

THE LEGAL BASIS AND CONTEXTUAL INTERPRETATION OF THE DUTY OF CARE IN COMPANY LAW IN THE SLOVAK REPUBLIC: FROM A “GENTLEMANLY AMATEUR” TO A PROFESSIONAL DIRECTOR?¹

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Abstract: A director may slip into the fulfilment of their own (opportunistic) interests due to the separation of management and ownership in companies and the fact that the director does not bear the risk of the possible failure of the company. Because there is a tension between the company (and its shareholders) and the director due to differences in their interests and information asymmetry, their relationship is based on trust, which is the core essence of a relationship between these entities (fiduciary relationship). The study focuses on the principal aspects of how Slovak company law deals with the tension between the interests of the company, its shareholders, and directors, especially from the point of view of compliance with the duty of care.

Keywords: due care; duty of care; duty of loyalty; duty of confidentiality; business management; business judgment rule

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1. INTRODUCTION

A characteristic feature of company law is that when the management of a property is entrusted to a person (agent) other than the owner of this property (principal), it is required that such an agent proceeds with due care while managing this property or respectively complies with the duty of care. The above-described also applies to members of an elected company's bodies, to which the management or control of the company has been delegated and these members are obliged to observe the duty of care in the performance of their office.

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Due to the separation of management and ownership in companies² and the fact that a director does not bear the risk of a possible failure of the company, they may slip into the fulfilment of their own (opportunistic) interests. Because there is tension between a company (and its shareholders) and the director due to differences in their interests and information asymmetry, their relationship is based on trust, which is the core essence of the relationship between these entities (fiduciary relationship).

The study focuses on the principal aspects of how Slovak company law deals with the tension between the interests of the company, its shareholders, and members of the bodies, especially from the point of view of compliance with the duty of care.

The company, as a legal person, is separate from its founders and shareholders, it has its private law basis in the Civil Code,³ which defines the general framework for companies as legal persons, with the central concept of a statutory body to which the Commercial Code⁴ assigns competence in matters of the decision-making process (creation of will) and management of the company. The very core of this study seeks an answer to the question of how the directors, as members of the bodies (either statutory or controlling), shall perform their competencies and the evaluation of the possible interventions to the decision-making process in the company's affairs by the general meeting or some of the shareholders, with a link to the emerging liability relations.

2. COMPANY AS LEGAL PERSON

Legal persons have their private law basis in the Slovak legal system in the Civil Code, which according to the *de lege lata* regulation is based on the so-called realist theory⁵ of legal persons.⁶ Legal persons have the capacity to have rights and

² The term “company” is used in the study in connection with limited liability company, joint stock company and simple joint stock company.

³ Act No. 40/1964 Coll. Civil Code as amended (Civil Code).

⁴ Act No. 513/1991 Coll. Commercial Code as amended (Commercial Code).

⁵ Section 18 Subsection 1 and Section 19a of the Civil Code. In the context of the legislative intention to recodify the company law inclination in favour of fiction theory might be detected. Legislative intention to recodify company law, Working group for recodification of the company law, Ministry of Justice of the Slovak Republic, May 2021 and Section 1 of the proposal for the Civil Code available at: <https://www.justice.gov.sk/Stranky/Ministerstvo/Rekodifikacia-OZ/Navrh.aspx>.

⁶ On the other hand, Csach states that the theory of legal persons in the Slovak legal system is based on both theories (realist theory and fiction theory) and at the same time on none of those. Csach stipulates in detail: “*Legal personality is granted to a certain organized unit only by law, not by social reality, even in relation to foreign entities. At the same time, it is assumed that a legal entity can act on its own through its bodies (rather reality theory), but the principles of representation also apply – position of the distinction between the existing entity and another entity acting on behalf of the legal entity (rather fiction theory). A possible inclination to the realist theory is relativized by the fact that the law avoids the terminological conclusion that legal persons are capable of legal or illegal acts.*” (CSACH, K. in: ŠTEVČEK, M. – DULAK, A. – BAJÁNKOVÁ, J. – FEČÍK, M. – SEDLAČKO, F. – TOMAŠOVIČ, M. a kol. *Občiansky zákonník. I, § 1–450: komentár* [Civil Code. I, § 1–450: commentary]. Bratislava: C. H. Beck, 2015, pp. 100–101). For more information on the realist theory and the fiction theory in the context of Slovak business companies, see: PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. – LACKO, P. *Legal personality of companies. In: Company Law and Law on Cooperatives – General introduction to the topic and definition of basic terms*. Bratislava: Právnická fakulta UK, 2019, pp. 50–52; and for more general information on the realist theory and fiction theory of legal persons in the context of company law and also with regard to the rulings of the

obligations (legal personality) as well as the capacity to acquire rights and obligations (capacity to perform legal acts). The ability of a legal person to acquire rights and obligations through its own acts may be limited under the Slovak legal system only by law.⁷ The *ultra vires* doctrine, which binds the validity of legal acts of the company to the scope of its activity specified in the founding documents, has not been applied in the Slovak legal system since 1991. From the *de lege lata* legislation stems the conclusion that even if the scope of the activity specified in the founding documents is exceeded, the legal acts will be binding on the legal person, unless these legal acts violated a prohibition resulting from special legal regulations.

2.1 THE BOARD OF DIRECTORS AS STATUTORY BODY

The above-defined capacity of the legal persons – companies – for legal acts is followed by the determination of who will express the will of this legal person in a legally relevant manner on behalf of it. The Civil Code designates persons who are entitled to act directly on behalf of a legal person in all matters as “statutory bodies”⁸ with a link to the general definition of legal capacity of a legal person. This term, which is by its nature a legislative abbreviation defined in the Civil Code, is taken over by the Commercial Code⁹, which stipulates that a legal person acts by its statutory body or a representative.¹⁰ The Commercial Code specifies the designation of a statutory body for each type of company¹¹ and cooperative, defines its essence as a collective or individual body, and, as a default, stipulates the manner of acting on behalf of the company.

An action of the statutory body is therefore directly an action of the company as a legal person and the statutory body is not the company’s representative in relation to third parties.¹²

A company as a legal person is a complex entity and it is necessary to make a strict distinction between (i) the expression of its will towards third parties (actions), which may be conducted by a statutory body or a representative¹³ and (ii) decision-making

Court of Justice of the European Union, see: PATAKYOVÁ, M. – CZÓKOLYOVÁ, B. Teória spoločnosti v triáde rozhodnutí Daily Mail, Cartesia a VALE – spoločnosť ako fikcia, nexus kontraktov alebo reálna osoba? [Theory of the companies in triad of decisions Daily Mail, Cartesia and VALE – company as a fiction, nexus of contracts or real person?]. *Právny obzor*. 2015, Vol. 98, No. 1, pp. 3–21.

⁷ For example, the Act on state-owned enterprises (Act No. 111/1990 Coll.) stipulates that a state-owned enterprise may not secure the liabilities of third parties with its assets.

⁸ Section 20 Subsection 1 of the Civil Code.

⁹ Section 13 Subsection 1 of the Commercial Code.

¹⁰ Section 13 Subsection 1 of the Commercial Code.

¹¹ For the purposes of this study, we use a term “statutory body” and “director” as a general term and specifically terms “managing director” for a statutory body in a limited liability company and “board of directors” in a joint-stock company. In the study, we abstract from a more detailed specification of directors, e.g., in the position of independent directors.

¹² Within the presented concept of legal persons in the process of recodification, it is proposed to change the actions of the statutory body of a legal person from direct action to representation. Section 32 of the proposal for the Civil Code available at: <https://www.justice.gov.sk/Stranky/Ministerstvo/Rekodifikacia-OZ/Navrhy.aspx>.

¹³ The Supreme Court of the Slovak Republic in the judgment from 27 November 2019, file no. 3 Obdo 57/2019 addressed the question of whether the supervisory board of a joint-stock company is authorized to

(creation of its will), which may or may not transform to the company's external actions. The decision-making depends on the internal administration and management of the company in accordance with the Commercial Code, as well as special arrangements in the articles of association and bylaws.

3. THE DECISION-MAKING AND MANAGERIAL COMPETENCE OF A DIRECTOR – THE CONCEPT OF BUSINESS MANAGEMENT

3.1 ABSENCE OF A LEGAL DEFINITION OF A BUSINESS MANAGEMENT

Business management is a term related to the overall management and control model of a company. This term does not and cannot have a single “shape”, because it depends on the scope of business activity, size of a company's enterprise, and the legal form of the company, as well as the “determination” in basic corporate documents.

By business management we mean the management of a company and decision-making on all its matters with intra-corporate effects. In relations with third parties, the conclusions of these decisions will be reflected in the actions of the directors or the company's representatives. The Supreme Court of the Slovak Republic also characterized the business management as “*decisions of any kind on the affairs of a particular company, except for acting externally as a statutory body (director)*”.¹⁴

The Commercial Code uses *expressis verbis* the term business management for an unlimited company, a limited partnership, and a limited liability company, but does not define the scope of this term. The Commercial Code uses various terms to define the competence of a board of directors of a joint stock company, a simple joint stock company, a cooperative, and directors of a limited liability company. In connection with the board of directors in the joint stock company, simple joint stock company, and cooperative the law defines the competence of a statutory body as the power to manage and make decisions; on the contrary, in a limited liability company, the decision-making power is more diversified among bodies, as a general meeting can take on powers from

act on behalf of the company externally. In its decision, the Supreme Court of the Slovak Republic stated that: “*The right of the members of the Supervisory Board to bind the joint-stock company by its own actions does not follow from the wording of the provisions of Section 15 Subsection 1 of the Commercial Code regulating the legal representation of an entrepreneur, as the members of the Supervisory Board cannot be considered as persons who would be entrusted with a certain activity in the operation of the company.*”

¹⁴ Judgment of the Supreme Court of the Slovak Republic from 1 December 2015, file no. 1 Sža 27/2015, for comparison, the Supreme Court of the Czech Republic defines business management as “*company management in particular the organization and management of its business activities, including decisions on business plans*”. (Judgment of the Supreme Court of the Czech Republic from 25 August 2004, file no. 29 Odo 479/2003, R 80/2005) Business management is recently interpreted in Czech Republic in the Judgement of the Supreme Court of the Czech Republic, Judgement from 11 September 2019, file no. 31 Cdo 1993/2019, R 24/2020 as: “*The business management of a joint-stock company is the organization and management of its normal business activities, especially decisions on the operation of the company's enterprise and related internal affairs, regardless of whether they are performed by the company's board of directors or a member of the board or a third person.*”

other bodies of the company, thus the question is complex and we cannot perceive it as binary.

3.2 THE JUDICIAL DEFINITION OF THE BUSINESS MANAGEMENT

Due to the fact that the Commercial Code does not contain a definition of the term “business management”, it is not possible to determine the exact legal enumeration of which decisions fall within the scope of the business management of the company. In this view, the courts have to deal with this intentional loophole in the law within their decisions in corporate litigations.

In a recent decision of the Supreme Court of the Slovak Republic, an organizational change within the company’s enterprise was considered as a decision on the company’s business management affairs. The court came to the legal conclusion that there were *de facto* collective redundancies in the company, even though the legal requirements for collective redundancies under the Labour Code¹⁵ were not met. The Supreme Court of the Slovak Republic stated that the decision was within the business management of the limited liability company and therefore should be taken with the consent of the majority of directors.^{16, 17}

The Constitutional Court of the Slovak Republic,¹⁸ with regard to the complainant’s (as defendant) complaint in this case, annulled the judgment of the Supreme Court of the Slovak Republic and returned it to the court for further proceedings. The Constitutional Court of the Slovak Republic assessed the above-mentioned legal conclusion of the Supreme Court of the Slovak Republic as incorrect. In its ruling, the Constitutional Court of the Slovak Republic reasons in its statement that the Commercial Code is not in relation of subsidiarity to the Labour Code. According to the Constitutional Court of the Slovak Republic: “*It is not possible to assess the protection of an employee through a company law institute, which is to serve a completely different purpose – internal protection of a limited liability company, protection of its shareholders from its directors.*”¹⁹ Furthermore, in its ruling, the Constitutional Court of the Slovak Republic refers to the legal theory: “[...] *a decision on an organizational change, which results in a redundancy of an employee shall be taken on behalf of the employer by a person who is authorized to perform legal acts on behalf of the employer without any connection to the adoption of this decision within the company’s management.*”²⁰

In the context of the above stated arguments, we do perceive a fundamental difference between the conclusions of the Supreme Court of the Slovak Republic and the Constitutional Court of the Slovak Republic in an answer to the question *Cui prodest?* (*Who benefits?*). In our opinion, the Constitutional Court’s reasoning gives the correct answer, it is the company itself and its shareholders whose protection is reflected in

¹⁵ Act No. 311/2001 Coll. Labour Code as amended (Labour Code).

¹⁶ This rule is stipulated in Section 134 of the Commercial Code.

¹⁷ Judgment of the Supreme Court of the Slovak Republic from 27 May 2020, file no. 4 Cdo/60/2019.

¹⁸ Judgment of the Constitutional Court of the Slovak Republic, file no. IV. ÚS 512/2020.

¹⁹ Ibid.

²⁰ Ibid.

the legal requirement. Management and decision-making processes are the basis for external legal actions, however, the legal effects of these actions do not depend on compliance with these internal processes, but on compliance with the disclosed manner of “representation” of the company entered into the Commercial Register. In the event of a breach of the internally set decision-making processes, such breach is linked to the obligation of the directors to compensate the damage caused to the company and not to the third parties (this obligation may occur exceptionally).

3.3 THE (NON)BINDING NATURE OF THE GENERAL MEETING'S INSTRUCTIONS TO THE DIRECTORS

Instructions to directors are undoubtedly a way of interfering with its decision-making competence. The Commercial Code does not explicitly address the issue of the binding or non-binding nature of the instructions to business management, therefore the opinions and the answers to this question vary and the legal doctrine is inconsistent on this issue.²¹ Opinions of the legal doctrine differ in two areas. The first area is the question of a possible transfer of competencies, respectively, their partial transfer in the area of management and business management from the directors to the general meeting. The second area is then the evaluation of the consequences of the decision (binding/non-binding) of the general meeting within the transferred competence. In order to answer the question of competence, it is necessary to distinguish between a limited liability company and a joint stock company. This difference is not justified by different standards of care and loyalty of the managing director and board of directors, as these standards are the same.²² The difference lies in the possibility of transferring the business management, respectively, transferring certain issues within the business management between the managing director and the general meeting of a limited liability company and the board of directors and general meeting of a joint stock company. The general meeting of a limited liability company may *ad hoc* appropriate a decision power in a matter which otherwise falls within the competence of another body.²³ In principle, in the case of a limited liability company, it is accepted (or it is not denied) that the Commercial Code allows the general meeting of the company to instruct the managing director, which could also concern the business management. Differences in approaches then vary in whether the Commercial Code allows a complete emptying of the competence of the managing director's business management and transfer it to the general meeting, or such a transfer is possible only in some issues not to deny the

²¹ See MAŠUROVÁ, A. in: MAMOJKA, M. et al. *Obchodné právo. I. Všeobecná časť, súťažné právo, právo obchodných spoločností a družstiev* [Commercial law I, General part, competition law, company law and cooperatives]. Bratislava: C. H. Beck, 2021, p. 614; and CSACH, K. Člen orgánu ako zamestnanec – obchodnoprávne odpovede na pracovnoprávne otázky? [Member of the body as an employee – commercial law answers to labor law questions?]. In: KRIŽAN, V. (ed.). *Opus laudat artificem: pocta prof. JUDr. Helene Barancovej, DrSc.* Trnava: Trnavská univerzita v Trnave, 2019, p. 107.

²² More specifically, DURACINSKÁ, J. Povinnosť starostlivosti riadneho hospodára alebo povinnosť odbornej starostlivosti z pohľadu právnej komparatistiky [The duty of care of a proper manager or the duty of professional care from the point of view of comparative law]. In: *Dny práva 2012 – Days of law 2012*. Brno: Masarykova univerzita, 2013, pp. 1791–1804.

²³ Section 125 Subsection 3 of the Commercial Code.

mandatory structure of the company's bodies.²⁴ The instruction of the general meeting addressed to the managing director interferes with their independent discretion and the utilization of their professional care.²⁵ The decision of the general meeting (in accordance with the law, articles of association, and bylaws) represents an exoneration from the damage of the managing director²⁶ (also a member of the board of directors).²⁷ This exoneration does not apply to the duty to file for bankruptcy nor in the case of a breach of the director's ban on competition.²⁸ However, such a decision of the general meeting does not constitute an excuse in relation to the duty of care²⁹ or the duty of loyalty of the director.³⁰ The director must always monitor the benefit of the company and disobey any instruction that would be contrary to the interests of the company, even at the cost of the threat of their dismissal.³¹ In our opinion, the managing director is not bound by the instructions of the general meeting precisely because of the possibility to bear

²⁴ See PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. – BARKOČI, S. Obchodné vedenie a jeho (potenciálne?) vplyvy na právne úkony v mene spoločnosti [Business management and its (potential?) influences on legal acts on behalf of the company]. In: 2017: *Výbrané výzvy v slovenskom práve obchodných korporácií*. Olomouc: Iuridicum Olomoucense, 2017, p. 8; CSACH, *Člen orgánu ako zamestnanec...*, p. 107; MAMOJKA, M. jr. in: MAMOJKA, M. et al. *Obchodný zákonník: veľký komentár. 1. zväzok* [Commercial Code: Big commentary. Volume I]. Bratislava: Eurokódex, 2016, p. 541; and PALA, R. et al. in: OVEČKOVÁ O. et al. *Obchodný zákonník: veľký komentár. Zväzok I* [Commercial Code: big commentary. Volume I]. Bratislava: Wolters Kluwer, 2017, p. 972.

²⁵ SMALÍK, M. Niekoľko úvah k povinnosti lojality konateľa spoločnosti s ručením obmedzeným [Some thoughts on the duty of loyalty of the managing director of a limited liability company]. *Pro-justice* [online]. 5. 6. 2014 [cit. 2022-05-10]. Available at: <https://www.projustice.sk/obchodne-pravo/niekolko-uvah-k-povinnosti-lojality-konateľa-spolocnosti-s-rucenim-obmedzenym>.

²⁶ Section 135a Subsection 3 of the Commercial Code: “A managing director shall not bear liability for damage if they can prove that they proceeded in exercising their powers with professional care and in good faith that they were acting in the company's interest. Managing directors shall not bear liability for any damage caused to the company by their conduct in executing a decision of the general meeting; this shall not apply if the general meeting's decision is contrary to legal regulations, the articles of association or bylaws or if it concerns the obligation to file the petition in bankruptcy. If the company has established a supervisory board, approval of the managing directors' conduct by the supervisory board shall not relieve them of liability.”

²⁷ Section 194 Subsection 7 of the Commercial Code: “A member of the board of directors shall bear no liability for damage if they prove that they proceeded in exercising their powers with professional care and in good faith that they were acting in the company's interest. Members of the board of directors shall bear no liability for any damage caused to the company by their conduct in executing a decision of the general meeting or if it concerns the obligation to file the petition in bankruptcy; this shall not apply if the general meeting's decision is contrary to legal regulations or bylaws. Members of the board of directors are not relieved of liability if their conduct was approved by the supervisory board.”

²⁸ CSACH, K. Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia (1. časť) [Obligations of members of the company's bodies and private law consequences of their violation (Part 1)]. *Súkromné právo*. 2019, Vol. 5, No. 5, p. 192.

²⁹ “The duty of care of the managing director will be reflected especially in the preparation of documents and the formulation of the resolution of the general meeting.” (PATAKYOVÁ, M. in: PATAKYOVÁ, *Komentár...*, p. 792); “The law does not accept unprofessionalism in the execution of resolutions of the general meeting by managing director.” (MAMOJKA, M. jr. in: MAMOJKA, *Obchodný zákonník...*, p. 542).

³⁰ PALA, R. et al. in: OVEČKOVÁ, c. d., p. 972.

³¹ Contrary LUKÁČKA, P. *Kategória zodpovednosti a zodpovedné podnikanie v právnom prostredí Slovenskej republiky* [Category of responsibility and responsible business conduct in the legal environment of the Slovak Republic]. Bratislava: Wolters Kluwer, 2019, p. 64, states that “the director is obliged to respect the will of the shareholders, who have a majority of votes in the company, but provided that such a decision of the majority of shareholders does not abuse the rights of a majority of votes under Section 56a of the Commercial Code”.

their liability, especially due to the duty of loyalty to the company.^{32, 33} If the managing director acted disloyally, even though they would implement the decision of the general meeting, their compliance with the duty of care is questionable as well. The managing director, bound by a duty of loyalty is, in principle, able to fulfil their obligation to proceed with the required standard of care only if they act in the interest of the company.³⁴ The obligation of the managing director to monitor the interests of the company cannot be exempted under Slovak law through the instruction of the general meeting.³⁵

Unlike the general meeting of a limited liability company, the general meeting of a joint-stock company cannot *ad hoc* appropriate a decision on a matter which otherwise falls within the competence of another body. If the general meeting of a joint-stock company has such competence, it must be included in the bylaws of the joint-stock company. In the case of a joint-stock company, there are also opinions that completely exclude any transfer of the business management from the board of directors to the general meeting.³⁶ We agree, that interventions to the business management of a joint-stock company would be counterproductive and, in essence, endanger the functioning of the joint stock company due to its nature (especially public joint stock company), but we do not completely exclude the possibility of such interventions in individual cases through amendments to the bylaws. In our opinion however, even the board of directors of a joint-stock company is not bound by such instructions from the general meeting. In the case of instructions that do not interfere with the company's business management, we may also encounter views which consider such instructions to be binding, provided that they comply with the law and the company's bylaws.³⁷

3.4 FACTUAL INTERVENTIONS TO THE MANAGEMENT OF THE COMPANY

Interventions to the company's management do not have to be in a way of a formal decision of the general meeting, or other elected body of the company, these may also be based on *de facto* interference to the management or actual exercise of the powers of the director, without the formal appointment of such a person to the office. It is not necessary for such a *de facto* director to act externally towards the third parties, the decisive factor is whether the company's business management is constantly

³² For a different opinion, see the judgment of the Supreme Court of the Slovak Republic, file no. zn. 4 Obdo 22/98 "the resolution of the general meeting is the result of the process of creating the collective will of the company and is binding to other bodies of the company" (authors' note – the decision was based on the Commercial Code before its amendment, which introduced Section 135a to the Commercial Code).

³³ DURACINSKÁ J. Povinnosť lojality člena štatutárneho orgánu verus jeho povinnosť riadiť sa pokynmi [The duty of loyalty of a member of the statutory body versus their duty to follow the instructions]. In: HURYCHOVÁ, K. – BORSÍK B. *Corporate Governance*. Praha: Wolters Kluwer, 2015, p. 144.

³⁴ JOSKOVÁ, L. Je rozdiel medzi povinnosťou lojality a povinnosťou postupovať s péčou riadneho hospodára? [Is there a difference between the duty of loyalty and the duty to proceed with due care?]. *Obchodněprávní revue*. 2019, Vol. 11, No. 11–12, p. 285.

³⁵ See for example judgment of the District Court Zvolen from 20 March 2017, file no. 13C202/2011.

³⁶ MAŠUROVÁ, A. in: MAMOJKA, *Obchodné právo...*, p. 615; and LYSINA, T. – ZELENÁKOVÁ, M. in: MAMOJKA, *Obchodný zákonník...*, p. 751.

³⁷ MAŠUROVÁ, A. in: MAMOJKA, *Obchodné právo...*, p. 615; and LYSINA, T. – ZELENÁKOVÁ, M. in: MAMOJKA, *Obchodný zákonník...*, p. 751.

performed by the *de facto* director,³⁸ a one-off intervention is not sufficient. The *de facto* director is also subject to the fiduciary duties and thus also to the duty of loyalty.³⁹ Such a duty of loyalty is a delegated duty in the standard required from a director who is obliged to suppress their own interests and follow the interests of the company and all of its shareholders exclusively. The persons in the position of the *de facto* directors are also subject to other obligations belonging to them, such as the director's ban on competition, which is a manifestation of the duty of loyalty, but also the regulation of self-dealing or related parties' transactions.⁴⁰

The liability for damage of the *de facto* director will be governed by the provisions on liability for damage of directors, including the reversed burden of proof, which lies on the *de facto* director.⁴¹ However, it is questionable whether it is possible to invoke the exoneration in the form of a decision of the general meeting, especially if the *de facto* director would be the single shareholder of the company or a majority shareholder or shareholder with a majority of voting rights. Discrepancy in the conduct of such a shareholder with its own decision is unlikely. The exoneration in the form of a resolution of the general meeting is inapplicable in such a case, because, in principle, the shareholder would exonerate themselves.⁴² The exercise of further liability claims against the *de facto* director will depend on the real possibility to fulfil the obligation to which the breach is bound. Csach stipulates that, as an example of an obligation which will not be enforceable by a *de facto* director, is the obligation to file for bankruptcy.⁴³

4. HOW TO PERFORM THE DIRECTOR'S DUTIES?

The duty of care and the duty of loyalty are general legal obligations which directors are obliged to comply with. As general clauses, they represent standards for a director's behaviour. Compliance with these general clauses as legal criteria is left to the discretion of the court in the specific circumstances *ex post*.

The duty of care and loyalty are aimed at ensuring different standards of behaviour (awareness and motive). If the duty of care is directed towards decisions with good

³⁸ MAŠUROVÁ, A. Zodpovednosť štatutárov, faktických štatutárov a tieňových štatutárov kapitálových spoločností voči veriteľom spoločností podľa novej úpravy Obchodného zákonníka a zákona o konkurze a reštrukturalizácii [Liability of statutory bodies, de facto statutory bodies and shadow statutory bodies of capital companies towards the creditors of companies according to the new regulation of the Commercial Code and the Act on Bankruptcy and Restructuring]. In: ANDRAŠKO, J. – HAMULÁK, J. (eds.). *Mil'ni-ky práva v stredoeurópskom priestore 2018: zborník z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov organizovanej Univerzitou Komenského v Bratislave, Právnickou fakultou*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2018, p. 177.

³⁹ Section 66 Subsection 7 of the Commercial Code.

⁴⁰ CSACH, K. Faktický orgán obchodnej spoločnosti a jeho zodpovednosť podľa § 66 ods. 7 Obchodného zákonníka [The factual body of the company and its responsibility according to Section 66 Subsection 7 of the Commercial Code]. *Bulletin slovenskej advokácie*. 2018, Vol. 24, No. 7–8, p. 17.

⁴¹ Section 66 Subsection 7 of the Commercial Code in connection with Sections 135a and 194 of the Commercial Code.

⁴² Identically PÁLA, R. et al. in: OVEČKOVÁ, c. d., p. 971.

⁴³ CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 188.

intentions and sufficient information, the duty of loyalty, unlike the duty of care, focuses on motive.⁴⁴ This focus on the motive means that it is not the outcome of the action or inaction of the director that is decisive, but in whose favour or in whom interest the director acted or did not act. In the case of a duty of loyalty, it must be a matter of adhering to a standard of conduct in the form of maintaining the right motive, i.e., pursuing the right interest. The duty of care and the duty of loyalty are interconnected, because in the performance of the office of the director one conditions the other, i.e., the duty of loyalty ensures that the duty of care is met. The violation of the duty of loyalty also violates the duty of care, because it lacks the right motive (simply the path that must be followed when providing care), in the case of violation of the duty of care, it is difficult to admit adherence to the duty of loyalty, respectively, if so, only with (reasonable) good faith.⁴⁵ However, other factors also enter into this premise, namely the regime concerning the binding nature of shareholders' instructions to the director, where there may be a conflict between what is in favour of the company and all of its shareholders, and a director's obligation to follow instructions, which do not comply with such an interest.

The legal regulation of a breach of duties of directors has a uniform phase for business and non-business decision-making. The question of compliance with the interests of the company and its shareholders is not relevant in matters of compliance with the obligations imposed by law. "*The law is not for deliberation*",⁴⁶ but in some contexts of decision-making process on the fulfilment of a legal obligation, we can also recognize a certain, sometimes significant element of uncertainty, e.g., an assessment of legality in competition law,⁴⁷ growing relevance of international human rights conventions and documents,⁴⁸ etc.

⁴⁴ ANABTAWI, I. – STOUT, L. Fiduciary Duties for Activist Shareholders. UCLA School of Law, Law-Econ Research Paper No. 08-02. *Stanford Law Review*. 2008, Vol. 60, No. 5, p. 12. Online available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089606.

⁴⁵ See also HAVEL, B. *Obchodní korporace ve světle proměn* [Corporations in the light of change]. Praha: Auditorium, 2010, p. 156; and JOSKOVÁ, c. d., p. 286.

⁴⁶ ŽITŇANSKÁ, L. *Zodpovednosť člena štatutárneho orgánu kapitálovej obchodnej spoločnosti a návrh zmeny zodpovednostného systému v súkromnom práve* [The responsibility of a member of the statutory body of a company and a proposal to change the liability system in private law]. *Právny obzor*. 2019, Vol. 102, No. 3, p. 278.

⁴⁷ In relation to the target vertical agreements see PATAKYOVÁ, M. T. *Cieľové vertikálne dohody* [Target vertical agreements]. In: *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku* [Current issues of competition law in the European Union and in Slovakia]. Bratislava: Univerzita Komenského, Právnická fakulta, 2015, p. 59. Target agreements in the European area are often perceived as per se restrictions of competition in which it is superfluous to carry out an economic analysis of the relevant market and the impact of the agreement on it. However, a closer examination of the targeted agreements reveals the existence of reasons why the application of the concept per target restrictions may be questioned per se. Doubts are deepened by the current case law of the Court of Justice of the European Union, which in several of its decisions indicates the obligation to carry out a limited analysis of the effects of the agreement on the relevant market.

⁴⁸ BLAŽO, O. – PATAKYOVÁ, M. T. *International responsibility of business for violation of human rights – customers perspective*. *Bialostockie Studia Prawnicze*. 2019, No. 2, pp. 101–122.

4.1 DUTY OF CARE

The duty of care is reflected in the Commercial Code in the duty to perform the office with professional care. At the same time, professional care is a term used in the Commercial Code especially for procurement contracts, within which the exercise of the mandate or commission requires performance at a professional level in the subject matter of the contract. This legislative solution is related to the fact that the Commercial Code contains legal norms for company law as well as business contract law. For this reason, the interpretation of the concept of professional care was initially uniform and only subsequently emancipated to the notion that the duty of care requires a certain quality of procedure and competence in the performance of the relevant activity.⁴⁹ As Csach points out, the term professional care is used in Slovak corporate law differently from this term in contract law, as in contract law, it contains a requirement for a higher quality of professional care in a given area of business (construction, transport, medicine, law, etc.).⁵⁰ In company law, this level of professional care within the framework of corporate governance is moderated by a doctrinal interpretation⁵¹ towards the competent performance of the office (at a mandatory level of care legitimately expected from a director – level of a proper caring manager).

The Commercial Code does not require a certain completed level of education or proof of experience in the field in order to fulfil the ability to perform the office and maintain professionalism. However, if a director has special knowledge or experience, they are obliged to use it for the benefit of the company (lawyer, auditor). According to Csach, “*the required quality of behaviour is therefore assessed objectively, but subjective conditions may strengthen it*”.⁵² However, general conditions, as well as special conditions relating to education or training, may be required by other regulations. An example is the professional performance of an activity ensured through a director.⁵³ The conditions for the performance of the office may also be stipulated in the company’s articles of association or bylaws and should also determine the consequences of the termination of the preconditions required by the articles of association or bylaws for the performance of the office.⁵⁴

The duty of care requires the establishment of an information system for strategic decision-making in order for the directors to be able to make decisions with such knowledge in the subject of company’s business activities,⁵⁵ which will be considered sufficient in an objective test. Based on the created system, it is possible to subsequently delegate the performance of some decision-making components to lower levels of

⁴⁹ JOSKOVÁ, c. d., p. 285.

⁵⁰ CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 183.

⁵¹ OVEČKOVÁ, O. – CSACH, K. – ŽITŇANSKÁ, L. *Obchodné právo 2: obchodné spoločnosti a družstvo* [Commercial Law 2: companies and cooperative]. Bratislava: Wolters Kluwer, 2020, p. 265.

⁵² CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 183.

⁵³ Section 11 of the Act No. 455/1991 Coll. on Trade Licensing (Trade Licensing Act) as amended.

⁵⁴ PATAKYOVÁ, M. in: PATAKYOVÁ, *Komentár...*, p. 784.

⁵⁵ Judgment of the Supreme Court of the Slovak Republic from 19 February 2009, file no. 1 Obo 16/2008.

management, however liability for the proper performance of the office remains with the director.

From the point of view of assessing compliance with the duty of care of directors, the subjective test is not applied in principle and personal prerequisites are not important (e.g., age, experience, knowledge are not decisive), but an objective test is applied – a professional approach to the performance of the office is decisive.⁵⁶ However, the core of the performance of the office lies in the management of foreign assets, which undoubtedly requires knowledge, experience, and skills, but if the legislator does not specify them (e.g., for banks, insurance companies, etc.), then it is at the discretion of the director, whether they are able to recognize and evaluate information obtained, or “*recognize their own incompetence*”⁵⁷ and subsequently use the professional assistance of a third party. The choice of this third party must be made competently, with proper care (*culpa in eligendo*), together with a proper evaluation of the results of this professional assistance.

In defining professional care, it is necessary to separately state the obligations of directors related to bankruptcy proceedings, as in these proceedings the creditors of the company become the entities entitled to the company’s assets instead of shareholders. The regulation of bankruptcy law explicitly defines the obligation of the debtor to prevent bankruptcy. If the debtor is in danger of bankruptcy, they are obliged to take appropriate and sufficient measures to avert it without undue delay. At the same time, continuous monitoring of the development of the financial situation as well as the state of assets and liabilities is required in order to identify a threat of bankruptcy in a timely manner and take the necessary measures. The directors are responsible for fulfilling these obligations, however, due to the content of the defined obligation (monitoring the development of the financial situation), the members of the supervisory board are also addressees of this standard.

The current legislation in Slovakia has a valid concept of “*vicinity of insolvency*” through the institution of a company in crisis.⁵⁸ This amendment also linked the provisions of the Act on Bankruptcy and Restructuring as a *lex concursus* with the provisions of the Commercial Code as a *lex societatis*,⁵⁹ when it specifically stated the obligation to file for bankruptcy, and when violated, the exoneration of business judgment rule does apply in a restricted manner. The debtor is obliged to file a petition for bankruptcy if the company is heavily indebted within 30 days from which they learned or, while maintaining proper care, could learn of this situation. The provisions of the Act on Bankruptcy and Restructuring are also followed by provisions on disqualification.

⁵⁶ CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 183.

⁵⁷ HAVEL, *c. d.*, p. 155.

⁵⁸ See PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. – KISELY, I. Current changes in the capital doctrine report from the Slovak Republic. In: *Festschrift für Theodor Baums zum siebzigsten Geburtstag. Band 2*. Tübingen: Mohr Siebeck, 2017, pp. 885–902.

⁵⁹ PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. Slovakia. In: *The private international law of companies in Europe*. München: C. H. Beck, 2019, p. 671.

4.2 DUTY OF LOYALTY

The duty of care is not isolated, and the director is also bound by the duty of loyalty. In the case of a duty of loyalty, it must be a matter of adhering to a standard of conduct in the form of maintaining the right motive, i.e., pursuing the right interest. The director is obliged to monitor the interests of the company and all of its shareholders,⁶⁰ it must not follow their own personal or business interests or the interests of third parties.⁶¹ The core of the duty of loyalty of the director is the ban on the use of business opportunities of the company, the director's ban on competition, as well as the ban on the misuse of inside information. The duty of loyalty is a general concept (general clause) and includes several obligations that resolve the conflict between duty and interest.

The duty of loyalty obliges the director to act in the interest of the company and all of its shareholders. The Commercial Code itself does not specify the company's interest and in fact it cannot specify it.⁶² The interest of a company ultimately depends on its ownership structure and is the result of the projection of the interest of all of its shareholders as a product of shareholders' democracy or a reflection of the interest of the controlling shareholder. When assessing the interest of the shareholders, it is not "any" interest, but this interest is limited by the purpose of the company. The conflict between the interests of the shareholders and the company must be resolved in favour of the company.⁶³ Of course, an interest that is contrary to the law is not protected by the duty of loyalty.

The duty of loyalty requires from a director to pursue the interests of the company and all of its shareholders. At the same time, however, other legislations imply that the director should also take into account the interests of consumers (regulations governing the quality of products and services), the public (environment), and the interests of employees. In case of violation of special regulations, the company will be directly liable. Subsequently, only after an assessment of all circumstances, will the company be able to claim damages (or other sanctions) against a director.

⁶⁰ Section 135a Subsection 1 stipulates: "*Managing directors are obliged to exercise their powers with professional care and in accordance with the interests of the company and all of its shareholders. In particular, they are obliged to obtain and take into account in their decision-making all available information relating to the subject of their decision, to keep in confidence confidential information and facts whose disclosure to third parties could cause harm to the company or endanger its interests or the interests of the company's shareholders, and while exercising their powers, must not give priority to their own interests, the interests of only certain shareholders or the interests of third parties over the company's interests.*"

⁶¹ JOSKOVÁ, c. d., pp. 281–282.

⁶² PATAKYOVÁ, M. in: PATAKYOVÁ, *Komentár...*, p. 787.

⁶³ Identically PALA, R. et al. in: OVEČKOVÁ, c. d., p. 1273; similarly, MAMOJKA, M. jr. in: MAMOJKA, *Obchodný zákonník...*, p. 540, states that the director acts primarily for the benefit of the company; Csach states that in the event of a conflict of interests, action in the interests of the company is given priority. (CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 191).

4.3 DUTY OF CONFIDENTIALITY

The professional and loyal performances of the office of a director are united in the duty of confidentiality.⁶⁴ Assessment of the professional aspect, which information shall be subsumed under the duty of confidentiality⁶⁵ (protection of confidential information and facts), is associated with the proper care of the director. Disclosure of confidential information and facts could not only harm the company itself, but also endanger its interests and the interests of its shareholders. The law prohibits such conduct by directors, which, in addition to causing damage to the company, may *lead to* damage to the company (without the consequence of actual damage or lost profit – potential threat is sufficient) or jeopardize the interests of the company and its shareholders (i.e., tort). In a joint-stock company, this element is amplified in assessing shareholders' requests for information at the general meeting, where the board of directors is obliged to subsume the request for information and explanations under the factual connection of the general meeting's program and identify possible harm to the company or the controlled entity. Identification of the potential threat to the company already reflects an effect of the director's duty of loyalty to the company and all of its shareholders. It is due to the fact, that information available to the directors from the performance of their office is taken into account and applied in relation to the potential threat of damage and threats to interests.⁶⁶

4.4 BUSINESS JUDGMENT RULE

Despite the competent performance of the office of directors, the expected correctness of a decision may not be confirmed in practice. This principle is an expression of the nature of the business judgment rule (BJR), which works with predictable risk, and therefore in assessing whether a director has acted with professional care. The result of the action is not examined, but the activity leading to this result (collection and evaluation of all relevant information, decision-making, and subsequent implementation of decision in good faith that the chosen procedure is in the interest of the company).

The principle of BJR is based on court decisions in the United States⁶⁷ and provides protection to directors if they acted in good faith with care that would be maintained by a reasonably prudent person in a similar position under similar circumstances and in the interest of the company.

⁶⁴ Moscow stipulates: “*The corporate statutes and cases do not establish a separate duty of confidentiality. The obligation of a corporate director to protect material corporate information is part of the overall duty to act reasonably in what the director believes are the corporation's best interests, which includes the general categories of care and loyalty.*” (MOSCOW, C. Director Confidentiality. *Law and Contemporary Problems*. 2011, Vol. 74, No. 1, p. 208).

⁶⁵ Judgment of the Supreme Court of the Slovak Republic from 19 February 2009, file no. 1 Obo 16/2008.

⁶⁶ The specific separation of conflicts of interest from the duty of care and the duty of loyalty is reflected in the European Model Company Act (EMCA), Chapter 9, p. 201 and following. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348.

⁶⁷ *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (D.C. Pa. 1945), *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. Super. 1985), *Smith v. Van Gorkom*, 488 2d 858, 864 Del. 1985.

It is a fact, that this rule is also undergoing a certain development in its country of origin, while its fundamental feature, created and completed by the courts, causes its characterization as the “*least understood concept in the company law*”.⁶⁸ The BJR is characterized in this way, because it balances between regulation and free market, between public interest and private autonomy.⁶⁹ If we are to evaluate the regulation of this rule in the Commercial Code and the consequences thereof, it is necessary to briefly state in which way one could interpret the performance of the competence of directors within the BJR in the “*country of origin*”.⁷⁰

The BJR is defined in particular by reference to the jurisdiction of the state of Delaware as the legal presumption that directors have acted with due care on the basis of sufficient information, in good and sincere faith, and in the best interests of the company.⁷¹ The essence of this rule is, that the decision itself is not examined, what is examined is the decision-making process, even if it turns out over time that the decision itself was not in the best interest of the company. Not every bad decision means a breach of directors’ duties.⁷² The BJR can be interpreted as a standard of performance of the office, requiring a preliminary judicial inquiry to establish whether there are any elements of “*disqualifying*” behaviour, the burden of proof on these elements lies with the plaintiff.⁷³

The BJR as a doctrine of refraining from interfering into the decision-making processes of directors is applied automatically, this rule applies as a rebuttable presumption. Judicial inquiry is used as an exception, when this presumption has been contested (fraud, illegality, self-dealing, etc.).

The BJR, as a qualified immunity (safe harbour) for directors, means that in cases where directors have taken a rational approach and considered all available information, the expertise of their decision-making process is not assessed. The court will respect the decision until a conflict of interest in their decision-making or a loss of decision-making independence is established, or if they have not acted in good faith, or if they have acted in a manner that cannot be attributed to a reasonable business purpose. The decision must be made in the scope of directors’ duties and the court will determine whether immunity will be applied, the burden of proof lies with the director. The BJR protects error, but does not protect negligence, lack of good faith, conflict of interest, or irrational or uneconomical decision, nor does it protect fraud or illegal decisions.⁷⁴

⁶⁸ MC MILLAN, L. The Business Judgment Rule as an Immunity Doctrine. *William & Mary Business Law Review*. 2013, Vol. 4, No. 2, p. 526.

⁶⁹ *Ibid.*, p. 526.

⁷⁰ Business judgment rule as a standard of responsibility for the performance of the function, as a doctrine of abstention and the doctrine of immunity will be presented below according to the work. MC MILLAN, *c. d.*, p. 521–574.

⁷¹ ANABTAWI – STOUT, *c. d.*, p. 11.

⁷² SMITH, L. The Motive, Not the Deed. In: GETZLER, J. (ed.). *Rationalizing Property, Equity and Trusts*. London: NexisLexis, 2003, p. 18.

⁷³ This is how this rule is evaluated in the official commentary to the Model Business Company Act, Section 8.31. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348.

⁷⁴ PINTO, A. T. – BRANSON, D. M. *Understanding corporate law*. 5th ed. South Carolina: Carolina Academic Press, 2018, p. 225.

The Commercial Code contains a BJR,⁷⁵ but it is applied differently than in the state of Delaware. According to the Commercial Code, the burden of proof lies with the defendant to prove, that they acted with professional (proper) care and in good faith and in the interests of the company. Proving that it was possibly only a wrong assessment in decision-making while fulfilling their duties burden a director.⁷⁶

The BJR frees the obliged person from the accidental failure associated with business risk, but it frees them only from an honest error. This rule does not in itself constitute an exemption from the duty of care (they must always act reasonably well informed) nor does it release the obliged person from their duty of loyalty (they must always follow the interests of the company in good faith). In the event of a breach of duty of care or breach of duty of loyalty, the right to error will not be exercised, as it does not protect disloyalty, lack of care, and dishonesty.

The BJR does not constitute a reason to exonerate from liability for damage of the director.⁷⁷ The BJR is based on non-violation of fiduciary duties. A precondition for liability for damage of a director is a breach of their duties. If the BJR is applied, there will be no breach of duty (there is no breach of law). The director's liability for damage will not even occur, therefore it is not necessary to release them from this liability or to exonerate them from it. Therefore, in the Slovak legislation, the BJR is not a reason for exoneration from director's liability for damage, but a test for an absence of breach of law.⁷⁸

In the context of the above-described categorization, given the determining elements, in our opinion, it is correct to conclude that the Slovak solution is attributable to the understanding of the BJR as qualified immunity.

5. CONCLUSION

In 2022 the Slovak company law entered into the fourth decade of its development in the conditions of a free market economy. It is therefore not surprising that there is still a way to discover the basic framework and rules of company law. If Paul Davies mentioned in his monograph *Introduction to Company Law in 2002*: “*We also suggested that the nineteenth-century starting point was one which displayed the director as a ‘gentlemanly amateur’, not expected to be very skilled but expected to observe the highest punctilio of honour, especially in avoiding apparent conflict of interests. [...] Over the past twenty years or so the courts have begun to demand standards of skill and care of directors which are much more closely attuned to those required of people in other walks of life... No longer a set of figureheads, the board claims its legitimacy, not only against the shareholders but also against other stakeholders in the company, on*

⁷⁵ Section 135a Subsection 3 first sentence, Section 194 Subsection 7 first sentence, Section 243a Subsection 2 second sentence of the Commercial Code.

⁷⁶ DURÁČINSKÁ, J. *Povinnosť lojalitý (fiduciárne povinnosti) spoločníkov kapitálových spoločností* [Duty of loyalty (fiduciary duties) of shareholders of companies]. Bratislava: Wolters Kluwer, 2020, p. 29.

⁷⁷ Different opinion: PALA, R. et al. in: OVEČKOVÁ, c. d., p. 970; and LYSINA T. – ZELENÁKOVÁ, M. in: MAMOJKA, *Obchodný zákonník...*, p. 766.

⁷⁸ Same opinion: OVEČKOVÁ – CSACH – ŽITNANSKÁ, c. d., p. 282.

the basis of expertise, which indeed can be studied and enhanced in the business schools of the universities."⁷⁹ Then it is clear that, together with the acquisition of knowledge and experience from the operation of companies in social relations, there will be conflicting views on the doctrine and case law, which must be confronted with current developments not only at national level but also at the European and global framework. However, the "compression" associated with this requires not only a rational legislature, a thoughtful judge, but also a demanding addressee of legal norms. This study discussed the following questions: *what is the current position of the Slovak company law in the central issues of companies as legal entities, what is the decision-making and its expression to the third parties, and who is entitled and under what conditions to manage the company and what standard must be observed* and addressed them from a position of demanding user, including the context of some proposed changes related to the recodification of private law in Slovakia.

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⁷⁹ DAVIES, P. *Introduction to Company Law*. New York: Oxford University Press, 2002, pp. 196–197.