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Limited Liability Company in Slovakia: Current Problems Faced

- **ABSTRACT:** *This article is focused on the Limited Liability Company (LLC), the most popular form of company in Slovakia, as a legal form for small and medium enterprises. The article analyses selected topics that are important for comparison and for establishing a better understanding of the Slovak regulation; these are mainly capital requirements and capital protection, bans on the return of investment contributions, management responsibility, the responsibility of the single or majority member, and rules on minority protection. The article also describes the current problems regarding the LLC regulation in Slovakia (restrictions on the company formation, transfer of business shares, piercing the corporate veil, de facto statutory body/ director.*
- **KEYWORDS:** LLC in Slovakia, management responsibility, responsibility of LLC members, LLC capital requirements, capital protection, minority protection, business share/ participation, piercing the corporate veil.

1. Introduction to the Slovak regulation of Limited Liability Companies

The Limited Liability Company (LLC) is the most popular form of company in Slovakia. LLCs may be formed by one person (a natural or legal person) and may have a maximum of 50 members under the Slovak Commercial Code. LLCs may also be established for purposes other than business.³

To a large extent, the LLC is established for the purpose of business activity, and the expansion of this form of business is directly related to the safety of business in relation to the LLC members. Any business failure will not be reflected in the personal

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3 Patakyová, 2019, p. 69.



property of the LLC member.⁴ LLC is an entity whose registered capital is made up of its members' contributions and whose members are liable as guarantors for the company's obligations until their paid-up investment contributions are entered in the Commercial Register. Upon payment of the shareholder's contribution in full and registration of the payment of the contribution in the Commercial Register, the shareholder is not liable as a guarantor for the company's obligations. The LLC is liable for breaches of its obligation with its entire property.

The LLC is obliged to create registered capital, which must amount to at least 5 000 euros. The value of the shareholder's contribution must be at least 750 euros. Each member may participate in the registered capital of an LLC with only one investment contribution. The amount of individual member's investment contributions may be determined differently, but the sum of all individual contributions must correspond to the total amount of the company's registered capital.

Of all company types, LLCs make up the highest number of established companies per year in Slovakia. Figure 1 shows the proportion of the number of LLCs established in relation to other forms of legal entities. LLCs are marked in dark green.⁵

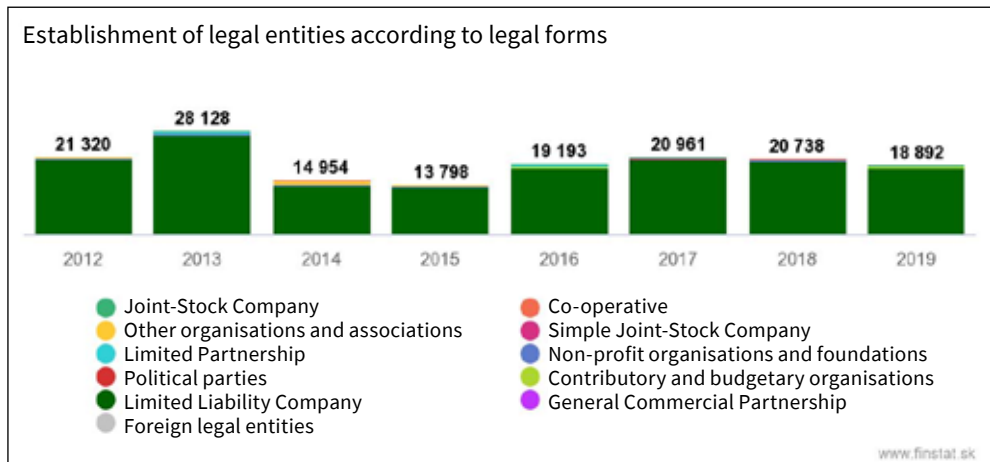


Figure 1. The proportion of the number of LLCs established in relation to other forms of legal entities. LLCs are marked in dark green.

According to legal theory, the LLC is classified as a capital company.⁶ However, it also has some properties typical of a personal company (e.g. the option of excluding the

4 Patakyová, 2016, p. 459.

5 The graph is available at: <https://finstat.sk/analyzy/statistika-poctu-vzniknutych-a-zaniknutych-firiem> (Accessed: 7 February 2020).

6 Kraakman, 2017, p. 5. identifies these five characteristic features of the modern capital company: (i) separate legal personality, (ii) limited liability or non-limited liability of partners / shareholders, (iii) transferability of business shares and shares, (iv) centralised management governed by directors/members of the board of directors, and (v) (residual) ownership of the company based on legal capital contributions.

inheritance of a shareholding, limiting or excluding the transfer of business shares, and limitation on the number of LLC members).⁷

The question that arises is ‘To what extent does the LLC legislation open up space for members to deviate from the LLC legal regulation?’ The Commercial Code does not address the question of mandatory and default legal provisions and does not set any general rule in this regard. Regarding the question of the mandatory or default character of provisions regarding LLCs, it is necessary to do so with respect to the limits of the associated contractual freedom, since corporate documents are contracts *sui generis*.⁸ Legal provisions of company law in the Commercial Code are considered primarily as mandatory. Patakyová (partially) agrees with this conclusion, but in this context declares that provisions regarding company law in the Commercial Code are under the rule set by Section 2(3) of the Civil Code considered as imperative, and therefore mandatory, considering the character of these provisions containing individual rules. Therefore, Patakyová partially corrects the above-mentioned approach and asserts that

“in the sphere of private law it is also adequate in this context to require a restriction and not to search for permission for autonomous regulation, whereby in case of an absence of restriction, the permission is implicitly given by law and participants of legal relationships may express relevant will praeter legem. I consider it necessary to highlight that the prohibition of certain autonomous regulation may arise from all ‘sources’ of the legal regulations of relationships which are subject to the Commercial Code and also from the principles which undergird the Commercial Code.”⁹

In particular, the provisions related to the formation of LLCs and the legal restrictions around their formation, the essential elements of the memorandum of association, the repayment of contributions and capital formation (minimal capital requirements), capital protection and profit distribution rules, and the provisions related to the protection of creditors all have a mandatory character. The provisions governing the liability of the statutory body and the statutory powers of the General Meeting, which cannot be delegated to another body, are also mandatory. Those mandatory provisions are mainly intended to preserve the essential characteristics of this type of company and to safeguard the balance within the company and the protection of third parties.

7 Patakyová, 2016, p. 459.

8 Patakyova, 2019, p. 46.

9 Patakyová, 2016 cited in Patakyová, 2019, p. 47.

2. Restrictions *ex lege* on the formation of LLCs

A person who wants to form an LLC must comply with several legal restrictions. The person may not be listed as a tax debtor or social insurance debtor (the application for registration of the company shall be accompanied by the consent of the competent authority involved in the formation of the company). This restriction was introduced for the declared purpose of combating tax fraud.¹⁰ This limit shall not apply if the tax administrator concerned has given his consent¹¹ to the formation of the company. An LLC cannot be established by any person registered as liable with regard to valid commenced enforcement proceedings either. These limits mentioned above do not apply to the founder, the foreign person.

The Slovak legislator transposed the Twelfth Company Law Council Directive¹² by adopting specific restrictions on situations in which a natural person is the sole member of several companies or the single-member company is the sole shareholder of an LLC.¹³ One individual may be a sole member of no more than three LLCs. The Unipersonal LLC cannot form or be a single member of another LLC. These limits apply only to LLCs and not to joint-stock companies or simple joint-stock companies. The Commercial Register examines the fulfilment of the limits above when an LLC is entered in the Commercial Register. Compliance with these limits is demonstrated by a written declaration provided by the founder. However, compliance with these limits is not examined in the case of the transfer of business shares during the existence of the company. In the case that these restrictions are breached upon entering the LLC in the Commercial Register, the court maintaining the Register shall refuse to enter the company in the Commercial register. If the restrictions are violated after the transfer of business shares during the existence of the company, the court may decide on winding up the company. Such a decision would not be automatic; the court would provide the company with a time period to withdraw the reason for cancellation before deciding to wind up the company.¹⁴ During this period, the company may adjust its structure to comply with the legal requirement that bans chaining.

10 Mamojka, 2016, p. 424.

11 The possibility of granting the consent to the tax administrator was introduced by an amendment Nr. 390/2019 Z. z. to the Commercial Code; this legislation will be effective from 20.10.2020.

12 Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies.

13 Ovečková, 2017, p. 750.

14 Section 68 (6) Commercial Code pursuant to the amendment to the Commercial Code effective from 1.10.2020 pursuant to 68b (1) Commercial Code; The new wording of Section 68b of the Commercial Code, which will be effective from 1.10.2020, does not, in contrast to the current version of Section 68 of the Commercial Code, contain an explicit obligation for the court to set a period for removal the reason for cancellation. However, according to the explanatory memorandum to the new wording of Section 68b of the Commercial Code, such court's calls will be automated. In our opinion, the automatic winding up of companies without a court call would be a disproportionate sanction and interference with the company's existence.

The open question is whether this ban on the chaining of unipersonal LLCs also applies to foreign persons. Most commentators tend to think in the affirmative; otherwise, there would be an unjustified difference between a Slovak and a foreign person, and the possibility of waiving the application of the chain ban on foreign persons would be contrary to the objective of the Directive.¹⁵

3. Minimal capital requirements and capital protection rules

The amount of capital registered by an LLC must be at least 5000 euros. The Commercial Code includes several capital protection rules.¹⁶ Such rules are, in particular, those relating to the creation of capital, which lay down the procedure for the repayment of contributions by LLC members (a monetary investment contribution or a nonmonetary contribution). A nonmonetary contribution may only be an asset with an economic value that can be ascertained. The value of a nonmonetary contribution shall be, in principle, based on expert testimony, unless the Commercial Code states otherwise.¹⁷ The Commercial Code does not require that the property be used in coherence with the company's main entrepreneurial focus. It is prohibited to make investment contributions in the form of an undertaking to perform some work or supply a service. A receivable against the company may be considered a non-monetary contribution. The member who transfers the receivable to the company is liable as a guarantor for its enforceability up to the value of its contribution. A nonmonetary contribution must be provided before the amount of the registered capital is recorded in the Commercial Register. Should the company not acquire the ownership title to a particular object of a nonmonetary investment contribution, even though such nonmonetary contribution is regarded as paid up, the member who undertook to provide such a contribution must pay its value in money and the company must return the nonmonetary contribution to this member unless the company is under obligation to surrender it to the entitled person. If the value of a nonmonetary contribution does not reach the originally agreed-upon amount by the time of the company's incorporation, the member who made the nonmonetary contribution must pay the difference in monetary instruments.

The tools for protecting capital also include the rules for the payment of profits and the prohibition of hidden profit payments.¹⁸ The LLC may pay a profit share or

15 Ovečková, 2017, p. 463.

16 Patakyová, Grambličková and Kisely, 2017, pp. 885–902.

17 E.g. Section 59b Commercial Code.

18 Section 123 (2), (3) in conjunction with Section 179 of Commercial Code.

distribute other own funds only if the conditions set out in Section 179 (3)¹⁹ and Section 179 (4)²⁰ of the Commercial Code are met, and if, in any circumstances, this does not cause it bankruptcy.

These are the provisions of a joint-stock company which apply to an LLC as well and which are significantly affected by the objectives set out in the capital directive.²¹ An important condition for the distribution of net profit, together with the replenishment of the reserve and other funds, is the coverage of losses from previous periods. Section 179 (3) of the Commercial Code provides a *net surpluses test* (*a nimble dividend test, a running account profit test*) based on Article 17 (3) of the Consolidated Capital Directive.²² Section 179 (4) of the Commercial Code provides an *equity test* (*a solidity test, a net asset test*) based on Article 17 (1) of the Consolidated Capital Directive, and this test was supplemented by a *bankruptcy test*.²³

The ban on the return of investment contributions²⁴ serves as the effective protection of creditors and prevents shareholders from obtaining any benefits to the detriment of the company's assets, with the exception of the payment of profits.²⁵ The goal is to avoid any performance in favour of the company member without adequate consideration of the company. The factual definition of the term 'investment contributions' is very broad and the approach is one of substance over form. The legal definition of investment contributions approximates the concept of distribution used in English law. In most cases, in practice, it will not be an investment contribution at all, nor will

19 Section 179 (3) of the Commercial Code reads as follows: "Until the LLC is wound up, LLC members are only entitled to the distribution among between them of net profit that has been reduced by contributions to the reserve fund, or any other fund applicable, created by the company under the law, and by the accumulated loss of previous years, increased by the retained profit of previous years and other of its own resources created from profits whose utilization is not stipulated by law."

20 Section 179 (3) of the Commercial Code reads as follows: „The company may not distribute net profit or other of its own resources among/ between shareholders, if, in all circumstances, this does not cause it to bankruptcy and if the equity ascertained from the approved annual financial statements is, or would be in consequences of the profit distribution, lower than value of the registered capital increased by the reserve fund, or any others funds if applicable, created by the company which must not be, under the law or articles of association, used for payments to shareholders, reduced by the value of unpaid registered capital, provided this value has not yet been included in the assets reported in the balance sheet under a special Act."

21 Second Council Directive (Capital Directive) on the company law of 13.12.1976, 77/91 / EEC on the regulations governing the formation of public limited liability companies and the maintenance and alteration of their capital, as amended by Directive 92/101 / EEC, OJ 1992 L 247 / 64.

22 Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

23 Patakyová and Grambličková, 2016, p. 459.

24 Section 67j of the Commercial Code.

25 Ovečková, 2017, p. 530.

there be funds generated from it.²⁶ The ban on the return of investment contributions is defined very broadly; examples of some of the definitions of ‘investment contributions’ in regard to this ban are as follows: (a) performance without adequate consideration based on a contract between a member of the company and the company, and (b) performance of the company provided due to the guarantee, lien or other security provided by the company to secure the member’s obligations or for their benefit. ‘Their benefit’ means not only the member’s benefit but also the benefit of the person who is the person close to member or a person acting on behalf of a member etc.

The Commercial Code includes not only the capital protection rules but also rules supporting capital increases in cases of impending bankruptcy through the provisions of the company in crisis. Slovak legislation on this matter was inspired by the German and Austrian legislation of the company in crisis. The essence of the company in crisis is the definition of the substitute equity financing resources, which in principle means loans provided by related creditors (these could also be members of the company) during the company’s crisis (bankruptcy or threat of bankruptcy). While the company is in crisis, it is not allowed to repay these loans to the related creditors; the time limits set for repayment do not run, and thus the company will not default.

4. Trading possibilities of a business share

In principle, the Commercial Code allows LLC members to regulate the transferability of business shares in an agreement of association. The regulation of the transferability of business shares is primarily not mandatory and opens the space for LLC members to edit the regulation of the Commercial Code otherwise. The Commercial Code distinguishes between the transfer of a business share to another LLC member and transfer to a third party. Unless the agreement of association stipulates otherwise, an LLC member may transfer their business share to another LLC member with the consent of the general meeting. If the agreement of association permits, an LLC member may transfer their business share to another person.

The Commercial Code prohibits the transfer of business shares to another LLC member or third party if a company is in the process of winding up, if the company is wound up by a court or by a court decision, or if the company is subject to bankruptcy or restructuring. Since 1.10.2020 the Commercial Code also prohibits the transfer of business shares to another LLC member or third person if the debtor is registered as liable in the register of valid commenced enforcement proceedings.

The provisions of the Commercial Code relating to the formal requirements for a contract on the transfer of a business share (written form of a contract and signatures must be verified) and the conditions for the transfer of a majority interest²⁷ are manda-

²⁶ Patakyová, 2016, p. 326.

²⁷ In principle, at least 50% is considered to be the majority, see Section 115 (8) of the Commercial Code.

tory. The transfer of the majority interest requires the consent of the tax administrator if the LLC member or the acquirer is on the list of tax debtors. This consent is not necessary in the case of a foreign person, regardless of whether he/she is an LLC member or an acquirer. In the case of a transfer of a majority interest, the effects of the transfer do not take effect until the entry in the Commercial Register.

The possibility of establishing a lien on a business share depends on its transferability under the agreement of association. A business share may not be subject to a lien if the agreement of association does not permit the transfer of a business share. If a business share may only be transferred with the general meeting's approval, its approval shall also be required for establishing a lien on a business share; unless such approval is granted, no lien shall be established; the meeting's approval is not required for the transfer of a pledged business share by an existing lien. If under the agreement of association, the fulfilment of another condition is required for the transfer of a business share, the fulfilment of such a condition is also required for the establishment of a lien.²⁸

Claims of personal creditors of the LLC member may be enforced against the business share.²⁹ The effects of the distraint of the business share depend on the possibility of transferring it. A free transferable business share without any limits is enforceable by selling at auction by analogy with the provisions on the sale of movable assets. In the case of the limited transferability of shares, the legal effect of the distraint shall have the same effects as the cancellation of an LLC member's participation in the company by the court. The distraint is then conducted to the debtor's right to a settlement share.

5. The rules and practice of the executive officer's responsibility

Executive officers are the managing authorities of LLCs. Executive officers are obliged to perform their activities with professional care (*duty of care*) and in accordance with the interests of the company and all its members (*duty of loyalty*). Executive officers do not have to be experts but they must act professionally³⁰; they have to obtain and take into account in their decision-making all available information related to the subject of their decision, ensure confidentiality of information and facts whose disclosure to third parties could cause harm to the company or endanger the interests of the company's members, and while exercising their powers, must not give priority to their own interests, the interest of only certain members, or the interest of third parties over the company's interests. The fulfilment of the duty of care is evaluated from an objective point of view; the personal abilities and experience of the executive officers are not decisive. Executive officers are obliged to select an appropriate expert advisor (*culpa in*

28 Section 117a (3) of the Commercial Code.

29 Section 113b of the Enforcement order.

30 Csach, 2019, p. 183.

eligendo); however, if the executive officer possesses the necessary expertise, he must use it. A part of the executive officer's duty of loyalty is the prohibition of competitive conduct, as well as an obligation to confidentiality.

Executive officers who have breached their duties while executing their powers shall be responsible for damages suffered by the company. Executive officers are not obliged to remunerate the company for the damages suffered, (a) if they prove that they proceeded with professional care and in good faith and were acting in the interests of the company. The burden of proof lies with the executive officer who must prove compliance with his obligations (the reverse burden of proof). From the doctrinal point of view, this approach is called *business judgment rule*.³¹ For example, the Delaware (US) approach is different. The decision-making activity of the Delaware courts has shaped this rule.³²

*“In Delaware, the business judgement rule provides a presumption that, in making a decision, directors were informed, acted in good faith and honestly believed that the decision was in the best interest of the company. The business judgment rule is both a procedural guide and a substantive rule of law.”*³³

Procedurally, it places the initial burden of proof on the plaintiff to prove why the rule is inapplicable.³⁴ However, the objectives of the above approaches to the business judgement rule are identical. The rule brings safe harbour for executive officers/directors' business decisions and allows for honest mistakes in decision-making. Executive officers are also not obliged to remunerate the company for the damages suffered, (b) if they are executing the resolution of the General Meeting that is not contrary to legal regulation or the agreement of association.

The question of whether the executive officers are responsible in the case that they implement a resolution of the general meeting that is in compliance with the law/statutes but not in the interest of the company is a theoretical one. We have not had many court decisions on the liability of the executive officers. However, such claims have been more common in recent years, including creditors' claims towards executive officers. Following a creditor's claim, the district court has already ruled on the liability of the executive officer, who has executed some decision of the general meeting that was in accordance with the law but was not in the interest of the company.³⁵

Agreements between the company and its executive officer that exclude or limit the executive officer's liability are prohibited. Neither the agreement of association nor articles of association may limit or exclude an executive officer's liability. A company may waive claims for damages it has against its executive officers or may conclude a

31 Csach, 2019, p. 184.

32 Petrek and Katkovčín, 2018, p. 227.

33 Pinto and Branson, 2018, p. 224.

34 Pinto and Branson, 2018, p. 224.

35 District court in Zvolen 13C202/2011 from 20.3.2017.

settlement agreement with them only three years after such a claim first arose, provided that the general meeting consents to such a waiver and that no shareholder or shareholders whose investment contributions amount to 10% of the registered capital object to such a decision at the general meeting in the minutes.³⁶

■ 5.1. *Claims for damages caused by executive officers*

LLC members are entitled to claim the damages caused to the company by executive officers on behalf of the company. LLC members are not entitled to claim reflex damages: that is, damage resulting from damage to the company's assets.

Company creditors may claim damages caused to the company by executive officers on their behalf or their own account if they cannot satisfy their claim through the company's assets. The creditor must prove, inter alia, that he cannot satisfy his claim through the company's assets. The inability to satisfy a claim from the company's assets must be objective because of a lack of assets of the company, it cannot be a subjective unwillingness of the company to fulfil a creditor's claim.³⁷ The basic requirement for bringing such a claim is the damages suffered by the company as a result of a breach of the executive director's duty. The filing of such a claim by the creditor is limited quantitatively to the amount of the creditor's claim. The creditor's claim shall not be limited if a waiver agreement or a settlement agreement between the company and the executive officer has been concluded. In the event of bankruptcy, the creditor's claim is exercised by the bankruptcy trustee. This legal option for creditors to submit a claim broadens the liability of executive officers to the extent that they are liable up to the amount of the damages caused, with all their assets.

■ 5.2. *Special duties of the executive officers*

In addition to general responsibilities (duty of care, duty of loyalty, duty of good faith), executive officers also have a number of special duties, some of which are mentioned in this paper. They are obliged to take measures to overcome the crisis.³⁸ The executive officer who finds, or, considering all circumstances, could have found, that the company is in crisis, must do everything possible, as may be required in line with the principle of reasonable professional skill and due care, from a reasonable and prudent person to overcome such crisis.

These special duties that arise in a crisis situation are intended to avert the crisis and ensure that the measures taken are effective. However, this particular obligation to overcome the crisis can also be inferred from the general duty of care.³⁹

The executive officers have the obligation to duly submit a proposal for a bankruptcy proceeding to be initiated. Executive officers have a specific responsibility for not duly submitting a bankruptcy proposal under the Slovak bankruptcy act: an

36 Section 135a (4) of the Commercial Code.

37 Mamojka, 2016, p. 543.

38 Section 67b of the Commercial Code, See: Kalesná and Patakyová, 2019, pp. 215–217.

39 Duračinská, 2017, pp. 268–272.

obligation to pay a legal contractual penalty to the company of 12,500 euro, and liability for any damage caused to creditors by not duly submitting a bankruptcy proposal. Unless otherwise proven, the Bankruptcy and Restructuring Act⁴⁰ assume that the creditor has suffered damage to the extent that the creditor's claim was not settled after the insolvency proceedings were closed due to the debtor's lack of assets, the cancellation of bankruptcy declared for the debtors' property due to lack of assets or the enforcement proceeding was closed due to lack of the debtor's assets. This is a rebuttable presumption of the amount of damage and the burden of proving the amount of damage caused was thus transferred to an obliged person.⁴¹

The court's decision on a legal contractual penalty is the decision on exclusion (disqualification).⁴² The court may decide on the exclusion of a representative from the statutory body for a specified period of time; the excluded representative may not perform as a member of the statutory body for the set time period. Violation of the ban on performance is sanctioned by a legal guarantee by the excluded manager for the benefit of the creditors.⁴³

6. Responsibility of LLC members

■ 6.1. *De facto statutory body (director)*

LLC members, in principle, are not obliged to care (they do not have a duty of care as executive officers) and are not liable for the debts of the company towards its creditors. However, LLC members may be the holder of the duty of care as a *de facto* statutory body (*de facto* director) under the Commercial Code.⁴⁴ *De facto* director under the Slovak Commercial Code refers to a person who effectively exercises the powers of a statutory body without being appointed to the office. Legal regulation of the *de facto* director is focused on facticity, on the basis of which the fact of management is the most important factor, not the legal status of the 'director'. Therefore, the *de facto* director can be anyone, not just a company member or shareholder.⁴⁵ The *de facto* director may be, for example, a senior employee, legal person, or state.⁴⁶ The *de facto* director has the same responsibility as a real member of the statutory body/real executive officer.

The *de facto* director has the same responsibility as a member of the statutory body/executive director. They are obliged to perform their activities with professional care (*duty of care*) and in accordance with the interests of the company and all its members (*duty of loyalty*). However, there is some disagreement on the possibility of delegating some specific duties of the statutory body/executive director (e.g., the obligation to duly

40 Section 11a Bankruptcy and Restructuring Act.

41 Mašurová, 2018, p. 173.

42 Section 74a Bankruptcy and Restructuring Act.

43 Section 13 of the Commercial Code.

44 Section 66 (7) of the Commercial Code.

45 Csach, 2018, p. 15.

46 Csach, 2018, p. 15.

submit a proposal for a bankruptcy proceeding to be commenced, or disqualification) to the de facto director. According to some, the de facto director will not carry all the duties of the executive directors;⁴⁷ according to some others, these special obligations are also transferred to the de facto director.⁴⁸

■ 6.2. The Slovak 'piercing of the corporate veil'

The possibility to pierce the corporate veil under Slovak law represents the responsibility of the controlling entity for the bankruptcy of the controlled entity.⁴⁹ Through this, responsibility has been explicitly incorporated a special tort: direct responsibility of the controlling entity towards the creditors of the controlled entity, in our legal order.⁵⁰ The controlled entity is, in principle, a company in which an entity has a majority on voting rights based on the share's ownership or an agreement. It is irrelevant whether the agreement is valid or invalid; factual control is sufficient.

The controlling entity is liable to the creditors of the controlled entity for damages caused by the bankruptcy of the controlled entity if it has contributed to this bankruptcy. The estimated amount of damages is the amount of the creditor's unsatisfied claim after the suspension of bankruptcy proceedings. The controlling entity may be liberated of its liability if it proves that it has acted with knowledge and in good faith in accordance with the interests of the controlled entity.

Before the adoption of the legal regulation of the controlling entity's responsibility for the bankruptcy of the controlled entity in our legal system, such liability could previously have been derived primarily from Section 424 of the Civil Code, which, however, imposes stricter conditions for the exercise of liability, especially contradiction with *boni mores* and at least indirect intent (*dolus eventualis*) on the pest side.⁵¹ However, we are not aware of any case of the application of this provision in connection with the liability of the controlled entity or the statutory body towards creditors in practice.

7. Decisional rules in the general meeting

The general meeting takes decisions through voting by the LLC members. The number of votes of each LLC member shall be determined by the proportion of the value of their investment contribution to the amount of the company's registered capital, unless the agreement of association determines a different number of votes.⁵² Thus, the agreement of association may regulate the number of votes attributable to every LLC member in a different manner. For example, each LLC member will have an equal number of votes,

47 Mašurová, 2018, p. 177.

48 Csach, 2018, p. 18.

49 Section 66a of the Commercial Code.

50 Mašurová, 2018, p. 172.

51 Mašurová, 2018, p. 172.

52 Section 127 (2) of the Commercial Code.

although the quantity of investment contributions will vary. The agreement of association may further stipulate that the number of votes of each LLC member will depend on the extent of repayment of his investment contribution and not on the amount of the investment contribution taken over.⁵³

A simple majority is required for a decision at the general meeting. However, the Commercial Code or an agreement of association may require a higher number of votes.⁵⁴ The Commercial Code determines the necessary (minimum) quorum for taking decisions at the General Meeting. The Commercial Code does not allow a lower limit to be set in the agreement of association.

The Commercial Code does not explicitly contain solutions regarding the case of two LLC members with equal participation (investment) in disagreement. However, the Commercial Code allows for the conclusion of an agreement between the LLC members in which they can agree to resolve such a situation, should it occur.⁵⁵ In some conflict situations, the Commercial Code contains a solution for voting at the general meeting. An LLC member may not exercise their voting right if the general meeting is deciding on their (a) non-monetary contribution, or (b) expulsion or the submission of a proposal for their expulsion from the company. These provisions are mandatory.

The minority of LLC members are protected through the general provision under Section 56a of the Commercial Code. This provision contains a general prohibition on the abuse of a shareholder/member's rights and majority and minority votes in a company, and also prohibits any conduct which is intended to place any of the company's shareholders/members at a disadvantage by means of malpractice.

However, the protection of the minority is also based on their ability to bring about a derivative claim on behalf of the company against the executive officer and another LLC member.⁵⁶ Also, each LLC member is entitled to file a petition with the

53 Patakyová, 2016, p. 552.

54 For example, the following decisions under Section 125 Subsection 1 always require approval by at least two-thirds of all votes of LLC members: paragraphs a) the approval of the conduct of persons acting in the name of the company before its incorporation; c) the approval of the articles of association and changes thereto, unless the law stipulates otherwise; and d) decisions on changing the agreement of association (Section 141), provided that such decisions are entrusted to the powers of the general meeting by the law or agreement of association; e) decisions on increasing or reducing the registered capital, and decisions on non-monetary contributions; and i) decisions on winding up the company or changing the legal form, if permitted by the agreement of association. The agreement of association may determine a higher number of votes required for the adoption of such decisions.

55 Section 66c of the Commercial Code.

56 Under Section 122 (3) of the Commercial Code, 'Acting in the company's name, each shareholder (LLC member) is entitled to exercise claims for damages or other claims that the company has towards an executive office, or to exercise claims for paying up an investment contribution by a shareholder (LLC member) that defaults in paying up the investment contribution or to exercise claims for the return of any benefit paid to a shareholder contrary to law. This shall not apply if the company has already begun exercising such claims. A person other than the shareholder (LLC member) who filed such action or a person entitled by such shareholder (LLC member) may not act in the name of the company in court proceedings.'

court to pronounce the decision of the general meeting invalid under the terms and conditions set by the Commercial Code.⁵⁷

8. Changes regarding the traditional concept of the LLC

In the context of the regulation of LLCs, there is a debate on the need for a ban on chaining and the restrictions of transfer of a majority interest concerning the need to present the tax administrator's consent. However, the last amendment to the Commercial Code⁵⁸ has made the legislation even more stringent, and the restriction does not only apply to tax debtors but also to persons who are listed as liable in the register of valid commenced enforcement proceedings. In addition, the last amendment to the Commercial Code, which will be effective from October 2020, introduces a restriction on the executive officer, who may be only a regular person not on the list mentioned above at the time of entry in the Commercial Register. The explanatory memorandum justifies this restriction by the need to ensure that the executive officer is able to perform his position economically and effectively. If such persons are included as liable in the register of valid commenced enforcement proceedings, they are not able to act economically and effectively for the company and to bind it to third parties. However, such a requirement does not apply to members of the board of directors of joint-stock companies or to statutory bodies of other forms of company.

Also discussed is the amount of the registered capital and which form of trading company is more suitable than the start-up. Since 2017, it has been possible to establish a new form of the capital company: a simple joint-stock company with a minimal capital requirement of 1 EUR. This form of company, inspired by French legislation, was incorporated as a form suitable for start-ups. Despite the option of creating a simple joint-stock company with 1 EUR, practice has not yet responded to this opportunity; as can be seen in Figure 2 (below), the LLC is still the most popular form of company with 5000 euros. A possible reason for this is that the simple joint-stock company format opens up the possibility of shareholder agreements to regulate relations between them,

57 Under Section 131 (1) of the Commercial Code 'Each shareholder, executive officer, liquidator, bankruptcy trustee, settlement administrator or member of the supervisory board may file a petition with the court to pronounce the decision of the general meeting invalid, if it is contrary to the law, agreement of association or articles of association. A former shareholder or executive officer shall also have such right if the decision of the general meeting relates to them. However, such right shall expire if the entitled person fails to exercise the right within three months from the adoption of the general meeting's decision, or if the general meeting was not duly convened, then from the date when such person could have learned of the decision.

(2) Upon the petition of a shareholder, the court may rule a general meeting's decision invalid only if such violation of the law, agreement of association or articles of association could limit the rights of the shareholder petitioning for such a ruling.'

58 An Amendment Nr. 390/2019 Z. z. to the Commercial Code.

which, however, can be rather discouraging because of its flexibility, unlike the pre-set legal rules of the LLC.

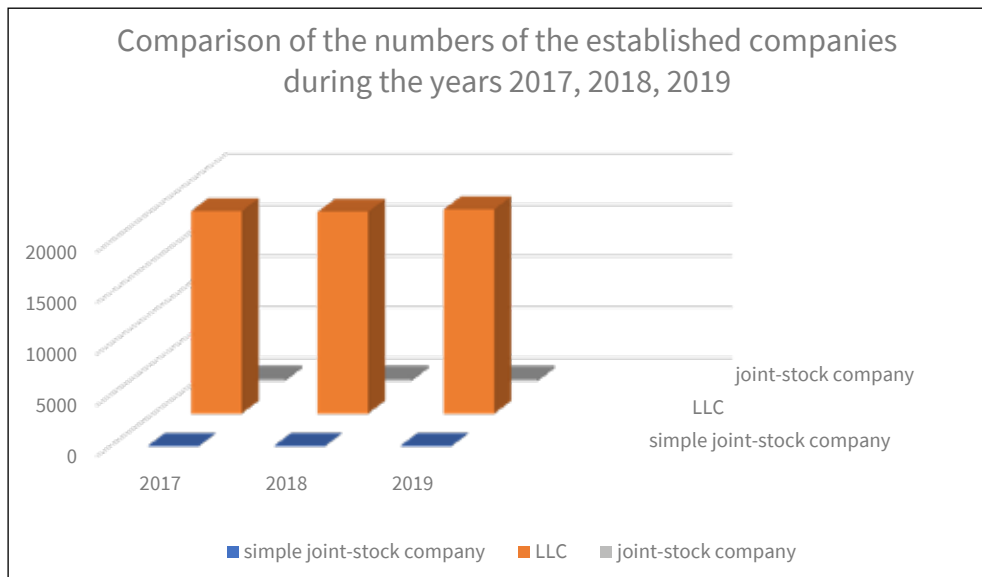


Figure 2. A comparison of the numbers of different types of companies established from 2017 to 2019 according to company type. LLCs are marked in red.⁵⁹

⁵⁹ The comparison was made on the basis of the data available at: <https://finstat.sk/analyzy/statistika-poctu-vzniknutych-a-zaniknutych-firiem> (Accessed: 24 February 2020).

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