SHAREHOLDERS' POWER TO MANAGE THE COMPANY'S BUSINESS IN A PRIVATE LIMITED COMPANY – THE CASE OF CZECHIA IN AN INTERNATIONAL CONTEXT

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Abstract: The legal regulation of the Czech limited liability company is distinctive in an international context. While many foreign jurisdictions, to varying degrees, allow shareholders to influence the business management of the company through the general meeting and, for this purpose, to instruct the director (or even decide on a particular matter themselves), Czech company law, as a general rule, explicitly prohibits such a procedure, except where expressly permitted by law. According to established case law, no contrary conclusion may be drawn, even in view of the differing nature of a limited liability company as opposed to a joint-stock company. However, Czech case law and legal doctrine regrettably fail to explore the underlying rationale and objectives of this prohibition in depth. A comparison with the legal framework governing limited liability companies in Germany, Austria, Slovakia, the United Kingdom, Canada, and Australia suggests that shareholders' intervention in the business management of a limited liability company can be functional, provided that the protection of minority shareholders and creditors remains unaffected and appropriate regard is paid to the director's liability towards the company. Even these issues, however, can be adequately addressed within the existing framework of Czech legal scholarship.

Keywords: management of company's business; division of powers; general meeting; director; private limited company; Czech company law; international company law

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1. INTRODUCTION

The division of powers between directors and shareholders (members of a company) as residual owners of a company plays a key role within corporate governance. As Greer LJ famously pointed out in *John Shaw & Sons (Salford) Ltd v. Shaw*:[1] *"If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove."*

[1] [1935] 2 KB 113.

Although this assumption may be viewed as clear-cut and logical, the reality of modern company law varies across different jurisdictions – not only regarding the means of transferring powers but also in relation to the very possibility of such a transfer.

The most liberal jurisdictions leave the division of powers between the general meeting and the director to be determined by the articles of association, thus placing it in the hands of the shareholders, typically with exceptions for matters of particular importance, such as transactions involving a substantial part of the company's assets or transactions involving conflicts of interest.

Other jurisdictions, in contrast, regulate the competences of individual corporate bodies in detail, with the extent to which deviation from the statutory default setting is permissible being a matter of doctrinal interpretation and judicial development.

This article aims, drawing on a brief international comparison,[2] to highlight the distinctive approach adopted in the regulation of Czech limited liability companies, which prohibits any person from issuing instructions to the director concerning business management, the persisting lack of uniformity within legal doctrine, and a subtle yet significant shift in judicial practice. A certain degree of criticism will be directed at the failure to examine the rationale and purpose of the Czech legal framework, as well as an exploration of interpretative possibilities through which potential risks may be mitigated.

To this end, in addition to presenting the current legal framework, attention will also be given to the principal doctrinal viewpoints and the recent developments in judicial practice.

2. CZECH COMPANY LAW

2.1 DEFAULT AND MANDATORY RULES RELATING TO CORPORATE STRUCTURE

The regulation of the distribution of powers among corporate bodies under the former Commercial Code[3] – although part of private law – was historically perceived as mandatory, leaving very little room for divergent autonomous arrangements in the articles of association unless expressly permitted by law.[4] The statutory concept

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2 The aim of this article is not to provide a comprehensive analysis of foreign legal systems but rather to briefly highlight the key features of these legal regulations.

3 Zákon č. 513/1991 Sb., obchodní zákoník [Act No. 513/1991 Coll., Commercial Code], as amended (hereinafter referred to as "Commercial Code").

4 The authors of commentary on the Commercial Code stated with regard to the regulation of companies that *"it is predominantly of a mandatory nature, and deviations are only permitted where explicitly allowed or at least where such deviation is implied by the nature of the matter"* or that its provisions *"are fundamental rules from which the parties cannot deviate or exclude, known as mandatory (cogent) provisions. The parties may only deviate from them if a specific provision explicitly allows for such deviation."* For the former see KOVAŘÍK, Z. in: POKORNÁ, J. – KOVAŘÍK, Z. – ČÁP, Z. et. al. *Obchodní zákoník: komentář: I. díl (§ 1–220)* [Commercial Code: Commentary: Part 1 (§§ 1–220)]. Prague: Wolters Kluwer ČR, 2009, p. 4 (marg. 8); for the latter then PLÍVA, S. in: ŠTENGLOVÁ, I. – PLÍVA, S. – TOMSA, M. et al. *Obchodní zákoník: komentář* [Commercial Code: Commentary]. 13th ed. Prague: C. H. Beck, 2010, p. 3.

of the division of powers was thus regarded as a mandatory framework, irrespective of significant differences between individual companies, and was therefore largely unsuitable for accommodating the various preferences of their shareholders. Consequently, shareholders could not, for instance by agreement in the articles of association, remove part of the director's statutory powers and assign them to a corporate body not foreseen by law but established under the articles of association.[5]

However, the 2012 recodification of private law, associated with the adoption of the new Civil Code[6] and the Business Corporations Act,[7] marked a significant departure from the previously rigid and formalistic approach. The Civil Code now generally stipulates that, unless explicitly prohibited by law, parties may agree on rights and obligations that deviate from statutory provisions, with prohibitions applying, among other things, to agreements *violating* laws concerning *the legal status of persons*.[8]

Over time, part of the legal doctrine began to distinguish between the legal status of a company in a *narrower* and *broader* sense. The narrower status, from which deviation is not permitted, is understood in theory to encompass only rules concerning the very essence of the company and the minimum competence structure of its corporate bodies distinguishing it from other forms of business entities. Other issues related to the internal organization of a company are considered part of the broader status, from which deviation is generally permissible.[9]

Reflections of this new approach can also be seen in case law. The Supreme Court recently stated, in relation to the authority to act on behalf of a limited liability company, that such representation constitutes one of the *fundamental* competences of the statutory body, which as a matter of principle cannot be taken away from the director.[10] This statement suggests that not every competence-related provision necessarily has a mandatory nature. In another decision, in a similar vein, the court acknowledged a level of contractual autonomy that was previously unthinkable, namely, the possibility of limiting, by an agreement in the articles of association, the statutory scope of information which a shareholder may request from the director.[11]

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5 Resolution of the Supreme Court of the Czech Republic (hereinafter referred to as "Supreme Court") of 24 November 2009, case no. 29 Cdo 4563/2008.

6 Zákon č. 89/2012 Sb., občanský zákoník [Act No. 89/2012 Coll., Civil Code], as amended (hereinafter referred to as "Civil Code" or "CivC").

7 Zákon č. 90/2012 Sb., o obchodních společnostech a družstvech (zákon o obchodních korporacích) [Act No. 90/2012 Coll., on Commercial Companies and Cooperatives (Business Corporations Act)], as amended (hereinafter referred to as "Business Corporations Act" or "BCA").

8 § 1(2) CivC.

9 For a recapitulation of these approaches, see e.g. HURYCHOVÁ, K. Schvalování odměn členů řídících orgánů akciových společností [Approval of Remuneration of Members of the Governing Bodies of Joint-Stock Companies]. *Obchodněprávní revue* [Commercial Law Review]. 2016, Vol. 8, No. 11–12, pp. 308–310; EICHLEROVÁ, K. Mandatory and Default Regulation in Company Law in Czech Republic. *Bratislava Law Review*. 2020, Vol. 4, No. 1, pp. 53–55.

10 Resolution of the Supreme Court of 31 November 2017, case no. 29 Cdo 387/2016.

11 Resolution of the Supreme Court of 15 April 2020, case no. 27 Cdo 2708/2018.

2.2 LIMITED LIABILITY COMPANIES – POWERS OF GENERAL MEETING AND DIRECTORS

The general meeting of a limited liability company decides on the most significant matters concerning the company. Through amendments to the articles of association, it determines the areas of activity in which the company operates, thereby fulfilling the purpose for which it was established – whether entrepreneurial or non-profit.[12] In personnel matters, the general meeting is responsible for appointing and dismissing directors and, where applicable, members of the supervisory board if such a body has been established, as well as approving their remuneration.[13] The general meeting is also competent to decide on changes to the company's registered capital,[14] impose additional capital contribution obligations on shareholders,[15] and approve transactions involving the company's assets that would fundamentally change the actual scope of the company's business or activities.[16]

Conversely, the law entrusts the director (or multiple directors) with matters relating to the company's day-to-day operations, in particular[17] its *business management* and *representation of the company externally* (acting on behalf of the company).[18]

Case law interprets *business management* as the continuous administration of the company's affairs, specifically decision-making on organizational, technical, commercial, personnel, financial, and other matters of the company.[19] The scope of business management thus includes decisions on the acquisition and disposal of company assets, debt repayments, procurement, marketing, hiring, dismissing, and determining employee remuneration.[20]

The distinction between business management and representation makes it clear that Czech law (similar to other continental legal systems) differentiates between the *internal* and *external* functions of the director. From a theoretical perspective, business management concerns the process of forming the will of the company, whereas

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12 §§ 190(2)(a), 146(1)(b), § 2 odst. 1 *a contrario* BCA. The possibility of establishing limited liability companies for non-profit purposes is historically inherent in Czech law – see e.g. ŠOUŠA, J. Vliv změn právního řádu po roce 1948 na změnu vlastnických poměrů společností s ručením omezeným [The Impact of Changes in the Legal System after 1948 on the Alteration of Ownership Structures of Limited Liability Companies]. In: KUKLÍK, J. et al. *Konfiskace, pozemkové reformy a vyvlastnění v československých dějinách 20. století* [Confiscation, Land Reforms, and Expropriation in Czechoslovak History of the 20th Century]. Prague: Auditorium, 2011, p. 85.

13 §§ 190(2)(c), 59(2)(3), 60, 61 BCA.

14 § 190(2)(b) BCA.

15 The general meeting may impose an additional capital contribution obligation on the shareholders, provided that the articles of association confer such authority upon it. A shareholder who did not vote in favour of such a resolution may withdraw from the company or, where the obligation is not fulfilled, may be expelled from the company. See §§ 162(1), 164(1), 165, 151(1) BCA.

16 §§ 190(2)(i) BCA.

17 In addition to these competences, the director is also responsible for, inter alia, keeping the prescribed records and accounts, convening the general meeting, and providing the shareholders with the information and documents concerning the company as requested by them. See §§ 196, 181(1) and 155 ff BCA.

18 § 195 BCA, § 194(1) BCA in conjunction with § 164(1) CivC.

19 Judgment of the Supreme Court of 7 August 2017, case no. 21 Cdo 1355/2017.

20 See judgment of the Supreme Court of 11 September 2019, case no. 31 Cdo 1993/2019, and the case law cited therein for reference.

representation involves expressing this will externally towards the addressee of a legal act (acting on behalf of a company).[21] However, both aspects of a director's function generally form a single functional unit, as a decision made in the course of business management is often followed by an act on behalf of the company where legal action towards third parties is necessary to implement the decision.[22]

It is understandable that in the case of a company with a single director, the distinction between internal and external authority becomes blurred, as e.g. the conclusion of a contract inherently includes the preceding decision on whom to contract with and for what purpose.

However, in a company with multiple directors, the law prescribes different rules for each aspect of their function. While business management decisions require the approval of the majority of directors,[23] each director is individually authorized to implement the company's will externally, unless otherwise stipulated by the articles of association. This can lead to situations where a director exercises their authority to represent the company without prior consultation with the other directors regarding the conclusion of the contract. In such cases, the law upholds the protection of the party to whom the legal act was addressed by a person authorised to act on behalf of the company.[24]

2.3 GENERAL MEETING'S INSTRUCTIONS TO MANAGEMENT OF COMPANY'S BUSINESS

If we set aside the competence of the general meeting to decide on matters expressly entrusted to it by law, the legal regulation of potential shareholder intervention in business management at the general meeting is highly complex.

While the law generally imposes an obligation on the director to *adhere to the principles and instructions* adopted by the general meeting, it simultaneously stipulates that no one is authorized to *issue (binding)*[25] *instructions concerning business management* to the director.[26] This takes place within a legal framework in which:

(i) The law explicitly allows the articles of association to limit the director's authority to represent (act on behalf of) the company.[27]

(ii) It envisages the possibility of expanding the general meeting's powers beyond those conferred by law.[28]

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21 Judgment of the Supreme Court of 11 September 2019, case no. 31 Cdo 1993/2019.

22 Resolution of the Supreme Court of 5 April 2006, case no. 5 Tdo 94/2006.

23 § 156(1) CivC and § 195(1) BCA.

24 § 162 CivC stipulates: *"If a member of a legal entity's governing body represents the legal entity in the manner recorded in the public register, it cannot be argued that the legal entity has not adopted the necessary resolution, that the resolution was defective, or that the member of the governing body has violated the adopted resolution."*

25 The prohibition on issuing instructions regarding the business management does not prevent the director from hearing the opinion or recommendation of a shareholder concerning a particular matter and subsequently considering its advantage for the company with the due care, skill and diligence. See judgment of the Supreme Court of 16 March 2021, case no. 27 Cdo 1873/2019.

26 § 195(2) BCA. An exception to this prohibition applies only to instructions requested by the director pursuant to § 51(2) BCA and instructions issued within a corporate group pursuant to § 81(1).

27 § 47 BCA.

28 § 190(2)(p) BCA.

(iii) Unlike other forms of business entities, the law grants the general meeting a general right to reserve decision-making authority over matters otherwise within the competence of another corporate body by adopting a resolution on an *ad hoc* basis.[29]

It is unsurprising that such an ambiguous and arguably internally incoherent legal framework remains highly problematic and continues to provoke almost endless academic debate. This debate was further fuelled during the recodification of private law by a remark in the explanatory memorandum to the Business Corporations Act, which stated that the new regulation of limited liability companies *"retains the possibility for the general meeting to assume the powers of another corporate body, including in relation to business management"*.[30] The drafters of the law made this assertion despite the fact that no prior judicial decision under the identical provision in the former Commercial Code had ever confirmed such a conclusion. Moreover, many legal scholars – whether deliberately or not – left this question unaddressed.[31]

Nonetheless, the prevailing view in contemporary legal doctrine remains that the general meeting's ability to reserve decision-making authority over matters within the competence of another corporate body does not extend to business management, as the prohibition on issuing instructions concerning business management constitutes a *lex specialis*. A fortiori, a "permanent" amendment to the articles of association that would transfer the authority to decide on business management or any part of it to the general meeting is impermissible (*a minori ad maius*).[32]

A notable advocate of the minority position is Havel, who primarily argues based on the distinct nature of a limited liability company as a "hybrid" type of company.[33] This reasoning likely responds to the fact that the legal framework governing limited liability companies offers greater flexibility in many respects than that of joint-stock companies. This flexibility lies, for instance, in the ability to attach not only rights but also obligations with a share beyond the statutory framework,[34] to exclude the transferability of

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[29] § 190(3) BCA.

[30] Parlament České republiky, Poslanecká sněmovna. Vládní návrh na vydání zákona o obchodních společnostech a družstvech (zákon o obchodních korporacích). Sněmovní tisk č. 363/0 [Government Bill on the Enactment of the Act on Commercial Companies and Cooperatives (Business Corporations Act). Chamber of Deputies Document No. 363/0] [online]. 25. 5. 2011, p. 223 [cit. 2025-02-01]. Available at: https://www.psp.cz/sqw/text/orig2.sqw?idd=71126&pdf=1.

[31] E.g. PELIKÁNOVÁ, I. *Komentář k obchodnímu zákoníku: díl 2: § 56–260* [Commentary on the Commercial Code: Part 2 (§§ 56–260)]. 2nd ed. Prague: Linde, 1998, p. 456 ff; ŠTENGLOVÁ, I. in: ŠTENGLOVÁ – PLÍVA – TOMSA et al., *c. d.*, p. 423 ff.

[32] E.g. ŠUK, P. in: ŠTENGLOVÁ, I. – HAVEL, B. – CILEČEK, F. – KUHN, P. – ŠUK, P. *Zákon o obchodních korporacích: komentář* [Business Corporations Act: Commentary]. 3rd ed. Prague: C. H. Beck, 2020, p. 481 (marg. 67–68); JOSKOVÁ, L. Zásady a pokyny valné hromady a jejich dopad na odpovědnost členů volených orgánů [Principles and Instructions of the General Meeting and Their Impact on the Liability of Members of Elected Bodies]. *Obchodněprávní revue* [Commercial Law Review]. 2022, Vol. 14, No. 1, pp.17–18.

[33] HAVEL, B. Chiméra neproniknutelnosti obchodního vedení ve společnosti s ručením omezeným (?) [The Chimera of the Impenetrability of Business Management in a Limited Liability Company (?)]. *Obchodněprávní revue* [Commercial Law Review]. 2019, Vol. 11, No. 6, pp. 153–154.

[34] See § 135(1) BCA in contrast to § 276(1) BCA.

shares,[35] or to opt for the non-distribution (or partial distribution) of achieved profits even in the absence of significant reasons for such a course of action.[36]

For the time being (at least until a legislative amendment is introduced), this doctrinal dispute appears to have been resolved in legal practice by the Supreme Court, which recently held that although the articles of association may expand the general meeting's competences, they must not do so in contravention of mandatory provisions of the law. Such a violation would occur if the articles of association allowed the general meeting to assume authority over matters of business management or if they permitted the general meeting to issue instructions to the director in this domain.[37]

Despite the above, it is noteworthy that over time, judicial decision-making has shifted a bit in favour of shareholder rights. The Supreme Court appears to have deliberately narrowed the definition of business management, classifying it as concerning matters of a *routine* or *day-to-day* nature.[38] This has effectively reduced the scope of the statutory prohibition on issuing instructions to the director regarding business management.

In recent case law, the Supreme Court has classified this category as *strategic (conceptual) management* – a domain that is neither expressly entrusted to the general meeting by law nor subject to the prohibition on issuing instructions.[39] Although, by virtue of *residual competence*,[40] strategic management formally belongs to the director, the general meeting may intervene in this area by issuing instructions or even assuming decision-making authority in this respect, whether on an *ad hoc* basis or through an amendment to the articles of association.[41]

3. INTERNATIONAL OVERVIEW

3.1 CONTINENTAL LEGAL SYSTEMS

The regulation of business management in a **German** limited liability company (*Gesellschaft mit beschränkter Haftung*, *GmbH*) under the GmbH Act[42] may

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35 The possibility of completely excluding the transferability of shares arises from the resolution of the Supreme Court of 19 September 2017, case no. 29 Cdo 5719/2016, in contrast to the prohibition of doing so in the context of a joint-stock company, which follows from §§ 270(1) and 273(1) BCA.

36 Resolution of the Supreme Court of 29 November, case no. 27 Cdo 1306/2023, in contrast to the statutory prohibition stipulated in §§ 270(1) and 274(1) BCA.

37 Resolution of the Supreme Court of 9 February 2023, case no. 27 Cdo 955/2022.

38 E.g. judgment of the Supreme Court of 30 September 2019, case no. 27 Cdo 4344/2017; judgment of the Supreme Court of 22 September 2021, case no. 27 Cdo 2837/2020; judgment of the Supreme Court of 22 February 2022, case no. 23 Cdo 3765/2020. In relation to the previous regulation under the Commercial Code, for example, resolution of the Supreme Court of 29 June 2005, case no. 29 Odo 442/2004; resolution of the Supreme Court of 5 April 2006, case no. 5 Tdo 94/2006; resolution of the Supreme Court of 26 August 2009, case no. 5 Tdo 894/2009.

39 Judgment of the Supreme Court of 11 September 2019, case no. 31 Cdo 1993/2019; judgment of the Supreme Court of 16 March 2021, case no. 27 Cdo 1873/2019.

40 § 163 CivC in conjunction with § 194(1) BCA.

41 See, albeit in the context of a joint-stock company, the judgment of the Supreme Court of 16 March 2021, case no. 27 Cdo 1873/2019.

42 Gesetz betreffend die Gesellschaften mit beschränkter Haftung vom 20. April 1892 (RGBl. S. 477).

at first appear confusing when analysed through the lens of the distinction between a director's internal and external functions. The provisions governing a director's competence are primarily found in Chapter 3 of the GmbH Act, titled *Representation of the Company*, as § 35(1) of the GmbH Act explicitly states that a GmbH *"is represented in and out of the court by the director"*.

Unlike in the case of a joint-stock company, the German legislator has thus refrained from enacting a detailed regulation of corporate governance in GmbHs. Instead, the logical inference that the director is responsible for business management in addition to representing the company is typically inferred from the very designation of the position of *Geschäftsführer* (director) or inferred from the supplementary application of certain provisions on joint-stock companies (*Aktiengesellschaft*) contained in the AktG Act.[43, 44]

The GmbH Act further provides that shareholders' rights regarding company management may also stem from the articles of association, and directors are likewise obliged to comply with restrictions imposed by the general meeting.[45] However, unlike Czech law, the GmbH Act does not contain an explicit prohibition on issuing instructions to the director concerning business management.

As a result, shareholders play a crucial role in managing a German limited liability company. In legal literature, the prevailing view is that there are no objections to the director being reduced to a purely executive body – a mere *"representative puppet"* (*Vertretungsmarionette*) – who has no discretion in making independent managerial decisions.[46] Provided that creditors' interests are safeguarded, it is not the director's duty to protect the company from its shareholders, as determining the company's interests is fundamentally the prerogative of the shareholders.[47]

An exception to this principle arises in the case of *unlawful* instructions in a company with multiple shareholders, where a majority shareholder seeks to obtain special advantages at the expense of minority shareholders. Conversely, even the tacit consent of all shareholders excludes the director's liability for the consequences of executing a given instruction.[48]

The **Austrian** regulation of a limited liability company (*Gesellschaft mit beschränkter Haftung*, *GmbH*) under the GmbH Act[49] does not significantly differ from its German counterpart,[50] as it contains provisions with the same substantive con-

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43 Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089).

44 STEPHAN, K.-D. – TIEVES, J. in: FLEISCHER, H. – GOETTE, W. et al. *Münchener Kommentar GmbHG: Band II. §§ 35–52* [Munich Commentary on GmbH Act: Part 2 (§§ 35–52)]. [online]. 4th ed. Munich: C. H. Beck, 2023, commentary on § 35, marg. 82 [cit. 2025-02-01]. Available at: http://beck-online.beck.de/.

45 §§ 37(1) and § 45(1) GmbH Act.

46 See ALTMEPPEN, H. *Gesetz betreffend die Gesellschaften mit beschränkter Haftung: Kommentar* [Act on Limited Liability Companies: Commentary] [online]. 11th ed. Passau: C. H. Beck, 2023, commentary on § 37, marg. 4 [cit. 2025-02-01]. Available at: http://beck-online.beck.de/.

47 Ibid., marg. 5.

48 Ibid., marg. 9 and 11.

49 Bundesgesetz vom 6. März 1906 über Gesellschaften mit beschränkter Haftung (GmbH-Gesetz), RGBl. Nr. 58/1906.

50 For some differences see MICHTNER, N. – SINGER, A. – WITTICH, D.-T. Deutsches versus österreichisches GmbH-Recht: Ein praxisorientierter Vergleich der nationalen Unterschiede [German versus

tent.[51] However, unlike the German regulation, § 25(5) of the Austrian GmbH Act explicitly states that a director may not be relieved of liability in cases where creditor claims need to be satisfied, even if they acted in accordance with a resolution of the shareholders.

Key conclusions arising from the Austrian legal framework have been analysed for Czech readers in an article by Zvára. Austrian limited liability company shareholders may intervene in business management at any time through the general meeting, thereby distinguishing it from joint-stock companies. Although such instructions must comply with legal provisions, legal literature suggests that these instructions may even be detrimental to the company. While the director is exempt from liability for the consequences of following such instructions, their liability towards creditors remains intact if the company lacks sufficient assets to satisfy creditor claims.[52]

The **Slovak** regulation of a limited liability company (*spoločnosť s ručením obmedzeným*) remains governed by the Slovak Commercial Code (SCC),[53] which was originally adopted in 1991 as a common legal framework for the former Czech and Slovak Federative Republic. While the Czech legislator undertook a recodification of private law after two decades, Slovakia continues to apply the SCC with subsequent amendments.

Thus, the Slovak legal framework is based on the same concept as the former (and still related) Czech regulation. It maintains the identical notion of *business management*,[54] which Slovak case law interprets, in line with Czech jurisprudence, as the internal administration of routine organizational, commercial, personnel, and financial matters of the company,[55] as distinct from external representation of the company.[56]

Similar to Czech law, the Slovak regulation provides the general meeting with the authority to reserve decision-making on matters otherwise falling within the competence of other corporate bodies.[57] However, legal doctrine holds that the general meeting may not assume control over *all* business management decisions, as this would interfere with the *mandatory* structure of corporate bodies.[58]

Austrian GmbH Law: A Practice-Oriented Comparison of National Differences]. *Zeitschrift für Internationales Wirtschaftsrecht* [Journal for International Business Law] [online]. 2022, Vol. 7, No. 4, p. 167 [cit. 2025-02-01]. Available at: http://beck-online.beck.de/.

51 §§ 18(1) and 20(1) GmbH Act.

52 ZVÁRA, M. Udílení pokynů jednatelům společnosti s ručením omezeným ve vztahu k obchodnímu vedení společnosti v českém a rakouském právu [Issuing Instructions to Directors of a Limited Liability Company in Relation to the Business Management of the Company in Czech and Austrian Law]. *Obchodněprávní revue* [Commercial Law Review]. 2019, Vol. 11, No. 4, pp. 86–87.

53 Zákon č. 513/1991 Zb., obchodný zákonník [Act No. 513/1991 Coll., Commercial Code], as amended (hereinafter referred to as "SCC").

54 § 134 SCC.

55 Judgments of the Slovak Supreme Court of 31 May 2012, cases no. 5 Obo 20,21/2011.

56 Judgment of the Slovak Supreme Court of 14 October 2009, case no. 5 Cdo 191/2008.

57 § 125(3) SCC.

58 OVEČKOVÁ, O. – CSACH, K. – ŽITŇANSKÁ, L. *Obchodné právo. 2: Obchodné spoločnosti a družstvo* [Commercial Law. Part 2: Commercial Companies and Cooperative]. Bratislava: Wolters Kluwer SR, 2020, p. 251.

Likewise, in accordance with the Czech model, Slovak law also recognises, to a certain extent, the director's obligation to follow the resolutions adopted by the general meeting,[59] although a minority of the legal doctrine disagrees with this interpretation.[60]

However, unlike Czech law, Slovak law does not impose a statutory prohibition on issuing instructions to the director concerning the management of the company's business. Additionally, § 135a(3) SCC, at first glance, mirrors the Austrian *GmbH Act* by stating that a director is not liable for damage resulting from executing a resolution of the general meeting, unless such a resolution contradicts legal regulations, the articles of association, or concerns the obligation to file for insolvency proceedings. Nevertheless, the interpretation of this provision remains contentious.[61]

Some authors argue that the exemption from liability does not apply where executing an instruction would violate the director's duty of loyalty, as the director must always act in the company's interest and must refuse to comply with an instruction that contradicts this duty.[62] Lukáčka previously took a somewhat divergent position, contending that the director is obliged to respect the will of shareholders holding the majority of votes, except in cases where such a resolution constitutes an abuse of rights by the majority shareholders.[63] However, he later revised his opinion, acknowledging that a director could challenge a general meeting resolution if it conflicts with the company's best interests by filing a motion to have it declared invalid.[64]

3.2 COMMON LAW

The issue of shareholder involvement in company management is by no means limited to continental legal systems but is also relevant in common law jurisdictions. Unlike continental jurisdictions, which typically regulate different types of

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[59] See § 135(3)(a) SCC, the judgment of the Slovak Supreme Court of 21 September 1999, case no. 4 Obdo 22/98, and in legal theory, PALA, R. – FRINDRICH, J. – PALOVÁ, I. in: OVEČKOVÁ, O. et. al. *Obchodný zákonník: veľký komentár: II. zväzok (§ 1–260)* [Commercial Code: Comprehensive Commentary: Part I (§§ 1–260)]. 2nd ed. Bratislava: Wolters Kluwer SR, 2022, p. 1269; LUKÁČKA, P. in: MAMOJKA, M. et al. *Obchodné právo I: všeobecná časť, súťažné právo, právo obchodných spoločností a družstva* [Commercial Law I: General Part, Competition Law, Company Law, and Cooperative Law]. Bratislava: C. H. Beck, 2021, p. 502.

[60] DURAČINSKÁ, J. Povinnosť lojality jediného spoločníka spoločnosti s ručením obmedzeným [The Duty of Loyalty of the Sole Shareholder of a Limited Liability Company]. In: ČERNÝ, M. (ed.). *2017: Vybrané výzvy v slovenskom práve obchodných korporácií* [Selected Challenges in Slovak Corporate Law] [online]. Olomouc: Iuridicum Olomoucense, 2017, p. 48 [cit. 2025-03-15]. Available at: http://www.michalcerny.net/OPD17OKS-SK-FV.pdf.

[61] For instance, an extremely ambiguous view is expressed in BLÁHA, M. in: PATAKYOVÁ, M. et al. *Obchodný zákonník: komentár* [Commercial Code: Commentary]. 5th ed. Bratislava: C. H. Beck, 2016, p. 595.

[62] E.g. PATAKYOVÁ, M. in: PATAKYOVÁ, M. – ĎURICA, M. – HUSÁR, J. et al. *Aplikované právo obchodných spoločností a družstva: ťažiskové inštitúty* [Applied Company and Cooperative Law: Key Institutes]. Bratislava: Wolters Kluwer SR, 2021, p. 228; PALA, R. – FRINDRICH, J. – PALOVÁ, I. in: OVEČKOVÁ et al., *c. d.*, pp. 1270–1271.

[63] LUKÁČKA, P. *Kategória zodpovednosti a zodpovedné podnikanie v právnom prostredí Slovenskej republiky* [Category of Liability and Responsible Business Conduct in the Legal Environment of the Slovak Republic]. Bratislava: Wolters Kluwer SR, 2019, p. 64.

[64] LUKÁČKA, P. in: MAMOJKA et al., *c. d.*, p. 503.

business entities through one or more statutory frameworks, common law traditionally uses the same basic legal structure to govern all forms of private companies as well as large financial business structures financed by thousands of investors.[65]

British law has traditionally afforded shareholders considerable freedom in determining the organizational structure of the company and the competences of its corporate bodies. From a comparative perspective, this notably distinctive approach stems from the prevailing belief in British legal scholarship that the division of decision-making authority within a company – whether private or public, profit-oriented or non-profit – should be left to the company and its articles of association rather than dictated by mandatory statutory provisions.[66] This approach is also arguably the result of the historical development of British company law, which traces its roots to the *contract of association* or *partnership*, allowing shareholders significant discretion in structuring the internal affairs of their enterprise.[67]

With respect to business management, in the sense understood by continental legal systems, the Companies Act 2006 does not explicitly assign this function to any particular corporate body. However, the Model Articles[68] stipulate that *"the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company"*.

Insofar as the company's articles do not exclude or modify the relevant Model Articles, these model provisions (insofar as applicable) form part of the company's articles of association in the same manner and to the same extent as if they had been duly registered as part of the company's governing documents.[69] Thus, the company's articles of association and the extent to which they exclude or modify the aforementioned provision determine how power is divided between the shareholders in the general meeting and the directors.[70]

Simultaneously, the Model Articles presume that shareholders may, by special resolution, instruct the directors to *"take, or refrain from taking, specified action"*.[71] The Model Articles thus empower the general meeting to regulate management of company's affairs without the need to formally to adopt a resolution to alter the articles.[72] However, this power of general meeting must be exercised with a "proper purpose",[73] ensuring protection for minority shareholders.

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65 AICKIN, K. A. Division of Power between Directors and General Meeting as a Matter of Law, and as a Matter of Fact and Policy. *Melbourne University Law Review*. 1967, Vol. 5, No. 4, p. 448.

66 See DIGNAM, A. – LOWRY, J. *Company Law*. 8th ed. Oxford: Oxford University Press, 2014, p. 290; FARRAR, J. H. – HANNIGAN, B. *Farar's Company Law*. 4th ed. London: Butterworths, 1998, p. 363 ff; DAVIES, P. – WORTHINGTON, S. *Gower's Principles of Modern Company Law*. 10th ed. London: Sweet & Maxwell, 2016, p. 356.

67 DAVIES – WORTHINGTON, *c. d.*, p. 356.

68 Art 3, Model Articles for Private Companies Limited by Shares [cit. 2025-03-15]. Available at: https://www.gov.uk/guidance/model-articles-of-association-for-limited-companies.

69 Sec 20(1) Companies Act 2006.

70 WILD, CH. – WEINSTEIN, S. *Smith and Keenan's Company Law*. 17th ed. Edinburgh: Pearson Education, 2016, p. 107.

71 Art 4(1) of the Model Articles.

72 See GRIFFIN, S. *Company Law: Fundamental Principles*. 4th ed. Harlow: Pearson Education, 2006, p. 406.

73 Ibid., p. 407 ff.

The issue of minority shareholder protection in this context is particularly reflected in **Canadian** corporate law. Under the Canada Business Corporations Act 1985, the powers of the directors to *"manage or supervise the management of the business and affairs of the corporation"* are subject to any *"unanimous shareholder agreement"*.[74] According to the Supreme Court of Canada in *Duha Printers (Western) Ltd. v. Canada*,[75] such agreements are in fact treated as *"part of the corporate constitution, along with and equivalent to the articles of incorporation and the by-laws"*.[76]

Although the unanimity requirement is somewhat anomalous in Canadian corporate law – especially considering that it is not required for the election of directors who manage the corporation or for amending the articles of association[77] – some argue that this requirement is designed to mitigate the risk of harm to shareholders.[78] This suggests an implicit concern regarding the majority voting principle that typically governs corporate decision-making.

Australian statutory law similarly vests directors with the general power to manage a company's business, except for those powers that the Corporations Act 2001 or the company's constitution require to be exercised by the general meeting.[79]

Although it may seem obvious that a company's constitution can be amended to alter the division of powers between the directors and the general meeting, some legal scholars identify difficulties with *ad hoc* amendments aimed at reallocating power over a particular matter. These concerns arise from both judicial precedent and practical considerations.[80] Furthermore, the Supreme Court of Australia has generally dismissed the notion of any "plenary" power vested in shareholders at a general meeting where no additional provisions are included in the company's constitution. The court ruled that *"nothing in the legal powers and capacities of an individual would support the existence of a legal power or capacity in the company in general meeting to express an opinion, by resolution, on a matter concerning the company's management,"*[81] even in cases involving advisory resolutions. Nevertheless, some of these conclusions remain the subject of academic debate.[82]

Despite the seemingly strict statutory framework concerning shareholder involvement in company management, Australian corporate law also provides an interesting exception under sec 187 of the Corporations Act 2001 regarding corporate groups. Under this provision, a director of a wholly-owned subsidiary may act in the best interests

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74 See sec 102(1) and 146(1) of the Canada Business Corporations Act 1985.

75 Judgment of the Supreme Court of Canada of 28 May 1998.

76 Ibid., marg. 61.

77 See JUZDA, N. *Unanimous Shareholder Agreements* [online]. Dissertation. Toronto: York University: 2014, p. 60 [cit. 2025-02-01]. Available at: https://yorkspace.library.yorku.ca/server/api/core/bitstreams/da500cac-e784-4a8f-8f5c-6b2d90041ee5/content.

78 See HAY, R. J. – SMITH, L. A. The Unanimous Shareholders Agreement: A New Device for Shareholders Control. *Canadian Business Law Journal*. 1985, Vol. 10, No. 4, p. 462.

79 Sec 198A of the Corporations Act 2001.

80 See BOROS, E. How Does the Division of Power between the Board and the General Meeting Operate? *Adelaide Law Review*. 2010, Vol. 31, Special Issue, pp. 171–172.

81 *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280, marg. 46–50.

82 See BOTTOMLEY, S. Rethinking the Law on Shareholder-Initiated Resolutions at Company General Meetings. *Melbourne University Law Review*. 2019, Vol. 43, No. 1, pp. 93–132.

of the holding company, provided that (among other conditions) the subsidiary does not become insolvent as a result of the director's actions. The requirement that the company be wholly-owned and that creditors' interests remain protected reflects the same concerns surrounding the director-shareholder relationship discussed in this paper.

4. OBJECTIONS TO CURRENT STATE OF AFFAIRS IN CZECH COMPANY LAW

The conducted international comparison demonstrates that, concerning the general meeting's ability to intervene in the business management of a limited liability company, Czech company law is among the most restrictive.

The primary reason for this state of affairs is the explicit statutory prohibition on anyone issuing instructions to the director concerning business management – a prohibition that is absent in the statutory laws of the aforementioned jurisdictions. It is likely due to this prohibition that the general meeting's considered power to issue such instructions may not be leveraged in favour of the general meeting, even considering for example the functional interconnection of the director's internal and external competences, as is the case in Austrian law. Nor can such competence of the general meeting be expanded in the articles of association on the basis of the rather general permission under the Business Corporations Act and other continental and common law jurisdictions.

Nonetheless, this legal framework should not be accepted without reservations. Its greatest weakness, in my view, is the lack of a more comprehensive examination of the purpose and rationale behind the statutory prohibition. In private law, any prohibition must be interpreted restrictively and in alignment with its intended purpose.[83] However, the Czech Supreme Court has only briefly addressed this issue in the past, stating that: *"If the board of directors is to be fully responsible for the performance of its functions in relation to the company, such responsibility cannot be established in cases where it is constrained by instructions from the general meeting in the exercise of business management."*[84]

This suggests that the prohibition on issuing instructions concerning business management in Czech limited liability companies is closely linked to the presumption of the director's unrestricted responsibility for managing this area. This is consistent with approaches in other jurisdictions, where this issue is addressed either explicitly in statutory law (Austria, Slovakia) or through legal interpretation (Germany). Furthermore, the concerns underpinning this restriction – namely, the potential abuse of majority shareholder voting power and the protection of creditors' interests (i.e., the company's solvency) – are also reflected in various foreign legal systems.

Nevertheless, I believe that these concerns may be effectively addressed within the existing Czech legal framework governing limited liability companies, without the need for legislative amendments.

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[83] See e.g. ruling of the Constitutional Court of the Czech Republic of 6 April 2005, case no. II. ÚS 87/04 (75/2005 ÚSn).

[84] Resolution of the Supreme Court of 27 August 2008, case no. 5 Tdo 488/2008.

First, when executing an instruction from the general meeting, the director is not acting on their own will but is executing the will of another entity. As a matter of principle, liability for the outcome of such an instruction cannot rest with the director. Indeed, the rules governing the contractual mandate (*příkaz*), which apply subsidiarily to the relationship between the director and the company,[85] require the mandatary to adhere to a subjective standard of honesty, diligence, and skill.[86] However, they do not impose liability for the achievement of the specific goals pursued by the instruction, nor for its ultimate result.[87] Naturally, this principle is subject to an exception in cases where the instruction itself is unlawful in its purpose.

Second, creditors' interests can only be affected if the company becomes insolvent or if such insolvency is at least imminent. In all other situations, creditor interests remain unaffected.

Third, in single-member companies, the interests of minority shareholders are never at risk. Moreover, even in companies with multiple shareholders, the law provides mechanisms to protect minority shareholders. For example, each shareholder owes a duty of loyalty not only to the company but also to other shareholders.[88] Furthermore, a shareholder who – due to the influence of another person (typically a majority shareholder) – cannot reasonably be expected to remain in the company may require the controlling person to buy out their share at a fair price.[89] A shareholder who unduly interferes with company affairs also risks being classified as an influential entity (*vlivná osoba*)[90] or even as a *de facto* director (*faktický vedoucí*), thereby assuming greater liability.[91]

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85 § 59(1) BCA in conjunction with § 2432 CivC.

86 See JANOUŠEK, M. in: PETROV, J. – VÝTISK, M. – BERAN, V. et al. *Občanský zákoník: komentář* [Civil Code: Commentary]. 2nd ed. Prague: C. H. Beck, 2024, p. 2607 (marg. 3).

87 See judgment of the Supreme Court of 17 January 2012, case no. 28 Cdo 1034/2011: *"The subject of the mandatory's activity is not the achievement of a specific result, but the activity itself; therefore, the risk of whether the result is achieved is borne by the mandator, not the mandatary."*

88 See § 212(1) CivC [*"By accepting membership in a corporation, a member undertakes to act, with respect to the corporation, with integrity and comply with its internal order. A corporation may not unreasonably discriminate in favour or against its member and must protect his membership rights as well as legitimate interests."*] and reasoning behind resolution of the Constitutional Court of the Czech Republic of 8 December 2011, case no. I. ÚS 3168/11.

89 § 89 ff BCA.

90 § 71(1) BCA stipulates: *"Anyone who uses his or her influence in a business corporation (the 'influential entity') to influence, in a decisive and significant manner, the behaviour of a business corporation (the 'influenced entity') to the damage of the same shall compensate such damage, unless he or she proves that he or she could have in good faith and reasonably assumed, in his or her influencing actions, to be acting on an informed basis and in a justifiable interest of the influenced entity."*

91 § 62(1) BCA stipulates: *"The provisions of this Act on the inadmissibility of competition and the provisions of the Civil Code and this Act on the obligation to act with the due diligence of a proper manager and on the consequences of a breach of this obligation will apply to a person who is effectively in the position of a member of the elected body, even if in fact he/she/it is not a member of this body, and without regard to the relationship of this person to the commercial corporation."*

5. CONCLUSION

Unlike other continental legal systems and common law jurisdictions, the legal framework governing Czech limited liability companies explicitly prohibits any person from issuing instructions to the director concerning business management. This broadly formulated prohibition leads to the conclusion that the general meeting may not intervene in business management, not even under other statutory provisions that might otherwise suggest such a possibility.

This legal distinction sets Czech company law apart from the legal frameworks of Germany, Austria, Slovakia, the United Kingdom, Canada, and Australia, all of which – albeit to varying degrees – allow the general meeting to become involved in the company's business management.

Over time, Czech case law has at least narrowed the substantive definition of *business management*, increasingly interpreting it as encompassing only *routine* or *day-to-day* matters. This development has created a partial opening for the sphere of *strategic (conceptual) management*, which, while still formally belonging to the director in the absence of a contrary provision in the articles of association, may be effectively influenced by the general meeting.

Despite this commendable shift, both case law and legal scholarship have thus far largely refrained from providing a more detailed interpretation of the statutory prohibition. However, foreign legal frameworks suggest that the key concerns in this context should be the *director's liability*, the *protection of minority shareholders*, and the *protection of creditors*.

Even these legitimate concerns, however, may be effectively addressed within the current wording of Czech company law, allowing the statutory prohibition to be interpreted more restrictively in line with its purpose. Indeed, the purpose of the legal regulation is not contravened, at least in cases where instructions concerning business management are given to the director of a limited liability company with a sole shareholder, provided that the execution of such instructions does not give rise to a risk of insolvency.

Only time will tell whether legal scholarship and judicial practice will evolve in this direction, as well as whether the domestic legislature will ultimately allow for an amendment to the Business Corporations Act following the example of foreign regulations.

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