

THOUGHTS ON A POSSIBLE COMMERCIAL CODE IN HUNGARY

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Abstract

After the fall of communism it was a natural need to change the legal system by introducing laws that would contribute to creating the rule of law and the market economy. A dispute was initiated by the academic and professional experts, since some of them were of the opinion that a new commercial code should be drafted simultaneously with the new Hungarian private code, and thus the structure of the Hungarian private law could become dualist.

Since, however, only the private code was redrawn in 2013, the Hungarian private law stays a monist system. In my talk I try to find answers to the question of what would happen if the commercial code were additionally introduced in Hungary.

For this purpose I would like to examine to what extent the cooperation of the BGB and the HGB in Germany can be considered an ideal one. This would present arguments for or against the proposal to introduce a commercial code in Hungary or to identify a separate field of commercial law.

There is another question, about the possibility to create a commercial code in the European Union. What kind of advantages or disadvantages would such an initiative bring? The question also arises how the European private law would develop in case the commercial law was to be separated from it.

Key words: *Commercial law, Civil Code, Hungary, BGB*

JEL Classification: [K12, 20]

1. Overview

An important event took place in Hungary on 15 March 2014: after more than fifty years a new civil code entered into force. The previous civil code, called the Book of Civil Law (Hungarian abbreviation: Ptk), came into force in 1959, but, due to important amendments, it remained applicable among the new private legal circumstances following the fall of the communist regime. It was in 1998 that the Hungarian Government issued a decree (No. 1050/1998) that decided on the drafting of a new civil code.

The arguments of the law-maker for creating a new Book of Civil Law included the following. First, there was a need for legal institutions supporting the mechanisms of the capitalist market economy and the needs of the people. For example, during the creation of the previous code, the regulation of ownership and the ensuring of contractual freedom were not among the priorities, which is reflected in the structure of the code itself, in spite of the necessary modifications carried out since its creation. Second, there was a need to include certain private legal rules that were in the meantime codified in different acts outside of the civil code (during the private law legislation process)¹. Madl² claimed, for example, that “the new code gives an

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¹¹ Vékás L. (2001) *Az új polgári törvénykönyv elméleti előkérdései*, Budapest: Hvg-orac p. 25.

opportunity to return to Hungary's own codification traditions, as well as to those of Europe". Vékás³ argues, for example, that the hundred modifications enacted on the 1959 code have "loosened the structure of the code so much that it could not have fulfilled its leading role, its role as an 'economic constitution' any more".

The construction of the code itself took more than a decade and, apart from minor detours, eventually got successfully implemented. The new Hungarian Civil Code aims to fulfill professional expectations. The official commentary of the code argues that it intends to be come the "constitution of the economy" and the "basic law of civilistics".

The creators of the new code wanted to learn from any mistakes of the old law and tried to create a much more structured book. Previously, for example, the separation of obligation and contract was not entirely successful and the substantive norms in family law and business associations were also included in the code. The approach was supposed to create a new private law, which is based on a single tier regulation. The legislator, of course, did not stop here: the new code is incomplete, and recently there has been discussion about collecting the experiences, reviews following its entry into force and incorporating them into the code as novel changes.

International trade is continuously becoming more active, within the European Union the movement of goods, persons, capital and services is uninterrupted due to the four freedoms. Economic relations in the rest of the world are also active. The expansion following the Second World War, and the international influence on parts of the world that were not in contact before is referred to as globalisation. Globalisation also involves commercial law gaining more importance⁴.

2. The Hungarian approach to private law

The new Hungarian civil code reflects a monist approach: it also includes the substantive rules of company law, a sign of a wish for a unified civil law on the part of the law-maker. The sources of the new civil code include the previous code, past court decisions and current practices, and international treaties. The drafters of the new Hungarian civil code followed the international trends, and paid particular attention to the civil codes that were currently being drafted (e.g. those of Québec, the Netherlands, the Ukraine).

The question whether to prepare a commercial code also arose. In certain other former socialist countries a commercial code was introduced immediately after the fall of the regime. This was either a newly drafted code, or the old code from the pre-socialist times reintroduced, which, however, are often rather outdated.⁵ The latter

² Szalma J. (2008) Az új Magyar PTK tervezetéről *Magyar Jog* vol. 11. pp. 797-808.

³ Vékás L. (2008) *Parerga* Budapest: Hvg-orac p.258-260 Budapest: Hvg-orac and Vékás L. (ed..) (2008) *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez*, Budapest: Complex Kiadó.

⁴ Török G. and Török L (2008) Az új Ptk. a globalizáció tükrében *Jogtudományi Közöny* no. 6, pp. 300-309.

⁵ Bárdos P. and Menyhárd A. 2008 *Kereskedelmi jog*, Budapest: Hvg-Orac p. 34.

solution emphasized the revival of old traditions, but the former represents a more practical way of meeting the legal challenges of the present.

Some European countries have a dualist system in the field of the private law, where a commercial code and a civil code coexist. (One example is Germany, where the BGB and HGB coexist). Currently, there is commercial code in force in Germany, Austria, France, Spain, Portugal, Poland, Romania, the Czech Republic, Belgium, Estonia and the Ukraine. There is no commercial code in force in Switzerland, Holland, and Hungary⁶.

The monist way of regulating the private law seems to be an easier solution than the dualist one with two different codes operating together. But both structures have their own advantages and disadvantages. In the monist system, the law maker has to pay attention to the fact that the act would be used by the consumers, average people, enterprises and merchants (traders). Of course, this only applies to some parts of the private code: in family law or inheritance law only one type of rule can exist anyway. The critical area of the monist regulation is the contract law, since contracts can be divided into different categories depending on the identities of the parties. First, there are the commercial contracts (e.g. franchising, leasing). Second, there are contracts serving the needs of average people (e.g. loans, life insurance contracts), and third, there is a mixed group of contracts that can be made between all kinds of parties. Vékás emphasizes⁷ that only the firm and unchangeable norms should be integrated into the civil code, the rules that are often modified should not be placed there. It undermines law security and reliability, which are the key properties of legal systems.

The domains and the contents of the two codes regulating civil law are different, as well as their philosophies, but by separating them we are left with two sets of very similar norms in two systems, which are very difficult to apply or set apart. A possible argument for keeping the duality is that different kinds of players need different types of rules. Separating the two codes helps the economy and commerce to be regulated on the basis of their own practices and expectations. The participants of economic life require a quicker and more flexible regulation, which must also be expressed in legislation.

For example, the basic model in the private code takes into account the traditional contractual relationships between individuals. Thus, the starting point is typically the cases of persons satisfying a basic need, and the two-pole legal relations with relative structure.⁸

The new code emphasizes in many places that it strives to achieve a unified private law. For example, it outlines the basic principles of private law, including the principles of good faith, of fairness, the consequences of the abuse of rights, and the principle of *nemo suam turpitudinem*, which help to achieve the monist structure. In

⁶ *Idem*

⁷ Vékás L. (2001) *Az új polgári törvénykönyv elméleti előkérdései*, Budapest: Hvg-orac.

⁸ Bíró Gy. (2006) „A civilisztika fejlődési vonala - jelenkori kodifikációnk.” p.47-74., in: Miskolci Bodnár P. (ed.) *A civilisztika fejlődéstörténete. Doktori tankönyvek 2*. Miskolc: Bíbor Kiadó.

addition, the code explicitly mentions certain commercial contract types such as shipping or commission.

In the old civil code, there were also several regulations with relevance to commerce. The term *business organization* was used to name a quasi-commercial participant. The term *businessline behaviour* was also used. In addition, a buyer could obtain the property rights of a product in the course of a regular trade turnover (in a shop) even if the seller was not in possession of the product.

There was a commercial code introduced in Hungary in 1875, which was the translation of the ADHGB from 1861. This code used the objective method: it had to be applied to a range of particular contracts, in addition to commercial transactions involving a merchant. The Hungarian code adopted this mixed system, and considered commercial transactions to be primary to general private law. The list of commercial transactions included transactions identified as such on the basis of objective criteria, independently of the subject (258§), relative transactions (259§), and those where a participant is a merchant and are thus identified with the help of objective criteria.

There is a Commercial Act in effect in Hungary at the moment (act CLXIV, 2005), which provides only a framework, and is not to be considered a type of classical commercial code. It regulates tourism services, the basic requirements and control of the marketing of products.

3. General questions of commercial regulation

Towards the end of the Middle Ages, the traders established their own rules based on tradition, and they introduced many new legal institutions based on practical considerations. Commercial law gives an opportunity for traders to conduct their transactions quickly and efficiently. The legal transaction requires unambiguity, legal certainty, as well as retaining trust⁹.

Since the second half of the 20th century, civil law and commercial law have been observed to get closer to each other in the legal systems of the most developed market economies¹⁰. Vékás believes therefore that the contracts of professional business life could be regulated inside of the civil code, thus creating a unified contract law. Nevertheless, the protecting measures within general commercial law are not sufficient if one of the parties is a natural person¹¹. According to Bíró, who argues in favor of harmonized rules, the rules related to contracts in business life (e.g. general rules on commission, shipping - which can have relevance to general private law) should be structured in such a way that they comply with the inherently higher regulations. Where the two rules meet, one has to plan the contracts for the business

⁹ Zerres, T. (2013) *Bürgerliches Recht* 7th edition Heidelberg Dordrecht London New York: Springer p. 18.

¹⁰ Török G. (ed.) (2006) *A Polgári Törvénykönyv Magyarázata III. Kötet: Kötelmi jog Általános rész* Budapest: Magyar Hivatalos Közlönykiadó.

¹¹ Bárdos P. and Menyhárd A. 2008 *Kereskedelmi jog*, Budapest: Hvg-Orac p. 34-35.

world with its higher requirements (e.g., sale or lease). Of course, it cannot be forgotten that between private persons different rules are required (e.g. commission), although there are contract types that only made between private persons.¹² Among the rules regulating contracts, those that pertain to particular types of contracts or individual contractual standards have to be complemented by standards applicable to consumer contracts.¹³

The creation of codes served many purposes, the most important being legal security. In European legal history, several waves of codification took place, and codification took various forms. The modern codes appearing from the 19th century followed two patterns. One of them took the form of the classical codices of the civil law, and was meant to regulate affairs that every private person could take part in, whereas the other one was created for commerce, for professional affairs. The beginnings of commercial law were constituted by the *lex mercatoria*, which was created on the basis of economic rationality. A significant problem, which is present with us even today is how to delineate the cases for which the commercial code is applicable¹⁴.

The most important problems in connection with the use of commercial codes include the following. First, the application of commercial law to natural persons has been considered outdated. EU law also investigates the impact of a particular conduct, examines the impact on the market, and also defines protection that way¹⁵. Second, an important question is under what conditions a commercial activity can be carried out. In the case of the modern legal systems the dominant approach argues that it is not the subject but the object of the regulation that matters for being part of commercial regulation¹⁶.

The establishment of a common trade is also important for the EU, and the four fundamental freedoms are basically aimed at this. The common market involves not only the activities of the individuals, but also those of companies and entrepreneurs in the EU. The Union has already dealt with rules belonging to the domain of private law since the 1960's, especially with relevance to the transparency of companies, the security of creditors, and competition law. The main aspect of the EU approach to private law is protection, it approaches the rules from a negative perspective. The expression *merchant* is not used in EU law in the sense it is used in French or German law. The Union has also tried to establish common European societies, such as *Societas Europea*, which tried to embrace a transnational approach. Another large-scale initiative was the European Common Sales Law (CESL) for E-commerce and small businesses of Europe. These initiatives, however, made for a defined area

¹² Bíró Gy. (2006) „A civiliztika fejlődési vonala - jelenkori kodifikációnk.” p.47-74., in: Miskolci Bodnár P. (ed.) *A civiliztika fejlődéstörténete. Doktori tankönyvek 2.* Miskolc: Bíbor Kiadó.

¹³ Bíró Gy. (2006) „A civiliztika fejlődési vonala - jelenkori kodifikációnk.” p.47-74., in: Miskolci Bodnár P. (ed.) *A civiliztika fejlődéstörténete. Doktori tankönyvek 2.* Miskolc: Bíbor Kiadó.

¹⁴ Dalhuisen Jan H. (2013) *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* 5th edition, Oxford: Hart Publishing p. 41.

¹⁵ Bárdos P. and Menyhárd A. 2008 *Kereskedelmi jog*, Budapest: Hvg-Orac p. 39. oldal

¹⁶ Vékás L. (2008) *Parerga* Budapest: Hvg-orac.

(online trading), which were not meant to replace national sales law, it would only have a supplementary role in the field of online commerce.

4. Solutions in commercial legal regulation

In countries considered to be exemplary in connection with commercial legal regulation there are two dominant approaches. One is the objective approach that is followed by French law (*droit réel*), that lists the types of commercial transactions in the course of which the commercial code has to be applied. Germany applies the subjective approach, where the definition of the merchant is important (*droit personnel*), although it is also important in this case as well what kind of activity they carry out. It is an important question in Germany how to determine the concept of the commercial act (*Handelsgeschäfte*), several activities count as such automatically. However, there are activities that non-traders can also carry out, such as the writing of cheques or drawing of bills of exchange, which are now regulated by a separate statute. In a case where a non-trader wishes to carry out a commercial activity the exchange belongs under the auspices of the commercial code, but the activity can only be referred to as commercial in a much wider sense.¹⁷ The third possible approach is a mixed system, in which both the properties of the participants and the type of the contract matters.

However, legal developments in the 20th century show that there is no group of contracts in commerce in the case of which special measures (the existence of a commercial code) would be justifiable. We have to note that the two groups of norms continuously get closer to each other. The advantage of the monist system is that it avoids parallel regulations and problems of discrimination.¹⁸ In the case of dualist systems, the lawmaker has to ensure that the corresponding norms in the two codes do not contradict each other. (For example, the Hungarian lawmaker regulated issues concerning consumer credit both in the previous private code and in independent laws as well, which led to an unnecessary multiplication of norms.) In the presence of a commercial code EU norms have to be implemented at two places.

It is an important question what private legal EU-norms should be implemented in the codes of private law. One extreme case is when when the relevant areas are regulated in individual laws, another extreme case is when all norms are situated within the private code. The advantage of the latter approach is that it avoids the multiplication of norms, since it leads to uncertainty.

Due to the monistic character of the new Hungarian code, the legislator has sought to establish a uniform law for the economy and for private individuals¹⁹. The

¹⁷ Dalhuisen Jan H. (2013) *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* 5th edition, Oxford: Hart Publishing, p. 41.

¹⁸ Bíró Gy. (2006) „A civilizáltika fejlődési vonala - jelenkori kodifikációnk.” p.47-74., in: Miskolci Bodnár P. (ed.) *A civilizáltika fejlődéstörténete. Doktori tankönyvek 2.* Miskolc: Bíbor Kiadó.

¹⁹ Wellmann György (2013) A szerződések általános szabályai az új Ptk.-ban *Gazdaság és Jog* vol. 1, pp. 3-7.

law envisages legal subjects who act reasonably, and take responsibility for their decisions. The new civil code contains many commercial elements, such as making contracts through a competitive procedure, the transfer of rights, product warranty. According to the official commentary of the bill, “the contractual provisions of the civil code consciously keep the more stringent requirements of the market economy in mind.”

Vékás²⁰ thinks that in countries that have a commercial code they are justified primarily on the basis of tradition, and that certain symptoms show the insecurity of the existence of the code. These include the fact that more recent additions to commercial law have already been regulated outside of the code, certain traditional legal institutions have been removed from there, the international regulations also involve the code, and that the lawmaker wishes to give a new role to commercial codes. The law of accounting, freight and shipping have been incorporated into the HGB.

5. The German solution

The system of the German private law is dualist (similarly to France), it has two codes, the BGB (Bürgerliches Gesetzbuch or Civil Code) and the HGB (Handelsgesetzbuch, or Commercial Code).

The HGB applies to merchants (*Kaufleuten*), for other persons, the BGB is applicable. The relation between the two codes is that of between general vs. special. (Art. 2 EGHGB (Einführungsgesetz zum Handelsgesetzbuch) – *lex specialis derogat lex generali*) In certain cases, the rules differ according to whether we are dealing with a *Kaufmann* or not. Only in these cases is it relevant to make a decision as to the quality of the party concerned. Starting from 1939, the majority of the German HGB was also in effect in Austria until 2007 January 1st, when the Handelsrechts-Änderungsgesetz (HaRÄG, öBGB I Nr. 2005/120) initiated significant changes, creating the new Unternehmensgesetzbuch (UGB). It is important to note that HGB is also influenced by the norms of the European Union.

The predecessor of the German HGB was the Allgemeine Deutsche Handelsgesetzbuch (ADHGB), which entered into force in 1861. There was a well-known motivation behind creating the code, namely, to help the development of commerce and economic relations in a non-unified country. The planning of the Handelsgesetzbuch in 1894 started in the framework of the unified Germany, with the aim to establish the counterparts of the regulations of the BGB for the commercial law.

The dualistic nature of the German civil law, the mutual dependence and cooperation between the HGB and BGB can be seen on the basis of the fact that both entered into force on 1 January 1900.

²⁰ Vékás L. (2001) *Az új polgári törvénykönyv elméleti előkérdései*, Budapest: Hvg-orac p. 45.

The HGB contains five books. Several major changes affected the code in the last twenty years, one of which was the reform that the Handelsrechtsreformgesetz (ReefG, 1998) initiated. The code provides definitions of various types of *Kaufmann* (merchant, including Istkaufmann, Kannkaufmann, Formkaufmann, Fiktivkaufmann, Scheinkaufmann). Generally, in order for a person to count as Kaufmann, he or she has to practise a particular profession, and in most cases should be registered in the Handelsregister (Commercial register). In addition, it contains regulations concerning certain other legal persons such as Offene Handelsgesellschaft (OHG, general partnership), Kommanditgesellschaft (KG, limited partnership), Stille Gesellschaft (SG, dormant partnership), and, for historical reasons, for the Offenen Handelsgesellschaft (OHG) and for the Kommanditgesellschaft (KG). The latter two companies belong more in the domain of company law and therefore their appearance in HGB is rather unusual. However, it should be noted that the two companies are obviously related to general commercial practice and to the definition of merchant. The HGB also contains rules on Handelsbücher (Trading Books), on Handelsgeschäfte (commercial transactions), and, since Germany is a country involved in maritime trade, there are regulations on Seehandel (maritime trade). It has to be noted that there are supplementary rules about Versicherungsunternehmen, Kreditinstitute and Genossenschaften.

In the German commercial law therefore the key issue is who the merchant is, which approximates the question of the applicability of commercial law from a *subjective* perspective. (§§ 1 to 7). However, in relation to other laws and regulations accurately determine when there is room for the application and what consequences it has if one is a merchant²¹. It should be noted that the merchant concept can always be interpreted in relation to a particular profession (example: owns a business, provides smaller services etc.).²²

Many regulations of HGB do not mention any specific commercial transaction and could be applied to non-commercial ones as well. This indicates that the distinction is not easy to make, which is also reflected in the German practice. The biggest problem is constituted by the fact that commercial businesses do not only carry out commercial transactions but also non-commercial ones. This entails that not only the concept of the commercial business but even that of the commercial activity is unable to cover the domain of the law

The relation between BGB and HGB is that of a general rule to the specific one. In many cases, the HGB modifies or extends the rules of the BGB referring to the same states of affairs.²³

²¹ Oetker, H. (2015) *Handelsrecht* 7th edition Berlin Heidelberg: Springer p. 13.

²² Oetker, H. (2015) *Handelsrecht* 7th edition Berlin Heidelberg: Springer p.16.

²³ Zerres, T. (2013) *Bürgerliches Recht* 7th edition Heidelberg Dordrecht London New York: Springer p. 19.

6. The Hungarian experience

The question is whether it would be possible to draft a business code on commercial and business affairs, which would contain rules for individual entrepreneurs and companies. These norms would include the substantive and procedural norms related to publicly available information about companies, company register, and authentic records, which are regulated in independent acts. I believe that the inclusion of company law in the new private code was not necessarily an optimal solution, given the recent major modifications of the regulations in 1988, 1997, 2006, or 2013.

Sárközy²⁴ suggests that following the example of consumer contracts it would be possible to create a type of commercial contract. This would be a type of contract used in commercial affairs, which then would not be used in transactions between private persons or in consumer contracts.

Commercial contracts are out of the focus of the private code. There are typical transactions of a commercial kind: special kinds of contracts of sale, insurance contracts, commission, broker, individual commercial relationship, leasing, package holiday sale, investment contract, concession contract, procurement, transport, freight transport, license agreement²⁵ It would be advantageous to work out rules for contracts involving investors, big companies, such as concession contracts, franchising, public procurement, certain accounting rules, shipping, and business insurance. This would enable the interaction of norms, and a general regulation for legal institutions in business life.

Hungarian law offers several solutions for this. Hungarian law uses the term 'individual entrepreneur', which is supposed to cover a category that is related to that of merchant (trader) (often used pejoratively). Those who carry out agricultural activity can register as 'primary producers'. There are various types of firms (bt, kkt, kft, rt).

It would be possible for the general private law to be the governing law of commercial transactions. But in some cases, the law maker drafts norms intended to create special rules on particular legal relationships which try to satisfy the independent situations of the commercial activity²⁶.

²⁴ Sárközy T. (2007) *A szocializmus, a rendszerváltás és az újkapitalizmus gazdasági civiljoga 1945–2005* Budapest: Hvg-orac p. 289.

²⁵ Bárdos P. and Menyhárd A. 2008 *Kereskedelmi jog*, Budapest: Hvg-Orac p. 39. oldal.

²⁶ Goode, R. and Kronke H. and McKendrick, E. (2015) *Transnational Commercial Law* Oxford: OUP, p. 4.

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