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Research Article

Selected Problems of the Public Trading Company and Its Management in Context of the Slovak Commercial Law

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Abstract

The change of social establishment in 1989 brought the possibility of doing business. The basic problem has become the question of determining the appropriate legal form of business since the Commercial Code and the Trade Licensing Act have allowed several legal forms of business. In practice, it is a trade license and business in the form of business companies. A public company, which has its origins in German and Austrian commercial law, is generally applied in the area of family business. In the current Slovak conditions, according to the data from the business register, it literally "extinguishes" despite its advantages. Our aim is to provide a scientific and doctrinal interpretation of legislation, professional literature and jurisprudence, to give this type of Business Company a comprehensive view with an emphasis on selected problems of its management. The contribution is divided into several parts; our focus is primarily the issues of founding and establishing a public trading company, the rights and obligations of the partners, the problems in managing the company, the liability of the partners for the company's obligations as well as the death of one of the shareholders. As a result of the public company's examination, the hypothesis that the Public Trading Company is an unnecessary type of Business Company and a historical experience of commercial law will eventually be confirmed or rejected

Keywords: liability, management, partner, public company

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Introduction

Public company is basically a typical personal business company because it is very closely connected with the persons of business partners. Because of business risk, this may also results into negative consequences for the partners. Vrabko, Machajová, Reken et al. (2001) argues that, these possible negative impacts are the same for example in the case of entrepreneurship according to Trades Licensing Act. However, the difference is that the risk is shared by at least two partners. In the long run, capital corporate companies remain on the edge of interest of business law scientists, and little attention is paid to them as compared with capital companies, which is what the authors are trying to at least partially remove with this contribution. Using multiple scientific research methods like analyzes, descriptions, deductions, or comparisons, we will review the available literature, court case law, and legislation, and provide a response to the hypothesis that "A public company is an unnecessary type of business and a historical experience of business law."

According to Paragraph 76 of the Commercial Code, a public company is a commercial company, in which at least two persons operate under the same business name and guarantee for commitments of company jointly and not differentially by all their assets. From this definition, it is clear that the legislator excluded the possibility of establishing a public company by one person in a conceivable way. To establish a public company by one person is possible only in case of capital companies. Such companies are Limited Liability Company, a joint-stock company and a simple joint-stock company. According to Ovečková, Černejová, Lacová et al., (2012), the founders of the company can be physical entities, legal entities or state. In case a state is a partner, state is considered as legal entity by law. This type of the business company can be established only for the purpose of doing business, because any activity other than business activity is allowed only for a joint-stock company and limited liability company.

Some authors (Kubíček, Mamojka, Patakyová, 2008) argue that the Czechoslovak legislator has been inspired by the German and Austrian trade-related regulation when drafting the regulation of a public company. The legal orders of these states, and as well in Great Britain, recognize a special legal position of public companies, and according to them, they are neither physical entities, nor legal entities. Slovak legal order has a different and clear point of view in this question; whether public company will be considered as legal entity or not. According to Paragraph 18, section 2, letter b) of the Civil Code, legal entities are purposeful associations of assets, including all commercial companies.

From the legal definition of a public company based on deduction, we can determine the base conceptual features, which includes the participation of at least two persons, the common purpose of the business activity, the common business name of the company, personal and joint liability of the partners for the company's commitments, the participation of a partner that is not conditional by the deposit of a contribution to the company, the law which doesn't require the company's capital, the threat of the company's demise based on partner's withdrawal from the company, and the legal

entitlement of all company partners to act as its statutory authority. As we have already mentioned, unlike the capital commercial companies to which the Commercial Code pays extensive attention, it has satisfied itself with very short and hesitant legislation in personal commercial companies. For this reason, the authors are convinced that in order to eliminate possible future disputes between partners, it's necessary to modify the mutual rights and obligations of the partners in the social contract in the most detailed way that is possible.

Establishing the Company

Like all business companies, the public company is also established by a social contract, which needs to be in a written form. Unlike the joint-stock company or simple joint-stock company, the lawgiver dropped the draft a founding agreement in a special form, notably a notarial record of a legal act (Milošovičová, Nováčková, Wefers, 2017). However, he insists that the social contract has to be signed by all founders of the company, and the authenticity of their signatures must be officially verified. We emphasize that the persons authorized to verify the authenticity of the signatures are the notary offices. This is the so- legalization under § 58 of Act no. 323/1992 Coll. On Notaries and Notarial Activities (Notary Code), as amended. The notary or the employee authorized by him certify that the person whose signature has to be certified in his presence, signed the document by himself, or that the signature on the document has been acknowledged before him as his own. Other subjects authorized to perform the verification of the signature are district authorities and municipalities pursuant to Act no. 599/2001 of Collection of the laws on certification of documents and signatures on documents by district authorities and municipalities, as amended. According to Cirák, Števček, Ficová et al. (2008), the law permits the social contract of the founders to be signed by their representatives on the basis of a written mandate of attorney with the certified signatures of the principals that are attached to the social contract.

Article 78 (1) of the Commercial Code contains the mandatory terms of the social contract. The first essential element of a social contract is to determine the business name and registered office of the company. The business name is the name under which the entrepreneur, i.e. the company is registered in the business register and under which it operates. The business name of legal entities consists of the strain i.e. its own name and the addendum identifying the legal form i.e. a public company. In case of bankruptcy, restructuring or liquidation being declared, this fact must also be mentioned as an addendum identifying the legal form. In this regard, it is worth pointing out the opinion of the Supreme Court of the Slovak Republic, according to which, the fact that if a commercial company or cooperative is a party to the litigation, the form of its business is part of its business name. If this fact in the business name is missing, it should be added. Mentioned deficiency cannot be regarded as an unavoidable impediment to the proceedings but as an incomplete submission that the court may remove in accordance with the provisions of Section 43 of the Code of Civil Procedure (The Supreme Court of Slovak republic, 1997). If the business name contains the surname of at least one of the members, the addendum "et al." is sufficient; the surname of other members is no longer needed to mention.

The second essential element of the social contract is the determination of the partners, indicating the name and registered office of the legal person or the name and address of the physical person.

Please note that this brief identification of the founder, caused by the legislature's superficiality, may have fatal consequences for the layman-founder, consisting in refusing to register a public company with a court of the registry. Each legal entity must be identified in the founding document by its name, legal form, registered office, identification number if it has been appointed and a person authorized to act for it. Physical person i.e. a person is identified by his or her first name, last name, date of birth, the birth number if it was given and by residence or by citizenship details.

The last essential element of a social contract is the determination of the subject matter of the company's business, taking care to ensure that it is not a prohibited activity or a law reserved for the selected entity (Strážovská, 2004). The absence of a written form as well as some mandatory elements of the social contract would mean that the social contract as a legal act would be affected by a fault of absolute nullity. Absolute invalidity occurs directly by law (ex lege) and affects everyone so that everyone can reach it. The court considers the absolute nullity. In particular, it must be pointed out that the defect of absolute nullity of a legal act can be remedied neither by subsequent approval nor can be reconsidered (remedied) by an additional failure to act on the ground of invalidity (Varga, 2012).

Article 78 (2) of the Commercial Code imposes an obligation on the partners to file an application for the registration of the company in the Commercial Register within 90 days of the establishment of the company or from the delivery of a document proving a trade or other business licenses. When counting time, however, according to Gregušová and Varga (2014), you need to keep an eye on the individual terms, because 90 days do not mean three months. In case of non-observance of the period of 90 days for delivery of an application for registration of a company in the Commercial Register, the registry court would have to refuse to register the company in the Commercial Register and the shareholders would have to establish the company once more. The application for registration of the company in the Commercial Register is filed by all the partners, and their signature must also be officially verified as is the case with the social contract. The proposal is submitted on the prescribed form, the model of which is listed in the annex to the Decree of the Ministry of Justice of the Slovak Republic no. 25/2004 Coll. laying down models of forms for filing applications for entry in the Commercial Register and a list of documents. The annex to the proposal consists of additional documents as an authorization to perform business activities i.e. usually a trade license granted for a registered trading company, and a document certifying the authorization to use the designated property for the purposes of the company's approval. Last but not least, the proof of payment of the court fee for registration of the company in the Commercial Register is attached to the proposal. As can be seen from the commentary on the Civilian Out-of-Competition Order (Ficová, Števček, Bajánková et al. 2010), the role of the Registry is to examine whether the social contract contains all statutory requirements, assess the annexes to the proposal for registration of the company in the Commercial Register, and decide to register the company in the Commercial Register. Company registration in the Commercial Register has constitutive effects. It means that a business company acquires the right to hold rights and obligations only on the day of its incorporation in the business register, not of the date of its establishment. If the application for registration is incomplete or the court finds contradictions of certain facts, it shall decide to refuse to enter the entry in the Commercial

Register. Against the negative decision of the court, a remedy, which is called objections, is admissible. In detail, the entire court process is governed by Act No. 161/2015 Coll. Civilian Out-of-Competition Order as amended.

Rights and obligations of partners

The social contract establishing a public company has several meanings. In the first place, a public company is established by this contract. The second meaning is the internal regulation of legal relations within the company i.e. between the company and the partners as well as between the partners (Komjaty, 2016).

According to Gregušová and Varga (2014), the provisions of Sections 79 to 84 of the Commercial Code have dispositive character, which allows the partners to make use of this possibility and, according to the agreement, to modify the relationship with the social contract. In general, the consent of all partners is necessary to change it, except when the Commercial Code or the social contract does not provide different legislation. In the case of a larger number of partners, the need for a unanimous decision to change a social contract can cause significant problems, and the company will not be able to respond flexibly to certain changes. In that case, the court would have to decide what, in the conditions of the Slovak judiciary and the length of litigation, would not have to be in the interests of the company (Capandová, 2015). From the author's perspective, the solution is, in case of three or more partners, for example, an acceptable reduction in the quorum to accept a change in the social contract for 2/3 or 3/4 of the shareholders' votes.

A public company is a private business company in which the law does not require capital (i.ee, shareholders' contributions). However, there are some cases in which the members of the company still choose to place money or non-monetary capital in a company that becomes the property of the company pursuant to Section 80 (1) of the Commercial Code. However, it is not necessary for all partners to assume the obligation to provide a contribution to the company. The partner has to repay his contribution within the term specified in the social contract and, if that term is not specified, without undue delay after the establishment of the company. The concept without undue delay is very broadly interpretable and not defined by law. It should always be considered in relation to the other circumstances. A more appropriate solution is to determine the specific period of time when a partner is required to repay his contribution if he has already committed himself to that step because it is a company's judicially recoverable claim against a partner (Králik and Jakubovič, 2004). Unlike a Limited Liability Company, the amount of the deposits of the individual partners is not recorded in the reserve register, which the legislator justifies by the fact that the establishment of that company is not conditional on the contribution of the partners. After the partner has ceased to participate in a public company for the duration of the company, the partner is not entitled to a refund of his contribution because it has become the property of the company and will be taken into account in calculating its settlement amount (The Supreme Court of Slovak Republic, 2002).

The characteristic feature of a public company is that the Commercial Code, in the provision of Section 81 (1), confers to each partner the statutory right to the company's commercial management under the principles agreed between the partners. By analyzing Section 81 of the Commercial Code, it can be concluded that if the partners in the social contract entrust the company's management partly or wholly to one or more partners,

the other partners lose this right. It is true that an authorized partner is obliged to follow the decision of the partners by a majority vote unless the social contract determines otherwise; each partner has only one vote (Krejci, 1995). The fact that he too often uses the notion of a company's business leadership also denounces the superficiality of the legislature, but this notion does not in any way define what can cause considerable disputes between the partners. In our point of view, we can understand the decisions relating to the normal operation of the company i.e. company management on technical, personnel, financial, and other issues.

If a social agreement does not specify otherwise, a partner's mandate can be called off if the other partners agree. In case that the authorized partner violates his obligations in a material manner, the court shall remove the partners' credentials from the company's management at the suggestion of any of its members, even if the commission under the social contract is irrevocable. In this case, the term "substantial breach of duty" is already defined in Section 345 (2) of the Commercial Code, but the formulation is inappropriate and in practice almost inapplicable. Even in this case, it is more appropriate in our opinion to precisely specify this term in the social contract. Until the time when the partners agree to a new person authorized to conduct business, the provisions of Section 81 (1) of the Commercial Code apply, according to which all partners are entitled to the company's management. The partner responsible for the company's business management is obliged to inform other partners about all matters of the company upon request. Each partner is entitled to inspect all company documents. The statutory authority of a public company is each of the partners unless the social contract determines that they act together. If only a few members are entitled to act on behalf of the company in all its matters by a social contract, only those partners are its statutory authorities. In particular, laypeople do not realize that internal partnership agreements have no legal force against third parties (Peráček, Vojtech, Srebalová et al. (2017). In case that the partners decide to entrust the performance of the statutory authority to only one of them or a certain number, the agreement takes legal effect with respect to third parties up to the moment of entry in the commercial register.

By extension of the Commercial Code on the provision of Section 81a, each partner was entitled to a repayment of the deposit or the right to compensation for the loss or damage suffered by the company against a partner or partners. This option does not apply only if the company already applies these rights.

Distribution of profit and loss of company

Dispositive provision Paragraph 82 (1) to (3) of the Commercial Code governs the distribution of profits, provided that the social contract does not provide otherwise. Nováčková, Saxunová and Strážovská (2016) state that the profit to be distributed; is divided among the partners equally. The share of profit determined on the basis of the annual accounts is payable within three months of its approval. The loss itself, found by the annual financial statements, is borne by the partners equally. The social contract may modify the method of dividing up profit and incurring losses.

Entry, resp. joining a partner to company

The personal character of a public company is also reflected in the fact that the provision of Section 83 of the Commercial Code makes possible, on the basis of a change in the social contract, for

another partner to join the company or to leave the company in condition that at least two partners remain in the company. The question of amendment of the social contract is governed by the provision of Section 79 of the Commercial Code, which is already analyzed, while for its change, the mandatory written form is required. If the social contract does not require the consent of all members to change, obtaining the sufficient number of votes with the required action is obliged to sign the amendment of the social contract by those members who voted for it. Furthermore, the new wording of the social contract, which is based on the collection of letters in the Commercial Register, is also signed by those members who voted against or abstain (Škultéty, Machajová, Reken et al., 2000).

In this question, Dědič and Čech (2004) claim that, in § 83, the change of the partners of a public company under the contract is regulated. It follows from that provision that the extension of the number of partners in a company is possible only by changing the social contract, that is, with the consent of all the members of the company. The same principle applies to leaving the company but with the condition that there will be at least two partners in the company because, in a public company, there cannot be only one partner. It is a mandatory establishment so that any provisions of a social agreement that only some of the members of a company decide to join a partnership, or that only the consent of some suffice, albeit an over-majority of the partners, is sufficient to leave the company. However, this view cannot be accepted as it is inconsistent with the principle of disposition of internal regulation of the rights and obligations of public companies' partners.

Liability of a partner for the company's liabilities

The liability is, from the point of view of the theory of private law, the legal relationship between the creditor and a third party whose content is the guarantor's obligation i.e. person other than the debtor to satisfy the creditor's claim if the debtor does not satisfy it himself (Eliáš, Bejček, Marek et al., 1999). A public company as a legal entity with the full capacity to be the holder of rights and obligations is responsible for its obligations with all of its assets. These responsibilities do not create obligations for individual partners. Another situation arises if the company's property ratios change so that they are unable to repay their debts to the creditors. In this case, the joint liability of the shareholders arises directly by law, which means that the procedure provided for in § 303 et seq. of the Commercial Code, under which the creditor declares in writing that he will satisfy him if the debtor fails to fulfill a certain obligation, becomes the debtor's guarantor.

The partners guarantee the Company's obligations in solidarity with all its assets i.e. jointly and severally. According to Vojčík, Krajčo, Ľalík et al., (2010) in practice, the creditor may demand full fulfillment from any guarantor. The partner who has joined the company must count on the company's liability for the company's obligations before his accession. He may require from the other members to provide compensation for the provision of that service and to compensate for the related costs. In case of a participant's disappearance in a company during its term, he is responsible only for obligations that arose before the termination of his participation.

Cancellation and liquidation of the company

Section 68 of the Commercial Code regulates the grounds for the cancellation

of a commercial company in general. This provision is followed by the provision of Section 88 (1) of the Commercial Code, under which a public company is also abolished:

a) if the contract was concluded for an indefinite period, by a lump sum of at least six months before the end of the calendar year, unless the social agreement determines otherwise,
b) by the decision of a court, on the basis of a proposal by another partner, on the grounds that one of the members of the company significantly violates the social contract,
c) the death of one of the partners, except that the social contract allows the heir to become an heir who signs up for his participation and at least two other members remain in the company,
d) the dissolution of a legal person who is a partner,
e) the bankruptcy of the assets of one of the partners or the rejection of the petition for bankruptcy for lack of property,
f) by forfeiture or limitation of eligibility for the legal acts of one of the partners,
g) delivery of the execution order to the partner's share,
h) for other reasons specified in the social contract.

Under Section 90 of the Commercial Code, "if one of the partners violates the social contract in a substantive manner, the court may, on the proposal of another partner, cancel the company." According to Srebalová (2008), in consideration of the over-general formulation of the law, we emphasize the need for a social contract or company statutes to clearly define this concept. However, even if a substantive breach of contract is really proven, it is not the duty of the court to cancel the company, since the legislator did not use the imperative "must" but the term "may".

Compensation of Partners

When company is cancelled by liquidation, the partners are entitled to a share in the liquidation balance, which is distributed among the partners first, up to the amount of their paid deposits (Bohdalová and Greguš, 2012). The remainder of the liquidation balance is shared between the partners equal to the share. However, if the liquidation balance is insufficient to repay the paid-up deposits, the partners are involved in proportion to their amount, and the social contract may adjust the distribution of the liquidation balance differently.

Conclusion

In Slovak society, the opinion is that a public company as a legal form of business "survives", respectively, it only survives from past times when its founding was mainly tax benefits. In the past, for example, in the case of a joint-stock company, there was a dividend tax, which in practice meant double taxation. Firstly, the tax was paid at company level and then, after the payment of the profit share i.e. dividends also at the shareholder level. In the case of a public company, it was not possible to talk about dividend payments because it was not a joint-stock company. This was often the main reason for doing business in this form. We reject the hypothesis that this is an unnecessary type of Business Company and a historical experience of business law. As a personal type of business company, however, there are also some shortcomings, such as the most criticized unlimited liability of the partners for the company's obligations, the relatively low possibility of obtaining foreign sources of financing from banks, the greater the number of partners in a certain risk of conflicts, as by law are all

also statutory representatives, or that leaving the partner of a company may in some cases also mean the extinction of society. From our point of view, the mentioned risks can be eliminated by a rigorous correction of mutual relations in the social contract as well as the honesty of business.

This type of Business Company has its undisputed benefits. A public company is relatively easy and simple to establish, it does not have to make a shared capital, it can only have two partners and each partner is legally a statutory body of the company. The advantage of a public company has also revived a tax license that does not apply to this legal form of business.

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