

EXTENT OF THE VOTING RIGHTS OF LEGAL PERSONS GOVERNED BY PRIVATE LAW, IN PARTICULAR OF COOPERATIVES

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Abstract: The rules relating to organizational structure and operation of legal persons governed by private law can be found among general rules pertaining to all legal persons and specific norms for various types of legal persons in the Book Three of Act V of 2013 on the Civil Code. The voting rights have an impact on the operation and management of the forms of association. One of the aims of this presentation is to draw up the similarities and distinctions between the different kinds of legal persons, in particular cooperatives. In the case of cooperatives the principle of „one member-one vote” is a key pillar of the basic cooperative principle „democratic member control”. This presentation is also undertaken to show, how this cooperative principle appears in legislation, concerning the legal norms on the European Cooperative Society (SCE) and some national legislation in the EU, too.

Keywords: Civil Code, cooperatives, legal persons governed by private law, voting rights.

1. Introduction

Legal persons may be established and operated in a form defined by the Civil Code.¹ The Civil Code determines the types of legal persons governed by private law. These are: associations, business associations (including general partnership, limited partnership, private limited-liability company or limited company), cooperative societies, groupings and foundations.

These forms of legal persons governed by private law are very different from each other. Because of their legal person character we can find several similarities in them. Their common nature is, that all legal persons have legal capacity; they are entitled to have rights and obligations.² They are independent in civil relations and operate as legal identities separated from its members. A legal person shall have its own name and seat, shall have assets separate from its members and founders, and shall have a management and representative body.³

Members and founders exercise their decision-making powers in a body consisting of persons exercising founder's.⁴ At the meetings of decision-making bodies the members or founders shall decide the matters at issue by voting.⁵ The exclusive competence of the decision-making body is – among others– to create rules in

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¹ Article 3:1 (4) on the Civil Code.

² Article 3:1 (1) on the Civil Code.

³ Article 3:1 (5) on the Civil Code.

⁴ Article 3:16 (1) on the Civil Code

⁵ Article 3:19 (1) on the Civil Code



connection with establishing and operating of the organisational structure, including the rules related voting rights.

Obviously, the voting right, the practise and extent of it are one of the most important part of the rights belong to membership.⁶ That is why it matters, how the voting right is laid down in the rules pertaining to the legal persons.

2. The Non-binding approach of the Civil code

The Third Book of the current Civil Code carried out the legislation concerning the legal persons in that way, that it sets out standard general provisions for all types of legal persons with specific rules for various types of legal persons at the same time.⁷

In the Third Book, the Civil Code has changed the binding aspect of the former legislation to the non-binding approach. The norms have to be applied on the grounds of principle *lex specialis derogat legi generali*. The provisions formulate the principle of freedom of establishment of a legal person and content of the instrument of constitution. By the Civil Code the members of a legal person themselves decide on the legal person's organizational structure and operational arrangements. As regards relations between members and founders, and between them and the legal person, and as regards the organizational structure and operational arrangements of the legal person, in the instrument of constitution the members and founders may derogate from the provisions of the third Book on the Civil Code relating to legal persons, except as set out in the law.⁸

On the basis of this provision we can say, that the regulating of voting right belongs to the issue of the private autonomy by the members, as it pertains to the relationship between the members, but it concerns also the legal person's organizational structure and operational arrangements.⁹

The further question, if the members may agree to derogate from the provisions relating to voting rights, their agreement infringes any interest to be saved or not. This is the obstacle of the freedom of content of the instrument of constitution.

Members and founders of a legal person may not derogate from the provisions of this Act:

⁶ Here apart from single-member companies.

⁷ It means not only a two-tier system of rules (general and specific norms), but a three-tier system of rules exists for business associations (general rules relating to legal persons, general rules relating to business associations and specific rules relating general partnerships, private limited-liability companies or limited company) for example. In addition, a four-tier system of rules needs to be applied to limited partnerships. (Article 3:155 on the Civil Code: The provisions on general partnerships shall also apply to limited partnerships subject to the exceptions set out under this Title.) The rules shall be interpreted at four levels, too. (Article 3:368 (3) on the Civil Code: The common provisions relating to business associations shall apply to groupings subject to the exceptions set out in this Part.)

⁸ Article 3:4 (1)-(2) on the Civil Code.

⁹ It is very difficult to guess whether rules relating to the legal person's organizational structure and operational arrangements concern external relationship or not. In many cases they concern, but in these cases they may not fall within paragraph (2).

- ❖ if it is precluded by law; or
- ❖ where any derogation clearly violates the interests of the legal person's creditors, employees and minority members, or it is likely to prevent the exercise of effective supervision over legal persons.¹⁰

We can take a position in this issue in view of the specific provisions. To study the rules relating to the legal persons is we can state that the members of a legal person may derogate in the instrument of constitution from the provisions on the Civil Code concerning the voting rights.¹¹ (It shall be noted, that in the case of cooperatives the derogation from the rule one member one vote is doubted, there is no single voice in this issue. I will go back to this question later.)

3. Voting rights in general

Common rules for all types of the legal persons that how many votes a member has do not exist. There is neither a such provision, that each member shall have at least one

¹⁰ Article 3:4 (3) on the Civil Code.

¹¹ On the problems of interpreting Article 3:4: AUER, ÁDÁM: Gondolatok a Ptk. III. könyvének diszpozitív szabályozásáról [Ideas on the non-binding legislation of the third book on the Civil Code], in *Opuscula Civilia*, 2016/3. szám, 2-11., http://akk.uni-nke.hu/uploads/media_items/2016_evi-3_szam_opuscula-civilia.original.pdf, [2017.03.20.], BODZÁSI, BALÁZS: Főbb változások az új Ptk.-nak a jogi személyekre, valamint a gazdasági társaságokra irányadó közös szabályaiban [Main changes under the common rules on the Civil Code governing the legal persons and the business associations], in *Céghírnök*, 2013/8. szám, 3-7., http://www.hvgorac.hu/sites/portal/files/ch_2013_8_bodzas.pdf, [2017.03.20.], BODZÁSI, BALÁZS: Az új Ptk. esetleges módosításairól [On any changes of the new Civil Code], in *Magyar Jog*, 2016/4. szám, 65-72., CSEHI, ZOLTÁN: A jogi személyek szabályozása az új magyar Polgári Törvénykönyv tervezeteiben – egy kísérlet eddigi története [The legislation of the legal persons in the Bills of new Civil Code- the previous story of an attempt], in *Polgári Jogi Kodifikáció*, 2008/5-6. szám, 4-13., <http://ptk2013.hu/polgari-jogi-kodifikacio/csehi-zoltan-a-jogi-szemelyek-szabalyozasa-az-uj-magyar-polgari-torvenykonyv-tervezeteiben-egy-kiserlet-eddigi-tortenete-pjk-20085-6-4-13-o/127>, [2017.03.20.], GADÓ, GÁBOR: Kógens-e a diszpozitív? [Is the non-binding binding?], in *Céghírnök*, 2013/9. szám, 3-5., <http://ptk2013.hu/szakkikkek/gado-gabor-kogens-e-a-diszpozitiv-ch-20139-3-5-o/2561>, [2017.03.20.], JÓJÁRT, ESZTER: Diszpozitivitás a régi és az új Polgári Törvénykönyvben [Dispositivity on the old and the new Civil Code], in *Magyar Jog*, 2014/2. szám, 673-685., <http://ptk2013.hu/szakkikkek/jojart-eszter-diszpozitivitas-a-regi-es-az-uj-polgari-torvenykonyvben-mj-201412-674-685-o/4613>, [2017.03.20.], KISFALUDI, ANDRÁS: A jogi személyek szabályozása az új Polgári Törvénykönyvben [The legislation of the legal persons on the new Civil Code], in *Jogtudományi Közöny*, 2013/7-8. szám, 333-342., SÁRKÖZY, TAMÁS: Még egyszer a Ptk. jogi személy könyve állítólagos diszpozitivitásáról [Again on the alleged dispositvity of the book of legal persons on the Civil Code], in *Gazdaság és Jog*, 2015/11. szám, 8-14., <http://ptk2013.hu/szakkikkek/sarkozy-tamas-meg-egyszer-a-ptk-jogi-szemely-konyve-allitolagos-diszpozitivitasarol-gj-201511-8-14-o/5668>, [2017.03.20.], SÁRKÖZY, TAMÁS: A Ptk. jogi személy könyve esetleges felülvizsgálatáról [On the alleged review on the book of relating to legal persons of the Civil Code], in *Gazdaság és Jog*, 2016/7-8. szám, 3-10., http://ptk2013.hu/wp-content/uploads/2016/08/GJ2016julaug3_10o.pdf, [2017.03.20.].

vote. Even so indeed we can state this. From the opposite side, no member may be deprived from his voting right – for guaranteed aims – and the opportunity to participate in the decision-making process of the legal person.¹² But a member may not exercise his voting right in each case. It does not mean, that this member does not have a voting right, only that, he may not vote in specific matters. We can find general and specific provisions relating to this issue. Among the general rules it is laid down, that the member may be precluded from voting, by a conflict of interest.¹³ It is to be noted, that it is possible to derogate from this rule. It can be found among the specific rules, that if a member of a cooperative or of a limited company does not provide his capital contribution prescribed in the statutes is not allowed to exercise their voting rights. It can not be derogated from this provisions.¹⁴

We can distinguish two types of regulation relating to the various types of legal persons. Typically, the nature of an association may be people-centred or investment capital-centred.¹⁵ It determines the share of the voting rights between the members. There are certain associations which have mixed nature. In these associations one nature is dominant over the other. We consider associations, general partnership, limited partnership, cooperative societies and groupings as people-centred formations. These formations allocate equal voting rights to members, independently of their economic position pursuant to the provisions relating to these associations. In investment capital centred associations – by the main rule - voting rights are allocated in proportion to the invested capital. Clearly investment capital-centred formations are limited companies, but private limited-liability companies and foundations are included also here.

4. Voting rights relating to each of legal persons

For this approach we can find further norms relating to the voting rights among the specific rules on the Civil Code. Each norm consists of derogation from the main rule, strengthening the regulatory model on derogation provided for by the Act. Such norms

¹² An opposite provision in the instrument of constitution otherwise may conflict with Article 3:4 (3) b. on the Civil Code.

¹³ Article 3:19. on the Civil Code.

¹⁴ Article 3:337 (2) on the Civil Code. Article 3:333 (3) on the Civil Code provides: Any provision of the statutes which provides more lenient sanctions than what is prescribed in this Act upon members for failure to provide the capital contribution shall be null and void. In combination with two provisions, it results, according to Article 3:4 (3)a derogating from this rule is inconceivable. The rule relating to limited companies we concern as a binding rule, because of the voting rights attached to shares. (Article 3:260 on the Civil Code).

¹⁵ An association is concerned as a capital-centred association, if its members are not important, but the financial contribution provided by the members is significant. The people-centred nature is exactly the opposite, where the members in general perform personal involvement in the association, or they contribute to achieving the objectives of the association. The rights of the members are same, independently on the invested capital. One of these rights is the voting right, when the same extent of the vote highlights the primacy of the individual and not the capital.

exist among the rules in connection with limited companies, associations, foundations and groupings.

In the case of limited companies the main rule is a binding legislative provision: voting rights attached to shares are determined by the nominal value of such shares. The exception to this is the one type of shares, so called shares conferring prior voting right. Holders of shares conferring prior voting right may exercise multiple voting rights to the extent defined in the articles of association. In respect of private limited company multiple voting rights are unlimited, in respect of public limited companies the voting rights attached to one share may not exceed the voting rights corresponding to the nominal value of the share by a factor of ten; any provision of the articles of association to the contrary shall be null and void. Besides, certain resolutions of the general meeting may be adopted solely upon the simple majority vote of the holders of shares present conferring prior voting right with veto rights, or if there is only one share conferring prior voting right in issue, such resolutions may be adopted if supported by the holder of this share.¹⁶

Associations' members shall have equal rights and obligations, except the membership of special legal status.¹⁷ These members of special legal status may have multiple voting rights, in theory without restriction. So the statutes may derogate from the provisions on the Civil Code.

The foundations have special nature, because besides the managing body of the foundation, the board of trustees, optional so called founders' meeting can operate optional.¹⁸ The founders' meeting is a form of a body, where several founders may exercise the founder's rights collectively. In matters not regulated by the charter document the provisions on the general meeting of associations shall apply to the founders' meeting.¹⁹ This means, that the founders have equal voting rights, but they may derogate from these provisions without limitation in the charter document.

The groupings have twofold: the legislation in connection with the main goal of groupings, that is issues of coordination and interest representation and the legislation in connection with the optional joint economic activities (economic auxiliary activities).²⁰ In the former field the people-centred nature, in the latter the investment capital-centred nature is significant. In connection with issues of coordination and interest representation all members shall have one vote. Independantly, whether the members provided financial contribution or not, and if they did, how much. The memorandum of association may, however, grant multiple voting rights to certain members, with the restriction that no single member may acquire more than fifty per cent of the votes.²¹ So, no single member can decide in any issues. Within the scope of economic auxiliary activities, as well as in some cases of prominent competence of the supreme body (such

¹⁶ Article 3:232 (1)-(2) and 3:260 (1) on the Civil Code.

¹⁷ Article 3:65 (2) on the Civil Code.

¹⁸ Article 3:397 (1) on the Civil Code.

¹⁹ Article 3:395 (1) on the Civil Code.

²⁰ The common rules on the business associations shall be applied to the groupings, too. This means, the extent of the voting right would be in proportion of invested capital without specific legal norm. [Article 3:368. (3)].

²¹ Article 3:372 (2).

as decision on dissolution or initiating the exclusion of a member etc.), voting rights shall be established in proportion to the capital contributions provided, or failing this, equivalent votes shall be granted.²²

No provisions other than the main rule exist in the case of general partnerships, limited partnerships, private limited-liability companies and cooperative societies. In general partnerships, limited partnerships, in the process of adopting decisions, each member shall have an equal vote. In practice, the voting rights are granted in proportion to the invested capital by the instrument of constitution. Any clause of the memorandum of association to deprive a member of his voting right shall be null and void.²³ In the supreme body of a private limited-liability company the voting rights are allocated in proportion to the invested capital provided by the member.²⁴

5. Voting rights relating to cooperative associations

There is a particular situation in cooperative societies. No provisions other than the main rule exist in connection with the voting rights. This is: at the general meeting each member shall have one vote irrespective of their capital contribution.²⁵ There is no consensus in the legal literature and legal practice till now, whether this rule is binding or not.²⁶

We stated earlier that the members of a legal person may derogate in the instrument of constitution from the provisions on the Civil Code concerning the voting rights. In contrast, there is a basic cooperative principle „democratic member control”, which implies the principle of „one member-one vote” also. It is not the element of the definition of a cooperative, but it is a marked, significant nature of cooperatives. If it was a part of the term, this provision would be definitely binding. If this norm is binding, this is the only one of the associations, where the Act doesn’t allow a derogation from the one member one vote rule. Unless in special laws, such as for example Act on Housing Cooperatives. If an investor takes a higher risk with a bigger financial contribution, he should but can not participate more vigorously in the decision making process. This rule does not improve the competitiveness of cooperatives. But at the same time, if the regulation is not binding, there is no restriction of the derogation

²² Article 3:372 (3).

²³ Article 3:143 (1) and 3:155.

²⁴ Article 3:110. (2) (general rules relating to business associations).

²⁵ Article 3:337 (1) on the Civil Code.

²⁶ DZSULA, MARIANN: Miért kógens a diszpozitív? IV. [Why binding a non-binding? IV.], in *Céghírnök*, 2014/6. szám, 11., <http://ptk2013.hu/dzsula-mariann-miert-kogens-a-diszpozitiv-iv-ch-20146-10-14-o>, [2017.03.20.], RÉTI, MÁRIA: A magyar szövetkezeti jog hatályos szabályairól a Polgári Törvénykönyv rendelkezéseire figyelemmel [On the current norms of the Hungarian cooperative legislation taking into account the provisions on the Civil Code], in *Szövetkezés*, 2015/1. szám, 54-58., NAGY, ERIKA: A magyar és a finn szövetkezeti szabályozás aktuális kérdései [Topical issues of the Hungarian and Finnish cooperative legislation], in *Jogi Tanulmányok 2016, Jogtudományi Előadások az ELTE ÁJK Doktori Iskolájának Konferenciáján 2016. június 10.*, 2016, Budapest, ELTE ÁJK Állam- és Jogtudományi Doktori Iskola, 51-62., <http://www.ajk.elte.hu/file/jogitanulmanyok2016.pdf>, 2017.03.20.

provided by the Act. It may happen, the voting rights between the members are established only in proportion to the invested capital. This is contrary to the cooperative principle democratic member control, including the principle one member one vote, as well as it is not in accordance with the essence of the cooperatives.

The Civil Code has implemented the whole text of the repealed Act on Cooperatives relating to the voting rights, with that difference, the former provisions were binding in the repealed Act, unless otherwise stipulated by the law.²⁷

To compare, the Statute for a European Cooperative Society (SCE) sets out in recital and among the binding specific provisions, that each member of an SCE shall have one vote, regardless of the number of shares he holds.²⁸ The Statute allows derogation from this provision, but it determines the maximum number of the votes a member may hold. The extent of weighted voting is in proportion to the member's participation in the cooperative activity.²⁹ In financial or insurance SCEs and those SCEs which the majority of members are cooperatives in the statutes may take into account the members' participation in the capital of the SCE for determining the number of votes.³⁰ Just the statutes may allocate voting rights in proportion of invested capital to non-user (investor) members.³¹ The statutes of the SCE may provide for the participation of employees' representatives in the general meetings, provided that the employees' representatives do not together control more than 15 % of total voting rights.³²

The German cooperative legislation has chosen a similar legal solution. The Cooperative Act allows multiple voting rights, too. Multiple voting rights (maximum 3) may be granted to those members, who promote particularly the activity of the cooperative. The legislation is different in those cooperatives, where at least the three-fourth of the membership are entrepreneurs or the majority of the membership is a

²⁷ Act on Cooperatives, that is Act X of 2006 [Article 23 (1)-(2)].

²⁸ Particular principles concerning cooperative associations include notably the principle of the primacy of the individual which is reflected in the specific rules on membership, resignation and expulsion, where the 'one man, one vote' rule is laid down. {Recital (7) (8) and Article 59 (1) on the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (Statute), celex:32003R1435, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R1435>, [2017.03.20.]}

²⁹ The control should be vested equally in members, although weighted voting may be allowed, in order to reflect each member's contribution to the SCE. [Recital (10) on Statute for SCE] If the law of the Member State in which the SCE has its registered office so permits, the statutes may provide for a member to have a number of votes determined by his/her participation in the cooperative activity other than by way of capital contribution. This attribution shall not exceed five votes per member or 30 % of total voting rights, whichever is the lower. [Article 59 (2) on the Statute].

³⁰ In financial or insurance SCEs the attribution shall not exceed five votes per member or 20 % of total voting rights, whichever is the lower. [Article 59 (2) on the Statute].

³¹ Nevertheless, non-user (investor) members may not together have voting rights amounting to more than 25 % of total voting rights. [Article 59 (3) on the Statute].

³² Article 59 (4) on the Statute.

registered cooperative. These registered cooperatives' members may have more number of votes and it is determined by the capital contribution.³³

The Finnish Act on Cooperatives says explicitly, that the members may derogate from the norm one member one vote in the bylaws.³⁴ This Act also stipulates the maximum number of votes a member may hold. So, no single member may acquire more than twenty times the number of votes of another member. Unless in those cooperatives, where the majority of the members is cooperative or other legal person, as well as at least one legal person governed by public law.³⁵ In the so called stock market cooperatives the bylaws may stipulate freely the extent of the voting rights.³⁶

6. Conclusions

The Hungarian Civil Code restricts the extent of the voting rights exercising by a single member exclusively in the public limited companies and in the field of cooperation and interest representation of groupings. The question arises: Do the member have freedom of establishment the voting rights indeed without restrictions? May there be any obstacles to be a single member in a position to take decisions? We know that nobody may be deprived from his voting right. Would be the principles of Civil Code the obstacle to the regulating of the voting right by the members? It is sure, that the other explicit guarantee provisions are the restriction on the extent of the voting right. For example, which powers must be shared amongst the organs, which are the exclusive powers of the supreme body, what kind of matters what kind of decisions must be taken by a qualified majority. Generally at least a two-thirds majority or unanimously, or who may not exercise his voting right because of his personal interest etc. It can be established, that the provisions relating to the organizational structure and operational management as a whole ensure the members to exercise properly their voting rights.

The Hungarian legislator does not establish provisions for the rule one member one vote in the case of cooperatives as an exception. The tendency of the European cooperative legislation is if an Act allows derogation from the main rule, it determines at the same time the maximum number of votes a member may hold and the types of cooperatives where there is no restriction on the derogation from the main rule. The Civil Code definitely provides in some associations, that the instrument of constitution may grant multiple voting rights to certain members, in the proportion to the invested capital or by another approach. The different importance of the members can justify these derogations. The different importance appears more frequently in the different amount of the financial contribution provided by the members, but it may be a specific professional knowledge of a member or any other aspects which may bring benefits to

³³ RÉTI: *op.cit.* 59.

³⁴ Each member has one vote, unless otherwise provided in the bylaws. [Article 13 (1) on the 14.6.2013/421 Osuuskuntalaki (Act on Co-operatives)], [http://finlex.fi/fi/laki/ajantasa/2013/20130421?search%5Btype%5D=pika&search%5Bpika%5D=osuuskuntalaki#O1, \[2017.03.20\].](http://finlex.fi/fi/laki/ajantasa/2013/20130421?search%5Btype%5D=pika&search%5Bpika%5D=osuuskuntalaki#O1, [2017.03.20].)

³⁵ Article 13 (2) on the 14.6.2013/421 Osuuskuntalaki (Act on Co-operatives).

³⁶ Article 13 (3) on the 14.6.2013/421 Osuuskuntalaki (Act on Co-operatives).

the society. It is in accordance with the European cooperative legislation. It refers to the fact too, that the derogation from the main provision is not prohibited by the Civil Code, neither in cases, where we can find only the main rule.

In summary, the legislator relies on the members the regulation regarding the share of voting rights between the members. The legal norm has an alternate role with regard to the regulation of sharing voting rights. If the members do not tell anything in this issue in the instrument of constitution or they do not derogate from the norms provided by the Act, the legal norms shall be applied even if the norm is not binding. This type of regulating approach means obviously, that it is very difficult to distinguish the various types of associations in view of the legislation of voting right. Because any type of associations may state almost any rule in its instrument of constitution. It may be concluded, that the intention of the legislator was the same in the case of cooperatives, too. That is, the legislator intended to regulate the voting rights in that way, that the members may derogate from them. But he failed to take into account the particular characteristics of the cooperatives, more precisely, that the principle one member one vote is an important, significant element of cooperative societies. Against this background it may be recommended to consider the cooperative legislation regarding the extent of the voting rights. Exceptionally, (a limited number of) plural voting rights may be granted through the bylaws. The base of the plural voting rights may be the volume of transactions with the cooperative or other criteria. However, plural voting rights may not be granted only on the basis of the amount of financial contributions by a member in primary cooperatives.

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