Changes and Reactions in the Fundamental Issues of Hungarian Company Law – Contributions to International Trends in Legal Regulation, Liability and Corporate Governance[1]

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Abstract

Throughout the first decades of the 21st century there have been numerous traditional and modern impacts on Hungarian company law. As a result of the codification of Hungarian civil law, the Civil Code of 2013 incorporated the previously effective substantive legal regulations of company law. Prior to this, Hungarian company law had undergone several modifications, beginning with the change of regime in 1989, through the years of its preparation to join the European Union, and during the initial phases of digitalization. Some more recent influences are, on the one hand, either international in origin (for instance: corporate governance, compliance), or, on the other hand, approaches taken from the legal debates on company law, which have evolved with the development of the law. Modern results demand both reconsideration and synthesis, in order to enable company law to fulfil its duties and achieve its purpose.

Keywords

Company law, corporate governance, mandatory and default rules, liability of director, liability of member, Hungary, Hungarian Civil Code, comply or explain, invalidity of memorandum of association, business association.

Introduction

This study offers an interpretation framework for Hungarian company law. It provides an overview of the areas where the new Hungarian Civil Code has raised challenges.

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It will reflect on the theoretical and practical problems regarding Hungarian company law.

Before the new Hungarian Civil Code came into effect on 15th March 2014, two layers of law were applied in Hungary: the Companies Act alongside a separate Civil Code (the separate regulation of business associations began with Act VI of 1988 and lasted until Act IV of 2006). Currently, Act V of 2013 – the new Hungarian Civil Code – is the sole source of company law (in Book 3), in line with the monistic principle of codification.[2]

Book 3 of the new Hungarian Civil Code is comprised of three levels: general and common provisions on legal persons related to business associations, cooperatives, groupings, funds and society; general and common rules on business associations (dealing jointly with general partnership, limited partnership, limited liability company and stock company forms); and finally, the special rules for each type of company.

Company law has also been affected by the Firm Act (Act V of 2006 on Public Firm Information, Firm Registration and Winding-up Proceedings, hereinafter: FA), the Accounting Act, the Bankruptcy Act, the Act on Capital Market, the Competition Act (Act LVII of 1996), the Act on Civil Procedural Law, the Act on Investments in Hungary by Foreign Nationals (Act XXIV of 1988), the Act on Branch Offices and the Commercial Representative Offices of Foreign Undertakings (Act CXXXII of 1997), the Act on Private Enterpreneurs and Sole Proprietorships (Act CXV of 2009), the Act on the European Economic Interest Grouping (Act XLIX of 2003), the Act on the Societas Europaea (Act XLV of 2004) and the Act on the European Cooperative Society (Act LXIX of 2006).

Hungarian regulation is doubly complicated: the regulation of company law is divided into private and public law norms (only the private law rules are contained in the Hungarian Civil Code) while in the Civil Code itself there are three levels of regulation, ranging from general to specific rules for each kind of business association. This has been characterised in the Hungarian legal literature as a duplicated legal basis.[3] It might be more accurate to state that Hungary has a peculiar, rather imperfect quasi-single-law model.

The difficulties of Hungarian Company Law lie in the lack of conformity and coherence of its inherent provisions and the questionable order of the applicable prescriptions, raising the question: How can we decide between legal norms? Should prioritising them be based on the principle of lex specialis derogat legi generali, or should it be governed by the nature of the regulation (default/mandatory and imperative/permissive rules)?

Besides this ambiguity, the intent of the legislator and the practical application of legislation are both also frequently unclear: the legislator often modifies company law by "salad norms" (where the statutory instrument regulates many types of legal

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[2] See Tamás Sárközy, *Az új Ptk. jogi személy könyvéről* 10 Jogtudományi Közlöny 461-469 (2013).

[3] See Tamás Sárközy, *A Ptk. jogi személy könyv esetleges felülvizsgálatáról* 7-8 Gazdaság és Jog 3-10 (2016).

relations in a number of paragraphs), while the provisions governed by public law may narrow the room for manoeuvre of private law, and push the Civil Code into the background. The applicability of the new general rules to legal persons may also be in doubt, as the starting point of the legislator's approach to the common features of legal persons in the Hungarian Civil Code is still shaped by the norms of the former company law. Moreover, it is worth pondering whether these general provisions are equally suitable for both civil and business organizations, when the earlier Company Acts were the models for the common prescriptions for legal persons in the Civil Code.

1. The Regulative Method of Hungarian Company Law

The permissibility of members of a company establishing alternative arrangements that deviate from default legal provisions has been a key question in company law since the beginning.[4] The most relevant issue from the perspective of economic vitality, in our view, is that the company members shall formulate regulations fairly and properly (in that they bear the transactional costs proportionally), taking into account the interests of creditors and stakeholders in company law. More precisely, it is necessary for the legislator to determine find a balance between allowing a sufficient degree of autonomy for the parties and ensuring the protection of creditors. One approach is the application of default rules that regulate the alternatives when deviating from a legal provision. In this particular respect, however, it is also important for Hungarian company law to remain competitive. Such issues in company law are, of course, present in several countries,[5] and Hungarian regulatory efforts could well add an interesting contribution to the debate in this area. The Hungarian legislator made a fundamental change to its approach to regulating company law in 2013, in response to these challenges. It is thus now worth examining this new paradigm of Company law in Hungary.

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[4] See John Armour & Henry Hansmann & Reinier Kraakman & Mariana Pargendler, *What is Corporate Law?* in John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, Edward Rock (eds), *The Anatomy of Corporate Law,* 18-19. (3d ed. Oxford: University Press, 2017).

[5] See Katerina Eichlerová, *Mandatory and Default Regulation in Company Law in Czech Republic* 1 Bratislava Law Review 47-60 (2020); Bartolomej Gliniecki, *Mandatory and Default Regulation in Polish Company Law* 1 Bratislava Law Review 71-78 (2020); Branislav Malagurski, *Mandatory and Default Rules in Serbian Company Law* 1 Bratislava Law Review 79-92 (2020); Maria Patakyová & Barbora Grambličková, *Mandatory and Default Regulation in Slovak Commercial Law* 1 Bratislava Law Review 93-111 (2020).

1.1. The Positioning and the Relevance of Default Rules within the Regulation of Hungarian Company Law

The parties in company law may diverge from the default rules set by legal provisions. These types of rules shall only set the directives on the legal relationship in force between them, if the parties did not specifically agree (mutually, on a particular detail which differs from the legal rule) otherwise. Default rules, as a particular type of a legal norm, are not exclusive to company law but are also a legal category of contractual law. According to Book 6 of the Hungarian Civil Code on obligations, with their concordant intent, the parties may depart from the common rules governing their obligations, as far as their rights and commitments are concerned, provided that such divergence is not prohibited by the Hungarian Civil Code.[6] The memorandum of association is one such type of contract, which serves both to create a legal subject (organizational function), and to arrange the internal relations between the partners, (regulating their mutual obligations).[7] It is not necessary to separately prove that this form of a contract differs from contracts on the exchange of goods, and this may result in some peculiar problems. Moreover, it is also subject to interference from other branches of law, first and foremost from public law, for reasons of public order and for the protection of the creditors.[8] As such,, default rules also apply when a memorandum of association is drafted – as with a contract – but due to the interference of other branches of law, along with the rules that are in place to safeguard a complex system of interests, the general possibility to diverge from default rules may not be implemented unconditionally and generally.[9]

Within the framework of this study, the notion of the default rule is understood in the sense that it is a rule, based on which the parties may derogate from the provisions of the legal rule, with their mutual agreement. Mandatory (cogent) rules, in contrast, are those from which no divergence is allowed and which are applied uniformly, while imperative norms can be distinguished further as those norms which do not even allow a legal rule to diverge from them, hence they demand unconditional realization.

We shall now highlight the next two features of default rules: default rules perform the role of gap-filling, if the parties should fail to include provisions regarding a specific legal institution. In this way, a default rule shall prevail specifically if such provisions are lacking. In addition, these rules may serve as models, whereby,

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[6] HCC Section 6:1 (3): among others, the general possibility to deviate from the Act is not deductible from this rule, either.

[7] Tekla Papp (ed.), *Társasági jog,* 54 (Szeged: Lectum, 2011).

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

[9] It is not only the Hungarian Civil Code that may decree the prohibition of default ruling, where it expressly prohibits any deviation from the singular rules, but also other lower legal rules as well applicable to particular economic activities.

provided that the parties agree to apply them, the detailed rules on a particular question are already available in the statute.[10]

The dilemma of default rules should also be linked to this question. Specifically, it is important to determine which rules allow for divergence from them within the memorandum of association, as this information can be looked up in the Firm Register. When divergence is prohibited, other types of agreement may be potential options, especially a shareholders' agreement.[11] Whether to stipulate default or mandatory main rules in the provisions of company law thus has a crucial impact on company law culture. It directly influences several areas such as informational asymmetry, transparency, and the protection of creditors. Thus, how the Hungarian Civil Codes regulates civil law and company law is not merely of theoretical interest. It is also a critically important legal and political choice by the legislator. It determines how much room for manoeuvre is granted to the partnering entities, and which deviations must be explicitly stated in the memorandum of association, thereby subordinating it to the requirements of company disclosure.

Excessively rigid regulation can lead to company disclosure being limited to basic information (for instance when using a contract template). This may also strand other agreements in a grey area of the law, as company disclosure does not extend to them. The enforceability of such agreements may also be dubious, even if their impact on the operation of the company is undeniable. This can have consequences for the legal supervision of companies, as well as for the protection of creditors.

1.2. The New Default-Paradigm in the Hungarian Civil Code

The Hungarian Civil Code was amended in 2013: its starting point became the freedom of the formation of legal persons. Default regulation became its general principle, albeit with certain limitations.

Hungarian company law has traditionally distinguished between the set of rules affecting third parties, and those only affecting company members. This distinction dates back to the first Hungarian Act on the Commercial Code, of 1875 (hereinafter: HACC).[12] The first type of rules were mandatory, while the second were default rules. In connection with public companies limited by shares, this duality did not exist, however, and the HACC prescribed mandatory legal regulation. This system is described in the professional literature as the era when statutory law was considered to be subsidiary to contract law.[13] Indeed, default rules applied contracts were the primary means of regulating the relations between the members of a company, in

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[10] See for instance the legal institution of provision-making without holding a session, as set out in the Hungarian Civil Code, in Section 3:20.

[11] The ministerial exposition to the Hungarian Civil Code does also make a specific reference to this.

[12] Section 68 Act XXXVII of 1875 on the Commercial Code (hereinafter: HACC).

[13] István Apáthy, *Kereskedelmi jog – tekintettel a nevezetesebb európai törvényekre,* 158. (Budapest: Eggenberger, 1886).

accordance with the sole interests of the members.[14] In Hungary, this approach was taken in the first Act on Business Associations (BA), which was connected to the regime change in 1989, when citizens were again generally free to form companies.[15] Nevertheless, only two years after the BA of 1988 had come into effect, the legislator decided to change this model.[16] The new concept of the 1988 BA, as amended in 1991,[17] made it clear that the members of a company are free to determine the content of the company's articles of association insofar as they are within the framework of the BA. They may derogate from its provisions in the terms of the articles of association, unless the deviation is prohibited by the Act.[18] The next two Acts on Business Associations (1997 and 2006)[19] also followed the concept of mandatory rules with the limits of deviation set by the legal regulation. the company members (shareholders) were able to derogate from the provisions of the BA if it was permitted by the BA. The members (shareholders) were free to determine the content of the articles of association insofar as they were within the framework of the BA and the statutes of law.[20] According to Tamás Sárközy, on the one hand, the amendment was justified due to the problems regarding the application of the law. On the other hand, the regulation of partnerships led to increased restrictions on private autonomy.[21] Later, however, the legislator continuously tried to include dispositive rules in the scope of company law. The Act IV of 2006 on Business Associations added to the previous system by permitting provisions to be included in a memorandum of association which do not conflict with the general purpose of company law or the purpose of the regulation of the specific form of company and which do not infringe the principle of good faith. This addition was intended as a step towards allowing the members to regulate their company according to their own needs, as long as they did not contravene the provisions of the 2006 BA. Based on our research,[22] we can conclude that

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[14] Ödön Kuncz, *A magyar kereskedelmi és váltójog tankönyve,* 147 (Budapest: Grill, 1944); Ferenc Nagy was emphasizing that this did not mean that the agreements of the members could be contrary to the "concept of the company", or any "public order and morals", in Ferenc Nagy, *A magyar kereskedelmi jog kézikönyve – különös tekintettel a bírói gyakorlatra és a külföldi törvényhozásokra,* 283 (Budapest: Atheneum, 1913).

[15] Sections 20 and 233 Act VI of 1988 on the Business Associations. The Companies Act has also considered it important to maintain the cogent rules because the entry into force of the Companies Act is not yet applied in a long-established market economy. Tamás Sárközy (ed.), *A társasági törvény magyarázata,* 48 (Budapest: KJK, 1993).

[16] Modified by Act LXV of 1991. BH 1991. 482 (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia), BH 1992. 592 (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia), KGD 1993. 233 (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).

[17] Modified by Act LXV of 1991.

[18] Sárközy, *supra* n. 14, 50.

[19] Act CXLIV of 1997 on Business Associations (hereinafter as: the BA of 1997).

[20] Sec. 9 BA of 1997.

[21] Tamás Sárközy, *A magyar társasági jog Európában,* 118 (Hvgorac, 2001).

[22] Ádám Auer, *A diszpozitivitás jelentősége a társasági jogban* 7-8 Magyar Jog 395-404 (2016): this conclusion is based on the fact that it has been possible to set up a company with a model contract since 2006 and that there have been very few decisions in case law that have examined this issue.

this law did not actually succeed in achieving this ambition. The regulatory concept has remained predominantly one of strict, rigid regulation unless the law is deviated from by the members in the memorandum of association.

In a memorandum of association, the members of a legal person may diverge from the provisions of the Hungarian Civil Code on legal persons when regulating their relations with one another and the legal person and when regulating the organisational structure and the operation of the legal person. However, the members of a legal person shall not diverge from the prescriptions of the Civil Code if the divergence is prohibited by the Civil Code; or if it manifestly violates the rights of the creditors, the employees or a minority of the members of the legal person, or if it undermines the efficient supervision of the lawful operation of legal persons.[23]

For example, the parties may wish to regulate a special field (e.g.: one share = one vote, or any special voting rights) of their relationship within the memorandum of association. However, doing so may contradict a regulation in the Hungarian Civil Code. To resolve this issue, the first step is for the parties to review the nature of their legal relationships. A legal relationship may exist: (1) between the members of the company; (2) between the legal person and its member; or (3) the relationship belongs instead to the organizational structure and the operating rules. If the field/issue to be regulated is not any of the above mentioned, then its regulation is mandatory. If the issue falls in any of the three categories of legal relationship mentioned above, then the rule is default. The second step is to determine whether the parties' intended regulation of their relationships is subject to prohibition by the Civil Code: (1) if any specific prohibition is decreed (then the rule is mandatory), (2) if the rights of: the creditors, the employees, the minority have been injured; (3) if the regulation would prevent the effective supervision of the lawful operation of the company. Basically, the first point to consider the nature of the legal relationship, while the second step involves analysing the legal rules in order to detect any relevant legal provisions intended to protect specific legal interests (e.g. the rights of creditors). In the most straightforward cases, the Civil Code prohibits any deviations.

Ultimately, the concept of mandatory and default regulation in the current Hungarian Civil Code is more liberal than the solutions provided for within the preceding Acts on business associations. Why was the mandatory-default concept modified in the regulations of Hungarian company law? Firstly, let us take into consideration the intention of the legislator. The theory behind the changes made to the Hungarian Civil Code is that memorandums of association must be capable of containing provisions that differ from the given regulations of law (principally, the Hungarian Civil Code).[24] This means that some binding obligations may be given less weight (shareholders agreements), while private autonomy can gain more ground. The legislator's intention is to create model rules that, if accepted by the parties, will save transaction costs. The right of the parties to deviate from statutory default models will better serve

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[23] HCC Section 3:4.

[24] András Kisfaludi, *A jogi személy létesítése* in Lajos Vékás, Péter Gárdos (eds.), *A Polgári Törvénykönyv magyarázatokkal,* 86-87 (Budapest: Complex, 2013).

economic interests, because the legislator cannot model every situation in advance.[25] However, the changes cannot be explained solely by the judicial practice in relation to the problem of mandatory versus default rules. Finally, yet more importantly, this paradigm shift cannot be fully explained by referring to either the economic situation, or the economic crisis, either.

The dispute over the new Hungarian default regulation has also generated an intense discussion in the Hungarian legal literature. The academic discourse is basically divided between those supporting the new concept of the Civil Code and those who are against it. The arguments in favour of it point to the strengthening of private autonomy,[26] whereas the arguments against it raise concerns about business safety,[27] for instance about the relativisation of company forms, or the transparency of the regulation. In short, the new regulative approach of the Civil Code is an important step towards the private autonomy of the members of business associations and the system. It allows them to determine the form of their relationships through a memorandum of association. It seems that the debate on this question is currently at a standstill. However, the legal profession presumably handles the question of mandatory versus default rules very carefully, because the literature is divided and little case law is available. A systematic examination of memorandum of associations could prove this, but in the absence of such a resource, we can only trust that members will make use of this possibility.

1.3. The Judicial Interpretation of Default Rules in the Hungarian Civil Code

In addition to the discussions in the literature, it is worth examining some judicial decisions where the dispute centred deviation from the Hungarian Civil Code, under Section 3:4 HCC. Indeed, when it was first introduced, the ministerial exposition of the Hungarian Civil Code emphasized the role of judicial practice in the interpretation of the scope for deviation. In one such case from 2016, the High Court of Appeal of Debrecen examined which of the Civil Code's rules on associations allowed derogations and which did not.[28] A further judicial decision makes it clear that the possibility of derogation arises only in relation to the Civil Code. As such, a legal instrument

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[25] András Kisfaludi, *Kommentár 3:4 §* in Lajos Vékás, Péter Gárdos (eds.), *Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez* (Budapest: Complex, 2022 online commentary).

[26] András Kisfaludi, *Kógencia és diszpozitivitás a társasági jogban* 8 Gazdasági Jog 3-10 (2006).

[27] Tekla Papp, *A jogi személy általános szabályai* in *András* Osztovits (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja,* 359-460 (Budapest: Opten, 2014); Mariann Dzsula, *Miért kógens a diszpozitív?* 2 Céghírnök 3-5 (2014); Gábor Török, *A jogi személy létesítése* in Tamás Sárközy (ed.), *Polgári Jog – A jogi személy,* 43 (Budapest: Hvgorac, 2014); Tamás Sárközy, *Még egyszer a Ptk. jogi személy könyve állítólagos diszpozitivitásáról* 11 Gazdaság és Jog 8-13 (2015).

[28] See BDT 2016. 3433 (Casebook of the Courts).

which is not regulated by the Civil Code, but by another Act[29] applicable to the legal person in question, is not subject to the possibility of derogation.[30]

According to another judicial decision[31], there is no requirement for of the process of founding a limited liability company, the increase of its capital, or the upgrading of the capital of a limited liability company to fall under the effect of the HCC. Instead, as prescribed by the Act IV of 2006 on business associations, these shall be regulated in the memorandum of association between the members. The deadline for the settlement of the arrears of the contribution in cash shall be determined by the memorandum of association and the respective provision of the members' meeting, in excess of two years. More precisely, the closing of the deadline period is unspecified by the Hungarian Civil Code.

The main rule of the HCC declares that members of companies may diverge from the rules contained in the Code, in the organization and operation of their businesses. On the basis of the decisions issued to date in the judicial practice, it can be concluded that the notion of private autonomy applied in the Hungarian Civil Code can in fact be interpreted rather broadly. One example of this freedom of members to determine the organizational structure of their companies is that, as per a judicial decision delivered by the High Court of Appeal of Budapest, there is no obligation whatsoever for a limited liability company not to define its own internal organizational structure in such a form that its management structure is a singular person (managing director), rather than a board of directors.[32] The High Court of Appeal of Budapest derived the form of the managing body from the general rules on legal persons, and since none of the provisions of the Hungarian Civil Code prohibit such an organ being called a board of directors, and neither does this infringe any rights as proclaimed in Section 3:4 to the Hungarian Civil Code, the application of this expression was found to be lawful. According to another judicial decision, the decision-making organ of an association is the general meeting, while decisions may also be taken at a meeting of representatives instead of at the general meeting. Nevertheless, these two may not be combined, and for this reason a "general meeting of representatives" may not be held.[33]

The prescriptions on directors are also classed among the organizational rules, from among which the High Court of Appeal of Pécs has – in our view, disputably – reconfirmed a resolution by the secondary court, according to which a director may be elected for an unlimited term.[34]

In an ad hoc decision, another court decision recognized the possibility of separate regulation of the rightful business share of members, given the lack of a specific

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[29] The appointment the honorary members are regulated by Act CLXXV of 2011 on the right of association, the status of a public utility, as well as on the operation and the supporting of civil associations.

[30] See BDT 2015. 3335 (Casebook of the Courts).

[31] See BDT 2015. 3383 (Casebook of the Courts).

[32] See BDT 2015. 3272 (Casebook of the Courts) The board of directors is the form of the management at the public limited company.

[33] BDT 2015. 3386 (Casebook of the Courts).

[34] PJD 2018. 23 (Decision of the Civil Division of Court).

prohibition of it in law.[35] In connection to the payment of dividends, the High Court of Appeal Debrecen – in our view, accurately – delineated the margins of mandatory and default rules by proclaiming that the business share (*Geschäftsanteil*), which demonstrates the degree of the entirety of rights and obligations bound to the capital contribution (*Stammeinlage*), is in congruence with the capital contributions supplied by the members, and is thus declared to be a default rule.[36]

On the other hand, the Curia (Hungarian Supreme Court) has reaffirmed that the public disclosure of the register of shareholders of a public limited company cannot be restricted. In other words, the rule in the Civil Code requiring disclosure of the share register is not a default but a mandatory rule.[37]

1.4. Conclusions

On the basis of the cases of the judicial practice that have been issued so far, we can draw the following two general conclusions. One is that the interpretive practice of the judiciary may always potentially influence the development of the content of legal norms. Whenever the legislator rejects this, it has opportunities to intervene. This may also occur if it recognizes such a high level of discrepancy in the application of the law that it has already become impossible to resolve by any of the instruments of the Curia (the Hungarian Supreme Court) for the sustainment of the legal coherence. The second general conclusion is that the abstract concepts of interests included in Section 3:4 of the Hungarian Civil Code (creditor, minority) can be applied in practice, and can indeed deliver the final resolution of a legal issue in a dogmatically correct, relevant manner.

It can be concluded that, in the cases that can be identified from judicial practice, judicial reasoning has played an active role in delineating the boundaries between private autonomy and the rules of conflict. In our opinion, this result refutes the arguments of those proposing to amend the regulation, a mere ten years since it was passed. Act XCV of 2021 amended the default or mandatory nature of the legal regulation in several sections of the HCC. As noted above, changing the nature of the rules is an important issue in the legislation on company law. In most cases, the legislator has clarified the default or mandatory nature of certain legal rules in response to the needs of practice. Even if these interventions may be debatable in some cases[38], in general terms, changing the nature of a rule by legislation (excluding the dispositive

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[35] PJD 2017.8 (Decision of the Civil Division of Court).

[36] ÍH 2015. 76 (Decision of the High Court of Appeal).

[37] 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* 12 Polgári Jog 1-9 (2017); the Constitutional Court of Hungary has also previously examined the publicity of the shareholders' registers and concluded that the requirement of publicity is constitutional from the point of view of transparency and creditor protection. See 563/B/2007. Decision of Hungarian Constitutional Court.

[38] e.g. HCC Sections 3:161 (2) and 3:164 (3) allow one member of the limited liability company may own more capital contributions (Stammeinlage) and more business shares (Geschäftsanteil).

nature of a legal rule or allowing for deviation) is certainly conducive to legal certainty.[39] However, this requires that the reason for the change in legislation be dogmatically sound. This amendment of the HCC is a foretaste of the importance the legislator attaches to clarifying the nature of legal provisions in company law. We believe that this confirms our earlier findings and that further amendments of this kind are to be expected in the future.[40]

2. Some Concepts Relating to the Establishment of Hungarian Companies

In this section, we describe some evolving phenomena generated by the new regulative concept of the Hungarian Civil Code in connection with the establishment of companies.

2.1. The Types of Hungarian Business Associations

There are two basic principles in Hungarian private law

- the cogency of the forms of the legal persons,[41]
- the formula of the prescribed forms of company in company law[42]; this latter means that the establishers of the company may choose from the four forms determined by the Hungarian Civil Code, while not being permitted to choose any other forms such as silent company (*stille Gesellschaft*), nor may they mix these forms, as in, for example, a partnership limited by shares (*Kommanditgesellschaft auf Aktien*), nor combine these forms, either, with any other forms of legal persons such as in a cooperative limited by shares (*Genossenschaft auf Aktien*).

The Hungarian phrase 'gazdasági társaság' means – word-for-word – an economic company like in German company law: Handelsgesellschaft; indeed, partnerships are also known as companies in Hungary. The most popular form of company is the

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[39] e.g. HCC Section 3:174 (5) states that any provision in a memorandum of association which imposes less stringent requirements on the limited liability company in respect of the rights which may be exercised by the company in respect of its own business shares than the rules laid down in HCC shall be null and void.

[40] Related to this topic, see Ádám Auer & Tekla Papp *The Mandatory and Default Regulation in Company Law – A Decade of Hungarian Experience,* in the process of being published in the European Company and Financial Law Review.

[41] HCC Section 3:1 [Legal capacity of legal persons] (4) Such types of legal persons may be established, which are defined by law: these forms may be the association, the business association, the cooperative society, the grouping, the foundation (and the state).

[42] HCC Section 3:89 [The constraint of form] (1) A business association may operate in the forms of a general partnership, limited partnership, limited-liability company or joint stock company. There are two sub-types of the latter: private company limited by shares, and public company limited by shares.

limited liability company,[43] but the judgements based on the new Hungarian Civil Code reveal a strange tendency: some court decisions conflate or merge the limited liability company and the private company limited by shares with each other:[44]

– one member of a limited liability company may own several capital contributions (*Stammeinlage*) and several business shares (*Geschäftsanteil*):[45] the HCC has allowed this since 1st January 2022;[46]
– the director(s)[47] may also be a member(s) of the board of directors in limited liability companies;[48]
– under the Hungarian Civil Code an auxiliary services may only be performed in person,[49] although this auxiliary service can be a contribution fulfilled in cash (over and above the capital contribution), and the term for the fulfillment of this obligation may be limited,[50] or an auxiliary service may be performed not only on the grounds of a membership relation, but also within the framework of an employment relation;[51]
– in the definition of the business share[52] however, the HCC fails to mention the possibility of different categories of business share with special rights: the creation of such preference shares is only possible in the lack of any respective legal norm prohibiting this.[53]

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[43] On the basis of the data of the Firm Register, effective on 01.07.2019, the following numbers of entities are declared as operating, by type: general partnership 2742, limited partnership 111725, limited liability company 342543, stock company 6719, SE 5, SCE 1, and European Economic Interest Grouping 4. Céghírnök 9-10. 8 (2019); For more on this, see Tekla Papp, *The Economic Operators* in János Bóka & Katalin Gombos & Tekla Papp & András József Pomeisl, *Commercial and Economic Law in Hungary,* 47-73 (Alphen aan den Rijn: Wolters Kluwer, 2019).

[44] BDT 2015. 3272.; BDT 2015. 3386 (Casebook of the Courts).

[45] The court decision will become a provision in the HCC from 1 January 2022.

[46] HCC Sections 3:161 (2) and 3:164 (3).

[47] HCC Section 3:196 [The management of the company] (1) The management of the company shall be exercised by one or more managing directors.

[48] BDT 2015. 30 (Casebook of the Courts).

[49] HCC 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(s) for failing to perform such actions of personal involvement, on condition that it is ensured by the memorandum of association.

[50] BDT 2019. 4057 (Casebook of the Courts).

[51] Kúria Mfv. 10.362/2017/3; EBH 2018. M.22 (Decision of the Curia).

[52] HCC Section 3:164 [Concept of business share] (1) A business share shall be the entirety of all rights and obligations relating to capital contributions. Business shares shall come into existence upon the registration of the company. (2) The rates of the business shares shall align with the capital contributions of the members. The business shares of identical rates shall grant identical membership rights.

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

In summary, it appears that the form of the limited liability company has been transformed into the form of the private company limited by shares, which implies that Hungarian company law will be deprived of one particular type of company, indeed, the most popular type. This convergence started in judicial practice, with deviations from rules of an undecided or disputed nature, expanding the scope of law enforcement. The legislator also reacted to part of this judicial interpretation, accepting the dispositive approach (see in this subpoint above). Essentially, two rules prevent the two company forms from overlapping: a) if the member has more than one business share, he/she/it shall be considered a member vis-à-vis the company[54]; b) the business share is not a security. In our opinion, the form of the limited liability company may be deemed ideal for family businesses or small enterprises, due to its mixed character (being both capital- and person-unifying). This form of company should be preserved in this economic role, and it should also maintain its flexible nature together with its important market position in Hungary.

2.2. The Pre-company[55]

Section 3:101 of the HCC regulates pre-companies as follows: beginning from the date when its instrument of constitution is executed in a notarized document, or when it is countersigned by a notary, or an attorney, or the legal counsel of a founder, a business may be established as a "pre-company" of the business association (*Vorgründungsgesellschaft*) to be established. The pre-company may begin its business operations only after an application for the registration of the business association has been submitted (*Vorgesellschaft*). The business association's designation as a pre-company must be indicated on all the company's documents and legal statements; in the absence thereof, any legal statements issued by the pre-company shall be treated as a legal statement issued by the founders collectively, if the Firm Court responsible for registration refuses to register the company.[56]

The regulations[57] applicable to the business association to be established shall also apply to the pre-company with the following exceptions:

(a) changes in the persons of the members of the pre-company are not allowed, although only if expressly permitted by law;
(b) the instrument of constitution may not be altered, other than to comply with a request made by the Firm Court or the competent body of authorization;

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[54] HCC Section 3:164 (3) Any other provision of the partnership agreement is null and void.

[55] See more in Pál Lászlófi, *Az előtársaságról, különös tekintettel annak jogalanyiságára* 2 Magyar Jog 84-93 (2003); György Wellmann, *Az előtársaság, elő jogi személy jogalanyiságáról* 12 Céghírnök 5-6 (2003); Tekla Papp, *Az előtársaságról – újólag,* Debreceni Jogi Műhely 3 (2007) (01 December 2022), *http://www.debrecenijogimuhely.hu/archivum/3_2007/az_elotarsasagrol_ujolag/ (Accessed 10 Nov 2022);* Tekla Papp, *Corporations and Partnerships Hungary, International Encyclopaedia of Laws,* 68-70 (Alphen aan den Rijn: Wolters Kluwer 2015).

[56] HCC Section 3: 101 (1).

[57] BH 2005. 16 (Periodical collection of the decisions of the Hungarian Supreme Court).

(c) the pre-company may not establish a business association, nor may it join one as a member;[58]
(d) legal proceedings for the exclusion of a member may not be initiated; and
(e) no decision on the dissolution without succession, transformation, merger or division may be adopted.[59]

Upon the act of registration based on the final decision made by the Firm Court, the business association shall cease to function as a pre-company,[60] and also, all transactions concluded in such capacity shall become treated as if they had been concluded by the business association.[61] In Hungary, the relationship between the registered pre-company and the final company is a continuity between legal entities, a legal continuity.[62]

In Hungary, it is also possible to employ a simplified registrational procedure[63] for the foundation of a business association. General partnerships, limited partnerships, limited liability companies and private companies limited by shares may use a standard formula (template) to draw up their memorandum of association, which may contain only what is required within the standard formula, and so this circumstance must be indicated accordingly in the standard formula, and also it must be enclosed with the application for registration.[64] The legal representative in such cases shall provide the request for registration with his confirmation that he has completed the legal inspection of the documents to be submitted, and that he shall also guarantee their legal compliance. The confirmation by the legal representative on having completed such a legal inspection must be included in the request for registration.[65] The competent Firm Court shall adopt a decision concerning the judgement to be made upon the request for registration after the receipt of the request for registration, within one workday from the receipt of the notification from the Tax Authority with the tax number. The Firm Court shall initiate the delivery of its warrant ordering the company's registration, or rejecting the request for registration to the legal representative within the above specified deadline.[66]

As a result of this simplified procedure, the pre-company form shall become both irrelevant and unnecessary for the founders of business associations: over 90 % of Hungarian companies are established by means of such simplified procedures.[67] The

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[58] BH 2010. 44; BH 2003. 471; BH 2003. 372; BH 2003. 80 (Periodical collection of the decisions of the Hungarian Supreme Court).

[59] HCC Section 3:101 (2).

[60] BH 2002. 296 (Periodical collection of the decisions of the Hungarian Supreme Court).

[61] HCC Section 3:101 (3).

[62] On the basis of János Dúl & Zóra Zsófia Lehoczki & Tekla Papp & Emőd Veress (eds.),*Társasági jogi lexicon,* 101 (Budapest: Dialóg Campus, 2019).

[63] Papp (2015), *supra* n. 54, 65-67.

[64] Section 48 (1) of the FA *(*Act V of 2006 on Public Firm Information, Firm Registration and Winding-up Proceedings.

[65] FA Section 48 (2).

[66] FA Section 48 (4).

[67] Economy Profile Hungary, Doing Business 2020, 5-9.

pre-company could be an important tool for the responsible establishment of companies, however: it encourages the conclusion of well-considered memorandumof association that take into account the future operation and the internal relations of the company, the amendments of the memorandum of association following registration in the Firm Register and the members'/shareholders' 'agreement (as syndicate contract) would be avoided. The pre-company stage is an opportunity to test company plans and ideas in practice before registration.[68]

2.3. The Invalidity of the Memorandum of Association[69]

Under the Hungarian Civil Code, the provisions on the nullity of contracts must also be applicable to the nullity of the instrument of constitution of a legal person, until the resolution passed in the subject of the registration of a legal person shall gain its legally binding force.[70] After the legally binding registration of a deed of a legal person, the nullity of the instrument of constitution of the legal person may not be used as a reference in order to request its removal from the registry. In the event that any provisions of the instrument of constitution are unlawful, all the tools available for ensuring its lawful operation may be utilized.[71]

Under the Firm Act, a lawsuit may be filed against the registered company, before the competent court as determined by the registered seat of the company, for the purpose of declaring the nullity of the establishment of the company, within a period of six months as a term of preclusion, calculated from the publication of the company's details in the Firm Gazette. Such a lawsuit may only be filed either by the public prosecutor, or by any entity, that confirms its related legal interest.[72] A lawsuit against a company of any type may only be filed for any of the following causes for nullity, as listed in the Firm Act:

– the instrument of constitution was not countersigned by a notary, or an attorney or by the founder's legal counsel, or it was not drawn up in a notarial document;
– the instrument of constitution fails to state the company's corporate name, its main business activity, its subscribed capital and the amount of the capital contributions of its members;[73]

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[68] FA Section 33 (3): An application to register a firm can be withdrawn until the first instance decision is made. In this case, the firm court terminates the procedure. In case of the withdrawal of the application for the registration of the company, the document on the termination of the pre-company or the amendment of the founding document, and if the change registration request was based on the decision of the supreme body, the relevant decision of the supreme body must be attached to the withdrawal of the application.

[69] See more in Éva Gyöngyösiné Antók, *A társasági szerződés érvénytelensége a magyar társasági jogban* 9 Gazdaság és Jog 3-8 (2015); Papp (2015), *supra* n. 54, 50-51.

[70] HCC Section 3:15 (1).

[71] HCC Section 3:15 (2).

[72] FA Section 69 (1).

[73] BH 1989. 370 (Periodical collection of the decisions of the Hungarian Supreme Court).

– the company's scope of activity is unlawful;
– the incapacity of all the founding members, or their failure to comply with the statutory provisions concerning the requirement of the minimum number of members participating in the foundation of the company;
– failure to comply with the provisions concerning the minimum amount of the subscribed capital to be paid in the cases of the limited liability company and the stock company.[74]

The court shall order the company to take appropriate measures for having the reasons for nullity eliminated within the deadline prescribed. If the measures produce the results required, the court shall determine the nullity, and shall order the Firm Court to take (the applicable measures).[75] If the grounds for nullity cannot be eliminated or if the company fails to comply with the court order,[76] then the court shall declare the nullity of the establishment of the company, and shall declare the instrument of constitution to be effective up to the date specified in the judgement. The court shall furthermore order the Firm Court to declare the company's termination by winding-up, and consequently to conduct a procedure of dissolution by compelled cancellation or liquidation proceedings.[77]

The Hungarian Civil Code distinguishes between the applicable rules on the invalidity of the memorandum of association, on the basis of whether a company is registered or not (i.e. it officially exists) : prior to the company's registration, the provisions of the Hungarian Civil Code are applicable, while after the registration, the prescriptions of the Firm Act that are applicable.[78] During the period lasting from the concluding of the memorandum of association to found a company, until the delivery of the decision of the Firm Court on the registration, the provisions of the Hungarian Civil Code on nullity shall be applied (exclusively). However, most of the reasons for nullity listed in the HCC are actually irrelevant and uninterpretable, for example a sham contract,[79] an immoral contract,[80] unfair general terms and conditions,[81] an unfair condition that hinders consumer rights[82] etc. The memorandum of association may only be regarded as a negligible form of contract while it is under the effect of the Hungarian Civil Code, and only until the registration of the business association. Thereafter, the legal institution of nullity is applicable, under the legislation. Unlike under the Hungarian Civil Code, the nullity of the establishment of a registered company may result in its cancellation from the Firm Register.[83]

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[74] FA Section 69 (2).
[75] FA Section 69 (3).
[76] BH 1994. 275 (Periodical collection of the decisions of the Hungarian Supreme Court).
[77] FA Section 69 (4).
[78] ÍH 2012. 185 (Decision of the High Court of Appeal).
[79] HCC Section 6:92 (2).
[80] HCC Section 6:96.
[81] HCC Section 6:102.
[82] HCC Section 6:100.
[83] Papp (2019), *supra* n. 42, 268-269.

In the legal practice, the provisions of the Firm Act are taken as the key points of reference, because these rules are both entirely useful and interpretable without any uncertainties, and these rules imply the adoption of the first EU directive (2017/1132/EU) on company law.

3. The Liability of the Members and the Director (Managing Director)

The Hungarian Civil Code perceives liability in a novel way: the legislator distinguishes between the obligation to fulfil commitments and liability. Regarding liability, we can differentiate legally between contractual liability (for a breach of contract) and delictual liability (for damages in a tort).[84]

In the first type of liability (contractual), a person causing damage to another party by breaching the contract shall be required to compensate them for it; he/she/it shall be exempted from liability if he/she/it proves that the breach of contract was caused by a circumstance that was outside of his/her/its control and was not foreseeable at the time of concluding the contract, and he/she/it could not have been expected to have avoided that circumstance or averted the damage.[85] In the second type, delictual liability, a person unlawfully causing damage to another shall compensate them for the damage caused; he/she/it shall be exempted from liability if he/she/it proves that he/she/it was not at fault.[86]

The new Hungarian Civil Code clarified the relationship between contractual and delictual liabilities by introducing the non-cumul rule: the obligee may enforce his/her/its claim for damages against the obligor in accordance with the rules on liability for damage caused by breach of contract, even if the damage gives rise to the obligor's extra-contractual liability.[87] Under this new liability regime, the role of liability exclusion and liability limitation clauses included in the contract has increased, and the importance of contractual shortening of the limitation period has grown.[88] However, the liability system of the new Civil Code is still the subject of debates in the legal literature.

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[84] Regarding contractual theory, see David Gibbs-Kneller & David Gindis & Derek Whayman, *Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms* 23 European Business Organization Law Review 573-601 (2022).

[85] HCC Section 6:142: Liability for damage caused by breach of contract; HCC Section 6:147 [Liability for damages in the event of gratuitous contracts] (1) The person undertaking the performance of a service free of charge shall be liable for the damage incurred in the subject of the service if the obligee proves that the obligor caused the damage by an intentional breach of contract, or failed to provide information on a substantial characteristic of the service which was unknown to the obligee. (2) A person undertaking the performance of a service free of charge shall be required to compensate for the damage caused by his/her/its service to the assets of the obligee. He/she/it shall be exempted from liability if he proves that he was not at fault.

[86] HCC Section 6:519: General rule on liability; BDT 2022. 4563: In delictual liability, foreseeability is a condition of causality.- (Casebook of the Courts).

[87] HCC Section 6:145: Exclusion of parallel claims for damages.

[88] Ádám Fuglinszky, *Kártérítési jog,* 67-68 (Budapest: Hvgorac, 2015).

3.1. The Liability of the Member

The regulation on the liability of the members of the company is notable for its lack of integration, and as such, it is hard to identify a clearly interpretable system of rules in this regard.

3.1.1. The Liability of the Member towards the Company

The basic prerequisite for membership in a business association is the obligation of the fulfilment of the capital contribution.[89] Deriving from this fundamental obligation of the member, further obligations[90] and relating liabilities arise. The relevant liabilities[91] are defined as follows in the HCC:

– if a member fails to provide his contribution as it was undertaken in the instrument of constitution, and by the deadline specified therein, then, in addition to the termination of his membership, the thus former member shall be held liable for the damages caused to the business association by reason of his failing to provide the contribution, in accordance with the provisions on liability for damages caused by a breach of contract;[92]
– the members, who were aware of and consented to the contribution in kind having been provided by a member at a higher value than its actual worth at the time of providing, shall bear a joint and several liability towards the company,

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[89] HCC Section 3:88 [Definition of a business association] (1) Business associations are legal persons established for the pursuit of business operations with capital contribution provided by the members, where each member has the right for a share of the profit and has the obligation to involve in the covering for the losses.

[90] HCC Section 3:10 (3) If, at the time of transfer, the value of contribution in kind does not reach the value indicated in the instrument of constitution, the legal person may demand for the payment of the difference from the person having provided the contribution in kind within five years after the date of transfer.

Limited liability company: HCC Section 3:207 (3) If, upon the commencement of dissolution or upon an order of liquidation, the initial capital of the company has not yet been paid up in full, the receiver in charge of the dissolution proceedings or the liquidator shall have the right to make unsettled payments due with immediate effect, and order the performance thereof by the members, if this is necessary in order to satisfy the debts of the company.

Stock company, HCC Section 3:322 (2) If, before the opening of dissolution procedures, or before the order of liquidation, the share capital of the stock company has not yet been paid up in full, the receiver in charge of the dissolution proceedings or the liquidator shall have the right to make unsettled contributions in cash and contributions in kind due with immediate effect, and to order the performance thereof by the shareholder, if this is necessary in order to satisfy the debts of the stock company.

[91] The applicable rule is: HCC Section 6:142 [Liability for any loss caused by non-performance] The person who shall cause damage to the other party by the breaching of the contract shall be liable for such damage. The aforementioned party shall be relieved from any liability if it is capable to prove that the damage occurred as a consequence of unforeseen circumstances beyond its control, and there had been no reasonable cause to take action for preventing or mitigating the damage.

[92] HCC Section 3:98.

together with the providing person, in accordance with the provisions on the liability for damages caused by the breaching of a contractual obligation.[93]

3.1.2. The Liability of the Member towards the Creditors

The rules of general liability are variously imposed or missing in the regulations on different company forms:

– the members of a general partnership, and the general partner[94] in a limited partnership must undertake joint and several liability for the obligations of the partnership not covered by the assets[95] of the partnership;[96]
– the limited partner of a limited partnership, the members of a limited liability company, and the shareholders of stock companies – unless otherwise decreed by the Hungarian Civil Code – shall not be held liable for the obligations of the company;[97] and so the notion of "otherwise decreed" opens the door to further interpretations, as will be highlighted below.

The Hungarian Civil Code, moreover, provides the rules for special liabilities in connection to the foundation, the operation, and the termination of a company.

In connection to the foundation of a company:

(a) If a company exists as a pre-company before its registration, but registration is refused so the pre-company is terminated, then the obligations undertaken until that time shall be settled from the assets made available to the would-be business association. The founders shall bear a joint and several liability against third persons for the liabilities that cannot be covered from such assets. If the liability of the members of the would-be business association for the obligations of the business association was limited, and if certain claims have still remained unsettled despite the proper fulfilment of the members, then the directors of the would-be business association shall bear unlimited liability jointly and severally, against third persons.[98]
(b) In the case of a limited liability company, when, according to the memorandum of association, the full contribution in cash does not have to be paid until registration, a member can pay the contribution in cash in whole or in part from the profit that can be distributed according to the rules of dividend payment. In such a case, the company may not pay the member the dividend

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[93] HCC Section 3:99 (2).

[94] BH 2001. 285; BH 2003. 240 (Periodical collection of the decisions of the Hungarian Supreme Court).

[95] Judit G. Farkas, *Mögöttes tagi felelősség a magyar társasági jogban* 6-7 Gazdaság és Jog 24-30 (2006).

[96] HCC Sections 3:138 and 3:154.

[97] HCC Sections 3:154, 3:159, and 3:210.

[98] HCC Section 3:101 (5) this provision shall also apply if the company withdraws its application for registration.

he/she/it is entitled to, but must account for it to the member's unpaid capital contribution until the unpaid profit has accounted for the member's capital contribution, together with the contribution in cash made by the member, reaches the amount of the total contribution in cash undertaken by the member. If, by the end of the second full business year, which includes twelve months from the date of its registration, the company has not provided the full financial contribution, the member shall pay the unpaid contribution in cash to the company and is obliged to make this contribution available within three months of the acceptance of the report for the second full business year – covering twelve months – from the date of its registration. In such a case the members shall bear the responsibility for the debts of the company to the extent of the unsettled parts of their contributions in cash.[99]

(c) In the case of stock companies, any issuance of shares below their nominal value is deemed null and void; liability towards third parties for the damages caused by the issuance of shares below the nominal value shall fall upon the founders on the grounds of non-contractual liability, if it happens before the registration of the company, or it shall fall upon the company, if such shares are issued after the registration of the company (if there is more than one founder, their liability shall be joint and several).[100]

Regarding the operation of companies, in the Hungarian Civil Code applies a similar rule to that of the piercing of the veil (*Haftungsdurchgriff*) (this statement of fact is the result of judicial development):[101] if a member of a legal person shall cause any damage to a third person in connection with his membership, the liability towards the person injured falls upon the legal person, but the liability of the member and the legal person shall be joint and several if the damage was caused intentionally.[102] This rule can only be applied if the member, through his/her own behaviour, causes damage to a third party on purpose, outside of the contract, exploiting an opportunity provided by his/her/its membership: the claimant can only be a person who does not have a contractual relationship with the legal person or its member, and who does not make a claim against the legal person on a delictual basis.[103] As noted earlier, there are several special types of members, including the dominant member in a group of companies,[104] the sole member[105] of a limited liability company (of one) or of the members of a stock company (with applicable qualified majority control). These

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[99] HCC Section 3:162.

[100] HCC Section 3:212 (4).

[101] György Wellmann, *Tagi felelősségátvitel* 11 Gazdaság és Jog 3-10 (2008); István Kemenes, *Mögöttes felelősség és felelősség-átvitel* 3 (207) Céghírnök 3, 4, 12-14 (2007).

[102] HCC Section 6:540 (2), (3).

[103] Fuglinszky, *supra* n. 87, 440-441.

[104] BH 2005. 187; BH 2007. 418 (Periodical collection of the decisions of the Hungarian Supreme Court).

[105] ÍH 2005. 34 (Decision of the High Court of Appeal).

members are to be held liable for any such debts arising on the on the part of the controlled member(s)/ the limited liability company / the stock company, which have arisen from the insolvency of the controlled member / the limited liability company / the stock company, due to the wrongful joint business policy of the group of companies '/ the limited liability company / the stock company.[106]

In connection with the termination of a company, general liability rules are included in the Hungarian Civil Code for termination without succession,[107] with succession[108] and for the transfer of liability (Übergang der Haftung).[109] Only in the case of a general partnership or a limited partnership does the legislator provide for additional rules in relation to the termination of the company,[110] the former membership relation[111], and the change of the member's position.[112]

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[106] HCC Sections 3:59, 3:208 (3), 3:323 (5), 3:324 (3).

[107] HCC Section 3:48 (3) The members and founders of a legal person dissolved without succession shall be held liable up to their respective shares for the outstanding debts of the dissolved legal person. Section 3:137 [Liability of the members in the event of dissolution without succession] (1) In the event of dissolution of a business association without succession, claims that remain unsettled on the basis of the obligations of the business association that will cease to exist, may be enforced within a five-year preclusive period against the former members of the business association. (2) If the liability of a member for the obligations of the business association was unlimited during the company's existence, his guarantee obligation shall also be unlimited and joint and several together with the other members with unlimited liability, for the liabilities of the terminated business association. Any debts arising between the members shall be covered by and shared among the members consistent with their share in the distributed assets of the business association; BH 2008. 183. (Periodical collection of the decisions of the Hungarian Supreme Court).

[108] HCC Section 3:135 [Liability rules relating to transformation] (1) The members who have decided to withdraw from the company upon transformation, if dissolved without succession, shall be liable for any debt of the predecessor which is not covered by the legal person established by transformation. (2) Any member with unlimited liability, who becomes a member with limited liability upon transformation, shall be liable for any debt of the predecessor jointly and severally with other members of the legal person established by transformation with unlimited liability, for a preclusive period of five years following the time of registration of the successor.

[109] HCC Section 3:2 [Liability for the legal person's debts] (1) Legal persons shall be liable for their debts with their own assets; members and founders of a legal person shall not be held liable for the legal person's debts. (2) In the event of the violation of the limited liability on the part of any member or founder of a legal person, in account of which any outstanding claims of creditors shall remain unsettled at the time of the legal person's dissolution without succession, the member or the founder in question shall be subject to unlimited liability for such debts; BH 2007. 418. (Court Order).

[110] HCC Section 3:153 (2) If, in connection to the conversion of a general partnership into a limited partnership, the liability of a member who becomes the limited partner shall remain to bear unlimited liability for the partnership's debts arising from prior to the conversion within a preclusive period of five years.

[111] HCC Section 3:157 If the partnership's general partner becomes a limited partner, it shall remain liable in accordance with the provisions applicable to the general partner within a preclusive period of five years from the date of becoming a limited partner for the partnership's debts arising from prior to the change.

[112] HCC Section 3:151 (1) A former member of the partnership – including the successor of a dissolved member, who did not join the partnership – shall remain liable for the partnership's liabilities arising from proceeding with the termination of his membership within a preclusive period of five years, the same way as it was, proceeding with the termination of his membership. (2) The heir of a

We can also find liability norms elsewhere, other than among the provisions of the Hungarian Civil Code: both the Firm Act[113] and the Bankruptcy Act[114] contain provisions on liability for the different types of company termination proceedings,[115] and also for the conduct of the members, as well as the position of specific members in various types of enterprises (not only in companies).[116]

3.1.3. Consequences

The provisions on the liability of the members are lacking in content: they are rarely applied in practice, and hence are rarely dealt with in the published court decisions. If the rules on the liability of the members are to be applied, then it is only the provisions of the Firm Act and the Bankruptcy Act that shall be utilized, and not those of the Hungarian Civil Code. This follows from the phrase "unless otherwise decreed" used in the Hungarian Civil Code. The professional legal literature does not favour this topic, either: only a few monographs[117] have been published on it in the last two decades.

There is no one unified system in Hungarian law that covers all the existing number of legal situations that may arise in connection with the liability of the members of companies. Indeed, it has never been the aim of the legislator to develop a comprehensive liability regime relating to the position and the conduct of the members. In the following sections, we will examine how the Hungarian Civil Code focuses on other legal problems than those regulated by the Firm Act and the Bankruptcy Act. The Civil Code concentrates on the protection of the assets of the company, and thus also on the protection of the creditors,[118] while the other Acts regulate the liability of the member holding a dominant position, and furthermore sanction the unlawful deeds of the member in the event of the termination proceedings of the firm.

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deceased member, who did not join the partnership, shall remain liable for the partnership's liabilities that arose preceding the time of death within a preclusive period of five years, in accordance with the provisions on inheritance debts.

[113] Act V of 2006 (FA).

[114] Act XLIX of 1991 Bankruptcy Act (BA).

[115] Mária Bodor, *Változások a kényszertörlés szabályozásában* 58 Gazdaság és Jog 1-2 (2022); Borbála Lénárdné Maletics, *A gazdasági társaság jogutód nélküli megszűnésének a jogi személy mögött álló természetes személyek magatartásával összefüggő okairól – különös figyelemmel a kényszertörlési eljárásra* 16 Gazdaság és Jog 4 (2021).

[116] FA Section 118/A (1)-(3); ÍH 2018. 113 (Decision of the High Court of Appeal); BA Sections 63 (2), 63/A; Kúria Gf. 30360/2018/8 (Decision of the Curia); BH 2019. 22 (Periodical collection of the decisions of the Hungarian Supreme Court); ÍH 2012. 138; ÍH 2013. 38 (Decision of the High Court of Appeal); BH 2016. 345 (Periodical collection of the decisions of the Hungarian Supreme Court).

[117] Fuglinszky, *supra* n. 87; Tamás Török, *Felelősség a társasági jogban* (Budapest: Hvgorac, 2015); Tibor Nochta, *A magánjogi felelősség útjai a társasági jogban* (Budapest-Pécs: Dialóg Campus, 2005); Máté Mohai, *Felelősség és helytállási kötelezettség a társaságok jogában* (Pécs: Menedzser Praxis 2019).

[118] See from another aspect, András Kisfaludi, *A hitelezővédelem funkciója és szabályozása a társasági jogban,* MKIK Jogi Szekció Tájékoztató Füzetek 6-18. (Budapest: MKIK Szolgáltató Nonprofit Kft. 2020).

The implementation of the established facts of the contractual -, and non-contractual liabilities in the Hungarian Civil Code in regard of the liability of the members does also seem problematic, as besides these two, proving the harmful nature of the actions of a member can be rather difficult. If we try to discern any particular tendencies in the development of the legislation in the field of Hungarian company law, then we can identify a desire on the part of the legislator to protect the real capital of the companies, and to eliminate the incidence of phony companies by means of rules on the liability of the members.

3.2. The Liability of the Director[119]

In Hungarian company law, the liability of the director is regulated by several acts, and in several ways. For this reason, we shall classify the respective established facts in accordance with a number of criteria in the following sections. To do this, we will use the same method as we did in the case of the liability of the member.

3.2.1. The General Legal Grounds for the Liability of the Director towards the Company and the Creditors[120]

Similarly to the European Model Company Act (EMCA)[121] and Aktiengesetz in Germany,[122] Hungarian company law regulation does not contain a duty of care

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[119] Ádám Auer *Vezető tisztségviselő felelőssége* in János Dúl & Zóra Zsófia Lehoczki & Tekla Papp & Emőd Veress (eds.), *Társasági jogi lexicon,* 315-319 (Budapest: Dialóg Campus, 2019); see more in Tibor Nochta, *A polgári jogi felelősség változásairól a társasági jogban* 7-8 Gazdaság és Jog 12-18 (2019); Tibor Nochta, *A vezető tisztségviselők magánjogi felelősségének mércéjéről és irányairól az új Ptk. alapjá* 6 Gazdaság és Jog 3-8 (2013); Balázs Bodzási, *A jogi személyek körében felmerülő felelősségi kérdésekről, különös tekintettel a vezető tisztségviselőkre* 6 Gazdaság és Jog 8-14 (2013); Judit Gál, *A vezető tisztségviselő felelősségének egyes kérdései a gazdasági társaságoknál* 6 Céghírnök 3-6 (2014) and 7 Céghírnök (2014); Judit Barta, *A gazdasági társaságvezető tisztségviselőjének felelősségi rendszere és a vezetői felelősségbiztosítás* in Árpád Homicskó, Róbert Szuchy (eds.), *60 studia in honorem Péter Miskolczi-Bodnár, De iuris peritorum meritis 11,* 25-37 (Budapest: KRE ÁJK, 2017); Judit Barta & Tünde Majoros, *A vezető tisztségviselő gazdasági társasággal szembeni és harmadik személyeknek okozott károkért való felelősségének neuralgikus kérdései* 2 Miskolci Jogi Szemle 5-16 (2015); András Kisfaludi, *Anyagi és eljárási szabályok a gazdasági társaságok vezető tisztségviselőinek hitelezőkkel szembeni felelőssége körében* in Árpád Homicskó, Róbert Szuchyt (eds.), *60 studia in honorem Péter Miskolczi-Bodnár, De iuris peritorum meritis 1,1* 321-336 (Budapest: KRE ÁJK, 2017).

[120] This subpoint is based on: Ádám Auer & Tekla Papp, *The Solution of Hungarian Company Law in Connection With Duty of Care and Duty of Loyalty* 3 Acta Universitatis Carolinae Juridica 50-51 (2022).

[121] EMCA Section 9.03 Duty of Care: A director of a company must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has.

[122] Aktiengesetz Section 76 Leitung der Aktiengesellschaft: (1) Der Vorstand hat unter eigener Verantwortung die Gesellschaft zu leiten.

requirement, only a general duty[123] and a duty of loyalty[124] (but not in its full sense) is required from the company's director.[125] Therefore, we can instead deduce these legal institutions from the principles of the Hungarian Civil Code and from the liability provisions for directors. The Hungarian system is based on providing incentives for proper behaviour, which has its roots in the general principles of Hungarian private law. The principles of good faith, fair dealing,[126] generally expected standard of conduct,[127] and prohibition of abuse of rights;[128] are reflected in the Hungarian Civil Code, including in relation to the liability of directors.

A director must be held liable for the damages caused to a legal person[129] by his/her management activities, in accordance with the provisions on the liability for damages caused by breach of a contractual obligation.[130] This rule applies to the director's internal liability vis-à-vis such a legal person. A director is only in breach of his/her contract if he/she fails to exercise the increased level of care expected of a person holding such a position.[131] This business judgement rule assumes that the director's business decision was based on reasonable information and was not irrational,[132] i.e. he/she acted in good faith and with the knowledge that his/her action best served the interests of the company.[133]

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[123] EMCA Section 9.01 General Duties: (1) The company's directors are responsible for the management of the company's affairs.

[124] EMCA Section 9.04 Duty of Loyalty: Directors must act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In doing so the director should have regard to a range of factors such as the long-term interests of the company, the interests of the company's employees, the interest of company's creditors and the impact of the company's operations on the community and the environment.

[125] Hungarian Civil Code (HCC) Section 3:21(1) Decisions related to the management of a legal person that fall outside the powers of the members or founders shall be adopted by a director or directors or by a body of directors. (2) Directors shall perform their management duties in the interests of the legal person.

[126] HCC Section 1:3(1) Parties shall act upon the requirement of good faith and fair dealing when exercising rights and fulfilling obligations. (2) The requirement of good faith and fair dealing is also breached by the person whose exercise of rights is contrary to his previous conduct upon which the other party could reasonably rely on.

[127] HCC Section 1:4(1) Unless otherwise provided in this Act, in civil law relations, one shall proceed with the care that is generally expected under the given circumstances. (2) No one can rely on his own fault for gains. (3) A person who is at fault himself may also rely on the fault of the other party.

[128] HCC Section 1: (1) Abuse of rights shall be prohibited by an Act. (2) If the abuse of rights consists of refusing to give a statement required by law, and this conduct harms an overriding public interest or a personal interest requiring special consideration, this statement may be substituted with the judgment of the court, provided that the harm to interests cannot be averted by other means.

[129] The threat of damage does not establish the director's liability: the damage must actually occur; BDT 2020. 4253 (Casebook of the Courts).

[130] HCC Section 3:24 (1); BDT 2019. 3994.; BDT 2019. 4011(Casebook of the Courts).

[131] Fuglinszky, *supra* n. 87, 136.

[132] Tamás Cseh, *A vezető tisztségviselő felelőssége és az üzleti kockázat* 9 Gazdaság és Jog 3 (2012); Fuglinszky, *supra* n. 87, 137.

[133] Tamás Fézer, *Kárfelelősség a kártérítési jogban* in Fézer Tamás (ed.), *A kártérítési jog magyarázata*, 408 (Budapest: Complex, 2010); Fuglinszky, *supra* n. 87, 137.

A legal person shall be liable for any damage caused to a third party by the director acting in his competence. The director and the legal person shall be jointly and severally liable if the director caused the damage intentionally.[134] This provision applies to a director's external liability to creditors. This includes, for example, a director's conduct when the director commits a crime using the legal entity.[135] This rule opened the way to the interpretation that the liability for damage caused by intentional behaviour can also be extended to damage caused by breach of contract.[136]

3.2.2. The Special Liability of the Director towards the Company and the Creditors in Respect of the Foundation, the Operation, and the Termination of the Company

The person appointed to represent a legal person shall be responsible[137] for submitting the request for the registration of the legal person to be established. As such, the representative shall be liable to the founders according to the provisions on the liability for damages caused by the breaching of a contractual obligation, e.g. for the damages caused by his/her failure to either submit the request or the submission thereof in due time, or if he/she did it in a deficient or erroneous form.[138]

If the registration of the business association (at the pre-company period) has been rejected by virtue of a decision with binding force, the business association under registration must terminate its operation without delay, upon gaining knowledge about the decision. The directors of the business association being registered are liable for any damages caused by the breach of this obligation, according to the provisions on the liability for damages caused by the breaching of a contractual obligation.[139] If the operation of a business association in the process of registration (during the pre-company period) is terminated, the obligations undertaken until that time shall be settled from the assets made available to the pre-company. If the liability of the members of the pre-company for the obligations of the business association was limited, and if certain claims have still remained unsettled despite the members having fulfilled their duties properly, then the directors of the pre-company shall bear an unlimited responsibility (fiduciary duty) jointly and severally, in relation to third parties.[140] These provisions are also applicable if the business association withdraws its request for registration.[141]

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[134] HCC Section 3:24 (2) see in Péter Miskolczi-Bodnár, *A társasági jog egyes problémái* 3 Gazdaság és Jog 7-14 (2019).

[135] BH 2018. 165 (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).

[136] Kisfaludi, *supra* n. 117, 173.

[137] On the responsibility and liability of the excutive officer see Péter Miskolczi-Bodnár, *Felelősség és helytállás* 1-2 Glossa Iuridica 111-145 (2017); Péter Miskolczi-Bodnár, *Helytállás a társaság tartozásaiért* in József Benke, Tibor Fabó (eds.), *A puro pura defluit aqua, Ünnepi tanulmányok Nochta Tibor professzor 60 születésnapja tiszteletére*, 197-209 (Pécs: PTE ÁJTK 2018).

[138] HCC Section 3:12.

[139] HCC Section 3:101 (4).

[140] HCC Section 3:101 (5).

[141] HCC Section 3:101 (6).

During the operation of a company, in the event that the supreme body of the business association grants the managing director a certificate of discharge from the compliance of his management activities, realized in the previous financial year, along with their approval of the financial report upon the request of the managing director, the business association may only enforce its claim against the director for the damages he/she caused by the violation of his/her management obligations, if the facts and data having served the basis for their granting the discharge were false or defective.[142]

In the case of a group of corporations, according to the HCC: the director of a controlled member shall manage the controlled member in accordance with the control contract, under the governance of the dominant member, based on the primacy of the business policy of the group of corporations as a whole. The director shall be exempt from liability to the members if his/her conduct is found to be in compliance with the provisions set out in the relevant legislation and in the control contract.[143]

After the termination of a business association without succession, those members who were members at the date of the deletion of the business association from the registry may enforce a claim for damages against the directors within a term of preclusion of one year from the date of the deletion of the business association from the registry. The members are entitled to lay such claims for such damages to the extent of their rightful share in the assets distributed.[144]

If the business association terminates without succession, the creditors may enforce their claims for the damages up to the amount of their unsettled claims against the directors of the business association, based on the rules on liability for damages caused under extra-contractual obligations,[145] if the director involved failed to take into account the interests of the creditors when the circumstance endangering the business association with insolvency arose. This provision is non-applicable in the event of termination by winding-up.[146]

In cases of compelled cancellation, and in relation to the liquidation process, the Firm Act[147] and the Bankruptcy Act[148] provide further rules on the liability of the

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[142] HCC Section 3:117.

[143] HCC Section 3:55 (4).

[144] HCC Section 3:117 (1), (3).

[145] HCC Section 6:519 Any person who causes damages to another person unlawfully shall be liable for such damages. The tortfeasor shall be relieved of liability if he is able to prove that his conduct was not actionable.

[146] HCC Section 3:118.

[147] FA Section 118/B (1)-(4); BDT 2020. 4243 (Casebook of the Courts); ÍH 2018. 76.; ÍH 2019. 67 (Decision of the High Court of Appeal).

[148] BA Section 33/A (1)-(4); ÍH 2018. 139 (Decision of the High Court of Appeal): This rule shall be applied and interpreted together with HCC Section 3:118; BH 2018. 231 (Periodical collection of the decisions of the Hungarian Supreme Court); See more Máté Mohai, *A csődjogi és cégjogi változások hatásai a wrongful trading intézményére* 1-2 Gazdaság és Jog 32-41 (2018).

director, in order to extend and interpret the provision of the Hungarian Civil Code[149] relating to the termination of a company without succession.[150] For example:

– the liability of a director is not only governed under the effect of the general terms of the Hungarian Civil Code, but also under the effect of the special terms on claims stipulated by the Bankruptcy Act, during the period of the liquidation process;[151]
– the creditor is required to prove the amount of decrease in the company's assets that occurred between the emergence of the situation endangering the company with insolvency and the start date of the liquidation,[152] and also the causality between the deed/ failure performed by the director and the damage to the interest of the creditor;[153]
– the director is required to prove that he/she had avoided or prevented the situation endangering the company with insolvency that arose during the period of his/her leadership;[154]
– the liability of the director is deemed secondary; [155]
– the rules on the liability of a director shall also be applicable to the liability of shadow directors (with respect to the actions performed by them in the capacity of a company manager, a member of the supervisory board with ultimate decision-making power, a member having significant influence, etc.).[156]

3.2.3. Consequences

The legal grounds for the liability of a director can be objective or subjective. Under objective liability conditions, exculpation is not available to the director (full and unconditional liability). While under a subjective liability regime, the director may exculpate his/her conduct on the basis of legislation. The legislator is not consistent in this regard, however: the equiponderant acts of a director are judged differently.

Other factors can lead to further difficulties in determining the type of liability that falls upon the director. Managing directors can act either on the grounds of their

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[149] In the legal practice, in the event of the repayment of a member's loan SZÍT Gf. I. 30 509/2012 (Decision of the High Court of Appeal of Szeged), and the event of concluding a contract, the completion of which is presumably impossible for the company. DÍT Gf. IV. 30 5402013/7 (Decision of the High Court of Appeal of Debrecen).

[150] See in Ágnes Mika, *Az új Polgári Perrendtartás rendelkezéseinek gyakorlati alkalmazása a társasági jogvitákban* 7 Céghírnök 3-10 (2018); ÍH 2018. 78.; ÍH 2018. 121 (Decision of the High Court of Appeal).

[151] BDT 2020. 4186 (Casebook of the Courts).

[152] SZÍT Gf. I. 30 509/2012 (Decision of the High Court of Appeal of Szeged); BDT 2022. 4554 (Casebook of the Courts).

[153] BDT 2020. 4121 (Casebook of the Courts); ÍH 2021. 25. (Decision of the High Court of Appeal).

[154] ÍH 2020. 129; ÍH 2021. 26; ÍH 2022. 27 (Decision of the High Court of Appeal).

[155] ÍH 2018. 157 (Decision of the High Court Appeal).

[156] The opinion of the Civil Department of the Curia, 6 February 2017, 13-14 (12 October 2022) https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_6.pdf.

employment relationship[157] (mixed obligation: diligence, and achieving certain results) or on the basis of their agentive[158] (diligence obligation) relationship. Moreover, they can exercise their acts together or independently. Finally, the jurisprudence is not unified in the matter of joint and several liability (whether it can also apply to the director's independent actions).[159]

However, certain common and consensual corner points can be identified in connection with the treatment of liability in the Hungarian established legal practice and in the legal literature:

– the liability of a director can be established if they breach their management obligations under the contract concluded with the company and this causes damage of a material nature to the company;
– the breach of contract by a director is necessarily careless;
– directors shall perform their duties with the due diligence expected of persons holding such positions; and
– they may be released from liability if they prove that they were acting as generally expected under the given circumstances (those generally expected in a director's position).[160]

There is no real liability imposed for the piercing of the veil (*Haftungsdurhcgriff*), as Hungarian legal regulation does not employ the concepts of "transmission of liability" and "break-through of liability". Since the Companies Act of 1988, the legislator has been trying to find a satisfactory approach to ensure the effective regulation of the director's liability towards creditors, but the details of it practical application is left to the courts.[161] Before the entry into force of the new Civil Code, the courts applied the following condition: treating a manager's behaviour under the guise of legal personality is deliberate abuse for his/her own individual interests and property.[162] Section 3:118 of the HCC is still not clear:[163] this rule is applied by the court only as a framework for the liabilities defined by the Firm Act and the Bankruptcy Act, and

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[157] HCC Section 6:540 (1) If an employee causes damage to a third party in connection with his employment relationship, his employer shall be liable towards the injured party. (3) The employee... shall bear joint and several liability with the employer..., respectively, if the damage was caused intentionally.

[158] HCC Section 6:542 (1) If an agent causes damage to a third party in his capacity as an agent, the agent and the principal shall have joint and several liability towards the injured party. The principal shall be exempted from liability if he proves that he cannot be at fault with respect to selecting the agent, providing him with instructions and supervising him. (2) In the case of an agentive relationship of permanent nature, the injured party may also enforce his claim for the reparation of his damages in accordance with the rules on liability for damages caused by employees.

[159] SZÍT Gf. III.30.185/2017/4 (Decision of the High Court of Appeal of Szeged).

[160] Auer & Papp, *supra* n. 118. 61.

[161] Tamás Török, *A vezető tisztségviselő hitelezőkkel szembeni felelősségével összefüggő, a magyar jogirodalomban megjelent egyes álláspontokról* in '*A vezető tisztségviselők hitelezőkkel szembeni felelőssége' tárgykörben felállított joggyakorlat-elemző csoport összefoglaló véleménye,* 128. (Kúria Polgári Kollégiuma Joggyakorlat-elemző Csoport 2016.E1.II.JGY.G.2. 2017).

[162] EBD 2014.11.G3 (unifying decision of the Hungarian Supreme Court).

[163] Török, *supra* n. 160, 138-141.

the tribunals do not apply nor do they refer to this particular liability set out by the Civil Code. It is a general phenomenon that the legal practice enforces, above all, the state of facts on liabilities, in connection to termination procedures, rather than the provisions of the Civil Code.

4. Trends and Results of Corporate Governance in Hungary

Roughly 30 years since the publication of the Cadbury Report,[164] the importance of corporate governance has grown uninterruptedly. It remains just as relevant today as in 1992, having become one of the main influences on the legal thinking of company law, in our view.[165]

The legal approach of corporate governance entails setting legal requirements in relation to the organizational operation of the business association which aim to make the operation of the companies more transparent and predictable. Collectively, these requirements ensure that the business association operates in a way that continuously reveals any flaws in its operation, thus allowing the termination of the business association due to its unlawful operation and insolvency to be avoided. In our opinion, when examining corporate governance, the definition provided by the OECD is the most suitable starting point: corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders.[166] However, it is also important to emphasize that corporate governance not only works with strict models, but also provides alternatives for the smooth and efficient operation of various kinds of business association. In other words, something that is optimal for one company might result in unreasonable regulation for another.[167] Thus, corporate governance is a specific complementary system providing for regulatory alternatives, that focuses on the operational effectiveness of business associations.[168] Whether this shall be treated as part of the legislation, or only as a matter of jurisprudence, it is subject to the decisions of the legislator.

We would generally agree with Gordon, that it appears that the perspective of company law has moved towards a more dynamic, operation-focused way of legal

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[164] Cadbury Report; Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation* 5 American Journal of Comparative Law 1 (2011); Christine Mallin, *Corporate Governance,* 26 (Oxford: Oxford University Press, 2009).

[165] Ronald J. Gilson, *From Corporate Law to Corporate Governance* in Jeffrey N. Gordon, Wolf-Georg Winge (eds.), *The Oxford Handbook of Corporate law and Governance,* 3-27. (Oxford: Oxford University Press, 2018); on the latest tendencies: Vanessa Knapp, *Sustainable Corporate Governance: A Way Forward?* 2 European Company and Financial Law Review 218-243 (2021) and Mark Fenwick & Joseph A. McCahery & Erik P. M. Vermeulen, *The End of 'Corporate 'Governance: Hello 'Platform' Governance* 20 European Business Organization Law Review 171-199 (2019).

[166] G20/OECD, *Principles of Corporate Governance*, 9 (2015) (9 July 2021) https://www.oecd.org/corporate/principles-corporate-governance/.

[167] J. Harold Mulherin, *Corporations, Collective Action and Corporate Governance: One Size Does Not Fit All* 1/2 Public Choice 179–204 (2005).

[168] See Thesis 2. Hopt, *supra* n. 163, 1-73.

thinking.[169] In our earlier works[170] we defined it by saying that the matters dealt with by business management were becoming drawn into the legal spectrum as those areas increasingly enter the scope of legal regulation, which had previously fallen outside the terrain of legal thinking and legislation. The enforceability behind a legal norm is ensured by its publicity, to put it simplistically: that is to say, the publication and the accessibility of a corporate governance report is its own sanction. Hence, besides the regulatory field being novel, the means of enforcement also differs from the enforcement methods of legal rules. Consequently, the number of legal requirements in relation to the governance of business associations is increasing. These derive in part from the volume of norms in the field of company law and stock market law, and partly from the codes of corporate governance.

4.1. The Status of Corporate Governance in Hungary

Corporate governance was first introduced in Hungary during the initial years following the turn of the millennium. In 2002, the Budapest Stock Exchange (hereinafter: the "BÉT") commenced its work, the outcome of which was the first code of the BÉT on corporate governance, completed in 2004.

It was also around this time that the scientific discourse started to discuss various matters of corporate governance in Hungary, the result of which was that corporate governance began to form part of the curriculum of graduate courses in the fields of legal science, political science and the science of economics at Hungarian universities.[171] Moreover, the scientific professional literature also dealt with the topic, adapted to national circumstances and in the Hungarian language, while various aspects of corporate governance received scholarly attention in a number of scholarly monographs, studies and PhD dissertations.[172] Alongside these, several debate–stimulating and corporate governance–promoting proposals are worth highlighting, which raised awareness of the topic and deepened understanding of it in the country.[173]

Finally, it is worth noting that corporate scandals related to corporate governance also affected Hungary, the origins of which can be attributed to organizational and supervisory misconduct. These scandals highlighted the need for transparency, accountability and proper supervision in corporate governance. One such instance

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[169] Gilson, *supra* n. 164, 7.

[170] Ádám Auer, *A felelős társaságirányítás hatása a jogi személyek elméletére* 11 Jogtudományi Közlöny 193-203 (2013).

[171] Based on the individual subject descriptions at the University of Pécs, Faculty of Law; the Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law; the Corvinus University of Budapest; and the University of Public Service.

[172] Ádám Angyal, *Corporate Governance* (Budapest: Aula, 2001); András Kecskés, *Corporate Governance* (Budapest: hvgorac, 2011); András Kecskés & Vendel Halász, *Stock Corporations – A Guidance to Initial Public Offerings, Corporate Governance and Hostile Takeovers* (Budapest: LexisNexis & hvgorac, 2017); Ádám Auer, *Corporate governance jelenkori dimenziói* (Budapest: Dialóg Campus 2017); Zoltán Csedő & Máté Zavarkó, *Társaságirányítás* (Budapest: Akadémiai Kiadó, 2021).

[173] Notable among these are the events and annual forums organized by the Budapest office of the American Chamber of Commerce (AmCham).

was the Postabank scandal of 1997 in Hungary involving the collapse of a large retail bank due to mismanagement and a clear lack of oversight of and accountability in its corporate governance. It was discovered too late that the bank was around 100 billion HUF in deficit, which the supervisory system was only able to indicate at a point when insolvency was already impossible to avoid.[174] Although not comparable in scale, another such scandal was the Buda-Cash, involving a brokerage firm which was investigated for fraud and breach of accounting rules. In this case from 2015, incidents of serious leadership malpractice came to light following a supervisory inspection. The misconduct uncovered included forgery of data, and the generating of fictitious acts to conceal the firm's losses.[175]

4.2. The Hungarian Stock Companies and Corporate Governance

The BÉT is the Hungarian capital market exchange, with a market capitalisation of HUF 9,773 billion.[176] Hungary's stock capitalisation as a proportion of GDP is internationally low by international standards at 16.5 percent. Hungary is currently behind Poland in the regional ranking. The Budapest Stock Exchange is almost 80% owned by the Hungarian Central Bank (Magyar Nemzeti Bank, hereinafter: MNB).[177] The 3 largest issuers of shares accounted for 93,5% of the stock market share of total stock market trading in 2021.[178] These three issuers are MOL, a Hungarian oil and gas group, with around 30% foreign ownership[179], OTP, a Hungarian banking group, with 50% foreign ownership[180] and Richter pharmaceuticals with almost 66% foreign ownership.[181] In addition to the three large issuers, there are around twenty issuers in the equity section, mostly Hungarian-owned companies. One of the strategic objectives of the Budapest Stock Exchange is to promote the listing of domestic medium-sized companies and to support ESG investments in line with international trends.[182]

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[174] https://www.wsj.com/articles/SB937940007943598675.

[175] https://budapestbeacon.com/buda-cash-at-center-of-brokerage-scandal-of-the-century/.

[176] www.bet.hu, 27.97 billion dollars in 2020, which is in the middle of the regional range. https://www.theglobaleconomy.com/rankings/stock_market_capitalization_dollars/Europe/.

[177] Magyar Nemzeti Bank, *Féléves jelentés 2022,* https://www.mnb.hu/letoltes/fe-leves-jelente-s-2022-hun-0928.pdf.

[178] Magyar Nemzeti Bank, *Versenyképességi Jelentés 2022,* https://www.mnb.hu/letoltes/versenykepesse-gi-jelente-s-hun-2022-1114-2.pdf.

[179] MOL Group, at https://molgroup.info/hu/a-mol-csoportrol/attekintes.

[180] OTP Bank, at https://www.otpbank.hu/portal/hu/IR_Tulajdonosi_struktura.

[181] Gedeon Richter Plc, at https://rgwebsite-prod-media-cdn.azureedge.net/-/media/sites/hq/documents/investors/financial-reports/annual-report/hu/2022/eves-jelentes.pdf?rev=2317fc621c1d48c5a62e86e86dda2a46&hash=638085591DECF5FD2473671416881BBB.

[182] See https://bse.hu/Issuers/corporate-governance-recommendations/bse-esg, Tekla Papp & János Dúl, *Sustainable Finance: The Relating Actual Hungarian Legislation in EU Frame* 4 Zbornik radova pravni fakultat (Novi Sad) 1145-1170 (2022) and Tekla Papp, *Társasági jogi gondolatszilánkok a hosszú távú részvényesi szerepvállalás ösztönzéséről* 2 Erdélyi Jogélet 17-31 (2022).

The BÉT announced its recommendations for responsible corporate governance in 2004, and then revised them in 2008, 2012, 2018, and 2020. Of these, the revisions of 2008 and 2018 can be considered to have brought the most significant amendments.[183] Since entering into force in 2007, the Corporate Governance Code (CGC) of the BÉT has been prescribing it as a mandatory obligation for companies listed on the stock exchange to prepare a corporate governance report. The adoption of the rule on publication was executed within the framework of fulfilling the EU obligations on the harmonization of law.[184]

The current recommendations of the BÉT focus on two main sections.[185] The first section outlines the rights of the shareholders and the general assembly. Over time, the recommendations of the CGC have narrowed down to focus on the most efficient way to conduct the general assembly. Some of the recommendations seek to facilitate the flow of information between the management and the members.[186] In our view, the CGC has become increasingly focused on of technical efficiency, and the former recommendations (for instance the principle of one share – one vote) have been removed from the CGC. The CGC, however, still does not reflect the governance requirements of the different shareholders (for instance: institutional investors). A possible explanation for this at present is that Hungary has adopted separate acts of law – on the grounds of its EU obligations in terms of the harmonization of law – with respect to institutional investors.[187]

The second major section of the CGC is composed of recommendations on organizational structure.[188] In this chapter, the CGC includes recommendations aimed at enhancing the efficiency of the operational governance of companies. It is also noticeable that the CGC aims to enhance public disclosure as a tool in several areas, for instance to promote unified governance, in connection with the criteria of independence and the internal audit. The CGC does not include any provisions on remunerations, because the rules on remunerations (the constituents of the remuneration policy, and the content of the remuneration report) are regulated by statutes as legal obligations.[189] The CGC also prescribes the requirement of internal risk management at the organizational level. This was included in the former CGC as a model that could be implemented, while the currently effective CGC facilitates this through the public

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[183] The most recent supervision has annulled several recommendations, which have become statutory rules.

[184] First it was introduced as a public accountancy obligation by Act CXXVI of 2007, which served as a vehicle of compliance in congruence with directive No. 2006/46 1-7. (OJ L 224, 16. 8. 2006.). Act LII of 2007 implemented the obligation of preparing the responsible corporate governance report in the Company Act, which can still be found unchanged in the effective Civil Code under Section 3:289.

[185] The Code is available at: https://www.bse.hu/Issuers/corporate-governance-recommendations/Corporate-Governance-Recommendations.

[186] CGC Sections 1:1-1:6.

[187] Act LXVII of 2019 on the reinforcement of long-term shareholding and the amendment of certain statutory acts on purpose of legal harmonisation defines the requirements on the publication of the investment policy.

[188] CGC Chapter 2.

[189] Act LXVII of 2019.

disclosure of the process of establishing spheres of responsibility, by recommending the implementation of certain types of activity (e.g. compliance), and by the prescription of minimum requirements (annual report obligation, obligation on the providing of information).

4.3. The Budapest Stock Exchange Code in Practice

The publication of the corporate governance statements and their content illustrates a key question. Every recommendation and soft law code counts as a step forward, yet their real value is represented by practices which enable companies to give an account of their application in a way that conveys relevant information towards the investors and in general, towards the public.

When examining the previous practice, it becomes clear that one of the most significant problems was that the companies did not provide, or were unable to provide relevant information concerning their corporate governance practice.[190] The practical reason for this was often either that a given event had not even occurred at the company, or that the recommendation could not be interpreted for the company. An example of this, was the former recommendation of the CGC to follow the principle of "one share – one vote". Hungarian company law in general does not require the principle of "one share – one vote", but in connection to several types of priority shares, it permits the increase or decrease of the voting right in a ratio that is different from its nominal value.[191] The previous version of the CGC also formerly allowed for such variations, which were defined as being divergent from its recommendations.[192] For example, a sample we examined in an earlier study[193] included both simple listings and companies that provided a breakdown of their share structure. In our opinion, this case illustrated a wide spectrum of interpretation and application of the principle of "comply or explain". While the reason for differing from the norm had to be explained, it would suffice to give a reason which did not reveal the full extent of the company's business interests. Such a report might not include any information with relevance to the subject, while other compliance statements might give details of the entire setup of the company's shares as an explanation for deviation.[194]

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[190] Auer, *supra* n. 171.

[191] An example of this is the dividend priority share under HCC Section 3:231, or the voting priority share under HCC Section 3:232.

[192] Essentially any stock company, founded not exclusively on an ordinary share structure, but even one share with preemptive right or any other priority (preference) right has resulted in an operation deviating from the recommendation of the CGC.

[193] Between 2010-2012, we have processed the annual corporate governance reports of the A and B Share category stock companies listed on the Budapest Stock Exchange. The result of this was published in Auer, *supra* n. 171, 99-147.

[194] The EU has also issued a recommendation on this: 2014/208/EU 43-47 (OJ L 109., 12. 4. 2014).

This particular practice of the CGC changed significantly in 2016.[195] Since the CGC was modified its recommendations take the form of asking companies precise questions, which the companies are mandated to answer, thus eliciting more specific, relevant information. Before 2016, scientific studies summarized the data of the reports produced on responsible corporate governance. These were rather less suitable for exposing long-term tendencies, as in the meantime either the Corporate Governance Code changed or the legal rules on which the recommendations had been grounded. However, since 2016 the Stock Exchange has been producing the monitoring report on Corporate Governance Code, revealing the extent to which its recommendations and guidelines have been applied.[196] An examination of these monitoring reports suggests that the general compliance rate with the CGC's recommendations is nearly 80 %, which is an decrease compared to previous years (2021: 80,1 %, 2022: 79,3%).

Furthermore, our research has found that in Hungary there has been one case, in which a court attempted to determine and to set the extent to which the provisions of the responsible corporate governance report are mandatory for a company.[197] The subject of the debate in the lawsuit – among other matters – was the issuance of a certificate of compliance of management activities[198], that was granted by the company to its director, three years after the event of accepting the company's audit report, which was carried out for the purpose of closing the business year. This fact came to light only from a responsible corporate governance report, and the debate during the court proceedings concerned whether such a report could be granted at all, on the grounds that the certificate of discharge may only be granted to the director at the end of the given business year, and not any later. In our opinion, this verdict of the court demonstrates the declarative function of the responsible corporate governance report, which played a role in the case. More precisely, while responsible corporate governance reports certainly do include this information, the act of granting a certificate of discharge does not depend on the adoption of the report, but instead occurs in the event of accepting (either separately, or together with the report) the provision on the

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[195] The monitoring report in 2016 still indicated it as a general problem that they had either not been finished, or that the data having been published by the issuers were incomplete.

[196] Available at: https://www.bse.hu/Issuers/corporate-governance-recommendations/Corporate-Governance-Recommendations.

[197] Case numbers: The Budapest City Court 26.G.40.877/2010/20; The Budapest Court of Appeal 13.Gf.40.014/2011/9; the Curia (Hungarian Supreme Court) Gfv. X. 30. 354/2011/8. As an analogy, we can refer to the German practice, yet it is no longer dominant, see Andreas Hecker & Marc Peters, *Anfechtbarkeit des Entlastungbeschlusses wegen unrichtiger Entsprechenserklärung („Umschreibungsstopp"),* juris PraxisReport Handels- und Gessellschaftsrecht 3 (2010); Lars Klöhn, *Kapitalmarktinformationshaftung für Corporate-Governance-Mängel?* 24 Zeitschrift für Wirtschaftsrecht 1145-1156 (2015).

[198] According to the Hungarian judicial practice, the discharge certificate is deemed to be a waiving of right by the company. By issuing this certificate, the company shall declare that during the given business year its director was acting in the prevailing interest of the company. The passing of the discharge certificate shall become a restraint on the claim of indemnification against the director. HCC Section 3:117.

granting of the certificate of discharge. Thus, the responsible corporate governance report shall only attest/ testify this piece of information, and the decision of the court under debate shall not be based on it.

4.4. Regional Comparison

The directives to listed companies setting corporate governance requirements are thus showing a tendency for the BÉT to carry out supervisory inspections of companies' compliance with recommendations more frequently and at shorter intervals than earlier. It is important to note that the monitoring of the Corporate Governance Code does not reflect upon the transformation of the subjects to be regulated on an annual or on a two-yearly basis, as in Germany or Great Britain. At the same time, the other countries of the Central European region generally also follow these transformations at a slower pace, as a result of which the code only changes over a longer period of time.[199] Corporate governance requirements do not only take the form of recommendations, but are also decreed by law as obligations, thereby narrowing down the scope for self-regulatory ways of creating norms and allowing companies fewer possibilities for deviation. Moreover, we would continue to argue that the legal regulation applicable to the operation of companies has become more extensive. The emphasis of the CGC's recommendations seems to be shifting to operative rules and the operation of companies, while the preparation of reports has clearly become more efficient, on the basis of the questions posed by the CGC. The monitoring activity of the Corporate Governance committee of the BSE is unequivocally progressive,[200] which provides the public with clear and accessible analysis.

4.5. State-owned Companies and Corporate Governance

The special situation of business associations that are owned by the state is also a field that has come under scrutiny in Hungary, besides the general development of corporate governance. The Hungarian legal system does not apply a special legal form to the business enterprise activities of the state (and of local governments). The state may choose from among the same legal forms of companies as private individuals, with the restriction that it may only gain shares in those forms of business association in which the responsibility of the state is limited. Originating from the constitutional framework, in Hungary, it is not only the role of the state as a member that is

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[199] Danila Djokic, *The Corporate Governance Statement and Audit Committee in the European Union and Republic of Slovenia* 5 Croatian Yearbook of European Law & Policy 283-289 (2009); Auer, *supra* n. 171, 133.; Bohumil Havel & Jan Lasák & Vlastimil Pihera & Ivana Stenglova, *Czech Corporate Governance in the Light of its History and the Influence of the G20/OECD Corporate Governance Principles* 24 European Business Organization Law Review 167-200 (2023).

[200] See Berlin Center of Corporate Governance and the annual monitoring activity of the British Financial Reporting Council.

significant, but also that of local governments, as they may also establish business associations.[201]

The state and local governments in Hungary have either a minority or majority stake in several companies. The range of publicly owned companies is influenced by current public policy trends. These companies include companies linked to the cultural traditions of Hungary (the centuries-old porcelain manufactory in Herend), transport companies (Hungarian State Railways, the long-distance bus service company Volán) and energy companies (Hungarian Electricity). The state can exercise its rights in these companies according to the rules governing commercial companies, without any additional rights. The development of corporate governance in this sector arose as an aspect of effective state ownership. In this role, the need for effective management was imposed on this sector and the results of corporate governance have been applied: remuneration rules for management and internal control systems.[202]

The conceptualization of "golden shares" also relates dogmatically to the position of the state as a member. In this regard, Hungary has repealed its rules on the role of the state since the years after joining the European Union. For stock companies, the Hungarian Civil Code permits the issue of voting priority shares, to ensuring the use of the right to veto, which can be of relevance in the event of decisions taken by a simple majority of votes.[203] In our view, in the absence of a legal prohibition – theoretically – the state may also possess this type of share. Moreover, it is also allowed – exclusively in the case of private companies limited by shares – to issue priority shares in connection to the appointment of a director, a member, or several members of the supervisory board.[204]

From the perspective of corporate governance, the general declarations of corporate governance are setting the directives for this sector[205] while on the other hand, the legal development that has taken place over the past ten to fifteen years has brought significant changes in Hungary, in our view. Most of all, it must be emphasized that it is the amount of experience acquired through the inspectional activity performed by the state and the authorities, that has driven the legal development of this sector of corporate governance. The legal supervision by Firm Court over legal persons normally involves the monitoring of legal compliance. However, due to the involvement of the state, it is not only the results of legal compliance inspectional activities, but also those of public finance inspection activities that have led to progress in this sector. We believe that one of the most vital participants in this activity is the

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[201] Tamás Horváth M., *Farkas a csónakban, A vállalati tulajdonosként mutatkozó állam* 9 Jogtudományi Közlöny 349-358 (2020); Tamás Horváth M., *Állami vállalattulajdonlás piacgazdaságokban* in Veronika Szikora (ed.), *Állami vállalatok nemzetközi összehasonlításban,* 459-485 (Budapest: Magyar Közlöny és Lapkiadó, 2019).

[202] Ádám Auer & Tekla Papp, *Corporate Governance in State-Owned Companies in Hungary* 1 Pro Publico Bono Magyar Közigazgatás 20-50 (2017).

[203] HCC Section 3:232.

[204] HCC Section 3:233.

[205] As the special recommendations of the OECD shall also be complementary to the general Guidelines.

Hungarian State Audit Office (SAO), which has engaged deeply in the inspection of the management of state-owned companies by implementing inspection reports and professional background studies, and by making suggestions for improvement based on them.[206] The professional literature on public finances regards this as one of the most encouraging trends in the transformation of state sector management. The main cause of the change was that the Hungarian Fundamental Law (i.e. the country's constitution) adopted in 2012 raised the requirements of inspection and efficient utilization of public finances to the constitutional level, making it a much greater priority for public finance bodies.[207]

Another driver behind the developments is the centralized institution tasked with exercising the state's proprietorship rights: the Hungarian National Asset Management Inc. (hereinafter: HNAM Inc.). The HNAM Inc. plays a central role from the perspective of the state-owned companies, since as per the main rule, the right of the state to exercise member's rights is held by HNAM Inc. Nevertheless, the changes in public policy that have occurred alongside the main legislative rule, have resulted in the weakening of HNAM's initial central role, because specialized budgetary institutions authorised to conduct professional supervision, as the exercisers of proprietary rights, and have moved into the foreground.[208] For this reason, the role of the HNAM Inc. has changed, with its initially dominant role during the past 15 years becoming pushed to the background for the past 4-5 years, although it is still decisive. At present, designating who will exercise the proprietary rights is a matter of public policy, and HNAM Inc. has become involved in the horizontal coordination of the various practitioners of the proprietary rights. Earlier, HNAM Inc. produced a comprehensive collection of recommendations on the corporate governance principles of state-owned companies.[209] This document is no longer available, but it made three recommendations, in the form of model regulations available to companies: a code of ethics, a model regulation in respect of investment policy, and a model regulation on liquidity planning. The mandatory application of these is not stipulated by any statutory provisions.[210]

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[206] The SAO also defined its propositions in 2016 in regard of the roles of the proprietors of the business companies in public proprietorship, for the operation of the supervisory board and the management: Domokos et al. (2016), pp. 185–204.

[207] Balázs Cseh & Csaba Lentner, *Az önkormányzati tulajdonú gazdasági táraságok működésének egyes jogi és gazdasági vetületei* 3 Jegyző és közigazgatás 21-23 (2020).

[208] Anita Boros, *Compliance Audit Issues of State-owned Business Associations* 4 Public Finance Quarterly 542-558 (2019).

[209] For the earlier evaluation on this, see Ádám Auer & Tekla Papp (eds), *Corporate Governance in State-owned Enterprises in Central and Eastern Europe* 1 Pro Publico Bono Public Administration 1-119 (2017).

[210] The homepage of the HNAM Inc. (30 March 2020), http://www.mnv.hu/felso_menu/tarsasagi_portfolio/eljarasi_dokumentumok/vallalatiranyitasi_ajanlasok.

4.5.1. The Peculiar Features of Corporate Governance within the Field of State (Local Government) -Owned Companies

There are several sources of corporate governance rules applicable to state-owned companies. On the one hand, international standards can be applied in this sector (either the general recommendations of the OECD, or special audit standards). On the other hand, the default ruling of the Civil Code introduced in this study also prevails here – which entails that the exerciser of the proprietary rights may provide guidelines which replace the default ruling set out in the Civil Code, and define the direction of such a derogation. Thirdly, the legislator has permanently addressed certain questions belonging to the sphere of corporate governance in the form of normative regulations. It has to be emphasized that these special statutory provisions do not set the rules for any businesses operating with any state involvement, but only in those cases where the state exercises majority control, meaning that it exercises more than half of the entirety of votes directly or indirectly through another legal person member.[211]

The statutory provisions regulating state-owned companies are on the one hand organizational norms which reduce the number of options to the optional models regulating companies (for instance as per the main rule, state-owned stock companies operate with a management composed of one individual, and the appointment of a supervisory board is mandatory).[212] State-owned companies fall under the obligation of public disclosure concerning the remuneration of their directors,[213] and also regarding contracts concluded by the company above a certain pre- determined value.[214]

The most recent legislation regulates organizational structure matters: since 2019, state-owned companies have been obligated to set up an internal audit system, provided that two of the following conditions are met: the main result of the balance sheet exceeds 600 million HUF, the annual net revenue amount exceeds 1200 million HUF or the average number of employees exceeds 100 people.

To develop an explicit model of the internal audit system, the legislator has created mandatory legal norms, which are built on international internal control standards.[215] Regarding the field of the matters of internal control, the supreme judiciary forum of Hungary, the Curia, delivered a significant judgement in a remarkable case. According to the statement of fact of the case, in the financial sector, the organ charged with exercising financial supervision (the Hungarian National Bank) conducted an ex

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[211] Act CXXII of 2009 § 1. point a).

[212] Act CXXII of 2009 Section 3.

[213] According to the Hungarian judiciary practice, this regulation is deemed as the base document on the remuneration of directors, thus, any payout with a legal title non-disclosed therein, must not be executed. EBD 2014. M. 10 (unifying decision of the Hungarian Supreme Court), BH 2016. 214 (Periodical collection of the decisions of the Hungarian Supreme Court).

[214] Act CXXII of 2009 Section 2: The fulfillment of this obligation is the precondition for the business company being entitled to make an addressee of a contribution to be granted from the national budget. Act CXCV of 2011 Section 50.

[215] COSO, INTOSAI, GOV 9001 2019. évi LXVI. The explanation of the act: Boros, *supra* n. 207, 548-549.

officio proceeding with respect to a company, as the result of which several instances of malpractice were identified, and after the withdrawal of the permit of the company, the liquidation of the business association was initiated. The company intended to claim the fine levied against the company, as damages caused by the directors of the company. During the lawsuit, the acting court determined that the responsibility of a member of the board should prevail both in the case of his having committed the breach of law directly (the breach of law is the direct result of his own decision, his own instruction), or indirectly (the breach of law is realized by the fault, deficiency of the control system being operated by the leadership) alike. Furthermore, the court declared that the company applied all the up-to-date, comprehensive internal regulations, and its formal operation had been found to be legally compliant by the financial supervisory organ over several years. However, the responsibility of the plaintiff is not limited to the wording and adopting of regulations, nor is it satisfied by the existence of compliant organizational units but, as one of the members of board, he is also responsible for ensuring that the regulations are de facto followed in practice. According to the tribunal, this responsibility does not only apply in the case of active involvement, but also due to the fact that as a member of board entitled with governance rights, he failed to take action for establishing such responsible corporate governance, responsible internal governance, and did not operate, nor did he establish such internal defence lines, that should prevent the possibility of committing those heavy breaches of law, which are determined as burden to fall on the company.[216] Even though in this decision the court evaluated a special type of action, that is the breach of professional governance duties, which it could establish the responsibility of the director for, this decision can be considered a shift from the preceding judicial practice. We would argue that, as the legislator determined the model for the internal control system, the levels of responsibility and the expectations in respect of business companies in public ownership, the findings of the above-mentioned judicial decision can be applied analogically.

4.5.2. Results and Possibilities of Development

The corporate governance are provided via two main routes in Hungary. Both the CGC, which is applicable to listed companies, and the guidelines for state-owned companies, can be said to be up-to-date and in line with international trends.

However, unlike the general corporate governance requirements, the norms setting the rules for business associations in public ownership are not soft law, but mandatory norms of law. The legislator did not establish certain key obligations of state-owned companies (public disclosure, remuneration) by means of self-regulation, but rather by the adoption of statutory models. It may be worth incorporating some of the lessons learned from the experience of monitoring compliance with these legal rules in future. The supervisory activity of the SAO (Hungarian State Audit Office) is particularly noteworthy with regard to integrity and compliance and its recommendations continue to available as examples of best practice for companies. Certain questions

[216] BH 2021. 25 (Periodical collection of the decisions of the Hungarian Supreme Court).

(for instance the internal control system) can also be addressed by legal rules. All of these requirements could also be applied to further areas in future (for instance the committee system, the relation towards the exerciser of proprietary rights), in our opinion. The regulation also designates the addressees of the liabilities, and by connecting this with the latest judicial practice, which places emphasis on their enforcement, the unfulfilled liabilities may thus form the basis for establishing the accountability of directors.

Conclusions – Quo Vadis Ius Societatis Hungaricum?

In this paper, we have made an attempt to throw some light on some of the thorny issues of current Hungarian company law. On the one hand, the roots of these difficulties include:

– the lack of a comparative approach and comparative legal works with an international perspective;[217]
– the lack of insights gained from the EMCA-project, which can offer modern and consensus-focused possibilities for national company laws.[218]

On the other hand, the legislator has been trying to establish a more competitive Hungarian company law within the international economic environment, with the aim of simplifying (by decreasing the volume of administration) the foundation of companies in Hungary.

The legislator has thus changed certain forms of liability: firstly, the forms of liability are to be distinguished from the fulfilment of commitments. Secondly, the range of persons who can be held liable is becoming more extended (e.g. shadow directors).

Hungarian company law has, however, made significant progress in another field: namely, in corporate governance. In Hungary, corporate governance has already entered into public awareness, and has not remained as an alien concept. The various areas of corporate governance are weighted differently in Hungary, the impact of the results of effective corporate governance has grown appreciably in the field of state and local government-owned enterprises.

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[217] Klaus J. Hopt, *Comparative Company Law. European Corporate Governance* (Institute Law Working Paper 7, 2018), 1-33. Katerina Eichlerova, *Group Interest in the Czech Republic* & Dorota Mašniak, *Group Interest in Poland* & Tekla Papp & Ádám Auer, *Group Interest in Hungary* & Emőd Veress, *Company Groups and Group Interest* – The Case of Romania & Martin Winner, *Group Interest in European Company Law: an Overview* 1 Acta Universitatis Sapientiae Legal Studies 5-62, 85-96 (2016), https://www.societas-cee.org/?page_id=16; Pierre-Henri Conac, *Proposal to Facilitate the Management of Cross-Border Company Groups in Europe* 2 European Company and Financial Law Review 299-306 (2015).

[218] See Paul Krüger Andersen et al., *European Model Company Act (EMCA),* Nordic & European Company Law Working Paper No. 16-26 (2017).

We began our study with the objective of reconsidering and synthesizing Hungarian company law while assessing the current influences on it. The aim of our study is to contribute to this systematizing work, so that Hungarian company law will prove to be suitable for fulfilling its purpose.