

MANDATORY AND DEFAULT REGULATION IN POLISH COMPANY LAW / Bartłomiej Gliniecki

dr hab. Bartłomiej Gliniecki, prof. UG
University of Gdańsk, Faculty
of Law and Administration,
Chair of Commercial Law;
ul. Jana Bazyńskiego 6,
80-309 Gdańsk, Poland;
b.gliniecki@prawo.ug.edu.pl
ORCID: 0000-0003-0231-4903

Abstract: *Company law regulations provide opportunity for individual shaping of some of companies and partnerships rules of operation. Proper determination of those regulations which may be modified by adopting different rules in articles of association (company statutes, partnership agreements) is important as far as legal safety of corporate regulations is concerned. Abusing or misunderstanding of company law regulations may lead to invalidity of contractual arrangements that would infringe mandatory regulation of company law. The article provides a general view on the principle of freedom of shaping company articles of association in the Polish company law as well as the ways of distinguishing between mandatory, semi-mandatory and default rules in the Polish company law. Apart from general remarks and indications helpful in understanding the Polish law, it also provides specific examples of company regulations in Poland and references to company rules of law in other European countries.*

Key words: *company law, Poland, freedom, default rules, mandatory rules, semi-mandatory rules, articles of association, company statutes, transferring shares*

Suggested citation:

Gliniecki, B. (2020). Mandatory and Default Rules in Polish Company Law. *Bratislava Law Review*, 4(1), 71-78.
<https://doi.org/10.46282/blr.2020.4.1.164>

Submitted: 6 March 2020
Accepted: 1 June 2020
Published: 31 August 2020

1. INTRODUCTION

One of the major dogmas of company law, which is true in various legal systems across Europe and beyond, is that operation of companies is partly based on the common regime (domestic regulations of company law), however, some rules of operation of companies may be shaped individually and determined by company statutes (articles of association). This would apply also to other types of corporations such as partnerships, cooperatives or societies. The abovementioned principle originates from the contractual freedom constituted by civil law and may be further derived from the concept of a free-market economy. It has been implemented into company law by grouping its norms (rules) into mandatory and default categories. The latter are recognised as standard and adjustable regulations that can be effectively amended in individual cases by contracting parties – founders or shareholders of the companies. Thus, default rules provide flexibility and adaptation of company operation rules to business expectations. This can be used to deliver autonomous solutions that may result in higher effectiveness of an organisation constituted by a company.

The Polish company law, which is historically based mainly on the German company law, as well as the company regulations in other CEE countries, has fully incorporated the opportunity to modify some of the out-of-the-box rules governing companies, mainly those applied to internal relations. This paper is intended to provide general perception of the mandatory and default rules in the company law of Poland, indicating some imperfections of the current corporate regulation in the field. The final conclusions will include suggestions that would make it easier to distinguish between default and mandatory rules in the company law.

2. CONTRACTUAL FREEDOM IN COMPANY LAW

The Polish company law¹ provides regulations applied to formation, governance, winding-up and transformation of 4 types of companies² and 4 types of partnerships, as well as the rights and obligations of their shareholders (partners). Their legal concept is based on the civil law regulations, especially implementing contractual freedom as a general principle. In the company law, it has been projected to the opportunity to shape company statutes (articles of association, partnership agreement) according to the expectations of the founders, however with some limitations described hereinafter.

The Polish CCC does not provide any explicit rule, applicable to all types of commercial companies that would allow to divide company law norms strictly into mandatory and default ones. However, that division, as well as possibility to dissent from some rules governing companies which have been provided by the CCC, is widely acknowledged and has not been contested. The core of this concept is represented by art. 2 of the CCC, which explicates subsidiary role of the Civil Code in the matters which have not been strictly covered by the CCC. As there is no general regulation of the level of individual adjustments than can be made to company statutes, art. 2 of the CCC allows using the principle of contractual freedom expressed by art. 353¹ of the Civil Code. It provides that contracting parties may shape their contracts (deals) according to their free will, as long as its contents or aims are not contrary to its nature, the acts of law or the rules of social coexistence. Thus founders, shareholders or partners may benefit from general competence to influence corporate rules of operation, which however cannot be recognised as unlimited.

Moreover, the wording of some provisions of the CCC provides clearly that rules expressed by them may be amended contractually.³ However, this cannot be assumed as a reliable guidance in distinguishing between mandatory and default rules of the Polish company law, as there are more rules which are recognised as default, even though they have not been explicitly marked as adjustable in such way.

Considering the above, the character of the company law regulations has to be clarified mostly using legal textual interpretation techniques. It is mostly done by analysing the role and aim of certain regulations in question, their placement and relation to other rules of the company law and possible impact on third-parties and/or company law principles in case of recognising a certain regulation to be mandatory or default. The practical determination is made by jurisprudence and doctrine, and focuses mostly on specific cases, often taken to court by disputing shareholders.

¹ The act Commercial Companies Code of 15 September 2000, hereinafter "CCC".

² Including *Societas Europaea* and a simplified joint-stock company with no share capital (*prosta spółka akcyjna*, art. 301-300 CCC).

³ By meaning of a commonly used phrase: „[...]unless company statutes provides otherwise”, or a phrase with a similar wording. Less than 10% of the CCC provisions include such a phrase.

3. DIFFERENT LEVEL OF FREEDOM IN DETERMINING PARTNERSHIPS' AND COMPANIES' RULES OF OPERATION

From the wording of certain provisions of the CCC it can be noticed that there is a notable difference between partnerships and companies when it comes to the scope of statutory freedom provided to their partners or shareholders. The partners are more free to arrange internal rules of operation of their partnership in general compared to the shareholders in companies.

The first reason for such observation is the content of art. 37 of the CCC, which provides general rules applicable to all internal affairs in a general partnership, but is also applicable to other types of partnerships, including limited liability partnership (or professional partnership)⁴ and limited partnership.⁵ The abovementioned regulation states that provisions of Chapter 3 titled „Internal affairs in a general partnership” (art. 38-57 CCC) shall be applied unless the partnership agreement states otherwise. Hence, it gives clear information on the default character of the forthcoming rules, however art. 37 § 2 CCC states additionally that a partnership agreement may not limit nor exclude rights expressed by art. 38 CCC – the right to manage the affairs of the partnership by at least one of the partners and the right of every partner to personally inquire about the state of the assets and business of the partnership and view the books and documents of the partnership (the right to get information on the partnership). In the regulation referring to companies there is no such solution that would explicitly declare default or mandatory character of a certain group of provisions.

Secondly, the potential impact of contractual modifications on corporate values which are protected by the CCC regulation is less visible in partnerships. Especially, there are no specific regulations that would protect minority shareholders (or partners), with exception of the guarantees of the essential rights provided to all partners such as the right to participate in gains, the right to get information on the partnership or the right to withdraw from the partnership. Also, because of unquestionable personal liability of partners for partnership debts, affecting creditors by individual arrangements made in a partnership agreement is less likely.

In companies, the principle of contractual (statutory) freedom has to be confronted with core values of the corporate law, which include corporate nature of companies, mechanisms ensuring effective management and protection against abusing a company by managers (rules of corporate governance), protection of creditors, safety and reliance of business operations and trust of third parties, as well as protection of minority shareholders. If one of those values were affected by a regulation introduced into company statutes, that would diverge from the rules expressed by the CCC, most likely it would be recognised as violating the mandatory rule, thus null and void, even though the respective provision of the CCC would not state clearly whether it is default or mandatory.

In a joint-stock company,⁶ the freedom of setting company statutes is further limited by the rule expressed in art. 304 § 3 CCC. It follows the *Grundsatz der Satzungsstrenge* concept, featured also in art. 23 § 5 of German *Aktiengesetz*.⁷ Its main

⁴ Polish: *Spółka partnerska*, art. 86-101 CCC.

⁵ Polish: *Spółka komandytowa*, art. 102-124 CCC.

⁶ Polish: *Spółka akcyjna*, art. 301-490 CCC.

⁷ *„Die Satzung kann von den Vorschriften dieses Gesetzes nur abweichen, wenn es ausdrücklich zugelassen ist. Ergänzende Bestimmungen der Satzung sind zulässig, es sei denn, dass dieses Gesetz eine abschließende*

aim is to provide solid and stable rules of operation of joint-stock companies in most of their internal and external affairs, thus protecting creditors and shareholders (Sołtysiński & Moskwa, 2016, p. 9). This approach has been criticised over recent decades as too limited and opposed to the less intrusive American regulation, providing more space for individual arrangements in company statutes. However, companies' frauds and economic slowdowns (i.e. crisis started in 2008 in the USA) proved weaknesses and possible poor consequences caused by abuse of statutory freedom and mostly default corporate regulation (Sołtysiński & Moskwa, 2016, pp. 10–23). Hence, in case of a joint-stock company, the default character of the CCC regulation may not be deemed nor interpreted, unless a provision explicitly states that company statutes may provide a different regulation (Sołtysiński & Moskwa, 2016, pp. 9–10).⁸ Therefore, it may be said that those regulations have rather mandatory character and the statutory freedom faces much more limitations here than in other types of companies and partnerships.

4. MANDATORY, SEMI-MANDATORY AND DEFAULT RULES IN POLISH COMPANY LAW

The company law rules that are essential for determining a legal framework of certain types of companies and partnerships, their founding process as well as regulations possibly affecting third parties, especially creditors, are recognised as mandatory, even though the wording of the rules often does not state clearly whether its sense could be modified by the company statutes or not. Rarely, the provisions of the CCC provide mandatory character of the regulation explicitly, usually stating that a certain wording of the company statutes (contrary to the wording of the rule) would be null and void.⁹

Usually, those rules whose main role is to provide protection to third parties, thus securing trust and reliability of business transactions, or provide minimum guarantees to shareholders, especially protecting minor shareholders may be considered as mandatory.¹⁰ In particular, this would refer to the company law regulations that address company founding and registration process, liability for company debts,¹¹ winding-up and company liquidation, basic corporate governance regulation protecting against the conflict of interests,¹² appeals against shareholders' resolutions, M&As, transformation

Regelung enthält. (The articles may contain different provisions from the provisions of this Act only if this Act explicitly so permits. The articles may contain additional provisions, except as to matters that are conclusively dealt with in this Act.)

⁸ An explicit authorisation to provide a different regulation in the company statutes has been expressed e. g. in art. 340 § 2 and 347 § 3 CCC.

⁹ E. g. art. 38 § 2, art. 60 § 2, art. 62 § 2, art. 63 § 3, art. 73 § 3, art. 108 § 2, art. 443 § 1 CCC.

¹⁰ Art. 177 CCC (a shareholder's duty to contribute with supplementary payments raised accordingly to shareholders' resolution) has been recognised as mandatory in the judgment of the Court of Appeal in Warsaw, I ACa 68/11 (3 October 2013). Art. 247 § 2 CCC (deployment of secret voting in election and revoking of company officers) has been recognised as mandatory in the judgments of the Court of Appeal in Gdańsk, I ACa 714/14 (13 March 2015); and the Court of Appeal in Szczecin, I ACa 234/13 (6 June 2013).

¹¹ Art. 299 CCC (personal liability of management board members for unpaid debts of a limited company) has been recognised as mandatory in the judgment of the Supreme Court, II CSK 446/13 (15 May 2014); the judgement of the Supreme Court, III CSK 46/10 (9 December 2010); and the judgement of the Court of Appeal in Cracow, I AGa 137/18 (14 June 2018).

¹² Art. 209 CCC (duty of management board members to refrain from making decisions on behalf of the company that could be biased by interfering with their personal interest or interests of persons related with them) has been recognised as mandatory in the judgment of the Court of Appeal in Cracow, I ACa 1413/15 (12 January 2016); art. 210 CCC (rules of making representations by the company in relations with member

and split processes, as well as the rules of company representation (Tarska, 2012, pp. 93–94). Obviously, one of the basic statutory freedom limitations is represented by numerous *clausus* principle of the CCC (art. 1) which does not allow to establish any other type of a partnership or a company which has not been foreseen by the acts of law (Tarska, 2012, pp. 96–97).

On the contrary, the CCC regulation that would affect mostly internal affairs are deemed as default, as far as their modification would not infringe the core rights of shareholders (i.e. the right to dividend, the right to sell shares), or would not lead to their unequal treatment.¹³ The examples of the corporate areas that are governed mostly by default rules of the CCC include the process of making decisions within a company (shareholders' resolutions, scope of freedom in making business decisions provided to a management board etc.), transferring shares, or raising share capital of a company.

It has been acknowledged that in the Polish company law, apart from mandatory and default rules, some regulations have a semi-mandatory character (Tarska, 2012, pp. 96–97). They are deemed to set out a minimum standard that must be obeyed in order to provide an effect assumed by introducing a particular regulation. Thus, they may be amended by company statutes, however, in one direction only: a statutory regulation may not deliver any worse resolution compared to the one provided by a semi-mandatory CCC regulation. They often provide protection e. g. to minor shareholders, that is why the foreseen level of protection may only be increased.

The semi-mandatory rules are usually not clearly marked in the CCC as well. Their character can be usually ascertained as semi-mandatory, if there are no strict premises that would consider the rule as mandatory, however allowing its free modification would lead to infringement of at least one of the core values of the company law. As an example, art. 238 § 1 CCC provides that invitations (notices) concerning a general meeting in a limited liability company shall be sent out to shareholders 2 weeks in advance.¹⁴ Although the regulation does not state its character clearly, it is widely considered that the period may be extended (e. g. to 30 days), however not shortened (e. g. to 7 days) by the articles of association. Thus, the rule shall be recognised as semi-mandatory (see, e. g. Kidyba, 2005, p. 674; Namitkiewitz, 1994, p. 190; Pabis, 2018; Sołtysiński, Szajkowski, Szumański, Tarska, & Herbet, 2014).

This, however, is not the only one and true understanding of the regulation in question. Some opinions consider it as mandatory or "generally mandatory".¹⁵ An example of art. 238 gives a great view on the problem of understanding the character of certain norms of the CCC. While it is doubtless to consider this regulation as rather mandatory than only default, there are disputes related to its elements that could be – under some circumstances – effectively amended by an agreement (company statutes). The regulation itself does not give any clues on its character, making it troublesome to apply it correctly and safely.

of the management board) has been recognised as mandatory in the judgment of the Supreme Court, I CSK 122/16 (3 October 2019); the judgment of the Supreme Court, II PK 124/13 (29 January 2014); the judgement of the Court of Appeal in Łódź, III AUa 707/13 (10 February 2014); and the judgement of the Court of Appeal in Lublin, III AUa 833/12 (6 November 2012).

¹³ Unequal treatment of shareholders in companies is generally prohibited by art. 20 CCC.

¹⁴ Art. 238 § 1 CCC: „*The general meeting shall be convened by means of registered letters or courier mail, sent out at least two weeks prior to the date of the general meeting. Instead of a registered letter or courier mail, the notice may be sent to the shareholder by electronic mail if the shareholder has earlier agreed thereto in writing and provided the address to which the notice should be sent.*”

¹⁵ Judgement of the Court of Appeal in Warsaw, VII AGa 220/18 (15 March 2018).

5. EXAMPLE: LIMITATIONS OF TRANSFERRING AND ENCUMBERING SHARES IN A LIMITED LIABILITY COMPANY

The general presentation of mandatory and default rules in the Polish company law described above has showed that i) there are no general rules or principles on the character of company law regulations that would be applicable universally, ii) the character of certain company law regulations is determined by jurisprudence or doctrine, typically by means of legal interpretation, iii) practical determination of statutory freedom limitations may be tough and lead to ambiguous conclusions, especially in companies other than a joint-stock company.

The operation of the abovementioned model can be presented using the example of a regulation that allows introducing the limitations of transferring and encumbering shares in limited liability companies.¹⁶ According to the wording of art. 182 § 1 CCC, the articles of association may stipulate that a transfer of share, its part or a fraction of share and a pledging of share shall be subject to the consent of the company, or otherwise restricted. Consequently, art. 182 § 2 CCC provides that if the transfer of shares is subject to the consent of the company, the provisions of § 3-5 shall apply, unless the articles of association provide otherwise.

The first provision introduces an opportunity to provide limitation in transferring or encumbering shares, the second provides the choice between the rules determined by the CCC and those determined by articles of association of the company. While the second provision has a clear default character, the role and meaning of art. 182 § 1 CCC was doubtful, leading to various conclusions and abuses of contractual freedom in the company law. Potentially, an introduction of rules that would provide limitations to the transfer of shares would infringe one of the basic rights of shareholders. Practically, art. 182 CCC was often understood as an opportunity to “lock” shareholders in a company by introducing severe limitations into articles of association. The reason for that was a general impression of a default wording of this regulation, which would allow its free modifications.

Jurisprudence and company law doctrine have interpreted this regulation as providing an exception to the general freedom of selling shares (see e. g. Opalski, 2018),¹⁷ although the latter has not been explicitly expressed in the provisions applicable to a limited liability company, contrary to e. g. art. 337 CCC which applies to a joint-stock company,¹⁸ or the German law.¹⁹ Thus, exceptions shall not be interpreted in a way leading to their extended application (*exceptiones non sunt extendendae*). A shareholder may not become a “prisoner” in a company, as its nature allows generally unrestricted transfer of shares. Any limitations shall be explicitly provided by regulations, they can also be introduced into articles of association complying with art. 182 CCC, however this regulation allows only to limit, but not to prohibit the sale of shares. Hence, both – an explicit prohibition or an intense limitation that would make the sale of shares practically

¹⁶ Polish: *spółka z ograniczoną odpowiedzialnością*, German: *Gesellschaft mit beschränkter Haftung*, Slovak: *spoločnosť s ručením obmedzeným*.

¹⁷ See also verdict of the Supreme Court, I CSK 132/11 (1 December 2011); the verdict of the Court of Appeal in Szczecin, I ACa 418/14 (30 October 2014).

¹⁸ Shares shall be transferable (art. 337 § 1 CCC).

¹⁹ “*Die Geschäftsanteile sind veräußerlich und vererblich*” (Shares shall be transferable and inheritable) (§ 15 sec. 1 *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*).

impossible²⁰ – shall be recognised as violating scope of freedom in the company law and as such – null and void.

As a result, art. 182 § 1 CCC, although having no explicitly stated character, shall not be deemed as default and shall allow introduction of the articles of association terms that would directly or indirectly make it impossible to sell shares. On the contrary, its character is mandatory in providing an opportunity only to possibly introduce limitations into the articles of association that would not basically contradict the right to sell shares.

6. SUMMARY

The Polish company law follows an acknowledged and the civil law derived principle of freedom of a partnership of company founders to determine its rules of operation. However, this freedom may be abused and may infringe statutory rights of shareholders or third parties, leading to violation of virtues other than contractual freedom which are considered as absolutely protected by the civil law and corporate law regulations – the safety and ease of transactions or the core rights of corporate members (shareholders).

Unlike corporate regulations in some other CEE countries (e. g. Hungary²¹), the current provisions of the Polish law do not provide clear, general rules due to the distinction between default, semi-mandatory, and mandatory norms in the company law. This makes their application difficult, in particular in terms of certainty as to the formulation of provisions of the statutes of companies differing from the content of the Code of Commercial Companies. The determination of a regulation character results from an interpretation of legal norms, which may be more or less complicated, and also has various effects as to the unambiguity – depending on the case. First of all, there is no clear general rule that would be specific to the CCC, and not recited from the principle of freedom of contracts defined in the Civil Code.

However, attempts can be made to formulate some more general principles in this respect in the provisions on joint-stock companies and general partnerships, which indicates inconsistency of the legislator on one hand, and on the other – it is neither an unambiguous and complete solution, nor does it solve problems in the entire CCC for all companies.

Such an approach often makes exact and undoubtful assessment of regulations complicated, leaving space for interpretation of the doctrine and jurisprudence. Similarly to other legal systems, an interpretation is usually based on confronting possible default of the mandatory character of a regulation with the company law principles, which would be recognised as privileged due to the protection of third parties or the shareholders' rights.

In my opinion, the current CCC regulation requires improvements that would make determination of default, semi-mandatory and mandatory regulations easier and

²⁰ E. g. allowing one of the shareholders to block transaction of the sale, allowing shareholders to determine the sale price of shares (and block the transaction by setting it too high than its market or fair price), providing a distant deadline for a company to give consent for the sale of shares.

²¹ The Hungarian Civil Code of 2013, Section 3:4. § (1)-(3): *"In the articles of incorporation, the members of the legal person may diverge from the prescriptions of Hungarian Civil Code on legal persons when regulating their relations with one another and the legal person, as well as when regulating the organisational structure and operation of the legal person, except as provided hereinafter, the members of a legal person shall not diverge from the prescriptions of the Civil Code, if the divergence is prohibited by the Civil Code; or if it manifestly violates the rights of the creditors, the employees, or a minority of the members of the legal person, or in case it undermines the efficient supervision on the lawful operation of legal persons."*

would provide clearer results. The most effective way to achieve it seems to be an introduction of general regulations referring separately to partnerships and companies. They should determine a general character of the CCC regulations in different fields of issues covered by this legal act, possibly introducing presumptions that would be helpful in difficult cases. Those general rules could be further overridden by specific regulations applicable to certain types of partnerships or companies (e. g. a narrower field of modifications allowed in joint-stock companies due to the principle of uniformity of operation rules for joint-stock companies), or introducing some reasonable exceptions.

Currently, determination of the character of the specific CCC regulations is often based on the views and opinions expressed in legal literature and jurisprudence, rather than on the solid rules. As a result, in some cases, it may be doubtful to make clear conclusions and safely adopt a rule that would not be in line with the CCC regulation. This violates safety of business operations and exposes shareholders to higher transactional costs.

BIBLIOGRAPHY:

- Kidyba, A. (2005). *Spółka z ograniczoną odpowiedzialnością. Komentarz*. Warsaw: C.H. BECK.
- Namitkiewitz, J. (1994). *Kodeks handlowy. Spółka z ograniczoną odpowiedzialnością z komentarzem*. Łódź.
- Opalski, A. (2018). Art. 182. In A. Opalski (Ed.), *Kodeks spółek handlowych Tom II A. Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 151-226*. Warsaw: C.H. BECK.
- Pabis, R. (2018). Art. 238. In A. Opalski (Ed.), *Kodeks spółek handlowych. Tom II B. Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 227-300*. Warsaw: C.H. BECK.
- Sołtysiński, S., & Moskwa, P. (2016). § 3. Zasada „surowości” statutu. In S. Sołtysiński (Ed.), *Prawo spółek kapitałowych. System Prawa Prywatnego. Tom 17B* (2nd editio, pp. 9–22). Warsaw: C.H. BECK.
- Sołtysiński, S., Szajkowski, A., Szumański, A., Tarska, M., & Herbet, A. (2014). Art. 238. In S. Sołtysiński, A. Szajkowski, A. Szumański, M. Tarska, & A. Herbet (Eds.), *Kodeks spółek handlowych. Komentarz. Vol. II*. Warsaw: C.H. BECK.
- Tarska, M. (2012). *Zakres swobody umów w spółkach handlowych*. Warsaw: C.H. BECK.
- Germany, *Aktionengesetz*.
- Germany, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*.
- Hungary, Civil Code of 11 February 2013.
- Poland, Commercial Companies Code of 15 September 2000.
- Poland, Supreme Court, III CSK 46/10 (9 December 2010).
- Poland, Supreme Court, I CSK 132/11 (1 December 2011).
- Poland, Supreme Court, II PK 124/13 (29 January 2014).
- Poland, Supreme Court, II CSK 446/13 (15 May 2014).
- Poland, Supreme Court, I CSK 122/16 (3 October 2019).
- Poland, Court of Appeal in Lublin, III AUa 833/12 (6 November 2012).
- Poland, Court of Appeal in Szczecin, I ACa 234/13 (6 June 2013).
- Poland, Court of Appeal in Warsaw, I ACa 68/11 (3 October 2013).
- Poland, Court of Appeal in Łódź, III AUa 707/13 (10 February 2014).
- Poland, Court of Appeal in Szczecin, I ACa 418/14 (30 October 2014).
- Poland, Court of Appeal in Gdańsk, I ACa 714/14 (13 March 2015).
- Poland, Court of Appeal in Cracow, I ACa 1413/15 (12 January 2016).
- Poland, Court of Appeal in Warsaw, VII AGa 220/18 (15 March 2018).
- Poland, Court of Appeal in Cracow, I AGa 137/18 (14 June 2018).