning of the EU Law, or the characteristics peculiar to certain specific public service activities or to certain specific activities in the civil protection services, are inevitably in conflict with the Directive provisions.

Contrary to the Advocate General view,[6] the Court found that foster carers are workers within the meaning of the EU Law based on two main findings: first, that "*the individual applicants are, with respect to the public service to which they are contractually linked, in a hierarchical relationship, evidenced by permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract, for the purpose of fulfilling the task of protecting the minor, which is conferred on that service by law', and second the fact that 'they have broad discretion as to the daily performance of their duties or that the task conferred on them is a 'task of trust' or a task of public interest' do not call into question such an assessment, nor is the fact that 'the work performed by foster parents is largely comparable to the responsibilities taken on by parents with regard to their own children*".[7]

Over passing this issue, the CJEU decided however to exclude foster parents from the material scope of Directive 2003/88 based on the second criterion stating that their activity presents peculiar characteristics that are inevitably in conflict with the Directive provisions.

[4] Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 26.
[5] Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*.
[6] Court of Justice of the European Union, opinion of Advocate General Wahl of 28 June 2018, Case C-147/17 *Sindicatul Familia*.
[7] Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, paras. 45-47.

To reach this conclusion, the Court started from two principles: first, that "*the concept of „public service" for the purpose of the first subparagraph of Article 2(2) of Directive 89/391, has no definition and there are no reference to national law as regards its meaning so, in order to determine its meaning and scope it must normally be given an autonomous and uniform interpretation throughout the European Union* (par.54 of the judgement cited); *second that the criterion used in the first subparagraph of Article 2(2) of Directive 89/391 is based not on the fact that workers belong to one of the sectors of the public service referred to in that provision, taken as a whole, but exclusively on the specific nature of certain particular tasks performed by workers in the sectors referred to in that provision.*"[8]

The Court noted that the applicant foster parents in the main proceedings are all employed by a public authority and their work therefore contributes to the protection of minors, which is a task of the public interest forming part of the essential functions of the State;[9] based on that findings, the CJEU concluded that such an activity must be considered to be covered by the specific activities referred to in the first subparagraph of Article 2(2) of Directive 89/391.[10]

The CJEU decision seems to be of particular importance, as the problem weather the foster carers are workers or not is still an issue in EU.[11] It is also a premiere in the CJEU case-law to admit that a certain activity does not fall within the material scope of Directive 2003/88, as the Court constantly decided that the exceptions based on Article 2(2) of Council Directive 89/391/EEC must be of strict interpretation and should not include any activity that can somehow be planned in advance as long as it is are carried out under normal circumstances, even if that would involve some difficulties for the employer.[12]

So, even if the applicants are hired by a labour contract and do not have the statute of public servants, they perform a public service for a public authority in the public administration.

5. THE ROMANIAN COURT DECISION FOLLOWING THE CJEU RULING

By its decision no. 117/CM of 2 April 2019, the Court of Appeal of Constanţa dismissed the appeal and upheld the regional court judgement.

Before that, on 26 November 2018, by the previously referred decision no. 25, the Romanian High Court of Cassation and Justice decided by a mandatory interpretative ruling given on the appeal in the interest of the law procedure that the regulation on professional foster parents activity does not derogate from the regulation regarding the annual paid leave, and when they assure the continuity of the children care activity, they are not entitled to the compensation equivalent to the leave allowance. By the same decision, the High Court also stated that foster carers are not entitled to supplementary payments for overwork and for work performed on weekly rest days, public holidays and other non-working days. The main reason for this conclusion was that the working program of foster parents is flexible, cannot be accurately determined, and is actually

[8] Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 55.
[9] Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, paras. 60-61.
[10] Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 63.
[11] Employment Appeal Tribunal London, National Union of Professional Foster Carers (NUPFC) v Certification Officer [2019] UKEAT 0285_17_2307, 23 July 2019, retrieved from: http://www.bailii.org/uk/cases/UKEAT/2019/0285_17_2307.html.
[12] Court of Justice of the European Union, judgment of 5 October 2004, Joined cases C-397/01 to C-403/01 *Pfeiffer and others*; judgment of 12 January 2006, Case C-132/04 *Commission v. Spain*; judgment of 21 February 2018, Case C-518/15 *Matzak*.

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organised by themselves. The High Court also took into consideration the preliminary ruling of the CJEU on that mater.

Also, by the decision of 11 December 2018, no. 817, the Romanian Constitutional Court[13] rejected the constitutional appeal regarding relevant provisions of Law no. 272/2004, basically stating in para. 15 that this law provides for a *"particular way of exercising the annual paid leave, adapted to the special nature of the contract under which this professional category carries out its activity."* The Constitutional Court also took in consideration the previous decision of the Romanian High Court of Cassation and Justice (cf. Athanasiu, Dima, Tunsoiu, & Vlăsceanu, 2016).

The Court of Appeal of Constanţa was bound to take into consideration those rulings of the Romanian High Court of Cassation and Justice, and the Romanian Constitutional Court, and cited the reasoning of those decisions.

Also, the national court stated that taking in consideration the CJEU judgement, only the rules of national law remain applicable, as it is not the case to apply the provisions contained in Directive 2003/88 (for example art. 7) directly, or to interpret the internal norms in accordance with the provisions of this Directive, since it was established that this Directive does not apply in case of the claimant foster parents.

Besides citing those rulings and the CJEU judgement, the reasoning of the Court of Appeal of Constanţa is as follows:

"Therefore, in view of the special characteristic of the individual employment contract concluded between the plaintiffs and the defendant, as well as the particular way of carrying out the activity, which has, in principle, a continuous character but not a constant intensity, also assuming numerous inactive periods, and the possibility of the maternal assistant to carry out other activities in the personal interest, it cannot be determined in advance nor later, with a minimum precision, what is the actual working time of the worker and there cannot be determined a certain time interval in which the applicants actually worked. Under these circumstances, it cannot be determined that the applicants actually performed work beyond 8 hours daily, as required by art. 120 of the Labour Code; for the same reason, it is not possible to exclude the possibility that the work performed on weekly rest days, which appears to be an inherent consequence of the specificity of the activity characterized by continuity, has been compensated with free hours on working days when the children's needs do not impose any activity. For this reason, the legislature has opted for a special regulation that presumes the accumulation of 8 hours of work a day in the working days, i.e. 40 hours of work per week, starting from the fact that, although the activity is continuous, the work is not performed continuously. In fact, it is unlikely that the applicants will actually work 24 hours a day every day because they would obviously exceed the physical limits of the human body.

In the same way, the specificity of the activity, which involves the care of a child in a manner very similar to the parental one, is not compatible with the way of exercising the right to annual leave by the workers who carry out an activity in which the exercise of the tasks is clearly delimited in time and even in space. Moreover, at the request of the court, the defendant filed a record of the annual leave enjoyed by each applicant during the relevant period, indicating whether the employee took the annual leave with the minor in care or without, accompanied by the requests for leave made by the applicants.

From the analysis of these documents, it can be seen that out of the 95 applicants, only one made the leave of absence without minors in both 2014 and 2015, while other 3 applicants made the leave without minors in 2014 and other 3 in the year 2015.

[13] Published in Romanian Official Journal no. 195, 12 March 2019.

In the requests for leave addressed to the employer, it is mentioned that the employee became aware that he has the possibility to make the leave without the minor in placement but chooses to make the leave with the minor. These applications are approved by the employer (in the sense of performing the leave of absence in certain periods of time but without separation from minors).

These claims were not challenged by the applicants. It does not result in and it was not claimed that the applicants would have asked the employer to make the annual leave of absence with the separation of minors and such requests would have been rejected by the employer.

These arguments are sufficient to ascertain the unfounded character of all the applicants' claims."

6. DISCUSSIONS AND CONCLUSIONS

The effect of excluding foster parents from the material scope of Directive 2003/88, but still including them in the category of workers within the meaning of the EU Law may be surprising and paradoxical.

On one hand, foster parents lack the protection provided by Directive 2003/88 that limits working time and provides for mandatory rest time. On the other hand, while being workers, foster parents are still entitled to the protective measures based on the second subparagraph of Article 2(2) of Directive 89/391 which requires the EU Member States to ensure safety and health at work for the workers excluded from its material scope as far as possible, and thus in the light of the objectives of the respective Directive.

At the same time, an exclusion from the material scope of Directive 2003/88 means that not only the rights granted by its provisions, but also the prohibitions comprised in its provisions are put aside. One of those interdictions is that the minimum period of the paid annual leave may not be replaced by an allowance *in lieu*, except for the case where the employment relationship is terminated, as stated in Article 7 of Directive 2003/88. It turns out that in the case of foster parents, such a replacement could have been possible, as the interdictions part of Directive 2003/88 does not apply. Regarding Article 7 of Directive 2003/88, the CJEU clearly stated that a worker must benefit from the annual leave for reasons of safety and security at work and therefore it is not allowed for this leave to be replaced by compensation in the course of performance of the employment relationship not even with the employer´s consent.[14] If Directive 2003/88 is not to be applied, then the compensation in lieu may be granted for the annual leave, if the employee is not able to effectively benefit in full of its annual paid leave even before the employment relationship would be terminated since the type of an activity is of such a nature that he/she cannot benefit from the annual leave fully or at all.

The CJEU concluded in the "*Sindicatul Familia*" case that in accordance to the second subparagraph of Article 2(2) of Directive 89/391 as regards the arrangement of their working time, the Romanian authorities have ensured safety and health of the foster parents as much as possible.[15]

However, one question still remains: would it have been an appropriate solution to grant the foster parents' compensation *in lieu* for the annual leave? It is clear that since they theoretically benefit from the annual leave without being separated from their foster

[14] See, among others, Court of Justice of the European Union, order of 21 February 2013, Case C-194/12 *Maestre García,* para. 28.

[15] Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 82.

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children, their daily activities do not differ in any way from usual activities during the rest of the year, as they are not released from the obligation to take care of the child. Even though such a compensation would have been in discussion only if the foster parents asked the employer to take the annual paid leave without the child, a legal possibility available for them, and that was not the case in that particular litigation. A different approach could have been taken to verify if, during the annual leave period, the foster parents actually perform work and if so, to determine if this work, being performed during rest time, could be considered as an overwork that would entitle foster carers to overtime payment even if they are not entitled to compensation *in lieu* for the annual leave. But in the main litigation, the claimants did not ask for overtime payment related to the work done during the annual leave.

Since the Romanian High Court of Cassation and Justice decided by a mandatory interpretative ruling that foster parents are not entitled to the compensation equivalent to the leave allowance, and the Romanian Constitutional Court decided that the legal provision interpreted in such way is not in contradiction to the Romanian Constitution, the Court of Appeal of Constanţa could not decide otherwise but to dismiss the appeal.

As for the entitlement to supplementary payment considering the work performed on weekly rest days, public holidays, and other non-working days, and overwork, it is also clear that the nature of work makes it impossible to determine exactly the amount of time used for performing work to the benefit of the child exclusively, or what is the duration of the time used for working for the mutual benefit in the household and how it should be considered, or whether the time used for providing supervision of the child without any activity done should be considered as working time, or if the time when the child is out of the direct supervision of a foster parent stands for the working time (e.g. the child is away at school).

That is why it was legally presumed by law that foster parents work 40 hours a week, 8 hours a day, so we deal with a presumed duration of working time.

As for the legal relations between foster parents and public authorities, namely if that is an employment relation or not, and if foster parents are workers within the meaning of the EU Law, the consequences of the CJEU are still to follow. For the moment, it is worth to notice that the London Court of Appeal decided that foster parents in the UK are not workers under the meaning of a special regulation regarding the registration of a trade union, on the ground, among many others, that they do not conclude a labour contract and the allowance they receive cannot be considered as salary or any type of remuneration for the work done, even though the Court did not exclude the possibility of finding, in an appropriate case, that a foster carer is a worker under a contract.[16]

Still, the CJEU judgement in Sin*dicatul Familia* case is a steppingstone for the Working Time Directive interpretation and application, and for the debate regarding the foster carer statute and working time that is more likely to generate effects on the national case law in the EU countries in the upcoming years.

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CIVIL LAW ASPECTS OF THE MAURITIAN CHILDREN'S BILL OF 2019 / Goran Georgijević

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Abstract: *The Mauritian Children's Bill of 2019 addresses many issues pertaining to child protection, such as best interest of a child, prohibition of discrimination of children, marriage of children, ill-treatment of children, surrogacy and sale of children and child prostitution. However, we may observe that the Bill regulates mainly the criminal law aspects as well as the administrative measures aiming at protecting children. The Bill does not contain the rules on Civil law aspects of the issues addressed in the Bill. In this article, we will analyse those Civil law aspects.*

Key words: *child protection; children's rights; the best interest of a child principle; civil law; comparative view; Mauritian law; French law*

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1. INTRODUCTION

The Mauritian Children's Bill of 2019[1] is intended, as per the Explanatory Memorandum attached to the Bill, *"to repeal the Child Protection Act and replace it with a more appropriate, comprehensive and modern legislative framework so as to better protect children and to give better effect to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child"*.[2] The objectives of the above mentioned Bill are numerous and various. Many of them pertain to criminal law issues or to administrative measures for protection of children, but none of them

[1] It has to be noted that according to Section 2 of the Bill, a child is defined as *"a person under the age of 18"*. Section 2 is in conformity with Article 388 of the Mauritian Civil Code that defines a minor as *"an individual of each sex who is under the age of 18"*.

[2] According to paragraph 2 of the above mentioned Explanatory Memorandum, the Bill *"makes provisions –*

(a) for the better care, protection and assistance to children and their families;
(b) for the respect and the promotion of the rights and best interests of children;
(c) for the setting up of structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
(d) for children under the age of 12 not to be held criminally responsible for any act or omission;
(e) for child witness and child victims under the age of 14 to be, under certain conditions, competent as witnesses without the need for them to take the oath or making solemn affirmation;
(f) for the setting up of a Children's Court, which shall consist of a Civil Division, a Protection Division and a Criminal Division; and
(g) for addressing the shortcomings in the Child Protection Act.".

concerns directly Mauritian Civil Law. In this article, we will attempt to analyse in detail Civil law aspects of the Mauritian Children's Bill of 2019 and its relationship with the Civil law legislation.

The Mauritian legal system is very often described as the *hybrid* or the *mixed* one. One part of it, more precisely the Public Law (Constitutional Law, Administrative Law, etc.), is of Common Law inspiration. On the other hand, and for historical reasons, Mauritian civil law has been influenced by French civil law (Agostini, 1992, p. 21; Angelo, 1970, p. 237; Bogdan, 1989, p. 28; Domingue, 2002, p. 62; Law Reform Commission, n.d.; Valentine, 2012, p. 629; Venchard, 1982, p. 31). The French Civil Code, which came into force in 1804, has influenced the Civil Code of the Republic of Mauritius. The original text of the French Civil Code of 1804 was incorporated into the positive law of Mauritius. This is due to the fact that at the early 19th century, Mauritius was a French colony, before the English took possession of the Island. Article 8 of the *Act of Surrender*, signed in 1810, provided that the People of the Island would maintain their religion, *laws* and customs. In addition, the Treaty of Paris of 1814, which officially transfers the legal possession of Mauritius to the Englishmen, does not have the effect of fundamentally overturning French laws considered in certain respects as the personal legislation of the inhabitants (Venchard, 1982, p. 31). Consequently, Mauritian civil law and, in particular, the Mauritian Civil Code, was modelled on French civil law and the French Civil Code of the time.

Despite the great resemblance between Mauritian civil law and French civil law, the former has managed to preserve an indisputable autonomy *vis-à-vis* the latter. In Mauritius, the decisions of the French Court of Cassation are a persuasive and not a binding authority on Civil law issues.[3] Thus, a Mauritian judge will quote and follow the reasoning developed in a judgment of the French Court of Cassation only if the judge considers it appropriate with respect to the context. On the other hand, no formal obligation lies upon the Mauritian judge to follow the decisions of the Court of Cassation relating the issue treated in the judgment. This rule has been, for instance, clearly confirmed with regard to the issue of reparation for indirect damage suffered by an unmarried partner in the event of the death of the other partner. The Supreme Court of Mauritius refuses constantly the reparation for indirect damage, moral or material, suffered by an unmarried partner in the event of the death of the other partner. This position is clearly expressed in the Mauritian Supreme Court's judgments *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & Anor* (26th April 2007)[4] and *Naikoo v. Société Héritiers Bhogun* (Record number 14 949).[5] Three main arguments are given in order to justify the above mentioned refusal, i.e. the immorality of the union of unmarried partners, the absence of legal link between unmarried partners as well as the existence of some kind of "legal fault" which consists in living together without being married. On the other hand, since 1970 the French Court of Cassation has been acknowledging the reparation for indirect damage suffered by an unmarried partner in the event of the death of the other partner. According to the French Court of Cassation, the union between two unmarried persons is not illegal and the lack of legal link between unmarried partners

[3] In the judgement of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* 2017 SCJ 411 we can read: *"It is appropriate to recall the practice that when it comes to the interpretation of a law borrowed from French law we stand guided for its interpretation by French doctrine and case law. One can quote in that respect the following passage from L'Etendry v The Queen [1953 MR 15]: "the normal rule of construction laid down time and again by this court (…) is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French doctrine and case law." But, it has to be pointed out that the practice of relying on French authorities has always been for guidance and not in application of the stare decisis principle."*(highlighted by author)

[4] 2007 SCJ 106.

[5] 1972 MR 66 1972.

does not constitute an obstacle to the reparation for indirect damage.[6] However, despite all the differences between Mauritian civil law and French civil law which have been pointed out previously and despite the indisputable autonomy of the Mauritian civil law, it is impossible to deny that the latter is strongly inspired by French civil law and that the Mauritian judge will refer most of the time to the decisions rendered by French courts – and especially by the Court of Cassation – as well as to the French doctrine.

This is why we will constantly refer to the French Doctrine as well as the judgments of the French Court of Cassation while analysing the Civil law aspects of the Mauritian Children's Bill of 2019.

2. RELATION BETWEEN THE CHILDREN'S BILL AND THE MAURITIAN CIVIL CODE

2.1 The Coexistence between the Children's Bill and the Mauritian Civil Code

Section 3 (2) of the Mauritian Children's Bill of 2019 clearly states the relationship between the Bill and Articles 371 through 387 of the *Code Civil Mauricien*. In principle, the rules contained in the Bill do not derogate from Articles 371 through 387 of the Mauritian Civil Code, they complement it. The same rule applies to the relationship between the Bill and the Divorce and Judicial Separation Act.[7] In other words, the Bill does not aim at modification of legal provisions in the field of the substantive Mauritian Civil law. The two sets of rules are meant to coexist.

2.2 A Brief Overview and a Critical Analysis of Articles of the Mauritian Civil Code pertaining to Guardianship Rights (autorité parentale) (Articles 371 through 387)

Articles 371 to 387 of the Mauritian Civil Code, which Section 3 (2) of the Children's Bill refers to, address numerous issues pertaining to the parents' guardianship rights (*autorité parentale*). Article 371 of the Mauritian Civil Code contains a moral proclamation that *"children, at all ages, owe honour and respect to their father and mother"*.[8] Article 371.1 of the Code addresses the issue of the length of the parents' guardianship rights[9] and article 371.2 provides us with the information on whom the above mentioned rights are bestowed (Courbe & Gouttenoire, 2017, p. 489; Fenouillet, 2019, p. 526).[10] Article 371.3 of the Mauritian Civil Code prohibits to a minor to leave the parental home without his parents' consent.[11] However, Judge in Chambers may, in very exceptional circumstances, grant a permission to a minor to leave the parental home.[12]

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[6] Cass. ch. mixte, 27 February 1970 number of pourvoi: 68-10276 and Cass. crim. 17 March 1970 number of pourvoi: 69-91040.

[7] The *Divorce and Judicial Separation Act* of 1982 (Act n° 20/1981) contains procedural rules on divorce and judicial separation.

[8] The lack of respect of this legal provision may amount to a civil fault (Article 1382 and 1383 of the Mauritian Civil Code) and bestow upon the parents the right to ask for compensation of their moral and material prejudice.

[9] *"He remains under their authority until his majority or his emancipation by marriage"*.

[10] *"The authority belongs to the father and mother to protect the child in his safety, his health, his morality. They have the right and duty to care of, supervise and educate child"*.

[11] *"Subject to special provisions derogating from the rules laid down in this article, a child may not leave the family home without the permission issued by his father and mother and may not be removed from it, except in cases of necessity determined by law"*.

[12] *"However, the Judge in Chambers may authorize a child to leave the family home, at the request of one of the parents, when the abusive refusal of the other parent is not justified by the interest of the child"*.

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This important exception aims at helping the child to avoid physical or psychological violence of his parents that might threaten the development of the child.

Article 371.4 of the Mauritian Civil Code guarantees the right of every child to maintain a personal relationship with his ancestors (his grandparents for instance).[13] Thus, a child has the right to stay at his grand-parent's home and to write letters to them (Fenouillet, 2019, p. 528).

Article 371.5 of the Mauritian Civil Code sets out the principle according to which siblings are not to be separated, save when there are special circumstances justifying such a separation (for example, the impossibility to avoid the separation or when the interest of a child requires the separation).[14] Thus, it may occur that the behaviour of one of the siblings is seriously disrupted and it may appear to be in the best interest of that child to be entrusted to a specialized institution in order to help him to improve his behaviour.

Articles 372 and following of the Mauritian Civil Code address the issue of the exercise of the guardianship rights over a minor. It has to be highlighted that those guardianship rights enable the parents to decide on the child's lifestyle, his relationships and occupations (Fenouillet, 2019, p. 527; Garrigues, 2018, p. 522 et seq.). Article 372.1 of the Code sets out the principle of the common exercise by both father and mother of the guardianship rights (Garrigues, 2018, p. 520).[15] However, it may occur that even when parents are still formally married, they are *de facto* separated. The Judge in Chambers will decide which parent he will bestow upon guardianship rights and his decision will be based on the best interest of the child.[16] A similar rule is provided for in Article 373.2 of the Mauritian Civil Code in case of divorced parents.[17] Moreover, even when the two parents live under the same roof, they disagree sometimes on how the guardianship rights should be exercised. In that case, the Judge in Chambers will make a decision on that issue and take into consideration previous practice on the same issue. If there is not any previous practice, the Judge in Chambers, seized by one of the parents, will decide in the best interest of the child (Article 372.1 of the Mauritian Civil Code).[18]

Article 372.2 of the Mauritian Civil Code protects third persons who act in good faith: those persons may legitimately consider that a parent acting alone and accomplishing an act pertaining to the person of the child has obtained the previous consent of the other parent. For instance, when a parent makes a contract with a private lessons teacher for the benefit of the former's child, the latter may assume that the above mentioned contract has been approved by the other parent.

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[13] *"Children have the right to maintain personal relationships with their ancestors. Only the best interests of the child can hinder the exercise of this right".* If it is in the best interests of the child, the Supreme Court sets the terms of the existence of the relationship between the child and a third party, whether a parent or not.

[14] *"A child must not be separated from his brothers and sisters, unless this is not possible or if his interest requires another solution."*

[15] *"During the marriage, the father and mother exercise jointly their guardianship rights".*

[16] *"However, in the event of de facto separation of father and mother, the Judge in Chambers, seized by one of the spouses, or the Supreme Court when there is a litigation between the two spouses, will rule on the custody of the child , taking into account exclusively the advantage and the interest of the child. Guardianship rights are then exercised by the parent who has been entrusted with custody, and the other parent will keep the visitation rights."*

[17] *"If the father and mother are divorced (…) guardianship rights are exercised by the one of them who the Supreme Court entrusts with the custody of the child, and the other keeps the visitation rights".*

[18] *"If the father and mother cannot agree on what is the best interests of the child, the practice they had previously been able to follow on similar occasions will be their rule. In the absence of such a practice or in the event of a dispute over its existence or its merits, the most diligent spouse may seize the Judge in Chambers who will rule on the issue after having attempted to reconcile the parties."*

Article 373 of the Mauritian Civil Code provides for the cases in which the guardianship rights may by definitely or temporarily lost. Thus, the above mentioned rights will be definitely or temporarily lost when:

- one of the parents is unable to express his will, due to his incapacity, his absence, his remoteness or any other cause;
- a judgment of revocation (withdrawal) has been pronounced against a parent, for those rights which have been taken away from him;
- a parent has been sentenced for abandonment of a child.

The Mauritian Civil Code gives always the priority to the idea that guardianship rights should be exercised at least by the father or the mother of a child. Thus, Article 373.1 of the Code stipulates that when one of the parents has died or one of the cases provided for in the above mentioned Article 373 of the Code is applicable, the other parent will exercise the guardianship rights. However, it may happen that a child does not have a parent able to exercise the guardianship rights. According to Article 373.3 of the Mauritian Civil Code when there is not a father or a mother able to exercise the guardianship rights, an official guardian will be assigned to a child.[19]

Article 374 of the Mauritian Civil Code addresses the issue of exercise of guardianship rights over a natural child whose parents are not married from the legal point of view.[20] As we have already explained, both parents will exercise, in principle, jointly guardianship rights over a legitimate child whose parents were married at the moment of his birth. This rule is derived from the automatic establishment of the filiation (parental) link between a child and both parents, and especially his father. On the other hand, the establishment of the filiation link is not automatic regarding a natural child whose father and mother have to recognize him[21]. Only the parent who has recognized the child and has established the filiation link will be able to exercise guardianship rights over a minor[22]. Where both parents have recognizes the natural child born out of marriage, they will exercise jointly the above mentioned rights if they live as husband and wife (under the same roof) tough they are not formally married. In all other cases, one of them will exercise the guardianship rights and the other will have the right of visitation.

Articles 375 through 380 of the Mauritian Civil Code address the issues, which are practically important, of deprivation and partial withdrawal of parental authority (guardianship rights) (Fenouillet, 2019, p. 555 et seq.).

According to Article 375 of the Mauritian Civil Code, *"a father and a mother who are convicted, either as perpetrators, co-perpetrators or accomplices of a crime or a*

[19] *"If neither father nor mother remains in a position to exercise parental authority, there will be a case for the opening of guardianship."*

[20] *"Parental authority is exercised, over a natural child, by father or mother, who has voluntarily recognized it, if it has been recognized by one of them only.*

If the father and mother, who have both voluntarily recognized the natural child, lead a common life and live in the same residence, parental authority is exercised jointly by the two, according to the rules established by Articles 372 to 373-1.

If the fathers and mother who have both voluntarily recognized the natural child do not live in the same residence, parental authority is exercised by the one of them with whom the child usually lives, the other has the visitation rights.

In case of a dispute, in particular following the separation of the father and mother, the Supreme Court, at the request of the father or the mother rules on the custody of the natural child, taking into account exclusively the advantage and interest of it. The Supreme Court may in particular, for the greater benefit of the natural child, entrust the care of the latter to another parent or to a third person who has accepted this office."

[21] Articles 336 and 339 of the Mauritian Civil Code.

[22] The same legal rules apply to the situation where the link of filiation is established by a Court's decision (Article 374. 1 of the Mauritian Civil Code): *"The same rules apply, in the absence of voluntary recognition, when the link of filiation is established in a judgment, either towards both parents, or towards only one of them."*

misdemeanour committed against the person of their child, or as co-perpetrators or accomplices of a crime or a misdemeanour committed by their child, may be deprived of parental authority (guardianship rights)". However, conviction pronounced by criminal court is not the only ground for deprivation of guardianship rights as per the Mauritian Civil Code. Thus Article 376 of the Civil Code stipulates: *"apart from any criminal conviction, a father and a mother who, either by ill-treatment, or by pernicious examples of habitual drunkenness, notorious misconduct or delinquency, or by lack of care or lack of direction, clearly endanger the safety, health or morals of a child may be deprived of parental authority (guardianship rights)"* (Fenouillet, 2019, pp. 556–557; Garrigues, 2018, p. 548). Article 376 stipulates also that the action for deprivation of guardianship rights may be brought before the Supreme Court *"either by the Attorney General, or by the father, mother or another family member of the child or by his guardian"*. This rule reflects the idea that the protection of the child is a matter of public interest and the circle of persons who, as per the Civil Code, may request deprivation of guardianship rights is wide.

Article 377 of the Mauritian Civil Code provides us with more precisions as to the scope of the deprivation of guardianship rights. The deprivation may be total, i.e. a parent is deprived of all elements, patrimonial and personal, of the parental authority, save a different decision of the Court. The deprivation is applied to all minor children already born or to be born of that parent. Article 377 of the Code adds that the deprivation of guardianship rights exempts a child from the maintenance obligation, by derogation from Articles 205 through 207 of the Civil Code,[23] but the Court's decision on deprivation of guardianship rights may set another rule and uphold the above mentioned obligation. Article 378 of the Mauritian Civil Code sets out the rule of partial withdrawal of parental authority (guardianship rights). In other words, the deprivation of parental authority is not necessarily total; it may be partial (Fenouillet, 2019, p. 557).[24]

From the procedural point of view, the Supreme Court of Mauritius must, as per Article 379 of the Mauritian Civil Code, while pronouncing the deprivation or the partial withdrawal of guardianship rights, designate another parent or a third person (if the other parent is deceased or if he has lost the exercise of parental authority) who accepts this charge, and the above mentioned parent or the third person will assume guardianship of a child and the Court will determine the extent of his powers.

Article 380 of the Mauritian Civil Code stipulates that a parent who has been deprived, totally or partially, of guardianship rights, may request the Supreme Court to restore his guardianship rights in whole or in part. Article 380 of the Civil Code imposes upon the applicant the obligation to *"justify new circumstances"* which might account for the reinstatement of his guardianship rights. Those new circumstances pertain, in principle, to a positive change in that parent's life that provides a sufficient guarantee that he will take good care of a child. In order to ensure the seriousness of the request for reinstatement of guardianship rights, Article 380 of the Code stipulates that *"the request for reinstatement of rights can be made only one year at earliest after the decision declaring deprivation or partial withdrawal has become irrevocable"*. Where the request for

[23] Article 205 of the Mauritian Civil Code stipulates that *"children owe food to their parents, and other ancestors who are in need"*. Article 206 adds that *"the sons-in-law and daughters-in-law also owe, in the same circumstances, maintenance to their stepfather and stepmother; but this obligation ceases, 1° when the stepmother has celebrated a new marriage, 2° when the spouse who produced the affinity, and the children resulting from his union with the other spouse died"*. Finally, according to Article 207 of the Mauritian Civil Code *"the obligations resulting from these Articles are reciprocal"*.

[24] *"The judgment may, instead of total deprivation, be limited to declaring a partial withdrawal of rights, and pertain to the elements specified in it. It can also be decided that the total deprivation or partial withdrawal will have effect only with regard to some of the children already born."*

reinstatement of rights has been rejected, a new request for reinstatement of rights may be submitted to the Supreme Court after a further period of one year.

Article 380 of the Mauritian Civil Code is a rare situation where the Bill derogates from the Civil law legislation. Section 26 (1) of the Children's Bill stipulates that *"any person who is convicted for an offence committed on a child under this Bill or under sections 249 and 250 of the Mauritian Criminal Code, shall be interdicted from any guardianship –(a) for a period not exceeding 5 years in the case of any offender; or (b) for a period of 10 years where the offender is a parent of a child"*. Thus, if the Bill is passed in the Mauritian Parliament, when a father and a mother are convicted, either as perpetrators, co-perpetrators or accomplices of a crime or a misdemeanour committed against the person of their child, they will be allowed to ask for the reinstatement of their guardianship rights after a period up to 10 years instead of a period of one year. We are of the opinion that the proposed rule is too harsh not only on parents but also on a child because it is not in his best interest to be deprived of the possibility to have his parents as guardians for a long period of time up to 10 years. People can change, and one year is a sufficient period of time to give every parent the opportunity to change positively in his life and to prove it to the Judge in Chambers in order to get back his guardianship rights. The absolute deprivation of guardianship rights for a period of eight or nine years takes away the opportunity that the parent who has made considerable efforts in his life and has changed positively will have an opportunity to take care of his child, which would be, without any doubt, the best solution for the child.

It should be underlined that Section 26 (2) of the Bill contains an explicit referral to Articles 371 through 387 of the *Code Civil Mauricien*. When an offence has been committed by the father or the mother of a child, the offender will be deprived of his rights and advantages provided for by Articles 371 through 387 of the Mauritian Civil Code. Thus, Section 26 of the Bill and Articles 371 through 387 of the Mauritian Civil Code complement each other.

Articles 381 and following of the Mauritian Civil Code addresses the issue of guardianship rights of the parents over the property of their minor child. According to Article 380 of the Mauritian Civil Code, the administration and enjoyment of a child's property is bestowed upon his father and mother (Chouk, 2017, p. 417 et seq.; Courbe & Gouttenoire, 2017, p. 500; Garrigues, 2018, p. 529). Article 382 of the Civil Code adds that the legal administration of their minor child's property is exercised by the father and the mother when they exercise parental authority (guardianship rights) in common. In other cases, the guardianship rights over the minor's property will be exercised either by the father or by the mother (Fenouillet, 2019, p. 528 et seq.).[25] Where the guardianship rights are exercised in common by both parents, every third person acting in good faith,[26] for instance a buyer of an object belonging to their minor child may consider that the parent acting alone has the necessary power to make a contract which qualifies as acts of administration (*actes d'administration*) (Article 391 (3) of the Mauritian Civil Code) (Garrigues, 2018, p. 529). All other contracts that are not considered as acts of administration, and in particular the acts of disposition[27] of their minor child's movable property, such as contract of sale or contract of exchange, require the consent of both parents, otherwise the contract will be null and void (Fenouillet, 2019, p. 533). Moreover,

[25] See also Article 389 of the Mauritian Civil Code.
[26] In fact, he does not know that the other parent disagrees with the contract made alone by the parent who detains an object belonging to their minor child.
[27] The acts of disposition may be defined as those acts, which affect the substance of the property of the minor child.

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the most serious contracts in terms of financial consequences, such as sale of minor child's immovable property require not only the consent of both parents but also the prior authorization of the Judge in Chambers (Article 394 of the Mauritian Civil Code) (Garrigues, 2018, p. 530; Hauser, 2015, p. 354). The Mauritian Civil Code remains silent on the legal rules applicable to the situation where the legal administration of the minor child's property is bestowed upon one parent only. It seems that the best solution would be to allow the above mentioned parent to make the contracts alone which qualify as acts of administration as well as acts of disposition of minor's movable property. On the other hand, the acts of disposition of minor's child immovable property, given their financial seriousness, would require not only the consent of the parent who exercise the guardianship rights but also the consents of the Judge in Chambers (Fenouillet, 2019, pp. 536–537).

Article 383 of the Mauritian Civil Code stipulates that legal enjoyment of a minor's child property *"is attached to legal administration: it belongs either to both parents jointly, or to that of the father and mother who are in charge of the administration"*. In addition, according to Article 384, *"the right of enjoyment ceases: 1. As soon as a child is sixteen years old; 2. For the causes which put an end to parental authority, or even more specifically for those which put an end to legal administration; 3. For the causes which lead to the extinction of all usufruct"* (Courbe & Gouttenoire, 2017, p. 500; Garrigues, 2018, p. 531).

Finally, Article 387 of the Mauritian Civil Code excludes some forms of minor's property from the legal enjoyment conferred to the parents. Thus, *"legal enjoyment does not extend to the property which a child can acquire through his work, nor to that which is given or bequeathed to him under the express condition that the father and mother will not enjoy it"* (Fenouillet, 2019, pp. 530–531).[28]

3. BEST INTEREST OF A CHILD

3.1 The Proclamation of the Best Interest Principle in the Children's Bill of 2019

Section 5 of the Children's Bill of 2019 sets out the best interest principle (Boulanger, 2006, p. 554 et seq.; Courbe & Gouttenoire, 2017, p. 491).[29] Thus, Section 5 (1) of the Bill stipulates that *"the best interest of a child shall, in respect of any matter concerning the child, be paramount and be the primary consideration by any person, Court, institution or other body"*. Section 5 (2) of the Act adds that *"(…), every person, every Court, every institution or any other body shall, in relation to any matter concerning a child – (a) respect, protect, promote and fulfil the rights and the best interests of the child; (b) respect the inherent dignity of the child; (c) treat the child fairly and equitably; (d) protect the child from discrimination; (e) bear in mind the needs of the child for his development, including any special needs which may be due to a disability; (f) where appropriate, give the child's family member an opportunity to express his views; (g) as far as possible, act promptly"*, etc. The principle proclaimed in Section 5 (1) of the Bill as well as the guidelines given in Section 5 (2) of the Bill are greatly respected in the Mauritian Civil law legislation.

[28] See also Article 390 (3) of the Mauritian Civil Code. – Cass. 1st Ch. 10th June 2015, *Recueil Dalloz*, p. 1318; Cass. 1st Ch. 11th Feb. 2015, *Recueil Dalloz*, 2015, p. 488.
[29] See: Cass. 1st Ch. 22 Nov. 2005, *Recueil Dalloz*, 2006, comment Gallmeister I., p. 554.

3.2 Conformity of the Mauritian Civil Code with the Best Interest of a Child principle

Article 371.3 of the Mauritian Civil Code prohibits a minor from leaving the parental home without his parents' consent.[30] However, Judge in Chambers may, under very exceptional circumstances, grant a permission to a minor to leave the parental home.[31] As already mentioned before, the exception to the rule aims at helping the child to avoid physical or psychological violence of his parents which might threaten the development of the child.

Article 371.4 of the Mauritian Civil Code guarantees the right of every child to maintain personal relationship with his ancestors (his grandparents for instance)[32]. The same right may be bestowed upon the so called "third persons", such as relatives or homosexual partners of a parent, and in particular when the above mentioned third party has resided permanently with the child and one of his parents has provided for his education, maintenance or installation and has established lasting emotional ties with him[33]. In a gist, as long as the contact with third persons may contribute to the good development of a child, the Mauritian Legislator considers that it is in the best interest of the child to maintain personal relationship with that third person.[34]

Article 371.5 of the Mauritian Civil Code sets out the principle according to which siblings are not to be separated, save when there are special circumstances justifying such separation (for example, the impossibility to avoid the separation or when the interest of a child requires the separation).[35] For example, it may be in the best interest of the child to be separated from his siblings when his education or a sports training abroad requires it.

It may occur that even if they are still formally married, the child's parents are separated. The Judge in Chambers will decide upon which parent he will bestow guardianship rights and his decision will be based on the best interest of the child.[36] In other terms, he will take into consideration all the circumstances of the case and decide which parents provide more guarantees for the good development of the child. It may also occur that even when two parents live under the same roof, they disagree on how the guardianship rights should be exercised. In that case, while deciding on the request, the Judge in Chambers will take into consideration previous practice on the same issue and if there is not, the Judge in Chambers, seized by one of the parents, will decide in the

[30] *"Subject to special provisions derogating from the rules laid down in this article, a child may not leave the family home without the permission issued by his father and mother and may not be removed from it, except in cases of necessity determined by law."*

[31] *"However, the Judge in Chambers may authorize a child to leave the family home, at the request of one of the parents, when the abusive refusal of the other parent is not justified by the interest of the child".*

[32] *"Children have the right to maintain personal relationships with their ancestors. Only the best interests of the child can hinder the exercise of this right."*
If it is in the best interests of the child, the Supreme Court sets the terms of the existence of the relationship between the child and a third party, whether a parent or not."

[33] Cass. 1st Ch. 6 nov. 2019, *Actualité Juridique Famille*, 2019, comment Saulier M., p. 649.

[34] Cass. 1st 27 May 2010, *Revue Trimestrielle de Droit Civil*, comment Hauser J., 2010, p. 548.

[35] *"A child must not be separated from his brothers and sisters, unless this is not possible or if his interest requires another solution."*

[36] *"However, in the event of de facto separation of father and mother, the Judge in Chambers, seized by one of the spouses, or the Supreme Court when there is a litigation between the two spouses, will rule on the custody of the child , taking into account exclusively the advantage and the interest of the child. Guardianship rights are then exercised by the parent who has been entrusted with custody, and the other parent will keep the visitation rights".* – Comp. with: Cass. 1st Ch. 13 mars 2007, *Revue critique de droit international privé*, 2007, comment Gallant E., pp. 603 et seq.

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best interest of the child (Article 372.1 of the Mauritian Civil Code).[37] Once again, the Judge in Chambers will base his decision on what is the best for the physical and psychological development of the child. Thus, in case of disagreement between the parents as to the religious rites pertaining to the child, the Judge in Chambers will take into consideration all the circumstances and make a decision in conformity with the best interest of the child.[38]

Since 2011, Mauritian Civil law contains a new form of divorce, i.e. divorce by mutual agreement (Articles 238-3 et seq.), which is based on an agreement of the ex-spouses on all aspects of divorce and has to be approved (*homologué*) by a Judge. According to Article 238-5 of the Mauritian Civil Code, the Judge can refuse the homologation of the divorce agreement of the ex-spouses and refuse to pronounce the divorce if he thinks that the agreement does not sufficiently protect the interests of the children or the interests of one of the spouses. The Judge may also delete or modify the clauses of the above mentioned agreement when it appears to him to be contrary to the interests of the children or of one of the spouses. Thus, every time when an agreement of the spouses pertaining to the residence of the child, the exercise of the guardianship rights, the financial contribution to the maintenance of the child, etc. does not sufficiently protect the health and the development of the child, the Judge will refuse to approve the divorce agreement.

According to Article 242 of the Mauritian Civil Code, in case of the divorce other than the divorce by mutual agreement when *"there are minor children, the Judge in Chambers, decides on their custody, as well as on the right of visit and accommodation"*,[39] while taking into account exclusively the advantages and interests of the children.[40] Moreover, the Judge in Chambers *"may entrust the children to any of the spouses or may order, for the greater benefit of the children, that all or some of them are to be entrusted to other family members or even to a third person who accepts this charge"*. The divorce judge will take into consideration all appropriate circumstances in order to evaluate the best interest of a child. For instance, the best interest of an autistic child may justify that in the event of the divorce, the judge chooses to entrust the custody of the child to one parent rather than to the other. Guardianship rights will be bestowed upon the parent who gives more guarantees for the best possible development of the autistic child. However, we have to underline the fact that in Mauritian Civil law there is a strong legal presumption that it is in the interest of a very young child to be entrusted to his mother. Thus, *"custody of children under the age of five must always be bestowed upon the mother, subject to exceptional circumstances likely to compromise their safety or health"*. The rule set out in Article 242 of the Mauritian Civil Code is confirmed in Article 261 of the same Code. This Article stipulates that the Supreme Court of Mauritius in cases of divorce other than the divorce by mutual agreement, *"rules on the custody of children, while taking into account exclusively their advantages and interests. The children are entrusted to one spouse, unless, after having heard the Attorney General's Office, the Supreme Court orders, for the*

[37] *"If the father and mother cannot agree on what is the best interests of the child, the practice they had previously been able to follow on similar occasions will be their rule. In the absence of such a practice or in the event of a dispute over its existence or its merits, the most diligent spouse may seize the Judge in Chambers who will rule on the issue after having attempted to reconcile the parties"*.

[38] Cass. 1st Ch. 23 Sept. 2015, *Recueil Dalloz*, 2015, p. 1952.

[39] The exercise of this right may be denied to the parent on whom the guardianship rights have not been bestowed, when it is in the best interest of a child: Cass. 1st Ch. 9 Feb. 2011, *Actualité Juridique Famille*, 2011, comment Siffrein-Blanc C., p. 207 ; Cass. 1st 24 Oct. 2000, *Revue Trimestrielle de Droit Civil, 2001*, comment Hauser J. p. 126.

[40] The same rule is applied by the French Court of Cassation: Cass. 1st Ch. 12th Sept 2019, *Actualité Juridique Famille*, comment Saulier M., p. 526.

greater benefit of the children, that all or some of them will be entrusted to another family member or even a third person who accepts this charge". Once again, Article 261 of the Mauritian Civil Code reminds that *"the custody of children under the age of five must always be bestowed upon the mother, subject to exceptional circumstances likely to compromise their safety or health"*. In principle, the siblings are not separated by court's decision (Fenouillet, 2019, p. 529), because from the psychological and emotional point of view, it is in their best interest to grow together.

Article 347 of the Mauritian Civil Code stipulates that at the request of one or both adopters a simple adoption may be converted by the Judge in Chambers into a full adoption when the conditions required by Articles 364 to 366 are met and *"when this conversion seems to be in the best interests of the child"*. In this particular case, the interest of the child whose adoption is being converted is to be treated by the Civil law in the same manner as the biological children of the adopter (inheritance rights).

According to Article 353 of the Mauritian Civil Code, *"at the adopter's request and after having heard the request, the adoption is pronounced by the Judge in Chambers, who checks whether the conditions set by the law are fulfilled and whether the adoption is in the best interests of the child. If he considers it necessary, the Judge in Chambers may postpone the pronouncement of adoption by imposing on the applicant a probation period, the duration of which will not exceed six months, during which the latter must host at his home the child that he intends to adopt"*. The decision rejecting the request for adoption must be justified and has to mention expressly the text of the legal provisions on which it is based or the reasons why the adoption was not considered to be in the best interests of the child. It is easy to understand that the best interest of the child here is to be adopted to a person or the persons who will provide the sufficient guarantees for the adequate physical and psychological development of the child.

We have to underline the fact that in Mauritian Civil law the best interest principle will be applied even if there is no specific provision in the Mauritian Civil Code which mentions it. For example, as already mentioned before, all contracts that are not considered as acts of administration, and in particular the acts of disposition[41] of their minor child's movable property, such as contract of sale or contract of exchange, require the consent of both parents, otherwise the contract will be null and void. Parents have to take their decision to sell or to exchange a movable property of their minor child only if it is in his best interest, for example in order to pay his medical bills or to pay for his studies in a private school. When the parents disagree on whether the act of disposition is in the best interest of their child or not, the decision will be made by the Judge in Chambers who will take into consideration the best interest of the child (article 391 (2) of the Mauritian Civil Code) (Fenouillet, 2019, p. 533). Moreover, even if the Mauritian Civil Code does not contain an express proclamation, it is certain that the best interest of the child is to live and be brought by his biological family, the total or partial withdrawal of guardianship rights being an exceptional measure (Marguénaud, 2019, p. 814). The best interest of a child is always evaluated *in concreto* by the Judge, i.e. the Judge has sovereign discretion while deciding what is, under given circumstances, in the best interest of the child.[42]

On the other hand, the *Code Civil Mauricien* provides examples where the best interest of a child is not taken into consideration in a satisfactory manner. Article 340 of the Mauritian Civil Code stipulates that paternity of a child born outside marriage can be

[41] The acts of disposition may be defined as those acts which affect the substance of the property of the minor child.
[42] Plen. Ass. 4th Oct 2019, *Actualité Juridique Famille*, 2019, comment Houssier J. p. 592.

judicially declared only if there is one of the situations listed in the above mentioned Article, i.e. in case of abduction or rape when the time of the abduction or rape coincides with the time of the conception of the child; in case of seduction accomplished by means of fraudulent maneuvers, abuse of authority, promise of marriage or engagement; in case where there are letters or some other private writing emanating from the alleged father and from which may be deduced an unequivocal confession of paternity; in case where the alleged father and mother lived in a state of notorious cohabitation during the legal period of conception of the child; in case where the alleged father provided or participated in the maintenance and education of the child as a father. Thus, Article 340 of the Mauritian civil Code does not allow the mother of a child born outside marriage, conceived in an ephemeral relationship between the mother and a man, to bring an action for the establishment of paternity before a court against that man who has never hinted in a writing that he is the father of the child. This assertion has been explicitly made in the judgment of the Supreme Court of Mauritius *Legueff v Dhunny* (29th May 2014)[43]. It does not seem that the ephemeral nature of the relationship between the mother and the father of a child is a sufficient reason to refuse the establishment of the filiation link between the father and the child and the solution set out in Article 340 of the Mauritian Civil Code does not seem, in our opinion, to be in the best interest of the child whose best interest is to have a father from the legal point of view. The link of paternal filiation bestows upon the child several important rights, provided for in the Mauritian Civil Code, such as right to paternal name, inheritance rights, right to maintenance, right to be provided education, etc.

4. PROHIBITION OF DISCRIMINATION OF CHILDREN

4.1 Prohibition of Discrimination of Children in the Children's Bill of 2019

Section 8 of the Mauritian Children's Bill of 2019 provides for the non-discrimination of children. Thus, according to Section 8 (1) of the Act, *"no person shall discriminate against a child on the ground of the child's or child's parents race, caste, place of origin, political opinion, colour, creed, sex, language, religion, property or disability"*. The non-respect of the above mentioned rule is a criminal offense sanctioned by a fine non exceeding 10 000 rupees and by the imprisonment up to 2 years. However, the above mentioned illegal discrimination of children generates also Civil law consequences.

4.2 Tort Law Consequences of the Discrimination of Children

The lack of respect of the prohibition of discrimination may also entail Civil law consequences, more precisely the Tort law consequences. Thus, the illegal discrimination of a child may generate the tort liability of the author of that discrimination towards the child who is a victim of such discrimination. This liability is based on a fault committed by the author of the act of discrimination. In Mauritius, the legal notion of civil fault is defined in Articles 1382 and 1383 of the Mauritian Civil Code. Article 1382 of the Code stipulates that *"any act of a man, which causes prejudice to another, obliges the person by the fault of which it occurred, to repair it"*. Moreover, Article 1383 of the Mauritian Civil Code adds that *"everyone is responsible for the prejudice which he caused not only by his deliberated act, but also by his negligence or his carelessness"*. In Mauritian Civil law the fault may consist of the violation of an obligation expressly laid down by law. Thus, if

[43] 2014 SCJ 191.

the Children's Bill of 2019 becomes an Act of Parliament in the future, the violation of the obligation of non-discrimination of children will certainly constitute a civil fault which will account for the tort liability of the author of the act of discrimination. More broadly, in Mauritian Civil law the fault results from any violation of the general principle of not harming unfairly others (Egéa & Tranchant, 2018, p. 123; Flour, Aubert, & Savaux, 2011, pp. 118–120; Jourdain, 2014, pp. 46–52; Terré, Simler, Lequette, & Chenede, 2019, pp. 1030–1031). In Mauritian Civil law a civil fault stems from the comparison of the behaviour of a subject of law with the behaviour considered to be correct and from the conclusion that there is a deviation from the behaviour which is considered as the correct behaviour.[44] The existence of a civil fault is evaluated *in abstracto*:[45] the behaviour of the author of the prejudice will be compared to the behaviour of an abstract and average person, commonly called *"normally prudent and advised"* person (Egéa & Tranchant, 2018, p. 124; Flour et al., 2011, pp. 136–137; Terré et al., 2019, p. 1037). There is a civil fault when the behaviour of the author of the prejudice is not in conformity with the behaviour of an abstract and average person[46]. It is certain that the act of unfair discrimination of a child is not the behaviour that a "normally prudent and advised" person would have and thus constitutes a civil fault.

The above-analysed civil fault of the author of an act of discrimination may cause either material or moral prejudice to a child. The Mauritian civil law allows compensation for both forms of prejudice.

According to the broadest definition, in Mauritian Civil law prejudice consists of an injury to a legally protected interest. More concretely, the prejudice may be defined either as a lesion of the property of a person (patrimonial prejudice) or an injury of extra-patrimonial interests of a person (moral/extra-patrimonial prejudice). The material prejudice is the one that may be financially assessed. Thus, the patrimonial prejudice may consist of a reduction in the assets of the victim of the prejudice.[47] A discriminated child may ask for compensation where an act of illegal discrimination has entailed the reduction in his assets. For example, a child was unable to enroll in a private school because of an act of illegal discrimination as per Section 8 of the Children's Bill. The total fee for the studies in that school is about 800 000 Mauritian rupees. The child had to be enrolled in another private school where the total fee is 1 300 000 rupees. The difference between the two fees of 500 000 rupees constitutes the material prejudice (the reduction of the child's assets) that stems from the act of illegal discrimination (civil fault). The minor (or his legal representative, a father or a mother) may bring an action before the court and ask for the compensation of the above mentioned material prejudice.

[44] Those basic rules have been set out in the judgment of the Supreme Court of Mauritius *Mohun v. Jugnah & ANOR* of 2002 and in the judgment of the Intermediate Court *Ramchurn Uma Parvati & ORS v. Sahadeo Ashok & ANOR* of 2008.

[45] See: the judgment *D. Hurnam v. D. K. Dabee*, handed down by the Mauritian Intermediate Court in 2010.

[46] In the system of evaluation *in abstracto* of the civil fault, personal characteristics of the author of the prejudice are not taken into account. However, there are a few concrete elements to be taken into account. These elements must not be strictly personal to the author of the damage. Thus, in the system of evaluation *in abstracto* of the civil fault, a model of comparison, i.e. an abstract diligent and prudent person is the person carrying out the same activity as the person whose behaviour is analysed. For instance, the behaviour of a doctor will be compared to the behaviour of an abstract prudent and wise doctor placed in the same circumstances. Thus, professional qualification is a concrete element which penetrates the abstract evaluation of the fault in Mauritian civil law. In addition, the circumstances of the concrete case are also taken into account in order to determine what an abstract prudent and wise person would have done in the same circumstances.

[47] See for instance: Cass. Comm. Ch. 20th Nov. 2012, *Revue des sociétés*, 2013, comment Tabourot-Hyest, p. 430 ; Cass. 2nd Ch. 8 April 2004, *Revue du droit immobilier*, 2005, comment Trébulle F. – G, pp. 321 et seq.

The Mauritian civil law provides, under certain conditions, compensation for the loss of a chance. In other words, the loss of a serious chance of making a gain or avoiding a loss may be compensated. The French Court of Cassation,[48] which is a persuasive authority in Mauritius, insists upon the seriousness of the loss of a chance.[49] The same approach is taken by Mauritian courts.[50] The concept of the loss of a chance may be very useful in case of illicit discrimination of a child as per Section 8 of the Children's Bill. For example, the civil fault (act of discrimination of a child) may sometimes entail for the child the loss of a serious chance[51] to follow the educational path, which might give him better professional and financial opportunities in life. This loss may be financially evaluated and constitutes a form of material prejudice that may be compensated in Mauritian Civil law.

The Mauritian Civil law also provides for the compensation for moral prejudice. Moral (non-pecuniary) prejudice may be defined as an injury to non-pecuniary characteristics of a person. Simply put, moral prejudice consists of suffering of a victim.[52] This suffering is sometimes psychological and other times it is physical. Moral (non-pecuniary) prejudice may stem from a violation of the right to honour (defamation), the right to a name (usurpation of the name) or the right to privacy (unauthorized disclosure). In the above mentioned cases the harm consists in the psychological suffering resulting from the violation of the aforementioned rights. It is easy to understand that a moral prejudice may result for a child who has been illicitly discriminated as per Section 8 of the Children's Bill. Such discrimination may entail a sharp psychological suffering of a child due to an attack on his honour. This psychological suffering may be compensated according to Mauritian civil law.[53]

5. MARRIAGE OF CHILDREN

5.1 Prohibition of Forced Marriages of Children in the Children's Bill of 2019

Section 9 of the Children's Bill of 2019 prohibits to force a child to marry either civilly or religiously. The non-respect of the above mentioned rule is a criminal offense sanctioned by a fine non exceeding 10 000 rupees and by the imprisonment up to 2 years. This is clearly a criminal law provision. On the one hand, forced marriages are also

[48] Cass. 2nd Ch. 23 May 2019, *Revue Trimestrielle de Droit Civil*, 2019, comment Jourdain P., pp. 881 et seq.; Cass. Comm Ch. 13th Feb. 2019, *Recueil Dalloz*, 2019.

[49] In a judgment of November 21, 2006, the judges of the First Civil Chamber of the French Court of Cassation stressed the need for the seriousness of the loss of a chance: *"(...) only constitutes a repairable loss of a chance, the current and certain disappearance of a favourable eventuality "*. Moreover, the judges of the First Civil Chamber of the French Court of Cassation stated in a judgment of March 22, 2012: *"Whereas the loss of a chance is of a direct and certain nature each time that the disappearance of a favourable event is established (...)"*.

[50] For instance, according to Mauritian Intermediate Court, there exists the loss of a serious chance if a candidate with the necessary skills and knowledge was unable to sit for an examination or competition due to the harmful event (civil fault). This reasoning was followed in the judgment of the Intermediate Court *Calleechurn Ashwin Kumar's v. Bhoyro Satteedeo & ORS* of 2007. In this case, a pedestrian had been injured and had suffered a loss of physical capacity. The Intermediate Court's Magistrate awarded the plaintiff compensation for the loss of the opportunity and held : *"Further no counter evidence has been adduced to disprove the assertion of the plaintiff that he had to attend treatment on a few occasions and that he could not complete his studies which can be assimilated to a "perte d'une chance"* .

[51] The lost chance of a child is serious when a child possesses the necessary abilities to study in a programme to which he did not get access because of an act of discrimination.

[52] Cass. 2nd Ch. 8 April 2004, *Revue du droit immobilier*, 2005, comment Trébulle F. – G, pp. 321 et seq..

[53] See for example the judgment of the Supreme Court of Mauritius *La Santinelle Ltd vs. J. R. Dayal* 2000 SCJ 92, where the former Police Commissioner Mr Dayal has been compensated for the moral prejudice stemming from an insult made by a journalist.

prohibited in Mauritian Civil law. On the other hand, marriage of a child is not always prohibited in Mauritian Civil law.

5.2 Prohibition of Forced Marriages in the Mauritian Civil Code

The treatment given to the forced marriages of children in the Children's Bill (a criminal offense) is in conformity with the prohibition of forced marriages in general, stipulated in Article 180 of the Mauritian Civil Code. Thus, Article 180 of the Mauritian Civil Code stipulates that *"a marriage which has been celebrated without the free consent of both spouses or of one of them, can be attacked only by the spouses, or by one of the two whose consent has not been free"* (on the issue of the time limit to take legal action and request the annulment of the marriage for violence: (Hontebeyrie, 2016, updated in 2020, par. 170). Sub-section 2 of Article 180 adds that *"if there has been an error in the person (of one spouse – highlighted by author), or on the essential qualities of the person, the other spouse may request the nullity of the marriage"*.[54] The nullity of the marriage entered into under the influence of violence is explained by the need to protect the personal freedom of every individual in Mauritius. In Mauritian law of marriage violence is defined as an evil by which one of the spouses is threatened regarding his person or his property. For example, it may happen that one spouse applies physical violence to the other before the celebration of the marriage and that the above mentioned violence incites its victim to enter into the marriage. Moreover, it may happen that one spouse utter threats to the other (death threats for instance) before the marriage is made and that those threats explain why the victim of threats has entered into the marriage (Lemouland, 2020, par. 111. 81). The evil by which one spouse threatens the other before the marriage must create in the latter's mind the fear of an evil whose realization would be, in the latter's eyes, relatively close (Lemouland, 2020, par. 111. 81). The Mauritian Civil law does not require that the evil by which one of the spouses is threatened is considerable, i.e. that it is objectively serious. It is sufficient that the object of the threat alters the will (to enter into the marriage) of the spouse who is the victim of the threat (Lemouland, 2020 par. 111. 81), and the victim of violence may request the annulment of the marriage. The author of the threat may be one of the future spouses or a third party (for instance, the parents of one of the spouses), it does not affect the possibility to ask for the annulment of the marriage. On the other hand, the victim of the object of the threat does not necessarily need to be one of the spouses, it may also be one of his relatives (ancestors, children, etc.). The above mentioned rules apply to all spouses in Mauritius, including the spouses who are still not of the age of 18. On the other hand, currently there is no obstacle to the marriage of minors of the age of 16 or 17, subject to the conditions laid down in the Mauritian Civil Code.

5.3 Validity of Children Marriages in the Mauritian Civil Code

Section 9 of the Children's Bill prohibits forced marriages of children without prohibiting the principle of children's marriage. On the one hand, in Mauritian Civil law the legal majority is acquired at the age of 18.[55] However, the Mauritian Civil Code allows,

[54] It has to be noted that Article 181 of the Mauritian Civil Code provides for the possibility to validate a forced marriage. Article 181 of the Code stipulates that *"the application for nullification of marriage is not admissible, whenever there has been continuous cohabitation for six months since the spouse acquired full freedom of will or the error was recognized by him"*. The Mauritian Legislator has deduced, from the voluntary cohabitation of sufficient duration between the spouses, the intention to validate the forced marriage.
[55] Article 388 of the Mauritian Civil Code.

under certain circumstances, marriages of children of the age 16 and 17. Thus, Article 145 of the Civil Code stipulates that *"minors who are old less than 18 years but more than 16 years may enter into marriage with the consent of their father and mother or of the one of them who exercise exclusively parental authority (guardianship rights). This consent may be expressed either before the Civil Registrar, before a notary, or before the person authorized to celebrate marriage"*. The consent of one of the parents will suffice when the other has already deceased or when it is impossible for the other parent to express his will (Corpart I., 2015 par. 111; Lamarche & Lemouland, 2014, par 249 et seq.). However, Sub-section 2 of Article 145 provides that *"in the absence of a father and mother or of one of them who exercises parental authority, the Judge in Chambers may grant an exemption of age to the minor if it is in the latter's interest"*. We believe that the same rule has to be applied, i.e. the Judge in Chambers has to give his authorization for the marriage of a minor when the parents who exercise jointly their guardianship rights disagree on whether their minor child should enter into marriage or not. It seems that the intervention of the Judge in Chambers is a solid guarantee that minor will not enter into a marriage which would be contrary to his best interest.

Parents are supposed to give their consent to the marriage of their minor child with regard to a specific person. In other words, the parents' consent must indicate the name and surname, as well as the place of residence of the future spouse. A general and indefinite authorization would not suffice, *"since it would not meet the objectives of protection of the child and his family that the law seeks"* (Lamarche & Lemouland, 2014, par. 273). Moreover, as long as the marriage is not celebrated, the parent may withdraw his consent and especially if he considers that his decision has been based on an inaccurate information pertaining to the other spouse (Lamarche & Lemouland, 2014, par. 274).

The Mauritian Legislator has considered that parents who exercise the guardianship rights over their minor child are the most appropriate persons to decide whether the marriage of their child is in the best interest of the latter or nor. This is why it has to be highlighted that the parent's authorization is discretionary, i. e. the parents' decision is sovereign and does not have to be motivated. A child will not possess any legal remedy against the decision (refusal) of his parents (Lamarche & Lemouland, 2014, par. 277).

6. ILL-TREATMENT OF CHILDREN

6.1 Prohibition of the Ill-treatment of Children in the Children's Bill of 2019

Section 10 of the Bill prohibits the ill-treatment of a child. According to Section 10 (1) of the Bill *"no person shall ill-treat a child, or allow a child to be ill-treated so that the child suffers, or is likely to suffer, harm"*. Subsection (3) of the Section 10 adds that the non-respect of the above mentioned rule is a criminal offense sanctioned by a fine non exceeding 10 000 rupees and by the imprisonment up to 2 years. The same idea is incorporated in Section 11 of the Bill according to which the corporal punishment of a child is prohibited. Section 11 (1) stipulates that *"no parent or other person responsible for the care, treatment, education or supervision of a child shall inflict corporal or inflict humiliating punishment on the child as a measure to correct or discipline the child"*. Section 11 (2) of the Bill provides that the non-respect of the above mentioned rule is a criminal offense sanctioned by a fine not exceeding 10 000 rupees and by the imprisonment up to 2 years. According to Section 11 (3) corporal or humiliation punishment is defined as any form of punishment which causes pain or suffering to a child through, but not limited

to, the use of force or use of substances. It has to be noted that ill-treatment of a child entails not only the criminal law consequences defined in the Children's Bill but also the important Civil law consequences.

6.2 Tort Law Consequences of the Ill-treatment of Children

The lack of respect of the prohibition to ill-treat children entails not only the Criminal law consequences stipulated in Sections 10 and 11 of the Children's Bill of 2019 but also Civil law consequences. The ill-treatment of a child may generate the tort liability of the author of the act of ill-treatment towards the child who is a victim of such an ill-treatment. This liability is based on a civil fault committed by the author of the act of ill-treatment who has not acted in conformity with Articles 1382 and 1383 of the Mauritian Civil Code. If the Children's Bill of 2019 becomes an Act of Parliament in the future, the ill-treatment of children will be contrary to Sections 11 and 12 of the Act and will certainly constitute a civil fault accounting for the tort liability of the author of the act of ill-treatment. As already mentioned before, more broadly, in Mauritian law the civil fault results from any violation of the general principle of not harming unfairly others. As already explained, a civil fault results from the comparison of the behaviour of a subject of law with the behaviour considered to be correct and the conclusion that there is a deviation from the behaviour which is considered as the correct behaviour.[56] The act of ill-treatment is considered to be incorrect behaviour from the point of view of Mauritian Tort Law: any reasonable and prudent person would consider it as inappropriate and incorrect.

The above-analysed civil fault of the author of ill-treatment may cause either material or moral prejudice to a child. Mauritian civil law allows compensation for both forms of prejudice. For instance, the material prejudice may consist of the reduction of the child's property: the child has to spend money on the payment of private clinic bills, medical drugs, etc. because of the injuries caused by the ill-treatment. On the other hand, the moral prejudice of a child, the victim of an ill-treatment, may be compensated and this prejudice consists of the moral suffering due to an attack on the honour of a child or of the physical suffering due to the suffered physical injuries.

7. SURROGACY AND SALE OF CHILDREN

7.1 Prohibition of Surrogacy and Sale of Children in the Children's Bill

Section 12 of the Children's Bill of 2019 provides for the offences pertaining to surrogacy and sale of children. Thus, Section 12 (2) of the Bill stipulates that *"no person shall, for remuneration or by gift, for promise, by threat or through abuse of authority, incite any parent to abandon his child"*. Section 12 (3) of the Bill adds that *"no person shall, for remuneration or any other consideration, act as an intermediary between a person wishing to adopt a child and any parent willing to abandon his child"*. The non-respect of the above mentioned rule is a criminal offense sanctioned by a fine non exceeding 10 000 rupees and by the imprisonment up to 2 years. In other words, the Bill prohibits anyone to make a contract for delivery of an unborn or already born child.

[56] Those basic rules have been set out in the judgment of the Supreme Court of Mauritius *Mohun v. Jugnah & ANOR* of 2002 and in the judgment of the Intermediate Court *Ramchurn Uma Parvati & ORS v. Sahadeo Ashok & ANOR* of 2008.

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7.2 Prohibition of Surrogacy Contracts and of Sale of Children in Mauritian Civil Law

Surrogacy and sale of children entail not only Criminal law consequences but also Civil law consequences. Surrogacy may take two different forms (Courbe & Gouttenoire, 2017, pp. 430–431; Garrigues, 2018, p. 702; Hess-Fallon & Simon, 2014, p. 193; Neirnick, 2019, par. 48). On the one hand, surrogacy may be a *gestational one*, where an embryo has been conceived with the gametes (genetic material) of the couple who wants to get a baby or with the gametes of another donors and, after that, the embryo has been transferred into the surrogate mother's uterus. The latter is supposed to forfeit the baby after she gave birth to him/her and to hand over the child to the couple that is usually called "intended parents". On the other hand, the intended parents will sometimes have recourse to the medical technique known as *surrogate mother*: a surrogate mother will get inseminated artificially with the sperm of the intended father. In both above mentioned cases, the surrogate mother will abandon and surrender the child to the intended parents, after his/her birth. This second technique of surrogacy differs from the first one mentioned above in that the surrogate mother will not only carry the child but also conceive him/her with her genetic material. The surrogate mother gives her genetic material for the conception of the child who will be handed over to the intended parents. The surrogate mother is the biological mother of the baby (Mirkovic, 2008, par. 1 and 2).

Currently, surrogacy is a legal gap in Mauritian Civil Law (see: Law Reform Commission of Mauritius, n.d.). Thus, there are no specific rules on it neither in the Mauritian Civil Code nor in another enactment written in English. There are no specific rules which would explicitly declare contracts pertaining to this medical practice legal or prohibited by law in Mauritius.

As already explained, for historical reasons the Mauritian Civil Law is very much influenced by French Law (Agostini, 1992, pp. 21–22; Angelo, 1970, pp. 237–239; Bogdan, 1989, pp. 28–31; Domingue, 2002, p. 62; Venchard, 1982, p. 31). The judgments of the French *"Cour de cassation"* on civil law issues are considered as persuasive authority by Mauritian courts of justice and the legal reasoning of French Judges will often, but not always,[57] be followed by their Mauritian counterparts. Thus, there is a strong probability that if and when a legal issue pertaining to the surrogacy contract is raised, a Mauritian Judge will follow the solution and spirit of the French Civil law which is the persuasive authority in Mauritius.

Article 16-7 of the French Civil Code formally prohibits the surrogacy (Dekeuwer-Defossez, Leroyer, & Dionisi-Peyrusse, 2018, p. 583; Garrigues, 2018, p. 701; Le Gac-Pech, 2016, p. 486; Le Gidec & Chabot, 2019, par. 35; Pichard, 2017, p. 1143 et seq.; Tourame, 2016, p. 275 et seq.), thus *"any agreement relating to procreation or gestation on behalf of others is void"*. This rule is directly linked to the public interest, i.e. the directional public order (*ordre public de direction*) which is comprised of the fundamental values in French society, such as dignity of women (Courbe & Jault-Seseke, 2019, p. 16). That is why the nullity of the surrogacy agreement is the absolute one (Hess-Fallon & Simon, 2014, p. 193). Every interested person can invoke this nullity (Courbe & Gouttenoire, 2017, p. 431) and the surrogacy contract cannot be confirmed by the gestational/surrogate mother and the intended parents. Even before Article 16-7 of the French Civil Code came into force, surrogacy agreements were strictly prohibited by the French *"Cour de cassation"*. In the famous judgment of all chambers of the *"Cour de cassation"* given on 31st May

[57] Thus, the question of compensation of unmarried partner as indirect victim for the detriment suffered is differently solved in French Law and in Mauritian Law. See: *Lingel-Roy M. J. E. M. & Ors v The State of Mauritius & Anor* 2017 SCJ 411; *Jugessur Mrs Shati & ORS vs Bestel Joseph Christian Yann & ANOR* 2007 SCJ 106; *Naikoo vs Société Héritiers Bhogun* 1972 MR 66; *Moutou vs Mauritius Government Railways* 1933 MR 102.

1991 (Courbe & Gouttenoire, 2017, p. 430), we can read: *"Considering articles 6 and 1128 of the Civil Code, together article 353 of the same Code; Whereas, the convention by which a woman undertakes, even free of charge, to conceive and carry a child and to abandon him after his birth is contrary both to the public order principle of the unavailability of the human body as well as to the principle of the unavailability of the state of persons (…)"*. The refusal by the French Civil Code and the *"Cour de cassation"* to validate contracts on the medical practice known as surrogacy is based on the idea that a woman and her body should not be used as a mere production tool. The capacity to carry a child is not something ordinary but one of the most intimate aspects of a women's existence. The pregnancy is not and cannot be considered as usual work (Courbe & Gouttenoire, 2017, p. 430; Mirkovic, 2008, par. 8). Moreover, the idea to abandon a baby, a human being as a whole, to a couple who "ordered" him seems to be shocking (Garrigues, 2018, p. 702) and that is why the French *"Cour de cassation"*, in its decision dated the 31st May 1991 has cited Article 1128 of the Civil Code which prohibits the object of contract which is not in conformity with the law, public interest and good morals. It is certain that a baby (a human being) cannot be considered as an ordinary goods nor handed over to one party to a contract by another. The same reason accounts for the prohibition of sale of already born children.

Given the fact that the case law of the French *"Cour de cassation"* is the persuasive authority in Mauritius regarding Civil law cases, if, at some point, the legal issue of the validity of surrogacy agreements is raised before the Supreme Court of Mauritius, there is a strong probability that our Supreme Court will follow its French counterpart and will declare this type of agreement null and void, whether a consideration is given/promised to the surrogate mother or not. The same position should be held by the Mauritian Supreme Court in case of sale of already born child. Even though the principle of the unavailability of the human body is not explicitly provided for in the Mauritian Civil Code, there is no doubt that it can be inferred from the existing legislation in Mauritius (cf. Marais, 2018, pp. 173–174). Section 6 of the Mauritian Constitution prohibits slavery,[58] and that means that no one in Mauritius can be sold for good consideration and deprived of his/her liberty. Human body as a whole is thus the material object that cannot be sold by contract (Penneau & Terrier, 2019, par. 55), and this rule stems from Articles 1128 and 1598 of the Mauritian Civil Code.[59] For the same reason, the contract on surrogacy should be illegal in Mauritius. This type of contract seems to be contrary to the public interest mentioned in Article 6 of the Mauritian Civil Code (Marais, 2018, p. 174), as well as to the dignity of the child who cannot be treated as an object of sale. Moreover, in Mauritius the dignity of a mother prohibits to treat her body as a simple tool of production.

8. CHILD PROSTITUTION

8.1 Prohibition of Child Prostitution in the Children's Bill

Section 17 (1) of the Bill prohibits child prostitution. Thus, *"no person shall – (a) offer, obtain, procure or provide a child for prostitution; (b) cause, coerce, force, a child to participate in prostitution; (c) profit from, or otherwise exploit a child's participation in*

[58] "*No person shall be held in slavery or servitude*".

[59] Regarding other illegal objects from the point of view of the Mauritian Contract Law see: Section 6 of the Dangerous Drugs Act 2000; Section 3 of the Firearms Act 2006; Sections 4, 5 (1) et 17 of the Human Tissue (Removal, Preservation and Transplant) Act.

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prostitution; (d) have recourse to child prostitution". The non-respect of Section 17 (1) is a serious offence and is punished by penal servitude not exceeding 10 years and where the child victim is physically or mentally handicapped the penal servitude may go up to 20 years. The important definition of child prostitution is given in Section 17 (5) of the Bill: *"the use of a child in sexual activities, for any form of consideration"*. Child prostitution entails also the Civil law consequences that have not been addressed in the Bill.

8.2 Prohibition of Contracts Pertaining to Child Prostitution in Mauritian Civil Law

A contract by which a child would promise sexual services to another person must be considered as null and void from the point of view of the Mauritian civil law. On the one hand, a contract made by a minor is usually considered as relatively null (*frappé d'une nullité relative*) for lack of capacity to make a contract. In Mauritian Civil Law the capacity to make a contract (*capacité d'exercice*) is normally acquired at the age of 18.[60] A minor needs to be represented, i.e. he may only make contracts through his agent(s) designated by the Law and this agent/those agents is/are normally parent(s) of the minor. If the minor makes a contract personally, the latter will be deemed to be null and void for the lack of capacity.[61] On the other hand, and this is even more important from the point of view of contracts pertaining to children prostitution, the object of a contractual obligation (*objet de l'obligation contractuelle*) which would consist of sexual services to another person for consideration is illegal, i.e. prohibited by the law. First of all, the above mentioned Section 17 of the Bill prohibits explicitly not only the contract made by a minor, provider of sexual services, but also the contract of agency pertaining to an act of sexual prostitution of a child. Second of all, these types of contract seem to be contrary to the public interest (*ordre public*) mentioned in Article 6 of the Mauritian Civil Code (Marais, 2018, p. 174). The public interest as a notion in Mauritian civil law is comprised of core values in the Mauritian society and it is certain that the need to protect a child as a very vulnerable person as well as the dignity of the child (the most intimate aspects of whom, i.e. his sexuality, may not be treated as an object of sale) are such core values. This is why a contract pertaining to prostitution of a child must also be considered prohibited by the Mauritian Civil law. The technical instruments which will allow a Judge to nullify a contract pertaining to child prostitution are Articles 1128, 1131 and 1133 of the Mauritian Civil Code. Article 1128 of the Mauritian Civil Code prohibits the object of contract which is not in conformity with the law, public interest and good morals. We have explained above why a contract aiming at child prostitution is contrary to the public interest in light of Article 1128 of the Code. Moreover, according to Article 1131 of the Mauritian Civil Code, *"the obligation without cause, or on a false cause, or on an illicit cause, can have no effect"*. Article 1133 adds that *"the cause is illegal when it is prohibited by law, when it is contrary to morality or public order"*. Articles 1131 and 1133 of the Mauritian Civil Code pertain to one of the fundamental elements of the Mauritian Contract law, i.e. the cause. According to the broadest definition of the cause [on the suppression of the notion of cause in the French Civil Code: Chénedé (2018, pp. 67–68); Tranchant, Egéa (2018, p. 42); Cabrillac (2018, p. 81 et seq.); Aubert, Collart-Dutilleuil (2017, p. 89 et seq.); Albiges, Dumont-Lefrand (2019, p. 71 et seq.); Mekki (2016, p. 494 et seq.); Terré et al.

[60] An exception is provided for by Articles 476 et seq. of the Mauritian Civil Code in case of emancipation of a minor by marriage. Thus, a minor 16 or 17 years old and married will acquire the capacity to make contracts, save the contracts which qualify as acts of commerce.

[61] However, there is an exception to this rule and Article 390 of the Mauritian Civil Code derogate from the above mentioned prohibition in case of contracts which qualify as acts of everyday life (*actes de la vie courante*).

(2019, p. 165 et seq.); Wicker (2015, p. 107 et seq.); Ansault (2014, p. 22 and 26); Ferrier (2015, p. 74); Houtcieff (2009, p. 198 et seq.)], the latter is the reason which explains why a party to a contract has decided to enter into it. The most logical application of this concept is the objective cause (cause objective), i.e. the cause of a contractual obligation. This cause is always the same in one given type of contract (Capitant, 1924, pp. 17–19, 43; Grimaldi, 2015, p. 814; Maury, 1920, pp. 32, 38; Mazeaud, 2013, p. 686 et seq.), such as sale agreement, exchange agreement, loan agreement, etc. For instance, in a sale agreement the cause of the obligation of the seller to convey the ownership of the sold item to the purchaser and to hand over that item to him consists of the payment of the purchase price. Vice versa, the cause of the obligation of the purchaser to pay the sale price consists of the obligation of the seller to convey the ownership of the sold item to the former and to hand over that item to him. Thus, given the fact that the object of the obligation of a child or his agent in a contract pertaining to child prostitution is illicit by virtue of Article 1128 of the Mauritian Civil Code, the cause of the obligation of the other party (the client) to pay the price will be illicit and the whole contract will be null and void. The nullity is an absolute one and every interested person, including the Attorney General's Office or the Ombudsperson for Children's Office, may bring an action before the court in order to nullify the contract.

9. CONCLUSION

In this article we have attempted to show that the Mauritian Children's Bill of 2019, which addresses many issues pertaining to child protection, such as best interest of a child, prohibition of discrimination of children, marriage of children, ill-treatment of children, surrogacy and sale of children and child prostitution, entails also civil law consequences that are not addressed in the Bill. We have highlighted the fact that the best interests of the child principle, which is set out in the Bill, is most of time well respected in the Mauritian Civil Code, but not always. We have drawn attention to the fact that the illegal discrimination of children and the ill-treatment of children, which are addressed in the Bill from the point of view of the Mauritian Criminal law, entail also Civil law consequences, i.e. the tort liability of the author of those acts. Forced marriage of children, whose Criminal law aspects are taken into account in the Bill, generate also Civil law consequences. On the one hand, every forced marriage in Mauritius is null and void from the point of view of the Mauritian Civil Code. On the other hand, child marriages are not necessarily null and void but strict conditions set out by the Mauritian Civil Code must be respected. Surrogacy, sale of children and child prostitution entail civil law consequences, i.e. Contract law consequences: contracts pertaining to surrogacy, sale of children and child prostitution are necessarily null and void as contrary to the public interest in Mauritius (*ordre public*).

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CIVIL-LAW PARTNERSHIP IN THE SYSTEM OF COUNTERACTING MONEY LAUNDERING AND TERRORISM FINANCING (AML/CFT) / Kamil Majewski

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Abstract: *This article addresses the problems of legal status of the so-called civil-law partnership, as specified in Art. 860 § 1 of the Polish Civil Code, from the point of view of performing he obligations in the area of counteracting money laundering and terrorism financing. First, the author provides a detailed characterization of this civil law institution and resolves that the civil-law partnership does not have legal subjectivity separate from its partners, and then points to the consequences of the above facts in the area of counteracting money laundering and terrorism financing. In conclusion, the author formulates a general conclusion that the obligations in respect of counteracting money laundering and terrorism financing, including financial safeguards, should be applied to the civil-law partnership partners, as customers in the understanding of Art. 2(2) item 10 of the Polish AML Act.*

Key words: *civil-law partnership, AML, CFT, Fourth AML Directive, legal persons, natural person, financial safeguards, obliged institutions, system of counteracting money laundering and terrorism financing, Polish law, EU law*

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1. INTRODUCTION

In the Polish legal order, there is a system of counteracting money laundering and terrorism financing. The adopted solutions, in model terms, are consistent with European legislation.[1] Such situation is a consequence of the fact that both Poland and other Member States of the European Union (EU) have been obligated to implement the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering

[1] In support of the conclusion that practice deviates from model assumptions, see work of Majewski (2020, pp. 92–103) and regarding the fact that not all solutions work out in practice, see work of Majewski (2017, pp. 165–182).

or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.[2] In the light of open borders, common markets and other circumstances facilitating widely understood business contacts within the EU, it is fully justified to address such problems on the level of European legislation. Also, the legislative method applied (Directive of the European Parliament and of the Council) is adequate. Adoption of an act requiring implementation in national legal orders implies allowing for a number of crucial discrepancies between individual legislations, which are dictated by social, legal and economic circumstances, including local market specificity (Majewski, 2018, pp. 67–77, cf. 2019, pp. 187–193),[3] including in the banking market.

The Fourth AML Directive was implemented in the Polish legal system by the Act of 1 March 2018 on counteracting money laundering and terrorism financing,[4] which, in principle, entered into force on 13 July 2018. Despite its application for over one year, in the second half of 2019, the Polish legislator, inspired by the position of European institutions, reached the conclusion that it was necessary to introduce amendments to certain solutions adopted in 2018. Those amendments were finally introduced in the act of 16 October 2019 amending the Act on counteracting money laundering and terrorism financing.[5] From the point of view of banks, the introduced modifications were not revolutionary (cf. Majewski, 2020, pp. 92–103).[6] One of them extended the liability to senior management staff responsible for the execution of obligations prescribed in the AML Act. The amendments passed on 16 October 2019 have no significance from the point of view of the subject matter discussed in this article.

The solutions adopted both in 2018 and at a later time do not eliminate all practical problems. The reasons of efficiency of the anti-money laundering and terrorist financing counteraction system, in light of the diversity of economic operators on the market and diversity (or often dissimilarity) of their activities, make it necessary to introduce solutions covering the widest possible scope, both in subjective and objective terms. The universalism of the legislative regime becomes problematic from the practical point of view. This phenomenon is even more significant on the European (directive) level, where solutions had to be developed to take into account the diversity on the interstate (EU), rather than national, level. In the Fourth AML Directive and, consequently, also in the AML Act itself, solutions were included to mitigate the risks relating to that phenomenon and other risks observable in the context of AML. One of them was the introduction of the obligation to formulate a National Money Laundering and Terrorist Financing Risk Assessment and to verify its up-to-datedness at least every two years. Those obligations were addressed in the Polish legal systemin Art. 25 of the AML Act.

In the Polish legal system, civil-law partnership is a specific type of legal construction. The most important aspect is that the partnership is not an entity separate from the parties establishing (partners) such vehicle and, consequently, it raises a

[2] OJ L 141, 5.6.2015, p. 73–117; hereinafter referred to as the "Fourth AML Directive."
[3] Adequacy does not refer only to the market but also to specific actors on that market, or even to specific areas of market activities.
[4] Dz.U. 2019, item 1115; hereinafter referred to as the "AML Act."
[5] Dz.U. 2019 r. poz. 2088.
[6] For a detailed discussion of the introduced amendments.

number of doubts and practical problems in the context of specific statutory regimes, including the AML Act. This article is an attempt to formulate an answer to questions raised by both legal theorists and practitioners. In the first place, the purpose of this analysis is to answer the following questions:

1) who should be considered a bank's customer in case of a so called "civil-law partnership,"
2) who should be considered a customer, in the understanding of the AML Act, in case of a civil-law partnership,

Then, opinions will be presented on civil-law partnerships from the perspective of other categories of the system of counteracting money laundering and terrorism financing. Specific aspects will be discussed taking into consideration the activities of banks as obliged institutions in the understanding of Art. 2(1) item 1 of the AML Act, that is institutions obligated, in the first place, to apply the financial safeguards laid down in that Act to such specific legal vehicles (Art. 33(1) in conjunction with Art. 34(1) of the AML Act). Some of the conclusions to be made, as relating to the provisions of the AML Act common to all obliged institutions, may be directly referred or applied also to their activities.

The last element subject to analysis will be the contents of the National Money Laundering and Terrorist Financing Risk Assessment[7] published in 2019 by the General Inspector of Financial Information (GIFI) in the context of the discussed subject of civil-law partnerships.

2. THE LEGAL STATUS OF CIVIL-LAW PARTNERSHIPS

The so-called civil-law partnership[8] was introduced in Art. 860 § 1 of the Act of 23 April 1964 – Civil Code.[9] Under that provision, by a contract of partnership, partners commit to strive to achieve a common economic purpose by acting in a specified way, especially by making contributions. In literature, the following are listed as *essentialia negotii* of the partnership contract:

1) commitment of partners to achieve a common economic purpose,
2) commitment of partners to act in a specified way with a view to achieving that purpose (specification of the mode of action for each partner) (Bagińska et al., 2018, p. 1150) (cf. Asłanowicz et al., 2016, p. 712).[10]

The above list does not include contributions, as mentioned in Art. 860 § 1 CC. Such an approach to the problem should be considered legitimate. The fact that the legislator used the term "especially" leads to the conclusion that contributions are an element (the only one, for the time being) of an exemplary list of actions which amount to acting in a specified way (cf. Sójka, 2019). However, if in a specific case, such element appears in the partnership contract, partners should additionally define the object of contribution and its value.[11]

[7] Hereinafter also "National Assessment".
[8] The Code Civil uses the expression "company." The designation "civil-law" follows from its nature.
[9] I.e.: Dz.U. 2019, item 1145; hereinafter referred to as "CC".
[10] C.f. Poland, Court of Appeal in Lublin, I ACa 373/13 (26 September 2013). Doctrinal authors emphasize also the contractual (voluntary) basis of establishment.
[11] C.f. Poland, Court of Appeal in Lublin, I ACa 373/13 (26 September 2013).

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At this stage of deliberations, it is essential to determine the legal status of the construction of so-called civil-law partnership, as specified in Art. 860 CC, including in particular the existence or absence of its legal personality and legal capacity, which qualities are necessary for any separate legal subjectivity of such partnership in relation to its partners (whether or not it is a separate entity). It follows from the literal reading of Art. 860 § 1 CC that so-called "civil-law partnership" is actually a mere relationship established under a contract of specific content concluded between two or more legal subjects.[12] In general, the Civil Code governs civil law relationships between natural persons and legal persons (Art. 1 CC), that is relationships which are subject to civil law norms.[13] In the light of the above, bearing in mind art. 1 CC, only two types of subjects may appear in civil law relationships. Additionally, in the provision of Art. 33(1) CC, there is yet another category – so called imperfect legal persons, that is organizational units with no legal personality but which are granted legal capacity (capacity to be a subject of rights and obligations) under the provisions of law, to which, according to Art. 33(1) § 1 CC, the provisions on legal persons apply as appropriate. Organizational units of such type are also separate entities. In effect, despite the three categories of subjects, with few exceptions, in fact we have to accept only two legal regimes – relating respectively to natural persons and legal persons.

Every human being is a natural person (Art. 8 § 1 CC). At the time of birth, every human being acquires legal capacity and, upon reaching the age of maturity (as far as they have not been incapacitated) – the capacity to perform legal acts (Art. 11 in conjunction with Art. 8 CC). In the context of nature of such persons, as presented above, they will be automatically excluded from further considerations.

Under Art. 33 CC, legal persons are the State Treasury and organizational units which are accorded legal personality by specific regulations. As a rule, an organizational unit acquires legal personality upon its entry in a relevant register (Art. 37 § 1 CC). In the absence of any legal provision granting legal personality to the partnership referred to in Art. 860 CC (civil-law partnership), it must be concluded that civil-law partnerships have no such personality[14] and, in consequence of the above, they are not legal persons in the understanding of Art. 33 CC.[15] Analogical conclusions should be formulated with regard to legal capacity. The absence of any legal provision granting legal capacity to civil-law partnerships leads to the conclusion that they are not imperfect legal persons in the understanding of Art. 33^1 CC. In consequence of the above, it is undoubted that the so-called civil-law partnership, governed by the provisions of Art. 860 and following of the Civil Code, is not a separate subject of civil law – it does not enjoy legal subjectivity separate from its partners (cf. Jezioro, 2019; Nowacki, 2017; Uliasz, 2019), partly otherwise (cf. Sójka, 2019) (cf. Pietrzykowski, 2018).[16] In the light of such legal situation,

[12] At least two. As regards the consequences of a civil-law partnership having only one partner, c.f. Poland, Supreme Administrative Court, I SA/Gd 367/98 (14 July 2000).
[13] Cf. Poland, Supreme Court, I CZ 108/80 (10 September 1980).
[14] Cf. Poland, Voivodeship Administrative Court in Kraków, I SA/Kr 1601/08 (3 March 2009).
[15] Cf. Poland, Court of Appeal in Białystok, I ACa 484/12 (26 October 2012).
[16] This is the opinion of a vast majority of doctrinal authors in civil law and case-law. Also a comparison of opinions in the discussed matter see in Pietrzykowski (2018). Regarding opinion of the judiciary, cf. Poland, Supreme Court, IV CZ 18/18 (18 April 2018); Poland, Supreme Administrative Court, II FSK 1533/12 (4 June

it must be indicated that the partnership specified in Art. 860 CC is a relation between partners, who are civil law subjects (ibid Uliasz, 2019), and legal subjectivity is a quality of such partners.[17] In the same way, any legal acts, as a rule, should not be performed by the partnership or with the partnership but by its partners or with its partners.[18] On the other hand, there is nothing to prevent a further specification that those persons act within a civil-law partnership (to make identification easier).

The last question that must be discussed and, at the same time, is closely related to the one above is the status of an entrepreneur. Under Art. 43(1) CC, an entrepreneur is a natural person, a legal person or an organizational unit referred to in article 331 § 1 conducting business or professional activity on its own behalf. The definition in that provision requires the existence of the following two elements if a given person is to be recognized as an entrepreneur:

1) the subjective element, namely being a civil law subject – natural person, legal person or imperfect legal person,
2) the functional element, namely conducting business or professional activity on one's own behalf that is understood as a sequence of specific repetitive activities.[19]

Under Art. 43(2) § 1 CC, an entrepreneur operates under a business name. Further provisions of the CC set out that the business name of a natural person is their given name and surname, which does not preclude inclusion in the business name of a pseudonym or designations pointing to the object of the entrepreneur's activities, the place of conducting business or other freely chosen designations, and the business name of a legal person is its name. To resolve the above question, it is enough to consider the subjective scope of the definition under Art. 43(1) CC. If entrepreneurs may only be the subjects listed in that provision (natural and legal persons, imperfect legal persons) and civil-law partnerships – as stated above – are neither one of the former, they may not be considered entrepreneurs in the understanding of Art. 43(1) CC. In such situation, it is needless to examine the remaining circumstances. In consequence of all the facts mentioned above, a civil-law partnership has no business name. On the other hand, partners who have concluded a partnership contract may act under a business name, as long as they meet the requirements laid down in Art. 43(1)CC.[20]

2013); Poland, Voivodeship Administrative Court in Wrocław, I SA/Wr 844/16 (10 January 2017); Poland, Voivodeship Administrative Court in Kielce, I SA/Ke 213/13 (27 June 2013); Poland, Voivodeship Administrative Court in Warszawa, VIII SA/Wa 36/11 (5 May 2011).

[17] Cf. Poland, Voivodeship Administrative Court in Warszawa, VI SA/Wa 827/12 (4 July 2012).

[18] So also the Supreme Administrative Court against the background of the provisions of the Act of 29 August 1997 – Banking Law (Dz.U. 2019, item 2357), cf. Poland, Supreme Administrative Court, II FSK 1533/12 (4 June 2013). Regarding other legal branches, cf. Poland, Voivodeship Administrative Court in Gliwice, I SA/Gl 1066/18 (6 February 2019) and Poland, National Appeal Chamber, KIO 1965/14 (9 October 2014).

[19] Cf. Poland, Court of Appeal in Szczecin, I ACz 441/06 (7 August 2006).

[20] Cf. Poland, Supreme Court, IV CZ 18/18 (18 April 2018).

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3. CIVIL-LAW PARTNERSHIP AND COUNTERACTING OF MONEY LAUNDERING AND TERRORISM FINANCING

The AML Act imposes a series of obligations on obliged institutions. Among these, special significance may attach to the following requirements:[21]

1) development and implementation (adoption and application) of an internal procedure of counteracting money laundering and terrorism financing (Art. 50(1) of the AML Act), and in case of obliged institutions within a group – also implementation of a group procedure in this regard (Art. 51(1) of the AML Act),
2) detection, assessment and documentation of the risk of money laundering or terrorism financing both at the level of customer (Art. 33(2) of the AML Act) and the obliged institution – with regard to their activities (Art. 27(1) of the AML Act),
3) application of financial safeguards (Art. 33(1) in conjunction with Art. 34 and following of the AML Act).

Under Art. 33(1) of the AML Act, financial safeguards are applied by obliged institutions to their customers. The catalogue of such measures, as adopted in Art. 34 of that Act, also directly refers to customers, by setting out that the application of financial safeguards covers, among others, customer identification and verification of customer identity (Art. 34(1) item 1 of the AML Act). In effect, it is crucial, from the point of view of due performance of that obligation, to properly specify the customer, and especially the customer's legal form.

Since, under the provisions on counteracting money laundering and terrorism financing, there is no special regime concerning civil-law partnerships, it must be concluded that it is a form in the understanding of the provisions of the Civil Code (operating on that basis),[22] which should be classified in the context of the AML Act.

The AML Act contains a number of definitions, including also the definition of customer of an obliged institution. Under Art. 2(2) item 10 of the AML Act, for the purposes of the regime of counteracting money laundering and terrorism financing, a customer is a natural person, legal person or organizational unit without legal personality to whom the obliged institution provides services or to whom the obliged institution renders activities within the scope of its professional objects, including a person with whom the obliged institution establishes a business relationship or upon whose instruction the obliged institution executes an incidental transaction; in case of an insurance contract, the person that is considered a customer of an obliged institution is the policyholder. The first two listed categories raise no doubts. However, such doubts may arise with regard to the third category. In relation to organizational units, the cited definition, as opposed to the provisions of the Civil Code, does not provide for the requirement of legal capacity being granted. Nevertheless, it refers to an entity in the form of an organizational unit. Since the civil-law partnership, as specified in Art. 860 CC, does not have legal subjectivity separate from its partners, it must be concluded that it may not count as an organizational unit as well without legal personality. As a consequence, the customer, in the understanding of Art. 2(2) item 10 of the AML Act will be the partners

[21] The presented list is not an exhaustive catalogue. The AML Act imposes many other requirements on obliged institutions.

[22] Similarly, the SAC against the background of tax law provisions, cf. Poland, Supreme Administrative Court, I GSK 1448/14 (18 February 2016).

of a civil-law partnership and, consequently, financial safeguards should be applied to such partners. This conclusion also follows from the expression used in the definition of a customer "including a person with whom the obliged institution establishes a business relationship."

4. THE NATIONAL MONEY LAUNDERING AND TERRORIST FINANCING RISK ASSESSMENT

Under Art. 25(1) of the AML Act, GIFI is responsible for the preparation of the National Money Laundering and Terrorist Financing Risk Assessment in cooperation with the Financial Security Committee,[23] the cooperating entities and obliged institutions. The Polish legislator indicates that, in the preparation of the National Risk Assessment, GIFI takes into account the report by the European Commission mentioned in Art. 6(1-3) of the Fourth AML Directive[24] (Art. 25(2) of the AML Act). Another statutory obligation imposed on GIFI – this time addressed in Art. 25(3) of the AML Act – is the verification of up-to-datedness of the National Risk Assessment and its update, when necessary but at least every two years.

The National Money Laundering and Terrorist Financing Risk Assessment was published on the website of the Ministry of Finance on 17 July 2019.[25] Five annexes were attached to the National Risk Assessment, covering respectively:

1) Methodology of preparation of the first National Assessment (Annex 1),
2) Money laundering risk scenarios (Annex 2),
3) Terrorist Financing risk scenarios (Annex 3),
4) Analysis of the statistical information obtained from supervised entities by the Polish Financial Supervision Authority for the purposes of the National Assessment (Annex 4),
5) Description of activities of the selected bodies and public authorities involved in the operation of the national anti-money laundering and terrorist financing counteraction system (Annex 5).

The National Assessment was divided into several parts. In the first place, financial and non-financial markets in Poland were discussed. Then the phenomena of money laundering and terrorist financing were described, as well as anti-money laundering and counteracting of terrorist financing. The following parts relate to: threats relating to money laundering and terrorist financing. The last part summarizes the National Assessment and presents its conclusions.

[23] The Financial Security Committee is attached to GIFI and has an opinion-giving and advisory function in the area of anti-money laundering and counteracting of terrorist financing (Art. 19(1) of the AML Act). The Committee's tasks were defined in an open catalogue of Art. 19(2) of the AML Act.

[24] Art. 6(1-3) of the Fourth AML Directive mentions the Commission's responsibility to carry out risk assessment in relation to money laundering and terrorist financing, which risk has a bearing on the internal market and relates to cross-border activities, and to prepare a report establishing, analysing and assessing the risk at the EU level. As in the case of the National Risk Assessment, the report is updated every two years or, if necessary, more often (need for updating).

[25] Information available at the address: https://www.gov.pl/web/finanse/krajowa-ocena-ryzyka-prania-pieniedzy-oraz-finansowania-terroryzmu.

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The National Assessment refers to civil-law partnerships at several points. First, the civil-law partnership appears in connection with the pursuit of the profession of legal advisers – it is indicated as an admissible form of practicing that profession. At a further part of the document, the civil-law partnership appears in connection with the definition of an entrepreneur. At this point, however, the reference is limited to mere indication that, under the Polish law, partners of a civil-law partnership are considered entrepreneurs in respect of their business activities. The Civil-law partnership is also mentioned in the context of the form the business activities are conducted, however, the authors of the National Assessment limited themselves to indicating that Polish law offers the possibility to conduct business activities, among others, in the form of civil-law partnership. For the last time, the civil-law partnership was mentioned in the catalogue of areas covered by the obligation to provide criminal information.

The issue of civil-law partnerships was not addressed in the money laundering risk scenarios presented in Annex 2 to the National Assessment. That document concentrates on products, services and forms of operation (bank accounts, credits and loans, prepaid cards, money transfers, payment services, investment fund units, charity, etc.). Although the scope of Annex 3 is slightly different, analogical conclusions should be formulated in respect of its terrorist financing risk scenarios.

It follows from the above that the National Assessment does not remove doubts relating to the status of the Polish civil-law partnership within the anti-money laundering and terrorist financing counteraction system. Answers to the questions posed in this article are nowhere to be found in the National Assessment. The document only allows to draw indirect conclusions (in the light of inclusion of partners of such vehicle rather than the partnership itself). However, the document remains practically useful, especially the risk scenarios under Annexes 2 and 3.

5. SUMMARY

A civil-law partnership, as referred to in Art. 860 § CC, established by conclusion between two civil law subjects of a partnership contract, through which the partners commit to achieve a common economic purpose by acting in a specified way, does not have legal subjectivity separate from its partners. This is the case because it cannot qualify either as a legal person in the understanding of Art. 33 CC or imperfect legal person in the understanding of Art. 33(1) § 1 CC, that is an organizational unit without legal personality but with legal capacity granted under the provisions of law. In the light of the above, the parties to legal transactions are its partners. The absence of legal subjectivity, in turn, leads to a situation in which the civil-law partnership may not be considered a customer in the understanding of Art. 2(2) item 10 of the AML Act. This does not mean, however, that in the discussed case the obligations under the AML Act are not to be followed and that no financial safeguards are applied. Customers, for the purposes of the AML Act are the partners, and the financial safeguards specified in that Act should apply to such partners.

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REVIEWS AND REPORTS

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Martin Hapla is an Assistant Professor at the Department of Legal Theory of the Faculty of Law, Masaryk University, Brno. In his work "Separation of Power and the Independence of the Judiciary" (*Dělba moci a nezávislost justice*) he deals with a frequently debated topic (not just in the field of constitutional law, but also in the realm of the theory of law).

Nevertheless, just as the author argues in the introduction, the partial questions of this topic are discussed quite often, but these discussions are mainly focused on specific questions/problems, therefore lack the important normative prerequisites and as a result the general problems are missing a theoretical-philosophical level. With this statement, the author sets the tone on why the dimension of a theoretical-philosophical argument is and always will be present in any legal discussion.

The monography is separated in four chapters: "Theory of separation of power" (*Teorie dělby moci),* "Application problems of separation of powers and their possible solutions" (*Aplikační problémy dělby moci a jejich možná východiska*), "Judiciary and its relation to separation of powers" (*Justice a její vztah k dělbě moci*), "Separation of power in the realm of principles and the question of legitimacy" (*Dělba moci v říši principů a otázka legitimity*).

The spine of the whole publication is the first chapter called "Theory of separation of power" (*Teorie dělby moci*), in which the author first tries to define and introduce theories of the separation of power in the historical and the present-day context. The author then starts by explaining the phrasing of the idiom "separation of power", and only afterwards draws the attention on the real problems of the terminology (the issue arises mainly from the authors native Czech language), without putting any ambition to solve these problems.

The author believes that many difficulties and misunderstandings related (not only) to the concept of separation of powers arise from the confusion of concepts and terminology. In fact, the name of the concept itself is confusing, where "separation" in addition to division rests also on other principles (in foreign languages, for example, it normally distinguishes between separation and distribution of power). The Czech literature does not adequately reflect these shortcomings in the terminology, which the author clearly summarizes. In the second chapter, "Application problems of separation of powers and their possible solutions" (*Aplikační problémy dělby moci a jejich možná východiska*) the author deals with the question of whether the concept of the separation of power is even a logical concept, and if it is then how it fulfills its goals. The author points out that the effectiveness of the separation of powers can hardly be determined, therefore it will be easier to prove it in the logical judgment context.

In this chapter the author gives three theoretical possible solutions for the problem of inability to predicate the application of the principle of separation of power for a specific case. Firstly, we could accept the premise that the system is imperfect and the principle of separation of power is just something that the author calls a "legitimation apron". Secondly, we should supplement the principle that as time passes by and the society changes, if a principle stays static there is a risk it dies away. Thirdly, to refuse the principle and to replace it something new that would fulfill the task this principle could not.

In the third chapter, entitled "Judiciary and its relation to the separation of powers" (*Justice a její vztah k dělbě moci*) the author reflects on the theoretical problems outlined earlier, which he considers to be a topical issue. Even though in this chapter the author claims that the independence of the judiciary is necessary, he points out that the concepts of "independence" and "impartiality" are not necessarily linked together, and that the absolute independence of the judiciary in the society would only lead to autocracy.

The fourth chapter, entitled "Separation of power in the realm of principles and the question of legitimacy" (*Dělba moci v říši principů a otázka legitimity*) examines the internal relationships between the principle of separation of powers and the other principles, such as the sovereignty of the people and human rights.

The author expresses his belief that many objections to the separation of powers are related to the fact that we have exaggerated expectations and even a good implementation will not ensure automatic resolution of all problems related to the topic. This statement shows not just a deep understanding of the topic in a theoretical scope but also in a real-life application. The author's supplementary footnotes in the monography are rich and they serve as good complement to the main text.

I strongly believe that there always will be the need in the scientific legal community for taking on practical questions in a theoretical-philosophical context and in this manner the author has succeeded in creating a high-quality monography, which is rich in content, logically structured, based on a correct grasp of theoretical concepts, whilst taking on a traditional question in a slightly different way. Therefore, this monography may serve as an original contribution to the scientific legal community.

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BALANCING CYBER-SECURITY AND PRIVACY (BRATISLAVA, 28 FEBRUARY 2020) / Mária T. Patakyová

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Comenius University in Bratislava has an honour to be part of a significant project dedicated to today's legal and security problems. Together with Palacky University, Tallinn University of Technology, Ruprecht-Karls-Universität Heidelberg and Taras Shevchenko national University of Kyiv, these five universities form a Jean Monnet Network. They are considered to be the leading universities in their respective countries, which is a promising commencement of a fruitful and impact-driven research network.

The topic of the Jean Monnet Network is the European Union and the Challenges of Modern Society (Legal Issues of Digitalization, Robotization, Cyber Security and Prevention of Hybrid Threats). It comprises various issues which must be dealt with by our society, one of them being the balance between cyber-security and privacy, which was the topic of this Jean Monnet Network's workshop.

The workshop took place in the premises of the Faculty of Law, Comenius University in Bratislava, Šafárikovo square No. 6, Bratislava (particularly in a very distinguished room named Iuridicum). It started on Friday, 28 February 2020, 9 a.m. Due to the fact that this workshop was the very first one from a significant list of events to be organised within the Jean Monnet Network, the first section was addressed to the members of the Jean Monnet Network. During this session, an important information of organisational character was delivered. This session was held by Assoc. Prof et Assoc. Prof JUDr. Naděžda Šišková, PhD., who is Head of Jean Monnet Centre of Excellence in EU Law at Palacky University.

Section two, opened for the public, started at 10:30 a.m. The honour of opening of the workshop was given to the local organisers of the workshop, namely Assoc. Prof.

RNDr. Daniel Olejár, PhD., Vice-Rector for Information Technology at Comenius University in Bratislava; and Assoc. Prof. JUDr. Eduard Burda, PhD., Dean of the Faculty of Law, Comenius University in Bratislava.

The keynote speech of the workshop was delivered by JUDr. Soňa Matochová, Ph.D., Head of Analytic Department of the Czech Authority for the Protection of Personal Data. Being a person from application practice with academic background, she secured more than suitable beginning of the substantive part of the workshop. Her forty-minute speech was focused, among others, on the human rights background of the data protection, historical development of data protection, basic presentation of General Data Protection Regulation (GDPR) as a principle-based regulation, characteristic features of GDPR, and independence of data protection authorities with an accent to judgements of the Court of Justice of the European Union (CJEU). The speech touched upon crucial issues related to data protection, such as possibility to sell personal data or importance of correct understanding of technologies for correct protection of personal data.

The keynote speech was followed by another distinguished speaker, Mgr. et Mgr. Ondřej Filipec, Ph.D. from Palacký University Olomouc, Faculty of Law. The topic of his presentation was Cybersecurity in Healthcare. It raised interest throughout the audience as it discussed a recent case of ransomware in hospital in Benešov, Czech Republic. The ransomware encrypted hospital's data and the attackers were blackmailing the hospital that the recovery is possible only after payment of a substantial sum of money. The case was analysed and certain risk factors, which are capable of making a hospital more vulnerable, were identified.

Tanel Kerikmäe, LL.M, LL.Lic, Ph.D. (Tallinn University of Technology) continued in a workshop's high level of expertise. His presentation was named: Estonian Artificial Intelligence Legal Strategy: Dilemmas Related to State Liability, Awareness and Privacy. He pointed out many interesting challenges that must be tackled by Estonia, which is one of the most progressive countries regarding the employment of computers and algorithms in the public sector. To mention but few, he touched upon the issues related to data sharing between Finland and Estonia, employment of artificial intelligence in e-governance, creation and employment of a robot-judge, or taxation of artificial intelligence.

The morning session was concluded by Assoc. Prof. RNDr. Daniel Olejár, PhD., Vice-Rector for Information Technology at Comenius University in Bratislava. His immense expertise in cyber-security was transferred into a presentation on the topic Functionality, Security and Privacy (in Cyberspace). His speech was launched by a definition of cyber-security as information security in cyber-space. After underlining several interesting facts on data quantity created by our society, he focused on issues such as data security, data integrity, data availability, privacy and personal data. Being responsible for information technology of Comenius University, his speech was enriched by his practical experience.

The afternoon session was launched by a presentation of JUDr. Mária T. Patakyová, PhD. (Comenius University in Bratislava, Faculty of Law) on the topic of Cyber-security and Private Entities. The presentation explored obligations of private entities (especially small ones, such as small e-shops) towards data-security on their websites. Several pieces of legislation were analysed, namely Act No. 69/2018 Coll. on Cyber-security; GDPR and Act No. 18/2018 Coll. on Personal Data Protection; Act No. 513/1991 Coll. Commercial Code (in relation to unfair competition); Act No. 40/1964 Coll. Civil Code (in relation to consumer protection) and other acts of law regulating consumer protection. The analysis was supplemented by considerations on potential applicability of competition law and civil liability. The outcome of the presentation was that there are

several legal obligations based on which even small e-shops may be obligated to secure data.

This presentation was followed by JUDr. Matúš Mesarčík, LL.M (Comenius University in Bratislava, Faculty of Law) who explored Faces of Privacy in the Context of Cyber-security. He focused on different faces of privacy. In relation to privacy qua human right, he outlined Article 8 of European Convention on Human rights, Articles 7 and 8 of EU Charter on Fundamental Rights, and Slovak constitution, where the regulation of privacy is spread around various articles. Subsequently, he presented the relationship between privacy and data protection and several future developments which should be monitored.

A speech on Cybersecurity Incident Notification was delivered by JUDr. Jozef Andraško, PhD. (Comenius University in Bratislava, Faculty of Law). His presentation gave valuable insides on incident notification which is regulated by several acts of law and may cause considerable troubles to basic services providers, especially the small ones. Furthermore, the presentation uncovered a possible non-compliance of the Slovak legislation with the EU NIS directive.

An insights on Security – Criminal Law Aspects, was a theme presented by Mgr. Petra Dražová (Comenius University in Bratislava, Faculty of Law). She pointed out the distinction between cyber-dependent crimes on the one hand, and cyber-enabled crimes on the other. Her presentation also zoomed in on Convention on Cybercrime and relevant EU law secondary legislation.

Last but not least, Mgr. Zoltán Gyurász (Comenius University in Bratislava, Faculty of Law) presented the topic of Uniqueness of Internet of Things Devices – from Privacy to Personal Data. He mentioned a tool which is increasingly used nowadays – smartwatch. In this regard, improved transparency is called upon, namely what data is collected, where it is stored and how it is processed.

All the contributions were followed by a fruitful discussion, led mainly by Prof.Dr.Dr.habil.Dr.h.c.mult. Peter-Christian Müller-Graff, Ph.D.h.c., MAE (Ruprecht-Karls-Universität Heidelberg). One discussion, particularly noticeable, was related to liability concepts in cases of employment of artificial intelligence. Various concepts were debated, whereas the most suitable concept seemed to be the concept of objective liability of the producer of an AI product.

The workshop was ended around 4.30 p.m. It proved to be a platform for excellent presentations followed by a vivid discussion in a collegial ambiance. Thus, we may look forward to other interesting presentations and discussions during the following events within the Jean Monnet Network.

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