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# **THE SYSTEM OF LEGAL PERSONS AND THE RECODIFICATION OF SLOVAK PRIVATE LAW**

## **Introduction**

The aim of the paper is to present the current state of the legal regulation of legal entities in Slovakia, the reasons why it is considered inappropriate as well as to present the proposals for recodification, which are currently being presented for discussion and which might be confronted with the ongoing discussions in Ukraine. In doing so, the author will focus on the new distinction between forms of legal persons and the systematic links between the various forms of legal persons.

### **1. The current state of the Slovak law regulating legal persons**

The fundamental problem with the current legal regime of legal persons is that it is essentially non-existent. Apart from the relatively comprehensive regulation of company law in the Commercial Code [1], the various forms of private law legal persons are regulated casuistically, in separate legislation focusing on certain aspects of their functioning only, without clear links between these forms. The Civil Code [2] comprises only a very limited set of provisions on legal persons and the regulation of interest associations of legal persons. Civil associations and their organisational units, hunting associations, interest associations of legal persons, associations of flat owners, land communities, non-profit organisations providing public services, associations of participants in land improvements, foundations and non-investment funds are all in more or less detail regulated in separate acts.

Currently, there are no systemic links between these different forms of legal persons, and they operate side by side. The legal regulation of the functioning of legal persons is thereby not only multiplied but also, due to its fragmented nature, regulates a different range of issues concerning the organisation and functioning of different forms of legal persons.

The systemic deficiency of the legal regulation of legal persons is dealt with differently in law and in practice. Since the most detailed legal regulation of private law legal persons is contained in the Commercial Code, it is not surprising that the Civil Code [2, § 20a] refers to the Commercial Code,

extending the regulation of liquidation of companies to all private law legal persons, as well as the legal regulation of civil associations in relation to their dissolution and winding up [3, § 13a] The role of corporate law is not limited to statutory reference norms, extending the application of the Commercial Code beyond its scope. The case law adopts the ideas or allows the application of the legal regulation of the Commercial Code directly to other forms of private law legal entities than commercial companies [4]. Obviously not all concepts of company law are suitable for adoption into the general regulation of legal persons. The doctrine of legal persons in civil law is underdeveloped in civil law doctrine – for instance, one of the two leading coursebooks on Civil law does not include any explanation on civil associations, although it does comprise detailed explanations on foundations, non-profit organisations or non-investment funds [5, p. 155 – 180]. Surprisingly, it is being dealt with much more detail in the administrative law doctrine [6].

Due to the absence of a general regulation of legal persons, several their legal forms are in a grey area of legal regulation with a high degree of legal uncertainty. Also, because of the minimal legal regulation of some legal persons (typically civil associations under a special law), legal persons are often used to conduct business in a less transparent manner.

Therefore, we consider the following to be the main problems of the current regulation of legal entities in Slovakia:

- Absence of regulation of legal persons of public law and unclear applicability of regulation of legal persons of private law to public law corporations.
- Unclear mandatory nature of the legal regulation.
- Chaotic legal regulation of individual types of legal persons, unclear links between special legal regulations, absence of general regulation of legal persons.
- A rigid perception of some legal persons of private law, foremost foundations, not allowing private foundations.
- Absence of private law implications of the fact that a private law legal person, other than a commercial company, carries on business.
- Lack of transparency of most private law legal persons.
- Unclear legal status of the bodies of the legal person (legal regime, obligations, liability towards the legal person, its members, or its creditors).
- The extent of the powers of a member of the statutory body to act on behalf of the legal person and the effects of internal limitations or the division of competences between the different bodies of the legal person.

- No regulation on transfers with related parties and lack of creditor protection.
- Ineffective assurance of the legal person's functionality during the vacancy of its bodies or when the bodies are passive or untraceable and difficulties in appointing a guardian for the legal person.
- Lack of judicial protection of a member of a legal person, control of decisions of a legal person.

## 2. The working draft regulation of legal persons in Slovakia

The result of the recodification should be a systematic regulation of private law legal persons (with a partial overlap into the regulation of public law legal persons) functioning as *lex generalis* for all types of private law legal persons. At the same time, legal persons can be systematically arranged and the relationship between *lex generalis* and *lex specialis* can be used also in further stages of systematic continuity of the legislature (for example, commercial companies are a subset of associations of persons) [7, p. 8 – 40].

Many European civil codes do not contain a general regulation of legal persons, which is mainly a consequence of the state of legal doctrine in the 19th century. The post-communist states of Central Europe adopted shortly after the fall of communist regimes special acts on civil associations, thereby limiting the natural evolution of a general legal environment for legal persons beyond their specific legal forms. Unless a general recodification abolished the special legislation, these acts are still in force [8, p. 486 – 507]. At the same time, academic discourse is shifting in favour of generalisations [9, p. 781 – 797], and this is reflected in more recent civil codes, including the recodification in Czechia [10, p. 111 – 120], Hungary [11, p. 6 – 8] or Estonia.

We consider the creation of the general part of legal persons as a necessary and appropriate consequence of the systematisation of law. The general part promotes systematic links between the various legal forms and the search for a consistent solution. It encourages thinking in context and helps to avoid unclear policy distinctions that cannot otherwise be completely avoided in casuistic legislation. The creation of a general legal regulation for all legal persons, or a generic legal regulation for certain types of legal persons, should also be combined with the clarification of the legal regulation in the special laws where specific changes are also appropriate.

The creation of a general law on legal persons is important for another reason also. The various legal forms of private law legal persons were created with a certain *Leitbild* in mind. A certain social, legislative, economic and political background. Thus, the societies of the nineteenth and early twentieth centuries originated as cultivation or voluntary associations, and the state

sought to impede their political ambitions. After the social changes after 1989, civil associations acted as a manifestation of a great exhale of freedom, with a significant retreat of the state from regulating them. This is clearly visible in the various acts on civil associations throughout central Europe that were not meant to be general regulations for legal persons of private law. In the same way, foundations were created with strong public benefit overtones, cooperatives with a strong solidarity context. Joint-stock companies emerged as a form of managing the large investments of a burgeoning capitalism. However, these fundamental mindsets are gradually blurring, and it is no longer possible to say that a particular purpose or object of activity, or its economic difficulty or risk, leads to the inevitable choice of a particular legal form of legal entity. Civil associations range from beautification associations in certain municipalities, ad hoc associations for the reconstruction of a certain monument to various means for anonymous business activities or sports clubs with multimillion-dollar revenues. Foundations (in Western Europe) act as holders of shares in large corporate structures, joint stock companies and limited liability companies are used for very similar business purposes and even for public benefit activities. The choice of a particular legal form is thereby influenced rather by specific tax rules, rules of their administration and regulation of the transfer of the property results of their activity between the members of the legal entity than by the legal regulation of the particular legal form of the entity. The law should respond to this moment by offering the broadest possible and value-consistent framework for the functioning of legal persons of all legal forms.

The general construction of the proposal for the regulation of legal persons should be based on the following premises at least:

1. Given the experience that case law has rarely supplemented the legal text or produced an appropriate solution, a rational use of the regulatory approach is necessary, even if it is to be merely non-mandatory or default rules. This is because *ex ante* legal certainty must be ensured as far as possible not waiting until the case-law on a particular issue has settled.

2. Clear definition of the mandatory rules expanding the scope for the autonomous creation of the structure of a legal person while maintaining the protection of its creditors.

3. Preservation of the concept of *numerus clausus* of types of legal entities.

4. Adoption of the elaborated models of commercial companies into the general regulation of private law legal persons, where possible and appropriate.

5. More detailed regulation of the duties of the members of the bodies of private-law legal persons already in the general part of the law [12].

6. The possibility of applying certain rules of the Civil Code also to legal persons of public law.

7. Hand in hand with the new regulation of legal persons special legal regulations governing certain types of legal persons governed by private law should be abolished (Act on civil associations, Act on foundations, Act on non-investment funds or the Act on non-profit organisations and special regulation on associations of owner, hunting associations etc.).

Nonetheless, the general regulation of legal persons will still require further specific legislation. Political parties and movements, trade unions, companies, and cooperatives, including European forms, should be regulated in separate laws.

### **3. Two approaches to the system of legal persons in the new Slovak private law**

There are several possible approaches to the systematic organisation of legal persons in the framework of recodification. Two possible legislative approaches are being discussed.

First, a generalised sets of rules for all forms of legal persons (or their theoretical categories) could be created, which will be complemented by specific legislation for actual legal forms. The legislation thus works with theoretical classification categories (legal person - association of persons - commercial companies - limited companies - limited liability companies). In this approach, the various legal forms of specific legal persons stand side by side and are linked to the abstract legal regulation of the general category. This is currently the case in Slovak company law, where the general regulation of companies does not constitute a specific form of legal person, but only a generalisation of the legal regulation applicable to all (or most) legal forms of a company. This approach has been followed by the Czech Civil Code creating more abstract categories.

Secondly, the recodification could rearrange the systematic links within legal persons while not creating any abstract new categories. Thus, some of the forms of legal persons will not only be separate legal forms but will also be a general arrangement to other forms of legal persons. A commercial company shall thereby be not just a parallel legal form to a civil association, but a subcategory of it. Instead of a general regulation of an abstract category (corporation, association of persons), it will allow for the creation of a regulation of a particular legal form of a legal person as a *lex generalis*.

Both approaches are possible and have many pros and cons. We prefer the second approach for several reasons. The aim is to work with as few theoretical classification categories as possible and to build certain legal forms of legal persons as basic (associations and foundations as *lex generalis* legal forms), to which other specific legal forms will be related. This will reduce the need for an analogous application of different type specific regulation. Instead of an analogy between legal forms of legal person, a link between *lex generalis* and *lex specialis* will be established. At the same time, however, as many common features as possible are selected before the bracket.

Two fundamental legal forms shall be regulated: association of persons (civil association) and foundations.

#### **4. Proposed categories of legal persons of private law for the recodified Slovak law**

The general part of the legal regulation of legal persons shall focus on the legal capacity of legal person, its formation and dissolution, the protection of its name, as well as the status and obligations of its corporate bodies and their members. Besides the general part, two fundamental legal forms shall be regulated: associations of persons (civil associations) and foundations.

##### **4.1. Associations of persons (civil associations)**

The categorisation of a legal person as an association of persons is of fundamental doctrinal importance, as it defines the basic structure of a legal person – there are other legal entities (partners or members) from who the legal person is separated by its personality, but who have a fundamental influence on its functioning and duration. And in the event of the dissolution of the legal entity, they are entitled to a share of the liquidation balance (as residual owners). Most of the current legal forms of private law legal persons are associations of persons (all companies, cooperatives, civic associations, interest associations of legal persons, land associations, homeowners' associations, etc.). Civil associations are not harmonised on European level; therefore, it is possible to draft a regulation in the national context only. In 1991, the European Commission drafted a proposal for a European association statute, which was constructed corporately, even to the point of being akin to a public limited company. However, work on European legislation ceased in 2005, although the European Parliament has continued to call for the need to adopt a unified regulation of both associations and the European foundation.

The civil association is proposed as being both, a specific type of legal person and a general type of legal arrangement for all associations of persons also. The new civil association shall replace not only the interest association of legal persons regulated in the current Civil Code but also the civil association

according to the separate Act and will act also as a *lex generalis* for all above mentioned legal persons of a corporate type.

The legislation should focus on the legal status of the members of the legal person, their rights and duties, but also on the decisions of the bodies and their judicial review, since it is the members of the legal person who have a fundamental interest in the judicial review of the bodies of the legal person. Thereby, modernisation of the rules is envisaged as well. For example, regulation on proxy, electronic realisation of rights of members is to be introduced

#### **4.2. Foundations**

A substantial change shall be proposed in the legal treatment of foundations. The current Slovak legislation on foundations, albeit quite recent, is one of the most rigid in Europe and is built on the idea of a foundation as a special-purpose pool of assets for public benefit purpose only [13]. The adoption of the concept of a private foundation, inspired by modern Liechtenstein legislation, is intended to remedy this shortcoming. As is the case with civil associations, pooling of property pools are also not unified at European level. A proposal for regulations on the Statute for a European Foundation was submitted in 2012 but was withdrawn in 2014.

It is proposed to introduce, as a *lex generalis*, a new type of private foundation, which should fulfil the role of a special-purpose pooling of assets for the benefit of a family or other purpose which would not be subject to inheritance settlement. The public benefit foundation would remain regulated separately, as a *lex specialis*. In general, the legal regulation of foundations could replace a number of other legal persons of the foundation type, in fact not only non-investment funds but also non-profit organisations. However, both remain in the new draft for the time being.

During previous meetings of the Recodification Commission, it was concluded that the legal regulation of trusts, fiduciary funds or similar substantive constructs could cause significant application difficulties in the Slovak legal environment [14], [15, p. 71 et subs.], [16, p. 86 et subs.]. Taking into account the voices in legal scholarship, the proposal adopts the recent substantial amendment of the Liechtenstein law on foundations (2008) and the polish proposal of the family foundation, including the model of distinction between private and public (charitable) foundations. The foreign models must obviously be adapted to the environment of the national law as it does never function as well as in the environment it was borrowed from [17, p. 14]. It is the private foundation, as a special purpose trust of assets intended to support a family, family members or another private permitted interest, that should

represent at least to some extent a functional substitute for the institution of a trust, which is not in the present state of the work the content of the proposed regulation. On the contrary, the regulation of public benefit foundations will require the preparation of specific legislation that will incorporate the tax and other public law specificities of legal persons established to pursue a public benefit purpose. Non-investment funds should be transformed into endowment funds.

### Conclusion

The recodification of legal entities in Slovakia is not yet concluded. The working drafts and the current discussions present fundamental departures from the current model of various parallel legal forms of legal entities. A systematic approach and a high degree of generalisation are advocated. Alongside this, it is proposed to reduce the number of different forms of legal persons and their specific legal arrangements, but also to liberalise the forms of legal persons and to extend the dispositive (non-mandatory) law.

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#### **Kristián Csach. The System of Legal Persons and the Recodification of Slovak Private Law**

The article describes the shortcomings of the current system of legal entities in Slovak private law and the proposals for recodification, which are being presented for discussion right now.

In the current situation, apart from the relatively comprehensive regulation of company law in the Commercial Code, other forms of legal persons of private law are regulated casuistically, in separate legislation focusing on certain aspects of their functioning only, without clear links between these forms. The Civil Code comprises only a very limited set of general provisions on legal persons.

The recodification drafts and the current discussions present fundamental departures from the current model of various parallel legal forms of legal entities. A systematic approach and a high degree of generalisation are advocated with two basic legal forms of legal entities (associations and foundations). Alongside this, it is proposed to reduce the number of different forms of legal persons and their specific

legal arrangements, but also to liberalise the forms of legal persons and to extend the dispositive (non-mandatory) law.

**Keywords:** system of legal persons, recodification, Slovak law