The Mandatory and Default Regulation in Hungarian Company Law – A Decade of Experience

by

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The option to deviate from a legal provision has been problematic for company law. The theoretical background of legislation is rooted in the interpretative models of company law: the investor model favouring the interests of its members (shareholder theory) and a contractual model which takes into account the stakeholders in the business relationship with the company (stakeholder theory). This article reflects on the development of the regulation's nature of Hungarian company law; the legislator implemented a fundamental change in the central element to the governance of company law in 2013. After the modification of central regulation concept of Hungarian company law, the role of the judiciary shifted to the classification of the different default-mandatory rules. This article investigates the development of the new company law regulations concept, and the related judicial practice, and also approaches the topic from the view of interests (of creditors, employees and members), striving to create a coherent dogmatic system.

Keywords: default rule, mandatory rule, imperative rule, creditor's interest, Hungarian company law

Table of Contents ECFR 2023, 314–335

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1. Introduction

The option to deviate from a legal provision is an important regulatory issue in company law; the relationship between the parties is basically contractual.[1] From an economic perspective, there is a dividing line for the legislator to identify: the protection of creditors, employers or other stakeholders between the proper ratios of the autonomy of the members, and safe turnover. One solution to this is the allowance for default rules. Members can adapt the operating provisions of the company to their own needs.

According to the *The Anatomy of Corporate Law*, the major part of company law consists of default rule.[2] However, finding the best option to provide alternatives for a legal provision and offer a default regulation for parties is different in national law and its jurisdictions. The United States and United Kingdom favor default rules, whereas the German system allows for the application of mandatory-default provision for legal forms of corporations.[3] In Central and Eastern Europe, the legislator uses different methods to secure the contractual freedom in company law, first between all between members of the company: the legislator either uses a list for the default rules[4], or uses semi mandatory rule as a bridge between the optimal solution,[5] or sets the basic framework for the deviation of the legal provisions.[6]

In this respect, Hungarian company law, as set down by the HCC must stay competitive. Such problems in company law are similar in several countries, to which the Hungarian regulative endeavor could well add an interesting contri-

1 *John Armour/Henry Hansmann/Reinier Kraakman/Mariana Pargendler*, What is Corporate Law?, in: Reinier Kraakman/John Armour/Paul Davies/Luca Enriques/Henry Hansmann/Gerard Hertig/Klaus Hopt/Hideki Kanda/Mariana Pargendler/Wolf-Georg Ringe/Edward Rock (ed.), The Anatomy of Corporate Law, 3rd ed., 2017, p. 17.

2 *Armour/Hansmann et al.* (fn. 1), p. 19.

3 *Klaus J. Hopt,* "Directors' Duties and Shareholders' Rights in the European Union: Mandatory and/or Default Rules?", ECGI Working Paper Series in Law 312 (2016), 4–5.

4 E.g. Slovakia: *Barbora Grabličková/Mária Patakyová*, "Mandatory and Default Regulation in the Slovak Commercial Law", Bratislava Law Review 1 (2020), 93–112.

5 E.g. Poland: *Bartłomiej Gliniecki*, "Mandatory and Default Rules in Polish Company Law", Bratislava Law Review 1 (2020), 71–78.

6 E.g. Czech Republic: *Kateřina Eichlerová*, "Mandatory and Default Regulation in Company Law in the Czech Republic", Bratislava Law Review 1 (2020), 47–60.

bution. The Hungarian legislators implemented a fundamental change in the central element of the governance of company law in 2013. After the modification of central regulation concept of Hungarian company law, the role of the judiciary has been shifted to the classification of the different default-mandatory rules. The aim of this article to summarize and evaulate the results of the last decade in connection with the default regulation of the Hungarian company law.

2. *The Introduction of Default Regulation into the Hungarian Company Law and the Judicial Interpretation*

This paper shows the structure of Section 3:4 of the Hungarian Civil Code (hereinafter HCC), which defines the nature of the regulation of legal persons.[7] After the adoption of the HCC, this rule has induced both justified, and unjustified polemic. The comprehensive reconstruction of the HCC even treated this rule as a separate question in 2016. It asked whether it was necessary to modify Section 3:4 HCC, and so stipulate that if the legislator should consider modifying the regulation, how it should happen.[8] Finally, the legislator didn't modify Section 3:4 HCC. Judicial decisions since, have shown that the judicial practice has been capable of dealing with this specific decree. Naturally, points

7 Act V 2013 on the Civil Code, the official English translation of the Hungarian Civil Code is available on the following link: https://njt.hu/jogszabaly/en/2013-5-00-00 Se ction 3:4 HCC [Freedom of establishing legal persons] (1) Persons may freely decide to establish a legal person by means of a contract, a deed of foundation or articles of association (hereinafter jointly "instrument of incorporation") and may determine themselves the organizational structure and operating rules of the legal person. (2) In the instrume nt of incorporation, the members and founders of the legal person may derogate from the provisions of this Act relating to legal persons when regulating their relations with each other and to the legal person, as well as the organizational structure and operating rules of the legal person, except as provided in paragraph (3). (3) The members and the founders of a legal person shall not derogate from the provisions of this Act if the derogation a) is prohibited by this Act; or b) manifestly violates the rights of the creditors, employees or a minority of members of the legal person, or prevents the effective supervision of the lawful operation of legal persons.

8 According to Balázs Bodzási, prior to the amending of the HCC, it must be examined, whether the legislator should change the main rule (i.e.: Sec. 3:4 HCC), in regard of which the majority opinion of the professional committee designated by the Ministry of Justice, cited that „by now, there is no point in amending it", yet the possibility to diverge needs to be expounded. In parallel with this, however, it also came up that it has to be defined which particular rules shall allow for any divergence within book III, and which shall not. See: *Balázs Bodzási*, "Az új Ptk. esetleges módosításairól", Magyar Jog 4 (2016), 65, 69 et seq.

of dispute remain, but neither the development of the legal system, nor this rule in company law have become deprived of content, an empty decree, yet it can indeed be acknowledged as a real step taken towards private autonomy.[9] On the basis of Section 3:4 HCC, the members and founders of a legal person may diverge from the rules applicable to legal persons declared by the decrees of the HCC, within the memorandum of association, in extension of regulating their relationship between one another and with the legal person, and also in the course of regulating the organization and the operation of the legal person, except if (a) prohibited by the HCC; or (b) in case the divergence shall manifest violate the rights of the creditors, the employees, or the minority of the members; or (c) in case it shall hinder the exercising of the supervision over legal persons in terms of their lawful operation.[10]

2.1. The Convergent Opinions in the Literature

According to the ministerial exposition to the HCC, the HCC alters the starting point of the previous BA[11] when it „adopts the regulative starting point to permit divergence (default), instead of the mandatory fundamental."[12] The ministerial exposition stipulates that even with the most exhaustive regulation, it is not feasible for the HCC to introduce the entirety of each bans, and the norms demanding unconditional prevalence, and for this reason, the general rules are necessitated so as to determine those cases, when any divergence from the HCC is prohibited. The ministerial exposition of the HCC, however, does explicitly highlight that the intention of the legislator is to stipulate that the founders should not set their obligations which are linked to a company or each other (typically in a shareholder agreement). Instead of the memorandum of association. Judicial practice declared that the deviation from the HCC (or the previous acts of business associations) may only in the memorandum of associations.[13] The exposition of HCC predicts that during the initial period after the HCC has taken effect, certain challenges are anticipated to with respect on the application of law. These challenges are to be resolved ultimately

9 It is important, that this rule in the HCC is in force for all legal persons (association, foundation, cooperative, grouping), but this present study is exclusively exploring the aspects of company law.

10 Section 3:4 (2)–(3) HCC.

11 Act IV of 2006 on the business associations (hereinafter referred to as: BA).

12 For the conceptual reasons to the definitions of state intervention and legal norms, see: the ministerial exposition of the Hungarian Civil Code.

13 ÍH 2017. 65. (Decision of the High Court of Appeal Budapest).

via judicial practice.[14] According to András Kisfaludi, the default regulation is deemed to offer the opportunity for those individuals, who shall establish themselves as legal persons, to formulate the operational rules and the framework to the legal person, adjusted to their requirements.[15]

An intense debate has evolved in legal literature regarding Section 3:4 of the HCC. In several studies, Tamás Sárközy (the leading professor to the codifications of the previous acts on business associations) presented an account of arguments deriving from the judicial practice, and relating to the subject of legal rules, against the reason for the obligation to sustain the supremacy of the rule of cogency, in connection to legal persons.[16] After the adoption of the HCC, the semi-professional debate inadequately first proclaimed the principle of an overall non-mandatory regulation. Since then, it stated the implementation of the non-mandatory rules disclosed in Book 3 of the HCC, yet, quite a number of concepts have emerged, that contradict, alter, and undermine the application of law.

The overall non-mandatory regulation, in our opinion, is a *contra legem* interpretation, for the members (founders) may derogate from the sections of HCC only in extension of regulating their relationship between one another, and with the legal person, and in the course of regulating their organization and operation. By applying multiple-step process aims, this paper highlights those rules that members and founders have disregarded.

The first step asks: "Does the HCC prohibit any divergence" secondly, "Can the rule, which we intend to disregard, be encapsulated in a legal exception. Per step one, thirdly, it asks, "How does one examine each individual criterion granting particular privilege?"[17] This is not an easy task when one considers a given set of the exceptions, evokes such elementary queries. These queries complicate the simple qualification of cases in practice.

There is also a related question whether the judges of the firm court can evaluate the situations at the time of the incorporation particularly in regard of any derogations that violate the interests of the creditors, employees, and minority

14 The exposition to Act V of 2013; *András Kisfaludi*, A jogi személy létesítése, in: Lajos Vékás/ Péter Gárdos (eds.), A Polgári Törvénykönyv magyarázatokkal, 2013, p. 85–92, p. 86–87.

15 *András Kisfaludi,* A jogi személy létesítése, in: Lajos Vékás/Péter Gárdos (eds.), Kommentár a Polgári Törvénykönyvhöz, 2014, p. 211.

16 *Tamás Sárközy*, "A gazdasági jog és az új Polgári Törvénykönyv", Gazdaság és Jog 3 (2012), 3–7., *Tamás Sárközy*, "Az új Ptk. jogi személy könyvéről", Jodományi Közlöny 2013, 461–469., *Tamás Sárközy*, "Még egyszer a Ptk. jogi személy könyve állítólagos diszpozitivitásáról", Gazdaság és Jog 11 (2015), 8–13.

17 *Kisfaludi*, in: Vékás/Gárdos (eds.) Kommentár (fn. 14), p. 213–214.

members to the legal person, or are likely to hinder the exercising of efficient supervision over legal persons.

Not all provisions of HCC are mandatory or default, but only those that fall within the above regulatory relations. One can, nevertheless, oversimplify the question, by claiming that the default ruling only applies to the operation of the business association's internal organization. Hence, one can reach a false conclusion as the default ruling is non-prevailing against third persons in an extrinsic legal relationship, the application of permissive norms in the intrinsic relations of the company is concordant with, what is more – agreeing with Zoltán Csehi[18] – it is indeed consummating the principle of private autonomy. If a question emerges relating to the enforcement of rights or sanctioning the company, that can only be handled through the organization-structure, by either the deprivation of the company's property loss, or the termination' of the business association. The organization as one of the criteria prescribed for the legal persons, ensures the execution of eligible actions to be taken in the interest of the company. Within the system of criteria on the legal persons, the (stable) organization is one of its principles, yet by adopting the concept of Zoltán Csehi,[19] we can identify the company ultimately, with its organization structure. From this aspect, however, it is not only limited to being the sole internal problem of the company, whether it chooses to apply non-mandatory ruling or not, but it also extends to being a vigorous and quintessential query, with respect to the protection of the creditors' rights.

2.2. „Default or Not Default, That is the Question"

A number of judicial interpretations connect to the general principle of individuals. Persons may freely decide to establish a legal person by a contract (a deed of foundation or articles of association; altogether "instrument of incorporation"), and may determine themselves to be the organizational structure and operating rules of the legal entity.[20] The court has not established a mandate in the event of the foundation of a limited liability company under the HCC or the increase of its capital. The deadline for the settlement of the arrears of the monetary deposit is determined by the foundation deed and the respective provision of the general assembly in excess of two years, because the

18 *Zoltán Csehi*, A jogi személyek szabályozása az új magyar Polgári Törvénykönyvben, in: Réka Gondosné Pusztahelyi (ed.), Jogi személyek a Polgári Törvénykönyvben – Miskolci konferenciák 2012-2013, p. 45, p. 68–70.

19 *Csehi, Zoltán/Szabó, Marianna* (eds.), A vezető tisztségviselő felelőssége, 2015, p. 9.

20 Section 3:4 (1) HCC.

HCC is unspecified the closing of the deadline period.[21] The main rule declares the option to diverge from the rules on the organization and operation.[22] On the basis of the decisions published to date by the judicial practice, private autonomy can, in fact, be interpreted loosely, based on the HCC

2.2.1. As one example of the freedom of organizational structure is no burden, a limited liability company defines its own internal organizational-structure in such form, that its operational directing organ be not a singular person executive officer (managing director), but the board of directors.[23] The court derived the board form of managing directorship from the general rules on legal persons, and since none of the decrees to the HCC prohibits that such an organ be called as 'board of directors', and neither does this infringe any rights as proclaimed by Section 3:4 HCC, thus the application of this expression is lawful. This prescription is applied not only to companies: the decision-making body of the association is the general assembly, and further possibility is granted for the operation of an assembly of representatives instead of the general assembly. Nevertheless, these two may not be combined, for this reason, a „general assembly of representatives" may not be formed.[24] The prescriptions for the executive officers, too, belong to the organizational rules, from among which the court has – in our view, disputably – reconfirmed that resolution of the secondary court, according to which the executive officer may be elected for an unlimited time.[25]

2.2.2. There are examples of diverging from the rules on the operation:

– the Curia (Hungarian Supreme Court) has reconfirmed the legal provision of HCC on ordering the mandatory public disclosure of the stock-book – that had also been approved earlier by the Constitutional Court of Hungary as constitutional –, which is for the protection of creditors and providing for market trust;[26]

21 BDT 2015. 3383. (Casebook of the Courts).

22 Section 3:4 (2) HCC: In the instrument of incorporation, the members and founders of the legal person may derogate from the provisions of this Act relating to legal persons when regulating their relations with each other and to the legal person, as well as the organizational structure and operating rules of the legal person...

23 BDT 2015. 3272. (Casebook of the Courts).

24 BDT 2015. 3386. (Casebook of the Courts).

25 PJD 2018. 23. (Decision of the Civil Division of Court).

26 BH 2017. 124. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).; related to the case, see: *Ádám Auer*, "'A gép forog' – Kógens társasági jogi szabályok a Ptk. előtt és után", Polgári Jog 12 (2017), 1–9.

– in another case the court has recognized the possibility for the separate regulation in terms of the rightful business-share, in respect of the given lack of a prohibitive decree of law thereto;[27]

– in connection to the payout of the dividend, the court accurately explained the margins of mandatory and non-mandatory by proclaiming that the business-share, as demonstrating the degree of the entirety of rights and obligations bound to the core deposit, is in congruence with the core deposits supplied by the members, it is declared as a non-mandatory rule.[28]

2.3. The Interpretation of the Exceptions to the Main Rule

The new concept also protects special interests, which act as a „general clause". A deviation would be possible, but the derogation is still unlawful if it harms a special interest. Such interests include creditors, employees, minorities, or oversight of legitimate operations.[29] However the concept protects the interests that company law is supposed to balance through default rules as well.

2.3.1. The notion of creditor is among the exceptions under Section 3:4 to the HCC is rather complex, yet it has been applied in company law, generally. The notion, appearing in several places within the HCC, carries various contents as well. However, in the field of insolvency proceedings, a different group of subjects are considered as creditors. It can only be decided case by case, who can be considered as a creditor. For this particular reason, during the examination of the memorandum of association, it is almost completely impossible to define the general notion for the creditor. It is expressed in the procedures for termination with and without succession, that one should work with differentiated notions for the creditor. Equally important, regarding the examples of a creditor of groups of companies,[30] or the decreasing of the share capital, it can be

27 PJD 2017.8. (Decision of the Civil Division of Court).

28 ÍH 2015. 76. (Decision of the High Court of Appeal).

29 Section 3:4 (3) HCC: The members and the founders of a legal person shall not derogate from the provisions of this Act if the derogation *a)* is prohibited by this Act; or *b)* manifestly violates the rights of the creditors, employees or a minority of members of the legal person, or prevents the effective supervision of the lawful operation of legal persons.

30 Sec 3:52 HCC [Rights of members and creditors of controlled companies] (1) The members of a legal person joining a group of companies as a controlled member may demand, within a term of preclusion of thirty days following the second publication of the notice on the formation of the group, that their shares be purchased by the controlling member at the market value prevailing at the time of the notice being published. (2) The creditor having, at the time of the first publication of the notice, a claim against a controlled

identified in terms of the creditor's rights.[31] It is questionable, which decisions of the company shall not interfere with the creditors' rights. While the restructuring of its property, the amendments of its competency rules – although in an abstract way – shall create opportunities for injuring the creditors' interests. Based on this approach, 'the protection of creditors' does not refer to the concrete individual notions for creditors, but in our view, properly, to the abstract system of the protection of creditors.[32]

2.3.2. Most of the rights of the employees are not contained in the HCC; however, from those that are contained within,[33] one can quite determine a framework for their application. The HCC inflicts mandatory rules with respect to the employee's participation, within the business associations[34], and regarding the employee's share, the Act has substantially implemented guarantee rules to apply.[35] However, it is relevant to consider the taxonomical reasoning, as the employment of the employees is only possible in the case of already registered companies. We maintain it is an unrealistic expectation from the court, that it should recognize an agreement distorting the rights of the employees in the foundation deed, already. The employees can simultaneously be considered as part of a nominated interest group, and – originating from the liquidation pro-

member participating in the group of companies may claim adequate security from that controlled member within a term of preclusion of thirty days following the second publication of the notice. The creditor shall not be entitled to claim security if he has a sufficiently secured claim under a statutory provision or a contract, or if such security is unjustified in the light of the economic standing of the controlled member or the content of the control contract. (3) A group of companies may be registered only if all rightful claims of the members and creditors of the controlled legal persons have been satisfied, or if in the related legal dispute the court dismissed the action of the members or creditors with a final and binding effect.

31 E.g. Sec 3:313 HCC security to be requested during the decrease of the share capital.

32 BH 2017. 124. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).

33 See: *Kisfaludi,* in: Vékás/Gárdos (eds.), Kommentár (fn. 14), p. 213–214.

34 Civil Code 3:127, Section 3:127 [Prohibition of derogation] Any provision of the instrument of incorporation prescribing rules more detrimental for employee representatives than those set out in this Act on employee participation shall be null and void.

35 Civil Code 3:236, Section 3:236 [Issue of employee shares] (1) Companies limited by shares may issue, free of charge or at a reduced price below the nominal value of the share, employee shares for its full-time and part-time employees. (2) In the event the articles of association attaches current dividend preference rights to employee shares, employees may exercise such rights following the holders of shares belonging to a class of shares granting current dividend preference rights. (3) Employee shares may be offered on the occasion of the increase of the share capital of a company limited by shares and for up to fifteen per cent of the increased share capital only.

ceeding – as creditors, too.[36] Actually, all property-related decisions are: insofar as harming the interests of the creditors, harming indirectly the interests of the employees as well.

2.3.3. Different rules apply also to the minority, inherently with privileged surplus rights. The injury of minority rights has occurred in several cases of the judicial practice. In Hungarian company law, minority rights are granted to members who hold at least 5% of the votes (1% in the case of public company limited by shares).[37] It is questionable whether minority means members entitled to exercise minority rights or not. According to a judicial decision, the members excluded the decree of the HCC in their memorandum of association, which prohibits the affected member from exercising his voting right in specific situations.[38] In the published case, the court formulated the resolution, which in as much as the decrees on the prohibition of the affected member become unrealized (in the given case, this member had 86% of the voting rights), the minority rights can get injured accordingly. If, indeed, the affected member is also allowed to draw a decision relating to himself, then the minority will fail to be in the position to efficiently enforce their own rights. The court declared, that the causes for this prohibition proclaimed in HCC are mandatory rules, the exclusion thereof would qualify as an injury to the minority's rights. The court[39] examined it separately, whether the memorandum of association must be modified, by declaring that if the company shall leave the memorandum of association unchanged, then the rules defined by the previous company law ought to be matched against the decrees of the HCC.

It is the act of matching the HCC, upon the mere result of what can be determined, whether the given foundation deed is in congruence with the HCC, or not. In the decision, the members failed to modify the memorandum of association, thus the provision-making capability of the general assembly to the limited liability company, in congruence with the previous Act on Business

36 Cf. in respect of the costs of liquidation, 57. § to Act IL of 1991.

37 Section 3:103-106, 3:266 HCC.

38 Szegedi Ítélőtábla Gf.30304/2015/8. (Decision of the High Court of Appeal), Section 3:19 (2) HCC. When adopting a resolution, no vote shall be cast by those: a) who, by the resolution, would be exempted from an obligation or responsibility or would gain certain other kind of advantage to the detriment of the legal person, b) with whom, according to the resolution, a contract would have to be concluded; c) against whom, according to the resolution, legal action would have to be brought; d) whose relative, being neither a member nor a founder of the legal person, has a vested interest in the resolution; e) who have a relationship based on majority control with an organization having a vested interest in the resolution; or f) who are personally interested in the resolution.

39 ÍH 2018. 30. (Decision of the High Court of Appeal).

Associations,[40] was to be calculated on the basis of half of the share capital. Nevertheless, the court pointed to the preceding decree is not in congruence with the mandatory rules of the HCC. More precisely, the BA decreed the provision-making capability of the general assembly in an either-or manner, in respect of either at least half of the share capital, or alongside representing the majority of the entire number of votes that can be submitted.

According to the HCC, the provision-making capability is bound by the participation of those, who possess the right for voting, if they are representing more than half of the entire number of votes.[41] As the right for voting shall not necessarily align with the degree of the share capital, the court proclaimed that the preceding rule is not congruent with the HCC, and so, it does unequivocally harm the rights of the minority. From the judicial practice, it can be concluded that the notion of 'minority' is not being identified with the instruments for the protection of the minority presented in the HCC. That is to say, it is not identified with the minority, representing at least 5% of the votes, but with a rather abstract group of the members instead, who can be regarded as a minority from the aspect of the decisions and the operation. The court established that deviation from the HCC is prohibited in relation to the payment of dividends (interim dividends). The aim of these rules is to protect creditors. Yet, according to the court, there is no burden whatsoever to the members, within their own interrelated relationships. With respect to the payout of the dividend, it may deviate in a degree that is equivalent to the rates of the share capital.[42]

3. The Positioning and the Relevance of Default Ruling Within the Regulation of Company Law

The parties may diverge from the default rules, and these types of rules shall only set the legal relationship between them, if the parties did not specifically agree (mutually, on a particular content different from the legal rule) otherwise. The default ruling, however, as a particular type of a legal rule, is not of a company law-, but of an obligational-, a contractual legal category.[43] According to the Book 6 of the HCC on Obligations, the parties, with their concordant intent, may deviate from the common rules of obligations, as far as their rights and obligations are concerned, provided that such divergence is not prohibited

40 Act IV of 2006 on the business associations (BA) (fn. 11).

41 Section 3:191 HCC.

42 ÍH 2015. 76. (Decision of the High Court of Appeal).

43 *David Gibbs-Kneller/David Gindis/Derek Whayman*, "Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms", European Business Organizations Law Review 2022, 573–601.

by HCC.[44] The memorandum of association is one such type of a contract, which bears the capacity of creating a legal subject (organizational function), and arranging the internal relations of the members, an economy-systematizing function.[45] It is not required to separately prove that this form of a contract is different from the contracts on the exchange of goods, thus peculiar problems may arise, and also it must endure the interactions from other branches of law, first and foremost from the public law, the reason for this being justified by public order, and the protection of the creditors.[46] So, in the instance of the memorandum of association – as a contract – the application of default ruling also arises. However, due to the interfering of other legal branches, and the rules safeguarding a complex system of interests, the general possibility to diverge may not be implemented unconditionally and generally.[47]

3.1. Before the Default or Mandatory Rule: Imperative Norm

Mandatory is one such rule to be declared, which does not allow for any divergence from it with unanimous will, and distinguished from this, imperative norms are those, that do not even allow a legal rule any exception. As a result, they demand unconditional realization. In this regard, at the decision of the nature of legal provision[48] we can find several contradicting court decisions drawn up in company law:

a) the regulation for the right for voting in a general assembly, when the business association deviate from the concerning HCC rule, and it limits the voting right e.g. no vote shall be cast by those against whom, according to the resolution of the general meeting, legal action would have been taught;[49] the rule of HCC with the limits of voting rights is either a cogent[50] or a default[51] type.

44 Section 6:1 (3) HCC.

45 *Tekla Papp* (ed.), Társasági jog, 2011, p. 54.; *Paul Davies*, Introduction to Company Law, 2nd edn., 2010, p. 9, p. 14.

46 Singular components of this can certainly be observed in other areas of civil law, as well: for example in relation to the authenticity of the real-estate registry, the invalidity of a contractual agreement clashing with a legal rule.

47 Not only the Civil Code may prescribe a decree prohibiting non-mandatory ruling, where it expressly prohibits any deviation from the singular rules, but other legal rules as well, like sectoral legal norms applicable to particular economic activities.

48 *Leszek Dziuba,* Gestaltungsfreiheit im ungarischen GmbH-Recht, 2021, p. 489–492.

49 Sections 3 :18-19 HCC.

50 ÍH 2017. 147. (Decision of the High Court of Appeal Budapest); BDT 2018. 3828. (Casebook of the Courts).

51 DÍT Cgf. III. 05–15-000014/2. (Decision of the High Court of Appeal Debrecen).

b) of what nature should that legal relation be, which is governing the acts of the manager (who is an employee with task to direct the continuous operation of the company on the basis of the executive officer's instructions)?:[52] should it be within the framework of an employment relationship or of an engagement-type of a contract?[53]

c) in connection with the initial capital (gezeichnete Kapital) and the core deposit (capital contribution, Stammeinlage) of a limited liability company: how many core deposits and business shares is a member of a limited liability company entitled to own: one[54] or more?[55] The judicial decisions delivered before the new Hungarian Civil Code declared that each member was only entitled to have one core deposit and one business share;[56] nowadays, such court decisions and opinions[57] are encountered, according to which one member of the limited liability company may own more core deposits and more business shares: the new modification of HCC, the Act XCV of 2021 decided this question and provided that the member may have more core deposits and also more business shares (but he is still considered a member vis-à-vis the company).[58]

In addition to these examples, there are provisions in the HCC which legal practice determines cogent: the rule of the amendment of the memorandum of association[59] provides that any amendment that would harm the rights of some members or make their status more onerous shall be decided by all members unanimously, it based on the protection of the minority.[60] The judicial practice also qualified the selling of the business share[61] from the aspect of the protection of the creditors,[62] as a mandatory rule. It ensured the transparency, legal certainty and legality of the sales process (on auction). Similarly, the rule for

52 Section 3:113 HCC.
53 Civil divisional court session on 21–23 May 2014.
54 Civil divisional court session on 21–23 May 2014.
55 ÍH 2017. 30. (Decision of the High Court of Appeal Debrecen).
56 BDT 2004. 939. (Casebook of the Courts); 3/2009. (VI. 24.) PK vélemény (Opinion of Civil Division of Curia); *Emőd Veress*, "Report from Hungary: Is it possible to issue bearer shares in Hungary? Remarks on mandatory and default rules in Hungarian Company La"", European Company Law Journal 3 (2019), 119.
57 *Lajos Vékás*, "A diszpozitív szabályozás elve és az elv kérdőjelei a gyakorlatba", Magyar Jog 7–8 (2018), 385, 391; *Mariann Dzsula*, "Miért kógens a diszpozitív?", Céghírnök 2 (2014), 3, 5; *Veress*, (fn. 56), 120.
58 Sections 3:161 (2) and 3: 164 (3) HCC.
59 Section 3:102 (3) HCC.
60 BDT 2017. 366. (Casebook of the Courts).
61 Sections 3:177–181 HCC.
62 BDT 2016. 3568. (Casebook of the Courts).

access to data recorded in the register of shareholders is also mandatory,[63] on the basis of the protection of the non-members.[64]

3.2. The Aim of Default Rules in the Structure of the Private Law Regulation

The next two features of non-mandatory ruling: non-mandatory rules possess a role of gap-filling, if the parties should fail to include provisions regarding a specific legal institution, this way, the rule shall prevail in the absence of such provisions. These rules are of model-worthy provided that the parties opt to apply them. Then, the detailed rules are available in the statute.[65] The following rules of HCC are considered as default in the interpretation of the courts

a) the executive officer(s) may also be a member(s) of the board of directors in the case of the limited liability company[66] despite that the HCC does not know this organ at the limited liability company; [67]

b) the auxiliary service may only be performed personally,[68] however, this auxiliary service can be a contribution fulfilled in cash (over the core deposit), and the term for the fulfillment of this obligation may be limited,[69] or the auxiliary service may be performed not only on the grounds of a membership relation, but also within the framework of an employment relation;[70]

c) the Hungarian Civil Code provides the definition of the business share[71] – as the entirety of all rights and obligations relating to capital contributions

63 Section 3:247 HCC.

64 BH 2017. 124. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).

65 See for instance the legal institution of provision-making without holding a session in the Civil Code, Section 3:20 HCC.

66 BDT 2015. 30. (Casebook of the Courts).

67 Section 3:196 [Management] (1) The management of a company shall be provided for by one or more managing directors.

68 Section 3:182 [Auxiliary services] (1) If the member shall perform any actions of personal involvement in the company's activities in the absence of a particular legal relationship to cover this, any compensation in return for such action performed may be requested in accordance with the respective provisions of the company's memorandum of association. The company may only be entitled to enforce demands against its member for failing to perform such actions of personal involvement, on condition that it is ensured by the memorandum of association.

69 BDT 2019. 4057. (Casebook of the Courts).

70 Kúria Mfv. 10.362/2017/3. (Decision of Curia); EBH2018. M.22. (Decision of Curia).

71 Section 3:164 HCC.

> which comes into existence upon the registration of the company and the rates of the business shares align with the capital contributions (core deposit) of the members, and the identical rates shall grant identical membership rights – yet it fails to specify the special-right business share: the creation of a special-right business share is only possible in the lack of any respective prohibiting legal norm.[72]

Default ruling appears in company law, as a category to the subject of legal rules, yet it may not prevail unconditionally. The nature and the complexity of the regulation's object shall necessarily conclude a certain unique regulative logic, comprising the body of coercive, mandatory, semi-mandatory, and non-mandatory rules. Company law, as we see it, cannot be positioned without fail onto the scale of mandatory – non-mandatory. If the mandatory makes the main ruling, then it must be determined, which cases allow for departing from the legal provisions (HCC), and it is a default, then it must be determined, which rules are prohibited to be deviate from. This particular distinction might, however, seem far too unambiguous and may even be petty at first reading. Yet it was considered that there might be room. Observance of the decrees of law from this particular perspective, points to the conclusion that as a predominant feature of the regulation, a relatively massive volume of the norms to company law has been formulating. So, it it will become impossible to depart from the statutory decrees of law. Equally important I is the set of those optional[73] models, in the case of which the partnering identities shall only be granted the choice of an option, examples to this are for instance the decrees on prescribing the degree of the base capital, or the singular (monist) or dual (dualist) governance system at a public company limited by shares.[74]

While the main rule to the regulation of company law can either be non-mandatory or mandatory, there is yet one regulation area, which remains unaffected. This volume of rules, in our view, creates a significantly large array, and in fact it covers to a decisive extent the „untouchable substance" of company law. The clauses describing legal persons,[75] the taxative category of the pre-

72 PÍT Gf. 40.015/2016/6. (Decision of the High Court of Appeal Pécs); PJD 2017. 8. (Decision of the Civil Division of Court).

73 In connection to this, see details in: *András Kisfaludi*, "Kógencia és diszpozitivitás a társasági jogban", Gazdasági Jog 8 (2006), 3–10, *András Kisfaludi*, Társasági jog, 2007, 65–69.

74 Section 3:212 HCC or Section 3:285 HCC.

75 Section 3:1 [Legal capacity of legal persons] (4) Legal persons may be established in a form defined by law: these forms may be the association, the business association, the cooperative society, the grouping, the foundation (and the state).

scribed forms[76] in company law,[77] the definitions on the characteristics of the companies[78], the provisions of HCC on the degree of the subscribed capital,[79] the change of the capital[80] fit this description. The cogent and imperative nature of the Firm Act,[81] the standard form of the memorandum of association[82] and the simplified e-registration process[83] also limit the possibility to apply the default rules in company law.

With this, we are not arguing for the relevance of the option to deviate from the regulation, even so, we have to accentuate that the principle of non-mandatory ruling may only prevail fundamentally in designated areas and specific degrees in company law.[84]

76 This means that the establishers of the company may only choose these forms, and mustn't choose any other (new) forms like silent company (stille Gesellschaft), and they mustn't furthermore mix these forms like partnership limited by shares (Kommanditgesellschaft auf Aktien), and they must not combine these forms, either, with any other forms of legal persons like the cooperative limited by shares (Genossenschaft auf Aktien).

77 Section 3:89 [Company form] (1) A business association may operate in the form of a general partnership, limited partnership, limited liability company and stock company.

78 ÍH 2018. 116. (Decision of the High Court of Appeal Budapest): The limits of derogation from Civil Code rules mean the definitive, essence creating and from these inseparable norms and for third persons extending articles.

79 Section 3:161 (4), Section 3:212 HCC.

80 Sections 3:198, 3:201, 3:295, 3:300, 3:302, 3:303 HCC.

81 Act V of 2006 on Public Firm Information, Firm Registration and Winding-up Proceedings (hereinafter: Firm Act or FA).

82 General partnerships, limited partnerships, private limited liability companies and private companies limited by shares may utilize this standard form, a model for which is included in a decree of minister of justice from 2006 to establish their memorandum of association. In this case, the memorandum of association may only contain what is in that standard form. The forms of documents are also applicable to any memorandum of association to be established in the standard form.

83 Company registration proceedings – apart from redress procedures – are non-judicial proceedings carried out electronically, to which the provisions of Act III of 1952 on the Code of Civil Procedure shall be duly applicable, unless otherwise provided for in the Firm Act. If the partnerships, the limited liability companies and the private company limited by shares will be established by a model of contract (memorandum of association determined by the Civil Code and the Firm Act) then these business associations shall become registered by a simplified, an electronic way.

84 By drawing a bold parallel to the principle of the Pareto-efficiency: in case only 20% of the rules shall change, that can actually generate a substantial change in the remainder of 80%. It can be, that 20% of the rules to company law are non-mandatory, but this actually affects the remaining 80% as well, in the case of which non-mandatory ruling shall originally not even appear. To the rule 80/20 see: *Albert László Barabási*, Behálózva, 2013 p. 74–75.

3.3. The Public Authenticity of the Legal Regulation

Should we adopt the above hypothesis as our starting point, then the question would seem to be simple only in the first moment. This will transfer to a more significant area, which affects the quintessential element of company law: that is publicity, the accessibility of the rules applicable to business associations. Company law disclosure and transparency are quintessential elements for company law.[85] The substance of this manifested in the public authenticity of the Firm Register and its functioning is aligned by a full set of essential interests and worth in the background, relating to the protection of creditors, the state-of-law, and guarantee.

The dilemma of default ruling illuminates this question. However, it is not to be neglected, which rules allow for divergence from them within the memorandum of association, for the direct imprint of this can be tracked down in the Firm Register. Insofar as the divergence is prohibited, then other agreements shall count as potential options, especially those of shareholder agreement – type.[86] The non-mandatory or mandatory rule over the decrees of company law does, in a crucial manner, impact company law culture, moreover, it can inflict several matters directly, namely the informational asymmetry, transparency, and the protection of creditors. As a result, it is not merely the theoretical question of the regulative concept of the HCC's regulating private law and company law matters, but it is of a critical legal-political decision to make, how extensive space is allowed by the legislator for the partnering entities, and which deviations ought to be inserted in the memorandum of association, whereby subordinating it to the requirements of company law disclosure.

This far too rigid regulation can lead to company law disclosure, in essence, becoming limited to basic information (for instance when using a standard formula of memorandum of associations). However, in simultaneity, this brings in other agreements, which are going to fall into the bleak-zone of the regulation, as company law does not extend to them. Whereas their impacts on the operation of the company are unequivocally relevant, their enforceability is also dubious. Such a legally gray area can draw consequences in respect of the pursuit of supervision of legality, and also the protection of creditors.

More than just theoretical, this question is relevant now. Those model-rules have been widespread (first as corporate governance requirements), about the utilization of its adequacy to issue a declaration, only. Publicity is the only sanction. The information will become disclosed publicly, and so they can influence the potential group of investors. Traces of this are evident in the pre-

85 *Papp* (fn. 45), p. 34–36.

86 The ministerial exposition to the HCC does also make a specific reference to this.

viously effective act on the business associations. The relevance of information – with respect to the decision of the Constitutional Court of Hungary linked on the BA – is outstanding. According to the rule, anyone without having to supply a certification upon the legal interest thereto, has the right to look into the register of shareholders of the public company limited by shares. The Hungarian Constitutional Court declared that the rule was constitutional and did not infringe the property rights of the company's members.[87]

4. Reasons Beyond the Company Law Dogmatic Aspects

Firstly, for the resolution of commercial and company legal disputes, arbitration is an available alternative. At present, the HCC provides for this alternative. So with respect to the rules allowing for derogation, it may also arise, that these solutions will be judged by a court of arbitration. The problem is not the question of appealing to a court of arbitration in general. But, it is a primal state-interest, which besides the national tribunal system, how extensive space is granted by the legislator to other forums, as well. Provided the judicial practice stays unable to respond in relevance to the issues of the interpretations of company law, there is a realistic chance facilitating that the legal disputes of companies shall become settled before forums outside the national tribunal system.[88]

On the other hand, as litigious cases emerge at the judicial forums with the default ruling of the HCC, the opportunity arises to establish the company by applying a standard formula of memorandum of associations. The members shall decide not to introduce any solutions divergent from the HCC. All of these result in the „illusion of default regulation" of the HCC, since the alternative to deviate shall remain sustained nominally in the HCC, while it still fails to be applied in practice, justified by referring to the insecurity of rights. We assume that this would surely make one of the most severe consequences, which should be avoided by taking all possible instruments.

As a result, we maintain that the extension of the principle of company disclosure and transparency, as a decisive momentum, is indeed sufficient, alongside the sustainment of non-mandatory ruling.

87 This rule was Section 202 (10) BA, and now, it is Section 3:247 HCC. The Hungarian Constitutional Court was examining the question in their decision of 563/B/2007. (i.e.: ABH 2008, 2723., Decision of the Hungarian Constitutional Court).

88 With respect to that in our opinion, Section 3:92 HCC and Section 3:4 HCC are covering each other.

The default regulation is legitimized in company law: the elementary interest of company law disclosure (regarding those singular solutions that diverge from the Act); the development of legal rules; the elimination of any unlawful conduct, that the information in respect of the operation of the company, and its legal solutions diverging from the Act, should be subject to judicial discretion and possible future adaptation.

On the basis of the elaborations exposed at the beginning of this study, the system of norms to company law is originally made up from multiple layers, and the alteration of the main rule is indeed only of a partly legal technique, for a predominant part of the entire body of norms is prohibiting any divergence by their feature, or is allowing for it in a specific direction, only. In our view, the rule, having been introduced by the HCC has served a legitimate interest, the objective can be respected.

The prevailing of the rule allowing for derogation conveys that the parties may include such divergences in their memorandum of association, which are optional, and are directive exclusively to them. Essentially, this model equates to a „one size does not fit all" approach.[89] There is no optimum regulation, that could be equally suitable for all companies, but it is the course of the negotiations of the parties, and the written format of their requirements, what shall compile their memorandum of association. Optionality and the application of model-rules used to form part of the company law also, yet in a more restricted form,[90] however, the concept of corporate governance, an international trend[91], has indeed been standing on the same ground.

Moreover, the default ruling can also play a role in the course of the codification of the rules. Within the articles, dedicated to explore this subject, it usually arises that the HCC would be modified several times, as the legislator needs to still refine the provisions of HCC. This process also arises regarding corporate governance. For instance, in Germany, as newer requirements keep appearing annually in the company law included either in the given corporate governance codex, or, if the legislator shall intend to reinforce the effectiveness of a stricter rule, then they shall lift it to the level of a legal rule.[92] We believe, that such type

89 *J. Harold Munsen*, "Corporations, collective action and corporate governance: one size does not fit all", Public Choice 2005, 179, 199.

90 „In case the parties shall not declare differently" or „in lack of a different declaration by the parties" expressions in the former Acts.

91 *Ronald J. Gilson*, From Company Law to Corporate Governance, in: Jeffrey N. Gordon/Wolf-Georg Ringe (Eds.), The Oxford Handbook of Corporate Law and Governance, 2018, p. 3–27.

92 Certain legal institutions in Germany became adopted in the German AktG „by this route". See: *Ádám Auer,* Corporate governance – a felelős társaságirányítás jelenkori dimenziói, 2017, p. 74–81 and p. 166–169.

of an amendment to a legal rule does not contradict the stability of economic law. While, however, it did form part of economic law, and so this problem-cluster had already been known before the compilation of the HCC, having been one of the chief arguments against the implementation of the singular (monist) governance system. We have not acknowledged this as a decisive criterion. The pre-determined, regular inspection of the legal rules to company law, alongside the regular analysis of the judicial practice can be managed in such way that shall be projecting the prospect of predictability, instead of causing a hazard of rights.[93] The legislator has already taken steps in this direction. The Act XCV of 2021 has made a number of changes to the mandatory or default nature of the rules, reflecting the practice.[94]

In case the members should fail to take their due autonomy provided to them by the HCC — because of the enforcement (uncertain judicial practice) or the norm-content — unnecessary transactional costs involved. Or, it is simply because of the rigidity of company rules and practice, they shall not take the opportunity to diverge, and so,, the HCC's ambition concerning autonomy will be left unfulfilled. Thus. the grounds for the regulative system of the HCC, taking into account all the above specified reasons, have formed the very basis for a company law that, as regards of its norms is more complex, still which is ultimately inducing the development concerning the safety of the turnover in the economy.[95]

5. Conclusion

This study has reflected on the development of the regulation's nature of HCC, the formulation of company law rules, and related judicial practice, and also approached the topic from the view of interests (of creditors, employees and members), striving to create a coherent system.

The theoretical background of the method of legislation is rooted in the interpretation models of company law: the investor model that favours the interests

93 The inspection of the Deutscher Corporate Governance Kodex in Germany does partially work based on one such concept, *Auer* (fn. 92), p. 166–169.

94 E.g. a member can have more than one business share Sec 3:164 HCC or the regulation of cases where the convocation of the members' meeting is mandatory is mandatory. For a summary of the main changes, see*: Leszek Dziuba,* Das Recht der Kft in der ungarischen Gesellschaftsrechtsreform von 2021, in: Christian Schubel/Stephan Kriste/Peter-Christian Müller-Graff/Oliver Diggelmann/Ulrich Hufeld (eds.) Jahrbuch für Vergleichende Staats- und Rechtswissenschaften – 2022, 2022, p. 81–105.

95 The evaluation of the leading professor heading the codification has also come to this conclusion. *Vékás* (fn. 57), 385–391.

of its members (shareholder theory)[96] and a contractual model concluding by the management[97] that takes into account the interests of those who have an interest in the business relationship with the company (stakeholder theory).[98] Related to investor theory is agency theory, Agency theory describes the conflicts of interest between the principal [member(s) of the company] and the agent (operative body of the company: executive officers, management). It identifies attitudes toward managerial decisions made to operate the organization (member's control, liability of the executive officer, preference for short-term benefits: profit maximization versus day-to-day management requiring specialized knowledge tailored to growing company size).[99] The long-term benefits of the investor model, stewardship theory, focuses on the priorities arising from the alignment of management's responsible company asset management activities with organizational goals (confidence and mutual value building, managerial sense of duty and loyalty).[100] Related to the contractual model is resource dependence theory, which measures the success of an organization in terms of its ability to subordinate, coordinate and control its internal and external resources to the company goal (the role of management qualifications and experience in shaping internal and external organizational environments).[101] The approach to the relationship systems within the company has become more nuanced and management-oriented. Yet, it also comes from legislation.

Default ruling, as a general question within the law of legal entities, is not unprecedented in the life of domestic legislation. The criteria revealing in the exposition of the Hungarian Civil Code are acceptable, and the opinions of those, having expressed their doubts relating to the heavy weight encumbering the judicial practice, was undoubtedly, carefully put. During the time that has passed since the adoption of the Hungarian Civil Code, this rule has been taking effect gradually, whereby a sufficient term has been given for a preparation period, until the general application of the new rule. Both of legal-literary as

96 *Milton Friedman*, Capitalism and freedom, 1962.

97 *Bodzási Baláz* , "A hosszú távú részvényesi (befektetői) szerepvállalás ösztönzésére irányuló uniós törekvések", Fontes Iuris 2 (2018), 32–33.

98 *R. Edward Freeman,* Strategic management: a stakeholder approach, 1984.

99 *Roya Derakshan/Rodney Turner/Mauro Mancini*, "Project governance and stakeholders: a literature review", International Journal of Project Management 37 (2019), 99–100; *Melinda Muth/Lex Donaldson*, "Stewardship theory and board structure: a contingency approach", Scholarly Research and Theory Papers 1 (1998), 5–6.: managerial control; *Lorraine Talbot*, "The coming of shareholders stewardship", Legal Studies Research Paper 22 (2010), 5.

100 *Derakshan/Turner/Mancini* (fn. 99), 99–100; *Muth/Donaldson* (fn. 99), 6: managerial empowerment.

101 *Derakshan/Turner/Mancini*(fn. 99), 99–100; *Muth/Donaldson* (fn. 99), 6: co-optation.

well as professional disputes have sometimes communicated such exaggerated anxieties, and also they have envisioned the possibility to diverge from such rules, in the context of which the application of § 3:4. to the Hungarian Civil Code is not even allowed to occur.

On the basis of the cases of the judicial practice having been published so far, two general conclusions emerge. First, the interpretive practice of the judiciary shall always potentially enhance the unfolding of the content of legal norms. Whenever the legislator shall reject this, its interventional opportunities are available. The very same tool is provided, if it should recognize such a high-level discrepancy in the application of the law, which has already grown impossible to be resolved by any instruments of the Curia (Hungarian Supreme Court) for the sustainment of the legal coherence. The second general conclusion is that those abstract notions included in § 3:4 to the Hungarian Civil Code (creditor, minority) can be applied in practice. Moreover, they shall deliver the final resolution to the given legal issue in a dogmatically correct, relevant manner. In our opinion, this result shall make all those matters ungrounded, which are proposing the amending of the regulation, some ten years after the establishment thereof.