Acta Universitatis Sapientiae

Legal Studies

Volume 12, Number 1, 2023

Sapientia Hungarian University of Transylvania
Scientia Publishing House

Contents

Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 5–21

DOI: 10.47745/AUSLEG.2023.12.1.01

The European Union's Investment Policy – The Effects of the *Achmea* Case and the 2020 Termination Agreement of Intra-EU BITs[1]

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Abstract. The increasing involvement of the European Union (EU) in the field of investment protection has been a source of several conflicts in the recent years. Also, this phenomenon has led to significant changes in international and EU investment protection regulations and related dispute settlement or even arbitration procedures. In this article, we briefly present what investment protection usually means and how investment protection law has developed. Later on, we cover the investment protection policy of the EU, including its regulations and reform efforts related to investment protection. Last but not least, we highlight the problems of investment protection litigation in the EU, based on a judgment of the CJEU and a multilateral agreement between Member States (Termination Agreement).

Keywords: investment protection, EU's judgment, *Achmea* case, bilateral investment treaties, Termination Agreement, investment protection policy of the EU, investment protection regulation, arbitration procedures

1. Introduction

The development of a new investment protection policy in the EU has begun a few years ago, which often seems to 'collide' with international investment protection based on international conventions, from the perspective of either regulation or

1 The research was carried out within the framework of the *Programs for Improving the Quality of Legal Training* supported by the Ministry of Justice.

dispute settlement or even arbitration. Collisions between these two dimensions included the issue of compatibility between the bilateral investment treaty (BIT) agreements concluded by the Member States and the EU law. In this case, the issue of compatibility concerned whether the Member States have the power to regulate investments between Member States through bilateral investment protection agreements or otherwise, with respect to, for example, the overlaps with the regulations on the freedom of establishment and the free movement of capital. The Court of Justice of the European Union (CJEU) has ruled on the issue, stating in its landmark Achmea judgement that the arbitration clauses of bilateral investor-to-state treaties within the EU (intra-EU BITs) are contrary to the EU Treaties and thus jeopardize the autonomy and direct effect of EU law. Several questions have been raised in this regard: for example, what will be the fate of intra-EU BITs and ongoing investment arbitration proceedings based on these treaties? Well, we already know the answer to some of these questions. However, there are some that are yet to be answered such as: how shall multilateral agreements (e.g. the Energy Charter Treaty) be interpreted by the Court?

2. Development of International Investment Protection

Before presenting the formation and evolution of EU investment regulations, we will briefly talk about international investment protection in general so that our readers can see that the investment protection system of the EU rests on a fundamentally different regulatory framework than international investment protection law.[2]

After the Second World War, in addition to international trade, foreign investments[3] played key roles in shaping the global economy. Liberal market economies emerging around the world and the technical breakthroughs that took place at the time further increased the flow of foreign direct investments. The operation of foreign investments faced several challenge such as the pursuit of maximizing advantages and minimizing disadvantages, expropriation trends, the treatment of foreign investors, and individual state investment support policies. In view of all this, the implementation of the protection of foreign investments within national borders required international regulation.[4]

2 Kende–Nagy–Sonnevend–Valki 2016.

3 The general characteristics of the investment are described in *Salini Construttori S.p.A. v. Morocco* (ICSID Case N ARB / 00/4), according to which 'an investment is to be considered as falling within the scope of Article 25 (1) of the ICSID Convention if it means a contribution of the investor, it includes a certain duration of performance and a participation in the risks of the transaction, also, it shall constitute a contribution to the economic development of the host State of the investment'.

4 Dimopoulos 2011. 11. See also: Somssich 2015. 317–332.

The last stage in the development of investment protection law can be traced back to the early 1990s. The two pillars of the resulting structure are the system of investment protection agreements (substantive rules) and the unique dispute settlement system and its rules.[5]

2.1. The System of Conventions

International legal protection for foreign investors is primarily provided by international investment agreements (*international investment agreement* – IIA). There are currently more than 2,200 bilateral investment treaties (BITs) in force worldwide, and more than 300 trade agreements include chapters that contain substantive rules on investment, arbitration (*treaty with investment provisions* – TIP)[6] such as the ICSID (International Centre for Settlement of Investment Disputes) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, also referred to as the Washington Convention),[7] the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), etc.

These conventions offer various international legal solutions to the investors that reduce the business risks that may arise from the unknown legal environment of the foreign state or include standard 'clauses' that set out, *inter alia*, the treatment of foreign investments, compensation for expropriation, and investor and state dispute resolution rules (e.g. non-expropriation principles, non-discrimination principles, right to adequate treatment, etc.).[8] In addition, they include investor–state dispute settlement rules (ISDS), thus allowing a foreign investor to bring proceedings before an institutional arbitral tribunal against the host state if it has violated any of its obligations under an international investment protection agreement concluded between the investor's home state and the host state.

2.2. Dispute Settlement Methods

As one of the options, ICSID dispute resolution shall be mentioned. The rules of this procedure are framed by the ICSID Convention itself, that is, the only legal source for the procedure. It is a self-regulating autonomous system, independent of any national legal implications. The rules of procedure provide for independence and neutrality, as well as flexibility, just as – in comparison – arbitration. It is

5 Katona 2015. 8.

6 Conventions currently in force are available through the *International Investment Agreements Navigator* at: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (accessed: 18.07.2023).

7 Convention on the Settlement of Investment Disputes between Natural and Legal Persons of States and Other States (ICSID Convention) adopted in Washington on 18 March 1965.

8 Dolzer 2009. 220–221.

important to emphasize that the enforcement of an arbitration award made by ICSID is also provided by the ICSID Convention itself, and it is possible to review and – in some exceptional cases – annul the award before the institution's own forum.[9] Since its establishment, the vast majority of investment disputes have taken place before this forum.[10]

The other option is to use the procedure of other international investment arbitral tribunals, the enforceability of which is based on the New York Convention, as in the case of commercial arbitral tribunals.[11] The procedure is based on a regulation developed jointly by the parties (e.g. a BIT), which is based on the national law of the place of the procedure.[12]

3. Development of the Investment Policy of the European Union

The formation of the European Union and modern international investment protection legislation developed simultaneously, but the EU gained competence for foreign investment from the entry into force of the Lisbon Treaty[13] as it is stipulated in Articles 206 and 207 of the Treaty on the Functioning of the European Union (TFEU). Following the Lisbon Treaty, foreign direct investments became an exclusive EU competence, as confirmed by the CJEU in its Opinion No. 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore.[14]

The TFEU distinguishes between two forms of capital flows (maintaining and expanding capital stock): foreign direct investment and portfolio investment. It is important to note that there is not any uniform definition for the concept of foreign direct investment (FDI). According to the settled case law of the Court of Justice of the European Union, 'direct investment consists in investments of any kind made by natural or legal persons that serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity'.[15] Thus, the aim of the investor is to exercise control and management rights over the company with the help of the acquired ownership. In addition

9 Schreuer 2009. 398.
10 Dimopoulos 2011. 14.
11 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958 (New York Convention).
12 Katona 2014. 3.
13 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union, C 306 of 17 December 2007.
14 Opinion 2/15 of the Court of 16 May 2017 (EU:C:2017:376).
15 C-446/04 Test Claimants in the *FII Group Litigation v. Commissioners of Inland Revenue*, Judgment of the Court (Grand Chamber) of 12 December 2006.

to acquisitions, real estate investments and loan transactions are also included. However, the purchase (acquisition) of company shares for financial investment purposes without the intention to influence the management and control of the undertaking (so-called 'portfolio' investment) does not fall into this category.[16]

Based on this distinction, it shall be emphasized that direct investment falls within the exclusive competence of the EU, while portfolio investment remains within the competence of the Member States. In the case of portfolio investment agreements, the conclusion of mixed contracts is suggested that involves the Union and the Member States.[17]

Obviously, the aforementioned does not mean in any way that the Treaty of Lisbon was the first to introduce foreign investment into EU law. In the past, the EU has sought to establish its own investment policy, as the European Commission (the 'Commission') carried out additional services in the field of capital movements and investment promotion, but only in areas not covered by Member States' conventions. With the extension of the Common Commercial Policy, the EU investment policy has started to increasingly cover wider areas with its regulations and has played an important role in multilateral investment-related agreements. This process, however, has resulted in that the scope and exercise of Member States' powers is ambiguous. Therefore, a kind of power struggle has begun between the EU and the Member States over the regulation of foreign investment, and the Treaty of Lisbon has not resolved these differences without contradiction.[18]

4. The Relationship between Investment Protection Conventions of Member States and EU Law

In the 1990s, the countries of Central and Eastern Europe aspiring to EU membership concluded several BITs with Western European Member States. These conventions were not in the focus of attention until 2004, when, in the Commission's view, the BITs became from the category of tolerated exceptions to obstacles of the single market.[19] The Commission also kept in mind that BITs grant different rights to foreign investors, as Member States with an investment protection agreement may have an advantage over those who are not party to them. The Commission considered this to be a discriminatory advantage that was not in compliance with the single market approach. The Commission also found it harmful that BITs between Member States created parallel jurisdiction through

16 Opinion 2/15 of the CJEU, paras 227–228.
17 Szabó–Láncos–Gyeney 2015. 81–82.
18 Dimopoulos 2011. 17.
19 Menczelesz 2017. 136.

arbitration, which could be a way to circumvent the CJEU's monopoly on the interpretation of EU law.[20]

Based on the aforementioned, it can be concluded that the conventions have generated significant political and legal debates, where the Commission has acted in a changing role, either as an *amicus curiae* or as a supervisory body. In order to ensure the supremacy of EU law, the Commission has intervened, handed in written submissions[21] or issued statements[22] in several international investment arbitration cases. However, the arbitral tribunals ruling in these cases did not find the BITs concerned to be in breach of EU law.[23] The Commission has initiated several infringement procedures against some Member States in relation to BITs concluded before the EU membership, and in 2009 three judgments were made by the CJEU on issues related to EU law between an EU Member State and third countries.[24]

The practice of the CJEU has developed a test to support these cases. According to the 'hypothetical conflict' test, if there is a conflict between EU law and the BIT, the BIT must be interpreted in conformity with the EU law or, if this is not possible, the application of the BIT must be refused. Beneath this reasoning lies the pursuit to maintain the monopoly of the interpretation of EU law by the CJEU.[25] In these cases, the Commission expressed that the SMP clause governing the free transferability of capital was contrary to EU law, as it did not allow the EU to restrict the movement of capital between Member States and third countries, thus infringing Article 227 TFEU. The CJEU agreed with the Commission's argument and therefore did not consider international public law instruments – such as renegotiation and suspension to which Austria and Sweden referred – to be adequate, as they did not sufficiently ensure the immediate and effective application of EU measures.[26]

However, not all of the Member States agreed with the Commission's position. On 3 March 2016, the German Federal Supreme Court (*Bundesgerichtshof*) referred a question to the CJEU regarding the compatibility of arbitration proceedings with EU law based on investment protection agreements between Member States, in particular Articles 18, 267 and 344 of the TFEU.[27] The German Federal Supreme

20 Grill–Lukic 2016. See also: Menczelesz 2017. 136.

21 E.g. *Eastern Sugar v Czech Republic* SCC case (No. 088/2004).

22 E.g. *AES vs. Hungary* (ICSID Case No. ARB/07/22.), *Achmea BV v The Slovak Republic* (UNCITRAL PCA Case No. 2008-13). In the latter case, the Commission described investment protection agreements as a 'single market anomaly'.

23 See: *Achmea BV v The Slovak Republic*.

24 C-205/06 *Commission v Austria* (2009), C-249/06 *Commission v Sweden* (2009), C-118/07 *Commission v Finland* (2009). See also: Menczelesz 2017. 136.

25 Lavranos 2011. 282.

26 Lavranos 2011. 4. See also: Menczelesz 2017. 137.

27 C-284/16: Judgment of the Court (Grand Chamber) of 6 March 2018 (request for a preliminary ruling from the Bundesgerichtshof – Germany) – *Slovak Republik v Achmea BV*.

Court has taken the opposite view to the Commission's approach in relation to Article 344, stating that the article in question applies only to disputes between Member States and shall not be applied to disputes between a Member State and an investor.[28] Also, Article 267 does not constitute an obstacle to intra-EU BITs either, as the CJEU expressed in the Eco Swiss China Time Ltd. v Benetton International EV case that Member States can review judgments and refer a matter of EU law to the CJEU in a preliminary ruling procedure.[29] However, this possibility is limited, as judgments can only be reviewed in the event of a breach of public policy.[30] As far as Article 18 of the TFEU is concerned, the German Federal Supreme Court was in favour of arbitration. In its view, the possibility of discrimination can be eliminated by providing all investors the option of arbitration, so intra-EU BITs remain applicable.

5. The *Achmea* Judgement: A Landmark Decision

A comprehensive court decision on the issue described above has been long overdue, but on 6 March 2018 the CJEU made a landmark decision on BITs and dispute settlement between Member States (Achmea judgment).

The procedure was based on a BIT between a Dutch financial service provider, Achmea BV (formerly Eureko BV), and the Slovak Republic. Achmea established a subsidiary in Slovakia, to which it contributed capital and through which it offered private health insurance services. As Achmea considered that the legislation of the Slovak Republic infringed the provisions of the BIT, Achmea initiated arbitration proceedings against the Slovak Republic under Article 8 of the BIT in October 2008 and sought compensation. In its final judgment of 7 December 2012, the arbitral tribunal found that some of the measures taken by the Slovak Republic infringed the provisions of the BIT and ordered the Slovak Republic to pay Achmea the amount of EUR 22.1 million in damages and to bear the full costs of the proceedings including Achmea's legal fees and expenses. The place of arbitration was in Frankfurt am Main, and the Slovak Republic appealed to the Bundesgerichtshof in Germany. In its appeal, the Slovak Republic claimed that the final judgment should be set aside on the grounds that it was contrary to public policy and that the arbitration clause under which it was given is void, also contrary to public policy, therefore it was contrary to the provisions of the TFEU.

On 6 March 2018, in a relatively briefly reasoned but historically significant decision, the CJEU made it clear that there was a fundamental contradiction between the dispute settlement clauses of certain BITs in the Union and certain

28 Menczelesz 2017. 138.
29 C-126/97 *Eco Swiss China Time Ltd. v Benetton International EV* (1999).
30 C-126/97 *Eco Swiss China Time Ltd. v Benetton International EV* (1999). 40–41.

provisions and principles of EU law. In order to ensure that the specific features and autonomy of the EU law and order are preserved, a judicial system has been created to secure coherence and consistency in the interpretation of EU law. By its very nature, the BIT may jeopardize the preservation of the specific nature of EU law, in addition to the principle of mutual trust between Member States. EU law precludes a provision in the BIT according to which an investor of one of the Contracting Member States may bring an action before an arbitral tribunal against the host Member State in the event of a dispute concerning investments made and where the jurisdiction of the tribunal is mandatory.[31]

We agree with the academic views expressed following the publication of the judgment, stating that the Achmea decision of the CEJU has left many questions unanswered. Among other things, the following issue was raised: how can the ruling of the CJEU be interpreted for multilateral agreements such as ECT? Furthermore, it also concerns a significant issue as to whether the ICSID procedure for investment protection matters within the EU is compatible the EU law if it is based on a multilateral agreement. The CJEU has not taken a position on these issues yet, so it is ultimately up to ICSID to attribute any relevance to the judgment in such a case. [32]

The Achmea judgment made it clear from the point of view of EU law that an arbitration clause based on BITs within the European Union is not supported, has no *raison d'être*.

6. The Gates Are Closed for ISDS within the EU

As a direct result of the CJEU ruling in Achmea, on 5 May 2020, twenty-three Member States of the European Union, with the exception of Ireland, Finland, Austria, and Sweden,[33] signed an agreement terminating bilateral investment agreements between EU Member States (hereinafter referred to as the 'Termination Agreement'),[34] which entered into force on 29 August 2020. All of a sudden, more than 270 bilateral investment treaties within the EU have been terminated,[35] including termination (sunset) clauses,[36] so the arbitration clauses in the BITs

31 C-284/16 *Achmea v Slovak Republic*.

32 See also: Katona–Kende 2018. 27–35.

33 Ireland has not signed or ratified an intra-EU BIT since its denunciation, only a single intra-EU BIT in 2011 with the Czech Republic.

34 Termination Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT., OJ L 169, 29.5.2020. 1. (henceforth: Termination Agreement).

35 Termination Agreement, articles 1–2.

36 The sunset clause guarantees that all investments made before the termination of the BIT will continue to be protected for a certain period of time, i.e. in the event of a dispute between the investor, it may assert its rights against the host state.

within the EU can no longer serve as a legal basis for initiating new arbitration proceedings against Member States. The Termination Agreement declares that a BIT between two Member States shall be repealed when both parties confirm the text of the Termination Agreement. Therefore, the mere drafting of the Termination Agreement did not automatically result in repealing any Member State's BIT, an additional condition for which was the declaration of approval made by the participating states.[37]

It is worth noting that the Energy Charter Treaty falls outside the scope of the Agreement and that this 'exclusion' could be significant in the context of EU reform efforts, as almost half of intra-EU arbitration proceedings are initiated on the basis of the ECT.

Austria and Sweden have not signed the Termination Agreement but have committed themselves to terminate their bilateral agreements with all EU Member States. The Commission has initiated infringement proceedings against Finland and called on the Member States to take all necessary measures to eliminate BITs within the EU as a matter of urgency, as they are not in compliance with EU law.

6.1. The Termination Agreement and Pending Intra-EU Arbitration Proceedings

The Termination Agreement distinguishes between three categories of proceedings but lays down detailed rules only for ongoing and new arbitration proceedings; for closed proceedings, it only provides a conceptual definition.

'Pending Arbitration Proceedings means any Arbitration Proceedings initiated prior to 6 March 2018 and not qualifying as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement.'[38] Article 7 of the Termination Agreement requires the Contracting Parties to inform the arbitral tribunal of the legal consequences of the Achmea judgement in ongoing or new proceedings and to request the competent national court (including the courts of any third country) to participate in the arbitration proceedings under the BIT, to set the arbitral award aside, annul it or to refrain from recognizing and enforcing it.

The Termination Agreement introduces the possibility of a so-called 'structured dialogue' in the event of ongoing arbitration proceedings. Depending on the stage of the proceedings, the investor party may ask the Contracting Party involved in those proceedings to enter into a settlement procedure. In the event that a decision has not yet been made on the matter, the investor may request the suspension of the proceedings and initiate conciliation proceedings. However, if an award has already been issued in the pending arbitration proceedings, but not yet definitively enforced or executed, the investor undertakes not to start proceedings for its recognition,

37 Termination Agreement, Article 16.
38 Termination Agreement, Article 1 (5).

execution, enforcement, or payment in a Member State or in a third country or, if such proceedings have already started, to request that they are suspended.

The investor has six months from the date of the formal termination or expiry of the BIT to initiate the settlement procedure. The settlement procedure is complicated by the fact that the CJEU or a national court must first establish in a final judgment that a State measure complained of in a given procedure infringes EU law.[39] The settlement procedure shall be facilitated by an impartial mediator in accordance with a carefully designed protocol so that the parties can settle their dispute outside of court litigation or arbitration, amicably, and to their best interest.

The option of the 'structured dialogue' described above can be interpreted towards investors as a kind of pressure in order not to use their power in terms of procedure or enforcement of the decision. However, that was not well received by investors.[40]

As far as new arbitration proceedings – that are defined in Article 1 of the Termination Agreement as 'Arbitration Proceedings initiated on or after 6 March 2018' – are concerned, it is the explicit will of the Member States that the investors shall not initiate new arbitration but rather to recourse to a national court and to exhaust domestic remedies even after the expiry of the national limitation periods. In this case, the investor is bound by the terms specified in the Termination Agreement. Thus, the investor withdraws from the pending arbitration proceedings and waives all rights and claims and commits to refrain from instituting new arbitration proceedings.[41]

In the light of the above, it can be said that the Termination Agreement is essentially a 'complex set of transitional procedures'. Investors can suddenly find themselves at a crossroads where they have to decide which way to go. They may choose to continue with the arbitration proceedings and bear the (increased) risk of not being enforced at the end of their journey. Or they may opt for the settlement procedure, which, however, undoubtedly provides very limited opportunities for successful claims.[42]

The Termination Agreement chose a quite radical path to ensure that intra-EU investment arbitration conforms to the requirements of the EU legal order.[43]

The provisions of the Termination Agreement are of concern, as they affect the procedures and their judgments that were pending at the time of the Achmea decision, whereas the agreement itself was concluded only in the spring of 2020.[44]

39 Termination Agreement, Article 9 (3).
40 Korom 2022. 112.
41 Termination Agreement, Article 10 (1) a.
42 Fermeglia–Mistura 2020.
43 Sándor 2022. 183.
44 The provision thus also affects the Sodexo case, for example, even though the decision related to it had already been announced before the Termination Agreement was drafted. See case details below.

It is also important to point out that the BITs repeal of the ratification of the provisions contained in the Termination Agreement by the party states means that the BITs were considered to be still in effect beforehand – certainly from the point of view of international law. Therefore, it can be argued whether the Termination Agreement could legally deprive arbitral tribunals of their jurisdiction if they base their proceedings on BITs still in force in the given period. It also raises concerns that the countries that have concluded BITs terminate interstate contracts with retroactive effects by their own acts, depriving individual investors of rights and guarantees that they have built on in the long term. The situation is made even worse by the fact that most BITs contain sunset clauses, typically regarding the right to refer cases to arbitration. All of this might have constitutional implications.

After the termination agreement, investors and arbitral tribunals expressed that unless the protection guaranteed by BITs is somehow replaced, the decline of investments within the Union may begin. Member State companies may also be at a disadvantage compared to investors from third countries, or companies may resort to 'forum shopping'.[45]

6.2. Raison d'être – Reason for Being of the Sunset Clause

The Termination Agreement dealt a 'decisive blow' to BITs and to ISDS within the EU. The abolition of sunset clauses can be exemplary in this respect, as they expire under the Termination Agreement and thus have no further legal effect. This change is somewhat contrary from what is stipulated in Article 70 (1) of the 1969 Vienna Convention on the Law of Treaties, where paragraph (a) states that: 'Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention releases the parties from any obligation further to perform the treaty.'

However, the abolition of the termination clause could even be a concern, as the Termination Agreement deprives investors of their rights under the BIT.

Some arbitration courts in the EU have addressed this issue. In Magyar Farming v Hungary, the arbitral tribunal noted that the purpose of the termination clause was to 'respect the long-term interests of investors, who have invested in the host State on the basis of contractual guarantees'.[46] Considering that the essence of the termination clause is precisely to extend the international protection afforded to the investor under the BIT, after its termination, the investor may argue that the termination of the termination clause in the EU BIT violates its legitimate expectations, as the termination clause results in acquired rights for investors

45 Korom 2020. 72.

46 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No. ARB/17/27, Award of 13 November 2019, para. 223.

that shall survive the termination of the contract.[47] This 'tension' has led to some debate as to whether ISDS courts should take full account of the abolition of termination clauses in BITs within the EU.

Other arbitral tribunals expressed that regardless of the benefits and legitimate expectations that investors derive from the BIT, parties to a contract may terminate sunset clauses like any other contractual clause by terminating these clauses at the same time when they agree to terminate all the other parts of the contract with mutual consent.[48]

Thus, the sunset clauses have particular importance if one of the contracting parties wishes to withdraw from the BIT unilaterally. The debate suggests that investors are likely to continue to rely on termination clauses in expired BITs within the EU. If this tension is to be resolved within the framework of EU law, the involvement of the CJEU will be particularly necessary.

The Termination Agreement continues to contribute to the collision between EU law and intra-EU investment arbitration, as EU law – as a superior legal system – clearly takes precedence over the ISDS system.

In our opinion, one of the shortcomings of the Termination Agreement is that the regulation of the ECT, that is the largest multilateral investment agreement covering a wide range of investments in the energy sector, was not included. About 45% of the claims before ISDS in the EU are based on the ECT (Electrabel S.A. v Hungary, Vattenfall v Germany, Uniper v Netherlands, etc.).

However, despite the shortcomings of the Termination Agreement, it also shows its importance in broadening the way for the modernization of the EU investment law system, which includes the promotion of the establishment of an EU investment court system.

6.3. The Constitutional Dilemmas of the Termination Agreement

It is worth exploring the constitutional dilemmas raised by the Termination Agreement in the light of a concrete case brought before the Constitutional Court of Hungary (hereinafter referred to as the 'Court'), focusing on three questions.

Firstly, it is worth analysing how strongly the rights guaranteed under intra-EU BITs as inter-state treaties relate to individual investors and the leeway State Parties have in modifying or terminating those treaties. Secondly, considering that the Termination Agreement is based on EU law obligations, how much leeway do national constitutional courts of Member States have in deciding such claims? Thirdly, what constitutional aspects should be taken into account when

47 Article 37 (2) VCLT.
48 Voon–Mitchell 2016. 413, 430.

assessing whether the Termination Agreement conforms to the non-retroactivity (non-*ex post facto* law) principle?[49]

One exceptional case has recently arisen before the Constitutional Court of Hungary. The constitutional case has its roots in the investment dispute between the French company Sodexo and Hungary.[50] Sodexo made investments in the social vouchers market in Hungary. Sodexo initiated the arbitration procedure before the ICSID in 2014 because of the enactment of legislation in 2011 granting the Hungarian Government a monopoly over the prepaid corporate vouchers industry, which thus restructured this social voucher market. The French company alleged that as the new legislation introduced a state-run voucher system with conditions more favourable than those granted to private operators, based on the intra-EU BIT, it amounted to an indirect expropriation with regard to their investment in the social voucher market.[51]

After the date of the Achmea decision, the ICSID tribunal sided with the French investor company in its award rendered in 2019. The arbitration panel declared that the introduced Hungarian reforms amounted to an indirect expropriation,[52] and thus Hungary breached the provisions of the investment treaty. Therefore, Hungary was obliged to pay more than 70 million euros as compensation to Sodexo.[53] Hungary requested the annulment of the award and a stay of the enforcement before the Secretary-General. However, in the annulment procedure, the ICSID upheld the judgement, which is in favour of the French investor company, in May 2021.[54]

Then Sodexo sought enforcement before the regular national courts of Hungary in 2019. The Hungarian courts denied the French claimant's request for enforcement in both instances. The first instance court, the Municipal Court of Budapest, referred primarily to the legal consequences of the Achmea decision of the CJEU as the ultimate reason for the denial of the enforcement of the ICSID award.[55] The Budapest Court of Appeal, as the second instance court, relied on the Termination Agreement as the basis for denying the enforcement, but it also noted that, as a Member State court, it is obliged to take into account the statements of the Achmea decision.[56] However, the decisions have in common that they directly or indirectly enforce EU law against international legal obligations. Sodexo initiated a constitutional complaint procedure in the fall of 2020 against this decision, before

49 Sándor 2022. 191–192.
50 ICSID Case No. ARB/14/20 *Sodexo Pass International SAS v Hungary*.
51 Sándor 2022. 184.
52 Article 5. para. 2 of the intra-EU BIT between France and Hungary, ICSID Case No. ARB/14/20 Sodexo Pass International *SAS v Hungary* Award para. 362.
53 ICSID Case No. ARB/14/20 *Sodexo Pass International SAS v Hungary Award* para. 519.
54 Sándor 2022. 184.
55 See decision no. 32.Vh.400.043/2020/6 of the Budapest Municipal Court.
56 See decision no. 2201-3.Pkf.25.414./2020/4. of the Budapest Court of Appeal.

both the Curia[57] and the Court. The Court suspended its own procedure until the Curia rendered its final decisions in the case.[58] Regardless of the outcomes of the procedure before the Curia though, the claimant company raised abstract and theoretically sound constitutional dilemmas with regard to the relation between the Termination Agreement and the constitutional guarantees enshrined both in national constitutions like the Fundamental Law of Hungary and in the EU legal order. These dilemmas had wider implications with regard to the nature of rights conferred upon investors by BITs as well as the deeper questions of the compatibility of obligations stemming from intra-EU BITs with EU law and the obligation to which national courts of Member States should comply.[59]

Accordingly, the main argument of the claimant company was that regarding the pending arbitration procedure, the Termination Agreement's judicial interpretation in the particular case is in contrast with the principle of non-retroactive (non-*ex post facto*) legislation. In principle, the Hungarian Fundamental Law prohibits the adoption of *ex post facto* laws. In the case law of the Court, the requirements of the Fundamental Law, which declare Hungary as an independent, democratic rule-of-law state, implicitly contain the principle of the settled expectation of the law, which, in principle, prohibits retroactive regulation.

In the reading of the claimant investor company, the Termination Agreement deprived them of substantive rights that are provided in the intra-EU BITs and procedural rights that are guaranteed by the ICSID Convention. These are a set of rights (international standards included in BITs) for investors such as compensation for indirect expropriation, fair and equitable treatment, legitimate expectations, and providing a venue that is isolated from the court system of the host state. Furthermore, the 'sunset clauses' provide that those rights shall be in effect for a longer time, spanning as much as 20 years after the BIT is terminated. However, the Termination Agreement prevents these rights from being exercised in pending arbitration procedures, and therefore it violates the principle of non-retroactivity.[60]

Sodexo finally withdrew its constitutional complaint on 3 January 2022, and with that the Court procedure itself was terminated, so we do not know what the Court would have said in its argument, how it would have resolved the contradiction between EU and international law in relation to Hungarian law.[61]

We agree with Lénárd Sándor's comment that 'although it is hard to provide one single straightforward solution for the constitutional dilemma of the Termination

57 The Curia is the Supreme Court of Hungary.

58 See decision no. 3209/2021. (V. 19.) of the Constitutional Court of Hungary.

59 Sándor 2022. 185.

60 Sándor 2022. 185–186.

61 See decision no. 3126/2022. (III. 23.) of the Hungarian Constitutional Court, decision no. 3127/2022. (III. 23.) of the Hungarian Constitutional Court.

Agreement, it seems certain that national judicial forums alone cannot address it, and that is true that the European judicial dialogue is unavoidable'.[62]

7. Reform Efforts – Strengthening the Position of the European Union's Investment Court System

Several experts have expressed their criticisms of investment protection arbitration in previous years. Critics of the current system of dispute resolution between a foreign investor and the host state generally complain that the case law is unpredictable and inconsistent, the procedure is indistinct, and the substantive review of arbitration awards is not possible.

Hence, the European Union established itself the goal of setting up an investment dispute settlement court. As a first step, the establishment of a bilateral Investment Court System (ICS) is being planned, which would be institutionalized in trade and investment agreements concluded with third countries (e.g. in a Comprehensive Economic and Trade Agreement between Canada of the one part and the European Union and its Member States of the other part, hereinafter referred to as: CETA). However, due to its 'bilateral' nature, the ICS is not able to remedy all the issues of investment arbitration; therefore, as a second step, the Union is working to establish a Multilateral Investment Court (MIC).[63]

Regarding the implementation of the European Union reform, issues may arise. For example, on 6 September 2017, the Kingdom of Belgium submitted a request for an opinion to the Court of Justice of the European Union under Article 218 (11) of the TFEU regarding the compatibility of the Treaties of the European Union with the new investment protection dispute settlement mechanism contained in CETA.[64] On 30 April 2019, the Court ruled that: 'Section F of Chapter Eight of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, is compatible with EU primary law.'[65]

8. Final Thoughts

As we expressed, the EU investment protection system follows fundamentally different trends from the international system of investment protection. In the

62 Sándor 2022. 191.

63 European Council 2017.

64 Official Journal of the European Union, C 369/2l, 30 October 2017.

65 Official Journal of the European Union, C 1/17. Opinion 1/17 of the Court (Full Court), 30 April 2019 https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=ecli:ECLI%3AEU%3AC%3A2019%3A341 (accessed on: 18.07.2023).

context of an increasingly evolving and changing investment protection policy, the European Union is creating a state of reform through the exercise of its competences and existing and future investment protection agreements with third countries. With the abolition or cancellation of BITs between Member States, the guarantee system they provide has become fragmented.

The case law of recent years clearly foreshadows the perspectives of the EU regarding foreign direct investment. It should be noted that the EU intends to lay the current system of international investment arbitration on completely new foundations. However, it is questionable whether the new system will be able to fulfil the role that, for example, the 'traditional' arbitration procedure based on the BITs between the Member States previously fulfilled.

In our view, the EU's investment protection policy is facing many challenges, and the law-making activities of the Commission, the CJEU, and the Member States are determining factors in it.

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*** *International Investment Agreements Navigator* https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last accessed on: 18.07.2023).

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Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 23–31

DOI: 10.47745/AUSLEG.2023.12.1.02

A Sketch of the Anglo-Saxon Roots of Constitutional Identity

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Abstract. Constitutional identity has become a focal point of Hungarian political and public discourse in recent years and is increasingly being discussed also in the European dialogue. More and more people are familiar with the meaning and value of the concept in Hungarian public law, but perhaps fewer are aware of the Anglo-Saxon roots of the concept of constitutional identity. My paper aims to summarize the latter (only sketchily, given that the subject matter of the paragraphs of this paper could fill books), providing a starting point for contemporary arguments and reasoning.

Keywords: constitution, constitutional identity, constitutional theory, constitutional law

1. Introduction

The concept of constitutional identity is scarcely addressed in constitutional theory; there are even legal scholars who are sceptical not only of its significance but even of its existence, saying that the label of 'constitutional identity' is a useful political tool for wrapping political ideologies into it and presenting them as public and constitutional goals to achieve. Therefore, there are many who share the view that the concept of constitutional identity is a notion which cannot be derived objectively and cannot be perceived passively from a neutral point of view.[1]

Personally, I believe that although constitutional identity is not an objectively definable concept, its existence is undeniable, and its application in a globalized world, even more so in the context of the European Union, can provide a useful anchor in law.

1 Tribe 1983. 440.

Although we may speak of different types of constitutional identity, such as written (the identity assumed by the constitutionalist), interpreted (the identity that can be read from the text of the constitution), discursive (the identity emerging from the communication of the political community),[2] it is clear that constitutional identity is a narrative, a story that is developed along constitutional principles, values, history, and experience. As Gary J. Jacobsohn puts it, the identity of a constitution is not an abstract invention or a well-rounded central core embedded in social culture, waiting to be discovered, but it is formed through experience, is a kind of dialogue and identity and also a mixture of many aspirations and opinions that express the nation's past and the determination of those who wish to transcend that past in some way.[3]

This paper goes back to the Anglo-Saxon roots of constitutional identity – not only because the concept was first elaborated on in any detail there but also because the continental interpretation of the concept is inextricably intertwined with EU integration, with the attempt to distinguish the legal systems of the Member States from the EU legal order,[4] which, compared to the Anglo-Saxon interpretation, is the subject of an extended explanation and a possible subject for another paper.

2. Constitution and Identity

To untrained ears, constitutional identity is a concept whose elements do not appear to be closely related or interrelated at first sight. Identity as a psychological and sociological concept is difficult to link with constitution, the written or unwritten document that forms the basis of the world's various national legal systems.

Constitution is a concept with multiple layers of meaning.[5] In absolute terms, it is the framework, or rather the result, of the emergence of a dynamic political entity that meets certain values. But a constitution is not just a political fact; it is also a law and a legal document.[6] The name can therefore refer to a norm, a political state, an object, or the document itself. Only some of these are usually used and rarely all of them.[7]

Constitution as a legal concept[8] has three levels of meaning: a theoretical level, reflecting on the constitution as an ideo-historical phenomenon and source of

2 Antal 2018. 299.
3 Jacobsohn 2013. 5.
4 For further details about the EU legal order in the Hungarian legal literature, see: Cserny–Téglási 2014. 13; Cserny–Orbán–Téglási 2018. 159–214. 208; Cserny–Orbán–Téglási 2019. 319–372. 366.
5 See also: Trócsányi–Schanda–Csink 2021. 29–35.
6 Takács 1989. 285.
7 For different aspects of the investigation, see: Möllers 2011. 5–37.
8 Regarding the concept of constitution, see: Cserny–Téglási 2013. 16–23; Téglási 2014. 11–18. András Téglási provides an interesting comparative analysis of the marking and naming of constitutions – see: Téglási 2011. 172–231, 263.

legitimacy. A normative level, which approaches the constitution as a positive norm, and, finally, a descriptive level, which takes a look at the constitution as a tool for describing institutions.

As will be mentioned later, if we start from the general or theoretical notion of a constitution, in which case by constitution we mean a regulated social order, then its identity as the identity of the constitutional arrangement is essentially equivalent to the concept of constitutional identity. If, however, the legal concept of the constitution is taken as a guide, the subject bearing the identity changes and the identity of the constitution in the legal sense (i.e. constitutional identity) and the identity of the constitutional order are determined by different factors. By examining constitutional identity, it is therefore important to determine the perspective from which we wish to approach the concept of constitution.[9] When the self-reflecting individual attempts to give a name to his or her consciousness and naming is an identity, it is a full articulation of the self. Identity can take many forms, and a person can have many identities, but identity is always a fixed point that organizes, guides, and controls the individual.[10]

Identity can best be defined as a social-psychological concept that examines the self-definition of an individual in a given social context. At the same time, identity is not a static state but a dynamic process that is not given to the individual but that we are all constantly building.[11]

However, identity is not only linked to the person as an individual but also to an organized group of individuals, which groups can behave as separate entities and have collective identities. Collective identity is built from the shared identity elements of individuals, which are no longer based solely on the experiences of the individuals who make up the group; this collective identity is more than the sum of the elements of individuals' identity. The identity of the community is the result of collective experience, of collective identity formation, which can take the form of religious, cultural, national, and thus constitutional identities.[12]

3. The Origins of the Concept of Constitutional Identity

Although the beginnings of the academic discourse on constitutional identity are generally dated to the end of the millennium, constitutional theories of identity have deep historical roots. In his *Politics*, Aristotle already asked the question on what basis should we say that a state has retained its identity or,

9 Tribl 2020. 36–44.
10 Marján–Boros 2017. 117.
11 Bodó 2004. 13.
12 Pataki 1197. 326–327; Tribl 2020. 28–29.

conversely, that it has lost its identity and become a different state?[13] To answer requires us to distinguish between the physical identity of the state and its real, substantive identity. Aristotle does the same when he says that the identity of a *polis* is not represented by its walls but by its constitution, which for Aristotle refers to the particular distribution of offices within the polis – which modern jurisprudence understands by sovereign power – and the specific goal towards which the community aspires. When this purpose is altered, or when these offices are distributed differently, the constitution is no longer the same, and the identity of the state is transformed. A *polis* may therefore physically retain all its recognizable features yet have a different identity if its 'compositional schema' is transformed.[14]

The initiative concept of constitutional identity first emerged in modern jurisprudence in Germany, following the work of Carl Schmitt and Carl Bilfinger, in the context of the possible limits of constitutional amendments and unconstitutional amendment of the constitution;[15] in European jurisprudence, the concept was first used by the German Federal Constitutional Court in its *Solange I* decision, which has since become a milestone in the European concept of constitutional identity.

The meaning of the concept of constitutional identity later diverged in Anglo-Saxon and European legal literature and thus nowadays has different meanings in the two legal literatures and legal thought. In the Anglo-Saxon trend, the understanding of jurisprudence and legal science remained unified, and the interpretation of the concept remained in its original context as used by Carl Schmitt, i.e. as a barrier to unconstitutional constitutional amendments, or to the 'amendability' of the constitution[16] (one should see the views on the 'eternity clauses' of certain constitutions[17] in order to understand the basic elements of the dilemma). However, in the continental meaning, there are significant divergences from the original content of the concept due to European integration, its development, and its relationship with the Member States, which, not surprisingly, fundamentally determine the direction of the interpretation of constitutional identity. In the continental interpretation, there are significant differences between the positions of jurisprudence and legal science, with the remark, of course, that the starting point remains the same: the relationship between the legal order of European integration and the constitutions of the Member States.

13 Aristotle. 32–49.
14 Jacobsohn 2006. 364.
15 Polzin 2016. 411–438.
16 For a thorough analysis of this question, see: Téglási 2014. 19–30.
17 Also see: Suteu 2021.

4. Anglo-Saxon Roots

In defining the concept of constitutional identity, the mechanisms deriving from the social-psychological notion of identity mentioned above must be applied in the coordinate system of constitutional law. The Anglo-Saxon definition of constitutional identity also provides a key to the continental interpretation, which is most notably attributed to the Anglo-Saxon legal theorists Gary J. Jacobsohn and Michel Rosenfeld. Michel Rosenfeld goes back to the Hegelian philosophy and, prior to the definition of constitutional identity, defines – as a quasi-prerequisite – the entity bearing identity, which he calls in his theory the 'constitutional self'.[18] In the case of Michel Rosenfeld and Gary J. Jacobsohn's theory, the starting point is that the bearer of constitutional identity can only be this particular 'constitutional self'. This constitutional self can be equated in Jacobsohn's theory with the constitutional system, which in European terminology is best identified as a constitutional arrangement. It is constituted by none other than the people who make up the political nation by virtue of popular sovereignty, the structure resulting from the interaction between the constituent power, *pouvoir constituant* conferred by the people, and the constitution established by the depositories of the constituent power, which is also a sovereign entity in its own right.[19]

Jacobsohn sees in the elements of constitutional identity the defining characteristics of the constitutional system, without which it would be transformed into something quite different.[20]

According to the theory of constitutional disharmony,[21] constitutional identity is in a constant state of change, which may be caused by incomplete or imperfect provisions in the text of the constitution or by the tension between the constitution

18 Rosenfeld 2010. 37–40.

19 This legal-theoretical premise is particularly worthy of consideration in the European interpretation of identity since in the continental understanding, the discussions of constitutional identity have so far been inconsistent in terms of whether identity is carried by the constitution itself, the political nation, or the constitutional system, nor is there a uniformly separate conceptual framework that consistently distinguishes between national identity, identity of the constitution, and constitutional identity. For the time being, therefore, the European discourse does not seem to have defined what exactly constitutional identity refers to.

20 At this point, the interpretation of Hungarian constitutional identity joins Jacobsohn's theory. The Constitutional Court of Hungary has established a new value to be protected in relation to the Fundamental Law, namely constitutional identity or 'constitutional self-identity'. The content of the Fundamental Law as a whole, and of its individual provisions, is developed on a case-by-case basis by the Constitutional Court of Hungary, with particular reference to the historical constitutional acquis. It is in fact a catalogue of constitutional principles and institutions without which the Fundamental Law would lose its national character. The cornerstones of the Hungarian constitutional identity, for example, are the following: the rights of freedom, the division of powers, the republican form of government, respect for public autonomy, freedom of religion, the legitimate exercise of power, parliamentarianism, equality of rights, recognition of the judiciary, and protection of the nationalities living with us. Gáva–Smuk–Téglási 2017. 13.

21 For more details, see: Jacobsohn 2010. 133–135.

and the social order. Constitutional identity is shaped through debates about constitutional identity itself. Constitutional identity retains its meaning and relevance and remains applicable only if its content reflects major changes in social morality, functionality, and operation. According to Jacobsohn, the courts and policymakers thus have a prominent role in shaping constitutional identity.[22]

Consequently, the phenomenon of constitutional identity must be examined in a process, a process of interaction of the above-mentioned factors, a process that can result in the emergence of elements of constitutional identity. It also follows from this that the individual constituent elements cannot be interpreted in isolation, as they only make sense in context, in relation to the past, present, and future of the medium that created them, the constitutional subject.[23]

Going back to Michel Rosenfeld, the American legal scholar further elaborated on Jacobsohn's theory. In his opinion, constitutional identity is in fact an essential link between the constitution, its wider environment, those who have created that identity, and those for whom it has been created.[24]

Rosenfeld also tried to develop certain models of constitutional identity based on historical processes, a classification based mainly on the form, quality, and current state of the constituent political community. On this basis, he distinguished a total of seven distinctive models. The central feature of the German model is that it is essentially based on the German ethnos, i.e. the culturally-linguistically determined people. In contrast, the French model favours the concept of civic demos over ethnicity. In the French model, the state and the nation are historical and legal rather than ethnic entities. The American concept stands close to the French model except that the French constitutional model, born out of the Enlightenment, had the community of the French more or less ready at the time, whereas the American constitutional model had to create the community of the Americans first.[25] The English model of constitutional identity is the result of a long and in many respects organic historical development but one that is very difficult to replicate elsewhere in this form. The following model is represented by Spain, which adopted its democratic constitution in 1978. Its distinctive character can be captured in two points. On the one hand, it seeks to strike a delicate balance between state unity and sub-national territorial units with their own ethnic identity. On the other hand, another peculiarity of the Spanish model is that it imported and incorporated several transnational norms, mainly linked to European integration.

The European transnational constitutional concept stands for the sixth model. In many respects, the European model is difficult to define precisely,

22 Drinóczi 2016. 17.
23 Martonyi 2018. 21; Tribl 2020. 47.
24 Rosenfeld 2011. 756–776.
25 Chandler 2006. 763–764.

it is so novel and specific, but it has a strong impact on the whole European continent, directly on the EU Member States and indirectly on the others. This model, like the American one, is in many respects forward-looking rather than inward-looking or backward-looking, but at the same time – also due to its supranational nature – it seeks to achieve the ideal of a diverse political community, like the Spanish one.

Finally, the postcolonial model should be mentioned.[26] This is particularly the case in African and Asian states liberated after the Second World War. The postcolonial model is characterized by duality: firstly, the colonies wanted to rid themselves of their former colonizers and to disconnect from them as rulers, but, secondly, they could not immediately break with the legal and administrative structures that remained. The same chains they desired to break off were represented not only by colonialism in some form but also by a certain strange modernity when compared to their pre-colonial status.[27]

5. Conclusions

To sum up, in the Anglo-Saxon approach, the framework of constitutional arrangements and thus the organic development of the constitutional system gives the coordinate system of the application of constitutional identity.

In the words of Attila Antal, constitutional identity is therefore no different from the story, the narrative that emerges from the principles, values, origin stories, myths, understanding of the history and visions of the future embodied in the constitution. Put briefly, it means the very way in which we think about the constitution and constitutionalism.[28]

Tribe is perhaps right to argue that constitutional identity cannot be viewed and examined passively. However, at the same time, this does not mean that societies do not need to examine their constitutional identity while actively shaping it. Constitutional identity is not a one-way street. It is not only possible to examine the impact of dysfunctional constitutional provisions on the constitutional identity of a given state, but it is also possible that, by looking at different constitutional identities (written, interpreted, discursive), we can find constitutional provisions where political intent, the text of the constitution, and/or the application of the constitutional provision do not overlap and require a modification or a change of mindset.

26 Chandler 2006. 763–764.
27 Halász 2019. 127–128.
28 Antal 2018. 298.

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Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 33–41

DOI: 10.47745/AUSLEG.2023.12.1.03

Preliminary Chamber According to the Latest Amendments to the Criminal Procedure Code[1]

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Abstract. The author examines the Romanian procedure before the preliminary chamber during the penal (criminal) procedure as regulated by current legal norms. The basis of the examination is formed by the requirements for a fair trial in the course of penal justice, especially from the perspective of the specific objections which may only be raised in the preliminary phase of the procedure. The author concludes that the preliminary chamber procedure may be optimized under several aspects in order to ensure a better, more efficient approach to the criminal trial.

Keywords: penal code, criminal trial, preliminary chamber, procedural objections, fair trial

Given that the intention of the legislator[2] was that through the institution of the preliminary chamber the Criminal Procedure Code[3] should meet the requirements of legality, celerity, and fairness of the criminal process, we legitimately wonder whether today, after several decisions of the Constitutional Court[4] that found some legal provisions governing the institution under discussion unconstitutional, as

1 This article takes into account the Government Emergency Ordinance (GEO) no. 18/2016 published in the Official Gazette of Romania, Part I, no. 389 of 23 May 2016, by which the legislator did not make any other changes to the regulations on the preliminary chamber.

2 *Proiectul Legii privind Codul de Procedură Penală. Expunere de motive* [Bill on the New Penal Code. Statement of Reasons] https://www.juridice.ro/wp-content/uploads/2015/07/Expunere-de-motive-Proiectul-Legii-privindCodul-de-procedura-penala-forma-transmisaParlamentului.doc (last accessed on: 10 May 2023).

3 Law no. 135 of 1 July 2010 on the Criminal Procedure Code, published in the Official Gazette no. 486 of 15 July 2010.

4 See, in particular, Decision no. 631 of 8 October 2015, published in the Official Gazette no. 831 of 6 November 2015; Decision no. 641 of 11 November 2014, published in the Official Gazette no. 887 of 5 December 2014.

well as after a decision rendered following an appeal in the interest of the law by the High Court of Cassation and Justice,[5] and several amendments made by Law no. 75/2016,[6] the institution of the preliminary chamber is able to achieve its purpose.

According to Art. 342 of the Criminal Procedure Code: 'The object of the preliminary chamber procedure is to verify, after the committal for trial, the jurisdiction and the legality of the referral to the court as well as the legality of the administration of evidence and the performance of acts by the prosecution bodies'.[7] This means that first the preliminary chamber judge verifies the jurisdiction of the court to which he belongs and implicitly his own, according to Art. 54 of the Criminal Procedure Code,[8] an activity that materializes in the study of the subject matter of the case file, which was randomly assigned to him, and its compliance with the provisions of Arts. 35–42 of the Criminal Procedure Code regarding the jurisdiction of the courts. If the preliminary chamber judge finds that he or she has jurisdiction, this fact does not materialize in any criminal procedural act, in the sense that the judge is not called upon to draw up a writ attesting it. This positive aspect will be indirectly known by the parties in that once the judge has established jurisdiction, he or she will order by a resolution that the provisions of Art. 344 paras (2) and (3) of the Criminal Procedure Code be complied with. The question that arises is if the preliminary chamber judge finds that the court does not have jurisdiction, then what is the procedural framework in which this will take place since there are no direct, express provisions in the current rules on this matter.

In Art. 344 para. (4) of the Criminal Procedure Code, the legislator has established that: 'Upon expiry of the time limits provided for in paras (2) and (3), if requests or objections have been formulated or if he has raised objections ex officio, the preliminary chamber judge shall set the deadline for their resolution, with the summoning of the parties and the injured person and with the participation of the prosecutor.' Since Art. 47 of the Criminal Procedure Code[9] provides that

5 Decision no. 5 of 26 May 2014, published in the Official Gazette no. 80 of 30 January 2015.

6 Law no. 75/2016, published in the Official Gazette no. 334 of 29 April 2016.

7 Translation by the author. Unless otherwise specified in the footnotes, all translations of Romanian texts are by the author.

8 Criminal Procedure Code: 'Art. 54 – Jurisdiction of the preliminary chamber judge
The preliminary chamber judge is the one who, within the court, according to its competence:
a) verifies the legality of the committal ordered by the prosecutor;
b) verifies the legality of the taking of evidence and the performance of procedural acts by the prosecution;
c) decides on complaints against decisions not to prosecute or not to refer cases for trial;
d) resolves other situations expressly provided for by law.'

9 Criminal Procedure Code: 'Art. 47 – Objections of lack of jurisdiction
(1) The objection of lack of jurisdiction in the matter or according to the quality of the person of the court inferior to the court having jurisdiction according to the law may be invoked during the whole trial, until the final judgment is rendered.
(2) The objection of lack of jurisdiction in the matter or as to the capacity of the person of the

the question of lack of jurisdiction is to be dealt with by way of a plea of lack of jurisdiction, which may be raised first of all *ex officio*, by reference also to the provisions of Art. 344 para. (4) of the Criminal Procedure Code, being in the presence of a plea raised in the preliminary chamber, I consider that it can be resolved in the council chamber only with the parties and the injured party summoned and with the participation of the prosecutor. As regards the way in which this plea of lack of jurisdiction is raised, in relation to the tense of the verb that the legislator uses in the above article 'if he has raised objections of his own motion […]', but also by logical reference to the fact that the parties and the injured party may raise such an objection by means of a document to be submitted to the case file, I consider that the judge may raise this objection by a decision rendered in the council chamber without summoning the parties and the injured party and without the participation of the public prosecutor, after which, by resolution, he or she sets a deadline for its settlement, which will take place with the summoning of the parties and the injured party and with the participation of the public prosecutor. Another, simpler, option would be to set a time limit in the council chamber to discuss jurisdiction, summoning the parties and the injured party and with the participation of the public prosecutor, where the objection of lack of jurisdiction would be raised *ex officio*, which would be recorded in the decision, after which it would be discussed and then ruled on. Considering that the objection of lack of jurisdiction does not require an elaborate preparation of defences by the parties, the injured party and the prosecutor, and that this procedure has been legislated to facilitate speedy criminal proceedings, the second option would probably be the most efficient one.[10]

Remaining on the subject of jurisdiction, it should not be ignored that, in accordance with the provisions of Art. 47 of the Criminal Procedure Code, jurisdiction may also be subsequently called into question, after the writ in the preliminary chamber procedure, during the trial, following the procedural time limits depending on the type of jurisdiction and the provisions relating to this procedural stage.[11]

Following CCR Decision no. 641 of 11 November 2014 of the Constitutional Court, the legislator wished to harmonize the rules of the preliminary chamber with the fundamental law, respecting the Court's criticism based on the right of

court superior to the court having jurisdiction by law may be raised until the commencement of the inquiry.

(3) The objection of lack of territorial jurisdiction may be raised under the conditions laid down in paragraph (2).

(4) The objection of lack of jurisdiction may be raised ex officio by the prosecutor, the injured party, or the parties.'

10 See Judgment no. 147/2016, file no. 2862/211/2016/a1 of the Cluj-Napoca [Local] Court, unpublished.

11 See Judgment no. 1332/2015, file no. 13752/211/2015 of the Cluj-Napoca [Local] Court, unpublished.

the parties to a fair trial with its three components of adversarial proceedings, oral proceedings, and equality of arms. Thus, Art. 344 para. (2) of the Criminal Procedure Code has been amended in the sense that, whereas previously the communication of the indictment, the notification of the indictment, the proceedings in the preliminary chamber, the right to hire a lawyer, and the possibility of formulating requests and objections only concerned the accused, now, with the exception of the communication of the indictment, this takes place in relation to all parties and injured parties. With regard to the failure to communicate the indictment to the civil party, the civilly liable party, and the injured person, it should be considered whether the new regulation is fully in line with the Court's decision, which in para. 49 of the grounds for its ruling stated that: 'in view of the adversarial principle, both the civil party and the civilly liable party must be offered the same rights as the accused'. However, they are in a position of apparent inferiority in that they are not notified of the indictment, which may contain many aspects that disadvantage them, such as reference to evidence that was unlawfully taken, references to the non-constitution or constitution as a civil party, the amount of the civil claims, etc., in which these parties are interested and which may affect their procedural rights.

Considering that the parties and the injured party are not identical in the sense that the procedural position of the defendant, the civil party, the civilly liable party, and the injured party differ from each other by the very different status of each of them in the criminal case, which is why the procedural rights conferred by Arts. 78, 81, 83, 85, and 87 of the Criminal Procedure Code are not identical, only similar and specific to each of their capacities, and that the Court itself states that they must be granted the same rights, and not identical, to those of the accused, I am entitled to consider that, in the given circumstances, the Court's decision is respected. Moreover, in para. 43 of the grounds of the decision, the Court states that: 'from the perspective of adversarial proceedings [...] the legal rule must allow all parties to the criminal proceedings – defendant, civil party, civilly liable party – to be provided with documents that are likely to influence the judge's decision and provide for the possibility for all these parties to effectively discuss the observations submitted to the court'. The indictment is not a document likely to influence the judge's decision, but as the Court pointed out in para. 31 of the reasoning of the decision, 'the elaboration of the indictment and the referral of the defendant for trial, [...] represents "official notification, by the competent authority, of the suspicion that a criminal offence has been committed" and, implicitly, a criminal charge'. which overwhelmingly concerns the defendant; as such, it is natural that the indictment is communicated only to him, an aspect which in no way violates the principle of equality of arms nor the decision of the Court. Moreover, according to Art. 344 para. (2) of the Criminal Procedure Code, concomitantly with the communication of the indictment, the

accused, the other parties, and the injured person are informed of the object of the procedure in the preliminary chamber, of the right to hire a lawyer, and of the possibility of formulating requests and objections so that it is in agreement with what the Court stated in para. 36 of the grounds of the decision, where, referring to the practice of the European Court of Human Rights (ECtHR), it stated that: 'according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[12]

However, the mere communication of the indictment is not intended to create such a disadvantageous situation, as long as all the parties and the injured party are informed of the stage of the proceedings the criminal case has reached, of their rights and the possibilities within that stage. The reasoning of this argument is supplemented by the fact that, according to Art. 344 para. (4) of the Criminal Procedure Code, the legislator has established that: '(4) Upon expiry of the time limits provided for in paras. (2) and (3), if requests or objections have been formulated or if he has raised objections ex officio, the preliminary chamber judge shall set the deadline for their resolution, with the summons of the parties and the injured party and with the participation of the prosecutor.' – i.e. after the parties and the injured party have been given the opportunity to make submissions and raise objections, a framework is also created in which they will be able to debate them and present their own defences, thus also respecting the Court's reasoning in para. 35 of the grounds of the decision, ensuring 'the right of each party to participate in the presentation, argument, and proof of its claims or defences and the right to discuss and contest the submissions and evidence of the other party' followed by 'the disclosure to the other party of arguments of fact and law on the one hand and the opportunity for the other party to respond to them on the other' and 'a real opportunity to debate before the judge all that is put forward in law or in fact by the opponent and all that is presented by him, evidence or other documents'.

Based on all of the above, the procedure in the preliminary chamber appears to take two forms. The first, in which no requests have been made and no objections have been raised, takes place in the council chamber, without the parties and the injured party being summoned and without the participation of the prosecutor, and ends with the adoption of a writ, simple in structure and content, whereby, according to Art. 346 paras. (1) and (2) of the Criminal Procedure Code, the preliminary chamber judge finds the legality of the referral to the court, the taking of evidence, and the carrying out of criminal proceedings and orders the trial to begin; the writ is then immediately communicated to the parties and the injured

12 European Court of Human Rights, Fifth Section, *Klimentyev v. Russia*, Application no. 46503/99, Judgment of 16 November 2006, https://hudoc.echr.coe.int/eng?i=001-78031 (accessed: 5 May 2023), para. 95.

party, it being subject to appeal within 3 days of communication, thus ensuring compliance of these provisions with both the Decision of the Constitutional Court no. 641/2014 and no. 631/2015 in that, unlike the previous legislation, all decisions adopting the preliminary chamber decision are subject to appeal,[13] and therefore also this one (even if no requests have been previously made and no objections have been raised on which the judge must rule).

The second form, in which requests have been made and objections raised, is more complex and requires a more detailed approach. Thus, it starts with the formulation of requests and raising of objections by the parties and the injured party or by the court's own motion, because until that point the path is the same as the one in the first form. According to Art. 344 para. (4) of the Criminal Procedure Code, upon the expiry of the time limits set by the preliminary chamber judge for the formulation of requests or objections, the judge sets the time limit for their resolution, with the summoning of the parties and the injured party and with the participation of the prosecutor. It should be noted that the legislator does not mention any other obligation on the part of the judge in terms of communicating the applications and objections to the prosecutor, the other parties, and the injured party, which means that all these participants in the criminal case will become aware of their content by studying the file. The legislator has not laid down any procedural norms to be followed or time limits to be observed in the case of any defences, but it goes without saying that they must be lodged by the deadline set for their resolution. Art. 345 of the Criminal Procedure Code regulates the procedure in the preliminary chamber, but, unfortunately, it does not have a strictly defined structure. From its content, it is clear that the judge decides on the requests and objections submitted or objections raised *ex officio*, in the council chamber, on the basis of the works and the evidence in the criminal case file, the subsequent administration of any evidence[14] that the preliminary chamber judge deems necessary in order to form a view as to their merits, and not in order to resolve the merits of the case, hearing the submissions of the parties and the injured party, if they are present, and of the prosecutor, and then ruling on them in the council chamber in a decision (writ), which has a broad, complex content, in which the judge addresses all the requests and objections, the defences put forward, in order to decide on their merits. The way in which he or she decides on the claims and defences determines the decision he or she will render in the preliminary chamber. According to Art. 346 para. (2) of the Criminal Procedure Code, when rejecting the requests and objections presented or raised *ex officio*, the preliminary chamber judge will issue a single decision, which will contain both the decision on them and the decision of the preliminary chamber, which can only be the finding of the legality of the referral to the court,

13 See in this regard also art. 425[1] of the Criminal Procedure Code.

14 See Decision of the Constitutional Court no. 802 of 5 December 2017, published in the Official Gazette no. 116 of 6 February 2018.

the administration of evidence, and the carrying out of criminal proceedings and the order to start the trial. On the other hand, when he or she admits requests and objections presented or raised *ex officio*, according to Art. 345 para. (3) of the Criminal Procedure Code, the judge will find either irregularities in the act of referral or the nullity[15] of acts of criminal prosecution carried out in violation of the law or will exclude one or more items of evidence taken. This decision shall be notified immediately, pursuant to Art. 345 para. (2) of the Criminal Procedure Code to the prosecutor, the parties, and the injured party. The procedure then concerns the prosecutor, as the representative of the accusation during the criminal trial, in the sense that if the judge has found irregularities in the referral, after communicating it to the prosecutor, according to Art. 345 para. (3) of the Criminal Procedure Code, the prosecutor has the obligation to remedy[16] them and to inform the judge whether he or she maintains the committal order or whether he requests that the case be returned, within 5 days of the communication. Although this text of the law is not sufficiently clear, I consider that even when the judge finds that certain acts of criminal proceedings are invalid or excludes one or more items of evidence, the prosecutor is obliged to inform the judge within five days whether he maintains the committal order or requests that the case be returned. The fulfilment of these obligations is important because how the judge will rule on the preliminary ruling, as we will see below, partly depends upon them.

Given the provisions of Art. 346 para. (4) of the Criminal Procedure Code, as a general rule, the judge will not grant the preliminary ruling by the same decision admitting one or more of the requests and objections presented or raised *ex officio* and will find either irregularities in the preliminary ruling or the nullity of acts of criminal prosecution carried out in breach of the law or exclude one or more of the items of evidence taken, but s/he will have to set a new deadline in the council chamber, with the parties and the injured party being summoned and the participation of the prosecutor, on which occasion it will issue a new decision containing one of the following solutions, in accordance with Art. 346 para. (3) letters a) and c), as well as para. (4) of the Criminal Procedure Code:

1. return the case to the Public Prosecutor's Office if:

a) the indictment is irregularly drawn up, and the irregularity has not been remedied by the prosecutor within 5 days, or if the irregularity entails the impossibility of determining the object or limits of the trial;

b) the prosecutor requests that the case be returned or fails to reply within the time limit laid down in the same provisions;

2. order the trial to commence if it has found irregularities in the act of referral, has excluded one or more of the items of evidence taken, or has found that criminal prosecution acts carried out in violation of the law are null.

15 See Arts. 280–282 of the Criminal Procedure Code.

16 See Decision no. 23 of 4 May 2022, published in the Official Gazette No. 665 of 04 July 2022.

In connection with the above and referring to the solutions established by the legislator, we note that the mere fact that the prosecutor does not respond within 5 days entails the return of the case to the prosecution regardless of the irregularities of the act of referral or the nullity of some acts of criminal prosecution or the evidence excluded.

From these legal provisions, also an apparently unnatural situation may arise, given that the legislator has established that this writ, which resolves the procedure in the preliminary chamber, will be given in the council chamber 'with the summons of the parties and the injured person' even if previously the judge had also set a deadline in the preliminary chamber at which he summoned the parties and the injured party, on which occasion he or she decided by admitting one or more of the requests and objections raised, a court date at which they could be present and be given a period of time for their information, set at that time by the judge, which as a duration included the period of 5 days from the communication set by the prosecutor. I consider that these regulations were introduced in the form mentioned because the legislator had in mind the possibility that the judge may adopt a decision to start the trial, postpone the judgment according to Art. 391 of the Criminal Procedure Code or the deadline for drafting the judgment according to Art. 406 of the Criminal Procedure Code, which is the rule in the matter, so that the anticipated setting of a future deadline would not be based on precise data that would give certainty that at that deadline the judge has decided on the solution or that all these activities will have been undertaken.

In the light of the provisions of Art. 346 para. (4^2) of the Criminal Procedure Code, the judge will give the preliminary chamber decision by the same writ by which he will admit one or more of the requests and objections invoked or raised *ex officio* and will find either irregularities in the act of referral or the nullity of acts of criminal prosecution carried out in violation of the law, when the preliminary chamber judge will return the case to the Public Prosecutor's Office due to the fact that he has excluded all the evidence taken during the criminal prosecution.

Regarding the appeal, the legislator has introduced two new elements in Art. 347 of the Criminal Procedure Code, namely that all the decisions of the preliminary chamber may be appealed against within 3 days of their communication and that the holders of the appeal are now the prosecutor, the parties, and the injured party. Although the decisions by which the requests and objections invoked or raised *ex officio* are resolved cannot be directly challenged, the legislator has established that the appeal may also concern the manner in which the requests and objections are resolved, thus representing an indirect means of appeal in relation to them. Regarding the procedure for deciding on the appeal, in the same article, the legislator has stated that the appeal is to be decided in the council chamber, with the parties and the injured party being summoned and the

prosecutor taking part, where no other requests or objections may be invoked or raised *ex officio* than those presented before to the preliminary chamber judge, except in cases of absolute nullity.

The legislator has also provided for novel elements regarding the transitional situation of preventive measures in that it has clarified who is competent to verify the legality and merits of the preventive measure, when a preventive measure has been ordered against the accused and an appeal has been lodged, by providing in Art. 348 para. (2) of the Criminal Procedure Code that it belongs to the preliminary chamber judge of the court seized with the indictment, if the preliminary chamber judge of the superior court or the competent panel of the High Court of Cassation and Justice has not yet been assigned to resolve the appeal, and it has been assigned to resolve the appeal, the competence belongs to it.

Considering all of the above, it can be concluded that the preliminary chamber procedure as it is now regulated, by the amendments made through Law no. 75/2016, comes closer to the requirements of legality, promptness, and fairness of the criminal trial originally envisaged by the legislator only in the version in which there are no requests or objections, but even in this situation the procedure could have been made more urgent if the judge had been given the opportunity to shorten its duration by reducing the 20-day period provided for in Art. 344 para. (2) of the Criminal Procedure Code depending on the subject matter of the case, or simply to end the procedure when, one of the cases preventing the initiation and exercise of criminal proceedings under Art. 16 of the Criminal Procedure Code arises during its course such as the death[17] of the accused, reconciliation of the parties,[18] etc. If there are requests or objections, the entire preliminary chamber procedure takes a long time, exceeding by far the 60-day time limit envisaged by the legislator in Art. 343 of the Criminal Procedure Code, despite all the efforts of the preliminary chamber judge. In this case too, if one takes into account that in the previous legislation, after the trial on the merits of the case, which lasted for a certain period of time, the appeal was to quash the judgment and order the case to be referred for retrial, it could be that the preliminary chamber procedure is a solution to avoid such situations, but only regarding relative nullities since absolute ones can be invoked at any stage of the criminal case.

17 See Decision no. 223/2016, file no. 1957/211/2016/a1 of the Cluj-Napoca [Local] Court, unpublished.

18 See Decision no. 59/2016, file no. 23754/211/2015/a2 of the Cluj-Napoca [Local] Court, unpublished.

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*** *Proiectul Legii privind Codul de Procedură Penală. Expunere de motive* [Bill on the New Penal Code. Statement of Reasons]. https://www.juridice.ro/wp-content/uploads/2015/07/Expunere-de-motive-Proiectul-Legii-privindCodul-de-procedura-penala-forma-transmisaParlamentului.doc (last accessed on: 10 May 2023).

Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 43–59

DOI: 10.47745/AUSLEG.2023.12.1.04

Protection of Children's Personal Data and Risks Posed by Smart Toys[1]

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Abstract. Data protection and consumer protection organizations have identified a number of data protection risks in connection with smart children's toys that use online services. This study presents the EU legislation that serves to protect the personal data of children using smart toys, with particular regard to the special provisions for children, and it also points out the extent to which these laws oblige the relevant economic actors to establish adequate protection. Examining all of this shows that the current legal framework is only able to manage the risks to a limited extent.

Keywords: consumer protection, cybersecurity, consumer safety, data protection, smart toys, Internet of Things

1. Smart Toys and Their Risks to Personal Data Protection

Digitalization, smart technology, and the Internet of Things (IoT) are unstoppable in our daily lives. Manufacturers have realized that children's toys can also be digitized, and in the middle of the second decade of the 21st century, intelligent toys have been launched on the market, combining the characteristics of toys and communication devices. In the case of traditional toys, the child is the active party and toys are passive; however, intelligent toys are able to respond to the child's

1 The research and publication were supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

instructions and questions with the help of sensors placed in the toys that provide data about the voice and other information regarding the child interacting with them. In terms of operation, the child asks a question from the toy, the toy records the sound using an internal microphone and then transmits the audio recordings via Wi-Fi or Bluetooth to a smartphone, which sends it to a server of a cloud service provider, where the voice is converted into text. Forwarding the text question is the next step, for example to Wikipedia, where the answer to the child's question is born, which an application sends back to the toy.[2] Due to these series of operations, once again, the European Union legislator is under pressure to act if it wants to ensure a high level of consumer protection in the internal market.[3]

Among smart toys, this study only looks at networked, so-called 'connected' toys. These are either toys with indirect Internet connection, i.e. they can communicate with a smartphone or tablet via interfaces such as Bluetooth, or toys connected directly to the Internet, i.e. connected to the Internet or directly to external servers through Wi-Fi via an integrated IP interface.[4]

Users of smart children's toys are exposed to multiple risks. Hackers accessed the database of one Chinese toy company and obtained millions of pieces of data, including children's voice data. The attacker was only interested in exposing the vulnerability: the toy vendor was transmitting data over an unencrypted channel.[5] However, in the environment of connected toys using unauthenticated Bluetooth devices, virtually anyone can talk to the child, and the toy can even act as a spying tool. These problems have shown that it is not the products themselves that pose risks, but the online services associated with the products that pose data security and data protection risks, i.e. the type of interaction through the IoT is the novelty of the product.

These problems have been highlighted by numerous consumer protection and data protection professional organizations in the case of children, the most vulnerable social group. In 2016–2017, an investigation by the Norwegian Consumer Council found that Internet-connected toys pose a potential risk to children's safety from a consumer and data protection perspective.[6] In addition to Norway, investigations have been launched in several countries, and similar errors have been identified.[7] In Germany, the baby 'Cayla' toy was withdrawn from circulation in 2017 due to unauthenticated Bluetooth connectivity, as the German Telecommunications Act prohibits the use of devices for spying, hidden cameras, and microphones.[8]

2 Hessel–Rebmann 2020. 27–37.
3 Hajnal 2011. 2419–2433; Hajnal 2019. 197–212.
4 Rauber–Thorun 2019. 14–16.
5 Dömös 2015.
6 *#Toyfail: An Analysis of Consumer and Privacy Issues in Three Internet-Connected Toys* 2016.
7 *International Working Group on Data Protection in Telecommunications: Privacy Risks with Smart Devices for Children. Working Paper* 2019.
8 *Bundesnetzagentur zieht Kinderpuppe 'Cayla' aus dem Verkehr* 2017; Hessel–Rebmann 2020.

The International Working Group on Data Protection in Telecommunications (IWGDPT) has issued two working documents: One addresses children's privacy issues in online services and the other analyses data protection risks in relation to children's smart devices. Both draw attention to data protection challenges and make recommendations to decision-makers, developers, and providers of online services, especially with regard to the activities of data controllers, data protection authorities, responsible persons, and standardization bodies.[9]

A study commissioned by the German Standards Institute (DIN) revealed key consumer expectations for smart toys to support the standardization process.[10] The expectations can be paralleled with the data protection principles of the General Data Protection Regulation[11] (henceforth: GDPR) and with the provisions of individual articles, in particular Article 25 on data protection by design and by default and Article 32 on security of processing. However, practice shows that personal data in the case of toys is not processed on the basis of the legislation in force. The wide range of risks associated with the use of smart toys and confirmed by studies suggests that they threaten children's privacy.

In order to address vulnerabilities, companies can designate contact points for reporting misuse. Sadly, in 2018, more than 90% of IoT devices were not connected to this option. This data, together with the privacy and data security risks identified by professional organizations, proves that throughout human history, the notion that industry will regulate itself is doomed to failure.[12] It is therefore up to legislators to ensure the protection of children's privacy and personal data with a single legislative framework. The risks related to the handling and storage of data show that the current regulation does not fully serve the protection of children's personal data, which may raise product safety problems.

The study would like to find out which EU norms in force can protect the personal data of children using smart toys and to what extent it obliges economic operators to establish adequate protection. On the one hand, the aim of the examination was to prove how inadequate and incompetent the current legislative framework was to handle the above-mentioned problems and, on other hand, to highlight the need for a specific regulation. In addition, we will examine the latest legislation of the European Union.

9 *International Working Group on Data Protection in Telecommunications: Protecting the Privacy of Children in Online Services. Working Paper* 2019; *International Working Group on Data Protection in Telecommunications: Privacy Risks with Smart Devices for Children. Working Paper* 2019.

10 Rauber–Thorun 2019. 17–36.

11 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)*. OJ L 119 4.5.2016. 1.

12 Winder 2018.

2. The Toy Safety Directive and Smart Toys

In terms of scope, Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (henceforth: *Toy Safety Directive*)[13] applies to products designed or intended exclusively or not exclusively for toy use by children under fourteen years of age.[14] Smart toys fall within the scope of the Toy Safety Directive, as they are electronic devices specifically designed for children and constitute toys in themselves.[15] This means smart toys are designed for playing purposes and the online feature is added to the original doll, teddy bear, etc.

However, the Toy Safety Directive does not contain provisions on the protection of privacy or personal data protection for smart toys. Although it has been amended twelve times so far, and every five years Member States evaluate the experience gained in applying it, there has been no proposal for smart toys. The summary of the Commission's evaluation stresses that the Directive focuses on the protection of children's health, i.e. a physical characteristic, and that, consequently, devices connected to the Internet, including smart toys, fall within the scope of the Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonization of the laws of the Member States relating to the market of radio equipment and repealing Directive 1999/5/EC[16] (henceforth: *RED*).[17] In doing so, the Commission argued that smart toys for children are products whose intrinsic toy safety requirements are regulated by the Toy Safety Directive; requirements related to online services, including privacy and personal data protection, are regulated by the RED. The boundaries between toys as products and services closely related to them are blurred during digitization, resulting in a so-called[18] hybrid product, a hybrid toy. In hybrid toys, the EU has identified the nature of online services as a stronger, multifaceted problem as opposed to the toy function, placing the former under a general law and the latter under a specific piece of legislation.

13 *Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys*. OJ L 170, 30.6.2009. 1–37.

14 *Toy Safety Directive* Article 2(1).

15 Annex I.14 of the *Toy Safety Directive*.

16 *Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the Harmonisation of the Laws of the Member States Relating to the Making Available on the Market of Radio Equipment and Repealing Directive 1999/5/EC*. OJ L 153, 22.5.2014. 62–106. Hungary amended Act C of 2003 on Electronic Communications on several points on the basis of Act CLXVIII of 2016 on the Amendment of Certain Acts Related to Electronic Communications and Consumer Protection. Related Regulation: 2/2017. (I. 17.) NMHH Regulation on radio equipment.

17 European Commission 2020.

18 Rauber–Thorun 2019. 17–18.

3. Smart Toys under the RED

The RED establishes a regulatory framework for the marketing and putting into service of radio equipment in the European Union.[19] Radio equipment is an electrical or electronic product intended to emit and/or receive radio waves for the purposes of radio communication and/or positioning or an electrical or electronic product which must be supplemented by accessories, such as antennas, in order to emit and/or receive radio waves.[20] Consequently, where a smart toy communicates via a radio link, such as Bluetooth or Wi-Fi, it is considered radio equipment and falls within the scope of the RED.

What are the requirements of the RED to protect privacy and personal data with regard to smart toys? An essential requirement is that radio equipment should be fitted with security devices to protect the personal data and privacy of users and subscribers before it is placed on the market.[21] Manufacturers should be able to meet these requirements: all economic operators intervening in the supply and distribution chain should take appropriate measures to ensure that only radio equipment that is in conformity with this Directive[22] is made available on the market. Since the requirements for the protection of privacy and personal data cannot be sufficiently achieved by the Member States but can rather be better achieved at a Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty of Lisbon,[23] whereby the RED empowers the Commission to adopt measures. In this context, a public consultation was carried out and an impact assessment was made on Internet-connected radio equipment and wearable radio equipment on behalf of the Commission, focusing specifically on the protection of personal data and privacy.[24]

The purpose of the inquiry was to determine whether the Commission should activate regulatory measures or delegated acts. During the related assessment, a number of vulnerabilities and risks were identified, mainly in consumer IoT devices. In order to address existing regulatory gaps, the impact assessment study considered a number of options, among which it argued that the Commission should adopt a legal act to ensure the protection of personal data, the provisions of which should make the existence of security protection a condition for market access. These requirements, together with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and

19 *RED*, Article 1(1).
20 *RED*, Article 2 para. (1), point (1).
21 *RED*, Article 3, paragraph 3, point (e).
22 *RED*, Recital (27).
23 *RED*, Recital (73).
24 *Radio Equipment Directive*.

repealing Directive 95/46/EC (henceforth: GDPR),[25] the ePrivacy Directive, and the forthcoming regulation would complement and uniformly require manufacturers to integrate data protection by default into their products, the technical solutions of which require the harmonization of technical standards.

In its product-based case studies, this impact assessment identified the types of Internet-connected devices in which vulnerabilities had been identified, including smart toys.[26] It not only made findings along the lines of the goals of the investigators but also pointed out the latent deficiency of the RED in that it does not take into account that children are the most vulnerable user group and does not contain any special requirements or rules pertinent to them.

The Council acknowledged the Commission's initiative for a legal act on short-term cybersecurity aspects in relation to the RED, but it also stressed the importance of assessing the need for horizontal legislation in the long term with regard to the conditions for placing radio equipment on the market and relevant aspects of cybersecurity of connected devices.[27]

4. The Cybersecurity Act and Smart Toys

We use information and communication technologies (ICT), i.e. elements or groups of elements of a network or information system (smartphones, tablets, etc.), on a daily basis and use ICT services, i.e. services consisting of transmitting, storing, querying, or managing information through network and information systems.[28] All these are underpinned by the ICT processes: all activities carried out to design, develop, provide, or maintain them.[29] In parallel with the spread of ICT, cyberattacks and crimes have increased. To prevent this and to guarantee the safe use of IT tools, the Internet and networks, a European cybersecurity certification scheme is implemented. The EU framework for the establishment of European cybersecurity certification schemes is laid down in Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (henceforth: *Cybersecurity Act*).[30]

This legislation also covers IoT devices, including connected smart children's toys, through digitalization and connectivity. With regard to IoT products, the

25 Published in the Official Journal L 119 4.5.2016. 1.
26 *Impact Assessment on Increased Protection of Internet-Connected Radio Equipment and Wearable Radio Equipment.*
27 Council of the European Union 2020. 7.
28 *Cybersecurity Act*, Article 2, points (12) and (13).
29 *Cybersecurity Act*, Article 2, point (14).
30 *Cybersecurity Act*, Article 1(1)(b).

Cybersecurity Act recognizes that security and resilience are not sufficiently built in, leading to insufficient cybersecurity, and that limited use of certification means that users do not have sufficient information about the cybersecurity features of ICT products, services, and processes.[31] There does not seem to be a coherent and holistic approach to horizontal cybersecurity issues such as IoT; the existing schemes show significant shortcomings and differences in terms of product coverage, assurance levels, essential criteria, and practical use, which hamper mutual recognition mechanisms within the Union.[32]

The Cybersecurity Act provides only principles, options, and a procedural mechanism for a European cybersecurity certification scheme but does not set binding requirements. However, it supports voluntary measures by the private sector, encourages manufacturers to carry out certifications, and introduces the concept of conformity self-assessment into the mechanism in this regard.[33] The economic operators concerned are encouraged to design for lifetime built-in protection, to develop it and to design user-friendly and secure settings, thereby achieving security by default.[34] This could be part of the duty of care principle, which should be further developed with industry.[35]

Given that the Cybersecurity Act currently only provides a recommendation and framework for a European certificate but does not impose obligations on manufacturers, it does not advance privacy or personal data protection for IoT devices, technologies, or smart toys in general.

5. Smart Toys and the Provisions of General Data Protection Law

The GDPR protects the fundamental rights and freedoms of natural persons and, in particular, their right to the protection of personal data.[36] This defends users and provides businesses with a clear legal framework.

The territorial scope of application of the GDPR covers all data controllers that carry out effective activities within the territory of the EU and process personal data, i.e. it protects not only the rights of EU citizens but also the data of any other person located in the EU. On the other hand, it also covers data controllers that process data of EU citizens anywhere in the world.[37] Tasks of the controller with

31 *Cybersecurity Act*, Recital 2.
32 *Cybersecurity Act*, Recital 65.
33 *Cybersecurity Act*, Recitals 79 to 82 and Article 53.
34 *Cybersecurity Act*, Recitals 12 to 13.
35 *Joint communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU* 2017. 6.
36 GDPR, Article 1(2).
37 GDPR, Article 3.

regard to the protection of personal data include implementation of appropriate technical and organizational measures for the processing of personal data in accordance with the GDPR. With these measures, it implements data protection by design and by default, guarantees data security, and, if necessary, carries out a data protection impact assessment.[38]

Data protection by design and by default serves the effective implementation of the principles governing data processing; therefore, producers of products, services, and applications should be encouraged to take into account the right to the protection of personal data during their design and development and to ensure that controllers and processors comply with their data protection obligations.[39]

GDPR provisions are also relevant in the context of IoT devices, including smart toys, but the best interests of children also prevail in the GDPR regulatory system. Children are among the consumer groups in need of special protection in the field of data protection, which the GDPR justifies by the fact that they may be less aware of the risks, consequences, and safeguards and rights associated with the processing of personal data.[40] It follows that the EU legislature separates children as users from their legal guardians and requires compliance with specific provisions relating to children's consent – information society services, that is to say, services normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient.[41] Based on this, data processing related to the use of smart toys also falls within this scope since the devices use online services during their operation.

As a general rule, a child may independently give his/her consent to processing when he/she has reached the age of sixteen – Hungary regulates according to this principle –, but Member States may set a lower age, but not lower than the age of thirteen. In the case of a child under the age of sixteen, the processing of his/her personal data is lawful only if and to the extent that consent has been given by the holder of parental responsibility over the child.[42] Operators may develop appropriate methods to monitor this themselves, but they or organizations representing categories of processors may draw up codes of conduct.[43]

The fact that the processing of personal data of children under the age of sixteen has been authorized by their legal representative does not mean that the status of legal representative is absolute or takes unconditional precedence over that of the child since the best interests of the child remain the primary consideration even

38 GDPR, Chapter IV.
39 GDPR, Recital (78).
40 GDPR, Recital (38).
41 The GDPR establishes the definition by reference to Directive 2015/1535 of the European Parliament and of the Council.
42 GDPR, Article 8(1).
43 GDPR, Article 40(2)(g).

if they need representation in exercising their rights.[44] Once the child has reached the age required for digital consent, he/she will have the possibility to withdraw consent himself/herself; the controller shall inform the child of this possibility.[45] The right to be forgotten also applies to a data subject who gave consent to the processing of his or her personal data as a child or who gave consent by his or her legal representative but later wishes to remove the personal data in question from the Internet.[46]

In order to be able to take an appropriate decision to grant or even refuse prior consent, the data subject should be well informed about the subsequent processing. With regard to the achievement of this objective, the preamble to the GDPR states that the processing of personal data must be transparent to data subjects in addition to lawfulness and fairness.[47] The principle of transparency requires that the information provided to the data subject be concise, easily accessible, and easy to understand and that it be drafted in clear and plain language and, where necessary, presented visually.[48] Elements of clear and understandable language are: child-centred vocabulary (common words; explanations), tone and style (contact with children; immediacy; avoidance of multiple complex sentences, foreign words). For a child-friendly approach, the Article 29 Data Protection Working Party recommends an example of a *UN Convention on the Rights of the Child in a Child-Friendly Language*.[49] The information must comply with these requirements even if the consent to data processing is given by the holder of parental authority, since children are the target group.

The GDPR states that special protection applies when using personal data of children for marketing purposes and for creating personal or user profiles.[50] Children who use smart toys can also easily become targets for businesses seeking ever-greater profit: several of the toys tested had pre-programmed phrases embedded in them that advertised commercial products.[51] Although the GDPR does not prohibit the use of children's personal data for marketing purposes,[52] the processing must still be lawful, fair, comply with data protection principles, and not exploit the child's age-related vulnerability. Children have the right to

44 Zavodnyik 2019. 130.
45 *Guidelines 05/2020 on Consent under Regulation 2016/679. Version 1.1.*
46 GDPR, Recital (65) and Article 17(1)(f).
47 GDPR, Recital (39).
48 GDPR, Recital (58).
49 *Guidelines 05/2020 on Consent under Regulation 2016/679. Version 1.1.*
50 GDPR, Recital (38).
51 #*Toyfail: An Analysis of Consumer and Privacy Issues in Three Internet-Connected Toys* 2016. 21–23.
52 In Hungary, the following legal norms serve to protect children in relation to advertising: Act CLXXXV of 2010 on Media Services and Mass Media, Act XLVIII of 2008 on the Basic Conditions and Certain Restrictions of Commercial Advertising Activities, relevant provisions of Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers.

object to the processing of their personal data for marketing purposes and must be informed of this right.[53]

For the purpose of behavioural advertising, in the case of applications related to smart devices, controllers should not process children's data because the child rarely understands these and therefore is unable to grant informed consent. In addition, controllers should explicitly refrain from collecting data relating to parents such as requesting and using financial information or medical data relating to family members of the child.[54]

Both the principles governing the processing of personal data and the specific rules applicable to children show that the provisions of the GDPR provide a secure background for the protection of personal data. Yet principles are being violated with regard to smart toys, as described and demonstrated by consumer protection and data protection organizations. On the one hand, the above contradiction can be explained by the fact that the GDPR was adopted in 2016 and is applied from 2018, which can be a small excuse in the case of older products since businesses have to constantly monitor and prepare for data protection processes. The authors Hessel and Rebmann argue that the reason for the problems is that the provisions of the GDPR apply to data controllers, and measures can only be directed against them, i.e. data protection authorities cannot take measures against manufacturers, suppliers, importers, or sellers. In the case of smart toys, data controllers are often East Asian companies that do not have branches in the EU or an appointed representative.[55] A similar conclusion is made in the impact assessment for radio equipment connected to the Internet, which highlights a regulatory gap: imposing fines is in the jurisdiction of data protection authorities, but national market surveillance authorities are responsible for placing products on the market and for the withdrawal of products.[56] As a solution, it is proposed that the GDPR provisions should be enforced strongly against manufacturers, especially with regard to data protection by design and by default, through fines imposed by data protection authorities, which over time will provide incentives to comply.[57]

53 *Information Commissioner's Office Consultation: Children and the GDPR guidance* 2018. 32–33.
54 Article 29 Data Protection Working Party 2013. 26.
55 Hessel–Rebmann 2020.
56 *Impact Assessment on Increased Protection of Internet-Connected Radio Equipment and Wearable Radio Equipment* 2020. 45–46.
57 *Impact Assessment on Increased Protection of Internet-Connected Radio Equipment and Wearable Radio Equipment* 2020. 10.

6. The Draft ePrivacy Regulation and Smart Toys

Compared to the GDPR, the forthcoming ePrivacy Regulation (henceforth: Draft ePrivacy Regulation)[58] – and the currently applicable ePrivacy Directive – aim to regulate the processing, use, and protection of personal data related to electronic communications services, especially those generated during electronic communications. While the GDPR operates as a framework regulation, i.e. it regulates the protection of personal data in a general sense, this regulation (draft) covers only the rules of one sector or a subfield, so it details, clarifies, and complements the provisions of the GDPR as a special legal act. Do the provisions of the draft ePrivacy Regulation apply to smart toys and related services?

The territorial scope of the draft ePrivacy Regulation – parallel to the relevant provision of the GDPR – covers the entire territory of the European Union, i.e. everyone who provides electronic communications services to users located in the territory of the European Union.[59] This does not require the provider to be located or established in the EU but requires a representative in the EU to be established in writing, who must be established in one of the Member States where the end-users of electronic communications services are located.[60]

Exactly which services fall within its scope can be clarified on the basis of definitions. The draft ePrivacy Regulation does not contain definitions in this respect but refers to the definitions of the European Electronic Communications Code.[61] On this basis, electronic communications services shall mean services normally provided for remuneration over electronic communications networks comprising Internet access, interpersonal communications services, and services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine communications and for broadcasting.[62] This means that the draft ePrivacy Regulation extends data protection rules for electronic communications to services already widespread at the current level of technological development and named in the draft: VOIP services, OTT services, hotspots, IoT services, and M2M.[63] It is proposed that the ePrivacy Regulation is to be applied to providers of electronic communications

58 *Proposal for a Regulation of the European Parliament and of the Council Concerning the Respect for Private Life and the Protection of Personal Data in Electronic Communications and Repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).*

59 *Draft ePrivacy Regulation*, Article 3(1)(a).

60 *Draft ePrivacy Regulation*, Article 3(2) and (3).

61 *Draft ePrivacy Regulation*, Article 4(1)(b). The use of the forthcoming ePrivacy Regulation has been criticized by the European Data Protection Supervisor. See: *EDPS Opinion on the Proposal for a Regulation on Privacy and Electronic Communications (ePrivacy Regulation).*

62 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 Establishing the European Electronic Communications Code (Recast). OJ L 321, 17.12.2018. 36–214. Article 2, point 4(a) to (c).

63 *Draft ePrivacy Regulation*, Recitals (1) and (11) to (13).

services and providers of public directories, and it should apply also to manufacturers of software enabling electronic communications.[64]

The draft ePrivacy Regulation extended the GDPR's definition of personal data to include electronic communications data, distinguishing between two types: electronic communications content and electronic communications metadata.[65] The former means content sent or received by means of an electronic communications service:[66] textual, visual, videographic, spoken information, etc.; the latter means data processed in an electronic communications network for the purpose of transmitting, distributing, or exchanging electronic communications content: data used to trace and identify the sender and destination of a communication, data generated in the course of providing services concerning the location of the device, date, time, duration, and type of communication.[67] Metadata does not appear to convey direct information, but in reality it can provide companies with data suitable for policy analysis. When it comes to IoT devices for kids, metadata is a treasure-trove, and for smart toys, even the time spent playing can result in important information for marketing companies, service providers, and manufacturers. According to the draft ePrivacy Regulation, both communication content and metadata are personal data and must therefore be protected and confidential: persons other than end-users are prohibited from accessing, listening, tapping, storing, monitoring, reading, or otherwise intercepting, monitoring, or processing them, unless permitted by the Regulation.[68] Electronic communications content should be protected until it reaches the end-user; after receipt of the message by the end-user, both the communication content and metadata should be erased or made anonymous.[69]

The original proposal for the ePrivacy Regulation has been amended several times, which is both a clarification and covers two problematic areas. The most controversial are the provisions on how electronic communications data and metadata are allowed to be processed and on cookies. This is because Member States prioritize different issues – to put it more harshly: 'it concerns such vital economic interests that it has yet to be adopted'.[70] However, it is already apparent that this draft regulation – although IoT devices themselves have come to the attention of the legislators – does not lay down a specific provision for children belonging to particularly vulnerable groups.

64 *Draft ePrivacy Regulation*, Recital (8).
65 *Draft ePrivacy Regulation*, Article 4(3)(a).
66 *Draft ePrivacy Regulation*, Article 4(3)(b).
67 *Draft ePrivacy Regulation*, Article 4(3)(c).
68 *Draft ePrivacy Regulation*, Article 5.
69 *Draft ePrivacy Regulation*, Recital (15a).
70 Fézer 2018. 57.

7. The Draft CRA and Smart Toys

EU decision-making bodies are increasingly recognizing that the growing penetration of IoT devices and technologies is both a key cornerstone of economic development and poses serious risks in terms of privacy and personal data protection. To address these issues, the Council supports the introduction of horizontal cybersecurity requirements in its *Council Conclusions on Cybersecurity of Connected Devices* and is committed to promoting the global competitiveness of the EU's IoT sector by ensuring the highest possible level of resilience and security. To this end, the EU Agency for Cybersecurity is working on European cybersecurity certification schemes,[71] and the Commission presented a legislative proposal on cybersecurity requirements for interoperable products.

The adoption, entry into force, and application of the Proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020 (henceforth: *draft CRA*)[72] will greatly enhance the protection of personal data and the integrity of privacy of users of smart toys. Due to its horizontal and comprehensive approach, its scope covers all products with digital elements, including interoperable products but excluding products covered by sectoral legislation, and therefore IoT devices in general[73] and consumer goods, such as toys for vulnerable consumers, among them.[74] We have seen that most of the relevant legislation described so far does not provide sufficient protection for users because it does not impose obligations on manufacturers, but the draft CRA sets cybersecurity standards precisely for economic operators, thus harmonizing the EU legislative environment during product manufacture from design through development to the entire life cycle, including vulnerability detection, management, and updates. The obligation of *security by design* will apply not only to manufacturers but also to other actors in the supply chain: importers and distributors.[75] However, the European Economic and Social Committee has drawn attention to the fact that the provisions of the draft CRA may overlap with other existing legislation.[76]

National authorities will exercise market surveillance in relation to this Regulation on the territory of the Member States and may take measures in relation to any product with inadequate cybersecurity features: requiring the

71 Council of the European 2020. Points 7, 9a, and 16.

72 *Proposal for a Regulation of the European Parliament and of the Council on Horizontal Cybersecurity Requirements for Products with Digital Elements and Amending Regulation (EU).*

73 *Draft CRA*, Article 2.

74 *Draft CRA*, Recital (8).

75 *Draft CRA*, Chapter II.

76 *Opinion of the European Economic and Social Committee on 'Proposal for a Regulation of the European Parliament and of the Council on Horizontal Cybersecurity Requirements for Products with Digital Elements and Amending Regulation (EU) 2019/1020'.*

relevant economic operator to eliminate the risk, recall, or withdraw the product from the market and imposing fines on companies that place the product on the market. As the draft CRA applies to all products with digital elements, it will also apply to smart toys. This means that while the sale of the 'Cayla' doll could only be prohibited in Germany on the basis of telecoms legislation – due to an unauthenticated Bluetooth connection –, in the future, the national supervisory authorities in the Member States of the European Union will be able to act on the basis of the CRA for any smart children's toy.

8. Final Thoughts and Conclusions

Smart toys are subject to several pieces of EU legislation, each with different approaches to reducing the risks to personal data protection and privacy associated with the products concerned. The Toy Safety Directive is not relevant in this respect, and the Cybersecurity Act only provides a recommendation and framework for a European certificate but does not impose obligations on manufacturers. The GDPR data protection principles and provisions ensure the protection of personal data related to the use of IoT devices, but some smart toys are not GDPR-compliant because its requirements apply to data controllers and not to manufacturers. The draft ePrivacy Regulation includes IoT devices within its scope if signals are transmitted over a publicly available electronic communications network. The regulation is planned to apply to software vendors in addition to service providers.

The key question with regard to the protection of children's privacy and the protection of their personal data is whether we succeed in requiring all economic operators involved in the supply and distribution chain, especially manufacturers, to integrate data protection by default into smart toys. The expected provisions of the Commission legal act related to RED, the GDPR, and the ePrivacy Regulation, which will replace the ePrivacy Directive, complement each other.

The other key question is whether it will be enough that only the GDPR sets out a special requirement regarding the protection of children's privacy and personal data. Looking at the relationship between GDPR and the draft ePrivacy regulation, the answer is affirmative, but this element is completely absent in relation to the RED of the Toy Safety Directive, as the RED does not take into account the vulnerability of children. In this direction, the legislator should strengthen the protection of privacy and personal data of children using smart children's toys.

The draft CRA, which will uniformly require manufacturers and distributors to comply with cybersecurity standards for all products with a digital element, is encouraging. However, some provisions of the draft CRA overlap with other EU regulations as regards the processing of personal data.

Therefore, the fact that EU legislative bodies are trying to tackle the rampant offshoots of the digital world using traditional legal frameworks does not bring us any closer to solving the problems, pushing regulators towards fragmentation instead of adopting a comprehensive legislation. In addition, the time factor is also key. On the one hand, legislation is unable to keep up with the accelerating pace of development, and, on the other hand, provided that the draft even becomes a living, effective law, a long time will pass before it will be possible to amend it. Addressing this issue calls for a new approach, for the introduction of a new regime, for example, by legislating a special product safety standard. And as long as the plans become reality, while the search for a path is ongoing, parents can also do something to keep their children's and their own data safe – by making conscious purchasing decisions, by acting responsibly online, by educating children to do the same from an early age.

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*** *Proposal for a Regulation of the European Parliament and of the Council on Horizontal Cybersecurity Requirements for Products with Digital Elements and Amending Regulation (EU)*. 2019/1020 COM/2022/454 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0454 (accessed: 02.05.2022).

Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 61–81

DOI: 10.47745/AUSLEG.2023.12.1.05

Constitutional Position of the Head of State in Czechoslovakia, Yugoslavia, and Poland in the Period between 1918 and 1990

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Abstract. The constitutional development in Czechoslovakia, Yugoslavia, and Poland was turbulent from their birth in 1918 until the fall of the communist regime. It can be said that during this period of time a significant number of acts of constitutional nature have been adopted in the mentioned countries and that Yugoslavia certainly had the most dynamic constitutional development adopting one constitutional act in each decade. All these acts of constitutional character inevitably regulated the position of the head of state introducing certain particular legal solutions such as the election of the head of state with the participation of the Council of Electors and the outgoing President in Poland or the existence of the collective and individual head of state at the same time with certain overlapping prerogatives in Yugoslavia.

The aim of this article is to examine the position of the head of state, taking into consideration every act of constitutional nature adopted in the above mentioned countries and particularly dealing with issues such as the election, term of office, termination of office, prerogatives, and accountability of the head of state with the intent to determine the specificities, similarities, and, above all, differences in this regard.

Keywords: prerogatives of the head of state, term of office, termination of office, accountability, Yugoslavia, Poland, Czechoslovakia

1. Introduction

The end of the First World War brought significant changes to the political map of Europe. In Central Europe, the most serious consequences were caused by the dissolution of the Austro-Hungarian Monarchy. On the one hand, new countries were created on its former territory, while, on the other hand, certain territories became part of already existing countries. For the needs of this paper, it is worth mentioning that Czechoslovakia, as the common state of Czechs and Slovaks, was established on 28 October 1918. Furthermore, Poland restored its statehood after more than one century with the proclamation of the Second Polish Republic on 11 November 1918. Finally, the Kingdom of Serbs, Croats, and Slovenes, as the only monarchical state among the examined countries, was proclaimed on 1 December 1918. This country changed its official name in 1929, becoming the Kingdom of Yugoslavia.

The turmoil of the Second World War fundamentally changed Yugoslavia, which ceased being a monarchical state, becoming a republic on 29 November 1945 with the official name of the Federal People's Republic of Yugoslavia. It changed its official name once more in 1962 into the Socialist Federal Republic of Yugoslavia. On the other hand, Czechoslovakia and Poland remained republics preserving their continuity with the states created in 1918. However, the common denominator of all the examined countries was the predominant influence of communist ideology.

The objective of this article is to examine the constitutional position of the head of state in the above-mentioned countries in the period starting with their creation and until the collapse of the communist regimes in order to determine similarities, differences, and peculiarities connected with the regulation of his legal position. This paper is divided into two separate chapters, covering the period before and after the Second World War. Each chapter contains subchapters devoted to issues such as election, term of office, termination of office, prerogatives, and accountability of the head of state during the examined historical period in the studied countries. Particular focus is placed on the provisions of numerous constitutions and constitutional acts adopted in the examined countries during this 70-year period of time.

2. The Period between 1918 and 1939

2.1. Election, Term of Office, and Termination of Office of the Head of State

The first constitutional act adopted in the examined countries was the Interim Constitution of Czechoslovakia from November 1918.[1] Its main objective was to determine the principles on which the Czechoslovak statehood was to be constructed. According to this provisional act, the president was elected by the National Assembly with a two-thirds majority, while the presence of two-thirds of all deputies was needed for the election. The elected president was to remain in office until the election of the new head of state pursuant to the provisions of the final Constitution which was to be adopted (Art. 7). This act also stipulated that the function of the president was to be entrusted to the government, which could delegate certain presidential tasks to the prime minister in case the office of the president became vacant or if he tarried abroad (Art. 8).

Additionally, the Constitutional amendments of 1919[2] brought some changes concerning the termination of office. Specifically, Article 8 ruled that if the president was unable to perform his duties due to illness or if the office of the president became vacant differently, the government (in the meaning of 'cabinet') exercised his power, which could be entrusted to the prime minister. Moreover, if the president was infirm for more than a month, the National Assembly elected a vice president, who filled this position until the return of the president (Art. 8).

Poland adopted its provisional 'Small Constitution'[3] in February 1919. Similarly to the legal solution present in Czechoslovakia, the function of the *Naczelnik Państwa* (Chief of State) was entrusted by the Sejm to Józef Piłsudski until the adoption of a comprehensive constitution.

Czechoslovakia adopted its final Constitution[4] in February 1920, repealing the Interim Constitution. According to Article 57, the president was elected by the National Assembly with a three-fifths qualified majority. This Constitution also contained a specific provision stating that no one could be elected president more than twice in succession. The only exception from this limitation was granted to the first President Tomáš Garrigue Masaryk due to his contribution to the creation of

1 Zákon č. 37/1918 Sb. ze dne 13. listopadu 1918 o prozatímní ústavě [Act no. 37/1918 on the Interim Constitution].

2 Zákon č. 271/1919 Sb. ze dne 23. května 1919, kterým se mění zákon o prozatímní ústavě [Act no. 271/1919 amending the Interim Constitution].

3 Uchwała Sejmu z dnia 20 lutego 1919 r. o powierzeniu Józefowi Piłsudskiemu dalszego sprawowania urzędu Naczelnika Państwa [Legislative Sejm's ordinance of 20 February 1919, entrusting Józef Piłsudski with the further execution of the office of Chief of State].

4 Zákon č. 121/1920 Sb. ze dne 29. února 1920, kterým se uvozuje ústavní listina Československé republiky [Act no. 121/1920 introducing the Constitutional Charter of the Republic of Czechoslovakia].

Czechoslovakia as a democratic state (Art 58, Sec. 4). Furthermore, if the president died or resigned during his term of office, all his powers were to be exercised by the government (again, in the meaning of 'Cabinet') until the election of a new president (Art. 60). Similarly, in Poland, which adopted its final Constitution[5] in 1921 laying the ground for a parliamentary system upon the example of the French Third Republic,[6] the Sejm and Senate in joint session elected the president with an absolute majority (Art. 39). On the other hand, pursuant to Article 40, in case of a permanent or temporary inability of the president to fulfil his duties, the Marshal of the Sejm, and not the government (cabinet), as it was the case in Czechoslovakia, was entitled to act as his deputy. Both constitutions limited the term of office of the president to the period of 7 years (Art. 58, Sec. 2. of the Czechoslovak Constitution, Art. 39. of the Polish Constitution).

The first constitution of the Kingdom of Serbs, Croats, and Slovenes[7] was adopted in June 1921, and it is known as *Видовдански устав* 'Vidovdan Constitution' in the Serbian historiography. Its specificity in this regard was that it explicitly stated that the King was Petar I Karađorđević and that he was to be succeeded by his son, Crown Prince Aleksandar, and by his male descendants from a legal marriage according to the principle of primogeniture (Art. 56, Sec. 1). If the King had no male offspring, he was entitled to appoint his successor with the consent of the National Assembly (Art. 56, Sec. 2). During a period of 'the monarchic dictatorship',[8] initiated by the *coup d'état* executed by King Aleksandar in January 1929, the Act on Royal Power and Supreme State Administration[9] further defined the reign of the King. The principle of primogeniture remained, but in case the King had no male offspring, he could nominate his heir from the descendants in the collateral line (Art. 7). Compared to the Constitution from 1921, the consent of the National Assembly was not required in this case. Furthermore, according to Article 10, the regency had the task to substitute the king if he was minor or permanently incapable due to a mental or physical infirmity.

With the Second World War looming, the Kingdom of Yugoslavia and Poland adopted new Constitutions,[10] respectively in 1931 and 1935. On the other hand, the 1920 Constitution of Czechoslovakia was never amended and remained in effect during the whole interwar period. Article 36 of the 1931 Constitution of the Kingdom of Yugoslavia specifically stated that the country was ruled by King

5 Ustawa z dnia 17 marca 1921 r. – Konstytucja Rzeczypospolitej Polskiej [Act from 17 March 1921 – Constitution of the Republic of Poland 1921].

6 Prokop 2018. 61.

7 Ustav Kraljevine Srba, Hrvara i Slovenaca iz 1921. godine [Constitution of the Kingdom of Serbs, Croats, and Slovenes 1921].

8 Krkljuš 2012. 321.

9 Zakon o kraljevskoj vlasti i vrhovnoj državnoj upravi [Act on Royal Government and Supreme State Administration 1929].

10 Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r. [Constitutional Act from 23 May 1935].

Aleksandar I from the Karađorđević dynasty. The principle of primogeniture and the provision empowering the King to nominate his heir from the descendants of the collateral line remained, but the novelty was the introduction of the competence of the parliament in joint session to elect a new King from the same dynasty if the former King died without appointing his heir (Art. 37). Parliament also decided on the time of the establishment and of the termination of the regency in case the King was permanently incapable of exercising the royal prerogatives (Art. 41). It can be inferred that the provisions on the position of the King in vacancy were extended, so other institutions achieved broader competences in this regard.

The Polish Constitution of 1935, known in Polish historiography as the 'April Constitution', brought a peculiar change regarding the election of the President. Pursuant to Art. 16. Sec. 2–3, the candidates for the presidency were chosen by the Assembly of Electors,[11] and the retiring president was entitled to propose another candidate. If the former president exercised this right, the new president was elected by a referendum (Art. 16. Sec. 4). In case the retiring president failed to exercise it, the candidate of the Assembly of Electors was elected president (Art. 16. Sec. 5.). The term of office of the president remained the same as according to the 1921 Constitution (7 years), but it could be extended by the time necessary for the electoral procedure to be concluded (Art. 20. Sec. 2). Finally, according to Article 21, if the president died, resigned, or this position became permanently vacant otherwise during his 7 years term of office, the Assembly of Electors was to be convened to nominate a candidate.

It is to be concluded that the constitutional regulation of the election, term of office, and termination of office of the head of state in the examined countries had its specificities. The Kingdom of Serbs, Croats, and Slovenes / Kingdom of Yugoslavia, as the only monarchical state, explicitly mentioned the name of the king in its constitutions and regulated the succession to the throne and the position of the regency. Czechoslovakia, which was characterized by constitutional stability in this period, foresaw the role of the National Assembly in the election of the president and of the government in the event of his inability to exercise the office. Finally, the most interesting peculiarity of the Polish constitutional regulation was the election of the president in a referendum and the crucial role of the Assembly of Electors.

11 This institution consisted of the Speaker (Marshal) of the Senate as chairman, the Speaker (Marshal) of the Seym as vice-chairman, the prime minister, the First-President of the Supreme Court, the Inspector-General of the Armed Forces and 75 electors chosen from among the worthiest citizens, two-thirds of whom are elected by the Seym and one-third by the Senate. Their mandate terminates by law the day a new president is elected.

2.2. The Prerogatives of the Head of State

The Interim Constitution of Czechoslovakia from 1918 and the 'Small Constitution' of Poland from 1919 had a very important common feature concerning the status of the head of state: in both cases, they had a formally inferior legal position compared to the legislature.[12] Although being brief, the Czechoslovak Interim Constitution had a separate part concerning the position of the president. Article 10 endowed him with representational powers in foreign relations, appointment of officials and granting pardons, and he was also the commander in chief of the armed forces. Taking into account the fact that the president was also endowed with a very weak right of suspensive veto in Article 11, it is to be inferred that the president was not more than a ceremonial figurehead.

According to the Polish 'Small Constitution', the position of the chief of state was formally even weaker in terms of competences than that of its Czechoslovak counterpart. The text did not mention any representational right or duty and stated that the chief of state was a mere executor of the Sejm's resolutions (Art. 2). The only substantial prerogative was the appointment of the government, but the provision added that this decision must be made on the basis of an agreement with the Sejm (Art. 3).

It is important to underline, however, that both the Czechoslovak (Tomáš Garrigue Masaryk) and the Polish (Józef Piłsudski) head of state at that time had enormous authority and informal influence, which resulted in the strengthening of their constitutional position during this period.[13] Masaryk managed to achieve the amendment of the constitutional text, which brought the significant enhancement of his powers. *Inter alia*, he gained the right to appoint and dismiss the members of the government and assign a function to them, and his right of legislative veto was also considerably strengthened. Piłsudski, on the other hand, gained strong influence in the military field through an additional protocol added to the 'Small Constitution'.[14]

Furthermore, the 1920 Constitution of Czechoslovakia ensured the preservation of the strengthened presidential powers as it was laid down in the 1919 amendments, occasionally increasing them even more. The president retained representative competences traditionally associated with the heads of state (Art. 64),[15] his powers towards the government (Art. 70, 72, 82, 83), and also his veto right in an even more favourable form (Art. 47, 48). He additionally gained a very influential power of dissolving the parliament, without any significant

12 Schelle–Tauchen 2013. 58.

13 Prokop 2018. 61; Schelle–Tauchen 2013. 514.

14 Prokop 2018. 61.

15 I.e. representation of the country abroad, concluding treaties, appointing officers, exercising the role of commander-in-chief, granting pardons, decorations and donations, etc.

limitation (Art. 31). Although the First Czechoslovak Republic is mostly regarded as a parliamentary system,[16] these prerogatives created the possibility for the president to have a substantial influence on the political environment and act as a balance among the branches of power.[17]

The Polish Constitution of 1921 elaborated the legal position of the president much more clearly. According to this constitution, the president had wide competences in foreign relations (Art. 48, 49), was the supreme head of army during peacetime (Art. 46), and could also grant individual pardons (Art. 47). The right to appoint or recall the members of the government (Art. 45) and to convoke, adjourn, or close the parliamentary sessions (Art. 25) was also reserved to him. On the other hand, according to the original wording of this Constitution, the president had a less favourable position in certain aspects compared to the rules laid down by the 1920 Czechoslovak constitution: the president could only dissolve the Sejm with the qualified consent of the Senate (Art. 26), and there was no mention of a presidential veto whatsoever. This was significantly changed by the 1926 constitutional amendment, which, *inter alia*, eliminated the requirement of the senatorial consent for the dissolution of the parliament and allowed the president to issue statutory decrees under certain conditions.[18]

The Polish legislator, adopting a new constitution in 1935, further strengthened the position of the head of state at the expense of the parliament, creating a presidential system of government.[19] Article 11 of this Constitution stated that the president was the 'superordinate factor' coordinating the activities of the supreme state organs. The president retained all the important political competences guaranteed by the previous constitution in the amended form and gained other important tools of power as, for example, the right of veto (Art. 54). The right to appoint or dismiss not only the prime minister but also the First President of the Supreme Court, the President of the Supreme Board of Control, and the Commander in Chief, and his right to nominate the judges of the Tribunal of State and a certain number of Senators (all Art. 13) perfectly illustrated how extremely disproportional the system of powers introduced by the 1935 'April Constitution' became in favour of the president.

Furthermore, the first constitution of the Kingdom of Serbs, Croats, and Slovenes from 1921 designed the king as the head of state who had all the representative competences traditionally associated with such a position.[20] The government was subordinated and responsible to the king, who appointed its members (Art.

16 Pavlíček 2011. 39.
17 Schelle–Tauchen 2013. 542.
18 Kowalski 2014. 318–319.
19 Srokosz 2009. 273–291.
20 The king represented the state in foreign relations (Art. 51), concluded treaties (Art. 79), appointed officers and awarded decorations (Art. 49), granted pardons or amnesties (Art. 50), and he was also the supreme commander of all military forces (Art. 49).

90 and 91). He also had very broad competences towards the legislature: the right to convene the parliament or adjourn its sessions and a broadly formulated right to dissolve the parliament were also granted by this constitution (Art. 52). The king could also propose bills (Art. 78), and a legislative veto could also be implicitly deduced[21] from the text of the constitution (Art. 80).

King Aleksandar secured even more power for himself by introducing a royal dictatorship in 1929. The Act on Royal Power and Supreme State Administration stated that the king was the bearer of all state powers (Art. 2). The King disestablished the legislature and became the only holder of legislative power (Art. 18), while he naturally continued to exercise all powers that were guaranteed by the Vidovdan Constitution as well.

Pursuant to the Yugoslav Constitution of 1931, the King held the traditional representative competences (Art. 29, 30, 31, 65), and he was the head of executive (Art. 27) consisting of ministers who were appointed and recalled by him (Art. 77) and solely accountable to him. Legislative power was exercised jointly by the king and the restored parliament (Art. 26), as the legislative acts needed his approval (Art. 29, 66); in extraordinary situations, he was entitled to order indispensable measures to be undertaken irrespectively of any constitutional and legal prescriptions (Art. 116), could appoint half of the number of senators (Art. 50), and also could at any time convoke the parliament and dissolve its lower (elected) chamber (Art. 32).

Development trends in the interwar period regarding the powers of the heads of state varied strongly in the three examined countries. Czechoslovakia introduced a parliamentary system with a decently but not overly influential presidential position, which managed to survive in an unchanged form until the brink of the Second World War. Poland also started off with a parliamentary system with the presidential prerogatives being similar, perhaps even weaker than those of his Czechoslovak counterpart. Over time, this system proved not to be sustainable, and a gradual enhancement of presidential competences had been undertaken. Despite that the position of the head of state in Yugoslavia (king) was very influential from the initial period, the trend line of his powers could be best illustrated by a curve: after the initial phase it peaked, meaning virtually unlimited dictatorial powers were vested in him, a consolidation followed, which brought a slight limitation of them, albeit still securing an absolutely dominant position for the king.

2.3. Accountability of the Head of State

The Interim Constitution of Czechoslovakia regulated the issues relating to the accountability of the president only in two articles. Article 10 stipulated that executive acts made by the president had to be countersigned by a responsible

21 Krkljuš 2012. 304.

minister, while Article 9 excluded the possibility of criminal persecution of the president. Similarly, the Polish 'Small Constitution' of 1919 demanded that each act of the president be countersigned by the competent minister (Art. 5). Unlike the Czechoslovak Interim Constitution, it explicitly stated that the president was responsible to the Sejm for the exercise of his office (Art. 4).

Compared to the Interim Constitution, the Constitution of Czechoslovakia of 1920 contained more provisions on the accountability of the president. First of all, it stated that the president was not accountable for the exercise of his office, rendering the government responsible for his acts (Art. 66). The provision demanding that every executive act of the president be countersigned by a responsible minister remained (Art. 68). The novelty was the introduction of the impeachment proceeding. Specifically, in Article 67, it provided that the president could be prosecuted only for high treason before the Senate, upon an indictment made by the Chamber of Deputies. The penalty inflicted in the event of his conviction was the loss of office without the possibility of regaining it later.

Moreover, the Polish Constitution of 1921 also rendered possible the impeachment of the president envisaging even more impeachment reasons than the Czechoslovak. Article 51, primarily stated that the president was not responsible either to the parliament or according to civil law and stipulated that the president could be held responsible by the Sejm in the case of violation of the Constitution, treason, or for criminal offenses. It was the competence of the State Tribunal to hear the case and pass the sentence. In the case of a successful impeachment before the Court of State, the president was suspended from office. Finally, this Constitution also stated that each governmental act of the president needed the countersignature of both the President of the Council of Ministers and of the competent minister in order to be valid (Art. 44, p. 4).

Regarding the accountability of the King in the Kingdom of Serbs, Croats, and Slovenes, it should be noted that the Constitution of 1921 represented no exception envisaging in Article 54 that each act of the Royal Authority necessitated the countersignature of the competent minister in order to be valid and enforced. This Constitution in Article 55 explicitly stated that the personality of the King was inviolable and that he could neither be held accountable nor sued. However, this provision was not applicable to his private property. The Act on Royal Power and Supreme State Administration of 1929 contained the same provision (Art. 6) without mentioning the exception relating to private property. Given the fact that the king became the only holder of legislative power, this Act demanded that the king's decree, containing the law, be countersigned by the President of the Council of Ministers, the competent minister and by the Minister of Justice (Art. 18).

Furthermore, the Yugoslavian Constitution of 1931 did not bring any change compared to Article 55 of the Constitution of 1921.[22] It also stipulated that each

22 Article 35 of the Constitution of 1931 also stated that the personality of the king was inviolable

written act of the Royal power should have been countersigned by the competent minister or by the Council of Ministers, assuming the responsibility for it (Art. 34). It is to be concluded that the impeachment proceeding was not admissible according to Yugoslavian constitution acts adopted during the interwar period.

Finally, the Polish Constitution, adopted in 1935, stated that the president was not liable for acts of office, nor could he be held liable for any act not related to his office (Art. 15, Sec. 1). It is important to point out that the provisions on the impeachment proceeding present in the Polish Constitution of 1921 were omitted. The 1935 Constitution simply stipulated that the president could not be prosecuted during the term of his office for actions not connected with the performance of his duty. Thus, it is evident that the president could not be impeached anymore. Concerning the countersignature of the acts of the president, the legal solution present in Poland was peculiar because it distinguished two types of presidential official acts. The Constitution demanded the official acts of the president deriving from his presidential prerogatives to be countersigned by both the prime minister and the competent minister in order to be valid (Art. 14, Sec. 1), while, on the other hand, the countersignature was not necessary for the official acts not arising out of these prerogatives (Art. 14, Sec. 2).

It can be concluded that the institution of countersignature existed in all the examined countries. Solely Poland demonstrated certain specificities in this regard discerning two types of presidential official acts. The Kingdom of Serbs, Croats, and Slovenes / Kingdom of Yugoslavia was the only studied country which did not recognize the possibility of the impeachment of its head of state (king). On the other hand, the impeachment was admissible according to the Czechoslovak Constitution of 1920 and also pursuant to the Polish Constitution of 1921, but this possibility was later repealed.

3. The Period between 1945 and 1990

3.1. Election, Term of Office, and Termination of Office of the Head of State

The first examined country which adopted a new constitution during this period characterized by a strong Soviet influence was Yugoslavia.[23] Pursuant to the 1946 Constitution, the Presidium, as the collective head of state consisting of a president, six vice presidents, a secretary, and not more than 30 members,

and that he could not be held responsible or sued with an exception relating to his private property.

23 Ustav Federativne Narodne Republike Jugoslavije 1946 [Constitution of the Federal People's Republic of Yugoslavia 1946].

was elected by the National Assembly in joint session of both of its chambers (Art. 73).

In 1947, Poland adopted its provisional Constitution,[24] in Polish historiography known as the 'Small Constitution' of 1947 (*Mała Konstytucja z 1947*), establishing a new institution called the Council of State with mainly executive powers. The President of the Republic was its chairman (Art. 15). The provisions of the 1921 Constitution (Articles 40–44, 45, 46–54) were applied, and, therefore, the President was elected by an absolute majority of votes in the presence of at least 2/3 of the statutory number of deputies, and his term of office lasted 7 years.

Moreover, the tendency to rely on previous constitutional solutions was present also in Czechoslovakia, which adopted its Constitution[25] in 1948, repealing the Constitution of 1920. According to Article 68, the President of the Republic was elected by the National Assembly with three-fifths majority of the votes of those present. His term of office lasted 7 years (Art. 69, Sec. 1). Altogether, it can be concluded that the provisions concerning election, term of office, and termination of office of the president did not change compared to the 1920 Constitution.

The 1950s brought important constitutional changes in Poland and Czechoslovakia. Poland adopted a new Constitution in 1952, retaining the Council of State. This institution, consisting of the president, four vice-presidents, the secretary and nine members, was elected by the Sejm from among its members (Art. 24, Sec. 1). Taking into consideration the fact that Paragraph 3 of the same article stated that after the expiration of the term of office of the Sejm, the Council of State acted until the election of a new one by the newly elected Sejm, it can be deducted that its term of office was inseparably linked to the incumbency of the Sejm.

On the other hand, the Constitutional Law of 1953[26] abolished the Presidium as the collective head of state, introducing the institution of the President of the Republic as the executive organ of the Federal National Assembly. Pursuant to Article 74, the president was elected by the Federal National Assembly among its members in joint session of both of its chambers by a secret ballot, while the majority of votes of the total number of its members was needed for its election. Similarly to the solution present in the Polish 1952 Constitution, the term of office of the president was linked to the incumbency of the Federal National Assembly (Art. 77). In case the function of the president became vacant, one of

24 Ustawa Konstytucyjna z dnia 19 lutego 1947 r. o ustroju i zakresie działania najwyższych organów Rzeczypospolitej Polskiej [Constitutional Act from 19 February 1947 on the system and scope of activities of the highest authorities of the Republic of Poland].

25 Ústavní zákon č. 150/1948 Sb. ze dne 9. května 1948 Ústava Československé republiky [Constitutional Act no. 150/1948 from 9 May 1948 Constitution of the Czechoslovak Republic].

26 Ustavni zakon o osnovama društvenog i političkog uređenja Federativne Narodne Republike Jugoslavije i saveznim organima vlasti [Constitutional Law on the Fundamentals of the Social and Political Organization of the Federal People's Republic of Yugoslavia and Federal Authorities 1953].

the Vice-Presidents of the Federal Executive Council, designated by the same institution, exercised his function (Art. 78).

The specificity of Czechoslovakia, which adopted its Constitution[27] in 1960, is that unlike in the other two examined countries, the president was never a collective head of state. Pursuant to Article 61 of the 1960 Constitution, the president was elected by the National Assembly. His term of office was abridged compared to the Constitution of 1948 to last just 5 years (Art. 63). Furthermore, Article 65 stated that if the office of the president became vacant, the government was entitled to exercise this function or, more precisely, to delegate some powers to the prime minister. The Constitution of 1968 did not bring any noticeable change in this regard.

The constitutional development continued dynamically in Yugoslavia, but it ceased in Poland given the fact that the 1952 Polish Constitution remained in effect until the regime change. First of all, Yugoslavia adopted a new Constitution[28] in 1963. Pursuant to Article 221, the President was elected by the Federal National Assembly one month before the termination of his term of office, which lasted 4 years. Article 220 stipulated that there was a possibility for the President to be re-elected for one further consecutive term. In the same article, the Constitution introduced an exception personally for Josip Broz Tito, hence he could be re-elected without limitation regarding the term of office.

Furthermore, the Constitution of 1963 was amended in 1971. Through Constitutional Amendment XXXVI,[29] the Presidency of the Socialist Federal Republic of Yugoslavia was instituted as the collective head of state. The composition of this institution together with the election of its members stressed the federal nature of the state.[30] The term of office of its members lasted five years without the possibility to be elected more than twice in succession (Art. 13). Constitutional Amendment XXXVII regulated the position of the president, and in Article 1 it accentuated the fundamental role of Josip Broz Tito in the creation of the state. It also stated that the above-mentioned articles 220 and 221 of the 1963 Constitutions were still to be applied, extending the term of office of the president to 5 years (Art. 3).

Finally, the Constitution of 1974[31] permitted the members of the Presidency to be elected twice in succession (Art. 324, Sec. 2). The undisputable position

27 Ústavní zákon č. 100/1960 Sb. ze dne 11. července 1960 Ústava Československé socialistické republiky [Constitutional Act no. 100/1960 Constitution of Czechoslovak Socialist Republic].

28 Ustav Socijalističke Federativne Republike Jugoslavije [Constitution of the Socialist Federal Republic of Yugoslavia].

29 Ustavni amandmani XXXVI i XXXVII [Constitutional Amendments XXXVI and XXXVII].

30 The Presidency consisted of the presidents of the assemblies of the republics, the presidents of the assemblies of the autonomous provinces, and two members from each republic, one member from each autonomous province, elected by the assembly of the republic or autonomous province at a joint session of all councils (Art. 10).

31 Ustav Socijalističke Federativne Republike Jugoslavije [Constitution of the Socialist Federal Republic of Yugoslavia].

of Josip Broz Tito was assured by Article 333, which stated that the National Assembly could elect him for an unlimited term of office.

The constitutional development of the studied countries was influenced by communism. A collective head of state was present in Yugoslavia (Presidium, Presidency) and in Poland (the Council of State), while, on the other hand, Czechoslovakia did not introduce this type of head of state. The peculiarity of the Yugoslavian system was the existence of the duality of heads of state (presidency and president) since the adoption of the Constitutional Amendments of 1971. It is worth noting that the Polish and Czechoslovak constitutions did not permit their heads of state to be elected for an unlimited term of office, which was the privilege granted to Josip Broz Tito by the Constitution of 1974.

3.2. The Prerogatives of the Head of State

Pursuant to the Yugoslav Constitution of 1946, the Presidium, as a collective head of state, exercised some of the traditional competences such as awarding decorations, granting pardons, appointing and recalling ambassadors, and ratifying international treaties (all Art. 74). The Presidium had also other prerogatives, which were not really conventional for the heads of states, among others, giving rulings on whether a law of a republic is in conformity with the federal constitution (Art. 74, Sec. 1, Subs. 4) or giving generally binding interpretations of federal laws (Art. 74, Sec. 1, Subs. 5). The Presidium also convened the sessions of the federal parliament but could only dissolve it if its chambers could not agree on a bill (Art. 74, Sec. 1, Subs. 1 and 2). It is important to point out that it was not entitled to appoint or recall the government, as this competence was exercised by the National Assembly according to Art. 77 of this Constitution.

Furthermore, according to the Constitutional law of 1953, which re-introduced the individual head of state, the President of the Republic represented the state in international relations, appointed and revoked ambassadors, awarded titles and decorations (Art. 71), and was the supreme commander of the armed forces (Art. 73). However, pursuant to Article 72, the president was also the President of the Federal Executive Council, which meant that the head of state was the head of the government at the same time. This interesting concept resulted in the fact that the President could not appoint nor recall the government or its members and was not entitled either to convene or dissolve the parliament, though the latter was the competence of the government (Art. 79, Sec. 10) headed also by him. Interestingly enough, the president acquired the right of suspensive legislative veto (Art. 72).

The duality specified above came to an end in 1963, when a new Yugoslav constitution was adopted. According to this constitution, the President of the Republic retained more or less the same prerogatives he previously had (with a few changes, e.g. he was given the right to grant pardons – Art. 217, Sec. 2, Subs.

3), but – as he was not the head of the government anymore – he had the right to propose to the Federal Assembly the candidate for this position (Art. 216). The president also kept his veto right (Art. 218), while he still did not gain the power to convene or dissolve the parliament or to appoint or recall the government.

A further – and the most complex – change regarding the prerogatives of the head of state in the socialist Yugoslavia's ever-changing constitutional environment occurred in 1971 with the adoption of the Constitutional Amendments XXXVI and XXXVII. They provided for two different heads of state: the Presidency of the Socialist Federal Republic of Yugoslavia and the President of the Republic, who was also the President of the Presidency.[32] The President of Republic only had a few representative prerogatives arising from his position: he could, *inter alia*, confer decorations,[33] appoint or recall ambassadors,[34] act as the Commander in Chief,[35] or promulgate laws.[36] He was additionally entitled to take measures in emergency situations when the Presidency and the Federal Assembly could not meet, by passing decrees with the force of law,[37] proclaiming a state of war, or ordering mobilization.[38]

The Presidency had several competencies overlapping with those of the president. It could, *inter alia*, confer decorations, appoint or recall ambassadors, and promulgate laws as well, but also grant pardons and appoint military officers or propose the election of the president or constitutional judges.[39] The Presidency could issue decrees with the force of law during the state of war or its imminent danger.[40] It could not appoint or recall the government, nor could it convene or directly dissolve the parliament. Furthermore, Article 8 of Constitutional Amendment XXXVI contained a rule, according to which the given chamber of the parliament could have been dissolved if it ultimately could not reach an agreement with the Presidency on the matter of draft legislation that the Presidency deemed indispensable, on the formulation of internal and foreign policy, or on the adjournment of debate on the passage of a bill. The Yugoslav Constitution of 1974 retained the above-mentioned duality without bringing any notable change in this regard. However, it is important to underline that the prerogatives of the Presidency were activated after the death of the President of the Republic for life Josip Broz Tito in 1980.

Concerning the prerogatives of the President in Czechoslovakia, the Constitution of 1948 did not change much compared to the Constitution of 1920.

32 Art. 2, Sec. 2 of the Constitutional Amendment XXXVII.
33 Art. 4, Sec. 1, Subs. 4 of the Constitutional Amendment XXXVII.
34 Art. 4, Sec. 1, Subs. 3 of the Constitutional Amendment XXXVII.
35 Art. 6 of the Constitutional Amendment XXXVII.
36 Art. 4, Sec. 1, Subs. 1 of the Constitutional Amendment XXXVII.
37 Art. 4, Sec. 2 of the Constitutional Amendment XXXVII.
38 Art. 4, Sec. 1, Subs. 5 of the Constitutional Amendment XXXVII.
39 All these prerogatives were contained in Art. 3 of the Constitutional Amendment XXXVI.
40 Art. 5 of the Constitutional Amendment XXXVI.

Most of his competencies from the 1920 Constitution were literally taken over or simply paraphrased.[41] Slight changes occurred, for example, by the introduction of the possibility to grant general pardon or by the extension of the deadline to veto a legislative act. An important change, however, was that according to this Constitution, the president could only recall the government or its members after their demise (Art. 74, Sec. 1, Subs. 6).

Furthermore, pursuant to the 1960 Constitution, the president kept his representative competences traditionally associated with the heads of state but significantly changed the balances of power between the president and the parliament: the Constitution did not mention the president's veto right, nor his right to dissolve the parliament. On the other hand, he retained the right to appoint or recall the government as a whole or its members, while the prerequisite of the above-mentioned ministerial demise disappeared from the text of the constitution. The 1968 Constitutional Act on the Czechoslovak Federation did not bring any notable change into the prerogatives of the president since it was entirely based on the previous regulation.[42]

Finally, in Poland, the part of the 'Small Constitution' from 1947 devoted to the president referred in its entirety to the provisions of the 1921 Constitution.[43] However, the Constitution of 1952 brought significant changes. According to Article 25, the Council of State had, *inter alia*, the following representative competencies: it could appoint or recall ambassadors, ratify treaties, appoint civil and military servants, award orders and decorations, and grant pardons. Pursuant to the same article, the Council of State could convene the sessions of the Sejm, but there was no mention of a right to dissolve it, nor of a veto right. The Council of State could, however, issue decrees having the force of law between the sessions of the Sejm (Art. 26) and issue universally binding interpretations of laws (Art. 25, point III.), as well as proclaim martial law and order mobilization (Art. 28, Sec. 2.). On the other hand, it did not have the prerogative to appoint or recall the government, as this power was exercised by the Sejm (Art. 29, Sec. 1.).

Similarly to the interwar period, the development of the position of heads of state concerning their prerogatives was thoroughly different in the three examined countries. The situation in Poland was the most stable one from this perspective, with a collective head of state capable of issuing decrees but otherwise having a rather weak position, which remained largely unchanged until the collapse of communist rule. The Czechoslovak post-war prerogatives of the president were the most similar to those during the interwar period among the three states, albeit a trend of a somewhat weakening position could be observed, mainly after 1960.

41 According to Art. 74 of the 1948 Czechoslovak Constitution and Art. 64 of the 1920 Czechoslovak Constitutional Charter.

42 Schelle–Tauchen 2013. 1315.

43 See Art. 13 of the 'Small Constitution' from 1947.

The situation in Yugoslavia concerning the prerogatives of the heads of state was extremely chaotic, but, in sharp contrast to the interwar conditions, none of the regulations granted them a particularly strong position.

3.3. Accountability of the Head of State

Pursuant to Article 75 of the 1946 Yugoslav Constitution, the Presidium of the National Assembly, as the collective head of state, was accountable to the National Assembly, which was entitled to remove it and elect a new one. The National Assembly could also dismiss its members individually. This Constitution did not prescribe the countersignature by the competent minister as a precondition for the validity of the acts of the Presidium. Furthermore, the Constitutional Act of 1953 defined the President of the Republic as an executive organ of the Federal National Assembly. It accentuated his connection to the Federal National Assembly stipulating in Article 76 that he was accountable to this institution for his actions and for the actions of the Federal Executive Council. The Federal National Assembly was also entitled to impeach him in the joint session of both of its chambers (Art. 36).

The Constitution of Yugoslavia of 1963 brought significant changes in this regard, omitting the provisions regarding the impeachment of the president. Given the fact that the president ceased being the President of the Federal Executive Council, he was not accountable to the Federal Assembly for its actions anymore. However, the responsibility of the president for his own actions remained intact (Art. 219). Moreover, it is important to highlight that Constitutional Amendment XXXVI of 1971 in Article 6 prescribed the accountability of the Presidium for the performance of its rights and duties without mentioning to which institution it was accountable. On the other hand, Constitutional Amendment XXXVII devoted to the President of the Republic explicitly stated that the above-mentioned Article 219 of the 1963 Constitution prescribing his accountability to the Federal Assembly remained in force. Finally, the Constitution of 1974 did not bring any change regarding the accountability of the presidency while the provision on the responsibility of the president was omitted.

Concerning the accountability of the President in Czechoslovakia, the 1948 Constitution did not bring any significant change in this regard compared to the Constitution of 1920. Therefore, the provisions stating that he was not accountable for the exercise of his office and that the government assumed the responsibility for it (Art. 76) and requiring his acts to be countersigned by a competent minister (Art. 77) remained intact. The only difference regarded the fact that the impeachment proceeding on a charge of treason was admissible upon an indictment of the Presidium of the National Assembly (Art. 78), consisting of the Chairman, the Vice-Chairman, and other members (Art. 63).

Furthermore, the 1960 Constitution of Czechoslovakia stated that the president was accountable to the National Assembly for the performance of his office (Art. 61, Sec. 2). The provisions demanding his acts to be countersigned by a competent minister and permitting the impeachment proceeding were omitted. The Constitution of 1968 did not bring any significant change in this regard. Apart from stipulating that the president was accountable to the Federal Assembly for the discharge of his functions (Art. 60, Sec. 2), it also explicitly stipulated in Article 65 that the president could not be prosecuted for actions related to the exercise of his office.

Similarly to the solution present in the Czechoslovak Constitution of 1948, the Polish 'Small Constitution' of 1947 did not make any change in this regard compared to the 1921 Constitution since articles 44 and 51 of the latter were to be applied. Finally, the 1952 Constitution stated that the Council of State was accountable to the Sejm for all its activities (Art. 26, Sec. 2). This Constitution did not contain the provisions on the countersignature of its acts nor on the impeachment proceeding.

The constitutional regulation of the examined issue was similar in the studied countries. It can be said that the accountability of the head of state to the parliament was a general rule. The only exception in this regard was Yugoslavia since the 1974 Constitution did not contain a provision on the accountability of the president, and it was not mentioned to which institution the presidency was accountable. Another point of similarity among the studied countries was the abolishment of the impeachment proceeding.

4. Conclusions

It is to be concluded that in the examined period of time the solutions concerning the constitutional position of the Head of State were the most peculiar in Yugoslavia. First of all, given the fact that in the period of 1918–1939 it was the only monarchical state among the studied countries, the name of the king and the ruling dynasty were explicitly mentioned in its constitutional acts, which also contained the provisions on the succession to the throne. Regarding the prerogatives of the king, it can be stated that they were particularly broad, especially after the introduction of the dictatorship in 1929, when the king became the only holder of legislative power disestablishing the parliament. However, the similar tendency was noticeable in Poland, where a presidential system of government was introduced by the 1935 Constitution, but the prerogatives of the President were not comparable to those of King Aleksandar Karađorđević during the period of 'the monarchical dictatorship' (1929–1931).

Furthermore, Yugoslavia was the only examined country whose constitutional acts adopted in the period of 1918–1939 did not envisage the possibility of the

impeachment of the king. One can notice that the Polish Constitution of 1935 also lacked the provisions of the impeachment of the president. However, the impeachment proceeding was admissible pursuant to the 1921 Constitution. Finally, the existence of the duality of heads of state (the President of the Republic as an individual and the Presidency as a collective head of state with certain overlapping prerogatives), introduced by the Constitutional Amendments of 1971 in Yugoslavia and retained by the Constitution of 1974, was another peculiarity. The fact that the prerogatives of the Presidency were activated after the death of the President for life Josip Broz Tito rendered this particularity even more peculiar.

The constitutional position of the head of state in Czechoslovakia and Poland was similar throughout the examined period of time, especially taking into account the first Constitutional acts of these countries, which were applied even after the Second World War. Concerning the period of 1918–1935, it can be inferred that similarities included, *inter alia*, the election of the president (it was a competence of the parliament – National Assembly in Czechoslovakia and Sejm and Senate in joint session in Poland), comparable presidential powers, requirement of the countersignature of his acts (this was the case also in Yugoslavia), and the existence of the impeachment proceeding. While the specificity of Czechoslovakia was constitutional stability, Poland deleted the mentioned similarities with the 1935 Constitution, given the fact that it introduced the role of the Council of Electors and the referendum for the election of the president, significantly strengthened his presidential powers, and abolished the impeachment proceeding.

Finally, in the period of 1945–1990, apart from the application of the provisions of the 1920 Constitution of Czechoslovakia and the 1921 Constitution of Poland, the similarities comprised the accountability of the head of state to the parliament (to the National/Federal Assembly in Czechoslovakia and to the Sejm in Poland) and the abolishment of the impeachment proceeding, given the fact that the 1960 Constitution of Czechoslovakia and the 1952 Constitution of Poland omitted the provisions in this regard. On the other hand, it can be concluded that the development of the prerogatives of the head of state was thoroughly different. It is important to underline that Czechoslovakia was the only examined country which did not introduce a collective head of state throughout this period.

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Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 83–95

DOI: 10.47745/AUSLEG.2023.12.1.06

Transfer of Mining Company Shares in Medieval Serbia

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Abstract. The beginning of mining in medieval Serbia is related to the settlement of the Saxons that is commonly thought to have taken place in the mid-13th century. Saxons brought with them not only the technique and knowledge for silver and gold mining and extraction but also customary rules that regulated numerous issues concerning mining. The first written mining law codification appeared in Serbia around 1400. This codification is known as the Mining Code of Despot Stefan, and it was enacted for Novo Brdo (*Ново Брдо*), the most important mining site in the state at the time. Although the influence of Saxon customs is evident, Serbian law showed significant unique development, resulting from the intensity of metal production and isolation from other European Saxon mining centres. One of the most important subjects regulated in the Code was the transfer of shares in mining companies. Although this was not the first issue regulated by the Code, according to the transcription from 1638, one seventh of its articles were dedicated to the change of shareholders. These articles prescribed various rules on registration of ownership, bearing of costs, representation, unilateral rescission of sale, and expulsion from the company. The aim of this study is to answer the question as to what extent these rules were the result of transplantation of Saxon customs, and which part of the rules represents a possibly unique Serbian legal contribution.

Keywords: mining law, Saxon medieval law, Serbian medieval law, medieval shareholders

1. Introduction

Chroniclers and writers from the second half of the 14th century and the first half of the 15th century gave numerous – and probably well exaggerated – testimonies about the huge gold and silver production in late medieval Serbia. Exploitation of precious metals was the basis of wealth and political power of Serbian medieval rulers and, therefore, probably the most important economic activity at the time.

The beginning of mining in medieval Serbia is related to the Saxon[1] settlement, which is commonly dated to the mid-13th century. Saxons brought with them not only the technique and knowledge of silver and gold mining and extraction but also customary rules that regulated numerous issues concerning mining. The first written codification of mining law in Serbia, known as the Miners' Law (*Закон о рудницима*), or the Mining Code of Despot Stefan, appeared around 1400. It was constituted by a charter issued for Novo Brdo (*Ново Брдо*), the most important mining site in the state at the time. The codification continued to be accepted during Ottoman rule after the fall of the Serbian medieval state. The Code is preserved in two Serbian manuscripts, a Serbian Cyrillic transcript from the 16th century[2] and a Serbian language transcript in the Latin script from 1638.[3] Although younger, the text written in the Latin script is considered to be more complete and similar to the original. The Cyrillic version contains *in continuo* another legal source, predominantly regarding the institution of vojvoda of Novo Brdo,[4] which was not directly related to the mining law. In the same year when Novo Brdo was conquered (1455), the Code was translated into Turkish, and other versions of Serbian mining rules subsequently also appeared in the Ottoman Empire. These were a later Turkish version from the late 15th century of the aforementioned Code and the laws of Suleiman the Magnificent.[5]

As the latest studies indicate, Serbian medieval mining law had considerable similarities to the Charter of Béla IV for Schemnitz (Banská Štiavnica – formerly in the Kingdom of Hungary, currently in Slovakia), the laws of Iglau (Jihlava) and Kuttenberg (Kutná Hora – both cities in what was once Bohemia, now in the Czech Republic), and the Saxon law of Freiberg. The resemblance is evident not only in the terminology (*lemšat* | *Lehenschaft*, *gvarak* | *Gewerke*, *urbar* | *Urbar*, *hutman* | *Hutmann*, etc.) but also in some of the legal institutions and rules. For example, there was the institution of the mine supervisor (*hutman*) in Serbian law,[6] as well as the contract of *Lehenschaft*[7] and loss of mining concessions through non-use.[8] On the other hand, there was considerable unique development, which resulted in different legal norms. Serbian landlords had no right to a share of ore excavated on their land.[9] Bohemian *urbarars* were contractors of crown income and tax collectors, unlike the Serbian ones, who

1 Динић 1955. 1–27.
2 Published by Nikola Radojčić; see Радојчић 1962.
3 Published by Sima Ćirković; see ЋиркоВић 2005.
4 КатанчеВић 2016. 230–233.
5 Published by Nicoară Beldiceanu; see Beldiceanu 1964. 243–254, 257–268, 316–323, 354–363. Some of these were translated into Serbian by Fehim Spaho and others by Skender Rizaj. Spaho 1913; Rizaj 1968. 199–256.
6 КатанчеВић 2022.
7 КатанчеВић 2020a. 265–276.
8 КатанчеВић. 2020c. 1066–1067.
9 КатанчеВић 2020c. 1074–1075.

were only mining officials.[10] The Serbian contract of *Lehenschaft* was regulated by imperative rules, with no parallels in comparative law.[11] Therefore, on the one hand, the influence of Saxon customs on Serbian law is evident, and, on the other, Serbian law shows significant uniqueness, which was the result of the intensity of metal production and, probably, isolation from other European Saxon mining centres since there have been no proven Saxon settlements after the one previously mentioned.

During both Serbian and Ottoman rule, mines were organized as companies of shareholders. Some of the shareholders were financiers while others were mining experts. The shares were calculated in fractions. The smallest recorded fraction in determining the shares was one sixty-eights of a share, one sixty-fourths shares were more common in practice, but in that particular case, there were four extra shares reserved for blacksmiths and managers.[12] One of the most important subjects of the Mining Code of Despot Stefan was the transfer of shares of mining companies. Although that was not the first issue regulated by the Code, according to the transcript from 1638, one seventh of its articles were dedicated to the change of shareholders. These articles prescribed various rules on registration of ownership, bearing of costs, representation, unilateral rescission of sales contract, and expulsion from the company.

It is interesting to note that there were no clear influences of the Roman contract of partnership (*societas*) in the historic regulation of Serbian mining companies under examination. Roman law was introduced to medieval Serbia through the Byzantine compilation of Procheiron (*Πρόχειρος νόμος*), which was translated into Serbian as part of the Nomokanon (*Номоканон*) in the early 13th century and is known as *Zakon gradski*. However, mining companies were designated and regulated differently from partnerships (*ωбьщина*[13] in Procheiron; *druxina*[14], *дроужина*[15] in the Code). For example, a partnership was deemed as rescinded by the death of a partner,[16] while a mining company continued to exist in that situation.[17] There is no evidence of any influence of customs and laws of the neighbouring coastal Adriatic city-state of Dubrovnik. For instance, while a partnership could be concluded *solo consensus* in Dubrovnik,[18] it was necessary for a public official to authenticate a mining company contract in Serbia.

10 КатанчеВић 2020a; КатанчеВић 2020b. 260–261.
11 КатанчеВић 2021. 122–123.
12 ЋиркоВић 2002. 80–83.
13 Дучић 1877. 75, 78.
14 ЋиркоВић 2005. 26.
15 Радојчић 1962. 44.
16 Дучић 1877. 75.
17 See below.
18 Cvejić 1957. 339, 342.

2. Cession without Compensation

The first issue that attracted the attention of the legislator was the transfer of shares among shareholders without remuneration. Although cession might appear as gratuitous in this case, it was not. The company share was always accompanied by the mining cost. Expenses arising from mining activities were significant and could be borne for many years, perhaps even more than a decade before ore was struck, which remained a possible but by no means certain outcome.[19] Therefore, if there was no ore, the transfer of the share could in fact constitute an expromission of the debts. The provision referring to this situation is preserved as the 11th item in the manuscript written in the Latin script. In the Cyrillic version, only the end of the norm was preserved as the final part of Article 16.

11. Ako li pusti gvark gvarku dělove u zapis' bez niedne plate, liho za paunan'e i ßto mu da Bog, za toy trebě kniga megju nimi i svědoçba da sě zapiße vrbarara i beläg car'nsky da se edin drugomu ne potvori.[20]	*16. [...] да запише оу оур҃барарскы тєтрагь· и бєлєгь цариници, да сє єд҃нь дроугомоу нє потвори:~*[21]

It prescribes that if a shareholder gives his share to another without compensation, there must be a written document of this drafted between them, a written record made by the *urbarar*, and a stamp of the tax collector.[22] At the end of the paragraph, there is a short explanation that emphasizes legal security as the reason in this case: 'so it could not be disputed'. The non-gratuitous character of the conveyance is underlined in the formula, according to which one gives to another 'to excavate whatever God grants him', alluding that there might be no resulting consideration for the transferee, while excavation costs remained certain.

Some similarities can be found in comparative law. In the charter of King Béla IV of Hungary to Schemnitz (*Banská Štiavnica, Selmecbánya*), issued between 1235 and 1270, there was a general provision (I, 11) on the necessity for property to be sold before a councillor and a judge and for the sale to be confirmed with the town seal. This rule was also accompanied by an explanation 'so that consequently no obstacle may arise'.[23]

The charter of Wenceslaus I of Bohemia to Iglau (*Jihlava*) from the mid-13th century contains an even more general rule (A/B, I, 1), which prescribed that: 'Everything urbarars and councillors of Iglau allow or give under their seals has

19 In Novo Brdo, it was necessary to dig for 10 to 15 years before discovering ore. ЋиркоВић 2002. 79.
20 ЋиркоВић 2005. 22.
21 Радојчић 1962. 41.
22 КатанчеВић 2020b. 266–267.
23 Kachelmann 1853. 181.

legal power and is not disputable.'[24] It was formulated so that it does not refer only to the transfer of property.

The charter of Wenceslaus II (the grandson of Wenceslaus I) to Kuttenberg (*Kutná Hora*) from 1301, also known as *Ius regale montanorum*, prohibited a buyer or donee (III, 6, II, 9) from requesting the right over shares if the contract of sale or gift was not sealed by the seller or the donor before a *magister montis*.[25] The same source required an 'investiture' in the case of share alienation (I, 7, VII, 21).[26]

There is significant resemblance between these laws in at least two aspects. Firstly, the transfer of shares required an active role of officials, which ensured legal security. Secondly, it had to be done in writing and confirmed by a stamp, i.e. authenticated.

Serbian uniqueness is probably constituted by the stylization of the rule. It seems that there was a commonly accepted obligation to transfer shares by a written contract recorded by the *urbarar* and confirmed by the tax collector's stamp. Therefore, the main rule did not have to be prescribed by the Code since it has not been disputed. Only transactions without consideration between shareholders were controversial. The Code excludes exceptions in this case.

Still, there are different opinions. Marković believes, without providing any ground for this, that transfer of title in the shares during sale took place *solo consensu* by the simple agreement on the object and price.[27] As it is shown, this contradicts not only the systemic interpretation of the Code but comparative legal tradition as well.

3. Expulsion from the Company

There is an interesting provision in the manuscripts on the expulsion of a shareholder from the mining company.[28] The text says:

21. Gvarci koi bi ednu rupu prihvatili da ju paunaju i megju sobom dělove razdelě, tko ßto prihvati dobrovolno i plati na svoe i. perperu, da ga nesu volna druxina poslě nekoe radi pizme izgnati, kromě ako ne bi hteo plakjati.[29]	*26. […] Ако би гварци єдноу роупоу прихватили да ю паоунаю мєгю собомь и дѣловє раздѣлили • кои що прихвати доброволно и плати на своє, а • пєрпєр да га нєсоу волна дроужина допослѣ ради нєкоє пизмє изгнати • кромє ако нє би хтєа жамкоща плакяти:~*[30]

24 Zycha 1900. 2, 3, 8.
25 Zycha 1900. 198–199.
26 Zycha 1900. 84, 85, 87.
27 МаркоВић 1985. 47.
28 On the further development of the provision under Ottoman rule, see ЋиркоВић 2005. 61.
29 ЋиркоВић 2005. 23.
30 Радојчић 1962. 44.

This regulated the situation when shareholders started to excavate and determined shares and paid preliminary expenses. A shareholder that accepted the arrangement and began paying his part of the expenses could not be expelled because of any kind of animosity towards him. The only reason for expulsion was a breach of the duty to bear the expenses of the mine. It is also interesting that this implicitly signifies that other shareholders could take over the share of one of them for not paying the required amount. Although it was not explicitly indicated, according to systemic interpretation in the context of the previously analysed article, there is no doubt that there had to be some kind of a written instrument authenticated by the public authorities in this case as well. Moreover, the next rule, in Article 22, which is quoted below, mentions 'loss of shares before the court or before the urbarar […] by his free will'. Since it relates to the previous article, this may refer to the case of a shareholder failing to bear the requested expenses. He could exit the company voluntarily 'before an urbarar' or he could be forced to do it 'before the court'.

No resemblance to this norm can be found in comparative law.

4. Renouncement in Anger

The following part of the Code regulated the opposite case – the situation when one of the shareholders was furious because of some irregularities related to expenses of the company[31] and angrily renounced his part in the company. The Code regulated the situation in following manner:

22. … Ako li bi u srdcu uçinia, viděvßi nekoi bezakony xamkoßt, te mu e rekal: eto ti dělovi nekju ti hi, ako bi mu onaj i nekoi poklon uçinia, toj da ne nißto vrědno, ere za srdce gvark baßtinu ne moxe izgubiti, nego ako bi poß prěd sudom ili prěd urbararom, ter da se otliçi dobrovolno ili komu da pokloni, a da plati xamkoßt do onde, da zapiße urbarar, to e tv'rdo da veke ne voln iskati.[32]	*27. [...] аколи би оу срдцоу оучинїа видєвꙋши нєкои бєзаконни жамᵏкощь• тєрᵗ би рєкь єто ти дѣлови нє трѣбоютᵗ ми• и ако би моу ѡнаи нєкои поклонь оучинїа• и тои нє нищта врѣдно• єрє оу срдцоу гваркь бащиноу нє мѡже изᵗгоубити• нєхо ако би пошь прѣд соудѡм и прѣд оурбарарома• тєрѣ да сє ѡдличи доброволно, или комꙋ да поклони, а да плати въсь жамᵏкощь донᵗдє• и да запишє оу врᵏбарара• то є врѣдно да нє волнь вєкıє искати:~* [33]

In particular cases, one of the shareholders, angry and dissatisfied by some issue concerning costs, might have exclaimed: 'I do not want the shares! Take

31 On the subsequent slight modification of the provision under Ottoman rule, see ЋиркоВић 2005. 61.

32 ЋиркоВић 2005. 24.

33 Радојчић 1962. 44.

them!' However, since done in anger, the gift was considered invalid. The Code prescribed that 'a shareholder cannot lose his share in anger'. The renouncement and donation of the share could only be done publicly before the court or before the *urbarar*, and the donor or the one who renounced was obligated to pay his part of expenses of the mine until the time of the transfer of title in the share.

Once again, there are no similarities to this provision in comparative law. Both of the provisions seem to be too particular to be explicitly provided for by other legislators and could be subsumed to the general rule on the transfer of goods or shares. However, around the year 1400 in Novo Brdo, these norms, for whatever reason, seemed necessary.

5. Unilateral Rescission of Sale

There are some rules in Despot Stefan's Code on rescission of the contract on sale of the share. Rescission could be unilateral, depending on the portion of the price paid and whether the ore was struck after the sale. The Code prescribed the following:

31. Ako proda gvark gvarku dělově, ili drugomu komu çl(ově)ku, i uzmě knigu ot sudie koi e u mestu, i u tetrag urbararov zapiße i svědoxba se postavi, i dinare plati svě na cělo, toj se vekje ne moxe raskinut. Ako bi naß zlato i srěbro na na n'iey ili paky nißta. Ako li bi izginula kniga vlastniçskaa, da se na nie svědoçba koa zna, da e věrovana. Ako li bi onay kup'c platia věkju polovinu aspri, a za drugo uçinio rok, i ne platio do roka, a ruda se naßla, da mu doplati, da mu e baßtina slobodna.	*37. Аколи продадє дроугому гваркоу дѣловѣ и оузꙋмє книгоу ѡт свдїє мѣста• и оу тєтрагь оурбарарꙋскы запишє• и динарє си плати то є тврьдо• аколи би книга соудїина изгынꙋла• а свєдожба коа зна да є вєрована• аколи би ѡонаи коупꙋць векю половиноу платїиа• а за дроуго оучинїа рок• и нє плати на рѡкь• а рꙋда сє є нашла• волꙋнь сє є потворить ѡньи коупꙋць на ѡвьи начинь• далꙋ ти сьмь братє мьню половиноу аспри• да ти соу аспри и бащина начьст томоу є такои закон:•*
Ako li bi m'nju polovinu platia, a ruda se nagie, voln se e potvoriti tko e proda, er pak ako se bi nißta ne naßlo, voln se e i ovi kup'c potvorit, a na ovi naçin: da ti sam m'nju polovinu aspri, da ti su na ç'st i baßtina da ti ě na ç'st, tomu ne takoj zakon.[34]	*36. Ако прода гварꙋкь гварькоу дѣловє• или дроугомоу чловѣькоу• ако моу плати дѣлови соутꙋ нѣговы• аколи нехо половиноу плати, а рꙋда сє нагѥ. Волꙋнь сє є потворити тко є прода аколи сє рꙋда нє нагѥ• волꙋнь сє є коуньць потворити, тои мꙋ є ꙋ законꙋ:•*[35]

The provisions are presented in a logical order in the Latin manuscript. Nevertheless, they are aligned in a different manner in the Cyrillic one. These provisions regulate several possible situations.

In the first case, the shares were bought, the price was paid, and the contract was solemnized. This sale could not be rescinded regardless of the subsequent

34 ЋиркоВић 2005. 25.

35 Радојчић 1962. 46.

discovery of ore. If the written instrument was destroyed, the contract could be proven through witness testimony.

In the second case, if more than half of the price was paid and there was a delay in payment of the rest and ore was struck, the buyer could pay the rest of the sum and gain an undisputed right to the share. Begović believes that this was applicable even if ore had been discovered before, but some new deposits were found. However, he offered no arguments for such a creative interpretation.[36] Marković wrote about the possibility of unilateral rescission by the buyer in this case.[37] It seems that she expanded the rule from the following article to a different case (or the previous one in the Cyrillic manuscript), where more than half of the price was paid. Ćirković reads the text in the manner that the buyer is not late with the rest of the price.[38] It is worth mentioning that both manuscripts, although not identical, contain the same negative condition: 'has not paid in the due time' *ne platio do roka* | *нє плати на рокь*.

Third, if less than half of the price was paid and ore was discovered subsequently, the seller could change his mind. He could give back part of the price he received and keep the shares. Marković reads this and the following provision to conclude that the rule was applicable to the payment of exactly half of the price.[39] However, the case when 50% of the price was paid was not mentioned in the Code.

The last provision is stylized as the *in continuo* explanation of the previous one. It proclaims the right of the buyer to rescind the sale if he paid only part of the price and ore had not been struck. He could give the share back to the seller but he did not have the right to demand reimbursement of the part of the price he had already paid. Implicitly, it seems that he had this right regardless of the percentage of the price he paid.

There are some similar provisions, but not the same, in the law of Kuttenberg (*Kutná Hora*). The general rule (III 6, I, 4) was that the sales contract was perfected after the price was paid. All the gains or damages to the subject that appeared afterwards affected the buyer alone.[40] Secondly (III 6, I, 5), if the sale had not been perfected, and the price had not been paid, both the seller and the buyer could forfeit. The forfeit could be penalized through the down payment rule.[41]

However, there was a specific rule for shares in new findings. If the shares were sold but were not fully paid, the buyer could forfeit and leave the paid sum with

36 БегоВић 1971. 56.
37 МаркоВић 1985. 47.
38 ЋиркоВић 2005. 65.
39 МаркоВић 1985. 47.
40 Zycha 1900. 194, 197.
41 Zycha 1900. 194, 197.

the seller (III, 6, I, 6).[42] On the other hand, if he did not pay the full price at the due time, he would lose everything (III, 6, I, 7).[43] In both cases, the parties were free to stipulate otherwise.[44]

There are some resemblances between the two laws. Both of them have the rule on the pendent sale before, and the perfected sale after the price is paid. In Novo Brdo, as well as in Kuttenberg, the buyer could withdraw from the sale of shares by leaving the paid sum to the seller. It is possible that the two rules have common origins in Saxon mining customs.

However, there is some specificity in the Code. Unilateral rescission of the contract is related to the discovery of ore. If the price was not paid but ore was struck, the right to renounce depended on the percentage of the price paid. If it was more than half, the buyer had the right; otherwise, it belonged to the seller.

Ćirković noticed the similarity of this rule to a provision from the short Serbian-Byzantine medieval legal compilation, known as Justinian's Law (*Zakon cara Justinijana*).[45] It contained a norm that the seller could rescind the sale if only half of the price was paid.[46] It is a possible origin of this rule from the Code. However, one should note there are a few differences. Justinian's Law spoke about 'half' and the Code about 'less than a half'. Secondly, the Code expressly prescribed discovery of ore as a condition for the seller's right to rescind the sale, although he tacitly may have had that right, regardless. Thirdly, according to the Code, the buyer could withdraw from the sale if no ore was struck, but he could not request reimbursement of what he had paid. On the other hand, Justinian's Law did not consider the right of the buyer to forfeit.

Although there is a certain influence of Saxon customs and Byzantine law in this matter, one has to say that the rule was at least partly unique. Its appearance is easily explained by high expenses and the uncertainty of the undertaking. As it was stated above, the transfer of shares could remain only an expromission of the debts if no ore was truck.

42 Zycha 1900. 194, 196, 197.
43 Zycha 1900. 194, 196, 197.
44 Zycha 1900. 196, 197, 199.
45 ЋиркоВић 2005. 65.
46 МаркоВић 2007. 55, 67, 78, 116.

6. Acquisition from a Non-Owner

There is an interesting rule on acquisition of shares from a *mala fide* (bad faith) seller:

32. Ako bi tko çie dělově proda nekoiom krivinom, ili odumr'tni ostali, ili çineki se epitropu, ili po nekoe nevole, pusti ostali, ili po někoem utvoru, tere ih bude proda po nepravdě, drugy si bude kupio po pravdě s knigom vlasniçskom i zapisom urbararskem, a poslě izlězu ili děca ili s'rodnici onogay çii su byli dělovy, da im ogovori onaj koi hi je krivinom proda, a tko ih ě po pravde kupio da ih ima kako svoju baßtinu. Ere ako ne bi nißto naßa na nih, ne bi nitko javio za nih i on bi izgubia i cěnu i ßto e da za nih i paunan'e ere ni car zemlje ne da stoati rupe da se ne rabota, kromě ßto e zakon.[47]	*38. Аколи тко дѣловѣ прода нєкѡм кривином[s] или ѡтоумрьтни ѡстаноу• или чинє [нє]кии притопь, сирѣч вєкил или по нєкоє нєволє поусти ѡстали• или по нєкоєм[s] оутвороу• тєр[s] хи боудє прода по нєправдє• у дроугы ихь боудѣ коупїа по правдѣ с книгомь соудїиномь• а потолѣ излєзв дѣтца• или сьродници чїино соуть дѣловы• да моу ѡтговоти ѡньи кои є продал кривином[s]• а тко є по правдѣ коупїа да хи има како свѣ свою бащиноу єрє ако ѡт них[s] нє би было• нє би сє ѡт них никто явїа• и ѡнаи би изгоубїа цѣнв що є да за них• єрє и царъ нє оузымлє да сє нє работа• кромє що є законом.*[48]

This provision regulated a specific case of the sale of shares. All the formalities were respected, and there was an authenticated written contract recorded in the public register. However, the seller was not the true owner of the shares. Moreover, he was not *bona fide* but aware of the fact that the object of the sale belonged to another. On the other hand, the buyer acted in good faith, believing that he became the owner of the shares. However, heirs of the previous owner turned up and claimed their inheritance. The legal solution was clear: the *bona fide* buyer was the new owner. The Code explained that the heirs would not have claimed their parts of the company if there had been no ore but only mining expenses. However, the claimants had the right to request compensation from the *mala fide venditor* (the seller in bad faith), but not from the *bona fide emptor* (the buyer in good faith).

This rule has a certain resemblance to the Kuttenberg law. There is a provision therein (II, 3, V, 11)[49] about those who have been working in a mine conscientiously for at least three years and without any objections from anyone during this time. Being the first who found the ore, they could not be impeded or deprived from their rights. In both laws, there is a possibility to acquire from a non-owner. Nevertheless, there are two significant differences. In Novo Brdo, the buyer became the owner immediately, while a three-year period of undisturbed use was a condition in Kuttenberg (a form of usucaption). The first provision is

47 ЋиркоВић 2005. 26.
48 Радојчић 1962. 47.
49 Zycha 1900. 140–143.

of material and the second of formal nature. Lastly, the *Ius regale montanorum* contains the condition that the acquirer was the first who found ore in the relevant location, while there was no such request in the Despot's Code. Through teleological interpretation, the rule from the Code could also be applied in cases when there has been ore mining before the shares were sold.

In both laws, there are similarities to the Roman law institute of *usucapio* (usucaption). Pfeifer[50] believes that there may be such influence in the Kuttenberg rule. In Novo Brdo, both *bona fides* (good faith) and *iustus titulus* (just title) are listed as conditions, but no passage of time is required, making usucaption immediate, without the requirement for prolonged adverse possession. The acquisition was instant. Therefore, the Serbian rule was more akin to the one that appeared in Roman law, in the constitution of Emperor Zeno (C.7.37.2), where there was instant acquisition from the imperial *aerarium*, regardless of the true owner. The difference is in the condition related to the *bona fides* of the acquirer. While it was required expressly in the Code, it was not in the constitution, or perhaps it was not a condition at all.[51] Nevertheless, the two rules appeared in different occasions and historical contexts without any mutual influence.

The purpose of the Serbian norm was related to two significant circumstances. Firstly, as it was previously said, mining expenses were exorbitant, and the discovery of ore was by no way certain. Furthermore, there was the rule of losing the right to excavation on the land by not exercising it for a certain period. The result was the solution that the owner was the *bona fide* buyer who bore the costs of mining. Heirs of the previous owner only had rights towards the fraudulent seller.

At the end, there is a short explanation, given in manner of a legal sentence: 'since the tsar does not grant it [so as] not to be used'. Taking into account the time when the manuscripts were completed, it is probable that the 'tsar' referred to the Ottoman Sultan and not the Serbian ruler. The meaning is that the concession was issued to a certain company in order for it to mine ore effectively and not to cease operations while searching for the heirs of one of the shareholders. The economic importance of metal production corresponds to the efficacy demanded. Begović believes that the text referred to the ruler as the one who sold the shares *mala fide*.[52] However, this contradicts the beginning of the article, which started with the words 'If somebody' *Ako bi tko* | *Аколи тко*).

50 Pfeifer 2001. 92–93.
51 Katančević 2022. 184–186.
52 БеговиЋ 1971. 57.

7. Conclusions

There are several provisions on the transfer of mining company shares in the Code of Despot Stefan. The most general one was obviously taken from the Saxon customs. It required a written contract on the transfer of shares, solemnized by a public official and registered in some kind of public records. The Serbian specificity is the emphasis on the impossibility of exceptions in cases of the gift of the share, exclusion of a shareholder, and his renouncement in anger. Apart from this, the only possibility of loss of the share was before the court.

In Serbian law, in the matter concerning rescission of sale of shares before the price was paid, there was also a probable influence of Saxon customs and Byzantine law through the Serbo-Byzantine compilation known as *Zakon cara Justinijana*. In *Ius regale montanorum*, there was the same condition concerning discovery of ore. In Novo Brdo, as well as in Kuttenberg, the buyer could withdraw from the sale of shares by leaving the paid sum to the seller. However, in Novo Brdo, the right to rescission depended on the percentage of the price paid. If it was more than half, the buyer had that right. Otherwise, it belonged to the seller. There were also some differences between the Code and *Zakon cara Justinijana*. The latter speaks about the half and the former about less than half price. Furthermore, according to the Code, the buyer could not request reimbursement of what he paid, while *Zakon cara Justinijana* did not consider the right of the buyer to withdraw.

Finally, in the Code, there was a unique rule that a *bona fide* buyer became the owner of the shares he had bought. The effectiveness of metal exploitation was, therefore, above legal certainty.

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Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 97–120

DOI: 10.47745/AUSLEG.2023.12.1.07

The Contract on the Transfer of Agricultural Holdings[1]

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Abstract. At the end of 2021, the Hungarian Parliament adopted Act CXLIII of 2021 on the Transfer of Agricultural Holdings, which entered into force on 1 January 2023. The Act codified the agricultural holding transfer contract, defining its concept, essential elements, and types. This article presents and describes the rules of this new type of contract. The article also discusses the theories developed in Hungarian case law and jurisprudence on the classification of the contract. The author attempts to classify the new type of contract within the existing categories of contracts. The author points out that the practical application of the new type of contract as an atypical contract outside the Civil Code may raise problems, especially in view of the combined application of the provisions of several different legal norms and the mixed nature of the contract. Problems may arise from the fact that, in addition to the statutory provisions on business transfer contracts, the provisions of the Civil Code, the Act on the Turnover of Agricultural Land, and the Family Farm Act also apply.

Keywords: transfer of agricultural holdings, contract, Hungarian Civil Code, atypical contracts, categories of contracts, classification of contracts, farm, family farm, farmer

1. Introduction

On 14 December 2021, the National Assembly adopted Act CXLIII of 2021 on the Transfer of Agricultural Holdings, which entered into force on 1 January 2023. The Act codified the contract on the transfer of agricultural holdings, defining its concept and its essential elements and types. It is likely that this new contract will be interpreted and explained in many different ways by many people. On our part, the following is an attempt to situate the contract on the transfer of agricultural

1 The study was carried out in the framework of the Hungarian Ministry of Justice's programmes to improve the quality of legal education.

holdings in the system of contracts, seeking an answer to the question of whether we are dealing with a new typical or atypical contract, or perhaps a contract with mixed content. The starting point for this is, of course, freedom of type as a non-codified sub-principle of Hungarian contract law. Contractual freedom is one of the most important of the contract principles, according to which the will of the subjects is not legally bound. One of the sub-principles of this principle is the freedom of type, according to which the parties are free to decide whether to conclude a contract named in the Civil Code or other legislation or a contract that may be unnamed or mixed.[2] This freedom of the parties may be limited only exceptionally, primarily in the public interest, in particular in the case of contracts creating legal persons.[3] We share György Bíró's view that the relevance of typification is that it assists the legal practitioner in correctly classifying the content of the contract, thus helping legislation and law enforcement.[4] Typing also plays an important role in determining the correct legal consequences.[5]

In the following, we will first look at the aspects, principles, and typification methods according to which types of contracts, categories and groups of categories have been developed by jurisprudence from the first third of the 20th century until today and to what extent legislation and judicial practice are or have been in line with them. Following a sketch of the attempts at typification, an overview is provided of the driving forces behind the emergence of the contract on the transfer of agricultural holdings as a newly codified type of contract and of the normative regulation of this new type of contract. In summary, we draw our conclusions as to where the new type of contract can be placed in the system of civil law and contract law in force and what are its main characteristics. In this connection, we wish to present a kind of characteristic of the new type of contract, thus contributing to the interpretation and smooth practical application of the new body of law as far as possible.

2. Trends in the Typology of Contracts

In our daily lives, we come across a wide variety of types and contents of contracts. In order to find our way through the maze of these contracts, not only legislation but also jurisprudence has very quickly recognized the need to set up 'signposts' to help us navigate between the different types of contract. Already in Roman law, the typification of contracts played an important role, where contracts concluded according to certain formalities were at first considered to

2 Bíró 1997. 190.
3 Bíró 1997. 194.
4 Bíró 2000. 39.
5 Bíró 1997. 194.

be legally binding only, and typification was known as the particular formality.[6] Later, in the period of the development of capitalist law, a significant change was observed: on the one hand, several types of contracts still known in Roman law were no longer regulated, and, on the other hand, the content of the remaining types of contracts changed, and new types were created.[7]

Hungarian private law literature of the first third of the 20th century also dealt with the typification of contracts, distinguishing between innominate (atypical) contracts, which are characterized by the fact that none of the traditional services are included but are directed to a specific service according to the contractual provisions of the parties, and mixed contracts, 'the content of which is the combination of several of the typical services included in the institutional types of contract in a different way from the traditional forms'.[8] Villányi also distinguishes contracts where 'the party undertakes as an ancillary service an obligation the content of which is a typical service of another type of contract'.[9] Villányi characterizes as a separate category contracts where the service 'serves the purpose of another contract'[10] and contracts concluded by agreement of the parties where the nature of the obligation is uncertain at the time of the conclusion of the contract and will only become clear in the future,[11] and by 'aggregation of contracts' Villányi means the inclusion of several separate contracts on the basis of a common element.[12] Villányi also points out that an obligation may arise in the case of a combination of contractual and non-contractual obligations.[13]

Villányi based his system of contract typification on the work of the German author H. Hoeniger (*Die gemischten Verträge in ihren Grundformen*, 1910), distinguishing between typical elements of the contract and elements which are incidental to the nature of the transaction.[14] By mixed contracts of a pure type, Villányi means contracts 'in which the typical elements of one category of statutory contracts are linked to atypical elements of another contract or contracts'.[15] By mixed contracts of a pure type, Villányi means contracts 'in which the typical elements of one category of statutory contracts are linked to atypical elements of another contract or contracts'. Villányi further distinguishes within mixed contracts of a pure type the situation where the non-typical element was already included in the contract at the outset from the situation where it was only subsequently introduced into the legal relationship, by mixed contract being

6 Harmathy 1980. 1589.
7 Harmathy 1980. 1591.
8 Villányi 1942. 2.
9 Villányi 1942. 2.
10 Villányi 1942. 2.
11 Villányi 1942. 3.
12 Villányi 1942. 3.
13 Villányi 1942. 3.
14 Villányi 1942. 4.
15 Villányi 1942. 4.

understood the former.[16] Villányi classifies as mixed-type mixed contracts those contracts whose 'content is a combination of typical factual elements of different contracts'.[17] Villányi points out that subgroups can also be distinguished within this category according to the way in which the contractual services are linked and the content of their services, where the linkage of services can be: (i) synallagmatic form, where the service is opposed by an equivalent service; (ii) corporate form, where the services are linked only indirectly; (iii) free form, where the services are not linked at all.[18] Villányi (based on Hoeniger) distinguishes between formal and material type-mixing, the former meaning the combination of different forms of connection, the latter the mixing of service contents.[19] Among the mixed type of mixed contracts, Villányi distinguishes mixed company contracts, by which he means contracts where each party undertakes to provide different types of services, contracts where the same contracting party is asked to provide different services, and so-called dual-type contracts, where 'two different typical services are in a relationship of value and consideration'.[20] Furthermore, Villányi treats as a separate category contracts with a formal mixture of services, where there is a mixture of interrelated forms of services, typically including a contract for consideration mixed with a contract of gift.[21]

Villányi also summarizes the different theories developed in the legal literature regarding the separation of mixed contracts from mixed 'pure' contract types, pointing out that (i) according to the absorption theory, the essential service of the contract is identical to the essential service of a historically established contract type and can be classified as one of the traditional contract types,[22] and (ii) according to the combination theory, 'mixed facts must be matched by mixed legal consequences'.[23] (iii) The creation theory focuses on an independent judicial assessment of the purpose of the contract and the interests of the parties.[24] (iv) The author distinguishes mixed contracts where absorption, combinatorial, and creative principles are alternately applied.[25]

The theories summarized by Villányi are also presented by Lajos Vékás in his seminal work on the contract system, pointing out that in the legal literature there are serious debates about mixed and atypical contracts, focusing on the general issues of contract typification and the 'legal consequences of the mixing

16 Villányi 1942. 4.
17 Villányi 1942. 4.
18 Villányi 1942. 5.
19 Villányi 1942. 5.
20 Villányi 1942. 6.
21 Villányi 1942. 6–7.
22 Villányi 1942. p. 7.
23 Villányi 1942. 8.
24 Villányi 1942. 9.
25 Villányi 1942. 10.

of type elements in life'.[26] These theories are often referred to in recent Hungarian private law literature.[27] In examining contract types, Vékás concludes that the essence of contract types can be grasped by 'starting from the legal theoretic insight that considers particularity as a specific conceptual element determining the concrete structure of the world of legal reflection'.[28] Vékás stresses that the main types of contract known in civil law reflect traditional forms, which is also a 'scientific type'.[29] Vékás emphasizes the high degree of generalization in typification from the scientific point of view, which can be advantageous for 'contract systematization, above all, for the systematization of codes, and very useful for the development of the didactics of contract law, but not a problem in the practice of law enforcement'.[30] In relation to the basic types of contract, Vékás stresses that 'the scientifically elaborated types have been given normative content and legal character in too direct a form, in their scientific generality'.[31] Vékás also stresses that the specific rules of contract types focus on transactions based on the person of the entrepreneur of free-enterprise capitalism or on private property, and concludes that transactions which are not only not regulated by a specific law but which correspond in their main characteristics to the characteristics of a type regulated by a specific law, but which 'in their concrete essence cannot be subject to the essential features and therefore to the rules of that type, are also considered atypical contracts.'[32] Vékás points out that contract typification is made more difficult by several factors such as the emergence of standard contracts and 'the proliferation of subforms of certain types of contracts'.[33] Vékás sees the biggest problem in the area of typification in the difficulty of finding the right proportions, i.e. defining the type both too broadly and too narrowly can be difficult, and in his view, a new type of contract should only be recognized if the creation of a sub-type cannot adequately assist judicial practice.[34] In conclusion, however, Vékás argues that the typification of contracts is necessary in all continental legal systems.[35]

Attila Harmathy draws attention to the dissolution of traditional types of contracts, primarily with the emergence of mass production, the continuous change in the nature of contractual services, and the economic content.[36]

26 Vékás 1977. 90–92.
27 Papp 2009a. 3; Papp 2011. 101; Papp 2009b. 14; Papp 2019. 83; Auer–Balog–Jenovai–Juhász–Papp–Strihó–Szeghő 2015. 48–49.
28 Vékás 1977. 151.
29 Vékás 1977. 152.
30 Vékás 1977. 152–153.
31 Vékás 1977. 153.
32 Vékás 1977. 155.
33 Vékás 1977. 155.
34 Vékás 1977. 156.
35 Vékás 1977. 156.
36 Harmathy 1980. 1592.

Harmathy focuses on the development of commerce in the evolution of contract law based on the Roman legal tradition and points out that, as the link between types of contract is loosened, 'the rules on the types of contract are increasingly designed to assist the parties'.[37] In relation to the trends of the second half of the 20th century, Harmathy points out that detailed statutory regulation is becoming more and more common, beyond the traditional civil law codes, and that general contract terms and mixed contracts are coming to the fore, where the development of metropolitan life and technology, as well as the increasing influence of the state in the conclusion of contracts, are influencing typification.[38] Harmathy sees the justification for increasingly detailed regulation of certain types of contracts in the fact that, on the one hand, this could remedy the crisis situation, and, on the other hand, there is increasing state intervention in economic policy, increasing the amount of binding rules in contract law.[39] Harmathy also points out that the boundaries between contract types are blurring, with the number and importance of sub-types increasing and the nature of the service, the economic element, becoming the most important grouping factor.[40] Harmathy concludes that there is no generally accepted grouping of the types of contracts, and, for his part, he considered the grouping according to contracts for consideration and free contracts to be of fundamental importance.[41]

The recent Hungarian private law literature also typifies according to different criteria;[42] thus György Bíró distinguishes, on the basis of formal criteria, between so-called atypical contracts, which are named in the Civil Code or other legislation, and those which are regulated in legislation but not named and those which are not regulated by legislation but only occur in practice,[43] also distinguishing between consensual and real contracts according to the legal effects of the contract, *dare*, *facere*, *nonfacere*, and *praestrae* contracts according to the content of the contract, free contracts and contracts for consideration according to the value relations, polarized and unipolar contracts according to the positions of interest, title-based and abstract contracts, and transactions which create and complicate a duty, mass and individual transactions. According to Bíró's classification, we can speak of preliminary and definitive contracts, as well as bilateral or multilateral contracts, or contracts concluded orally, by implication or in writing, and contracts involving a single service or a continuous service, the latter emphasizing the continuous, recurrent, or intermittent nature of the obligation, although he also considers that

37 Harmathy 1980. 1593.
38 Harmathy 1980. 1594.
39 Harmathy 1980. 1594.
40 Harmathy 1980. 1595.
41 Harmathy 1980. 1599.
42 Szudoczky 2000. 57–62; Miskolczi Bodnár 1997. 3–11; Osváth 2006. 457–467.
43 Bíró 1997. 195.

the typology is only relative.[44] He also stresses that the primary consideration is the qualification of the content of the contracts.[45]

In Bíró's view, the essence of typification is to form groups on the basis of identical criteria and to separate them by emphasizing the differences, stating that the task of typification is 'to orient the parties to the contract, as a constitutional rule of freedom of contract, which tolerates exceptions, in the elaboration of a sufficiently deep, clear, easily analysable and classifiable contract'.[46] Regarding the role of normative rules on types of contracts, Bíró stresses that they 'provide a framework for derogations from the common rules and a model set of contracts that are most frequently applied'.[47] Bíró also stresses that for all types of contracts, a distinction can be made between elements that cannot be disregarded (*essentialia negotii*), elements that can be disregarded (*naturalia negotii*) and elements that are not essential but can be made essential (*accidentalia negotii*).[48] According to Bíró, there is no principle of classification along which all contracts can be grouped, but the conduct of the principal service provider is the focus of the analysis.[49] Bíró considers it important to reflect the different levels of abstraction in the legal regulation of individual contracts such as the general provisions of the Private Code, the common rules of obligations, the general rules applicable to contracts, and, finally, the fixing of the characteristics of the basic types of contracts as families of types, which may be accompanied by specific rules for certain contract subtypes.[50] As an important development trend, Bíró points out the increasing assertion of the free will of the parties and the reduction of binding regulations in the regulation of certain types of contracts.[51]

Tekla Papp, in her assessment of the emergence of so-called atypical contracts outside the Civil Code at the end of the 20th century, highlights the following factors in the background: the mass increase in commercial activity and business-like management, the emergence of new types of contracts, the emergence of new contract techniques, and the tendency towards standardization.[52] Tekla Papp describes atypical contracts according to different aspects, distinguishing the following attributes: the absence of a Hungarian name, the lack of a Hungarian version in the Civil Code, the role of foreign practice and legislative patterns and domestic customs in the drafting of the rules, codification typically at the level of a statute or government regulation, the influence of European legal unification, the

44 Bíró 1997. 197.
45 Bíró 1997. 198.
46 Bíró 2000. 40.
47 Bíró 2000. 40.
48 Bíró 2000. 40.
49 Bíró 2000. 41.
50 Bíró 2000. 42.
51 Bíró 2000. 44.
52 Papp 2009a. 3.

possibility of concluding contracts with any content, the preference for written form, the appearance of general terms and conditions and blanket contracts, the existence of a business organization at one or both poles, the existence of a long-term market relationship, and the existence of a durable legal relationship.[53]

Tekla Papp also refers to mixed contracts (*contractus mixtus*), by which she means contracts involving several named contractual services and within which she distinguishes three subgroups such as the mixed type contract, where elements of other contracts are mixed in such a way that they cannot be established, from which contract the provision in question derives, the type-combination contract, where elements of other contracts are separable in the new contract, and the contract for a wholly specific service, which, apart from the specific service, does not otherwise differ from the contract provided for in the Civil Code – contract.[54]

Tekla Papp concludes that atypical contracts cannot be classified in any of the sub-categories of mixed contracts because, in her view, atypical contracts are a sui generis group,[55] i.e. in her view, the range of atypical contracts is both more and different in nature from the group of mixed contracts.[56] Tekla Papp does not classify innominate contracts as atypical contracts, characterizing them as 'agreements' in that they do not have a separate name, are less widespread, and lack specific exceptional normative regulation.[57]

Tekla Papp, examining the judicial practice, came to the conclusion that the judicature approaches atypical contracts primarily in a result-oriented manner, where it primarily examines the will of the parties, the business and economic objective to be achieved, and the specific characteristics of the service contracted.[58] As regards atypical contracts, Papp stresses that the number of atypical contracts is constantly growing, while pseudo-atypical contracts can also be distinguished alongside mixed and atypical contracts,[59] which may appear to be atypical contracts by their name and content but in reality are either mixed contracts or named contracts (such as distributorship contracts).[60] This is due to changes in social and economic circumstances, in that new types of agreements need a certain 'crystallization' period, after which they can be classified as atypical contracts.[61] Tekla Papp also draws attention to the fact that in the context of mixed contracts, there is also a 'mixing' of branches of law, which means that

53 Papp 2009a. 3; Papp 2011. 97–98; Dudás–Papp 2003. 44–45; Auer–Balog–Jenovai–Juhász–Papp–Strihó–Szeghő 2015. 37–39.
54 Papp 2009a; Papp 2011. 10; Dudás–Papp 2003. 5.
55 Papp 2009b. 12.
56 Papp 2009a. 3; Papp 2011. 11.
57 Papp 2009a. 2; Papp 2011. 11.
58 Papp 2009a. 5; Papp 2011. 11-15; Auer–Balog–Jenovai–Juhász–Papp–Strihó–Szeghő 2015. 46.
59 Papp 2009b. 23; Papp 2019. 48; Auer–Balog–Jenovai–Juhász–Papp–Strihó–Szeghő 2015. 59; Papp 2011. 12.
60 Papp 2009a. 8–9; Dudás–Papp 2003. 11.
61 Papp 2009a. 6.

the provisions of several branches of law apply to the same contract.[62] The author concludes that it is not the nomenclature or vocabulary used by the parties that is of importance for the type of contract but the actual conceptual elements and the content that must be given decisive importance.[63] She also points out that from the early 1990s until a few years after the turn of the millennium, judicial practice considered as atypical all contracts that were not regulated in the Civil Code, and after the turn of the millennium, judicial practice adopted the typification of contracts in the legal literature.[64] Finally, it should also be mentioned that Tekla Papp distinguishes between autonomous and non-autonomous contract types within atypical contracts,[65] the former being contracts that are independent of other legal relationships or activities, and the latter being contracts that are based on another legal relationship or activity.[66] Tekla Papp also distinguishes between atypical contracts according to whether they differ from the contracts regulated by the Civil Code in terms of their ancillary or essential features and also according to whether the atypical contract in question is regulated by a legal norm or not.[67]

Ágnes Juhász primarily distinguishes between named contracts (including typical and atypical contracts) and non-named contracts, stating that within named contracts the distinction between typical and atypical contracts is based on whether the contract in question is named in the Civil Code.[68] Juhász also points out, however, that the contracts named in the Civil Code are rarely found in practice in a 'completely clear-cut form' but rather in a mixture of contracts and mixed contracts, which blurs the boundaries of the basic types of contracts.[69] Based on an examination of the content of the contracts, Ágnes Juhász distinguishes between 'typical-atypical' contracts, which are not regulated by the Civil Code but by other legislation, and the group of contracts which are not regulated by legislation at all.[70] With regard to the codification of certain atypical contracts in the Civil Code, Juhász points out the underlying driving forces (focusing on franchise contracts), the change of economic relations, and the process of unification.[71]

Tekla Papp's monograph on atypical contracts, which deals in detail with the issues of contract typology, the classification of atypical contracts, and the appearance of atypical contracts in various legal acts and in judicial practice, should not be left out of the presentation.[72] Tekla Papp, in her monograph, also considers

62 Papp 2009a. 6.
63 Papp 2011. 15.
64 Papp 2011. 11.
65 Papp 2009b. 16.
66 Papp 2009a. 6.
67 Papp 2009a. 6.
68 Juhász 2012. 68.
69 Juhász 2012. 68.
70 Juhász 2012. 70–71.
71 Juhász 2012. 73.
72 Papp 2019.

the contracts named in the Civil Code, Part Three of Book Six, as typical contracts, while the group of contracts outside these are considered atypical contracts.[73] In this context, the author stresses that even a contract named in a procedural law (e.g. the joint litigation contract named in Act CXXX of 2016) can be included in the scope of atypical contracts.[74] The author's summary work refers to contracts covering a special legal transaction governing a non-permanent legal relationship, which appear in his previous articles under the title 'agreement', as 'de facto innominat contractus'.[75] The author also refers to an approach in the international legal literature that focuses on bilateral and multilateral contractual relationships, distinguishing groups such as chain contracts, network contracts, umbrella or framework agreements, and affiliated contracts.[76] The author also mentions a new category, which he calls a group of contracts, in which there are independent contracts of equal rank.[77] In this context, the author mentions that complex contracts have also appeared in Hungary and that affiliated contracts can also be found, mainly as a result of the implementation of EU legislation with a consumer protection approach,[78] while pointing out the lack of legal literature on multilateral contractual relations.[79] The monograph also reflects the distinction between independent and dependent contract types within atypical contracts;[80] however, the author distinguishes each atypical contract from the others on the basis of certain characteristics such as the nature of the regulation of the contract, its function, content, connection with a particular branch of law, or its unclaimed or indirect object.[81] Finally, Papp's monograph reflects the attitude of judicial practice towards atypical contracts,[82] as well as the attitude of the legislature towards such atypical contracts.[83]

3. Legal Regime of the Contract on the Transfer of Agricultural Holdings

As mentioned in the introduction, Act CXLIII of 2021 contains basic provisions on a new type of contract, the contract on the transfer of agricultural holdings. The scope of the Act covers the transfer of the agricultural holding of a farmer and a

73 Papp 2019. 43–44.
74 Papp 2019. 45.
75 Papp 2019. 47.
76 Papp 2019. 52.
77 Papp 2019. 53.
78 Papp 2019. 54.
79 Papp 2019. 56.
80 Papp 2019. 78.
81 Papp 2019. 80.
82 Papp 2019. 81–82.
83 Papp 2019. 83–86.

self-employed person engaged in agricultural, forestry, and ancillary activities.[84] The preamble of the Act stresses that the farm and forestry activities carried out by family members, through the joint use of their resources and the results of their work, is a unique set of assets, the transfer of which to the next generation is a priority for the legislator, taking into account economic efficiency and viability, as well as the balanced income of farmers.[85] The ministerial explanatory memorandum of the Act stresses that it is essential to facilitate the generational transition of the agricultural sector and to promote generational renewal of the agricultural sector, to which the contract on the transfers of agricultural holdings contributes, whereby, in order to continue agricultural and forestry activities, or as a result of such activities, an individual asset is created which is of greater value than the sum of the individual assets and which is otherwise separate from the private assets of the farmers.[86] The ministerial explanatory memorandum sees the need for a separate type of contract in the specific rules for the transfer of agricultural and forestry land or in specific rules due to the complexity of the elements that make up the economy.[87]

The following is a brief overview of the concept and the most important elements of the contract, with the understanding that the provisions of the Civil Code also apply to the contract on the transfer of agricultural holdings, in addition to the *lex specialis* rules contained in the separate law,[88] i.e. the Parts One and Two of Book Six of the Civil Code, as well as the provisions on sale, gift, maintenance, and life annuity contracts as background rules, are also applicable to the contract on transfer of agricultural holdings.

The concept of a contract on the transfer of agricultural holdings is defined in a complex manner, but basically in a method typical of the types of contracts regulated by the Civil Code, i.e. by specifying the parties to the contract and their main obligations. The law states that under the contract on the transfer of agricultural holdings (i) the transferor is obliged to transfer ownership of the agricultural holding, the transferee is obliged to pay the purchase price and take possession of the agricultural holding (agricultural holding transfer contract of sale), (ii) the transferor is obliged to transfer ownership of the agricultural holding free of charge, and the transferee is obliged to take possession of the agricultural holding (the agricultural holding transfer contract of gift), and (iii) the transferee is obliged to transfer the agricultural holding, or the person designated by the transferor to provide for the care and maintenance of the holding according to the circumstances and needs of the transferee until the death of the transferee or the person designated by the transferor (the agricultural holding transfer

84 Act CXLIII of 2021, Article 1.
85 Act CXLIII of 2021, Preamble.
86 Act CXLIII of 2021, Ministerial Explanatory Memorandum, General Reasons.
87 Act CXLIII of 2021, Ministerial Explanatory Memorandum, General Reasons.
88 Act CXLIII of 2021, Article 3 Paragraph (2).

maintenance contract), the transferor is obliged to transfer ownership of the agricultural holding, or (iv) the transferee is obliged to provide a specified sum of money or other fungible item on a recurring basis until the death of the transferor, the transferor is obliged to transfer ownership of the agricultural holding (the agricultural holding transfer life annuity contract).[89] This means that an agricultural holding transfer contract can be concluded on the basis of the provisions of the four types of contracts regulated by the Civil Code.[90] However, it is also possible for the parties to agree that the use of the land is transferred by the transferor to the transferee on the basis of Act CXXII of 2013 on leasehold or freehold land use, in the case of forests on the basis of the titles specified in Act CCXII of 2013, in which case there is an obligation on the part of the transferor to transfer the use of the land and an obligation on the part of the transferee to pay a fee or a rent (except for the use of the land as a favour).[91]

The law also allows the parties to agree that, on the one hand, the rules of a contract containing elements of transfer of property (sale, gift, maintenance, or life annuity) will be mixed with the rules of a contract of use, with the proviso that it must be clearly distinguished which contractual provisions will govern each element of the holding.[92]

Examining the elements of the contract, we can primarily conclude that the contract can only be concluded between specific parties defined by law and for a specific indirect object (the agricultural holding), with the result that we are basically dealing with a dare, property-transfer type of contract, where the main obligation of the party providing the material service is to transfer ownership of the farm as a set of things. This may be supplemented by elements of a use-type contract.

According to the law, the contract is concluded between the transferor and the transferee. A transferor may only be a farmer who has reached the retirement age or will reach it within 5 years of the conclusion of the contract or a self-employed person engaged in farming or forestry who (i) has been engaged in farming, forestry, or ancillary activities in his own name and at his own risk for at least 10 years and has a proven turnover from these activities, (ii) has been registered in the land use register for at least 5 years as a land user of more than three quarters of the area of land used for agriculture or forestry as defined in the farm transfer contract or has been registered in the forestry register for at least 5 years as a forest manager or is the owner of a business company registered as such.[93]

The transferee may be a farmer who is at least 10 years younger than the transferor, who is under 50 years of age, who is a self-employed farmer or a

89 Act CXLIII of 2021, Article 3 Paragraph (2).
90 Act CXLIII of 2021, Ministerial Explanatory Memorandum, Explanatory Memorandum to Article 3.
91 Act CXLIII of 2021, Article 3 Paragraph (3).
92 Act CXLIII of 2021, Article 3 Paragraph (4).
93 Act CXLIII of 2021, Article 2 point b).

self-employed person engaged in farming or forestry, who meets the statutory requirements for operating the agricultural holding to be transferred and who (i) is related to the transferor by family ties as defined in the Act on Family Farms or[94] (ii) has been employed or has had other employment relationships[95] with the transferor for at least 7 years.[96]

The legal definition therefore establishes several criteria for the parties, the primary one being that a farmer or self-employed person who has reached or is close to retirement age should enter into a contract with a person who can take over the economic activity already carried out by the transferor and who is younger in age than the transferor and has been previously in contact with him or her, either in a relationship of dependency or in a relationship of employment.

With regard to the parties, it follows from the wording of the law that the qualities that the parties must have are laid down in the law by means of a congruent regulation so that persons who do not meet the definition laid down in the law cannot conclude this type of contract, i.e. the new type of contract, the contract on the transfer of agricultural holdings. At the same time, the legislator excludes the possibility for the transferee to have more than one party to the contract at the same time, stipulating that the transferee can only be one person.[97] Also on the side of the transferee, a further special condition is that the transferee must be related to the transferor (chain of relatives). According to the law on family farms, a chain of relatives is defined as a group of natural persons who are closely related to each other (Civil Code Book 8 Article 1, Paragraph (1) point 1 such as spouse, lineal relative, adopted, step and foster child, adoptive, step and foster parent, and sibling), as well as relatives and direct relatives of these persons. Although this is not explicitly referred to in the Family Farms Act, it is presumed that the term 'relative' is used in the Civil Code 8 Article 1, Paragraph (1) point 2, in addition to the close relative, the life partner, the spouse of a relative in the same line, the spouse's relative in the same line and the spouse's brother or sister, or the brother's spouse, should be understood to mean the life partner, the spouse of a relative in the same line, the spouse's relative in the same line and the spouse's brother or sister, or the brother's spouse.[98] The transferor can be a farmer or a self-employed person, which follows from the rule defining the scope of the law.[99]

As an indirect object of the contract, the agricultural holding is defined in the law in such a way that the definition actually lists certain property elements for

94 Act CXXIII of 2020.

95 Employment as a salaried employee, activity based on works contract or a contract of assignment, activity as a member of a commercial or civil law partnership or sole proprietorship, and activity as a self-employed person (Act CXLIII of 2021, Article 2 point d).

96 Act CXLIII of 2021, Article 2 point c).

97 Act CXLIII of 2021, Article 3 Paragraph (6).

98 Act CXXIII of 2020, Article 2 point b).

99 Act CXLIII of 2021, Article 1.

the operation of the farm such as agricultural, forestry and other land, including farms, owned or used by the transferor, real or personal property and rights in rem necessary for the pursuit of such an activity, as well as shares in the assets of a business company, cooperative shares or interests in forestry associations related to such an activity, and other rights and obligations relating to all these assets.[100] From the definition of the agricultural holding, it can therefore be concluded that an aggregate of things may constitute the indirect object of the contract, i.e. a mass of property which appears in the contract as a unit of turnover. A contract on the transfer of the agricultural holding can therefore also be described as a single contract for the transfer of all the various items of property necessary for the operation of the farm and owned by the transferor.

The legislator emphasizes the definitive nature of the contract by means of a specific normative provision, which is reflected in the rule that the transferor may not, after the conclusion of the contract, engage in any new activity on the transferred holding, nor exercise any rights or obligations of forestry (except the right to benefit); this activity, registered in the food chain information system, must be deleted, and the transferor may only request to be re-registered in the information system or in the register of forest holders if the contract is terminated for specific reasons defined by law (termination by a court or by one of the parties by notice of termination) or if, following the death of the transferee, the transferor acquires ownership of the agricultural and forestry land forming part of the holding as the transferee's heir or acquires the right to use the land in question.[101] According to the minister's explanatory memorandum, the basic aim of the contract on the transfer of agricultural holding must be to ensure that the transferor ceases his activity and does not restart farming and forestry.[102] If the holding includes shares in a company, neither the statutory right of pre-emption nor the right of pre-emption provided for in the articles of association may be applied to the transfer of such shares.[103]

The law lays down an essential formality when it provides that a contract on the transfer of an agricultural holding is valid only if it is in the form of a public deed or a private deed countersigned by a lawyer.[104]

The contract on the transfer of agricultural holding contains a number of provisions, in line with the land turnover regulations, which are also reflected in the provisions relating to the ownership, possession and use of agricultural and forestry land, and the collection of benefits, as follows:

100 Act CXLIII of 2021, Article 2 point a).
101 Act CXLIII of 2021, Article 4 Paragraph (1) and (2).
102 Ministerial Explanatory Memorandum to Act CXLIII of 2021, Explanatory Memorandum to Article 4.
103 Act CXLIII of 2021, Article 4 Paragraph (3).
104 Act CXLIII of 2021, Article 3 Paragraph (5).

– In the event of termination of the contract by the court, the parties must settle and restore the original situation or, if this is not possible, settle for the services already provided.[105]

– In the event of termination of the contract, the transferee may take away the fixtures and fittings which he or she has installed.[106]

– The transferor is obliged to pay to the transferee, in the case of the development of the holding through investment, the part of the holding's profits not yet recovered, and the transferee is entitled to the holding's profits.[107]

– In the case of a transfer of ownership of the land, the transferor must make declarations under the Act on the turnover of agricultural land (e.g. that the use of the land will not be transferred to another person, the land will be used by the landowner, the landowner will fulfil his/her obligation to use the land, and he/she will not use the land for any other purpose for a period of five years),[108] and, in the case of a transfer of the right to use the land, the transferor must make declarations under the Act on the turnover of agricultural land (e.g. declarations concerning the non-assignment of the use of the land to another person, the use of the land by the landowner, the obligation to use the land)[109] and other commitments,[110] and, in the case of a transfer of land ownership or a contract of use involving the use of land for a specific purpose or other obligations, s/he must also undertake to fulfil the specific obligations.[111]

– The transferor must be deleted from both the register of farmers and the register of agricultural producer organizations and agricultural holding centres (where he can only be re-registered if the transferee dies before the transferor and the transferor acquires ownership or the right to use the land for agricultural and forestry purposes as the transferee's heir).[112]

– In the case of a transfer of use, the provisions of the Act on the turnover of agricultural land and Act CCXII of 2013 on the longest duration of the contract (possibly for an indefinite period) also apply in this context,[113] and after the expiry of the duration of the contract for the use of land, the transferor is obliged to conclude a new contract with the transferee (or a third party) for the transfer of the use of the land.[114]

– The rules of the Act on the turnover of agricultural land concerning the maximum acquisition of land and the maximum possession of land shall be

105 Act CXLIII of 2021, Article 5 Paragraph (1) and (2).
106 Act CXLIII of 2021, Article 5 Paragraph (3).
107 Act CXLIII of 2021, Article 5 Paragraph (4).
108 Act CXXII of 2013, Article 13 Paragraph (1).
109 Act CXXII of 2013, Article 42 Paragraph (1).
110 Act CXLIII of 2021, Article 6 Paragraph (1).
111 Act CXLIII of 2021, Article 6 Paragraph (2).
112 Act CXLIII of 2021, Article 6 Paragraph (3).
113 Act CXLIII of 2021, Article 6 Paragraph (4).
114 Act CXLIII of 2021, Article 6 Paragraph (5).

applied mutatis mutandis to the date of acquisition.[115] If this land acquisition or possession maximum is exceeded, the contract becomes impossible according to the law, which results in the termination of the contract under the Civil Code.[116]

As regards the rights and obligations of the contracting parties, i.e. the content of the contract, the law provides a detailed definition, listing the mandatory elements that must form part of the contract. These are the following:

– the rights and obligations of the parties according to the nature of the contract;

– the precise definition of the elements of the holding;

– a list of the civil law contracts relating to the elements of the holding (showing that the transferee is aware of the rights and obligations arising from them);

– the authorizations to carry on the activity (certifying that the transferee is aware of the rights and obligations arising therefrom);

– pending procedures for aid under Act XVII of 2007;

– applications for aid from European Union funds submitted and not yet decided and the deeds of establishment of the aid relationships established (certifying that the transferee has acknowledged and accepted the rights and obligations arising therefrom);

– the provisions necessary to ensure the agricultural holding transfer process in the case of joint management of the parties, the duration of cooperation, and the date of transfer of each element;

– other elements required by law.[117]

In our view, the list is not exhaustive, the parties may agree on other matters, but the elements listed in the law must be included in the transfer contract in any case, as a consequence of the legislative purpose.

If the contract on the transfer of an agricultural holding is concluded with a specific character, additional detailed rules shall apply to the contract. The agricultural holding transfer contract of sale must specify the value of the various elements of the holding and may not include rights of pre-emption, repurchase, purchase option, and right to sell, nor may it include an agreement to purchase upon delivery subject to inspection and purchase upon delivery subject to testing.[118] Where the parties enter into a contract of gift, maintenance, or annuity as a contract on the transfer of an agricultural holding, (i) the value of each element of the holding must be determined, (ii) such a contract may only be entered into by close relatives if they agree to transfer ownership of agricultural and forestry land, (iii) in the case of a contract of a gift nature, if the transferor's survival is threatened by a change in the circumstances of the transferor after the conclusion of the contract, the transferor may claim an annuity from the

115 Act CXLIII of 2021, Article 6 Paragraph (6).
116 Act V of 2013 Book 6, Article 179.
117 Act CXLIII of 2021, Article 7.
118 Act CXLIII of 2021, Article 8 Paragraph (1) and (2).

transferee, the amount of which shall be decided by the court in the absence of agreement. This rule is similar to the rule in the Civil Code concerning gift contracts, according to which, if the gift is necessary for the donor's subsistence because of a change that occurs after the conclusion of the contract, the donee may reclaim the existing gift if the return of the gift does not endanger the donee's subsistence, but the donee is not obliged to return the gift if the donor adequately provides for his subsistence by means of an annuity or maintenance in kind.[119] This rule differs from the rule in the Civil Code in that in the case (iv) if the relationship between the parties deteriorates or if, as a result of the conduct or circumstances of one of the parties, it becomes impossible to keep the property in kind, the transferor may apply to the court to have the contract amended into a life annuity contract, which is the same as the contract of maintenance provided for in the Civil Code,[120] with the difference that the statutory provision on the agricultural holding transfer maintenance contract does not include the Civil Code rule on contracts of maintenance, which provides that the contract may be amended 'definitively or until the circumstances cease to exist'. (v) In the event of the death of the transferee, the liability for the debts of the testator is transferred to the heir of the transferee under the rules of the maintenance or life annuity contract to the extent that the maintenance or life annuity granted until the death of the transferee does not cover the value of the agricultural holding determined at the time of the conclusion of the contract on the transfer of the agricultural holding, which is a rule of the Civil Code similar to the rule on maintenance contracts,[121] formulated as a *lex specialis* for the agricultural holding transfer maintenance contract.[122]

According to a special rule in the law, the parties may cooperate in the joint management of the holding, which may be for a maximum period of 5 years, during which the transferee may personally participate in the management of the holding and the costs of which may be borne jointly by the parties. In this case, the transferor shall be entitled to a share in the results of the operation of the holding in proportion to the costs of running the holding, the difference being accounted for as an instalment of the purchase price in the case of a contract of sale of the holding or as an annuity in the case of a life annuity contract, unless otherwise agreed, in the case of a transferor's share of the results exceeding this proportion.[123] In this case of cooperation, the parties are jointly authorized to conduct the business and take their administrative decisions together.[124] Management is understood to mean decision making for the operation of the agricultural holding, where

119 Act V of 2013 Book 6, Article 237 Paragraph (1).
120 Act V of 2013 Book 6, Article 495 Paragraph (2).
121 Act V of 2013 Book 6, Article 495 Paragraph (3).
122 Act CXLIII of 2021, Article 9 Paragraph (1)–(5).
123 Act CXLIII of 2021, Article 10 Paragraph (1)–(3).
124 Act CXLIII of 2021, Article 10 Paragraph (4).

cooperation requires ongoing decisions to be taken unanimously by the parties, the details of which cannot be specified in detail at the time of contracting.[125] This provision is similar to the Civil Code's rules on the conduct of civil law partnership agreement.[126] Unless otherwise agreed by the parties, the transfer of ownership of the elements of the holding or the transfer of use may take place on the last day of the cooperation period.[127] The purpose of cooperation between the transferor and transferee is to transfer the farmer's knowledge and contacts, thus contributing to the success of the generational change.[128]

A special provision applies to the purchase in instalments: where the transferee pays the purchase price in instalments (in the case of a sale and purchase contract), the transferee has a lien on the assets of the holding up to the amount of the instalments paid, although the parties may provide otherwise. However, if the transferee has acquired ownership of the assets of the holding, the transferor shall thereafter have a lien on the assets of the holding up to the amount of the unpaid purchase price instalments, unless the parties agree otherwise.[129] A pledge is a security in rem, i.e. one of the strongest securities available to the parties, which the legislator regulates as a statutory pledge. It can be understood as a completely new type of statutory pledge because the Civil Code does not provide for a statutory pledge in the case of a contract of sale in the rules of purchase in instalments.

However, in the case of cooperation between the parties, it is possible to record the fact of the transfer of the holding in the land register.[130] However, during the period of cooperation, the contract on the transfer of agricultural holding may be terminated with immediate effect if (i) one of the parties is in culpable breach of an essential obligation under the contract or (ii) the health of the transferee has deteriorated or there has been a lasting change in his/her living conditions which prevents him/her from fulfilling his/her obligations under the law.[131] If the transferor dies, his heir shall not be required to make any personal contribution which the transferor undertook to make under the contract.[132]

The similarity with the strict rules of the Act on the turnover of agricultural land and the consistency with leases is shown by the legal provision requiring the approval of the contract on the transfer of agricultural holding by the agricultural administration. In the course of the procedure, the agricultural administration must verify compliance with the provisions of the Act on the turnover of

125 Ministerial Explanatory Memorandum to Act CXLIII of 2021, Explanatory Memorandum to Article 10.
126 Act V of 2013 Book 6, Article 503 Paragraph (1).
127 Act CXLIII of 2021, Article 10 Paragraph (5).
128 Ministerial Explanatory Memorandum to Act CXLIII of 2021, Explanatory Memorandum to Article 10.
129 Act CXLIII of 2021, Article 10 Paragraph (6).
130 Act CXLIII of 2021, Article 10 Paragraph (7).
131 Act CXLIII of 2021, Article 11 Paragraph (1).
132 Act CXLIII of 2021, Article 11 Paragraph (2).

agricultural land on the acquisition of ownership or the right of use, with the provisions of the Act on the transfer of agricultural holdings and with the other provisions of the Act on the turnover of agricultural land and Act CCXII of 2013.[133] A contract on the transfer of agricultural holding is therefore a contract subject to the approval of the authority under the Civil Code, which is governed by the rule of the Civil Code that the contract becomes effective retroactively to the date of its conclusion upon the approval of the authority, with the proviso that until the declaration of approval or the expiry of the time limit for the declaration, the rights and obligations of the parties are to be assessed according to the rules of the pending condition and the contract does not become effective if the authority does not grant the approval.[134] The agricultural administration shall have 60 days for approval. Note that the ministerial explanatory memorandum to the Act mentions a further 30 days.[135] However, the approval does not replace the other conditions and requirements for the validity of the contract.[136]

The agricultural administrative body may also refuse approval if the parties do not comply with the conditions laid down in the Act, if there is a barrier to the acquisition of the right of ownership or use, if the provisions on the use of the land do not comply with the provisions of the Act on the turnover of agricultural land and Act CCXII of 2013, and if the agreement of the parties does not comply with the conditions laid down in the Act.[137] It can be concluded from the above that the legislator did not intend to apply the legal consequence of invalidity in the case of certain provisions that do not comply with the conditions laid down in the Act on the transfer of agricultural holding but rather to provide that in such a case the contract will not become effective since in the absence of official approval the contract cannot have legal effects.

Lastly, the law lays down certain succession issues relating to the transfer of holdings, which cover three areas: civil law contracts, public authorizations, and subsidy relationships. With regard to civil law contracts, it is a matter of contractual subrogation based on the provision of the law,[138] with the exception that the transferee replaces the transferor without the consent of the third party remaining in the contracts,[139] in which case an additional speciality is that the transferee must undertake to fulfil obligations under civil law contracts.[140]

133 Act CXLIII of 2021, Article 12 Paragraph (1).
134 Act V of 2013 Book 6, Article 118.
135 Ministerial Explanatory Memorandum to Act CXLIII of 2021, Explanatory Memorandum to Article 12.
136 Act CXLIII of 2021, Article 12 Paragraph (3).
137 Act CXLIII of 2021, Article 12 Paragraph (4).
138 Act V of 2013 Book 6, Article 211.
139 Act CXLIII of 2021, Article 13 Paragraph (1).
140 Act CXLIII of 2021, Article 13 Paragraph (2).

As regards public authorizations, the law provides for succession in respect of all public authorizations required to carry out the economic activity linked to the holding, as specified in the transfer contract, on condition that the transferee must comply with the legal requirements, including qualification requirements, which determine the conditions for carrying out the activity.[141]

The transferee will also be the general successor to the transferor as regards the subsidy relationships but must meet the eligibility and content conditions, failing which the subsidy relationships will be terminated, but the transferor will be exempt from the obligation to repay the aid.[142] In this context, the provisions of Act XVII of 2007 and Government Decree 272/2014 (XI.5.) on subsidies must be taken into account.

4. Conclusions – Typical Features of the Contract on the Transfer of Agricultural Holdings

With regard to the contract on the transfer of agricultural holding, the legislator considered that in order to ensure the transfer of the agricultural holding and to facilitate the generational transfer, it is necessary to regulate a separate, sui generis type of contract in a normative form. For our part, we are not convinced that it was absolutely necessary to create this separate type of contract and to draw up detailed rules for it. The legal provisions in force, such as the rules on the transfer of ownership and usufructuary rights in certain types of contracts (sale, gift, maintenance, and life annuity contracts), the rules on the Act on the turnover of agricultural land, and other provisions of the Civil Code (Book Six, Part Two, General Rules of Contract), have always provided an appropriate framework for the parties to transfer all the assets necessary for the pursuit of agricultural and forestry activities or to settle any use relations and the framework for their cooperation in other complex ways, in the context of an unnamed contract. Given that the legislator decided that it was necessary to create a separate type of contract, the following conclusions can be drawn from an assessment of its main characteristics:

– The contract on the transfer of agricultural holding regulated by Act CXLIII of 2021 is a named type of contract, which, according to the classical private law jurisprudence, does not belong to the group of atypical contracts regulated by the Civil Code and which (i) can be understood as a special subtype of sale contract, gift contract, maintenance contract, and life annuity contract, and as such would not have required a separate legal regulation, and (ii) can be considered as a mixed contract, in that it may contain, in addition to the elements of transfer of ownership, elements of use (lease) and even elements of

141 Act CXLIII of 2021, Article 14 Paragraph (1)–(2).
142 Act CXLIII of 2021, Article 15 Paragraph (1)–(2).

cooperation. The provisions on cooperation between the parties are reminiscent of similar provisions in civil law partnership regulated in the Civil Code. The latter would not have justified a separate statutory provision either. In our view, there was no need to name a mixed contract which contains elements of a property transfer contract (sale, gift, maintenance, and life annuity), a lease and a civil law partnership contract, all of which have the characteristics of a civil law partnership. Just as there is no independent regulation in the Hungarian civil law in force, i.e. the sale mixed with a gift does not qualify as a named atypical contract, there was no indispensable need for independent legislation in relation to the contract on the transfer of agricultural holdings.

– As indicated above, the legislator could have achieved the same objective by applying the current civil law legislation (Civil Code, Book Six, Part Two) and the land turnover rules (Act on the turnover of agricultural land and Act CCXII of 2013) in combination, as it was regulated by the special new legal provisions on the contract on the transfer of agricultural holdings. An appropriate solution would have been for the legislator not to regulate these contracts in the Civil Code as a separate subtype of sale, gift, maintenance, and life annuity contracts, but the Civil Code could (in the rules of Civil Code on contracts of sale, gift, maintenance, and life annuity and in the provisions of the Civil Code on leases and civil law partnership contracts) at least refer to the fact that a separate statutory provision contains additional special provisions for the contract on the transfer of agricultural holdings.

– By referring to the Civil Code as a background rule in the Act on the contract transfer of agricultural holdings, it can be clearly stated that, compared to the Civil Code, we are dealing with a *lex specialis* regulation, to which the provisions of the Civil Code must also be applied.

– The contract on the transfer of agricultural holdings is primarily regulated as a contract for the transfer of property, with the proviso that if it contains elements of use or cooperation, it can also be used in practice as a mixed contract. Because of the property transfer nature, the most important obligation of the transferor as the obligor, as the party providing the material service, is the transfer of property, and as such it is specific in that the indirect object of the contract can only be the agricultural holding, which, according to the legal definition, is a set of things of different types and rights. The discrepancy between the name of the Act (on the transfer of agricultural holdings) and the type of contract it regulates (farm transfer contract) can be seen as a minor legislative shortcoming since the definition of 'holding' in the Act makes it clear that, in the case of a farm transfer contract, it is only a contract type that provides the framework for the transfer of agricultural holdings, not other types of holdings.

– By including in the definition of an agricultural holding, on the one hand, agricultural and forestry real estate for agricultural and forestry use and other real

estate and the movable property, rights of property, shares in companies, and other rights and obligations necessary for the exercise of such activity, the agricultural holding transfer contract is a contract for the transfer of several individual things (and rights) in one contract, i.e. it is in fact a sale as a single unit of turnover. The transfer of goods and rights necessary to carry out agricultural activities in the context of one contract can be carried out in the absence of specific legislation (designation as a separate type of contract) in the current civil law environment. The sale (transfer of property) of all the individual things (and rights) necessary for the pursuit of a given activity in the context of a contract does not justify the codification of the contract as an atypical contract with a separate name. There is no doubt that the combination of things (*universitas rerum*) is relevant from a practical point of view, i.e. that it is easier to transfer things and rights as a whole than to transfer the elements that make up the combination separately.[143] However, as Barna Lenkovics clearly points out, this 'unit of circulation' does not preclude the individual things in the totality of things (*universitas rerum*) from being the subject of separate property rights.[144] The holding which is the subject of a contract for the transfer of an agricultural holding may in fact be understood as a property, that is to say, as 'a totality of rights in rem and obligations concentrated around a specific person as the centre' or as 'a totality of his property, that is to say, his rights and obligations in respect of things and in relation to other persons, which can be determined in the interests of a legal entity',[145] where – from a legal-dogmatic point of view – the agricultural holding is seen as a sub-asset within the assets of the farmer or self-employed person. The nature of 'property' does not, however, justify defining a contract permitting the joint transfer of the goods and rights which it covers as a separate type of contract.

– The provisions of the Act on the Transfer of Agricultural Holdings on the contract on the transfer of agricultural holdings require a complex legal application since, in addition to this Act, the provisions of the Civil Code, the Act on the turnover of agricultural land, the provisions of Act CCXII of 2013, and the provisions of the Family Farms Act must also be taken into account. The parties can only conclude a full and comprehensive contract if they comply with all the laws listed, bearing in mind that many of them are not subject to derogation.

– As a differentiating feature of the farm transfer contract, it is indispensable to mention the increased formal requirements, the need for a private deed signed by a lawyer or a public deed, and the need for approval by the agricultural administration. Another special rule (different from the Civil Code) is that in the case of a contract on the transfer of agricultural holdings, the application of certain special types of sale and purchase agreement (right of repurchase, pre-

143 Lenkovics 2001. 49.
144 Lenkovics 2001. 49.
145 Lenkovics 2001. 49.

emption right, purchase option and right to sell, nor may it include an agreement to purchase upon delivery subject to inspection and purchase upon delivery subject to testing) is not possible in the absence of a statutory prohibition, while the purchase by sample cannot be interpreted as another special type of sale contract, and the legislator has made it possible to use instalment sales in contracts on the transfer of agricultural holdings, supplemented by special rules.

In our view, problems may arise in the practical application of the new type of contract as an atypical contract outside the Civil Code, in particular with regard to the combined application of the provisions of several different legal acts and, where appropriate, the mixed nature of the contract. It is conceivable that the actual practical application of this new type of contract will remain limited, taking into account that the objective of a contract on the transfer of agricultural holdings can be achieved by other legal constructions, and in many cases in a simpler way, without legal obligations and mandatory rules. The new type of contract severely limits the contractual freedom of the parties, restricting their room for manoeuvre in reaching an agreement that is fully adapted to the needs of practice. Practice, however, will decide whether there is a need for a contract on the transfer of agricultural holdings as a sui generis atypical contract in the current Hungarian law or whether the new type of contract remains a type of contract that is not actually applied as part of the living law. It cannot be ruled out that a few years after entry into force, based on practical experience, the legal regulation of this type of contract will be amended to better adapt it to the needs of practice. Once the experience gained from the application of the provisions of the law has been formulated, it will be necessary to examine the justification for the legislation and its possible amendment a few years after its entry into force.

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Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 121–135

DOI: 10.47745/AUSLEG.2023.12.1.08

Company Law Aspects of Matrimonial Property Litigations

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Abstract. A number of studies in the Hungarian legal literature have explained the challenges raised by the 'division' of common property contributed to a company. The aim of this paper is to explore the current corporate law aspects of matrimonial property litigations as a result of the entry into force and joint application of the Hungarian Civil Code and the Code of Civil Procedure. In order to achieve this goal, firstly, the author focuses on a critical analysis of the existing procedural law governing matrimonial property lawsuits, with a special emphasis on the intersection of litigious and related non-litigious proceedings. The second part of the research project examines matrimonial property law provisions applicable to the various company forms that may constitute matrimonial common property according to the set of rules governing legal persons in the new Civil Code.

Keywords: non-litigious procedure, Hungary, matrimonial property litigation, matrimonial action, common property, limited liability companies

1. Introduction

The codification of both substantive and procedural civil law has played an unquestionable role in the modernization of matrimonial property law over the last almost one decade. This is fully in line with the legislator's basic position, which did not only redefine the substantive and procedural rules of Hungarian private law but also undertook to incorporate the substantive rules of the field of private law, previously contained in separate legal acts, into a single code.

The biggest innovation in this process, apart from the adoption of the monistic concept of company law, is undoubtedly the incorporation of the normative system of family law into the Civil Code. Following the order and logic of the former Draft Code of Private Law submitted during the early 20th century, the reformed Code of Private Law incorporated not only the civil law regulation of

the most fundamental personal and property relations but also the substantive law material of company law and family law. Accordingly, the assessment of certain legal institutions is a much more complex task for both practitioners and litigants, which is a particularly relevant starting point in spheres of life such as family life and its economic interdependencies or family and business issues at the intersection of family law and economic law and, as a particular element therein, the challenges of matrimonial property law.

On the basis of the above, the legislator opened up new horizons with the new Civil Code by regulating the institutionalized legal status of partnership shares in matrimonial property law while simultaneously aiming to eliminate the difficulties of interpretation and case law that surfaced repeatedly in judicial practice.[1] The legislator acted in a similar way when codifying the new Code of Civil Procedure, which, by placing the professional economic approach of civil law in the focus and essentially in line with its new vision of society, created a professional approach and foundations in the field of civil procedural law. Consequently, in the new Code of Civil Procedure, matrimonial property lawsuits, as separate from matrimonial dissolution actions (divorce), were intended, on the one hand, to promote the efficiency of property law litigations by drawing a clear distinction between matrimonial actions and matrimonial property lawsuits,[2] while, on the other hand, to provide the appropriate procedural background, as a kind of toolkit, in line with the changes in substantive law. Substantive and procedural law do not only 'go hand in hand' at these levels, but complex substantive law interpretations as starting points, which not only presuppose but expressly require the joint application of the books of the Civil Code, are more strongly enforced in such actions. Given the fact that in a company, asset contributions are an essential and inherently irrecoverable condition of the company's legal personality as separate from its members, their possible division raises both company substantive law and family law issues. Since these assets are not recoverable from the company, their distribution requires particular care, taking into account the interests of the company; at the same time, it also presupposes that the interests of the company are also taken into account by the parties themselves and are duly reflected alongside their own interests in their mutual accounting relationship.

A number of studies in Hungarian legal literature have explained the challenges raised by the 'division' of common property contributed to a company. In line with the above starting points, the aim of this paper is to explore the current corporate law aspects of matrimonial property litigations as a result of the entry into force and joint application of the new Civil Code and the new Code of Civil Procedure. In order to achieve this goal, firstly, the author focuses on a critical

1 Kőrös 2022.

2 See *T/11900. számú törvényjavaslat a polgári perrendtartásról* [Bill No. T/11900 on the Code of Civil Procedure]. § 455.

analysis of the existing procedural law governing matrimonial property lawsuits, with a special emphasis on the intersection of litigious and related non-litigious proceedings. The second part of the research examines matrimonial property law provisions applicable to the various company forms that may constitute matrimonial common property according to the set of rules governing legal persons in the new Civil Code. In addition to a comparison of the existing civil substantive law and civil procedural law, the main focus of both sections of the study is on the relevant case law of the judiciary supplemented by a discussion of the various legal literature.

2. The Function of Matrimonial Property Actions in Current Procedural Law

The new regulatory principle inserted in § 462 of the new Code of Civil Procedure, the prohibition of combining matrimonial actions and matrimonial property actions, may presumably settle the real, substantive separation/demarcation of matrimonial actions for marriage dissolution and matrimonial property actions. Even though the new Code of Civil Procedure still lacks a definition of matrimonial property actions, it is clear from this principle that matrimonial property actions can now be undoubtedly included in the category of property actions.

It is important to stress, however, that matrimonial property actions are not only litigations brought on grounds outlined under Title VI of Book IV of the Civil Code, entitled 'Matrimonial Property Law', but also those relating to other property consequences of the marriage, so, for example, claims for the recovery of maintenance or gifts, actions for declaring a matrimonial property contract null (invalid) and determining its legal consequences, as well as the company law, securities law, copyright and property law aspects of the division of property.[3]

Instigating a matrimonial property action does not require the filing of a petition for dissolution or a judgement dissolving the marriage. According to *László Károly Simon*'s approach, the commencement of matrimonial property actions is subject to primarily substantive law conditions, the most important of which is the termination of the matrimonial community of property.[4] However, there is a non-negligible scope of cases where the division of matrimonial property is justified by a reason, in particular, but not exclusively, the intention of the parties to transition from the previous property regime, but such a cause may be, for example, the bearing of the risk of a commercial enterprise by only one spouse, tax optimization, or the occurrence of circumstances arising from the complexity of life – circumstances which justify such a step. Naturally, in the majority of such

3 Simon 2021. 11; Csűri 2017. 1–8.
4 Simon 2021. 11–12.

cases, we cannot talk of a legal dispute because there is consensus among the parties, although it may not be excluded entirely. As a result, the position held in commentary literature saying 'The division of common property is not the same as the termination of the community of property.'[5] is correct; what is more, neither is such division identical to the termination of the community of life.

In a combined reading of § 4:53. of the Civil Code and the case law of the courts, Simon identifies three cases of terminating the community of property: (i) by terminating the matrimonial community of life, (ii) by the exclusion of the statutory property regime contained in the matrimonial property contract, (iii) by applying for the termination of the community of property in a non-litigious proceeding.[6] I think it is necessary to point out here that if the spouses decide to terminate the community of property by excluding the statutory property regime contained in the matrimonial property contract and the court subsequently rules on a claim not settled in the matrimonial property contract in a matrimonial property action, the content of both the matrimonial property contract and the judgment must comply with the statutory conditions of the division of property.[7]

In my view, today, the primary issue to be clarified when examining the justifiability of a matrimonial property action, divorced from a matrimonial dissolution action, is, as a preliminary question, the existence of consensus between the spouses. If there is an agreement between the spouses on the division of the common property, they can only seek the court's approval in a non-litigious proceeding. If only one of the spouses requests the division of the common property, or if there is no agreement between them on the matter, civil litigation proceedings are available.

Prior to 1 January 2018, non-litigious actions determining people's personal status and family relations were regulated independently in legislation on various levels (acts, decrees). The need to summarize in one norm the non-litigious procedures falling under the jurisdiction of courts affecting personal status rose concurrently with the creation of the new Code of Civil Procedure, and Act CXVIII of 2017 on the rules applicable in non-contentious civil court procedures and on other non-contentious court procedures (hereinafter referred to as the Act on Non-contentious Civil Court Procedures) was promulgated on 12 October 2017.

Besides non-litigious procedures defining personal status, personal integrity (declaration of death, procedure for establishing the fact of death, declaration of a missing person, overturning the presumption of paternity), non-litigious procedures of a property nature related to personal status, such as the jointly requested termination and recovery of matrimonial community of property during

5 Varga 2018. Translation by the author. Unless otherwise specified in the footnotes, all translations form non-English sources are by the author.

6 Simon 2021. 12.

7 Kőrös–Makai–Szeibert 2013. 277.

the marital community of life, were inserted in the Act on Non-contentious Civil Court Procedures.

Pursuant to the provision inserted in § 19 of the Act on Non-contentious Civil Court Procedures, the application for the termination of a matrimonial community of property may only be submitted jointly by the parties in a judicial non-contentious procedure. Such applications falling under the competence of district courts may not be connected to other applications. The Act on Non-contentious Civil Court Procedures specifically refers to the reasons leading to the termination of the matrimonial property regime and also refers to §§ 4:54 (1) a), b), and c) of the Civil Code,[8] but while in the case of the existence of these grounds the civil litigious procedure may be initiated based on an application of either party, in non-litigious procedures the joint request of the parties is a condition for the institution of proceedings. In a non-litigious action, the court may hear the applicant parties. If any of the applicants fail to appear at the hearing, the court shall terminate the procedure *ex officio* [§ 21(1) of the Act on Non-contentious Civil Court Procedures]. An order for termination does not rule out the subsequent enforcement of the claim in a civil litigation. The order terminating the community of property must be delivered to the creditors of the spouses and in guardianship cases to the guardianship authority.

During the almost five years since the application of the new Code of Civil Procedure, during the 'separation' of actions for marriage dissolution and matrimonial property law actions, in practice, the question of determining the duration of the community of life has generated legal interpretation issues. From the relevant resolutions of the National Conference of the Heads of Civil Law Colleges (a national assembly of the representatives of civil court judges), the following may provide professional guidance. If litigation regarding marriage is pending pursuant to the Code of Civil Procedure of 1952 or was previously closed with a final decision in accordance with that Code, the court does not

8 '§ 4:54 [Termination of community of property regime by the court]
(1) The court, at the request of either spouse, may terminate, if justified, the community of property regime during the marital community of life. Justified cases shall especially include cases where:
a) a spouse accumulated, through a contract concluded without the consent of the other spouse or by causing extra-contractual damage, a debt of such a volume that might jeopardize his share of the common property;
b) the spouse engaged in private entrepreneur activities was subject to enforcement procedure, or the individual firm, cooperative, company in which the other spouse is a member with unlimited liability is subject to an enforcement or liquidation proceedings, and that procedure might jeopardize the spouse's share of the common property; or
c) the other spouse is placed under custodianship limiting capacity to act in full or partially, regarding financial matters, and the appointed custodian is other than the spouse.
(2) Unless otherwise ordered by the court, the community of property regime shall be terminated on the last day of the month following the month when the decision on its termination becomes final and binding.'

have to establish the duration of the community of life in the operative part of the judgment in the matrimonial property litigation. § 463(2) of the Code of Civil Procedure specifically sets out that if the procedure for marriage dissolution is already underway (even if pursuant to the Code of Civil Procedure of 1952) the duration of the matrimonial community of life should be established by the court of the matrimonial litigation and not that of the matrimonial property action.[9] If the parties are concurrently involved in a matrimonial and a matrimonial property action and the duration of the community of life is debatable, the court shall suspend the matrimonial property action until the final decision of the ongoing matrimonial action is adopted.

There is no obligation to suspend the procedure in this case either; it is decided at the discretion of the court, and, as stated by law, the option is available if the duration of the community of life is debated. There is therefore no justification for staying proceedings if the duration of the cohabitation relationship, which is identical in property law to the matrimonial community of life, is disputed.[10]

Pursuant to § 459(2) of the Code of Civil Procedure, the court shall establish the duration of the matrimonial community of life in the operative part of the judgement, dissolving the marriage if it had not been previously established in the substantial final decision or an interim ruling by the court of the matrimonial property action. In such cases, it constitutes a necessary substantive element of the judgment dissolving the marriage, and there is no room for settlement.[11]

3. Company Shares in Matrimonial Common Property

Shares in a company may be considered part of matrimonial common property. This chapter aims to describe and analyse the company law provisions of the new Civil Code which, in addition to the provisions governing legal persons, are part of matrimonial property law and as a result are primarily applicable to the spouses in matrimonial property law actions (in certain non-litigious actions).

The substantive law provisions applicable to shares in companies forming part of the matrimonial common property are governed by the rules of the Civil Code on common property and its distribution (§§ 4:58–4:61 of the Civil Code) and by the provisions of the Civil Code on shares which are securities [§ 5:14 (2) of the Civil Code], but also, and especially, by the provisions applicable to individual company forms.

Somewhat similarly to the institution of marriage, the establishment and operation of a company is a long-term commitment, a focal point of which is

9 CKOT 2017.11.20:54.
10 CKOT 2017.07.07:24.
11 CKOT 2017.07.07:26.

precisely represented in contributing assets to the company, thus providing grounds for determining the time of establishment for a property law purpose. If the company was founded before the commencement of the community of life, the assets previously contributed to the company are essentially considered separate property. However, the establishment of a company during the matrimonial community of life renders the assessment of such property a complex challenge: if it was separate property, it may retain its separate status, if it was common property, it must be assessed as such.

Accordingly, the freedom of association may be exercised not only by one spouse but also by the spouses jointly; what is more, they may even establish companies separately, and these circumstances all raise issues to be addressed and are further complicated by the specific conditions of the given company forms, even the diversity of qualification requirements. Consequently, exercising the freedom of association rightfully raises issues of adjudicating not only individual but also matrimonial property issues, and their property law assessment may result in numerous cases of conflict.

4. Matrimonial Common Property in General and Limited Partnerships

According to the traditional structure of company law dogmatics, general and limited partnerships are company forms establishing a partnership of parties. By the conclusion of a contract for the establishment of a general partnership, the parties undertake the commitment of contributing assets for the economic activity of the company and assume unlimited and joint liability for the company's debts not covered by the asset contributions. If any or all of the members are in a matrimonial community of life, this obligation of liability makes virtually all the property subject to business risk. By emphasizing the partnership aspect, the legal concept highlights cooperation among the members, enhanced trust, a special professional relationship between the members and the given economic activity, which, in addition to its organizational characteristics, also gives rise to the special nature of the issue of property. It follows from the liability to pay the company's debts that, although the incorporation of the company does not contain a specific capital requirement, the contribution of the assets deemed necessary by the members to start the company's operations must, of course, be made available to the company and, as mentioned above, it is equivalent to putting the entire family property at risk. As explained in detail below, a separate legal provision deals with the issue of matrimonial property with regard to general partnerships; nevertheless, it is also necessary to mention the fact that a member who joins the partnership, in this case the spouse, is liable for the obligations of

the partnership incurred before joining in the same way as the other members are, and any agreement to the contrary between the members against third parties is null and void. It should be added that the Civil Code also addresses the issues arising from the other private law relationships of the member, i.e. the spouse, due to the partnership nature of the general partnership, in view of the fact that the member shall assume liability for the partnership's debts with his/her entire property, which obligation necessarily impacts on the member's ability to perform in the light of his/her other legal relationships. In such a case, i.e. when the member's property, even the separate property of a spouse, is also used to satisfy a claim against the member under another legal relationship, the solution necessarily leads to the inverse application of the member's liability as a member. Private creditors of a member cannot satisfy their claim directly from the assets of the company, but they are covered by the share of the assets of the general partnership to which the member is entitled in the event of the termination of his/her membership. If the creditor also executes on such share of assets, it may exercise the right of terminating the member's membership in place of the member, resulting in the termination of the membership and thus satisfying its claim from the share released to the member as a result of the settlement of accounts between the company and the member. To sum up, the assets of a member contributed to a general partnership cannot give rise to concealing assets and an exemption from execution, but neither can they result in direct satisfaction from the partnership assets since that would be incompatible with the legal personality of a general partnership, and therefore the assets contributed to the general partnership can be indirectly used to satisfy the claim of the member's private creditor.

Only one paragraph from the substantive law rules on general partnerships contains a property law provision pertaining to spouses. § 3:141 of the Civil Code titled *Partnership Share Acquired through Matrimonial Community of Property* declares that the spouse of a member may become a member in the partnership, on the grounds of either matrimonial community of property or division of matrimonial common property, only by the amendment of the memorandum of association. From a membership viewpoint, this can create two kinds of situations: the previous member spouse's membership is maintained, and the spouse who was not a member prior to the division of common property becomes a member of the company without an asset contribution. In other cases, the former member spouse remains a member, independently, by acquiring the full company share.[12]

In the former case, the memorandum of association may be amended by the unanimous resolution of all the members. Due to its partnership nature, 'in this case, the […] company cannot be forced either to take the spouse who was formerly not a member'.[13] In the absence of a unanimous decision, the

12 Ujváriné Antal 2016. 148.
13 Ujváriné Antal 2016. 148.

member's spouse may only raise a claim for settlement against the company.[14] As regards the interpretation of this rule, in the volume entitled *Társasági jogi perek* [Company Law Actions], Gál, Juhász, and Mika deduce from the principle of the freedom of association that company members cannot be obliged to give a declaration of consent. In this regard, no action for the provision of a juridical act may be brought against a member of a general partnership.[15]

By deduction from § 3:90 of the Civil Code, Éva Csűri points out that when establishing a general partnership on the grounds of matrimonial community of property, a general partnership may not be founded by two spouses as sole members, but both spouses may be members in two separate general partnerships.[16]

Limited partnerships are company forms based on the partnership of parties who assume various degrees of liability for the company's debts. By concluding a memorandum of association for the establishment of a limited partnership, the members of the partnership shall undertake to make monetary or in-kind contributions to the partnership for its economic activities, and at least one of the partners, the general partner, shall assume joint liability together with the other general partners for the obligations of the partnership not covered by the assets of the partnership, while there shall be at least one other partner, the limited partner, who is not liable for the obligations of the partnership unless otherwise provided in the Civil Code. It can be deduced from the legal definition that the liability of the general partner is identical to that of a member of a general partnership, whereas the liability of the limited partner is essentially limited.

The new Civil Code does not contain specific provisions for spouses and the matrimonial common property under the § pertaining to partnerships. Given that § 3:155 renders the provisions of general partnerships applicable to limited partnerships, § 3:141 shall be considered governing for limited partnerships as well. From among these differences, the two membership statuses bear relevance from a matrimonial property law point of view, meaning that the issue of the potential changes of membership status has to be settled. This is because changing a general partner to a limited partner would empty the obligation of liability for the company's debts; therefore, a former general partner turned limited partner shall still be liable for the previously generated liabilities of the company for 5 years after the status change. In case of a status change in the opposite direction, such regulation is obviously not required.

With regard to partnerships involving two spouses as members, the reasoning of the division of company shares contained in Decision No. Pf. 20040/2015/11 of the Regional Court of Appeal of Debrecen is noteworthy.

14 Mányoki 2019. 54.
15 Gál–Juhász–Mika 2018. 215.
16 Csűri 2017. 7.

Thus, § 3:146 of the Civil Code provides for the possibility for a member of a limited partnership not to transfer the company share to an external third party but to another member of the partnership, which is an option available for two-member, i.e. spousal companies too, and it is also irrelevant what position the member wishing to transfer a company share occupies in the partnership (general or limited partner). Therefore, the division of shares in general or limited partnerships belonging to the community of property may be carried out in a way either resulting in a membership change from an external legal relationship or not, irrespective of whether the general or limited partnership is a two- or a multi-member partnership, whether only one or both of the spouses are members and whether the spouses have the same or different membership status (positions) in the limited partnership of which both spouses are a member of. (Supreme Court [...]). This is why there was no obstacle to a plaintiff and a defendant transferring their shares owned in a limited partnerships constituting their matrimonial common property as limited partners to the other spouse, who was also a member, by way of a division of the matrimonial common property, which constituted a transfer of the partnership interest outside the contract of sale. In this case, the memorandum of association must be amended not before the transfer of the company share but in relation to it because of the termination of the membership of the limited partner. Pursuant to § 3:148 of the Civil Code, the contract of transfer shall become effective subject to the amendment of the memorandum of association in accordance with the transfer. This also means that as the transfer of the partnership share is carried out based on the judgement of the court adjudicating the matrimonial property action, the amendment of the memorandum of association for both companies required for the ensuing data change shall be done by the parties.

5. Business Share as the Subject of Matrimonial Common Property Division – Common Property in Limited Liability Companies

Before explaining the special rules pertaining to limited liability companies, I find it important to note as a starting point that 'although a business share may not be acquired ownership from a civil law perspective, and thus it may not be the subject of property law in a civil law sense, as "a theoretical object" […] it can be transferred just like other objects.'[17] A business share may not be considered a security either, '[…] but it represents the entirety of the legal relationship between

17 Barta 2009. 289.

the limited liability company and its members, which sums up the members' status (legal status) in the company'.[18]

When settling a business share in matrimonial property, it bears no significance whether the spouse (ex-spouse) is a member of the company at hand or not, whether or not they take part in the activity of the company and exercise and perform their rights and obligations as owners.[19] Firstly, when acting on the principle of unified settlement of claims arising from a community of property (§ 4:58), the court must apply the rules of the new Civil Code on the termination of common property [§ 5:83-5:84] for the division of business shares forming part of the matrimonial common property, with the difference that no physical division may take place if objected to by either spouse on reasonable grounds [§ 4:60 (2)]. Secondly, pursuant to § 4:61. (3) of the Civil Code, a business share may be allocated to a non-member spouse – upon his/her request, and only then – if a share of the common property cannot be allocated in any other way.[20]

The Civil Code settles the legal fate of business shares in actions brought for the division of matrimonial common property under § 3:172. Departing from the previous rules of the Act of Business Associations,[21] the new Civil Code provides primarily for the application of the provisions of the articles of association for the transfer of business shares; in the absence of such articles, the provisions of the act on share transfer shall be governing. Ádám Mányoki highlights the mandatory rules of the Civil Code, which stipulate the consent of the members' meeting as a prerequisite for the division of business shares.[22] If the articles of association exclude the transfer of business shares, this shall apply to transfers carried out on family law grounds as well.[23]

In a matrimonial property action aimed at dividing common property, the legal fate of a business share may be any of the following: (i) a business share owned by one of the spouses becomes a co-owned share (by a court judgement); the court (ii) may order the non-member spouse to redeem the business share or any of the member spouses to incorporate the other party's business share or part of a business share into their own; (iii) the court may order the business share to be sold at auction and divide the sales price between the parties.[24]

As Judit Barta also points out, 'the division of common property does not only mean dividing existing property between the parties but also the settlement of reimbursement claims'.[25]

18 Veress 2019. 119.
19 Kőrös 2022.
20 Kőrös 2022. § 3:172.
21 Gadó–Németh–Sáriné Simkó 2013.
22 Mányoki 2019. 55.
23 Barta 2016. 171.
24 Witzl 2019. 6.
25 Barta 2009. 290.

The theoretical context of the latest precedent-setting resolution of the Curia under No. Pfv. 20054/2022/7. outlines the following with regard to settling reimbursement claims:

> If the spouses have individual shares in the company and a legal dispute arises from the contract for the transfer of only one of the spouses' shares, this spouse may independently enforce a civil law claim arising from the obligation to transfer the business share. Just as the share of the business belonging to the spouses' community of property under the special rules of company law, which have priority of application, the purchase price replacing it may also be set off between the spouses when the community of property ceases to exist, in accordance with the rules of family law governing the property relations between spouses.[26]

Matrimonial property law contains a peculiar conflict of interest between the partnership and the 'joint stock' nature of companies, which is resolved by the Civil Code, so the rules on business share transfer are applicable to a spouse wishing to become a member based on a matrimonial property law claim, which means in this case that the spouse is considered a quasi-independent external person and not a member, with the difference that other members may not exercise a priority right for the business share divided up based on a community of property claim, and the requirement of a capital contribution does not have to be applied either. The reason for the difference is that, based on the rules of matrimonial property law, the spouse may already be fundamentally entitled to the business share, so his/her status as an external person must be further detailed. The rules on business share division must be properly applied for a spouse's acquisition of a business share, that is, if the company does not approve of the division of the business share, the spouse may not acquire an individual business share, but he or she may only become entitled to a part of a business share, as a result of which a co-owned business share is created. If, based on the above, the founding document prescribes the right of consent in relation to the acquisition of a business share, the spouse may acquire a business share or part of a business share only with the company's approval. If the spouse is not allowed to become a member, then, according to the matrimonial property law rules, the member spouse is obliged to settle the value of the business share with the spouse who is not to become a member, fulfilling any obligations from his or her other property.

26 A Decision by the *Kúria* (the supreme court of Hungary) no. Pfv.20054/2022/7, as a judicial precedent in the matter of contracts of sale [on § 36 of the Code of Civil Procedure] – justices: Judit Anna Csesznok, Ottília Kocsis, Péter Puskás.

6. Shares in the Matrimonial Common Property

The new Civil Code does not contain rules for matrimonial common property and their division under the special rules pertaining to companies limited by shares. Accordingly, from the legal institutions reviewed in the research assignment, first the provisions pertaining to co-owned shares must be deemed applicable. The co-owners of the co-owned shares must be considered a single member of the company; therefore, their rights may be exercised jointly, through a joint representative, and they shall assume joint liability.

As the different types and classes of shares do not have individual features from a property law point of view, employee shares, which can only be acquired by employees employed – or, based on a provision of the articles of associations, formerly employed – by the company limited by shares, can be taken as an example from a matrimonial property law aspect. The Civil Code defines the rate of employee shares as up to no more than 15% of the share capital. Employee shares can also be linked to other types of shares, such as dividend preference rights, which can be granted in absolute terms. The principle of employee shares does not allow them to be acquired by persons other than those defined above, so the transfer or division of matrimonial property is conditional on the employee or, where applicable, former employee status of the acquiring party. In the case of inheritance, if the heir's employment was terminated, and in the former employment he/she could not acquire employee shares on the same principles, he/she is obliged to sell the employee shares in the estate to the person who meets the personal conditions. The starting date of the period for sale is the date of termination of employment, the date of the death of the testator in the case of succession if no probate proceedings have been initiated, the date of the entry into force of the probate order transferring the estate in full in the case of other probate proceedings, the date of the entry into force of the court judgment in the case of succession proceedings, and the last day of the period is the date of the first general meeting following the expiry of six months after the starting date. In the case of an unsuccessful sale, the company limited by shares may decide, at the general meeting closing the deadline, to cancel the employee share or to sell the employee share by converting it into another type of share, in which case the former employee or his/her heir shall be entitled to the nominal value of the share, which shall be paid within thirty days of the cancellation or transfer of the share. Irrespective of employee shares, employees may acquire any other shares in the company, but the shares so acquired retain their original characteristics.

7. Summary

Having reviewed the above rules, it can be concluded that the system of rules for individual company forms in the new Civil Code created the substantive law basis for an effective enforcement mechanism by incorporating the case law and the economic and social expectations of today. From the point of view of the status of the parties, the separation of matrimonial property litigations and matrimonial dissolution proceedings allows, on the one hand, the early resolution of the legal status of the former spouses and, on the other hand, the enforcement of their property claims, in line with the dynamics of economic life, separately from their personal status.

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Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 137–165

DOI: 10.47745/AUSLEG.2023.12.1.09

Eastern and Central European Member State Solutions for Transposing Directive 2019/1151 (EU) Part I. The Baltic States

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Abstract. In a two-part study, the author analyses the transposition of Directive 2019/1151 (EU) by various Member States of the European Union. In this firs part of the series, the basis for the analysis and the common criteria for comparison of the various implementations is presented. The author then proceeds to the presentation of the national implementations of the directive in Estonia, Latvia, and Lithuania, all Member States with a strong tendency, and some tradition in the field of digital governance.

Keywords: Directive 2019/1151 (EU), online company formation, Eastern and Central European Member States, transposition, electronic identification, machine readability, structured filing system

1. Introduction

1.1. Research Concept

Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (henceforth: *Directive*) has the objective to streamline the establishment of limited liability companies and branches by EU companies, eliminating the requirement for parties to appear before a legal representative and instead enabling electronic identification and document signing. It is part of the most significant EU initiative in European company law in over a decade.

The Commission sees this Directive as an essential element of the EC's Digital Single Market Strategy, with the aim to simplify and facilitate European company

law, in particular with regards to the digitalization of company registers (i.e. the organizations responsible for receiving and storing documents which companies are required by law to provide).

The EC aims at the full digitalization of company foundation/registration and reporting. By means of European minimum standards, the EC is seeking to harmonize national approaches to digitalization. The directive obliges Member States to ensure the possibility of online company registration. Likewise, the directive is supposed to speed up the process of registration.

Additionally, the directive mandates that all documents and particulars submitted during the incorporation of a company, registration of a branch, or notification of changes must be machine-readable and stored in searchable or structured data formats by 1 August 2023.

This scientific article delves into the unique challenges faced by Eastern and Central European Member States in transposing Directive 2019/1151 (EU). The article addresses several pivotal questions that emerge during the transposition process, shedding light on diverse strategies and solutions adopted by these Member States. Key areas of exploration include identification procedures, electronic identification solutions, recognition of different identification means and systems, identification protocols for persons from other Member States, and the digital signing of documents.

Furthermore, this article investigates the implications of the directive's provisions during change registration, analysing whether tasks must be uniformly executed or if facilitation rules are in place. It also examines the measures implemented by Member States to ensure the machine readability of documents and explores potential differences in the formats of company documents received by involved parties versus those submitted to the Registry. The article also delves into the concept of an electronic document serving as the 'original' and whether it is universally accepted in electronic form by all relevant bodies. Additionally, it investigates the responsibility of companies or legal representatives acting as intermediaries in ensuring appropriate document formats and the availability of free services provided by Member States.

In addition, the article explores the existence of platforms or services that enable simultaneous and real-time completion of online incorporation tasks. It examines whether Member States have established comprehensive interfaces that facilitate identification, document drafting, signature, and data storage through video conferencing or other means, ensuring all parties involved can perform necessary tasks synchronously.

Lastly, this study explores mechanisms for creating a structured filing system that guarantees efficient searchability and data exchange with other systems. By analysing the strategies and approaches employed by Eastern and Central European Member States, this article contributes to a comprehensive evaluation

of the transposition of Directive 2019/1151 (EU), providing valuable insights into the effectiveness of these solutions and informing future policy considerations in the region.

That is to say, the following main questions arise in relation with the transposition of the Directive:

1.2. Identification

How do Member States ensure the identification of members, officers, and other officials (supervisory board, auditor, etc.) involved in the incorporation of a company online and how do they comply with the obligation to verify and identify them in the context of preventing and combating money laundering and terrorist financing? Are these tasks incorporated into the company formation process, or are they handled separately? If a legal representative is involved in the company formation process, does he/she carry out these tasks? If no legal representation is required or not required, which body (registration authority/court) performs these tasks?

1.3. Electronic Identification Solutions

What electronic solutions are used, what identification means are used, and what identification systems are recognized:

– during the identification process (specific question: is image/video identification also used?),
– when identifying persons from other Member States,
– when signing documents?

1.4. Identification during Change Registration

Question: How does all this work during change registration? Do all tasks have to be done in the same way, or are there facilitation rules for identification etc.?

1.5. Machine Readability of Files

What provision is made to ensure that documents submitted are machine-readable? Is there a difference between, for example, the form in which members/other persons involved receive their copy of the company documents and the form in which they are submitted to the Registry? Who can make a paper copy of the electronic company documents and by what procedure?

1.6. Formal Requirements

Together with the rules under point 1.4, have Member States changed their provisions concerning the form in which the company documents may be requested if the company has to attach them in other procedures (e.g. tenders)? In other words, is an electronic, machine-readable document considered the 'original', and must it be accepted in electronic form by all other bodies?

For the rules under point 1.4, does the company or, where applicable, the legal representative acting as intermediary ensure that the format is appropriate? Does the Member State provide any free service in this respect, accessible to all?

1.7. Platforms and Concurrency

As a separate question, in relation to question 1.4, is there a Member State that ensures that the tasks related to online incorporation are carried out simultaneously, online? In other words, has a platform or service been established which ensures, by video conferencing or other means, that absent parties can be online at the same time and perform the necessary tasks (identification, drafting of company documents, signature, data storage), but at least can perform the tasks by logging in to one interface?

1.8. Structured Filing System

How can the searchability and exchange of data with other systems, i.e. the creation of a structured filing system, be ensured?

Let us see how some of the EU Member States – to which we considered that Romania and Hungary are comparable in terms of history, integration level, and somehow financial capabilities, as well as geographical region – managed to implement the Directive recently.

2. Implementation of the Directive in Some EU Member States

2.1. Estonia

Setting up a business online in Estonia can be done in a very short time, thanks to the country's development and digitalization, if the founders follow a few well-defined steps.

The first of these steps is a basic one, but all the more important – one of choosing a company name and checking its availability. Only Latin letters can be

used in the company name, no special characters are allowed, and it is important that the name is distinctive and unique.

The second step is to select the main area of activity, which can be defined and identified using the EMTAK (*Estonian Classification of Economic Activities*)[27] codes.

The third step is particularly important for companies whose board of directors or replacement is located abroad. Section 63[1] of the Commercial Code (*Äriseadustik*)[28] provides that in this case a legal address in Estonia and a designated contact person are required. The legal address of the company is linked to the contact person designated by the founders. This means that the address of the contact person is the legal address of the company. It is understood that the contact person acts as a service agent to whom the company's procedural documents and notices of intent addressed to the company are served.[29] This person cannot be just any person, since Article 63(2) of the said Act states precisely that they are only notaries, lawyers, law firms, certified public accountants, audit firms, tax representatives of non-resident persons under the Taxation Act, and trustees and company service providers, as defined in Article 8 of the Prevention of Money Laundering and Terrorist Financing Act.

Subsequently, the application for company registration consists of four steps: preparation, signature, payment of state fees, and submission. In the case of a limited liability company (*Osaühing – OÜ*), the state fee for the online incorporation (€265) must be paid into the account of the Estonian Ministry of Finance, which must then be linked to the application.

At the same time, as a fourth step, it is also possible to pay up the company's share capital, but this can be done at a later date by the founders. The second option is the one proposed here, where the payment is deferred, and the company continues to be formed without a contribution of share capital during the formation process. This is possible because the contribution of share capital can be made by transfer either to the company's initial bank account or to a designated escrow account at the Registrar of Companies.

On the basis of the application submitted, the court will make a decision, and once the company has been registered in the Companies Register, there is only one last step left, the completion of the registration, which is the opening of a bank account for the company to cover its banking needs.[30]

If the founder does not choose to set up the company online, an alternative solution is to use a notary.

27 EMTAK fields of activities.
28 Commercial Code [Estonia].
29 Contact person and legal address.
30 5 steps how to start a company online.

2.1.1. Identification

The online incorporation of a company can only take place in a fully online space, without the need for a notary, if all founders, board members, etc. have a digital ID card issued under the Estonian residency programme (*e-Residency*) or an Estonian, Latvian, or Belgian ID card,[31] Estonian or Lithuanian mobile ID card,[32] and are private persons.

Under the Estonian residence scheme, you will not only receive a state-issued digital ID card, which is a digital identity document, but also a complete set of card reader, 11-digit Estonian ID code and PIN codes, ensuring more secure access to e-services. No username and password are required for use, but PIN1, which is required for the identification process itself, such as logging in, and PIN2, which is required for digital signatures[33] and payment confirmation. Otherwise, you will need to use the services of a notary office in Estonia.

The identification of the participants of the online company formation is based on Article 36 of the Act on Notaries[34] and is basically carried out in two parts: by means of a video conference connection between the notary and the participants (so-called remote authentication[35]) and simultaneously by using the participants' electronic identification devices (so-called facial recognition).[36]

The online company registration process requires the identification of the beneficial owners. The obligation to retain and collect data on beneficial ownership stems from Chapter 9 of the Prevention of Money Laundering and Terrorist Financing Act.[37] For the purposes of the said Act, a 'beneficial owner" is a natural person who, through ownership or other control, has ultimate decisive influence over a natural or legal person or in whose interest or for whose benefit or on whose behalf transactions and operations are carried out.

In the e-Company Register, it is possible to enquire about the actual owners of legal persons. After providing some information, the response to the query will indicate whether the person is indeed identified as the actual 'beneficial owner' of a legal person, but there is already a charge to view the legal person's details.

31 e-Identity.

32 e-Identity.

33 An electronic signature provided by a digital ID card is legally valid and binding and is legally equivalent to a handwritten signature.

34 Notaries Act [Estonia].

35 Remote authentication allows notarial acts to be carried out via a video call between the notary and the client. Such authentication is equivalent to authentication in a notary's office. Remote authentication is an option, not an obligation. It is up to the notary to decide whether or not a transaction can be carried out by remote authentication.

36 The Veriff Facial Recognition Program is used to identify parties performing notarial acts by remote authentication.

37 Money Laundering and Terrorist Financing Capitalization Act [Estonia].

Also, to help detect money-laundering schemes, there is a visualization tool on the e-Commerce website, which is described in more detail below.

The identification operations mentioned above are an integral part of the company formation process: the Internet platform (https://ariregister.rik.ee/eng?) specifically created for online company formation first asks for identification in the above way, depending on whether the person is an Estonian resident or a resident of a particular EU country.[38] This method can only be used if all persons involved in the incorporation (board members, founding members, supervisory board members, etc.) can digitally sign the initial registration application and incorporation documents.

If a notary is used for the registration, the notary will be identified during the offline, office, or online interaction with the participant, as the video conferencing connection allows him to see the participant he is dealing with and the details he has provided at the time of login.

During the online company formation process, the persons involved in the company formation process are responsible for preparing the company's founding document and registering it in the company register. If the company registration is carried out through a notary, the preparation and filing of the documents in the register of companies is carried out with the assistance of the notary. The notary's offices have all the model documents and templates required for the incorporation of a company.[39]

Estonian law does not provide for mandatory legal representation during the online incorporation process, but, as can be seen above, the notary as the person/body who handles the identification and the entire company registration is a significant option during the process.

2.1.2. Electronic Identification Solutions

As explained above, the identification is carried out through a dedicated web interface, available at https://www.notar.ee/et. Once the interface is opened, the landing page will display a login to the e-Notary application, where the participant will then have to choose between the options for citizen identification.[40]

(State) citizenship identity can be provided by several different identification systems. One option is identification by means of an *ID card* with an electronic chip activated for this purpose (so-called *ID-card*), in which case a card reader and a valid ID card are required. A valid Mobil-ID contract is required for logging

38 See the landing page of the web interface when you open it, where you will immediately see the login options.

39 Registering a company.

40 https://tara.ria.ee/auth/init?login_challenge=3302cfa9ad674d239a56beabcfbe1f9d (accessed: 22.04.2022).

in with a so-called *Mobile-ID*, as well as the person's ID number and telephone number. You will then receive a verification message on your mobile phone. Finally, another option is to use a *Smart-ID*, which requires a valid Smart-ID account. Once the person has provided their ID number, they will receive a verification code to use the Smart-ID application.

During the online company formation process, it is possible to use an e-ID, which does not require photo/video identification, as the e-ID stores personal data and codes that only the owner can know or confirm. However, in certain cases, identification can be based on, inter alia (see first point of the report), live image/video identification. The Notaries Act explicitly emphasizes this in Article 36(5).

As we have already seen, all Estonian citizens have a state-issued digital identity. This is the electronic identity system, the so-called e-ID/e-identity. People also use their e-ID to pay bills, vote online, retrieve health information, and that is why it can also be used when setting up a business online, for example, to sign contracts. This e-ID therefore includes ID cards, Mobile-ID, and Smart-ID.

Since 2014, people with a digital identity no longer need to be Estonian residents, as this year Estonia established the e-Residency program, under which citizens of other Member States, regardless of nationality and residence, can become Estonian e-Residents and thus access Estonia's diverse and varied digital e-services. As e-residents, they will receive a digital ID card with two PINs for secure digital identification and digital signature, as explained in point 1.

Documents created during the online incorporation process that require the signature of the participants or a notary are electronically signed (identification and the electronic signature are discussed in more detail in the previous section and questions).

2.1.3. Identification during Change Registration

Although not stated in the law, according to the information on the official Estonian websites, the portal allows electronic filing of applications for changes, liquidation, and cancellation of companies in the company register. A particular requirement is that applications must be digitally signed with the identity card when submitted.[41]

2.1.4. Machine Readability of Files

Online company formation in Estonia is designed so that people wishing to form a company do not need to obtain and submit pre-issued documents to a notary. The entire company formation process can therefore be completed from the ground

41 Registering a new company.

up using only the documents prepared during the incorporation process. On the web interface for company formation, including the application for company registration, there are ready-made templates in which some information fields are pre-filled, some have several options available so that only some data can be formatted according to the details of the company to be created. Only electronic, i.e. machine-readable documents are created during the process.

The law does not give a concrete answer to this question, but given Estonia's level of development in digitalization (see e-services), it can be concluded that when a company is established online directly through the dedicated web interface, all related documents are prepared in electronic form, no original paper copy is made available to anyone, but a paper copy can be requested later (as will be explained in the next question).

Article 28(2) of the Commercial Code states that the data and documents stored in the register of companies are available for consultation in the notary's offices or on the corresponding website (see *e-notary*). Authentic forms from the register of companies can be obtained from the notary offices. Article 69(2) of the same Act deals with access to the register of companies via a computer network. On this basis, the responsible minister may provide by decree that notaries shall provide access to the electronic register of companies through the electronic notarial information system (e-notary). In this case, any person has the right to obtain a certified extract from the register of companies from the notaries' offices. It follows that a notary acting in the course of an online incorporation is also entitled to produce a paper document from the electronic documents created during the incorporation process.

2.1.5. Formal Requirements

There is no specific answer to this question in Estonian law, but the Trade Act states that a business file must be opened for every registered business. And the documents in the business file must be originals, notarized copies or officially certified copies when they are submitted. In the case of a copy, the name and signature of the person certifying the copy and the stamp of the office must be replaced by the digital signature of the person or the digital stamp of the office. However, it underlines that in an electronic folder, the original paper, the notarially or officially certified transcript, must be replaced by a digitized document.[42]

It is clear from the wording of the Act that electronic documents are also considered to be a full-fledged form of document, on a par with paper documents.

The e-Notary systems allow individuals, as well as representatives of companies and institutions, to access notarial documents (mainly contracts, orders, requests) related to them. This system includes documents notarized in

42 Commercial Code [Estonia] 38–39§.

Estonia after 23 November 2009. Pursuant to Section 16 (1^2) of the Notaries Act, the notary is obliged to record certain specified documents in the digital notarial archive in the e-Notary Information System.[43]

In accordance with Article 28 of the Commercial Code, entries in the business register are public, and everyone has the right to obtain copies of the documents in the business file. On the e-Company Register website, several services are available to enable holders of identity cards to use them free of charge and on a rent-free basis, where applicable by contract.

There are three basic services on the site. One of these is the query, which has four methods: simple query, detailed query, written query, name query.[44]

In addition, the visualization tool provides an overview of the relationships between legal and natural persons registered in the business register and is designed to help detect money laundering schemes and patterns.[45]

Finally, the *XML service* is for users who need to perform a large number of queries in the company registry or store data in their own database.[46]

2.1.6. Platforms and Concurrency

In Estonia, there is an online platform specifically created for the purpose of starting a business online. The platform is available at https://ariregister.rik.ee/eng?.

The e-Business Register (*e-Bäriregistri*) is one of the most widely used Estonian government e-services, allowing companies to submit documents electronically without the need for a notary and to register a new company, amend registration details, apply for liquidation and for removal from the register.[47]

There are four steps to filing an application for company registration: preparation, signature, payment of state fees, and filing. The application must be signed by all persons involved in the incorporation, which is why it is important that each person has an e-ID. Thanks to e-services, several people can sign the documents remotely at the same time, so the incorporation is done simultaneously and entirely online. The steps and practical information on how to set up a company using the online platform are available at https://www.youtube.com/watch?v=WAtMzLhN2N0.

43 Notaries Act [Estonia].

44 More information on these can be found at the website https://www.rik.ee/en/e-business-registry/queries.

45 For more details, we advise the reader to see the following web interface: https://www.rik.ee/en/e-business-register/visualization-tool.

46 More information on this can be found at https://www.rik.ee/en/e-business-registry/xml-service.

47 Registering a new company.

2.1.7. Structured Filing System

Currently, this issue is regulated by the Notaries Act, more specifically Article 16. It stipulates that documents drawn up by a notary or a deputy notary are the property of the State and that a common archive has been set up to store them. These documents are therefore recorded in the digital notarial archives in the e-Notarial Information System.

The e-Notary system is an environment that supports the daily work of notaries and enables electronic communication between notaries and the state. The environment is designed with notaries in mind and allows them to do everything they need to do their job; the system also allows 16 different queries (e.g. to the Marriage Register, Official Gazette, Estonian Central Register of Securities, Building Register, Real Estate Register, Traffic Register, Land Register, Register of Succession, Population Register, Register of Recreational Craft, Register of Companies). The system is owned by the Chamber of Notaries, and the servers are managed by the Centre for Registry and Information Systems.

In order to ensure that the registration of notarial acts is carried out in a single, secure environment, the e-Notary system is only accessible to notaries and employees of the notary's office (deputy notaries, legal advisers, secretaries, receptionists, and archives staff) and is not available to the public.[48]

The trade register also facilitates the flow of information. Article 22 of the Trade Act states that the Trade Register is a database of the State Information System, and the purpose of the management of the database is to collect, store, and publish information on individual enterprises, companies, and branches of foreign companies in Estonia. The Business Register is maintained by the Registration Department of Tartu County Court (the so-called 'Registrar').

2.2. Latvia

As in many other EU countries, Latvia currently allows companies to be set up online. In order to carry out the company registration process digitally, the Republic of Latvia takes into account the work of the classical registry authority, the online platforms established at the national level, and the identification tools provided by the EU.

The procedures for the incorporation of companies are mainly regulated by the *Act on the Company Register of the Republic of Latvia*[49] (hereinafter: the Act on the Company Register) in force since 2005 and by the *Act on Trade in Latvia*[50] (hereinafter: the Act on Trade) in force since January 2002, which, as a result of

48 E-notary.

49 *Par Latvijas Republikas Uzņēmumu reģistru* [Latvian Act on the Register of Commerce].

50 *Komerclikums* [Latvian Commerce Act].

the amendments of 2021, specifically refer to compliance with the requirements of Directive 2019/1151 in certain places.

In Latvia, the Companies Register of the Republic of Latvia (*Latvijas Republikas Uzņēmumu reģistrs*)[51] is the Latvian state body that registers traders, their branches and representative offices, as well as changes to their constituent documents and performs other tasks required by law. The business register also includes mass media companies, associations and foundations, pledges, controlling interests, public–private partnership agreements, and matrimonial property agreements. It registers political parties, arbitration bodies, trade unions, religious organizations and institutions and also monitors insolvency proceedings.

Company registration procedures have been digitized and, as a result, applications for registration can be submitted electronically to the systems maintained by the Latvian Companies Registry.

A public e-service has been set up for the electronic management of various administrative procedures, including company registrations, which can be accessed via the website www.latvija.lv. In cases not covered by the e-service (e.g. e-signed documents issued abroad), the necessary information and documents must be sent via the designated e-mail address.

2.2.1. Identification

The opportunities and conditions for starting a business online in Latvia are still very rudimentary. The filing of the necessary documents for company formation requires, of course, the signature of the parties, which can be done by using a smart e-ID or e-Signature card or by using a digital electronic signature recognized by the EU, more detailed information on which is available via the website www.eparaksts.lv.

The status of the application and the correctness of the documents will be communicated to the applicant via the e-service website. The registration process also includes the obligation to verify the documents and the identity of the applicants, which is primarily the responsibility of the registration body, i.e. the Trade Registry. Identification and verification can be done in two ways: for citizens by using the data in the state databases and for foreigners by using their advanced electronic signature.

We can therefore talk about a prior checking procedure for documents. In this sense, the draft application and the supporting documents are checked before the application for registration. The State Registrar of Companies examines the documents and the authenticity of the data contained therein in accordance with the legislation applicable to the activities of the organization concerned and then informs the applicant of any errors via the website referred to above or by e-mail.

51 *Latvijas Republikas Uzņēmumu reģistrs* [Latvian Register of Commerce].

Pursuant to Article 4.4 of the Companies Registration Act, a special online form available on the website of the Companies Registry must be used for the electronic submission of the application. In order to verify the accuracy of the data provided, the Business Register uses data from the public information systems necessary for its operation. Accordingly, when identifying the natural persons involved in the online incorporation and verifying the personal data (personal status, capacity, legal status, etc.), an official of the Companies Registry checks the accuracy of the personal data in the Population Register under the supervision of the Office of Citizenship and Migration.

According to Article 9 of the Commercial Code, the documents to be filed must be authenticated in accordance with the procedures laid down in the law, i.e. in the case of traditional paper filing, notarization is required for hand signatures that identify the parties. In comparison, if the documents are provided with a secure digital signature and associated time stamp, no further notarization will be required.

In summary, when verifying a handwritten signature, the notary will check the applicant's capacity and the scope of the power of attorney of the authorized representative or agent. If the document is in electronic form and has been signed with an advanced electronic signature, the necessary verification tasks will be carried out by an officer of the court of registration.[52]

It is also important to note that public documents issued abroad must be legalized in accordance with the procedures laid down in international treaties and accompanied by a notarized translation into Latvian. Therefore, the registration will ultimately require a Latvian translation of the original documents.

In the context of the prevention of money laundering and terrorism, the business register has the statutory task of providing public access to information on the beneficial owners of legal persons established in the Member States. In doing so, it cooperates with law enforcement agencies and financial and intelligence services.[53] It also sends information on requests for registration or registration of documents in the registers to the State Tax Service, which must also have online access to the above-mentioned data on request.

As can be seen from the previous answers, Latvian law does not provide for a procedure for the identification of members, officers, and other officials involved in the online incorporation of a company that is independent of the incorporation. The verification tasks must therefore be performed entirely by the Companies Registry: they are thus left to the registrar of companies or an authorized officer of the Registry.

Latvian law does not provide for mandatory legal representation when setting up a company online. If a legal representative acts on behalf of the person

52 Latvian Commerce Act, Article 9.

53 Latvian Act on the Register of Commerce, Article 4, paragraph 14.

wishing to incorporate a company, the same rules apply as for incorporators. In this case, they will still be responsible for the authenticity of the documents and the identification of the applicants, which will continue to be handled by the company registry.

2.2.2. Electronic Identification Solutions

The identification of persons applying for registration can be done through a dedicated web portal (e-service) available at https://latvija.lv/lv/Epakalpojumi/EP119/Apraksts. The e-service is currently only available to natural persons. The identification of the person filing the documents can be done in two ways: the person involved in the company formation has to choose between the options of providing a bank identity or a civil identity.

After selecting the bank identity/identification means (currently available in nine Latvian state banks), the applicant selects his/her bank and is redirected to the bank's Internet banking login interface. The applicant can then identify themselves by entering their Internet banking login details for the online company formation.

The second option is to provide a civil/citizenship identity, which can be done through a dedicated identification system. Identification through the system, available on both computer and mobile applications (*eParaksts* and *eParaksts mobile*), can be achieved by using an ID card with an electronic chip (e-ID card or e-Signature card).

An e-ID card is an identity document that contains an e-Signature both for signing documents and for verifying a person's e-identity in the digital environment. An e-Signature can be requested on an e-Identity card from the age of 14.

The e-signature recognized in Latvia is linked to the use of an e-ID, so the applicant will need an e-ID card, which can be issued by the regional office of the Office of Citizenship and Migration or by an office abroad. Together with the card, the office will also send the applicant an envelope containing a PIN code. To use the card, you will also need a card reader and the free downloadable software eSigning (*eParakstītājs*).[54]

To sign using the eParaksts mobile smartphone application, the applicant must log in to www.mobile.eparaksts.lv. The application is also available from the age of 14 with a valid identity document issued by the Republic of Latvia, i.e. passport, identity card (except e-ID card for foreigners) or residence permit.

A third option for electronic signature identification is the use of the ePakasts card, which, unlike the e-ID card, is only available to legal persons.[55]

54 *eParaksts*/e-ID.

55 More information on how to apply for the cards is available at: https://www.eparaksts.lv/en/About_eSignature/What_is_an_eSignature (accessed: 22.04.2022).

Although the Notaries Act of 1993[56] (the 'Notaries Act'), as amended in 2018, allows notaries to perform electronic acts and issue certificates through the Notary Information System by video conference,[57] the current Latvian legislation on online company formation does not specifically address the requirement of video identification.

The website used to set up a company online does not include specific identification options for people from other Member States, so they too must choose between the identification options available to Latvian citizens or through banks.

In Latvia, electronic means of identification recognized in the EU can be used to submit documents for company registration and to avoid notarization of signatures, which can be validated through state-provided systems, as described in the answers to the questions above.

With regard to persons from other Member States, it is important to note that if the application and the documents to be attached to it are signed with a secure (qualified) electronic signature issued abroad, they can only be submitted via the e-mail address of the Trade Register (pasts@ur.gov.lv). In this case, the e-service described above cannot be used.[58]

When signing electronic documents, you must choose between the following signature formats: eDoc, PDF, or ASiC-E. The eDoc format can be selected if you need to sign a package of several documents or if there are files in other formats (e.g. if you need to sign images).

PDF is preferred if the recipient wants to use standard software – e.g. Adobe Reader – to read the signed document and verify the e-signature. The ASiC-E format should be used if the document to be signed is addressed to a national or organization of another Member State or if the document is signed by a citizen of another EU Member State. The signature format can be selected at the place where the document is signed (eparaksts.lv portal).

To summarize the previous answers, there are three ways to e-sign documents in Latvia: via the www.eparaksts.lv portal (online), using the free eSigner 3.0 program, which can be installed on a computer or phone, or via other registration systems. The validity of secure electronic signatures can also be verified through these platforms or programs. Electronically signed documents from other EU Member States (including documents signed using Latvian e- signatures) can also be verified via the European Commission's Trusted List website (https://esignature.ec.europa.eu/efda/tl-browser/#/screen/home).

56 *Notariāta likums* [Latvian Act on Notaries].

57 Latvian Act on Notaries, Article 139.

58 https://www.ur.gov.lv/lv/kontakti/ka-iesniegt-dokumentus-elektroniski/e-adrese-vai-e-pasta/dokumenti-kas-parakstiti-ar-arvalstis-izsniegtu-drosu-elektronisko-parakstu/ (accessed: 26.04.2022).

2.2.3. Identification during Change Registration

In the description of the services available via the website for online company formation, the possibility to send the documents required for the registration of changes in electronic form is specifically mentioned. As the Companies Registration Act does not contain any facilitating or specific provisions for online change registration, it can be concluded that the general identification options described so far should be applied for this type of process.

2.2.4. Machine Readability of Files

Parts of the Latvian law specifically address the validity conditions for electronic documents and electronic versions of paper documents.

The requirements for the proper design and drafting of documents and their annexes are set out in the *Procedure for the Issuing and Presentation of Documents*[59] and *Cabinet Regulation No 558 on the drafting of documents*.[60] The signature of electronic documents and their derivatives is governed by the provisions *of the Electronic Documents Act*[61] and *Cabinet Regulation No 473 of the Council of Ministers*.[62]

Electronic documents are produced by computer printing, using dedicated applications. When registering online, the documents must be prepared using the templates that can be accessed from the business registry website or from the e-services portal, which has been referred to several times so far, so that they are always machine-readable. The above rules only address the conditions relating to the validity of e-documents.

According to Title II of the Cabinet Regulation 473, e-documents must be produced in one of the formats indicated in the Regulation, which are: plain text format, Open Document format, Office Open XML file format, portable document format (PDF), or digitally compressed and encoded image format (JPEG, TIFF, PNG).

Company documents can be issued and sent to applicants by post and e-mail. As Article 5 of the Electronic Documents Act allows for the creation of copies, transcripts, or extracts of e-documents equivalent to the originals, it can be concluded that members and other participants will also receive their copies in electronic form.

According to Article 5 of the Electronic Documents Act, a paper copy, transcript, or extract of an electronic document shall have the same legal force as the original,

59 *Dokumentu juridiskā spēka likums* [Latvian Act on the Legal Force of Documents].

60 *Dokumentu izstrādāšanas un noformēšanas kārtība* [The Procedure for the Issuing and Presentation of Documents].

61 *Elektronisko dokumentu likums* [Electronic Documents Act].

62 *Elektronisko dokumentu likums* [Electronic Documents Act].

provided that the correctness of the copy, transcript, or extract is certified in accordance with the legal requirements. A paper version of an electronic document may be created only from an electronic document that is machine-readable or can be displayed in graphic form. Although conversion is not specifically provided for in the law, it would be the responsibility of the business registry issuing the company documents to make these copies after the online incorporation.

A simple printout of the e-document without certification is for information purposes only and cannot be used by the parties in other proceedings. According to Article 54 of Decree No 993 on the procedures for the drafting and design of documents,[63] when a paper copy is made, the information that cannot be reproduced on paper must be indicated on the last page of the document, after the certified inscription. Failing this, the paper copy will not be valid.

2.2.5. Formal Requirements

This problem is not specifically addressed in the Latvian legislation in force. Since the provisions described so far allow for the conversion of paper documents into electronic format, it can be concluded that if these e-documents are prepared on the basis of the legislation mentioned in point 4, and thus have the necessary legal force, then machine-readable legal documents should henceforth be recognized by all other bodies.

In Latvia, there is no mandatory legal representation for company registration tasks, so the applicant is free to choose this type of service, for which a fee is charged.

The applicant must also ensure that the documents are legally signed electronically, that the means used for signing are valid, and that the necessary valid identification documents are provided. As the verification and identification requirements will continue to apply to the founders, it will ultimately also be up to the company or the founders to ensure that the documents are in the correct format.

2.2.6. Platforms and Concurrency

The Republic of Latvia allows online company formation operations and electronic submission of documents through the e-services portal mentioned above. Since the use of e-Signatures does not require additional notarization and the authenticity of documents is verified by checking the various state registers and granting a gap period, there is no need for remote parties to be in the online space at the same time. Consequently, the tasks related to the incorporation are not performed at the same time / at the same place.

63 The Procedure for the Issuing and Presentation of Documents.

2.2.7. Structured Filing System

Pursuant to the Act on the Companies Register, the Companies Registry shall ensure the conversion of archival documents into electronic format for storage in an electronic environment, in accordance with the legislation on records management.[64] From 1 August 2021, all entries in the Companies Register will be published in the official gazette *Latvijas Vēstnesis* and in electronic form on the website of the official gazette: https://www.vestnesis.lv/english.

Entries in the Register may be relied upon against third parties only after publication in the Official Gazette *Latvijas Vēstnesis* unless the relevant information was known to the third party prior to publication. If the third party proves that it did not and could not have been aware of the published information, such information may not be relied on in relation to legal actions taken within 15 days of publication.

The Companies Register of the Republic of Latvia provides information on all registered legal entities and legal facts. Public information and documents registered in the Companies Register (articles of association, annual report, memorandum of association, rules on reduction of share capital, etc.) can be obtained online from the website of the Companies Register without verification of authenticity, immediately and free of charge.

Non-public information can be requested for a fee by submitting the information request form[65] in person or by post or by sending it as an electronic document with a secure electronic signature and digital time stamp to the Registry's e-mail address. The request must include detailed information on the payment of the fee to the Trade Register (a copy of the document proving payment or a printout of the online bank transfer). The fee for a copy of a document is EUR 9,00 for a document from the registration file and takes 3 working days to obtain; for other documents from the archives of the Trade Register it is EUR 4,5 and can be obtained within 5 working days.[66]

The Act on Electronic Documents states in Article 6(2) that the National Archives of Latvia is responsible for the management of documents intended for long-term and permanent storage and that the Archives must also ensure that the preservation and accessibility of documents is ensured in the archives of state and local government institutions.

64 Latvian Act on the Register of Commerce, Article 4, paragraph 4.
65 Request Information.
66 Copies of document.

2.3. Lithuania

In Lithuania, the registration of companies is the responsibility of the Register of Legal Entities,[67] which operates under the control and supervision of the State Registration Centre (*Registrų centras*).[68]

The Lithuanian Register of Legal Persons (*Lietuvos juridinių asmenų registras*) was established by the Lithuanian legislator by Act IX-368./2001.12.06[69] (hereinafter referred to as the Register of Legal Persons or the Register).

The following information is stored in the Register: name of the legal person, company registration number, legal form, legal status, registered office of the legal person, bodies of the legal person, members of the governing bodies (first name, surname, ID number, place of residence) and partners authorized to enter into contracts on behalf of the legal person and the extent of their rights, branches and representatives, restrictions on the activities of the legal person, expiry of the period of time for which the legal person is established, financial year, dates of amendment of documents and particulars contained in the register, information on natural persons who are authorized to enter into contracts on behalf of the legal person and other particulars required by law.

The Registry also offers, among other things, the possibility to check, free of charge, that a given name is not the same as the names used by other legal persons, branches or representatives, or the names temporarily recorded in the Registry.

In 2010, the State Registration Centre also introduced an electronic service for the establishment and registration of legal persons. The service, which does not require paper documents, relies heavily on electronic signatures based on a public key infrastructure (PKI). The electronic service for the establishment and registration of legal persons has so far been available to Lithuanian citizens, but the Registry is making great efforts to ensure equal opportunities for foreign investors. In the meantime, foreign clients are offered the *E-Guide* to start a business in Lithuania, which provides assistance with company formation and registration.

2.3.1. Identification

In order to complete the online company registration process, the applicant must first log in to the Customer Service / Self-Service System of the Registry Centre (JAREP Self Service System), which can be accessed through the following

67 *Registru Centras* [Lithuanian Register of Legal Entities].

68 Established by Resolution 742/1997 of the Government of the Republic of Lithuania of 8 July 1997.

69 *Lietuvos Respublikos juridinių asmenų registro įstatymas* [Act on the Register of Legal Entities of the Republic of Lithuania], 2001 m. birželio 12 d. No IX-368.

website: https://www.ipasas.lt/?app=savitarna. When logging in, electronic identification can be done in two ways: by using an electronic signature or by providing your bank identity through the online banking login process.

The Code of Conduct for the Registration of Legal Persons[70] (hereinafter: the Code of Conduct) does not require a notary public to certify the establishment of a company online. According to Article 6 of the Management Regulations, when the documents required for the incorporation of a company are submitted electronically, they are sent to the Registrar of Companies, who then verifies the authenticity and accuracy of the information contained therein.

Pursuant to the Decision of the Government of the Republic of Lithuania on the Prevention of Money Laundering No. VIII-275/1997,[71] as subsequently amended and supplemented, all entities established in Lithuania are obliged to obtain, update, and store accurate information on beneficiaries and to submit this information to the Lithuanian Trade Register. In this respect, therefore, the verification obligations related to the identification of officers or future members fall mainly on the Registry.

As of January 2022, a new beneficial ownership register (the *Legal Entity Beneficial Ownership Information Subsystem – JANGIS*) was launched in Lithuania. The register is currently in its initial stage, but it is now mandatory to register the beneficial owners of natural persons in companies.[72]

A member of the management board of a Lithuanian company can submit a true statement of ownership (hereinafter UBO) electronically (without a paper copy) through JANGIS or by proxy (given by the member of the management board) to be registered in the Register of Legal Persons. To access JANGIS and submit UBOs, an electronic signature certified by a qualified certificate is required (provided by *Registru Centras* or by an ID card issued by mobile operators (mobile signature) or by the Identity Document Personalization Centre).

The Lithuanian legislation currently in force does not expressly mention the requirements for the identification of the parties. Documents submitted in digital format must be accompanied by a qualified and officially recognized electronic signature. Documents uploaded through the JAREP Self-Service system are thus verified by the Registrar of Companies. It can be concluded that in this case there is no longer any need to use the services of a notary for identification tasks. The verification tasks will thus be carried out by the registrar of the Trade Register

70 *Dėl Juridinių asmenų registro tvarkymo taisyklių patvirtinimo* [Regarding the approval of the rules for managing the Register of Legal Entities].

71 Republic of Lithuania Act on the Prevention of Money Laundering and Terrorist Financing.

72 As defined in Directive (EU) 2015/849/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

as part of the company formation process and on the basis of the electronic identification means previously obtained.

The head of a legal person may authorize his or her legal representative (mainly a lawyer) to submit applications and documents to the Register of Legal Persons. If the documents are filed through a representative, the documents evidencing the representative's authorization must be submitted to the Registrar together with the other documents. A representation agreement by a lawyer is an appropriate document to prove the authorization.

If a legal representative is acting in the formation of the company, he or she is not competent to carry out the tasks of identifying the members, managers, other officers (supervisory board, auditor, etc.) involved in the formation of the company.

There is no mandatory legal representation for the company registration process, and the registrants are free to choose the legal services they wish to use. In all cases, the Registrar of Companies will carry out the verification and identification tasks.

2.3.2. Electronic Identification Solutions

As explained above, the identification is carried out through a dedicated web interface available at https://www.ipasas.lt/?app=savitarna. During the registration process, the founders can submit the necessary documents in this way electronically directly through the JAREP Self-Service system, and the first and most important requirement is that the founder has a qualified electronic signature.

There are currently three bodies in Lithuania that have issued qualified electronic signatures: the State Enterprise Registration Centre (*Registrų centras*), mobile operators (Bité. Telia, Tele2, Teledema), and the Personal Data Issuing Centre. The electroninis.lt electronic signature (*elektroninis.lt parašas*) issued by the State Enterprise Registration Centre essentially consists of two qualified *electroninis.lt* digital certificates. One is a digital certificate for personal identification, which is an electronic proof of identity. It links the electronic signature verification data to the signatory and confirms or allows the signatory's identity. The other is a digital signature certificate, which ensures the validity of the data signed with an electronic signature and protects it against forgery.

As a consequence, it can be stated that the electronic signature has three important roles: identification for e-services, signing of electronic documents on the website https://www.gosign.lt/en/, and approval of financial transactions in e-banking.[73]

As regards the bank identity, the savings account for the payment of the share capital can be opened electronically at Luminor, Citadele, Swedbank, SEB, LKU,

73 What are the uses of elektroninis.lt?

Siauliu Bankas, and Medicinos Bankas. In order to access the self-service customer support system and use e-services for company registration through banks, an electronic application must be submitted to the respective bank. The contract for the savings account issued by the bank employee must be accompanied by a qualified electronic signature. After the signature, the bank informs the e-service system of the Registry Centre of the concluded contract and the amount of money transferred to the savings account. If all requirements are met, it will be possible to proceed with the company registration.

As described above, identification is available through a dedicated web interface, which does not provide any separate image or video identification options at login other than the different signature formats or bank identity.

Following in Estonia's footsteps, in January 2021, the Republic of Lithuania also launched an e-Residency program, which is largely based on the Estonian model. The program is designed to facilitate access to public administration, government and commercial services electronically for all e-residents, regardless of nationality or place of residence. As it is a fairly recent and embryonic program, it currently only provides non-Lithuanian citizens with a digital identity and electronic signature tools to access e-services.[74]

The e-Accession application can be filled in via the Lithuanian Migration Information System and then submitted to the Ministry of Migration via an external service provider of your choice. Within 4 months from the date of filling in the application, the person must also appear in person by presenting a valid travel document that meets the identification requirements set out in the Act of the Republic of Lithuania on Prevention of Money Laundering and Terrorist Financing, providing biometric data to prove his/her identity (face and two fingerprints), and presenting a document authorizing him/her to stay in the Republic of Lithuania if the application is submitted by a foreigner subject to visa requirements.[75]

Article 6 of the Code of Conduct, already referred to in the first answer, requires that documents used to set up a company online must be accompanied by a certified qualified electronic signature.

2.3.3. Identification during Change Registration

Electronic changes to company data are possible only for citizens of the Republic of Lithuania or foreigners who have an identity document issued in accordance with the procedure laid down in the legislation of the Republic of Lithuania and a qualified electronic signature.[76]

74 E-Residency in Lithuania: All You Need to Know.
75 Migration Department under the Ministry of the Interior of the Republic of Lithuania.
76 https://info.registrucentras.lt/node/904 (accessed: 28.04.2022).

If the manager of the legal person does not have or cannot obtain a qualified electronic signature, the electronic amendment request may be submitted by a person authorized by the manager and holding a qualified electronic signature. There are three ways in which the head of the legal person can grant an authorization: electronically via the electronic self-service of the Registry, by post, or in person at the Customer Service Department. In each case, a fee of €7.26 is payable for the registration of the authorization.[77]

Documents submitted by a legal person via the electronic self-service system of the Registry Centre may also be submitted electronically to the notary, provided that certain conditions are met. More information on these can be found on the website https://www.registrucentras.lt/p/171. The modification of data by electronic means varies in most cases depending on the data that the person wishes to modify, but there are some constant requests: JAR forms[78] and electronic signature. For example, there is a separate procedure for changing the name of a legal entity,[79] its registered office,[80] and its contact details.[81]

2.3.4. Machine Readability of Files

Since the JAREP self-service system automatically generates the documents required for the incorporation of a company (the articles of association, the statutes, the list of shareholders, the application for registration in the register of legal persons) after the completion of the predefined electronic forms (JAR-5-E electronic forms), these are always generated in a machine-readable format.

Based on the provisions of the Regulation on the Approval of the Registration of Legal Entities adopted by the Lithuanian Government,[82] the State Enterprise Registration Centre (hereinafter: The Registry Manager) provides data, information, copies, and duplicates of the stored electronic documents to the applicants, at the same time realizing the interoperability of the Registry with other registers, state information systems, and classifiers and transmitting and receiving data to and from them in accordance with the provisions and agreements stipulated in the regulations and agreements of the registers, state information systems, and classifiers.

When setting up a company online, documents are prepared electronically. They are available to both members and participants through the JAREP Self-Service system, so no paper copies are made ex officio. Consequently, participants

77 https://www.registrucentras.lt/p/459 (accessed: 26.04.2022).
78 https://www.registrucentras.lt/p/49 (accessed: on 26.04.2022).
79 https://info.registrucentras.lt/node/724 (accessed: 26.04.2022).
80 https://info.registrucentras.lt/node/549 (accessed: 26.04.2022).
81 https://info.registrucentras.lt/node/784 (accessed: 26.04.2022).
82 *Dėl Juridinių asmenų registro nuostatų patvirtinimo* [Regarding the approval of the provisions of the Register of Legal Entities].

can also access their own copies online, i.e. in the form in which they were issued electronically by the registration system.

After the Registrar of the Registry has entered amendments to the data or information concerning legal persons in the Registry, these amendments will be published no later than the next working day and will also be published on the electronic bulletin board on the day of their registration. Pursuant to Article 4.262 of the Lithuanian Civil Code,[83] the data entered in the Public Register shall be deemed to be correct and complete.

If the legal person was created electronically, or its articles of association were amended through the self-service system (statutes, bylaws), the founding documents and other company documents stored in the JAREP Self-Service system can be accessed and printed by the person requesting registration (founder joining as a natural person), the managing director, or other person authorized to provide electronic data and sign documents.

Upon request, the Register of Legal Persons issues different types of company extracts such as short, basic, extended, extended with historical extracts, and electronically certified extracts. An electronic certified extract (ESI) from the Register of Legal Entities is an official document that must be accepted as a valid document by anyone in the online space. The ESI must be issued free of charge to newly registered legal entities. The ESI (access key) will be issued for a fixed fee (EUR 1.92) subject to exceptions set out in the law. The ESI verification system should allow for the free verification of the legal entity's current data and information by indicating the access key (code) provided. Third parties (public authorities, banks, etc.) who receive an access key from the legal entity can no longer require the company to submit a paper company certificate, as a document signed with a secure electronic signature has the same legal effect as a written document.

If the legal person has been registered electronically, or its articles of association have been amended through the electronic application of the Registry Centre,[84] the documents stored in the system can be accessed and printed by the founders or the managing director. The application will show all the documents submitted during the incorporation of the legal person, but simply printed documents will not be considered as the original document.[85] Thus, an electronic document can be printed for personal use and for non-binding official information, but in this case it must first be saved in PDF format.

The conversion of electronic documents to paper is governed by the state recommendations on printing copies and extracts of electronic documents,[86] and

83 *Lietuvos Respublikos civilinis kodeksas* [Civil Code of the Republic of Lithuania]. Žin., 2000, No 74-2262; 200.

84 https://www.registrucentras.lt/savitarna/ (accessed: 27.04.2022).

85 https://info.registrucentras.lt/node/649 (accessed: 27.04.2022).

86 https://info.registrucentras.lt/node/649 (accessed: 27.04.2022).

parts of the Lithuanian Document Preparation Rules,[87] which are referred to in the document several times. These only deal with the content of the documents to be created, not with the persons authorized to issue them. As the fees for the provision of information in paper form are specifically indicated on the website of the Trade Register (https://www.registrucentras.lt/p/45), it can be concluded that electronic documents may be produced by an official of the Trade Register in paper form for a fee.

2.3.5. Formal Requirements

Thanks to the *elektroninis.lt* digital signature mentioned in the second point, there is no longer any need to go from one authority to another with paper documents. State and local authorities will have to accept electronically signed and submitted documents in the same way as paper documents. Article 5(4) of the Act on Electronic Transactions in Electronic Identification and Trust Services of the Republic of Lithuania[88] states that a digital document signed by an electronic signature of a company representative has the same legal force and effect as a document printed on paper and signed in handwriting with an official stamp. In all cases, the documents to be uploaded must be saved in PDF format.[89]

The data and information from the Register of Legal Persons are provided by the State Central Register for a predetermined public fee.[90]

The Register of Legal Persons may issue original copies of company documents in both paper and electronic form, the latter being machine-readable documents.

Data is provided in XML and JSON (machine-readable) formats for automated processing. For this purpose, the requesting company must conclude a data contract with the State Central Registry and acquire the software to receive the data in order to facilitate the long-term permanent provision of data.

2.3.6. Platforms and Currency

Certain tasks related to the online incorporation of a company can be carried out by remote parties by logging into an online interface. For example, if an electronically registered legal entity is established at a registered office/establishment not owned by the founder, the owner of the property must confirm electronically his/her consent to the transfer of the registered office/establishment to the resulting legal entity – when registering the legal entity, the founder must

87 https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.403753/asr (accessed: 27.04.2022).

88 *Lietuvos Respublikos elektroninės atpažinties ir elektroninių operacijų patikimumo užtikrinimo paslaugų įstatymas* [Act of the Republic of Lithuania on Electronic Identification and Reliability Assurance Services of Electronic Transactions].

89 https://info.registrucentras.lt/content/24915 (accessed: 28.04.2022).

90 https://www.registrucentras.lt/p/45_(accessed: 28.04.2022).

indicate the person provide the details of the person selected. In this case, the system will generate the document *Consent to the Provision of Premises for the Legal Entity's Registered Office*. The owner of the real estate connected to the JAREP Self-Service system will receive the completed consent form (*Consent to the Provision of Premises for the Registered Office of a Legal Person*), which he/she must sign electronically by selecting Register of legal persons → My documents. Once the owner has confirmed his/her consent electronically, the founder of the legal person will be notified by e-mail. The founder may proceed with the registration of the company only after the owner of the property has given his consent.[91]

When carrying out the necessary operations for the online incorporation, participating members have the possibility to sign the electronically issued articles of association electronically in the JAREP Self-Service system. Simultaneity in this form only applies to the signing of documents. Further verification of the documents, identification of the parties, possible completions, and registration of the company will take place at different times.

2.3.7. Structured Filing System

The storage of documents registered in the Register and the exchange of data with other systems is governed by the *Rules on the Registration of Legal Persons*[92] (hereinafter: the Rules). Pursuant to Article 13 of the Code, the Registry is responsible for ensuring compliance with the data management obligations set out in Regulation (EU) 2016/679 and for fulfilling the tasks set out in the Act on the Management of State Information Resources.

In addition, the Rules specifically provide that the registry administrator is responsible for ensuring the security of data, information, and documents and for the interaction of the Registry with other registries and public information systems. Furthermore, according to Article 13(6), the registry administrator is required to create and enter into the Registry the data, information, and any copies of electronic documents stored in the registry systems. He is also required to ensure the archiving of the registry data and to make the data series thus compiled available to the Lithuanian open data portals using the State Data Management Information System.

To be continued in Issue No. 2023/2 of Acta Universitatis Sapientiae, Legal Studies.

91 https://linden.lt/startup/imones-steigimas/steigimas-rc-savitarnos-sistemoje/ (accessed: 28.04.2022).

92 *Dėl Juridinių asmenų registro nuostatų patvirtinimo* [Regarding the approval of the provisions of the Register of Legal Entities].

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*** *Dėl Juridinių asmenų registro nuostatų patvirtinimo* [Regarding the approval of the provisions of the Register of Legal Entities]. No. 1292, 2015-12-09, paskelbta TAR 2015-12-17, i. k. 2015-19870, 2003 m. lapkričio 12 d. No. 1407. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.221119?jfwid=rivwzvpvg (accessed: 26.04.2022).
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Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 167–182

DOI: 10.47745/AUSLEG.2023.12.1.10

Management Skills and Vocational Training as Tools for Economic Development in the Hungarian Economic Chamber Movement

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Abstract. Our public discourse today and our image of the rule of law as a civil state is shaped by the presence of organizations based on direct citizen participation and their involvement in public affairs. Particularly important is the role played by institutions representing professional groups and economic circles, especially chambers. At the same time, however, we know very little about what exactly these institutions do, what their obligations and powers tend to be, and what their historical roots and genesis are. In order to approach the subject, it is important to point out that the historical development of these organizations was marked as early as in the 19th century by the emergence of a certain line of thought, the principle of subsidiarity, and self-government. The chambers saw themselves as an organization established by law to manage their own affairs autonomously, to represent the interests of their members, and to take over certain tasks and powers from the public administration in their own professional field. From the very beginning, chambers in our region were set up with compulsory membership and had, in addition to their interest articulation function, mainly an advisory role. In representing the general interests of commerce and industry, the chamber was entitled to submit proposals for the improvement of laws relating to trade and industry, to participate in the establishment of tariffs, to make personal proposals for the appointment of trade diplomats, and to prepare statements and reports for the government. In the later bourgeois period, the scope of activities became even more focused on advocacy work. All this brought with it the need to disseminate modern technical achievements and knowledge as widely as possible. Thus, from its beginnings, the Hungarian economic chamber movement became one of the most important proponents of Western models. This article attempts to show how the Hungarian economic chamber system (the chambers of commerce and industry and later the chambers of agriculture) supported and aided the spread of modern management ideas and how much they contributed to the cause of civic engagement, development and progress by performing educational tasks.

Keywords: Chambers of Commerce and Industry, Chambers of Agriculture, self-government, management, education, vocational training, Kingdom of Hungary

1. Background to the Chamber of Commerce Movement

The history of the chambers of commerce in the Carpathian Basin has been documented by scholarly research since the time of Napoleon.[1] After an initial French influence, first an Austrian Council of Ministers decree of 1848 and then, in the spirit of punitive 'uniformization', centralization and reform of public administration, a decree issued by Baron Karl Ludwig Bruck, Minister of Trade, based on an imperial patent in 1850, provided for the establishment of a system of economic chambers on the territory of the Kingdom of Hungary.[2]

From the outset, the economic chambers were established in our region with compulsory membership and an advisory function in addition to the articulation of interests. In representing the general interests of trade and industry, the chambers were entitled to submit proposals for the improvement of laws relating to trade and industry, to participate in the establishment of tariffs, to make personal proposals for the appointment of trade diplomats, and to prepare statements and reports for the government. These organizations were financed by a compulsory chamber fee levied on their membership, with some subsidies from the central budget, and became semi-official and semi-autonomous bodies.[3]

The Austro–Hungarian Compromise of 1867 not only led to the re-regulation of chambers of commerce but also to the expansion of the chamber movement and the grouping of certain liberal professions in chambers. The period was also characterized by a greater degree of autonomy and a reduction in the almost oppressive presence of the state in the operation of chambers, which had previously been a feature of neo-absolutism. In terms of the scope of activities, the focus was on advocacy work, while the professional administrative character was somewhat relegated to the background.

With Act VI of 1868, the principle of general and compulsory representation of interests was retained, and the 'functional self-government organizations' became institutions with the nature of a public authority, advising, reporting, giving opinions, taking initiatives, and submitting proposals on their own.[4] During Gábor Baross's time as Minister of Infrastructure Affairs (1886–1889) and

1 See in detail: Fritz 1896, Szávay 1927, Strausz–Zachar 2008, Zachar 2016.

2 *1850. március 18-i királyi pátens* [Royal Patent of 18 March 1850]. See Gergely 2005. 517–527.

3 Sárközy 1967. 55–61.

4 In German legal history, the term 'functional self-government' is used to describe public bodies of chambers which have compulsory membership, manage their own affairs autonomously but also take on public administrative functions. Kluth 1997.

as Minister of Trade (1889–1892), there was a great deal of cooperation with the government on the regulation of the new law on industry and trade. It was also the time when the number of chambers of commerce and industry reached its highest level.[5] In addition to annual reports and statistics for the Ministry of Trade, the chambers were required to keep a register of trademarks and samples, check company registrations, and issue certificates of origin for goods. At the same time, they became important organizations for reconciling interests, giving opinions, and formulating proposals for economic development, and they were also sensitive to the changes and challenges of the era of liberal capitalism.[6]

During the time of the dual monarchy, however, the Hungarian chamber system – compared to other Habsburg-ruled territories and other European countries – could not develop to its full potential. Until 1918, only two other chamber organizations were set up in Hungary in addition to the chambers of commerce and industry: the first chamber for the liberal professions was the chamber of attorneys at law (the Bar), and at the same time the chamber of notaries was created. The newly established organizations, which were based on compulsory membership, became the main functional self-governing bodies of the two legal professions. As with the chambers of commerce and industry, they remained regional organizations without a national umbrella organization. The Bar of the period was responsible for safeguarding the moral authority of the legal profession, defending the interests of attorneys at law, monitoring the performance of their duties, providing legal services to its members, remedying problems affecting the legal profession, expressing opinions and submitting proposals for the introduction of reforms, and dealing with disciplinary matters.[7] Its activities have also included representing the interests of the membership and, to a lesser extent, examining wider issues of justice and suggesting ways of remedying perceived problems. In contrast, the autonomy and activity of the notaries' bodies, beyond their self-organization, did not play a major role in the era.[8]

The chamber system thus created was modified, further developed, and expanded after the difficult period of 1918–1919 with the consolidation of the counter-revolutionary system. The Horthy era – in contrast to the efforts of the revolutionary period of 1918–1919 – saw in many respects a continuation of the Hungarian traditions of the 19th century, in which the development and expansion of the chamber system, reflecting the liberal concept of the bourgeois-

5 The chambers of the period were organized with the following centres: Budapest, Bratislava (*Pozsony*), Sopron (*Ödenburg*), Kassa (*Kosice*), Debrecen, Temesvár (*Timişoara*), Kolozsvár (*Cluj-Napoca*), Brassó (*Braşov*), Rijeka (*Fiume* – 1850–1868), Arad (1872), Zagreb, Zengg, Osijek (*Eszék* – 1876), Miskolc (1880), Pécs (1881), Szeged, Győr (*Raab*), Banská Bystrica (*Besztercebánya*), Oradea (*Nagyvárad*), Târgu-Mureş (*Marosvásárhely* – 1890).

6 Szávay 1927. 64–65; Zachar 2004. 97–113.

7 Cserba 2000.

8 Strausz–Zachar 2009. 295–340.

led economy, was initially promoted and supported. It can be concluded that the emerging economic and professional chambers became a factor in the social, economic, and sometimes even political life of the time and had to be taken into account in political decision-making. Their task was to assist the government in its legislative work by providing professional advice and proposals, to promote the social development of the professional group they represented, to ensure the relationship between the represented social group and the political leadership, and, above all, to represent professional interests. Thus, in the bourgeois era, chambers became important vehicles for promoting social welfare for the group represented. Their activities demonstrated their ability to cooperate with the government while keeping the interests of the business community they represented constantly in mind. Their tasks and the main elements of their structure continued to be governed by of Act VI of 1868, a framework which was amended only on certain points by Act XX of 1934. The centralizing tendencies that prevailed in general during the period did not escape the chamber's attention, and the supervising Minister of Commerce became more and more present in the daily life of the economic chambers.[9] This centralization was accompanied by the recognition by the chambers that 'they could only achieve their objectives in cooperation with a government that was more powerful than they were, and therefore in most cases they sought cooperation rather than confrontation.[10]

This latter observation can also be applied to the new functional self-governments that emerged in the field of agriculture. In 1920, after lengthy preparatory work, the Act on the Representation of Agricultural Interests (Act XVIII of 1920) was passed, which added new elements to the chamber system. A three-tier system was established for the representation of agricultural interests: the agricultural committees in the municipalities, districts, towns, and counties delegated their members to the five district agricultural chambers,[11] whose proposals were forwarded to the Ministry of Agriculture by a central umbrella body: the National Chamber of Agriculture. Recent analyses show that the agricultural interest groups have always remained in close contact with the state authorities, which indicates their limited room for manoeuvre and their limited possibilities.[12]

In spite of centralization efforts and the overlap between the economic chambers and the political elite, the functional bodies have not become 'handmaidens of

9 Strausz 2009. 62–64.

10 Strausz 2009. 65.

11 Due to the legal framework, five district representative bodies were created, based in Kecskemét, Debrecen, Miskolc, Győr, and Kaposvár. This division of the chambers was later modified with the temporary return of the Upper Hungarian, Subcarpathian, Transylvanian, and Southern Hungarian regions: the Kisalföld Agricultural Chamber was created from parts of the North Transdanubian Agricultural Chamber and the returning Upper Hungarian counties, and in 1940 the Subcarpathian agricultural representation was established. See: Strausz 2004. 63–80.

12 Strausz–Zachar 2009. 295–340.

politics'. Through their independent initiatives and their autonomous activities, which had an impact on a broad section of society, the economic chambers have always sought to maintain and, where possible, even extend their autonomy. Through the work of the chambers of commerce and industry and the chambers of agriculture, Hungarian society was enriched in the period between the two world wars by a number of elements which still stand before us today as exemplary initiatives. Among these, vocational education and the development and transfer of knowledge in the business sector played a central role. It is therefore worth taking a look at the achievements of the chamber movement in the field of business education and management skills.

2. The Economic Chambers and Management Education

The history of chambers of commerce is intertwined with the development of bourgeois society and modern economic conditions from the very beginning. Economic liberalism (inspired by the Anglo-Saxon model) and the idea of self-government (inspired by the philosophy of Lorenz von Stein) brought with them the need to disseminate modern technical achievements and knowledge as widely as possible. Thus, from its beginnings, the Hungarian Economic Chamber movement became one of the most important proponents of Western models in the period. This was already reflected in the professional self-organizations that could be seen as the precursors of the chambers. Voluntary trade associations operating in the heart of the country from the very beginning of the 18th century, such as the Buda Privileged (1699) and Pest Civil (1700) merchants' bodies, the Székesfehérvár Trade Committee (1714) and the Body of Merchants and Sutlers (1822), were closely following the changes in the economy.[13] Following the example of the Hamburg Commercial Academy and later the Vienna Real School, they encouraged the organization of courses and regular training and the establishment of similar training centres in Hungary. The first permanent institutions were the Collegium Oeconomicum in Szenc (*Senec*, now in Slovakia), followed by Selmecbánya (*Banská Štiavnica*, in Slovakia) Academy, while the first modern institution of this kind, the First Open Commercial Education Institute (*Erste Öffentliche Commerzial-Bildungsanstalt*), known also as the 'Bibanco Institute' after its founder, was established in Pest in 1830.[14] These institutions were staffed by academics trained in similar workshops in Western Europe on the one hand and by economic and commercial specialists from the field on the other.

The real breakthrough, however, came in 1844, when King Ferdinand V ordered the establishment of a Hungarian institute of higher education, modelled on the

13 Finánczy 1899. 199–204.
14 Antal–Baksa 2013. 25–42.

Vienna Polytechnic, which had been established in the Austrian capital in 1816. The institution, which had a one-year preparatory course and a two-year regular course of study, offered not only technical and natural science courses in German but also separate courses in agriculture and commerce, which were discontinued in 1856, when the institution was reorganized. From then on, it continued to operate under the name of the Imperial and Royal Joseph Polytechnic until 1871, when it was upgraded to university status.[15]

In the context of the abolition of economic and commercial vocational education, one of the most prominent figures of Hungarian trade organizations, József Appiano, the first President of the Pest-Buda Chamber of Commerce and Industry, who was also the President of the Royal Board of Privileged Wholesalers of Pest, repeatedly called for the establishment of a permanent institution of higher economic education. This is how the trade school of Miklós Röser was founded on private initiative in 1853. This, however, could only meet the needs of the time, so József Appiano, who was certainly familiar with the similar courses offered by the Öffentliche Handelslehranstalt in Leipzig in addition to the Viennese training centres, worked out the plans for the new institution together with the commercial and economic teachers of the school of applied sciences on the one hand and with Lajos Rósa, the Secretary of the Pest Chamber of Commerce, and the board of wholesalers on the other. Pest-Buda Trade Academy was finally opened on 1 November 1857 with the permission of the Viceregal Council and became one of the most important precursors of modern Hungarian higher education in economics.[16] The Chamber of Commerce of Pest-Buda always tried to do a great deal to promote the operation of this private school: in addition to the above, Ferenc Heinrich, the Vice-President of the Chamber, was particularly involved in the teaching and running of the Handelsakademie.[17] After the compromise of 1867, István Gorove, Minister of Agriculture, Industry, and Trade, supported the construction of a school building, the inauguration of which was celebrated in 1885 by Ágost Trefort, Minister of Religion and Public Education. In 1899, the institution underwent a major transformation to meet the needs of the time and, with the addition of the Royal Hungarian Academy of Eastern Trade, became the first (foreign) trade college in the Central European region, including the Austro–Hungarian Empire.[18] In addition to the future leaders of Hungarian business life, it also trained the specialists of the period in international trade and Austro–Hungarian banking for foreign service.

After the turn of the century, the realization of an effective higher education in economics became an increasingly important issue in Hungary. The economic

15 Mihalik–Szögi–Zsidi 2004. 5–36.
16 Szögi 1995. 5–47.
17 Domanovszky 1907.
18 Bricht 1896. 13–30.

crisis of the previous decades and the emergence of modern business and management skills played a role in this. Thus, after the turn of the century, the Budapest Chamber of Commerce and Industry tried to keep the issue on the agenda with a series of debates, and from 1905 onwards held regular expert meetings to draw up reform proposals. The Chamber's reform proposal was initiated by Antal Székács, who also addressed the issue in a separate pamphlet.[19] It is particularly interesting that Hungarian professional circles were familiar with Western management trends from the very beginning and even discussed them in internal debates, so as early as 1912, on the initiative of Kálmán Méhely, regular discussion evenings were organized with the participation of university lecturers and economists on the ideas and first works of Frederick Winslow Taylor, who was considered the founder of the new discipline of management.[20]

In addition to the creation of higher education, the chambers also focused on the development of the organizational framework for lower and secondary vocational education in industry in order to ensure the provision of adequate supplies. The Budapest Chamber constantly monitored the development of apprenticeships, craft training, industrial vocational schools, industrial colleges, and industrial arts education. Chamber members have also played a role as examiners and master teachers in these institutions. In addition, several chambers in Hungary have set up scholarships for talented and hard-working students and have also regularly provided financial support to individual institutions.[21] In addition, the establishment of workshops in certain industries, the issue of teachers, and the organization of industrial training courses were also constantly on the agenda in the proposals made to the government.

Already at this time, the creation of a general national trade fair was on the agenda, which, following the Millennium Exhibition of 1896, would present the achievements of Hungarian industry and innovations in the region annually.[22]

However, the political crises that followed the turn of the century, the Great War and the revolutionary events of 1918–1919 did not allow for further construction either in the field of economic development or in the more limited field of economic and commercial education. Thus, the issues that had been left unresolved, in particular the university of economics, the resolution to the question of the fair, which was by then expanding into an international fair, and the reform of vocational education, could only be resumed after 1920 in a completely altered context and with completely different opportunities. Their resolution therefore led to protracted and serious controversies. At the same time, the newly created Faculty of Economics at the University of Pest was already

19 Székács 1903.
20 Strausz 2013. 9–24.
21 Szávay 1927. 449–450.
22 Zachar 2006. 267–272.

an intellectual workshop, integrating the knowledge accumulated under the previous academic system and at the same time seeking to meet the most modern training needs of the time. In this spirit, one focus of education was clearly on the functioning of enterprises, including various aspects of corporate management, the so-called private economics.[23]

In the period between the two world wars, the activities of the Chamber of Commerce movement in the field of vocational education were essentially aligned with the vocational programmes launched by the Minister of Education, Kunó Klebelsberg. Thus, as a new element, both the chambers of commerce and industry and the newly created chambers of agriculture set up foundations to support talented apprentices and students and to finance study trips abroad for the most gifted students. The most spectacular initiative in this respect, and one that was praised on several occasions during the period, was the 50,000 Hungarian Pengő Foundation set up by the Budapest Chamber of Commerce and Industry at the Hungarian Academy of Sciences. Its endowment capital ensured that interest was paid annually to the author of the study who, in the opinion of the jury, had done the most to promote trade in the year in question.[24]

In addition, the development of vocational education was supported through a series of scholarships and prizes for the best students of industrial vocational schools and trade schools for boys and girls. Even in 1940, the last year of peace in Hungary, the Budapest Chamber supported 33 students of 13 industrial vocational schools with a scholarship of 100 Hungarian pengő each.[25] And the chamber similarly financed the best 40 students of the boys' and girls' trade schools in Budapest. Even during the war years, the chamber continued to set aside substantial sums of money to support vocational training in commerce, providing 10,000 pengő in 1943 and 13,000 pengő in 1944.[26] In 1945, the chamber planned to spend 18,000 pengő. However, wartime inflation and the suppression of Hungarian independence in March 1944 meant that these plans could not be implemented.[27]

This shows that the chambers continued to support the network of trade schools in accordance with their original creed and mission even under the altered state structure and also issued numerous publications and continued the system of professional evenings and workshops to improve the skills of those involved in

23 Antal–Baksa 2013. 29–30.

24 Resolution of the General Assembly of the Budapest Chamber of Commerce and Industry of 18 May 1937. *Kamarai Közlöny* [Official Journal of the Chambers] 1937.

25 Magyar Nemzeti Levéltár Országos Levéltára [National Archives of the Hungarian National Archives], (henceforth: MNL OL) Z 198 2. cs. 7. t. (A kereskedelmi szakoktatás [Specialized Education for Commerce] 1941–1943).

26 MNL OL Z 198 2. cs. 7. t. (A kereskedelmi szakoktatás [Specialized Education for Commerce] 1941–1943).

27 MNL OL Z 198 2. cs. 7. t. (A kereskedelmi szakoktatás [Specialized Education for Commerce] 1941–1943).

trade and agriculture. To this end, libraries were set up in the headquarters of each chamber. The most important collection in Hungary was that of the Chamber of Commerce and Industry in the capital: after the First World War, it had 40,000 volumes, but from 1925 it was opened in a larger space and with a more modern layout, while ten years later it had a collection of 54,000 volumes.[28] In addition to the central library, the Budapest Chamber of Commerce also developed the network of specialized libraries of the trade associations and continuously supported the apprentices' homes, the development of office technology in vocational schools, and the expansion of school libraries and classrooms under a separate budget heading. (In 1942, the last regular budget year, the Chamber spent nearly 9,000 pengő on these issues in Budapest.)[29]

All these activities were part of a larger concept that can be understood as a real agenda: looking at the whole spectrum of activities, we can attribute a major role to the chambers in the field of economic development and economic organization. In the period between the two wars, they did their utmost – through technical development, innovation, and regional development – to revitalize and modernize a mutilated country and played a prominent role in the economic reintegration of the territories that returned after 1938 and their effective integration into the Hungarian economic process.[30] The development of the Budapest International Fair, which was of major importance for economic life, was successfully organized before the Great Depression, and the Hungarian Week was also established to enhance Hungary's international position. The chambers also launched the National Credit Protection Association in 1926 and initiated other welfare measures. In all these activities, they never forgot the importance of education and vocational training, discussing and disseminating new best practices and international trends at home.

Similarly, progressive initiatives with significant social benefits can be found in the newly launched agricultural chambers. Innovation has often produced even more spectacular results than in the case of the Chambers of Commerce and Industry. Thus, the various chambers of agriculture have launched very successful businesses (diagnostic stations, small-scale horticulture, model orchards, etc.) aimed at creating financial autonomy. They have helped to establish new agricultural crops (such as sand vines in the lowlands or new apple orchards) and to speed up the mechanization of agriculture. They also set up their own credit organization, which distributed millions in subsidies each year. In the field of education and training, they set up a school for garden workers, held winter schools for farmers, tried to

28 MNL OL Z 193. A Budapesti Kereskedelmi és Iparkamara iratai [Papers of the Budapest Chamber of Commerce and Industry]. 50. d. 43. t.

29 MNL OL Z 198 2. cs. 7. t. (A kereskedelmi szakoktatás [Specialized Education for Commerce] 1941–1943).

30 See in detail: Strausz 2006. 261–267.

provide Hungarian farmers with up-to-date professional information through their own official journals and periodicals, and even played an active role in keeping the farm issue on the agenda and launching the so-called people's college movement. They also managed to set up a workers' welfare fund and build workers' homes.[31] All this shows that for the chambers, their activities did not stop at preparing and participating in policy making but that they have reached out to the most diverse levels of public life and have moved beyond their narrow professional sphere to create welfare initiatives for the society as a whole.

Among the agricultural interest groups, the Duna-Tisza Interfluve Chamber of Agriculture appears to be the most prominent in the field of educational development. The first major investment was made by the Chamber in Kecskemét in 1929, where it spent more than 11,000 pengő to set up a modern school for garden workers in the model orchard and to finance the living costs of 17–24-year-old students (more than 8,000 pengő per year).[32] During the two-year – in today's parlance: dual – training period, the students not only received free board and lodging but also some payment for practical work on the model farm after the theoretical training. During its existence, the institution has always had a high enrolment rate, as graduates were easily employable, highly sought after by the various estates, and the business itself was profitable.[33] In later years, the success of the initiative was also demonstrated by the fact that the establishment of a network of schools for garden workers had become part of a government programme by 1939.[34]

The Duna-Tisza Interfluve Chamber of Agriculture also played a major role in the people's college movement: in 1932, it supported the establishment of Pilis People's College, of which the director of the chamber, László Gesztelyi Nagy, was an enthusiastic supporter throughout. It was a special institution because its training was planned for a three-year cycle, and it sought to recruit students only from the surrounding area and not nationally. This college was complemented by a system of winter economic schools, which provided two five-month courses to train specialized farmers.[35] In addition, both the Duna-Tisza Interfluve Chamber and the

31 Strausz 2008. 150–155.

32 Pintér 1983. 429–432.

33 *A DTMK számvevő bizottságának 1930. május 3-i jelentése* [Report of the Chamber Audit Committee of 3 May 1930]. Magyar Nemzeti Levéltár Bács-Kiskun megyei Levéltára [County Archives of Bács-Kiskun in the Hungarian National Archives] (henceforth: MNL BKML) IX. 234. a. A Duna-Tisza közi Mezőgazdasági Kamara iratai – Általános iratok [Papers of the Duna-Tisza Interfluve Chamber of Agriculture – General Papers]. 1. d. DTMK közgyűlési jegyzőkönyvek, 1922–1944 [Minutes of the General Assemblies of the Chamber of Agriculture for the Area between the Danube and the Tisza 1922–1944].

34 Speech by László Gesztelyi Nagy, Director of the Chamber. Minutes of the General Assembly of 18 November 1939. MNL BKML IX. 234. a. A Duna-Tisza közi Mezőgazdasági Kamara iratai – Általános iratok [Papers of the Duna-Tisza Interfluve Chamber of Agriculture – General Papers]. 1. d. DTMK közgyűlési jegyzőkönyvek, 1922–1944 [Minutes of the General Assemblies of the Duna-Tisza Interfluve Chamber of Agriculture 1922–1944].

35 Pintér 1983. 424–425.

other agricultural chambers launched throughout the country regularly organized specialized lectures on specific topical issues, short courses on innovative methods, and practical demonstrations. The series of conferences on farms, also organized by the above-mentioned László Gesztelyi Nagy, the director of the chamber, was of particular importance in the era. The event took place in several locations (Szeged, Szentes, Kiskundorozsma), and every year, in addition to the results achieved, the agenda included the most pressing issues of the day. The different topics and lectures were also regularly reported on in the columns of the Magyar Róna, the chamber's journal, which also served to disseminate information.

It is also worth mentioning that the Trans-Tisza (*Tiszántúl*) Chamber of Agriculture organized the first national exhibition on meadow and pasture farming in Hungary, where poultry and sheep farming adapted to modern conditions was presented, and the possibilities of improving saline and sandy soils were also discussed.[36]

The Chambers of Agriculture, like the Chambers of Commerce and Industry, have also used their own income to set up foundations to support talented young people in need and have regularly funded projects, which have proved to be a pioneering initiative in the chambers' field. They have also worked to uplift and develop the region through these activities. Recent analyses show that agricultural advocacy organizations could achieve this especially because of their close contacts with state authorities. The main reason for this can be found in the fact that the ordinary members of the agricultural chambers included the mayors of the towns with jurisdiction, the deputy mayors of the district counties, and from 1937 onwards the heads of the county economic inspectorates and a delegate from each of the military staff councils. Another important reason can be seen in the fact that the presidents of the district chambers – who performed their mainly representative duties without remuneration – were almost exclusively members of the landed aristocracy. For example, the presidents of the Trans-Tisza (Tiszántúl) Chamber of Agriculture included Count Imre Almássy, Count Miklós Kállay, later Prime Minister and Minister of Agriculture, and Baron László Vay and István Losonczy, both of whom later left to take up high government positions. And the post of President of the Duna-Tisza Interfluve Chamber of Agriculture was held for a time by the Governor's relative, Emil Purgly, who later also became Minister of Agriculture.[37]

The restoration of the bicameral Hungarian National Assembly in 1926 marked an extraordinary change in the life of the chambers. With Act XXII of 1926, the Upper House of the National Assembly was reinstated as a successor to the House of Peers operating at the time in the Austro–Hungarian Monarchy. The Upper House also became an important forum for the operation of chambers: six members of the Chamber of Agriculture, six members of the Chamber of Commerce and Industry,

36 Strausz 2008. 154.
37 Újlaky 1978. 599.

two members of the Bar and of the Chamber of Engineers, and one member of the Chamber of Notaries were made *ex officio* members of the Upper House. (Later, the newly formed chambers of medical professions were also allowed to delegate members.) Here too, of course, the chambers' activities were primarily geared to the interests of the group they represented, and so they often found themselves in conflict with each other on certain issues. In addition, for each professional organization, there were always one or two persons connected with the chamber who had been appointed by the will of the governor to be a member of the Upper House in perpetuity so that their intercession and assistance could be counted on even in social and educational questions.[38]

3. Summary Outlook

It is clear from what has been said above that the Hungarian chambers with real autonomy throughout the entire civil era – even in the oftentimes difficult circumstances following the Treaty of Versailles (known as Trianon in Hungarian historiography) – tried with all their might to appear in as many forums of social life as possible, to represent the interests of their members with the appropriate weight. In this way, these organizations became important players in the economic and social reconciliation of interests in the 19th and 20th centuries. As we have seen, the function of the chambers was complex: they helped the government to better understand the economic and professional sphere in question, to solve its problems, and in the interests of efficiency and cost reduction, they relieved the state administration of certain specialized professional tasks. They had not only the right but also the duty to represent the interests of their members before the government, to represent the professional consensus, which could contribute to the promotion of the common interests of the country, the development of the economy, and the dissemination of modern knowledge. Their most important tool in this respect was the right to participate in the preparation of relevant draft legislation, but over time a number of other forums have developed in which chambers have been able to articulate their own interests. However, they could not have fulfilled these two functions if they had neglected their primary duty: the internal balancing of interests between the groups that make up the chamber. Indeed, the only way to be successful in the 'outside world' was to have the support of the majority of its members.

This articulation of interests was often hampered by the centralizing tendencies of the government and the better lobbying skills of certain circles, as well as by personal contacts and the existence or lack of financial resources. Nonetheless, it can be said that chambers' organizations, based on self-government and autonomy,

38 Zachar 2013. 141–159.

which stem from classical liberal thinking, have fulfilled their tasks properly and to the benefit not only of the profession but of the society as a whole, as long as they have been able to do so. In this respect, their decades of activity in the field of education and vocational training were of particular importance, helping to promote the spread of modern technologies and Western business organization and management skills in our country.

The end days of the chamber movement coincided with the end of civil Hungary: first, the troops of the National Socialist Third Reich invaded the country on 19 March 1944, and then the troops of the internationalist Communist Soviet Union took power. Thus, a return to civil values and institutions at the end of the war became almost impossible. From the beginning, there was an aspiration to build a permanent political, social, and economic institution on the Soviet model, and this model stiffly rejected any self-governing organization in the name of powerful centralization. This aspiration became more and more prominent with the growing dominance of the Communist Party. As a result, in the case of the chambers of commerce and industry, the scheduled chamber elections were repeatedly postponed and then never took place. Although several memoranda were issued by some of the chambers on the need for economic advocacy work and interest representation and their future role and place in the socialist economy, even these efforts proved insufficient to keep these fundamental institutions of self-government alive after 80 years of development. In parallel with the establishment of the Stalinist-style one-party system, the proletarian dictatorship under Mátyás Rákosi also carried out a transformation of property relations. As early as November 1947, the big banks and the shares of the industrial and commercial companies they represented were nationalized, followed by the nationalization of factories employing more than 100 workers in February 1948 and of medium-sized enterprises in March 1948. With this move, state ownership became dominant in industry. With the increasing nationalization and the final seizure of power by the communists in the rigged elections of 1947, the most traditional chamber autonomies were dissolved: with government decree no. 5590/1948, the chambers of commerce and industry were finally consigned to history for several decades. The administrative tasks previously performed by the chambers were taken over by state bodies again, and the activities of the advocacy organization were subsequently handed over to other trade and industry representative bodies.

Based on the experience discussed in the previous section, the chambers of agriculture could not avoid, of course, Soviet-style restructuring after 1945. Already in July 1945, the Prime Minister's Decree No. 4.660/1945. M. E. provided for the possibility of abolishing the self-governance of these chambers and for appointing ministerial commissioners at their head. Although this did not happen, the chambers were dissolved the following year by Decree No. 24.070/1946. M.

E. They were replaced – in accordance with the Soviet system – by agricultural councils, which were given a national central organ, the National Agricultural Council, in Budapest. The restauration of the traditional chambers could only begin in parallel to the period of the regime change.

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