NGL SYMBIO

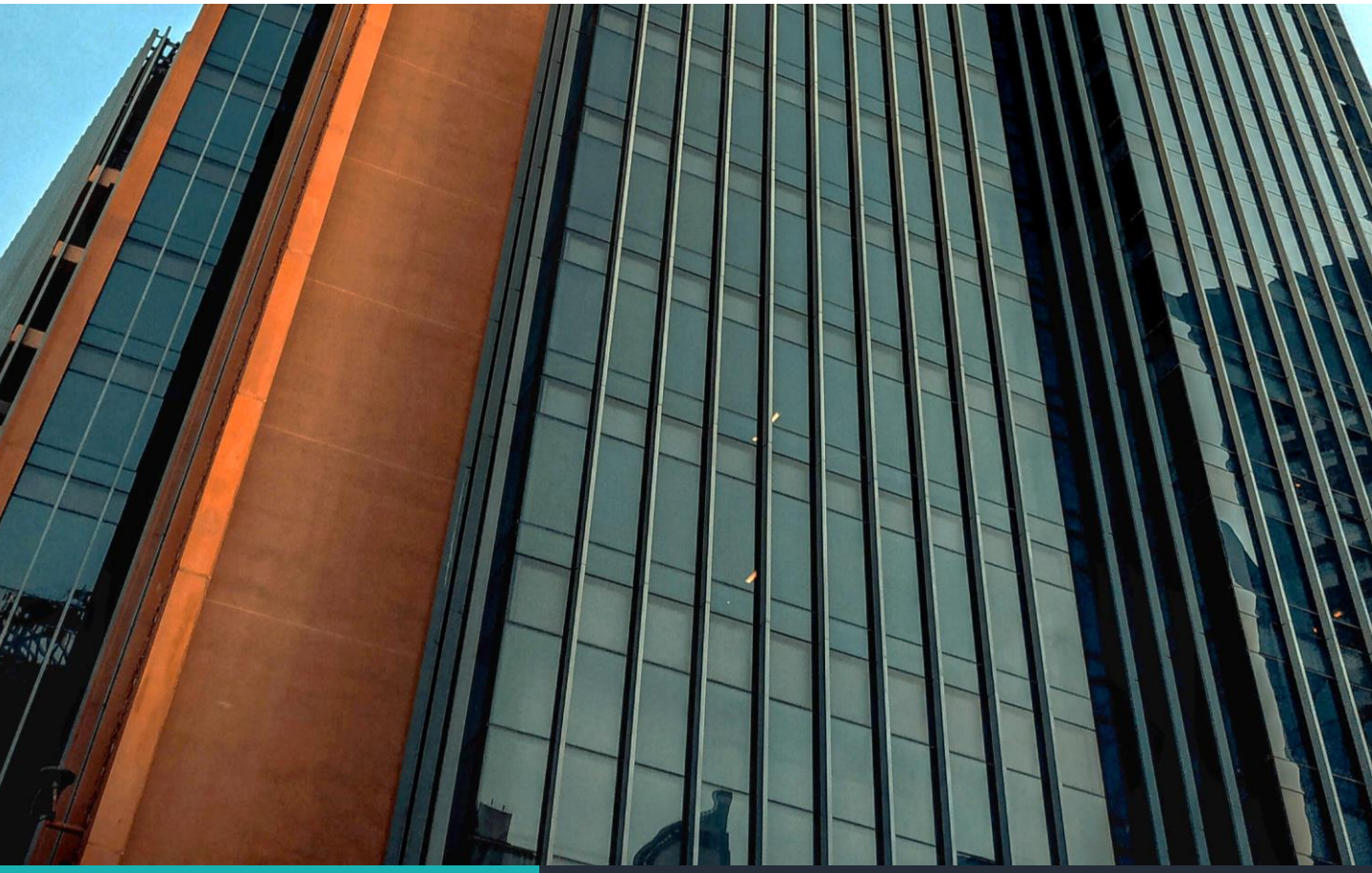
KEY ASPECTS OF SHAREHOLDERS' AGREEMENTS IN CEE

A COMPARISON & PRACTICAL GUIDE

KEY ASPECTS OF SHAREHOLDERS AGREEMENTS IN CEE

We are pleased to launch our 'Key aspects of Shareholders' Agreements' comparative guide covering the Czech Republic, Hungary, Poland, Romania and Slovakia.

There are certain considerations all shareholders should think about when contemplating putting a Shareholders' Agreement in place. This article examines a few of the key issues to consider and a checklist of questions to keep in mind, and is intended to act as a guidance tool to make obtaining legal advice a more cost effective, more efficient and less intimidating process.



CZECH REPUBLIC

Is this area explicitly regulated in the law:

The Business Corporations Act (Act No. 90/2012 Coll.) neither expressly regulates nor prohibits any shareholders agreements. Therefore, the shareholders agreements are concluded as innominate contracts pursuant to Section 1725 of the Civil Code (Act No. 89/2012 Coll.).

However, the existence of certain shareholders agreements is implicitly assumed by the Business Corporations Act, e.g., acting in concert (including the exercise of voting rights) or the disposal of voting rights.

In the absence of explicit regulation, the shareholders agreements are subject to general limits on freedom of contracting and limitations of a corporate-law nature (duty of loyalty among shareholders, prohibition of undue advantage, non-interference in the business management of the company etc.).

What is the nature of tag-along / drag-along right?

The legal institutes of tag-along / drag along have within the Czech legislation nature of contractual obligation and as such are an expression of the contractual autonomy of the parties.

Does the shareholders agreement have to be notarized?

The Czech legislation does not require the shareholders agreements to be notarized. One of the advantages of the shareholders agreements (apart from their flexibility) is that the involvement of a notary in the process of conclusion of the shareholders agreements is not required in any situation.

Does the shareholders agreement have to be registered?

The Czech legislation does not require the shareholders agreements to be registered. They are therefore referred to as "tacit" agreements.

However, it may be preferred in some cases that the obligations arising from the shareholders agreements are also reflected in the corporate arrangement, i.e. are included in the articles of association which is published in the Collection of Deeds.

Nevertheless, they are not part of the “shareholding relationship” of the shareholders and the rights and obligations between shareholders arise directly from the "silent" shareholders agreements, not from the participation in a specific company, even if these obligations are inextricably linked to the involvement in a particular company.

CZECH REPUBLIC

Does the shareholders agreement have to be concluded for definite period?

The shareholders agreements may be concluded for definite or indefinite period.

In the case of the shareholders agreements for an indefinite period, in which the possibility of termination is not agreed upon, the law provides for the possibility of termination by notice. If the parties do not agree on the length of the notice period or the beginning of its commencement, the Civil Code provides for the notice period to expire on the last day of the calendar quarter following the calendar quarter in which the notice was delivered to the other party.

Similar situation occurs, if the contract was concluded, without good reason, for a period exceeding ten years. In that case, the contract may be rescinded after the expiry of 10 years from the date on which the obligation arose.

Accordingly, the shareholders agreements are usually concluded for a definite period (mostly connected to certain conditions, such as change in the shareholder structure, winding-up the company etc.).

Does the shareholders agreement replace the company's articles of association / memorandum of association?

Shareholders agreements belong to the group of so-called side agreements (side letters), i.e. agreements governing relations between shareholders of a company beyond the scope of the articles of association or the law and as such does not replace the company's articles of association / memorandum of association.

The wording of these agreements does not have to be publicly available (Collection of Deeds kept by the Commercial Register) and does not require the form of a notarial deed. This makes the conclusion of shareholders agreements less costly and more flexible than modifications or amendments to the articles of association.

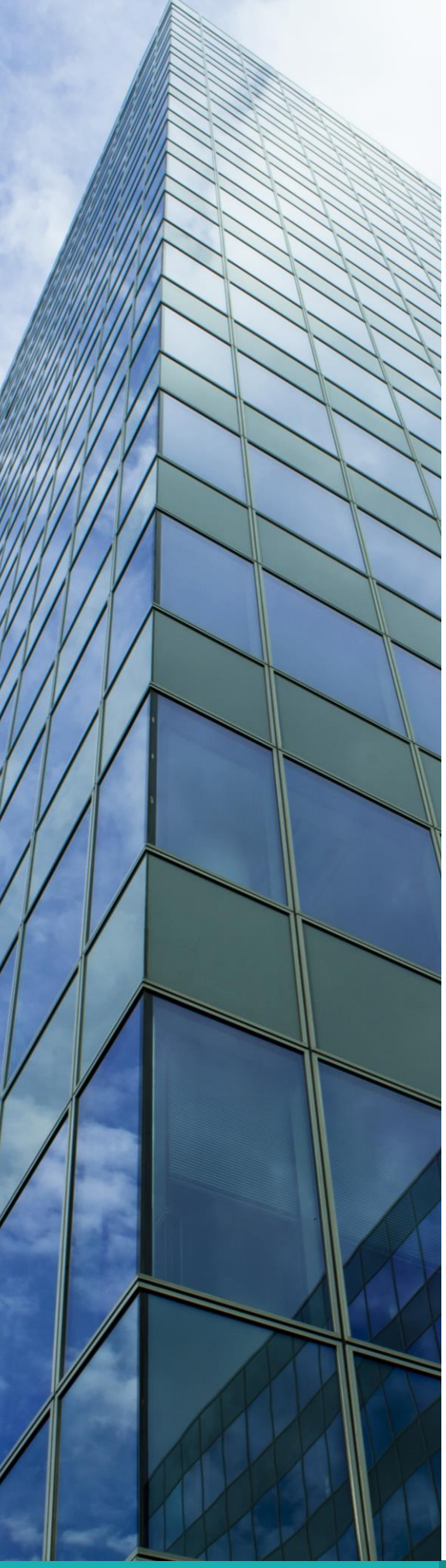
What are the consequences of a breach of the shareholders agreement?

Shareholders agreements are binding *inter partes*, i.e., the rights and obligations arising from them bind only the parties to them. The performance of shareholders agreements is subject to the general provisions on obligations under the Civil Code. The consequence of a breach of a shareholders' agreement will take the form of liability for damages or a contractual penalty if agreed.

Moreover, the shareholders agreements are not linked to shares or other property rights of the shareholder. Their rights and obligations are attaching only to the person of the shareholder as a party to the agreement. Therefore, if a share is transferred to another shareholder, the shareholders agreement does not automatically transfer to the new shareholder.

What further development do you expect?

Under the former Commercial Code, certain agreements between shareholders were expressly prohibited. This applied to selected agreements on the exercise of voting rights by shareholders. However, in the absence of a regulation corresponding to this prohibition in the Business Corporations Act, the question may arise whether such agreements on the exercise of voting rights are permissible today. It can be expected that the case-law of the Czech courts will follow their decisions regarding prohibited agreements on the exercise of voting rights enshrined in the previous legislation, especially with regard to the prohibition of self-regulation of the elected bodies of a joint-stock company, which constitutes one of the basic principles of the legal regulation of a joint-stock company and is its inherent feature.



HUNGARY

Is this area explicitly regulated in the law:

Hungarian law does not expressly regulate shareholders agreements.

According to the Hungarian judicial case-law, the shareholders agreement is an autonomous legal relationship among the shareholders of the company. It is an independent contract separate from the company's articles of association, contracts concluded by the company or contracts concluded by the shareholders of the company.

What is the nature of tag-along / drag-along right?

Under the Hungarian law, these institutions correspond to a call option under the principle of freedom of contracting, and these rights have the same validity and nature as other contractual obligations do.

However, in case of a specific type of a company – "simple joint stock company" (in Hungarian: *részvénytársaság*) – these rights may be registered and, in such case, would be subject to regime similar to rights in rem. Nevertheless, such procedure is very little used in business practice. Moreover, this applies only to "simple joint stock companies".

Conversely, in regard to other types of companies in Hungary, a transfer of shares in favor of third parties is subject to stricter regulations, including prior shareholder approval and the absence of creditor opposition.

Does the shareholders agreement have to be notarized?

Since the shareholders agreement is not regulated as a separate type of contract in the Hungarian Civil Code, its conclusion is governed by the general rules of contractual law and notarization is not required.

Does the shareholders agreement have to be registered?

Unlike the articles of association, which are a public document, the shareholders agreement is a private contract between the shareholders which does not need to be registered with the Court of Company Registration in Hungary. There is no central register of shareholders agreements in Hungary.

Certain exception to this rule applies to relations, where one of the parties is the state (e.g. government, municipality, state-owned company). In this case, it is necessary to publish the shareholders agreement. However, it is not a question of "registration", but only of the publication of such agreement and its effectiveness.

HUNGARY

Does the shareholders agreement have to be concluded for definite period?

The shareholders agreement may be concluded for definite or indefinite period.

While in practice many types of shareholders agreements may exist, shareholders agreements that are concluded in form of "preliminary agreements" usually conclude around the time when the company is founded.

We can also differentiate shareholders agreements complementing the instrument of foundation with parallel existence, and there are also contracts surviving the instrument of foundation, particularly stipulating the company's dissolution.

Does the shareholders agreement replace the company's articles of association / memorandum of association?

The shareholders agreement does not replace any mandatory corporate document which is defined by the Hungarian law, neither the company's articles of association / memorandum of association. However, the members of the company may decide to incorporate the provisions of the shareholders agreement in the articles of association / memorandum of association, but only those which are not prohibited by the Hungarian Company Law (Act V of 2006) or other applicable law.

While the articles of association / memorandum of association are accessible through the Court of Company Registration in Hungary, the secret or confidential character of a shareholders' agreement can be preserved, as this agreement is not submitted to the Court of Company Registration in Hungary.

What are the consequences of a breach of the shareholders agreement?

As with all other types of contracts, enforceability is a major feature of a shareholders agreement as well. Thus, in the event of a breach of contract, the aggrieved party shall be entitled to require performance of the obligation, pursuant to Section 6:138. of the Hungarian Civil Code.

Related to this issue, it should be noted, that according to the Hungarian judicial case-law, the shareholders agreements cannot be enforced *in natura*, thus the contractually agreed consequences related to the breach of the shareholders agreement will not be enforceable, because of the unique relation of these agreements and the company's instrument of constitution.

As a conclusion, the major form of enforcement in relation to these agreements is to claim a compensation based on liability for any loss caused by non-performance, pursuant to Section 6:142 of the Hungarian Civil Code.

What further development do you expect?

There will be an anticipated act entering into force on the 1st of January, 2022, bringing several amendments to the Hungarian Civil Code's provisions related to legal persons.

However, these amendments hardly connect to the current legal status of shareholders agreements, as they mostly affect strictly company law-related provisions.

POLAND

Is this area explicitly regulated in the law:

The shareholders agreement is not explicitly regulated under Polish law.

The shareholders agreement is allowed under the principle of freedom of contracting under the Civil Code, which also applies to the corporations.

There are certain provisions of the Polish Commercial Companies Code, which limit the abovementioned freedom of contracting. For example, under the above regulation, in joint-stock companies (spółka akcyjna) any agreement restricting the transferability of shares in the company is only allowed for a period of 5 years.

What is the nature of tag-along / drag-along right?

Tag-along and drag-along rights have a nature of contractual obligations subject to the freedom of contracting under the Civil Code.

Does the shareholders agreement have to be notarized?

The shareholders agreement does not in general require any specific form or notarization.

However, in case of the limited liability companies (*spółka z ograniczoną odpowiedzialnością*), if the shareholders agreement provides for the obligation to transfer shares (e.g., call-option, or compulsory transfer as security for the event of a breach of the shareholders agreement), then the shareholders agreement should be concluded with notarized signatures in order for such provisions to be enforceable.

Does the shareholders agreement have to be registered?

In Poland the law does not require the obligation to register the shareholders agreements.

However, it is often necessary that the obligations arising from the shareholders agreement are also reflected in the company's articles of association, which have to be submitted to the registry files, which are open to the public.

POLAND

Does the shareholders agreement have to be concluded for definite period?

The shareholders agreement may be concluded for definite or indefinite period.

In practice, the parties usually enter into the shareholders agreement for definite period, in particular for the duration until there is a change in the shareholder structure, and additionally, the shareholders agreements usually contain a provision regulating the possibility of early termination.

Does the shareholders agreement replace the company's articles of association / memorandum of association?

The shareholders agreement does not replace the company's articles of association. It is recommended to include in company's articles of association the most important provisions from shareholders agreement for enforceability reasons.

However, due to the fact that the articles of association are publically available it is often not desired to include to the articles of association the sensitive information.

What are the consequences of a breach of the shareholders agreement?

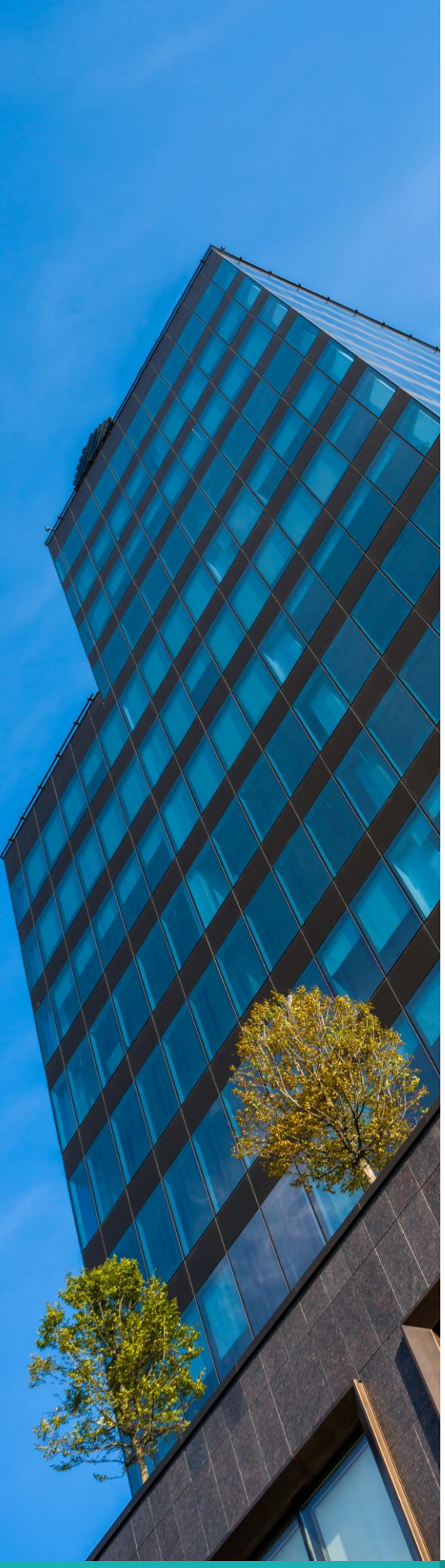
Breach of the shareholders agreement has a nature of breach of a contractual obligation.

The performance of shareholders agreement is subject to the general provisions on obligations under the Civil Code. The consequence of a breach of a shareholders' agreement will take the form of liability for damages or a contractual penalty if agreed.

What further development do you expect?

Currently, the legislature is not pursuing any active legislative proposals to regulate the shareholders agreement.

Due to the fact that the Polish jurisprudence concerning the shareholders agreements is not quite developed and the interest in concluding shareholders agreements (even in small businesses) is growing significantly year by year, we expect relatively more disputes in the future, which should have impact on development of the law in this area.



ROMANIA

Is this area explicitly regulated in the law:

The shareholders agreements are not explicitly regulated by the Romanian legislation. However, such agreements are governed by the general rules on contracts pursuant to the Civil Code.

Due to the lack of regulation, the shareholders agreement usually provides in great detail the rights, obligations and procedures agreed by the shareholders for their future organization and cooperation. This is also advisable since the Romanian court practice has not developed yet and therefore sufficient legal or judicial framework is lacking.

What is the nature of tag-along / drag-along right?

These rights have the nature of contractual obligations. Starting with 2009, however, the new Romanian Civil Code expressly provides the possibility to automatically transfer movable assets (including shares) based on a call option procedure.

Such rights (drag along/tag along) are more easily enforceable for joint stock companies (in Romanian: *societate pe actiuni*) due to the fact that for these types of companies the transfer of shares is performed by registration of the transfer in the company's shareholders registry.

For limited liability companies, where a corporate approval by the Trade Registry is necessary to perfect a transfer of shares, the direct enforceability is still debatable, as the local trade registry practice is not yet consistent.

Does the shareholders agreement have to be notarized?

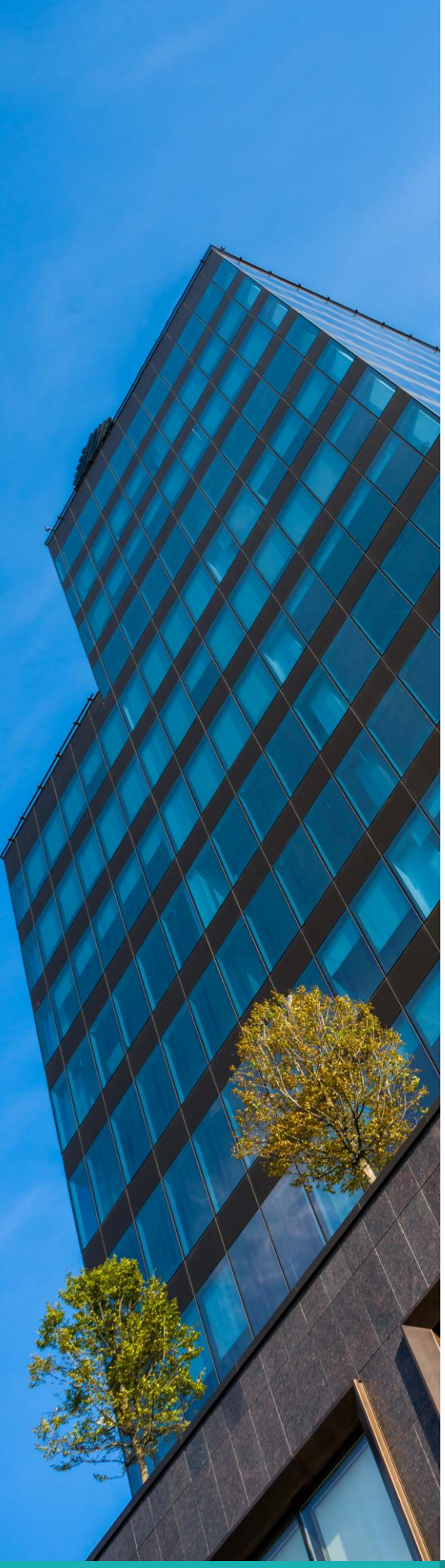
Under the Romanian law the simple signature would be sufficient in case of a shareholders agreement.

However, signature certified by a lawyer or a notary public, should be considered for cases when the shareholders' agreements provide for liquidated damages in case of breach of obligations.

Does the shareholders agreement have to be registered?

There is no legal obligation to register the shareholders agreements. However, should the parties decide for the agreement to be certified by a lawyer, the obligation to register such agreement with the local bar becomes applicable.

In addition, in case the target company is a limited liability company, the registration of certain rights from the shareholders agreement with the local Trade Registry (i.e., call / put options, drag along/tag along etc.) might provide stronger enforceability.



ROMANIA

Does the shareholders agreement have to be concluded for definite period?

The shareholders agreement may be concluded for definite or indefinite period.

Generally, the parties expressly provide therein the possibility of termination of such agreement.

Does the shareholders agreement replace the company's articles of association / memorandum of association?

The shareholders agreement does not replace the articles of association of a company.

Due to the fact that the articles of association are, by law, the contract of the shareholders, it is recommended to include in the articles of association as many clauses as possible from the shareholders agreement for enforceability reasons (i.e., call / put options, drag along/tag along etc.).

What are the consequences of a breach of the shareholders agreement?

Breach of the shareholders agreement has a nature of breach of a contractual obligation.

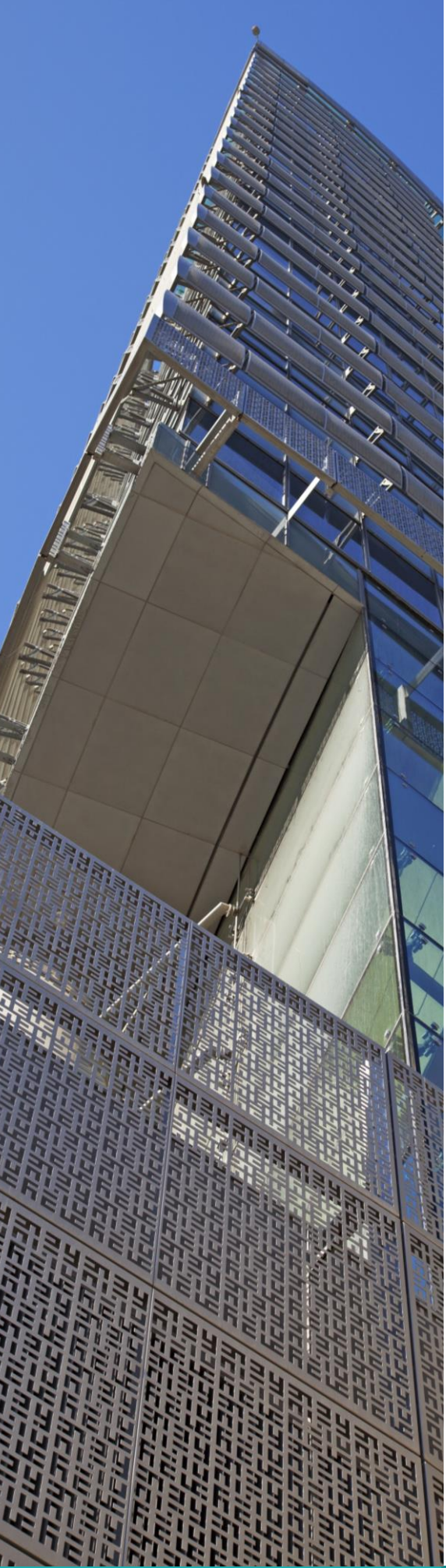
Therefore, the consequence shall be in form of a liability for damages or a contractual penalty, if agreed.

However, in the cases of breach of tag-along / drag-along rights or put/call options, specific performance may be requested in court.

What further development do you expect?

Currently, in the Romanian legislation, there is no active plan to expressly regulate the shareholders agreements.

Developments may be generated by the court case law.



SLOVAKIA

Is this area explicitly regulated in the law:

The Slovak Commercial Code explicitly enables the shareholders agreements. However, the legal regulation is only general and decision-making practice of Slovak courts has not developed yet. Therefore, the shareholders agreements are typically drafted in great detail since there is not sufficient legal or judicial framework. The parties thus seek to avoid the risk that any aspect of the shareholders relationship would be potentially unclear and disputed.

What is the nature of tag-along / drag-along right?

In general, these rights have a nature of contractual obligation. Nevertheless, in case of a "simple joint stock company" (in Slovak: *jednoduchá spoločnosť na akcie*), which is a specific type of a company under the Slovak law, these rights may be registered with the relevant securities depository and, in such case, would be subject to regime similar to rights in rem. However, such procedure is very little used in business practice. Moreover, the abovementioned applies only to "simple joint stock companies" and is not applicable in respect of other types of companies.

Does the shareholders agreement have to be notarized?

Generally, the Commercial Code does not require any higher legal form for the shareholders agreements. In case of the "simple joint stock companies" (in Slovak: *jednoduchá spoločnosť na akcie*), the signatures need to be notarized and in case of registration of tag-along / drag-along right, the shareholders agreements are required to be in form of notarial deed. However, this only applies to the "simple joint stock companies" and is not applicable in respect of other types of companies.

Does the shareholders agreement have to be registered?

The law does not require the obligation to register the shareholders agreements nor enables such registration.

Only in case of "simple joint stock company" (in Slovak: *jednoduchá spoločnosť na akcie*), certain rights (tag-along / drag-along rights) may be registered, providing them with stronger enforceability – the registration concerns those certain rights from the shareholders agreements, not the agreements themselves. This, however, does not apply in respect of other types of the Slovak companies.

Certain exception to this rule applies to relations, where one of the parties is the state (e.g. government, municipality, state-owned company). In this case, it is necessary to publish the shareholders agreement in the Central Register of Agreements before it becomes effective. However, it is not a question of "registration", but only of the publication of such agreement and its effectiveness.

SLOVAKIA

Does the shareholders agreement have to be concluded for definite period?

The shareholders agreement may be concluded for definite or indefinite period.

In practice, the parties usually enter into the shareholders agreement for definite period, in particular for the duration until there is a change in the shareholder structure. The reasoning behind such practice is that agreements concluding for indefinite period of time can be generally terminated by notice without stating a reason.

Thanks to such legal structure of the shareholders agreement, the agreement usually can be terminated by notice only for reasons specified therein.

Does the shareholders agreement replace the company's articles of association / memorandum of association?

The shareholders agreement does not replace, only supplements the corporate documents and the subject-matter of the shareholders agreement goes beyond the scope of these documents.

The practical importance of concluding shareholders agreements in parallel with the company's articles of association / memorandum of association is that:

i. the shareholders agreement usually specifies the rights and obligations of the shareholders towards each other in more details and

ii. the articles of association / memorandum of association are obligatorily published in a Collection of Deeds kept by the Commercial Register, while the shareholders agreements does not have to be published in most cases.

What are the consequences of a breach of the shareholders agreement?

Breach of the shareholders agreement has a nature of breach of a contractual obligation. Accordingly, the consequence shall be in form of a liability for damages or a contractual penalty, if agreed.

In case of breach of registered tag-along / drag-along (in case of "simple joint stock company" (in Slovak: *jednoduchá spoločnosť na akcie*)), we are of the opinion that due to nature of these registered rights as rights in rem, a party to the shareholders agreement shall be entitled to (i) ask the court to rule on the relative invalidity of the agreement on the basis of which the shares were transferred to a third party (if applicable), (ii) demand the exercise of the tag-along / drag along right, or (iii) shall be satisfied that he shall retain tag-along / drag-along right.

What further development do you expect?

As part of the efforts of Ministry of Justice to recodify the commercial codes, it is planned that the "simple joint stock company" (in Slovak: *jednoduchá spoločnosť na akcie*) as a specific type of a company will be abolished.

Moreover, the Ministry of Justice plans to regulate the issue of shareholders agreement in the relevant laws in more details, whereas the specifics are not yet finalized.

In addition, the Slovak legal community is eagerly awaiting new case law on shareholders agreements.

MORE QUESTIONS?

We are happy to help.

Contact our Regional Corporate Team:

Martin Šubrt
PARTNER, CZECH REPUBLIC
+420 725 032 062
subrt@rowan.legal

Luca Bokor
PARTNER, HUNGARY
+36 30 859 3522
luca.bokor@erdoskatona.com

Tomasz Ciećwierz
PARTNER, POLAND
+48 607 098 210
tomasz.ciecwierz@nglllegal.com

Teodora Motatu
PARTNER, ROMANIA
+40 744 950 988
tmotatu@birisgoran.ro

Lukáš Michálik
PARTNER, SLOVAKIA
+421 907 700 870
lmichalik@hkv.sk