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ARTICLE

Czech Corporate Governance in the Light of its History and the Influence of the G20/OECD Corporate Governance Principles

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Abstract
This article maps the development of Czech corporate law after 1989 against the backdrop of the gradual change of private law and its paradigms as well as considering especially the influence and use of corporate governance soft law. It describes some of the economic, political and social reasons that slowed down or marginalized the relevance of OECD Corporate Governance Principles after the transition of Czechoslovakia and later the Czech Republic to democratic law. At the same time, the article attempts to show that while the gradual recodification of corporate law, in particular corporate governance rules, did not provide much support for the use of corporate governance codes, it nevertheless reflected the relevant rules and recommendations for statutory rules, thus, partially attaining similar goals. The authors of this article therefore believe that the lack of the practical development of some aspects of corporate governance or corporate social responsibility is often not due to the inadequacy of legal regulation but is rather the result of an overestimation of the personal characteristics of entrepreneurs, their reluctance to introduce complex governance structures and a rigid or very conservative interpretive positivism.

Keywords Corporate governance · Private joint stock company · Corporate law · Civil law · European company law · Legal transplants · Legal transitions · OECD Corporate governance principles

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1 Introduction

As the article focuses on a broader analysis of the development and state of Czech corporate governance and the extent of the influence of the corporate governance principles of the Organisation for Economic Co-operation and Development (OECD), we have also sought to determine the current and practical state of governance of Czech private (non-listed) joint stock companies which, unlike listed companies, are not required by law to report on their applied corporate governance codes in their annual reports. Therefore, with the kind assistance of the Chamber of Commerce of the Czech Republic, approximately 2,000 Czech private joint stock companies were approached with a questionnaire aimed at obtaining relevant data on the form, mechanisms and inspirations of corporate governance, the motivation and remuneration of members of their bodies as well as their information and training. The questionnaire was sent out at the end of 2020, which, as it later transpired, unfortunately determined the extent of the responses received—the pandemic had a detrimental effect on the ability or willingness of those in charge to respond and therefore only 121 responses were received, of which only 66 were complete and usable for a partial analysis. Due to the size of the sample of respondents, it is unfortunately difficult to analyze the data conceptually and to draw any general conclusions therefrom. However, from the 66 complete responses received, it is possible to determine some general tendencies, i.e. certain standards that are used.

Firstly, the responses of 53 companies with a dualistic governance model and 13 companies with a monistic governance model show that there is not much difference between them in that almost none of them make use of soft law or recommendations (including the Czech Code of Corporate Governance or the OECD Corporate Governance Principles) to establish their corporate governance principles. Although approximately half of the companies subscribe to the use of Corporate Social Responsibility mechanisms, it is our opinion that this statement is related to their mandatory auditing, which may reduce its validity. In principle, the responses of almost all respondents further indicate that they have introduced and are introducing into their management systems only that which is foreseen or imposed by law. This has led, amongst other things, to an increased formal focus on compliance due to the risk of the criminal liability of companies and management, without creating special organizational units, however. At the same time, since most companies do not include independent members in their collective bodies, it appears that companies rely on the written law mechanisms of fiduciary governance to establish their governance models without developing them much further; or if they do, they do so rather formally (as a 'must have'). A partial exception can be found in the laying down of rules for the remuneration of members of the bodies, which a (small) majority of companies have set up and they use, for example, a combination of fixed and variable remuneration.

It is also noticeable that a (small) majority of companies pay attention to internal anti-corruption mechanisms, employee training and codes of ethics for employees. Here it is also possible to speculate whether companies are merely

trying to meet the requirements of broader compliance as well as, for example, complying with the upcoming legal requirements on whistleblowing.[1]

Although the response sample is not sufficiently representative, we are of the opinion that it shows current defining trends, which follow on from the gradual developments after 1989 and which can be described as (a) the *prima facie* trust in simple written law, (b) a disinterest in or ignorance of market soft mechanisms or complex solutions, and (c) the confidence of owners in their own ability to take care of the company and its management. We believe—and we attempt to demonstrate this further—that these trends reflect not only the state of Czech (post-)modern society and its long-standing (and practically blind) trust in legal positivism but also the low ownership dispersion of private joint stock companies. If we combine the above theses with the finding that of those Czech companies that avail themselves of protection against creditors (moratorium) in insolvency proceedings, over 90% thereof had in fact become bankrupt as recently as 1-3 years previously,[2] it turns out that the confidence of the owners of private joint stock companies in their own ability to manage their companies is often overestimated, i.e. it shows risks of path dependence.

2 Privatization and its Influence on the Ownership Structure of Czech Companies

The idea of a centrally-planned economy was propagated with a consistency that was quite unusual for other socialist countries during the 40-year period of communism in the former Czechoslovakia. Immediately after its fall in 1989, only 1.2% of the workforce was employed in the private sector and its share of the total gross national product (GNP) was not more than 4%.[3] At the beginning of 1990, the country was therefore faced with the task of transforming (not merely reforming) an extremely centralized economy, which at the same time lacked most institutions that are typical of market economies. The Czechoslovak, and later the Czech (Czechoslovakia was split up in January 1993), path to transformation was specific in its neo-liberal approach with a focus on the shortest possible yet comprehensive change of the economic system through stabilization, liberalization and deregulation—in other words by creating a private sector through privatization as quickly as possible.[4]

The first wave of (partial) restitutions already took place between 1990 and 1991, which saw properties nationalized after 1948 (the communist *coup d'état*) being returned to their original owners or their heirs. The value of the returned properties in the values of that time amounted to 200 billion Czech crowns (CZK). The

[1] The Whistleblower Protection Act transposing Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of whistleblowers is currently under final consideration in the Czech Parliament.

[2] Schönfeld et al. (2018).

[3] Vychodil (2004), p 48.

[4] Mejstřík (2003), p 375.

so-called small-scale privatization followed, during which roughly 22,000 small companies (retail services) comprising a total value of 30 billion CZK at the time were sold through public auctions between 1991 and 1993. Other large and medium-sized state-owned companies designated for privatization were transformed into joint stock companies and privatized as part of the so-called large-scale privatization, which took place in two waves between 1991 and 1994. Their total value was 1200 billion CZK. Standard privatization methods (public auctions, public tenders, direct sales) were combined as part of the large-scale privatization; however, its main method through which a total of 60% of all companies included in the large-scale privatization[5] were privatized, was voucher privatization.

In the first and second wave of large-scale privatizations, every adult citizen had a right to buy a voucher booklet containing 1000 investment points for 1000 CZK (which was about 25% of the average monthly salary at the time). These points could have been applied as part of a fairly complex process of the auctioning of various companies, either through direct investment in the shares of a specific company or by investing in investment privatization funds. Privatization funds then applied these points in auctions for blocks of shares from privatized companies via the same auction process. About 77% of authorized persons took part in the first wave of voucher privatization while around 74% authorized persons took part in the second wave.[6] This high level of participation in the privatization process was very surprising and unique for Central Europe.[7] It was precisely the privatization funds that probably played an important part in this.

There were supposed to be no middlemen, i.e. no entities such as privatization funds, according to the original concept of voucher privatization. This was mainly due to concerns over how to guarantee the reliability of such funds, the absence of a relevant legal framework and fears concerning the excessive aggression of such funds when offering investments. The potential concentration of property rights and control over the privatized companies was to occur not *a priori* (on the ground of privatization funds), but *ex post*, i.e. only on the secondary stock market.[8] In spite of this, concerns over the fact that voucher privatization could result in ownership that would be so fragmented that control over the companies would be completely transferred to their management eventually won the day.[9] In order to ensure a certain level of ownership concentration, which ensured that owners exercised a monitoring role over managers (and also using the argument of simplifying the participation of more citizens[10]), the participation of investment funds was finally permitted in 1991. The result was the creation of several investment privatization funds, which was surprising for that time.

5 Vychodil (2004), p 51.
6 Richter (2005), p 17.
7 Mejstřík (2003), p 379.
8 Tříska (2002), p 49.
9 Vychodil (2004), p 51.
10 Tříska (2002), p 49.

In the end, 264 Czech and 165 Slovak privatization funds took part in the first wave of voucher privatization in the form of joint stock companies specifically created for this purpose. In the second wave, 196 investment funds took part as joint stock companies, along with 120 closed-end mutual funds and 38 open-end mutual funds. As a result, privatization funds obtained control over a significant number of companies privatized via the voucher method. Nevertheless, even here there was a further concentration offsetting the large number of investment funds. For example, 14 investment groups took over almost two thirds of shares held by privatization funds during the first wave, i.e. 43% of all shares in the first wave of voucher privatization, and if we consider all privatization methods, then these 14 largest investment groups took over 26.4% of all shares after the first wave of voucher privatization.[11] Five of the largest privatization funds were able to control 754 companies together, i.e. about 76% of companies privatized via the voucher method.[12] Vychodil states that 'Czech voucher privatization in the hands of external owners (i.e. as opposed to being in the hands of the employees and managers of the company being privatized) with the participation of investment privatization funds amounted to, in short, the transfer of ownership from the state into the hands of 6 million fragmented shareholders and the transfer of control from nomenclature cadres into the hands of a few investment funds'.[13]

The concentration of the ownership of private companies then continued to rise, especially due to the restructuring of privatized companies or through the sale of participation by the investment funds into the hands of non-institutional investors. The role of small-scale shareholders was marginalized in most cases. As of 2001, Czech law began to allow a so-called squeeze-out, which is the forced exclusion of a shareholder minority from a company, whereby, according to the data available, by the year 2020 a squeeze-out had taken place in 806 companies which had been privatized under voucher privatization, which amounts to 38% of all companies privatized in this manner.[14]

Even after the large-scale privatization was complete, the state still controlled a significant portion of the Czech economy. Companies with a total value of 300 billion CZK remained in full state ownership.[15] The state further retained stakes in several privatized companies, including majority stakes in 21 strategic companies, which had the effect of natural monopolies or retaining the 'family silver' (e.g. in energy, telecommunications and distribution networks).[16] Even today, the Czech state still (co-)owns a very high number of entities[17] on a global scale, which includes business corporations as well as state-owned enterprises, national enterprises etc. The state also retained shareholder control in the largest banks. The banks

[11] Hanák (2009), p 40.

[12] Šulc (1998), p 73 (according to Richter (2005), p 18).

[13] Vychodil (2004), p 54.

[14] According to https://www.in-server.cz/rubriky/akcie-akcionari/akcie-z-kuponovky-6-vytesnovani-akcionaru-ze-spolecnosti/.

[15] Vychodil (2004), p 50.

[16] Mejstřík (2003), p 384.

[17] OECD (2017).

concurrently also took over several of the most important investment privatization funds. Through them, the state therefore controlled several (seemingly) completely privately owned companies, and so in 1996, Mertlík spoke of 'a five-year journey from public ownership to public ownership'.[18] The state began retreating from the ownership structures in the banking sector in 1998, whereby it completed its withdrawal by privatizing its stakes in Komerční banka and handed them over to Société Generale in 2001.

3 Post-privatization Institutional Development

Inadequate institutional support for the selected types of privatization is often cited as being one of the major pitfalls of the Czech social transformation.[19] This was a conscious decision. The liberal government adopted a firm stance which Vychodil calls '*ex post* regulation' based on the idea that institutions, which are created spontaneously from the ground up, are the most effective.[20] The creators of this transformation strategy were aware that the (unprecedented) transformation of socialist economies could not be implemented quickly in the institutional environment of traditional market economies ('Thatcher had to privatize three or four companies per year and we had to privatize three or four an hour'[21]). Standard institutions in the Czech Republic did not exist at all at the time, and their creation was in itself a process for the 'long haul'. Klaus, who in the first two post-socialist governments served as Minister of Finance and Prime Minister respectively, added that 'Institution building is an endless task and takes time. […] Our capacity for law making was certainly not perfect, and lawyers did not help us much, because they did not have the reform mentality needed; they were *status quo* keepers'.[22]

At the same time, it was evident that for basically the entire duration of the 1990s, this area of legal expertise (as compared to economic expertise) had to deal with a complete lack of experts who were familiar with the modern private law of market economies, especially corporate law, the law of financial services and the capital markets. Independent lawyers as well as the regime's legal experts focused mainly on public law or theoretical disciplines, while the rest of the legal community remained mostly trapped in a deformed paradigm of socialist law, far removed from the world of a market economy. This detachment was facilitated by the legal continuity of the state and its legal system, to which the post-communist political representation subscribed following the fall of communism.[23] The result of this was manifested in the field of legislation and in the judiciary, both of which were facing a 'brain drain' to the Bar, which at the time offered the possibility of much higher

[18] Mertlík (1996), pp 499 et seq.

[19] Cf. e.g. Mejstřík (1997), p 487; Kouba (2004), p 33; Richter (2005), p 25.

[20] Vychodil (2004), p 58.

[21] Klaus (2013) in an interview published on https://www.klaus.cz/clanky/3347.

[22] Klaus (2014).

[23] Cf. Kopeček (2019), p 88.

earnings (and was itself facing a staff shortage). Concurrently, one cannot but help to gain the impression that this situation suited the architects of the transformation and that this is why they did not attempt to change the status quo.

That is how privatized companies were transformed into joint stock companies in a situation when their position was basically only laid down in a very brief (temporary) law on joint stock companies from 1990.[24] Duty of care requirements for CEOs, wrongful trading rules, rules on takeover bids, the regulation of transformations of business corporations and several other instruments, which were intended to protect shareholder minorities, were all lacking. Insolvency law regulation was absent. The subsequent development of corporate and insolvency law as well as the protection of minority shareholders will be further discussed in detail below. It must be noted that in terms of the institutional structure created through the transformation, privatization investment funds also found themselves in this weak legislative framework as they themselves were basically created spontaneously as simple joint stock companies before the first wave of voucher privatization. The specific regulation of investment funds came into effect in May 1992[25]—in other words, after the deadline for registering privatization funds for participation in the voucher privatization had passed; and also after the first preliminary round of the first wave of voucher privatization had taken place, in which people could entrust their investment points to one of the privatization funds for the first time. The process of establishing privatization funds took place in a situation of legislative limbo[26] and in principle no special requirements for entering this sector were imposed. This was in line with the belief at the time that market forces must be given a free rein.[27]

The Act on Investment Companies from 1992 contained a basic regulation framework for collective investments and it forced privatization funds to transform, thereby imposing several requirements for the diversification of their portfolios. The act did not adopt the requirement in the temporary rules for creating privatization funds that forced the founders of these funds to terminate their ownership of the fund following privatization and to limit their role to mere asset managers.[28] This allowed them to hold decisive stakeholder shares in the funds (thanks to the

[24] Act No. 104/1990 Coll. on Joint Stock Companies.

[25] Act No. 248/1992 Coll. on Investment Companies and Investment Funds.

[26] The rules for creating privatization funds were stipulated in the following document: 'How to Proceed when Creating an Investment Privatization Fund in the Voucher Privatization Process', which was published in 1991 by a group comprising representatives from the Federal Ministry of Finance and Ministries of Privatization of the Czech and Slovak Republic.

[27] 'The smooth process of creating investment privatization funds was of course made possible thanks to the extreme liberalism of the governments of the time, when basically anyone could set up a fund. The act of entering financial services therefore required a process that was much more akin to a registration rather than a licensing procedure. We firmly believed and continue to believe that the opposite would have been a grave error. Perhaps some careless investors would have been protected from thieves but it certainly would have degraded the entire event to a state paternal project' (Tříska (2002), p 51).

[28] According to 'How to Proceed when Creating an Investment Privatization Fund in the Voucher Privatization Process' (see above), once the voucher privatization was completed, the privatization fund founders were to increase the registered capital of funds by the volume of shares obtained during the privatization and to concurrently decrease it by the capital contribution, which the founders put into the funds when they were founded.

fragmented structure of the other stakeholders). This status quo was only disrupted in 1998 when all investment funds had to either transform into open-end mutual (trust-like) investment funds or they were disposed of. Up until 1996, however, the act did not explicitly forbid investment funds from transforming themselves into holding companies through a simple change of articles of association, i.e. to become standard joint stock companies, which did not fall under the investment fund regulation. Even though the Supreme Court later challenged this type of process (see below), 152 of the original privatization funds were transformed into holding companies in the course of 1996.[29]

Shares of companies privatized as part of the large-scale privatization were automatically admitted to trading on public markets.[30] The result was a capital market characterized by excessive size as well as very low liquidity and transparency throughout the 1990s. Shareholding disclosure and the obligation to disclose annual reports were not implemented until 1996. Most share trading—according to some over 90%—took place away from the stock exchange and mostly between investment privatization funds.[31] Out of a total of 1629 privatization issues, 1371 issues were delisted for inadequate liquidity. Supervision of the capital market was carried out by the Ministry of Finance up until 1998, which struggled with inadequate capacity and the necessary authority. Market participants themselves felt the negative effects of insufficient regulation and supervision, which led to the establishment of the Union of Investment Companies in the Czech Republic in 1996, which was a voluntary self-regulatory institution bringing together the vast majority of Czech investment companies and investment funds. It was not until 1998, when the Securities and Exchange Commission was established, that major improvements were made.[32] The Commission acquired significantly more authority than the Ministry of Finance had had up to that point, and it began to actively use this power both towards the issuers as well as the financial service providers, especially investment companies and investment funds.

4 Germanization of Czech Corporate Law and the Way Back Again

4.1 1989–1995

It would seem logical from today's perspective that following the political and social changes in the revolutionary year of 1989, Czech private law would undergo rapid and significant changes, which would allow society to adapt to new conditions. This did not happen, unfortunately, even though work on different forms of recodification began very quickly and a great deal was discussed and written about this. The

[29] Hanák (2009), p 46.

[30] The operators of these markets were the Prague Stock Exchange and the RM System. Both of these markets still exist today.

[31] Vychodil (2004), p 57.

[32] Act No. 15/1998 Coll. on the Securities Commission.

Civil Code from 1964 remained in force up until 2014 and even though it had been repeatedly amended, it could never deny its Soviet roots from 1922 and later 1964.[33] It continued to suppress the autonomy of freewill and to completely disintegrate private law,[34] which had been functional and established in Czechoslovakia up until 1948.[35] The particular rules on private life were therefore modified but not in terms of their structure and no deconstruction of inherently socialistic legal thinking took place nor was there a Thaler's *Nudge* to reasonable development.

The corporate world was in a slightly different situation especially thanks to the fact that private business had to be enabled quickly as well as the usability of companies for all. Hence a new Commercial Code was implemented immediately in 1991. It mainly reproduced the pre-war (Austrian) Commercial Code[36] and built on the last amendment of the Economic Code (*Wirtschaftsgesetzbuch*), which was familiar to commercial companies shortly after 1989, and on the not very successful Joint Stock Companies Act of 1990. It is not surprising, however, that in the first stages of constructing free law, Czechoslovakia lacked a professional elite which could modernize the rules that were reproduced or could supplement them with elements that would prevent their abuse.

Considering the fact that, at that time, an institutional regulation of the capital market was completely absent in the law and most of the professional public was devoted to pragmatic praxeology, it is not surprising that up until the first of the major amendments to the Commercial Code in 1996, corporate law was legalistic, flat and left a number of phenomena unnoticed. Again, it is therefore not surprising, in retrospect, that the imperfect law was extensively abused, leading to a large volume of litigation in overburdened courts, all framed by the sometimes even systemic failure of public institutions. While case law, especially from the Supreme Court, attempted to address the problems, since it dealt with significant deviations in human behaviour and abuses of the law, it tended to reach strict and restrictive conclusions that—when applied generally—severely limited the autonomy of freewill. Society was thus caught in a vicious circle—the more restrictive the interpretation the courts took to address significant failures, the more the business community sought creative solutions, which nevertheless reactivated litigation.

If we consider corporate governance rules, the aforementioned circumstances significantly affected their contents. Not only did written law underestimate this regulatory world (partly also because it was based on a pre-war model) but, more importantly, there were no general rules for the administration of the property of others, which would *ex ante* influence the behaviour of all legal entities. That is why, paradoxically, up until the adoption of the new Civil Code, the doctrine of the

[33] See https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1002&context=books.

[34] Based on the historical affiliation of the Czech lands to Austria–Hungary, i.e. after 1811 especially with the application and interpretation of the *Allgemeines bürgerliches Gesetzbuch* (ABGB). After all, part of the professional and political public called for at least a partial restitution of the pre-1948 legal order after 1989.

[35] There was a political *coup d'état* in Czechoslovakia in 1948 when the communists took power (1948–1989).

[36] And the Act on Limited Liability Companies from 1906.

administration of joint stock companies and limited liability companies was gradually developing, which led to an inappropriate transfer of its conclusions even to the world of associations and foundations while general civil law did not develop at all. Although everyone was aware of this unbearable situation, there was no systemic solution on the table and much was therefore effectively influenced by the market, as foreign law firms in particular, or lawyers (attorneys) educated abroad, brought into practice solutions that they knew and had used in their original practice.[37]

Looking back on this period today, we can point out another feature that was characteristic of Czechoslovak law and that strongly influenced the subsequent development of corporate governance—random legal transplantation or a literal legal transfer. Even though legal orders influence each other today as well, this is usually done functionally and with the use of the transfer or inspiration of structures or information.[38] Back then, however, it was carried out rather haphazardly, literally without context and intuitively, with a preference for the particular language skills of the authors of individual amendments. This way of transferring 'non-systemic knowledge'[39] was certainly not harmful in itself, but it often (jointly) created dysfunctional or complex normative puzzles and, in the Czechoslovak case, a mix of *ad hoc* models from historical law—from Austria, Germany and France.[40]

4.2 1996–2001 (2021)

The inappropriateness or unfashionability of corporate law, including its easy abuse, was obvious to foreign investors for whom Czech law did not meet legitimate expectations. Moreover, between 1998 and 2004, the Czech Republic was in the process of negotiating its accession to the European Union, which entailed, amongst other things, the obligation to adapt Czech law to European law. As the Czech economy became more and more intertwined with the German economy, and as the doctrinal influence of German law on Central Europe was nothing new, most contemporary authorities tended to be inspired by German law, especially the German Stock Corporation Act of 1965.

The first significant attempt at modernization was the amendment to the Commercial Code in 1996, which, amongst other things, modernized the regulation of the commercial register, introduced rules for corporate groups (*Konzernrecht*) and modernized the regulation of joint stock companies, all as part of the initial

[37] In this respect, one can confirm the actual influence of these attorneys and comparatists, as written about by Hopt (2006), pp 1169 et seq. It must also be pointed out, however, that several replicated models did work in practice but they were not connected to civil law in any way (e.g. club or syndicated financing, shareholder agreements etc.).

[38] Glenn (2000), p 15.

[39] Indeed, the fact that this was no surprise was already apparent in the classic work by Watson (1993), pp 17 et seq.

[40] It is therefore almost anecdotal that the first regulation of joint stock companies from 1990 was influenced by Hungarian law only because one of its authors knew Hungarian.

transposition of the First[41] and Second[42] Company Directives. It must be noted that the transposition of European law was either a literal translation of the directive or a wording influenced by specific and decontextualized rules of German law, which was apparent, for example, in the conceptual transposition of the regulation of corporate groups that was unique in Europe at that time, and which complicated Czech practice for many years. In effect, this amendment strengthened the regulation of the registered capital of joint stock companies, including the issues of own share acquisitions; however, corporate governance was affected by the new rules rather in terms of consequences with corporate law or in modifications that were implicated by case law. In general, however, it can be concluded that greater emphasis began to be placed on issues relating to the management and administration of joint stock companies and, consequently, of all companies, while contemporary commentaries often used the conclusions of German doctrine to interpret Czech law.

It is true, however, and perhaps even more so during those times, that the common civil law remained without significant changes, which greatly influenced the use of German models for the interpretation of corporate law rooted in the German *Bürgerliches Gesetzbuch* (BGB) or shifted its content. Here, we would also like to point out that although contemporary doctrine and case law tended to increase the importance of the mandatory rules of law of corporate groups, the basic element of the German Stock Corporation Act—namely, the adoption of the *Satzungsstrenge*[43]—was never adopted. This of course means that although Czech legislation was close to its German counterpart in many respects, it was and remained structurally different.

Another semblance of modernization came in the form of the amendment in 2000, supplemented with a technical amendment in 2001. This did move corporate law forward even though not necessarily in terms of quality but more in the sense that areas that had not been adequately regulated or not regulated at all up until this moment began to be regulated. In addition to the transposition of other European directives, i.e. their amendments, rules on relocations, company conversions and takeover bids were introduced. From the perspective of corporate governance,

[41] Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L 258/11, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0101&qid=1651129582625 (later repealed by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46).

[42] Second Council Directive 77/91/EEC of 13 December 1976 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 58 of the Treaty, 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 [1977] OJ L 26/1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31977L0091&qid=1651129936936 (later repealed, last time by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46).

[43] Sec. 23(5) AktG—'[1]Die Satzung kann von den Vorschriften dieses Gesetzes nur abweichen, wenn es ausdrücklich zugelassen ist. [2]Ergänzende Bestimmungen der Satzung sind zulässig, es sei denn, daß dieses Gesetz eine abschließende Regelung enthält.'

however, several sub-changes are significant or at least ideologically significant, in particular the strengthening of restrictions on self-dealing and the replacement of fiduciary due diligence with a standard duty of care. Although this nuance of the Czech reaction to the duty of care may seem uninteresting, the significance of this change was unmistakable—not only did it distinguish the standard of the duty of care from professional care but, more importantly, it articulated a concept that later became a *via facti* standard for all private law and built a bridge to the subsequent generalization of such care in the Civil Code. If we are to keep our feet firmly on the ground, however, it was not the Romanist deliberation that was used as a template for its implementation but rather, once again, the German Stock Corporation Act, including its emphasis on independent business management (*Geschäftsführung*).

When describing the development of Czech corporate governance in 1991–2001, one can say that from the initial disinterest of the legislator, the formulation of basic fiduciary rules proceeded with little attention to detail and, instead, various restrictions were formulated, supplemented by a blanket principle of the absolute invalidity of any legal act that would violate these restrictions. This trend was not greatly affected by subsequent European academic attempts[44] either, which the doctrine knew but their influence on the legislature was marginal. Moreover, contemporary legal scholarship remained systematically untouched by theses on the theory of the firm, transaction costs or agency problem considerations, which also did not help the modern development of the business corporation and corporate governance.[45]

Paradoxically, it was the economists who took over the baton of development[46]—at least in theory—when the Securities Commission (established in 1998) published the first (non-binding) Czech Corporate Governance Code based on OECD[47] principles in 2001, subsequently amended in 2004. Its practical or legislative effectiveness was negligible, however, and contemporary literature and case law did not generally refer to the Code.[48] However, the main reason for its failure was not in the content of the code but—and this is still true today in principle—in the fact that although the capital market gradually developed and became standardized, publicly traded

[44] Report of the High Level Group of Company Law Experts in Issues Related to Takeover Bids, in: Ferrarini et al. (2004), pp 825–925; High Level Group of Company Law Experts on a Modern Framework for Company Law in Europe, in: Ferrarini et al. (2004), pp 925–1091; Forum Europaeum Konzernrecht (1998), pp 672–772; Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward, COM/2003/0284 final, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52003DC0284.

[45] The names of Coase, Williamson, Meckling and Jensen, Easterbrook with Fischel or Hansmann were unknown to most of the legal scholarship at that time. It is surprising that for some doctrinal textbooks on corporate law, the theses and authors mentioned are still unknown to the present day and contain no mention of them nor do they mention, for example, the collective work *The Anatomy of Corporate Law* by Kraakman et al. (2017).

[46] Even though the authors had some legal support, representatives of legal professional bodies, legislation or academia did not participate in preparatory works at all.

[47] Formulated also with the use of the Combined Code of the London Stock Exchange etc. Czech version—https://www.mfcr.cz/cs/archiv/transformacni-instituce/agenda-byvaleho-fnm/sprava-majetku/kodex-spravy-a-rizeni-spolecnosti-corpor/kodex-spravy-a-rizeni-spolecnosti-zaloze-14620.

[48] Czech law at that time did not apply the ‘comply or explain’ principle.

companies, i.e. those whose shares were admitted to trading on the stock exchange or another regulated market, were still scarce, and therefore the impact of corporate governance soft law was not significant.

A significant and last change thus far occurred with the entry into force of the Civil Code and the Companies Act[49] in 2014. Their rules already contained corporate governance standards as we know them from Europe or the USA and also from the OECD rules, not only for the regulation of stock corporate law, but also in a number of rules for the general management of foreign assets, including foundations or trusts. Of course, the regulation of corporate governance[50] remained most developed for business corporations but the professional public also increasingly focused on foundation governance[51] or insolvency governance, and more recently also on Corporate Social Responsibility or Environmental and Social Responsibility.

Looking at the basic structures of corporate governance, Czech law thus found itself in a situation where a number of rules that were previously contained in international non-binding corporate governance codes were now codified, which of course influenced the first Czech version of this code. In 2018, the Czech Institute of Directors published a completely new Czech Corporate Governance Code[52] (hereinafter referred to as the CZ Code), which also reflected the 2015 OECD Principles of Corporate Governance[53] (hereinafter referred to as the OECD Principles) in the Czech milieu. Because of codified law as well as due to the low number of public joint stock companies, the Czech Institute of Directors is currently finalizing an upgrade of the Czech CZ Code, as well as the Methodology for its application. Both seek to explain the rules of corporate governance so as to make them applicable to private joint stock companies or more complexly structured and managed limited liability companies or cooperatives (based on the 'think and comply' rule).

5 Protection of Minority Shareholders

The beginnings of the formulation of rules for the protection of (minority) shareholders in Czechoslovakia (later in the Czech Republic) can partly be identified with the drafting and adoption of the Commercial Code in 1991. Although its original format contained some means of protection for (minority) shareholders of capital companies, the regulation was very curt and its use in practice was very sporadic. If we zoom in on joint stock companies where protection was more extensive and sophisticated, an important protective measure was the right of each shareholder to apply to the courts for a declaration of the invalidity of a resolution of the general

[49] Act No. 90/2012 Coll.

[50] Because of the time when it was created, its regulation was ideologically influenced especially by the British enlightened shareholder value model—see e.g. Sjåfjell (2009), pp 88 et seq.

[51] As well as e.g. on the basis of the new Swiss regulation—https://veluxstiftung.ch/news/the-swiss-foundation-code-2021-is-out/.

[52] See https://www.cginstitut.cz/cs/dokumenty/.

[53] The code was officially supported by the Ministry of Finance of the Czech Republic as well as the Czech National Bank and is based on the comply or explain principle.

meeting due to a contravention of the law or the articles of association and the right to a preferential takeover of contributions in the event of a registered capital increase in proportion to their share contribution to the existing registered capital, which was intended to prevent the dilution of their shareholding in the company. However, a shortcoming of the regulation was that the articles of association could limit this right without the law imposing specific limitations, thus providing room for the dilution of minority shareholder shares on the basis of a majority decision (often enforced by the majority shareholder) to modify the articles of association. Only to 'qualified shareholders' (i.e. shareholders holding shares with a nominal value exceeding 10% of the company's registered capital) did the Commercial Code grant the right to request the convening of a general meeting and obliged the statutory body to convene such a general meeting within the time limit set by law. A breach of this obligation meant that qualified shareholders could demand that the court calls a general meeting. Furthermore, the law also granted qualified shareholders the right to have the statutory body include a matter designated by them on the agenda of the general meeting and the right to have the controlling body review the performance of the statutory body's authority in designated matters.

The Commercial Code (or any other law) did not provide for any other means of protection for shareholders' rights, although violations of the rights of small shareholders by the statutory body and later by larger shareholders occurred frequently.[54] In this state of affairs and in the absence of explicit legal regulation, it was up to the decision-making practice of the courts to determine the limits beyond which minority shareholders could not go. However, the ability of the courts to significantly intervene in the interpretation of the regulation of shareholders' rights was limited both in time and in substance. As for the time limit, it took quite a while for the Supreme Court, which is statutorily mandated to unify lower court case law, to hear the first shareholder protection cases. In relation to the substantive limitation, it should be pointed out that in the 1990s, for Czech judges the availability of foreign literature and case law in the field of corporate law was limited. Thus, even in situations where it would today be possible to draw on the extensive decision-making practice of foreign courts and the conclusions of foreign doctrine, judges had to develop—in the context of completely inadequate regulation—their own solutions. This was in a situation when for more than forty years in the Czechoslovak Republic, companies practically did not exist and most lawyers did not have any real knowledge about their legal regulation and especially about their functioning.

The first disputes relating to the protection of shareholders only began to appear before the Supreme Court of the Czech Republic at the end of the 1990s. It gradually dealt with the task of ensuring their protection on two levels. The first was the

[54] The methods used in such violations varied widely. These included, for example, convening the general meeting at a place and time that was difficult for small shareholders to reach, deficiencies in the delivery of the invitation to attend the general meeting, limiting shareholder presentations at the general meeting to a written form, etc.

interpretation of the rules of corporate law, the second was the formulation of their underlying principles as one of the sources of commercial law.[55]

The Supreme Court first formulated some of the principles of the law of corporations in its decision in Case No. 1 Odon 88/97 where it concluded that these principles included not only the principle of the protection of minority shareholders but also the principle of the protection of all shareholders against arbitrary and unfair conduct by the statutory body, against an abuse of office by directors and the principle of proper and timely provision of information to shareholders about the possibility of exercising their rights.

One of the first questions regarding shareholder protection that the Supreme Court was confronted with was the decision whether a change to the business name and the business activity could transform an investment fund into a joint stock company with a different business purpose.[56] As already noted above in its decision No. 32 Cdo 587/98 the Supreme Court overturned the rulings of the lower courts and rejected such practice even though there was no explicit prohibition on such a possibility in the Management Companies and Investment Funds Act (or anywhere else). The Supreme Court argued that as the law expressly prohibited an investment fund from carrying out activities other than collective investment, it had to be inferred that the general meeting of an investment fund could not decide to change the statutory purpose of the investment fund's business or to change its business name so that it did not contain the designation investment fund; if the general meeting were to make such a decision, this did not change the articles of association and convert the investment fund into a 'simple public limited company' since such a procedure would bring the articles of association of the investment fund into conflict with a mandatory provision of the Management Companies and Investment Funds Act and would therefore be invalid in that respect.

A frequent subject of dispute was also the method of convening the general meeting in relation to the accessibility of the method used for shareholders,[57] the assessment of the certainty of the invitation to attend the general meeting in terms of whether it allowed shareholders to make a decision whether to attend the general meeting in time and with knowledge of the content of the general meeting in order to ensure the conditions for such attendance and to prepare[58] for the meeting, restrictions on shareholders when speaking at the general meeting[59] and some other restrictions.

[55] According to Sec. 1(2) of the Commercial Code, if some questions regarding legal relations stipulated by the Commercial Act cannot be resolved according to the provisions of this Code, they are to be resolved according to the rules of the Civil Code. If they cannot be resolved even under such provisions, they shall be judged according to commercial custom and, if there is no such custom, according to the principles underlying the Commercial Code.

[56] For example, so that the business activity amounts to the purchase of goods for resale instead of collective investment.

[57] See e.g. the decision of the Supreme Court of 24 September 2001, Case No. 29 Odo 88/2001.

[58] See e.g. the decision of the Supreme Court of 25 September 2001, Case No. 29 Odo 155/2001.

[59] See e.g. the decision of the Supreme Court of 5 November 1997, Case No. 1 Odon 74/96.

The legal regulation of the status of minority shareholders began to gradually improve after the Commercial Code was repeatedly amended (see above). In 1996 a newly introduced shareholder action (*actio pro socio*) became an important tool for protecting the rights of qualified shareholders against breaches of the obligations of members of statutory bodies, allowing shareholders to claim—in the event of inaction by the statutory body—compensation for damages caused to the company by its member and to claim the payment of the outstanding capital contribution. Furthermore, the amendment regulated the obligation to buy back the shares to which the denial related at a price determined by law (the model was Sec. 68 of the German Stock Corporation Act) from the shareholder who had been denied consent to transfer registered shares by a corporate body, although he or she was not obliged to do so under the articles of association. The company's redemption obligation was also newly introduced in the event that the general meeting decided to cancel the public tradability of shares, to change the type of shares or to limit the transferability of registered shares to shareholders who did not vote in favour of these changes. The ban on the exercise of voting rights in situations where the general meeting decided that a contract should be executed with the shareholder or that the shareholder should be excused from fulfilling his or her obligations and also in cases where he or she had failed to fulfil a statutory obligation in relation to other shareholders (e.g. the obligation to make a public proposal for a contract for the purchase of other publicly traded shares if he/she acquired a statutory share in publicly traded shares) became another instrument for the protection of minority shareholders.

Changes were also made in relation to the shareholders' preferential right to subscribe for shares to increase the registered capital—the Commercial Code newly stipulated that this right could not be limited or excluded in the articles of association; this could only be decided on a case-by-case basis by the general meeting but only in the important interest of the company and for all shareholders/holders of one type of share to the same extent. The Supreme Court subsequently concluded that when deciding on the invalidity of the resolution of the general meeting on the exclusion of the pre-emptive right, the court must examine not only the existence of the alleged important interest of the company, but also the extent to which the exclusion of the pre-emptive right is capable of fulfilling the alleged important interest of the company and whether this interest would be jeopardized if the court considered the resolution to be invalid.[60] The amendment provided for a new regulation on the decrease of registered capital, allowing for a reduction of registered capital by taking shares out of circulation only on the basis of a lottery draw or on the basis of a proposal that shareholders could (but did not have to) accept. This prevented an abuse of the position of the majority shareholder, who—before the amendment—could, with the weight of its votes at the general meeting when deciding to reduce the share capital by removing shares from circulation, enforce the withdrawal of shares from minority shareholders.

The inclusion of the new Section 196a in the Commercial Code was significant for the protection of minority shareholders' rights. It regulated the execution (or

[60] Cf. e.g. Eisenhardt (2002), p 287.

the securing) of a loan agreement between a company and members of its bodies (or persons close to them) or an agreement on a gratuitous transfer of the company's property to such members and was of great importance for the protection of the rights of minority shareholders (and also creditors of a joint stock company). It stipulated that such a contract must be approved by the general meeting and that the contract must be executed under normal commercial terms. It also stipulated that if a company acquires property for consideration from or transfers property to shareholders, members of bodies and persons close to them for consideration and the value of such property exceeds one tenth of the company's registered capital within one year, it may be acquired or disposed of only at a price determined by an expert's report and only with the consent of the general meeting. Since the members of the bodies were very often majority shareholders who, with the weight of their votes, often pushed through the approval of a transaction that did not comply with the conditions laid down in the law, this provision triggered many lawsuits filed by minority shareholders seeking a ruling that the resolution approving the transaction was invalid. However, in many situations the rule substantially complicated legitimate business transactions.

As noted above, the initial inadequacy of shareholder protection legislation and the resulting consequences led legislators and courts to work intensively to ensure an increased level of protection. On the one hand, this led to its gradual improvement, but, on the other, it often led to an abuse of the rights that the law provided for these shareholders and that the courts had granted to them. In particular, the right to seek a court decision on the invalidity of general meeting resolutions was abused—some minority shareholders filed a lawsuit for the invalidation of general meeting resolutions in a frivolous manner, often challenging not the content of the adopted resolutions, but the procedure for convening the general meeting, the voting procedure, the content of the invitation to attend the general meeting and other procedural matters. Therefore, the amendment to the Commercial Code included certain limitations in the legal regulation of the right to seek a decision on the invalidity of a resolution of the general meeting. Shareholders could no longer seek this decision for breaches of the law or the articles of association that resulted in only a minor breach of shareholders' rights, or where the material breach of rights did not have serious legal consequences, as well as in certain cases relating to conversions. Gradually, through its decisions, the Supreme Court also began to set limits beyond which the exercise of the right to judicial protection became an abuse of that right. Following its earlier decisions,[61] the Court in particular clarified the principle that when examining the legal consequences of a violation of legal regulations upon the adoption of a general meeting resolution, it is necessary to base the examination on a comprehensive assessment of the consequences of such a violation. That is to say, not only from an assessment of the consequences that such a breach had for one or several shareholders, but also what consequences it had for all other shareholders and for the company itself (and thus indirectly also for the shareholders).

[61] See e.g. the decision of the Supreme Court of 11 February 1997, Case No. Odon 25/96, of 9 February 2000, Case No. 32 Cdo 2963/99 and of 29 August 2001, Case No. 29 Odo 71/2001.

In a series of subsequent amendments to the Commercial Code, the measures for the protection of shareholders were gradually refined and the conditions under which these rights could be exercised were also refined and tightened. However, some protective elements were not incorporated into the Commercial Code or its amendments. A significant omission, for example, was that it did not allow for voting by electronic means; this option was only incorporated into the Commercial Code in 2009.

Once the Czech Republic joined the European Union, its shareholder protection regulation was not only set at the level required by EU law, but in many cases, in an effort to prevent interference with shareholders' rights caused by the initial insufficient regulation, it was extended well beyond the minimum level required by European regulations and was too broad. However, the Czech Republic was not entirely exceptional in this respect; some other EU Member States also incorporated the extended regulation of shareholder protection beyond the required level into their legal systems, and so the level of protection of shareholders' rights in the Czech Republic was and still is far from uniform—despite the implementation of the European regulation.[62] As a result of this, as well as thanks to the decision-making practice of the courts, this situation gradually stabilized.

In 2000 the Commercial Code incorporated the regulation on the transfer of assets to a shareholder (the so-called false squeeze-out) and in 2005 the regulation on squeezing out minority shareholders (the squeeze-out). This amendment, which allowed a forced transfer of shares owned by minority shareholders to the (at least 90%) majority shareholder, originated from a parliamentary proposal. It was gradually modified by a number of amendments and sparked an intense debate as to whether the 'expropriation of shares' belonging to minority shareholders was constitutionally compliant. It was pointed out, for example, that German legislation also allowed the expulsion of minority shareholders but gave the shareholders who are squeezed-out the right to subject the offered consideration for shares to a special judicial review (*Spruchverfahren*), which provided minority shareholders with numerous procedural advantages compared to ordinary civil proceedings. In particular, it allowed them to overcome the information deficit that made it impossible to calculate the correct amount of the consideration.[63] In this context, it was pointed out that although Czech legislation allowed for a review of the amount of the consideration provided to the expelled shareholders, it did not grant these shareholders a procedural position corresponding to the German legislation, which made it particularly difficult for them to specify what consideration they were seeking in the lawsuits they filed.[64] It was also reiterated that the Commercial Code expressly ensured

[62] Cf. e.g. Mäntysaari (2005), p 423, who considers the minority shareholder rights legislation in Great Britain to be very limited as compared to the German legislation, or Andersen and Sorensen (2012), p 188.

[63] See e.g. Zima (2005), p 27 with reference to Wirth and Arnold (2002), pp 505 et seq.

[64] This procedural disadvantage was subsequently eliminated by the Supreme Court in its decision of 16 December 2009, Case No. 29 Cdo 4712/2007, in which it ruled that shareholders may demand both the determination of the amount of adequate consideration and its payment (or the payment of the difference between the amount of consideration paid by the main shareholder and the adequate consideration) in the

that the inadequacy of the consideration provided could not be a basis for a decision on the invalidity of the general meeting resolution on the squeeze-out.

The question of the constitutional conformity of the legal regulation of a squeeze-out was addressed by the Constitutional Court, which rejected the proposal to repeal the squeeze-out legal regulation in the Commercial Code.[65] It concluded that while the use of the option of a compulsory sale does not exclude interference with the constitutionally guaranteed rights of shareholders, such an option does not in itself result in unconstitutionality. This could only occur if the state has failed to provide minority shareholders with legal protection appropriate to the nature of share ownership as part of its protective function. In assessing the constitutionality of the squeeze-out regulation, it was essential for the Constitutional Court that the squeeze-out was an economically-based procedure that is legally regulated as required under the rule of law (the legality of the intervention), and therefore it was not an expropriation. The Court also did not find the regulation on the determination of reasonable consideration to be unconstitutional. The general courts subsequently proceeded in accordance with the conclusions of the Constitutional Court.

The last major change in the regulation of shareholder protection was the implementation of the EU regulation on business corporations primarily in respect of the protection of minority shareholders. Even without significantly extending this protection beyond the lowest required level, it can be said that as a result of this regulation and also due to the growing case law mapping the conditions for providing judicial protection to the rights of minority shareholders, there have been fewer cases of violations of their rights as well as frivolous actions.

As mentioned above, a new CZ Code was published in the Czech Republic in 2018, which develops the recommendations of the OECD Principles in relation to Czech legislation and Czech conditions. Its first chapter, which is devoted to shareholders' rights and their protection, primarily states that the corporate governance system should protect and facilitate the exercise of shareholders' rights and ensure equality for all shareholders, including minority and foreign shareholders. Furthermore, the CZ Code adds certain rules concerning the equal treatment of shareholders and the protection of the exercise of their rights.[66] Although the CZ Code is not a legal regulation and business corporations are therefore not obliged to comply therewith, the regulation of business on the capital market for example requires that listed joint stock companies include in their annual report information about the corporate governance codes that are binding on them or that they voluntarily comply with, or information about the fact that they do not comply with any code or only some of the provisions of a code, including a justification for not complying with them.[67]

Footnote 64 (continued)

event of a squeeze-out. However, it is not necessary for them to state the specific amount they claim in the action—the court will decide on this.

[65] Finding of the ruling of the Constitutional Court of 23 March 2008, No. Pl. ÚS 56/2005.

[66] For further details, see Štenglová (2020), p 687.

[67] As of December 2021, 15 companies were listed on the Prague Stock Exchange. Of these, 3 refer to the CZ Code 2018, 1 to the CZ Code 2004, 1 has complied with the CZ Code 2018 without explicit reference, 1 refers to the Slovak Corporate Governance Code and 1 to the Polish Corporate Governance Code, the rest are without any reference.

6 Corporate Governance under Financial Distress

Although by now no one doubts the importance and role of insolvency governance as being the other side of the same coin or as a broader aspect of corporate governance,[68] Czechoslovak and later Czech law was still lacking in many respects here. The opening of the Czechoslovak economy to the world also exposed it to a massive increase in investment and foreign capital flows, which, in addition to *ex ante* corporate governance regulation, required balanced insolvency law and reasonable rules for managing debtors in distress. For essentially similar reasons to the late introduction of corporate rules, insolvency law has long been mired in outdated structures. While the Act on Bankruptcy and Settlement was also enacted in 1991,[69] its content was based on the bankruptcy, settlement and repudiation orders from the early 1930s,[70] and in some aspects even on the Austrian Emperor Bankruptcy Order of 1781. The legal regulation of bankruptcy law concurrently favoured liquidation bankruptcy, it deprived secured creditors of part of their collateral in favour of unsecured creditors and it did not contain sufficient and transparent rules for debtor bankruptcy proceedings and protection mechanisms against the failure of bankruptcy trustees or bankruptcy courts. The result was a situation where debtors filed motions to initiate the formal process too late, and the entire process was often used as a coercive tool for hostile takeovers. Moreover, the Czech Republic was faced with a significant systemic failure by bankruptcy trustees and bankruptcy judges, especially in the 1990s, which subsequently had very significant criminal consequences.

The negative experience with bankruptcy law and the fact that the statutory regulation denied the modern purpose of insolvency proceedings—a rational collection and allocation of assets so as to avoid the negative aspects of collective action and to maximize going concern efficiency[71]—led to banks overcharging for their loans (to cover potential losses in bankruptcy proceedings among other things), the value of collateral was manipulated, 'white horses' were included on company boards and debtors were often 'shelf companies'. The rules for insolvency governance were almost entirely absent, not least because insolvency proceedings had a strong defamatory effect and the idea that the debtor's authorities would not have caused the insolvency, or that the debtor would have continued to operate its business under the insolvency proceedings and would have been reorganized or restructured, was not in fact assumed or supported. Linking this to the poor state of the banking sector, we think that it is safe to assume that the initial application of bankruptcy law tended to devastate corporate governance rules, meaning that legislation and doctrine therefore tended to focus on rules for healthy companies.

A change was brought about by the new Insolvency Act in 2006,[72] which abandoned the favouritism of bankruptcy proceedings, standardized the position of

[68] Eidenmüller (2018), pp 1003 et seq.

[69] Act No. 328/1991 Coll. However, the possibility of initiating insolvency proceedings (the cashflow test) was postponed for another year.

[70] Laws from 1931 following on from regulation from 1914.

[71] Jackson (2001), pp 7–19.

[72] Act No. 182/2006 Coll.

secured creditors, introduced the regulation of executory contracts and, following the example of Chapter 11 of the US Bankruptcy Code, allowed a reorganization (the pre-pack approach). Although the Act was enacted at a time when civil and corporate law had not yet been modernized, the general standards of debtor-in-possession governance in formal insolvency proceedings gradually modified and developed the interpretation of general corporate governance. As a result, insolvency governance was no longer universally criminalized and a more detailed review of who the economic owner of a corporation was and when began to be conducted as part of the duty of loyalty analysis. In this way, considerations gradually developed to distinguish different forms of the financial difficulties of a debtor, which did not always imply bankruptcy.[73] This also modified the obligations of the debtor's authorities as well as the position of creditors (coverage gap, financial difficulties, limitation of the viability of the business, imminent bankruptcy, the use of an automatic stay, etc.). This trend is now significantly influenced by the current transposition of the Directive on Preventive Restructuring Frameworks,[74] which the Czech Republic is finalizing and which partly affects corporate/restructuring governance rules.[75]

Although these issues are left aside by the OECD principles, the Czech insolvency governance regulation has a number of sanctioning mechanisms available in the event that members of the bodies cause their bankruptcy—not only the obligation to pay damages for the late filing of an insolvency petition but also the new obligation to surrender the income received from the company to the insolvency estate (for up to two years previously) and the obligation to replenish the insolvency estate up to the amount of the difference between the sum of debts and the value of the company's assets (an action for the replenishment of liabilities). There is not much experience with these rules but it is clear from the behaviour of debtor authorities that they have an *ex ante* role to play in raising concerns and therefore lead to more proactive action and, in practice, the increased use of external advisers and their analyses.

[73] Also see Havel (2020), pp 155 et seq.

[74] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1023&from=CS.

[75] Cf. Art. 19 of Directive on restructuring and insolvency or e.g. Corno (2021), pp 238-248; Havel (2021), pp 75 et seq.

7 The Impact of EU Law on the Development of Corporate Governance Standards in the Czech Republic: The Case of a *Societas Europaea*

In connection with preparations for the Czech Republic's accession to the European Union, it eventually became necessary to adapt Czech corporate law to the requirements of Community law at the end of the 1990s. Effective as of 1 May 2004, when the accession negotiations culminated in the Czech Republic's accession to the European Union, the sources of Czech commercial law, as well as the rules for the interpretation of commercial law norms, including corporate governance rules, which had their origins in the Community law of that time, changed significantly.[76]

In terms of the effects and impact of EU law in the formulation of corporate governance standards in the Czech Republic, a distinction can be made between a direct and indirect influence. As in other jurisdictions, the direct impact on corporate governance rules was due to the direct application of Community (EU) law. In addition to the primary sources of law (the EC Treaty and later the Treaty on the Functioning of the EU), which laid down the freedom of establishment[77] and the free movement of capital as part of company basic rights, it also had a direct impact on Czech commercial law through secondary EU regulations, whether applied directly (regulations) or through the obligation of proper and timely implementation (directives).

In the field of company law, directives historically prevailed,[78] which is mainly due to the traditions and concepts of company law in individual Member States, which have varied widely across the European Union throughout history (e.g. in terms of organizational structure, the existence or absence of group law or mandatory co-determination). This is also the reason why EU harmonization efforts in respect of company law have been relatively limited, focusing primarily on (i) the creation of a minimum standard of protection for creditors of corporations, (ii) the availability of comparable information on corporations and their shareholders, and (iii) the protection of shareholders, in order to remove obstacles to the single market.[79] Nevertheless, EU law fundamentally influenced Czech corporate governance.

Since 2012, within the framework of corporate governance rules in the Czech Republic, an adaptive approach to reception (fulfilling transposition obligations) has been applied, the purpose of which is not to literally adopt the translated text of the

[76] On problematic aspects of the application of EU law in the Czech Republic after accession to the European Union, see e.g. Bobek et al. (2011).

[77] On the basis of the freedom of establishment, for example, the Czech law already in force since 1 January 2012 allows for cross-border demergers because the national legislators believed that the right to carry out cross-border demergers was derived from the freedom of establishment. Cf. Hansen (2007). Cross-border demergers were then allowed and harmonized at the EU level through Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending the existing Directive (EU) 2017/1132 with regard to cross-border seat transfers, mergers and divisions [2019] OJ L 321/1.

[78] Over time, a number of company directives have been recodified into Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/46.

[79] Cf. Dědič and Čech (2004), p 55.

EU Regulation (Directive), but the transposition of its contents (substantively) into Czech law (usually) on the basis of so-called minimum transposition.[80]

In the context of Czech corporations, the formation of and, in particular, the interest in the gradual deepening of the single European market have manifested themselves (in addition to the desire for a partial harmonization of minimum standards relating primarily to the protection of creditors and shareholders of national stock corporations) in the desire for the emergence of multinational forms of companies with a European pedigree as symbols of an integrating Europe. These efforts historically materialized in the field of company law with the adoption of directly applicable regulations governing EU company forms, namely the European Economic Interest Grouping (EEIG), the European Company and the European Cooperative Society.[81]

In terms of corporate governance, the multinational form of business corporations provides entrepreneurs with a complementary choice of the corporate arrangement in which to conduct their business or other activities. However, in addition to this direct impact of the relevant regulations, the existence of multinational forms has or may have an indirect impact on the corporate governance rules that are applicable to national companies and possibly other entities. For example, in the context of the regulation of cooperatives contained in the Business Corporations Act, Czech legislation explicitly stated that it took into account, among other things, Council Regulation EC/EU No. 1435/2003 on the Statute for a European Cooperative Society,[82] or conceptually also took into account the draft Regulation on the European Private Company.[83]

However, this indirect impact is most clearly illustrated using the example of the Societas Europaea (SE) in the Czech Republic. During the first years after joining the European Union (2004 to 2011/2012), the Czech Republic became the absolute 'market leader' in terms of the number of Societates Europaeae (SEs) established. The fact that a relatively high number of SE incorporations were taking place in the Czech Republic did not go unnoticed outside the Czech Republic. For example, Eidenmüller, Engert and Hornhuf conducted research on the initial results of the use and formation of SEs within the European Union. In their paper, they noted that a surprising number of SEs were being founded in the Czech Republic. They pointed out that in the period from May 2007 to May 2008, as many SEs were founded in the Czech Republic as in Germany in the 3-year period from October 2004 to October 2007. At the end of 2008, according to Eidenmüller, Engert and Hornhuf, there

[80] Cf. explanatory memorandum to the Corporations Act, point 12.

[81] On the contrary, the regulation on the status of a European private company—Societas Privata Europaea or SPE (proposal of the Council from 25 June 2008 on the statute of a European private company, COM(2008) 396 final) has not yet been implemented.

[82] Cf. explanatory memorandum to the Business Corporations Act, point 14.

[83] Cf. Explanatory memorandum to the Business Corporations Act, to Sec. 119/132, in fine, or Sec. 133/152.

were even more SEs founded in the Czech Republic than in Germany and the most in the entire European Community.[84]

Subsequently, at the end of 2010, the European Commission issued a report on the functioning and impact of the SE Regulation,[85] in which it stated that approximately 70% of all SEs were established either in the Czech Republic or in neighbouring Germany. The growth of SEs in the Czech Republic then reached a point where, in 2011, 273 SEs were established in the European Economic Area, of which only 74 were established in a Member State other than the Czech Republic. This difference was even more pronounced in 2012, when out of a total of 426 SEs, only 97 were established in a Member State of the European Economic Area other than the Czech Republic.[86]

Since the above-mentioned report of the European Commission did not work with any significant data set, the team conducted research at the Faculty of Law of Masaryk University in Brno in 2011 to identify the specific motives behind the boom in the establishment of SEs in the Czech Republic between 2004 and 2011. This team found that one of the main reasons (motives) behind the massive development of SEs in the Czech Republic during the period under review was the different corporate governance rules for a domestic joint stock company and an SE.

The SE Regulation offered the founders a choice between a single-tier internal governance structure (represented by the board of directors) and a two-tier internal governance structure (the board of directors and the supervisory board). In contrast, Czech legislation did not provide this choice for the founders of a national joint stock company in the period under review. In this context, the OECD Principles (as well as the earlier versions of 1999 and 2004) stressed that there was no single model of good governance and did not favour any of the traditional systems of internal governance (dualistic or monistic), i.e. it cannot be said that the absence of a choice between a monistic or dualistic system of internal governance within a national joint stock company (as opposed to an SE) would contradict the OECD Principles.[87]

The internal management structure of a 'national' SE was attractive in the Czech Republic in the period in question not only because of the possibility of choosing between a one-tier and a two-tier internal management system, which was not possible for a national joint stock company, but also because of the structure of the two-tier internal management system, which differed from the structure of a national joint stock company in significant ways. Article 39 of the SE Regulation provides that the number of members of the board of directors of an SE, or the rules for determining the number of members within a two-tier structure, are to be determined by the statutes of the SE. However, the Member State was entitled to determine the minimum and/or maximum number of members of the board of directors.

[84] Authors have nevertheless noted that a large part of Czech European companies are merely 'shelf' companies offered 'for sale' by professional agents—see Eidenmülleret al. (2009), pp 1 et seq.

[85] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1). Source Carlson (2017).

[86] Source Carlson (2017).

[87] Cf. e.g. OECD Principles for Company Management and Administration 2015, Sec. VI.

However, between 2004 and 2011/2012, Czech legislation regulated neither the minimum nor the maximum number of members of the board of directors or the supervisory board of an SE with a two-tier internal management structure. This allowed Czech SEs to have only one member of the supervisory board and one member of the board of directors. In contrast, Czech corporate law required a national joint stock company to have at least three members of the board of directors, unless it had a single shareholder, and three members of the supervisory board.

The internal governance structure of an SE was therefore attractive not only with regard to the introduction of a one-tier internal governance structure, which was not permissible in the case of a national joint stock company, but also with regard to the possibility of a limited number of elected members of the management boards of the SE within a two-tier internal governance structure.

Based on the data obtained, the research team then concluded that the SE brought advantages to entrepreneurs by combining a simple internal structure within a two-tier management system—in which the election of one member of the board of directors and one member of the supervisory board is sufficient—and the reputation of the SE (brand management), i.e. that entrepreneurs used the SE as a tool through which they could have a very simple internal management structure consisting of two people in the elected bodies of a joint stock company.[88]

The corporate governance rules on the SE (underlying the significant expansion of SEs in the Czech Republic) became a source of fundamental change in corporate governance rules applicable to national joint stock companies as they have significantly influenced the debate on corporate governance standards within domestic (national) joint stock companies, in the context of the recodification of private law carried out through the new Civil Code and the Business Corporations Act. In terms of corporate governance standards or the internal structure of the bodies of a joint stock company, the Business Corporations Act, inspired by the rules applicable to SEs, gave founders the option to choose between a two-tier and a one-tier management structure within the internal structure of a national (Czech) joint stock company.[89]

Following on from the experience with SEs established in the Czech Republic, when the Czech legislator (in accordance with the relevant EU regulations) allowed Czech SEs to have only one member of the supervisory board and one member of the board of directors, the question arose as to how appropriate and desirable the current regulation of national joint stock companies was. This regulation required that the board of directors of a joint stock company (except in the situation where the company has a single shareholder) and the supervisory board should be composed of at least three members, when at the same time, the Czech legislator allowed

[88] The results of the research were summarized in detail in Lasák et al. (2011), pp 313 et seq.; Eidenmuller and Lasák (2012a); Eidenmüller and Lasák (2012b).

[89] Cf. explanatory memorandum to Sec. 452 of the proposal for the Act on Business Corporations: ‘According to the development of European law […] an obligatory option to choose between a dualistic and a monistic internal governance structure is being introduced into Czech law.’

an SE to have only one member of the board of directors and one member of the supervisory board.

The Business Corporations Act responded to this by stipulating that, effective as of 1 January 2014, the articles of association of a joint stock company may provide that a joint stock company (with a dual system of internal management) has only one member of the board of directors and one member of the supervisory board (unless the rules on mandatory co-determination apply). In other words, in terms of the internal management set-up, a national (Czech) joint stock company had the same internal management structure as an SE from 1 January 2014 onwards, i.e. the board of directors and the supervisory board could essentially only have one member. This was because the domestic legislator was not, however, required to make these corporate governance changes, unlike the obligation to transpose EU directives. We therefore speak of the indirect impact of EU law on Czech corporate governance standards

This legislative change seems to have contributed significantly to the fact that after 2014, the number of SEs established in the Czech Republic started to decrease significantly, as the basic advantages that motivated domestic entrepreneurs to choose the SE form for their business (according to previous surveys) disappeared.[90] However, since single-member boards of directors and supervisory boards of joint stock companies may not be ideal from the perspective of good corporate governance, the CZ Code responded by recommending that under a dualistic system of internal governance, the board of directors should have at least three members (Art. 5.4 of the CZ Code), as should the supervisory board (Art. 6.2 of the CZ Code).

Although no EU regulation unifies the regulation of the internal organizational structure of national joint stock companies, the regulation of the SE has become one of the reasons for the increased variability of the internal management and administration of Czech joint stock companies—both in terms of the choice between monistic and dualistic internal management systems and in terms of personnel requirements for the minimum number of members of the supervisory board or the board of directors in these joint stock companies. This case illustrates that, in a situation where a deeper EU harmonization of national corporate governance rules is not 'realistic' in view of the traditions in the individual EU Member States (path dependency), pressure can be indirectly put on the corporate governance rules and standards that are applicable in the individual EU Member States' legal systems—through the regulation and structure of multinational forms of business corporations, alongside which national companies then 'compete' for public favour.

[90] For more information on the impact of the changed regulation to allow for a choice between European joint stock companies and Czech joint stock companies, see Lasák (2020), pp 151 et seq.

8 The Trajectory of Czech Corporate Governance

The development of Czech corporate governance is fundamentally determined by the transformation of the totalitarian system of a centrally planned economy into a democratic system of a market economy, and thus by the change to the institutional structure, which is unprecedented in traditional democracies. As we have shown above, the Czechoslovak, and later Czech political representation chose the path of privatization as quickly as possible, with the largest proportion of the companies being privatized in voucher privatization. This privatization took place in the early 1990s in a situation where the old socialist institutions disappeared or were dysfunctional and new institutions had either not yet been created or were very weak. The architects of the transformation did not consider it appropriate to wait for them to be created or strengthened because they considered that the costs associated with such a delay would be greater than the losses threatened by privatization within a weak institutional framework. This approach was later criticized mainly from the perspective of the new institutional economics.[91] The transformation strategy is the prerogative of politics and will probably always be a subject of controversy.

Privatization undoubtedly achieved its main objective, which was the separation of the economic and political power of the state, the abolition of the institutions of the centrally planned economy and the creation of the necessary conditions for the restructuring of privatized enterprises. However, the transfer of ownership from the state into private hands did not in and of itself establish the conditions for enhanced corporate governance.[92] All the more so if such a transfer results in a separation of control from residual claims to the property, as was the case in voucher privatization. In such a situation, the lack of an institutional and legal framework widens the space for moral hazard, which manifested itself in all its shapes and sizes in the Czech Republic in the 1990s.

The transformation failed to build a strong capital market. Although privatization nominally floated the shares of almost 2000 companies on the stock exchange, liquidity remained very low and markets failed to fulfil their price-setting purpose. The low level of protection for minority shareholders, the lack of transparency, the low level of law enforcement and the lack of any prior experience on the part of investors, in the context of the disastrous coverage of the free media in the 1990s, constituted a major barrier to their further development. The absence of investment privatization funds being regulated was a major contributing factor to this failure.

Although privatization investment funds were supposed to function as a control mechanism over the management of privatized companies according to the ideas of the creators of the voucher privatization, in the end, investment funds established by non-banking entities in particular often engaged in various forms of asset stripping; i.e. alienating assets and reducing the assets of privatized companies by taking assets outside the company in order to enrich their founders or connected persons. These activities attained considerable frequency. One can probably agree with Ježek

[91] Cf. Kouba (2004), pp 15 et seq.
[92] Mejstřík (2003), p 386.

that the fundamental issue was the resignation to separate the assets of the founders from those of the investors.[93] This allowed the founders to control the funds' efficiently at minimal cost, creating a huge agency problem. Investment privatization funds were designed as closed-end funds. While their shares were traded on public markets, the shares of many funds were traded at discounts of up to 90% and there was minimal interest in them.[94] At the same time, these funds were managed by investment companies under long-term management contracts which, until 1996, were difficult to terminate.[95] This, together with an inadequate regulation of shareholders' rights, prevented a possible hostile takeover of privatization funds.[96] The largest embezzlements occurred in investment privatization funds, which were transformed into unregulated holding companies to escape the tightening regulation of investment funds.[97]

State-controlled banks were a specific phenomenon of the transformation. These banks controlled a number of privatized companies through their investment companies. The banks then provided 'their' companies with soft budget constraints, prolonging inefficiencies and delaying the bankruptcy of 'their' companies. In doing so, they gave companies room to loot (or take out non-performing loans), harmed their depositors and shareholders, increased the rate of classified loans and distorted competition in the credit market by discriminating against companies that were not granted this preferential treatment.[98]

While Czech society was in a state of transformation euphoria in 1990, by 1995 it found itself in a state of transformation hangover, which lingered for at least another ten years. After 1995, there was strong pressure to build the missing institutions and while these institutions were paradoxically natural, they were being built primarily from within in a natural reaction to the 'transformation shock'. In 1995, the Association Agreement with the European Community entered into force at the same time,[99] in which the Czech Republic undertook, among other things, to gradually approximate its legal order with the acquis communautaire, which has since then fundamentally influenced institutional development. In contrast to the first half of the 1990s, when Czech law remained a victim of its own past, an increasingly deeper reflection on foreign legislation has become apparent, with the influence of the German legal system being the most prominent.

[93] Tomáš Ježek in Hanák (2009), p 76.

[94] Coffee (1996), pp 118–145.

[95] Richter (2005), p 83.

[96] Vychodil (2004), p 57.

[97] According to data from the Security Commission, up to 80% of assets from these funds were fraudulently diverted after their transformation. That amounts to damages of about 40 billion crowns (Hanák (2009), p 48).

[98] Vychodil (2004), p 56.

[99] The European Agreement establishing an association between the Czech Republic, on one side, and the European Communities and their Member States, on the other, was executed in Luxembourg on 4 November 1993. This Agreement was approved by the EC by Council Decision ECSC/EC/EURATOM/94/910 on 19 December 1994.

Thus, in 1996, corporate law was fundamentally amended, rules increasing market transparency were introduced, the regulation of investment funds was amended, the Anti-Money Laundering Act was adopted and the Czech Republic embarked on a path of gradual legislative change aimed at completing the institutional infrastructure corresponding to the post-transformation phase of the Czech economy. Efforts to respond to the painfully-apparent lack of regulation led to overreaction in some cases, such as the regulation of conflicted transactions in Section 196a of the Commercial Code, brought about by the 2001 amendment to the Commercial Code.[100] The adoption of the new Act on Capital Market Undertakings in 2004 marks the beginning of another era of the modernization of Czech law, which includes, among other things, the reform of the Insolvency Act (2006), a new regulation on takeover bids (2008), transformations of business corporations (2008) and investment funds (2013), culminating in the recodification of private law (2014). The current Czech legislative framework is thus fully standardized and equivalent to its counterparts in the traditional market economies of the 'old' EU Member States.

Between 1998 and 2001, the state (after a costly rehabilitation) sold its shares in Czech banks to foreign banks as strategic partners. This led to the final privatization of the banking sector, one of the last areas of an economy that had not been fully transformed. The capital market was on a downward trajectory for a long time. While in 1998 there were still 304 companies listed on the Prague Stock Exchange, in 2015 there were only 25. Even though 55[101] companies were listed on the Prague Stock Exchange in 2020, we still cannot speak of its revival. After the 'flight' of investment privatization funds from the tightening regulation in 1996, investment funds underwent a gradual standardization, accelerated by the aforementioned privatization of banks, which controlled the largest investment companies, and the implementation of extensive regulation under European law. In 2006, the previously fragmented supervision of the entire financial market was unified under the Czech National Bank. Among other things, the privileged independent position of the Czech National Bank, guaranteed by the Constitution, increased the effectiveness of capital market supervision, including increased pressure on the corporate governance of financial institutions and issuers of listed securities.

The institutional framework of corporate governance in the Czech Republic thus became standardized. The exceptional historical experience of a unique process of transformation remains a unique aspect of the Czech situation. However archaic it may seem to have been, its imprint is still present in the form of historical experience influencing contemporary discourse and as an emotional element of the collective subconscious.

[100] Cf. Richter (2010/2011), pp 23–55.

[101] Annual Reports of the Prague Stock Exchange are available at https://www.pse.cz/vyrocni-zpravy.

9 Conclusions

As is apparent from the above thesis, there are several specific factors determining the development of corporate governance in Czechoslovak and later Czech law, and only a few of them are of a purely legal nature. Primarily, it was the post-revolutionary socio-economic change and the previous decades of the devastation of private property and privacy that brought a high degree of reluctance to demonstrate the internal structure of business to the public and to minimize the extent of regulation when the law was generally still understood as the tool of (principally undesired) state intervention. Even though it later became clear that the failure or absence of various types of control mechanisms left a negative social[102] mark—(self-)confidence in one's own ability to conduct business and mistrust in the state system of social control—they still had a significant impact on legal regulation and its form at the time. We must also remember that the growth of large assets in the hands of individuals occurred by leaps and bounds, and was not gradual; there was a massive transfer of assets from the state into the hands of specific individuals. In effect, an almost unlimited number of resources were transferred to the private sector, which allowed it to draw on the knowledge and experience of foreign experts and consultants who, however, found themselves in a 'world without adequate regulation'. Solutions were thus often transferred to the Czech situation that would not have worked or would not have been possible in a developed structure. The natural state that determined the way of doing business at that time thus did not contain most of what we would understand today as the necessary standard for functional corporate governance:[103]

- An experienced and neutral management, which would be independent of the will of the corporation owner, was lacking;
- *Ex ante* rules for the minimization of risks of moral hazard both on the side of management as well as the corporation owners were non-existent;
- Internal control systems were missing;
- Gatekeepers did not fulfill their role (auditors, external legal advisors etc.);
- Rights of residual minorities were marginalized.[104]

Moreover, the life of this Leviathan was either not constrained at all or only *ex post* and haphazardly by external control because the institutional guardians of the borders of its territory either did not themselves have the necessary knowledge and experience or they did not have sufficient and functional legal instruments at their disposal. If we realize that capital market regulation was almost absent, it is also

[102] Here we leave aside various forms of criminal behaviour, an abuse of legal regulations or other pathological phenomena.

[103] The significance and role of these components in managing corporations at a time of crisis is shown in, for example, Bainbridge (2012), pp 43 et seq.

[104] In addition, their ability to actively defend themselves was also limited by the fact that there were a huge number of them as a result of voucher privatization, which severely reduced their ability to act and effectively put the corporation in the hands of the majority shareholders or its management.

understandable that the judiciary reacted belatedly, if at all. Moreover, it logically reacted only to extreme cases of deviance and generalized its conclusions, which led to the interpretive ossification of many rules that would otherwise have played a different role in a reasonable system of corporate governance.

Today, we can probably admit that the subsequent structural inclination of corporate law towards the inspiration of the German Stock Corporation Act was an expected reaction because, besides the fact that Germany was and is the largest trading partner of the Czech Republic, its legal regulation was primarily perceived as being tried and tested, safe and transferable to Czech law. Although this assumption was not false, we now know that it was not necessarily true either, especially because of the very different civil law and related dogmatics. The gradual 'Germanization' of Czech corporate law, including the case law, which rarely drew on non-German sources, may have helped to set partial rules at the time but, in many respects, it systemically turned them towards greater inflexibility. This led to the frequent use of foreign legal codes for the internal regulation of companies or in some cases to the relocation of Czech companies outside the Czech Republic.[105] It is therefore understandable in retrospect that when the Securities Commission published its Corporate Governance Code in 2001, it explicitly stated that while the text 'is based on the OECD Principles, other materials including the Combined Code of the London Stock Exchange have also been used',[106] it was clearly a hit that missed the mark. The Czech environment did not know how to work with the schemes of corporate law on which UK law was based and there were no theoretical discussions on corporate governance because the gaps in legal regulation were only patched up quickly and *ex post* by transferring rules from German corporate law, which were often rules from the late 1960s. In retrospect, it is safe to say that the detachment of this Code and its authors from Czech practice and the reality of corporate law made it an overlooked and marginal episode with minimal impact and significance. Unfortunately, this also marginalized the OECD Model Principles, whose influence on Czech law was rather academic, although they were later visible in practice and legislation through foreign inspiration in the creation of new private law. However, as is apparent from the research results presented in the introduction, despite some improvement, the situation in private companies today is far from ideal and it is in no way possible to speak of them as having adopted the recommendations of the relevant corporate governance codes to any greater extent.

If, later on, we consider the business corporation and its governance, we must not forget that the Czech Republic had and still has a very high number of state (co-) owned entities (see above). As a rule, these entities have their own regulation in which functional corporate governance has not been set up, even though they are major players on the market. Although, today, more attention is being paid to these

[105] These processes, of course, were the result of several factors, in particular the slowness and unpredictability of the Czech judiciary, the high and/or opaque tax burden or the high degree of corruption within the public administration. Unfortunately, estimates and data on this issue are not available.

[106] After all, the text was professionally guaranteed by British lawyers from the British Know How Fund.

structures,[107] their historical role in the legal order has been more of a deviance rather than being developmental. It is also probably because of the existence of these state business structures and the gradual privatization of state property that it is not possible to consider that the business corporation should have the role of a public or social institution in the Czech environment in the period from 1989 to 2001, as is nowadays discussed when considering Corporate Social Responsibility.[108] At the same time, however, and often indeed independently of the state, Hayekian informal institutions developed, which gradually moved away from the pathological consequences of the time and helped to interpret and later to create legal rules. We believe that this spontaneous development was one of the reasons for the gradual infiltration of corporate governance standards adopted in developed Europe into Czech law (and later also the OECD Principles), further supported by the development of capital market and stock exchange standards.

However, after the completion of the privatization of state property—which *ad hoc* led to a strong fragmentation of the ownership structure through the use of the voucher privatization method and especially after the subsequent concentration of assets (buying out fragmented shares)—many corporations can be considered to have the status of 'large' corporations that ought to have and bear social or public responsibility, even in relation to the Czech Republic. This is why the Methodology of Application of the CZ Code currently being finalized seeks to interpret the rules for public joint stock companies in such a way so that they are also applicable to large and more complexly structured private joint stock companies. Here too, of course, the fact that many of these large companies have the characteristics of family companies and their structural set-up combines Czech and foreign corporations and foundations influences the final corporate governance set-up.

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[107] And also of discussions regarding the OECD Guidelines on Corporate Governance of State-owned Enterprises (2015), https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm, see also e.g. parts in Csach and Havel (2020).

[108] E.g. Gerner-Beuerle and Schillig (2019), pp 225 et seq.

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