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Some Remarks on Shareholders' Agreements in the Context of Hungarian Law**

I On the Concept of a Shareholders' Agreement

In the currently effective Hungarian law, there is no single type of contract that would be regulated under the name of a shareholder agreement or, as it is used in the Hungarian legal literature, a 'syndicate agreement'. This description is still well-known and commonly used: there is a type of contract that is entered into on the basis of the doctrine of the freedom of contract, with varied content but identifiable in its main features, which is thus internally coherent. As per Section 6:59 of the Hungarian Civil Code *(Polgári törvénykönyv),* '(1) The parties shall be free to enter into a contract, and shall be free to choose the other contracting party. (2) The parties shall be free to determine the content of the contract. With their concordant intent, they may depart from the rules of contracts concerning the rights and obligations of the parties, if such derogations are not prohibited by this Act.'

A syndicate or shareholders' agreement is a *cooperative type of legal relationship separated from the articles of association but one which has a strong connection to these articles (a syndetic coordination, 'a group of contracts'), entered into on the basis of the doctrine of the freedom of contract with the participation of each member or some members of a company, or in some cases, even third parties, in the framework of which the parties undertake obligations related to the foundation, operation or termination of a company, which point beyond the frameworks of the articles of association.*

The individual elements of the definition allow the identification of the key elements of the concept of a syndicate agreement:

– there exists a contractual legal relationship, for which the general rules of contracts should be applied, and it also arises from this contractual feature that a shareholders' agreement only has binding effect with regard to the contracting parties;

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– syndicate agreements are on the borderland between *company law and the law of obligations,* because they contain certain rights and obligations related to the foundation, operation or termination of a company, in addition to those that are set out in the articles of association but they are not of an accessory character in their relationship with the articles of association (being accessory is not suitable for describing the relationship between the two contracts, in this case, the use of the 'group of contracts' concept is much more accurate);
– the effective law does not specifically identify or regulate syndicate agreements; however, within the restraints of the freedom of contract, they can obviously be validly entered into, and the questions of their validity can only be judged by taking their specific contents into account: a shareholders' agreement cannot be regarded as invalid in itself;[1]
– a third party may also be a contracting party in a syndicate agreement; what is more, the very company regulated by the shareholders' agreement can also be one.

Syndicate agreements are usually of a confidential nature; syndicate agreements are not accessible at the court of registry and they do not appear in any public documents.

The name 'syndicate agreement' gained ground in Hungarian law as early as in the pre-Second World War period. In other legal systems, some other descriptions are used for it, for example, in English, the name *shareholders' agreements,* in French, *pacte sociétaire* (appr. company pact), while in Italian *patti parasociali* (appr. pacts 'besides' or 'behind' the company) are used. In Italian law, however, the concept of syndicate appears for the naming of the individual subtypes of these pacts; for instance in the case of a voting syndicate *(sindacato di voto).*

Shareholders' agreements, among others, as a consequence of the lack of regulation, show a very diverse picture from a content perspective; each specific contract of this type settles a specific situation: this is why we cannot aim at giving a comprehensive picture when we examine the legal impacts of a shareholders' agreement. However, these contracts also contain recurring topics which are typically to be settled. The parties may regulate all these topics, or only some questions in the framework of a shareholders' agreement. It was rightly established in the legal literature that *'related to shareholders' agreements, one needs to distinguish between the contractual provisions that refer to a legal relationship under company law (and the sub-relationships thereof, such as the underlying legal relationship, the ownership relations, the relationship of economic organisation and the organisational and representational legal relationship) and those which are related to the legal relationships under company law but which are not of the company law kind (for example, a loan agreement between the member and the company).'*[2]

Shareholders' agreements play a key role in the coordination of the members'/shareholders' interests, primarily by establishing the legal framework for the cooperation between them. The question obviously arises that, from this aspect, the articles of association also serve

[1] For a detailed analysis on the validity of shareholders' agreements, see Veress Emőd, 'A szindikátusi szerződés ütközése a társasági jogi normákkal és a társasági szerződéssel (The Syndicate Agreement Conflicting with Company Law Regulation and the Articles of Association)' (2018) 9 Magyar Jog.

[2] Papp Tekla, *Atipikus szerződések (Atypical Contracts)* (Lectum 2009, Szeged) 29.

basically the same purposes and why one needs a shareholders' agreement in such circumstances.

The reasons are multiple:

– Primarily, a shareholders' agreement may contain such requirements the fulfilment of which will only be undertaken by some of the members, i.e. not every member of the company is the subject of the syndicate contract. In the same way, it is also possible that the content of the shareholders' agreement takes on a secret character for the other associate members, i.e. it is only the parties to the shareholders' agreement that are aware of the existence of the contract but not the other members.

– A shareholders' agreement may have a party who is not a member of the company. For example, the members of governing bodies or certain creditors may also be contracting parties in a shareholders' agreement. What is more, in my opinion, the company itself, the operation of which is regulated in the shareholders' agreement, may be a party in the syndicate agreement. When a third party is also a contracting party, a contract that is separated from the articles of association will obviously become necessary.

– The articles of association are subject to the principle of publicity of company data. The data of companies are available to the public in the Companies' Gazette and in electronic databases; even free of charge, while the articles of association are accessible through the courts of registry. However, the secret or confidential character of a shareholders' agreement can be preserved, as this agreement is not submitted to the court of registry.

– A shareholders' agreement many times precedes the establishment of the company. In such a case, the shareholders' agreement may anticipatively define some of the content elements of the future articles of association that are deemed important.

– The articles of association are the basic document of the operation of the company, without which the company cannot exist. However, a shareholders' agreement, although it may be effective during the entire period of the company's operation, can be entered into only for certain periods or for the performance of certain operations, groups of operations, projects, investments, i.e. separated from the life cycle of the company. In the same way, the shareholders' agreement may trigger legal effects after the termination of the company too (e.g. clauses on the prohibition of competition).

– The law applicable to the company from the perspective of international private law is clearly determined (there is no freedom to choose the applicable law in company law). However, in the case of a shareholders' agreement, the freedom of the parties to choose the applicable law is not restricted by any regulation.

– Since a shareholders' agreement is entered into on the basis of the general principles of contract law, the expression of the unanimous will of the parties will be necessary again for its amendment. However, the articles of association can usually be amended according to the majority principle. A shareholders' agreement may thus appear as a special instrument for protecting the minority when the shareholders' agreement cannot be modified without the agreement consent of the minority.

The goal of the Hungarian Civil Code was to regulate company law in a flexible manner, by opening perspectives of so-called 'dispositivity' (use of default rules), which have so far been unknown in company law (Section 3:4), in order to reduce the significance of shareholders' agreements in practice. However, we should realise that the above-mentioned situations and goals continue to justify shareholders' agreements being entered into. The development of company law in itself does not lead and cannot lead to the reduction of shareholders' agreements, since the legal and economic interests that generate the conclusion of shareholders' agreements are not primarily aimed at the contractual correction of company law, but they also serve complex goals that are independent of the quality and dispositive character of company law. Putting it more simply, we can state that company law, which is of outstanding standards and applies a dispositive regulatory method, does not stop the relatively widespread use of shareholders' agreements either.

A shareholders' agreement is, however, in a very close and organic relationship with company law; its purpose is basically inseparable from company law. Therefore, the following question inevitably comes up: what kind of effects do the norms of company law exert on shareholders' agreements? Also, the issue of the relationship and mutual effects between the articles of association and the shareholders' agreements emerges.[3]

II The Typology of Shareholders' Agreements

Shareholders' agreements can be classified by several different criteria.

– According to the effect of the shareholders' agreement, one may distinguish between a shareholders' agreement that is entered into prior to the foundation of the company, which is of the pre-contract type, on the one hand, and a shareholders' agreement that is effective parallel to the effectiveness of the articles of association, which may even survive the articles of association, as the case may be, one which regulates the operation and termination of the company, on the other hand.

– According to the content of the shareholders' agreement, one may distinguish between a shareholders' agreement that prepares the foundation of the company, on the one hand, and the contract that affects the operation of the company, on the other hand. These two types of contractual content may appear at the same time in the case of a shareholders' agreement entered into before the foundation of the company; however, the first type of content, which refers to the foundation, is of course missing from the shareholders' agreement concluded during the operation of the company.

– As regards the classification according to the legal effects exerted by the shareholders' agreement, we may distinguish between a shareholders' agreement that generates rights exclusively for the members of the shareholders' agreement, on the one hand, and a syndicate that creates authorisations also for the shareholders' company, which does not participate in

[3] Veress (n 1) 510–519.

the shareholders' agreement, on the other hand (in such a case, the legal mechanism to be applied is a contract for the benefit of the third party, since the company itself may also request the performance of the contract by the members of the syndicate).

– By the legal relationships regulated by shareholders' agreements, a shareholders' agreement may be one regulating a syndicate of a purely company law nature, of miscellaneous branches of law and of a purely different branch of law (for example, only competition law or labour law).

– We can distinguish between an organisational shareholders' agreement (the subject of which is the development and operation of the organisation of the company) and non-organisational articles of association (for example, the subject of which is funding the activities of the company).

– Based on the parties taking part in the shareholders' agreement, one may distinguish between a shareholders' agreement with two subjects and one with more than two subjects (multilateral syndicate agreement).

– Based on whether the shareholders' agreement can be accessed by a third party or not, one may distinguish between a public shareholders' agreement and a confidential shareholders' agreement, which is treated as a business secret.

III Contracting Parties in the Shareholders' Agreement

The parties in a shareholders' agreement, according to the general rules, are those persons who have expressed their uniform wills regarding the contract. Just as in the case of the company, both natural persons and legal entities may appear as contracting parties in a shareholders' agreement.

From the definition specified in the previous subsection, a definite position arises with regard to the contracting parties in a shareholders' agreement: a shareholders' agreement may be entered into by each member or some members of the company as contracting parties. What is more, in certain cases, even third parties may participate in a shareholders' agreement. This position, based on the fact that legal literature is not uniform in assessing this question, requires explanation and justification, as there are several specific issues that emerge related to the shareholders' agreement. The subject of this paper is such an explanation and justification.

IV Shareholders' Agreements in Which Not Every Member of the Company is a Contracting Party

It is not absolutely necessary to have a complete overlap between the members of the articles of association and the shareholders' agreement. While the conclusion of the articles of association assumes the unanimous statement of will of all the future parties (members), this is not a precondition to the validity of a shareholders' agreement.

In order to be able to enter into a shareholders' agreement, at least two persons will obviously be necessary.[4] As long as one of the members did not sign the shareholders' agreement, the effect of the shareholders' agreement will of course not extend to that party.[5]

Thus, it can happen that each member of the company is at the same time also a member of the shareholders' agreement. However, it can also happen that a shareholders' agreement is entered into by certain members (for example, between the 'large shareholders', or the 'small shareholders' to establish a syndicate for exercising minority shareholders' rights).

According to the legal literature, this is natural in the case of joint stock companies that count on a subscription to shares in a wider range: *'in the conclusion of a shareholders' agreement, it is usually only the founders or the main shareholders, or some of them who participate.*'[6] However, in the case of limited liability companies, it is more common that each member takes part in the shareholders' agreement as well, because it is less probable that some of the members intend 'to enforce particular interests'[7]. It can definitely be pointed out that not every member of the company is necessarily a contracting party in the shareholders' agreement.

There is no overlap either between the members of the articles of association and the shareholders' agreement when an entity becomes a member of the company later, i.e. as a result of the assignment of a business share. In such a case, if the new member is also intended to be specified as a party in the shareholders' agreement, the shareholders' agreement must be amended. The new member of the company must be accepted by the other signatories of the shareholders' agreement and this person shall also accept the terms and conditions of the shareholders' agreement.[8]

V Participation of Third Parties (Those Without Membership in the Company) in the Shareholders' Agreement

In my view, it is not only the members of the company that can take part in the shareholders' agreement. This can be regarded as a disputed issue in the legal literature but my standpoint is not isolated. It has been pointed out that 'it is not prohibited by the law either that a shareholders' agreement has such a member who is not a member of the company, although it is without a doubt that this very rarely happens in practice (e.g. such a case may be when the real estate property whose use is intended to be granted to the company has a further owner in addition to the member). It is worth making a reference to this possibility as well

4 Papp (n 2) 29.

5 Lukács Mónika, Sándor István, Szűcs Brigitta, *Új típusú szerződések és azok gyakorlata a gazdasági életben (New Types of Contracts and their Practice in Business)* (HVG-Orac 2003, Budapest) 23.

6 Kolben György: *A szindikátusi szerződés (The Shareholders' Agreement)* (Közgazdasági és Jogi Könyvkiadó 1996, Budapest) 34.

7 Kolben (n 6) 34.

8 Lukács, Sándor, Szűcs (n 5) 23.

because, as we will see later, some of the earlier members of the company may remain subjects of the shareholders' agreement, even though their membership in the company has already terminated.'[9]

In the same way, the contracting parties of a shareholders' agreement may also come from a circle of persons beyond the members. For example, a major creditor or financier of the company may also take part in the shareholders' agreement (who, for example, stipulates in this contract the terms and conditions under which members may alienate their business shares or shares, or any and all changes in the membership structure may also be prohibited by the shareholders' agreement).

The expression *shareholders' agreement* used in the Anglo-Saxon legal system, however, indicates only the agreements entered into between the holders of shares. However, not even in this approach is the participation of the members is exclusive: it is noted in the legal literature that these agreements are 'predominantly' entered into between the members.[10]

VI The Company Regulated in the Shareholders' Agreement as a Contracting Party in the Shareholders' Agreement

The company regulated in the shareholders' agreement may be the subject and the object of the shareholders' agreement at the same time. It is possible that the very company regulated in the shareholders' agreement should also undertake obligations in the shareholders' agreement, for example in relation to the utilisation of the funding made available by the members (for example, a loan granted by a shareholder).

The joining of the company to the shareholders' agreement may only happen subsequently if the shareholders' agreement was entered into before the conclusion of the articles of association. As long as the shareholders' agreement is entered into after the conclusion of the articles of association, the company may also be an original contracting party, 'co-founding' the syndicate.[11]

The participation of the company in the shareholders' agreement, however, requires further explanation as well.[12] The reason for this is that a significant part of legal literature takes the stance that it is only the members of the company that can be contracting parties in the shareholders' agreement.[13] We can see the re-enforcement of this idea in judicial

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9 Lukács, Sándor, Szűcs (n 5) 23.

10 Graham Muth, Sean FitzGerald, *Shareholders' Agreements* (5th edn, Sweet & Maxwell – Thomson Reuters 2009, London) 3.

11 Sárközy Tamás, 'A szindikátusi szerződésről (On Shareholders' Agreements)' in *Eörsi Gyula Emlékkönyv* (*Gyula Eörsi Commemorative Book)* (HVG-Orac 2002, Budapest) 178.

12 See Szabó Gergely, 'Gazdasági társaság a szindikátusi kötelemben (Companies in Shareholders' Contracts)' (2012) 5 Céghírnök 7–11.

13 Balásházy Mária, 'Szindikátusi szerződés a társasági és a polgári jog határán (Shareholders' Agreements on the Border of Company and Civil Law)' (1993) 5 Gazdaság és Jog 17; Jasztrabszki Tamás, 'A szindikátusi szerződés

practice as well.[14] In practice, a shareholders' agreement settles the cooperation between the parties taking part in the contract; it imposes no obligation on the company.[15] This approach is problematic because it is in fact restrictive in many cases if the company is not a contracting party: in such a case, the company cannot claim that the shareholders' agreement be implemented; it cannot put the obligations undertaken in the shareholders' agreement into action, which, however, may make sense in many cases.

The company could perhaps file a case against the member(s) of the shareholders' agreement, based on the legal institution of a contract on behalf of a third party, as long as the conditions set out in the Hungarian Civil Code exist. As per Section 6:136 of the Hungarian Civil Code:

> (1) If the parties concluded a contract for a service to be performed to a third party, the third party may directly claim the performance of the service if
>
> *a)* his right to this was expressly set forth by the parties; or
>
> *b)* this clearly follows from the purpose of the contract or the circumstances of the case.
>
> (2) The third party may claim the performance of a service set forth for his benefit as of his notification by either party that a contract for his benefit has been concluded. If the third party waives his right to claim the performance of the service, the service may be claimed by the party that concluded the contract for the benefit of the third party.
>
> (3) The obligor may also enforce his objections arising from the contract against the third party.

If, in the shareholders' agreement, the goal of the parties is to allow the company to be clearly entitled to enforce the performance of the terms and conditions of the contract then, in order to avoid interpretation problems and legal uncertainty, it is worth expressly stipulating this right of the company in the contract.

Consequently, acknowledging the company as a party in the shareholders' agreement seems to be a minority opinion in Hungarian law[16] but we may see examples for its acceptance in judicial practice too.[17]

In the Anglo-Saxon legal literature, it was concluded that it commonly happens that the company also joins the shareholders' agreement. In the relevant literature, many possible reasons for this were defined, for example, in order for the company to undertake certain obligations as well (the company should also accept the agreement on the limits of loans to be granted to the senior executives, which the parties did not wish to include in the articles of association in order to preserve confidentiality); in the same way, if the company is also

(Shareholders' Agreements)' (2000) 7–8 Cég és Jog 7; Papp (n 2) 29; Juhász József: '„Cégkörökben" gyakoribb atipikus szerződések I (Common Atypical Contracts in the World of Companies 1.)' (2009) 4 Céghírnök 12; Lukács, Sándor, Szűcs (n 5) 25.

14 BH *(court decision)* 1999.89.

15 BH *(court decision)* 1997.10.; VB *(arbitration court decision)* 95.1134.

16 Sárközy (n 11) 178.

17 BH *(court decision)* 2007.158.; EBH *(court decision)* 2007.1617.

a contracting party, the executive officers will also be indirectly obliged to perform the shareholders' agreement, which may gain special significance in all such cases where the executive officer is not a shareholder in the company; or in order to ensure that the company (as a 'parent company') should duly fulfil the requirements set out in the shareholders' agreement with regard to its subsidiaries.[18]

My standpoint remains that, in the Hungarian law, a company may be a member of a shareholders' agreement as well.

The most important argument for this is the doctrine of the freedom of contract.[19] According to the principle of the freedom of contract, the parties do not only decide on whether they wish to enter into a contractual relationship and what content the contract should have but also the freedom of contract involves the freedom to select the contracting parties as well. Obviously, the freedom of contract, including the freedom to select a contracting party, is not absolute in nature but it has at least two very significant constraints from the aspect of the issue in question:

– one of the obstacles to the freedom of contract is constituted by *imperative norms,* as those agreements which run counter to a law or which have been entered into by bypassing a law are regulated as prohibited contracts and are considered void by the Hungarian Civil Code;[20]

– second, *good morals;* the Hungarian Civil Code also sanction those contracts which obviously run counter to good morals with voidness.[21]

Although the contract law subsystem of private law is basically built on dispositive – suppletive norms (default rules), in certain cases, the legislator models the private law relationships by relying on imperative norms, in order to achieve specific legal policy objectives.

It comes up as a question here whether there is any such law in the Hungarian Civil Code or outside the Hungarian Civil Code which prohibits the participation of a company in a shareholders' agreement. A shareholders' agreement is an unregulated contract, as a consequence of which it does not have its own (special) legal provisions, this is why no express statutory prohibition for this may exist. It is possible to investigate the matter on the basis of an analogy: whether any statutory restriction of company law is applicable, on the basis of an analogy, to a company that wishes to take part in a shareholders' agreement. The answer to this is negative: there are no such binding norms which would prohibit a company from taking part in the shareholders' agreement.

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[18] John Cadman: *Shareholders' Agreements* (4th edn, Thomson – Sweet & Maxwell 2004, London) 2; Muth, FitzGerald (n 10) 5.

[19] Section 6:59 of the Hungarian Civil Code.

[20] It constitutes an exception to the sanction of voidness if the law attaches another legal consequence to the violation of the law. Despite these other legal consequences, the contract shall also be null and void if it is specifically provided by the law, or if purpose of the law is to prohibit the legal effect intended to be reached by the contract. See Section 6:95 of the Hungarian Civil Code.

[21] Section 6:96 of the Hungarian Civil Code.

Good morals are a supplementary category as compared to the prohibitions contained in the imperative norms. It is difficult to give a concise answer to the issue of running counter to good morals, i.e. good morals are a general clause that requires ad hoc investigations, as well as the precise analysis of the concrete situation. Consequently, the participation of a company in the shareholders' agreement cannot *a priori* be qualified as an act that runs counter to good morals but it cannot be entirely excluded either that, in certain cases, the 'obvious' running counter to good morals exists.

VII The Company and Other Third Parties as Contracting Parties: a New Type of Contract?

A third standpoint was also defined in the legal literature. Starting out from the idea that a shareholders' agreement regulates the relationships, cooperation and expectations between the members of the company within the company, an author concluded that a contract entered into with the participation of the company cannot qualify as a shareholders' agreement, which, due to its nature, is realised within the frameworks of the company, so it is conceptually excluded that the company itself be a member of the shareholders' agreement.[22] This is why, according to the above-quoted author, this agreement is a new unregulated contract, which 'gives a section of shareholders' agreements and civil law contracts', which is a syndicate-type *joint venture* contract, partially a syndicate, partially a civil law contract.[23]

VIII Further Arguments for the Acknowledgement of Third Parties as Contracting Parties in the Shareholders' Agreement

It is a very important argument for acknowledging the company as a possible member of the shareholders' agreement that, in such a case, the company will also become a contractual obligee, i.e. it can act on its own behalf against the members who violate the shareholders' agreement. In such a case, it will not become necessary to apply the scheme of the contract entered into for the benefit of the third party. The situation is that if we do not recognise the entitlement of the company to become a contracting party in the shareholders' agreement, the company 'may not coerce the obligations undertaken in the shareholders' agreement and may not enforce the rights that arise from the latter; except if the shareholders' agreement is at the same time a contract concluded for the benefit of a third party (for example, in the case of the conditions required for the operation of the company, or in the case of benefits provided to the

[22] Szabó (n 12) 8.
[23] Ibid.

company).'[24] According to the provisions set out in the Hungarian Civil Code (Section 6:136), if the parties have entered into an agreement for a service to be performed for a third party, the third party will be entitled to directly claim the performance of the service if this right of the third party has been expressly stipulated by the parties, or if this clearly derives from the purpose of the contract or the circumstances of the case. Thus, in a case where the possibility of a company to enforce its own rights by itself is not acknowledged in the shareholders' agreement, the existence of this entitlement will become disputable and it is the judge who can decide whether the possibility of enforcing the rights directly, by the company, clearly derives from the purpose of the contract or the circumstances of the case.

A third party may claim that the service defined for its benefit be performed from the time when it is notified by one of the parties that a contract for its benefit has been entered into. If the third party renounces the claim for the performance of the service, the service may be claimed by the party that has entered into the agreement on behalf of the third party. The obligor may also enforce its objections arising from the contract against the third party.

Consequently, the technique of entering into a contract for the benefit of the third party can be applied restrictively, in an uncertain manner; this is why the solution whereby the company is acknowledged in the shareholders' agreement as a contracting party is more practical and more efficient as well.

As regards the participation of third parties in the shareholders' agreement, we should again refer back to the Anglo-Saxon approach. It is specifically discussed in the legal literature that, in certain cases, the participation of executive officers in the shareholders' agreement may be expressly necessary.[25] This is meant directly to oblige the executive officers to fulfil the requirements set out in the shareholders' agreement.[26] In the same way, the participation of third parties (i.e. non-members of the company) in the shareholders' agreement is also acknowledged by Italian legal practice: essentially an agreement concluded with the participation of at least one member of the company, of syndicate type in its objective, one which is in a functional relationship with the articles of association, nevertheless structurally different from those, is regarded as a shareholders' agreement.[27] In the Italian legal practice, it came up as a typical example for the participation of third persons in a shareholders' agreement when the members of a limited liability company and third parties reach an agreement on the recapitalisation of a limited liability company and its transformation into a joint stock company.[28]

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[24] See Papp (n 2) 29–30.

[25] Cadman (n 18) 4; Muth, FitzGerald (n 10) 5.

[26] I have indicated above that if the company is a contracting party in the shareholders' agreement, i.e. if it has undertaken obligations within the framework of this agreement, the executive officers will also be obliged indirectly to execute the shareholders' agreement, i.e. the company can only be managed in the framework of the contract entered into by the company.

[27] Cons. St. (Consiglio di Stato), sez. V, 26 novembre 2008, n. 5845. See Dario Scarpa, *I patti parasociali nelle s.p.a. e nelle s.r.l.* (Giuffrè Editore 2011, Milan) 4.

[28] Cass. civ., sez. I, 18 luglio 2007, n. 15963. See Scarpa (n 27) 8.

IX Executive Officers as Parties in the Shareholders' Agreement

It is an exciting question whether the company's executive officers may appear as parties in the shareholders' agreement. In the legal literature a standpoint appeared, according to which venture capitalists in the shareholders' agreement 'restrict the decision-making competence of the management in a number of areas from the start, which means that decisions on a number of important questions regarding the business cannot be adopted without asking them.'[29]

The Hungarian Civil Code regulates the legal standing of the executive officers with regard to their relationships with the members in its rules related to the 'Autonomy of Executive Officers' [Section 3:112 (2)]. According to the provisions set out in the law, an executive officer manages the company autonomously based on the priority of the interests of the company. In this capacity, he is subjected to the laws, the articles of association and the decisions adopted by the executive body of the company. A member of a company is not entitled to give instructions to an executive officer and the latter's competence cannot be withdrawn by the general (or member's) meeting. One-man companies constitute an apparent exception from this rule, with regard to which the only member may give instructions to executive management, which the executive officer will be obliged to perform. The exception is apparent because the instruction given by the only member is actually the decision adopted by the executive body of the company, to which the executive officer is subject in every case. However, in the case of a company with several members, an instruction given by one of the members, even if this member is a majority member, will not qualify as a decision adopted by the executive body of the company, which is why it is not obligatory for the senior executive.

According to the principle of freedom of establishment in company law (large usage of default rules) (Section 3:4 of the Hungarian Civil Code), as we are analysing internal relations here, we cannot exclude the possibility of diverting from this rule. In my view, diversion is possible not only in the articles of association but also in the shareholders' agreement with effect between the parties, if such an agreement is entered into by the very executive officer as a contracting party as well.

However, the following case, which is managed in the shareholders' agreement, may also emerge in practice. In many cases, company creditors ask the executive officers to provide a guarantee for the debts of the company. For example, the bank makes the lending dependent on the guarantee undertaken by the executive manager of the company for the company's debts. In such cases, the goal is obviously to ensure the company's ability to perform and to prevent the company from undertaking contractual obligations in an irresponsible way, thus this need ultimately comes up for the stronger protection of creditors' interests. If the executive officer has to undertake responsibility himself / herself for the company's debts, the members

[29] Karsai Judit, 'A kockázati tőkét befektető társaságok és alapok magatartása Magyarországon (Behavior of Companies and Funds Investing in Venture Capital in Hungary)' (1997) 9 Külgazdaság 33.

of the company can undertake in the shareholders' agreement that, in such an event, they will perform on behalf of the managing director and they can determine the exact proportion of their respective responsibilities.

It arises from these examples as well that, in certain cases, it may be necessary for the executive officers to take part in the shareholders' agreement.

X Effect of the Alienation of Business Shares or Shares on the Shareholders' Agreement

The alienation of (business) shares or the termination of membership do not involve a change in the subject of the shareholders' agreement, unlike in the case of the articles of association.

The change in the subject of the articles of association takes place but a member or shareholder that is newly entering the shareholders' agreement has to join with a specific expression of will for this purpose: 'thus, the legal succession in the member's position does not mean a change of subject, or a legal succession with regard to the shareholders' agreement, the new member of the company has to enter separately'.[30]

If we acknowledge the possibility for the syndicate membership of a third party, this has yet another key consequence. The question becomes what will happen if somebody is a member of the company and is at the same time a contracting party in the shareholders' agreement and then his or her membership is terminated: will this automatically involve his or her exit from the shareholders' agreement? If we accept the standpoint that, in a shareholders' agreement, only the members of the company may be contracting parties then the conclusion to be made will be clear: 'if the member whose membership is terminated is at the same time the subject of the shareholders' agreement then his or her exit from the company will also result in the termination of his or her contractual relationship in the shareholders' agreement, as his or her being a subject of that agreement is dependent on membership. As long as there was only one other contracting party besides him or her, the shareholders' agreement will also be terminated, as this has to be a legal relationship that is at least bilateral.'[31] If we choose the other way, which I have also proposed, i.e. we do not deny the possibility for participation in the shareholders' agreement to third parties, this conclusion will not be correct: company membership and being a subject of a shareholders' agreement are to be judged separately, and this has to be taken into account when the shareholders' agreement is entered into.

As such, a more permissive interpretation with regard to the scope of subjects has a very important practical implication as well. The shareholders' agreement often regulates questions that refer to the payments to be made to the member exiting the company. As long as, along with the membership, being a party to the shareholders' agreement is also automatically

[30] Sárközy (n 11) 178; also: Muth, FitzGerald (n 10) 7.
[31] Papp (n 2) 30.

terminated in the case of the person in question then he or she will not be able to enforce his or her rights related to the payments and compensations, etc.

Consequently, the termination of being a subject in the shareholders' agreement is not an immediate and automatic consequence of the termination of membership and, if the parties would like to achieve this legal effect, this has to be specifically stipulated in the shareholders' agreement.

XI Conclusions Regarding the Contracting Parties

The conceptual limitation of the shareholders' agreement should not be made from the aspect of the scope of its subjects. In the case of this contract, the lack of regulation is also meant to ensure flexibility. As a consequence of the need for flexibility, it is not necessary to regulate this type of contract separately (except, perhaps, in the case of companies operating in a capital market context). The scope of contracting parties should be treated in an adaptive manner as well. It should be acknowledged that, despite the fact that the shareholders' agreement is basically entered into by and between the members or shareholders of the company, it cannot be excluded that third parties that are not members of the company, including senior executives, or the very company regulated in the syndicate contract may take part in it.

XII Significance of Voting Syndicates

Voting agreements and voting syndicates belong to the typical, recurring provisions of shareholders' agreements.[32] Regarding shareholders' agreements, it was concluded as early as 1933 that 'they almost always contain the limitation of the voting rights that the individual shareholders are entitled to for each other's benefit'.[33] Even earlier, in 1926, it was pointed out that 'since the existence of Act no. XXXVII of 1875 on Commerce *(Kereskedelmi törvény),* similar agreements have become increasingly common, especially in the case of so-called financing, as the financial institutions or some larger businesses are only willing to take part in the foundation of a joint stock company or take over larger share packets if they are able to ensure appropriate influence on the management of the business operations for themselves, through reaching agreements with some larger shareholders; however, it is not only the financial institutions but also the public authorities that will endeavour to ensure similar

[32] On this question, see also: Veress Emőd, 'Megjegyzések a szavazati szindikátusról, különös tekintettel a szerződésszegés következményeire (Notes on Voting Syndicates, with special regard to the Consequences of Breaching Contracts)' (2018) 5 Polgári Jog.

[33] See König Endre, 'Joghatályos-e az érvénytelen szerződéssel kapcsolatos választottbírósági kikötés? (Is the Arbitration Court Stipulation related to Invalid Contracts Legally Effective?)' (1933) 31 Jogtudományi Közlöny 179.

influence for themselves, or they are obliged to ensure such, in the process of the establishment of so-called joint stock companies that are formed with their participation.'[34]

The importance of voting agreements is provided by the mechanisms of the generation of the corporate will in the general meeting (members' meeting): the shareholders' agreement ensures the stability and forecastability of the decision-making process, so basically it will become a key tool in the management of the company.

Voting in the executive bodies, in general in the members' meeting (general meeting) makes up a key part of the shareholders' agreements; in certain cases, the objective of a shareholders' agreement is exclusively the establishment of a voting syndicate.

For example, certain members of the company, which have a majority of votes jointly but not individually may establish a voting syndicate for developing and stabilising the voting majority, so it will be them who will determine the decisions of the general meeting; in this way they will exercise control over the company, or even ensure the management or the manageability of the company. The voting syndicate may be valuable for certain minority members (shareholders) as well, as they may reach a bargaining position as members of the syndicate and they can represent their interests more effictively. The contracting parties usually undertake an obligation, in the shareholders' agreement, to vote during the decision-making on a certain question in such a way that they ensure the enforcement of the stipulations of the shareholders' agreement.

XIII Types of Voting Syndicates

There are several forms of voting syndicates. Based on its nature, a voting syndicate may be a long-term syndicate on the one hand, which assumes continuous cooperation (defined in time but long-term, or even one that is not defined in time), and on the other hand, it may be an ad-hoc syndicate, which defines a cooperation obligation for a certain general meeting (members' meeting) and thus its effect in time exclusively extends to the general meeting (members' meeting) that is defined therein. Based on its objective, a syndicate may be, on the one hand, a general voting syndicate, in the case of which the members undertake to vote uniformly in any and all questions that are in the competence of the general meeting; on the other hand, it may be a special voting syndicate, which only requires the obligation to vote according to the syndicate decision on some predefined questions such as voting on the dividends or the election of the executive officers or other corporate bodies. As regards its purpose or the strictness of its definition, a syndicate may be a closed-end one on the one hand, when even the method of voting is defined by the contract (for example, the election of the person designated by the head of the syndicate for a certain position in the company), or there may be open-ended syndicates too, in the case of which it is only the obligation of uniform voting that is required and the nature of voting (voting against or for a proposal) is only defined later. Based on its

[34] Sichermann Bernát, 'Két kúriai ítéletről (On Two Curia Judgments)' (1926) 1 Jogtudományi Közlöny 130.

content, a syndicate may be one that requires a uniform voting obligation or one that qualifies a majority vote as changing in practice the articles of association for the parties of the syndicate agreement. The qualification of the majority or the introduction of unanimous voting in such cases when no such action is required by the law or the articles of association 'can mainly be justified if some of the members are afraid to be exposed to the whims of the others if they were alone, in a minority position'.[35] A piece of practical advice is also given by legal literature: 'it does not make sense to exaggerate in this respect. If, for example, the articles of association said that a unanimous decision is required for each resolution, this would easily lead to paralysing the business activities of the company'.[36]

XIV Validity of the Voting Agreement

A problem that arises in connection with voting syndicates is the validity or invalidity of the voting syndicate: is preliminary self-restriction regarding voting possible?[37] In classical commercial law, voting restrictions were regarded as something that ran counter to the 'honesty of a good tradesman', i.e. they were regarded as void due to immorality.[38] It was in this spirit that the Curia made a decision in 1925, for example.[39] A voting syndicate can in fact be interpreted in such a way that it hinders the development of a free company will, the free operation of the company body in question.

The legal literature did not uniformly accept the Curia's position on the invalidity of voting agreements in Hungary, even as early as between the two world wars. It was concluded that

> …this decision, according to which an agreement reached by the shareholders that restricts them in the free exercise of their voting rights runs counter to the law, is wrong, as the shareholders may enter into a valid agreement and in this, they may validly oblige themselves to exercise the voting rights that they are entitled to on the basis of their shares as stipulated in the contract. This is not contrary to the concept of the joint stock company, to the law, or to good morals either. The idea that the justification of the decision adopted by the Curia, according to which the above-mentioned,

35 Kolben (n 6) 42.
36 Ibid.
37 44.
38 Sárközy (n 11) 190.
39 Decision No. P. IV. 3478/1925. See Credit Law Case Book, Volume XIX, p. 54. According to the quoted decision, 'such an agreement entered into by the shareholders which would also oblige them with regard to their legal successors, i.e. one that always restricts them in freely exercising their voting rights in accordance with their financial interests, in a changing business environment, will deprive the shareholders of their important membership right aimed at participating in the management of the company's affairs, which is also provided by the law [Section 157(9) of Act XXXVII of 1875 on Commerce] and thus it runs counter to the concept of a shareholding company'. However, the quoted section from Act XXXVII of 1875 on Commerce no. only stipulates that, in the statute, the voting rights of the shareholder and the method of exercising them should be regulated as well, i.e. the prohibition of voting agreements could actually not be derived from this legal provision.

> so-called syndicate agreement of the shareholders runs counter to the concept of a joint stock company, and the law, is not correct; is actually less important than that the Curia states that such an agreement reached by the shareholders is ineffective in general, although the underlying justification is not correct. The situation is that these shareholders' agreements deserve the name of the articles of association much more than the statutes in an economic sense, which is called so by the German legal nomenclature. The syndicate agreement of the shareholders precedes or accompanies the foundation of the joint stock company. Without this, most joint stock companies would not be established at all. But the high business significance of shareholders' agreements does not cease to exist, even when the joint stock company is founded. Those who are experienced in practice are aware that such contracts are very often entered into between the shareholders of all kinds of joint stock companies, i.e. not only between those who subscribe to the shares when the company is established, with the most diverse kinds of economic purposes. These contracts ensure, *inter alia,* not only that the majority of the shareholders stay together but also the placeability of the shares, because there are hardly any shareholders who would be willing to take over a quantity of shares, which are significant in amount but still constitute a minority by themselves, without joining the majority; it is also in the interests of the seller to ensure that the recipient of the shares does not have an unlimited right of disposal over the shares that he has received, as in this case, undesirable entities (such as persons with opposing interests, or even rival companies) may hinder or prevent the operation of the company. All these purposes are legitimate, and they can be realised according to the autonomous discretion of the shareholders… through concluding contracts. It does not need to be explained that it would cause damages to every joint stock company anyway if the direction and results of its operation depended on the will of the majority that is developed at random at the general meetings. But the shareholders need to enter into shareholders' agreements also for their own protection. Thus, it is these syndicate agreements that organise the shareholders. To make this impossible by declaring shareholders' agreements ineffective would equal the disorganisation of the company.[40]

It was also stated about the highly criticised decision No. P. IV. 3478/1925 of the Curia that 'this could not be entered into the authentic collection of the uniformity decisions; just the opposite is true: these should be entered separately in the collection of mistaken decisions, which would warn the courts to act with double caution in far-reaching questions because to err is human'.[41] In the opinion of the age and the public view of commercial law at that time, the decision overshot the mark, as they may damage transactions based on free determination that are economically necessary. The above-quoted author was right to conclude that anyone may undertake a valid obligation regarding how they will exercise their voting right based on their possession of shares.[42]

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[40] Sebestyén Samu, 'Rezonanciák (Resonances)' (1926) 14 Jogtudományi Közlöny 113–114; Salamon Beck took a similar stance. Cf. Pester Lloyd, July 11, 1926.

[41] Sichermann (n 34) 130.

[42] Liebmann Ernő, 'A közüzemi részvénytársaságok kormányi ellenőrzése a kereskedelmi törvény szempontjából (Government Control of Public Utility Shareholding Companies from the aspect of the Commercial Code)' (1927) 20 Jogtudományi Közlöny 181.

At the moment, the voting agreements concluded on the basis of the doctrine of the freedom of contract are considered valid both by legal science and by legal practice. The validity of voting agreements is also acknowledged by the practice of the Hungarian arbitration courts.[43]

The traditional approach in Italian law was also that exercising one's voting rights may not be the subject of a legal agreement. In this approach, the voting right is a feature of the share that does not allow any diversions, and the members may not enter into a contract on the method of exercising the voting right in advance as, according to logical and legal arguments, the votes should serve the interests of the company rather than personal ones, voting is the obligation of the member as well, and the decision of the member regarding how he or she will vote in the framework of the members' meeting/general meeting should be arrived at as a result of appropriate discussions.[44] The freedom of voting rights was regarded as part of the economic public order.[45]

However, in the Italian law, the entry into force of the *Codice civile* (the Italian Civil Code) in 1942 meant a turning point: on the one hand, the reason for this was the change in the perception of the nature of voting rights; on the other hand, the fact that the shareholders' agreement came to be used by the shareholding state as well, as a unique instrument for ensuring the internal balance of the company and the realisation of the owner's interests by the state. A kind of emancipation of the status of the shareholder took place. Thus, the shareholders were given a much greater degree of independence and freedom in exercising their voting rights than before, and the lawfulness of a voting agreement is only questioned if it clearly runs counter to the system of company law.[46] This is why a voting right may become the subject of a legal case.[47]

Voting agreements are excluded or at least significantly restricted by Romanian law. As per Article 128 of Act 31 from 1990 on Companies, voting rights cannot be transferred and any such agreement in which the shareholder undertakes to exercise his or her voting right based on the instructions or proposals made by the company or the persons who have the right to represent the company will be invalid. In spite of this, voting agreements are applied in practice.

XV A Syndicate Organisation?

In the Hungarian legal literature, there is a viewpoint according to which a shareholders' agreement may not contain any structures that are not organic to company law, or may not regulate, for example, a management committee or a presidency.[48] It in fact comes up as

[43] Cf. Lukács, Sándor, Szűcs (n 5) 45
[44] Scarpa (n 27) 11–12.
[45] Scarpa (n 27) 31.
[46] Scarpa (n 27) 12.
[47] Scarpa (n 27) 30.
[48] Papp (n 2) 33.

a question whether a contractual, cooperative type of legal relationship (and not a legal person) may have ('shadow') organs.

In my view, the answer to this question has to be nuanced. In general, a contractual relationship does not establish an organisation but it does not qualify as a major characteristic feature of the contractual relationship, since an organisational structure may also be established in a contractual relationship. The question obviously is what is meant by an organisation. In the case of legal entities, an organisation means one or more precisely structured organs, which are a high-level materialisation of organisational structures. However, the concept of organisation does not only mean organs established by the law but it may also mean simpler coordination structures than these organs.

In this sense, there is nothing to prevent a shareholders' agreement from creating a unique syndicate organisation. For example, such is the obligatory syndicate meeting (which is the mandatory meeting of the parties that take part in the syndicate) preceding the general meeting or the members' meeting, in which the parties taking part in the shareholders' agreement agree on what position they will take at the general meeting or the members' meeting. 'At this syndicate meeting, the owners of the company many times adopt more important decisions with regard to the operation of the company than the general (members') meetings, and the syndicate decisions determine the decisions made by the general (members') meetings.'[49]

Of course, the syndicate organs do not qualify as company bodies and the decisions of the syndicate organs should also be formally accepted by the company bodies. As long as the decisions adopted by the syndicate meeting are formalised by the members' meeting or the general meeting, the will developed in the syndicate context will become the will of the company.

The organisation-building nature of a syndicate arises from stipulating the operational rules: it can be regulated who can initiate the convening of a syndicate meeting, in what form such a meeting is convened, when the meeting will be held, whether optional and compulsory meetings can be defined, whether the member of the syndicate who does not adhere to what has been accepted at the syndicate meeting may be compelled, or any sanctions may be imposed under the shareholders' agreement; furthermore, it can be stipulated how the syndicate is governed, etc.

The question of a syndicate organization also emerges with regard to a voting syndicate. The situation is that a voting syndicate means that the members of the syndicate will vote uniformly on a given issue. Thus, the methods and procedure of developing the syndicate position may be regulated in the shareholders' agreement. For example, it may be determined that each member of the syndicate will vote in the same way as a predefined member or leader of the syndicate (for example, the member with the largest share in the company). It is a special, strict technique of a voting syndicate when the members of the syndicate exercise their voting rights through a single agent (usually the head of the syndicate), thus minimising

[49] Sárközy (n 11).

the chances of the individual syndicate members violating the terms and conditions of the shareholders' agreement and to vote on the basis of their own free will and own interests, i.e. differently or contrary to the interests of the syndicate. It represents an even stricter technique that the shareholders or members undertake to assign their participations (shares or business shares) to the head of the syndicate for the time of the general meeting, who will thus vote on his own behalf at the general meeting. In these cases, no syndicate organization will actually be established. The third method for establishing a voting syndicate is the one in which a trust agreement is entered into, when the shares are assigned to the head of the syndicate as a trustee and thus he is the one who exercises the voting rights *(voting trust),* while the shareholders, for instance, preserve their dividend entitlements. The trustee will be obliged to deliver the assets that he has managed to a further or new trustee appointed by the settlor once the mandate of the trustee expires, or in the absence thereof, to deliver the assets (the shares) to the settlor.

It is also possible to elaborate the position of the syndicate on a given question in a syndicate meeting that precedes the members' meeting/general meeting, by majority vote.[50] If the syndicate position is developed in the syndicate meeting that precedes the members' meeting/general meeting, with a majority vote that also obliges the members to vote no, it will be obvious that a specific organisation of the syndicate will also be built, which is different from the company bodies. The cooperative nature of the shareholders' agreement very easily entails that the development of the will of the syndicate should take place in these very peculiar organisational frameworks.

XVI Voting Syndicate and Violation of Contract

The efficiency and enforceability of a shareholders' agreement[51] arises from its contractual nature: the shareholders' agreement is also, according to the general rules of the Hungarian Civil Code, the mutual and unanimous legal statement of the parties from which an obligation for the performance of the service and an entitlement to claim the service will arise. However, enforceability is a very important feature of the contracts, which means that if the terms and conditions of the contract are not fulfilled then the interested party will be entitled to receive the performance of the contract in kind. This party can use the court for coercing the non-performing party to perform the contract. In the event of a violation of the contract, the Hungarian Civil Code will entitle the offended party to claim the performance of the contact and/or damages.

As a very exciting issue, we should analyse the violation of the contract with regard to the voting syndicate. It comes up as to what consequences may be involved if one of the members does not vote in line with what he undertook in the shareholders' agreement. According to

[50] Scarpa (n 27) 7.

[51] For details under Hungarian law, see Attila Menyhárd, 'A szindikátusi szerződés kikényszeríthetősége (Enforceability of Shareholders' Agreements)' in Acta Conventus de Iure Civili, Tomus X. (Lectum 2009, Szeged).

the categorical position taken in the legal literature, 'the consequences of a vote contrary to the contract may be several (penalty, compensation), except for one scenario, i.e. that the vote that has been cast in violation of the contract will not render the decision in question invalid'.[52] The same standpoint is accepted by judicial practice, so it has been concluded that a resolution adopted at the members' meeting of a company may not be one that violates the law as a result of its running counter to the shareholders' agreement, since the shareholders' agreement does not have a governing effect in the legal relationships of company law and its violation may not substantiate the non-compliance of the resolution.[53] In the practice of the court of arbitration, the dominant view is that 'the violation of the additional requirements of the shareholders' agreement may not have company law implications. If, for example, in a shareholders' agreement related to a private joint stock company, the majority Hungarian member obliges itself to vote for the persons proposed by the minority foreign member at the general meeting when the members of the supervisory board are elected and despite this, he votes against the persons proposed by the foreign member at the general meeting, by using his majority, the general meeting resolution will be valid from a company law perspective and sanctions may only be applied for the violation of the terms and conditions of the shareholders' agreement according to the rules set out in the civil law.'[54]

It was established in the Italian judicial practice that nothing will prevent the member from violating the voting syndicate agreement if he has a stronger interest in the result of the voting that he expects than the risk that he will be held liable for his violation of the shareholders' agreement.[55] In the same way, in the Italian legal practice, a member of the company is not prevented by the shareholders' agreement from voting in the way that he wishes to vote if his interest in the result of the voting that he expects overrides the risk that he will be held liable for the violation of the shareholders' agreement.[56]

The point is that, in Italian law, a distinction is made between articles of association for a company and a so-called 'para-company' agreement (*'parasociale',* meaning 'behind' the company). A shareholders' agreement is of a 'para-company' kind, i.e. it does not directly determine the operation of the company from a legal perspective. This is why the freedom to vote of the member/shareholder is not restricted from the perspective of the company; the member/shareholder may vote validly in any way whatsoever. Even if he casts his vote in violation of the shareholders' agreement then his vote and the decision of the company will be valid. However, he will have to bear the contract law consequences of the violation of the shareholders' agreement[57] (usually he will be obliged to pay a penalty). This is why, in the position of Italian legal science, the company and the syndicate are independent and separate

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52 Lukács, Sándor, Szűcs (n 5) 45.

53 ÍH *(Court of Appeal)* decision No. 2014.156. Szeged Court of Appeal, Gf.III.30.059/2013.

54 See Szakál Róbert, 'Társasági szerződés és szindikátusi szerződés ütközése (The Conflict between the Articles of Association and the Shareholders' Agreement)' (2014) 10 Gazdaság és Jog.

55 Cass. civ., sez. I, 5 marzo 2008, n. 5963. See Scarpa (n 27) 2–3.

56 Cass. civ., sez. I, 23 novembre 2001, n. 14865. See Scarpa (n 27) 10.

57 Trib. Milano, 6 marzo 2006. See Scarpa (n 27) 13.

systems which do not influence each other. In the framework of the company legal system, the member's expression of free will cannot be questioned; therefore, a vote cast by violating the shareholders' agreement may definitely not cause the invalidity of the vote or that of the decision adopted by the members' meeting/general meeting, and the voting syndicate is not enforceable. The company's will is developed in the members' meeting/general meeting freely and unconditionally.[58] The separation of the company and the syndicate is a condition for acknowledging the validity of the voting syndicate. The position taken by Italian legal science is also of critical importance in Hungarian law.

A typical sanction of the voting agreement is a penalty, i.e. a cash payment obligation undertaken in the event of a breach of contract by the other parties taking part in the shareholders' agreement, for the benefit of the company. A penalty can be stipulated in a written form. In Hungarian law, the beneficiary may enforce his penalty claim irrespective of whether he has incurred any damage from the violation of the contract by the obligee. This means that if one of the parties in the syndicate has voted against the position of the syndicate and, despite this, the syndicate position won at the voting at the general meeting (members' meeting) (i.e. there is no 'damage'), he will still be obliged to pay the penalty, as the penalty is separated from the damage by the Hungarian Civil Code [Section 6:186 (3)]. However, the beneficiary may enforce his damage claim that exceeds the amount of the penalty [Section 6:187 (3) of the Hungarian Civil Code]. The party that breaches the shareholders' agreement may only request the court to reduce the penalty amount; however, this will only become possible if the court establishes that the extent of the penalty is excessive (Section 6:188 of the Hungarian Civil Code).

XVII Conclusions

Several conclusions may be drawn from the above analysis. On the one hand, not even the ideal regulation of company law, which is predominantly dispositive in its nature, puts any constraints on the significance of shareholders' agreements, as syndicate contracts nuance company law; they adjust it to their peculiar interests. A shareholders' agreement is an instrument for the operation of companies which is separated from company law and one which enforces and coordinates specific interests, one which supplements company law.

On the other hand, despite the diversity in the contents of shareholders' agreements, there are recurring elements that provide coherence to them, which can also be analysed scientifically and can be considered permanent. The contents of shareholders' agreements that refer to exercising voting rights, for example, belong to this category.

In summary, the practical benefits of shareholders' agreements, as well as the complexity and interesting nature of the questions that they bring up; furthermore, the serious professional discussions that emerge, all make it necessary from time to time for science to re-analyse and subject to critical assessment the institution of shareholders' agreements.

[58] Scarpa (n 27) 31.