RECODIFICATION OF THE HUNGARIAN CIVIL LAW

Abstract: The first draft of the new Hungarian Civil Code was published in 2006. The Code will repeal Act IV of 1959, the Civil Code in force. The reason for adopting a new Civil Code is that the current Code has been amended more than 150 times. The Government foresees that the new Code shall be the legislative conclusion and summarisation of the process of the change of the regime from a centrally planned socialist economy to a multi-party democracy with market economy. The new Code shall meet three requirements: it shall cover the most important parts of civil law, it shall give answers to newly emerged economic needs, and finally, it shall solve existing dogmatic problems. In line with these principles the draft broadens the scope of the Code by incorporating e.g. family law, the law of negotiable instruments and material rules of land registry; however the Code will still not contain rules on company law and labour law. The draft significantly modernises civil law: it introduces detailed regulation for registered and unregistered partnership, and fundamentally amends the law of secured transactions. In accordance with the third principle, the draft creates the common rules for all obligations, although it still does not provide rules for juristic acts in the field of property law. If these principles are followed, the Code might play a significant role in the removal of trade obstacles and the reduction of legal uncertainty and, thus, lead to an enhanced economy with lower transaction costs and more easily accessible credit.


Zusammenfassung: Der erste Entwurf des neuen ungarischen Zivilgesetzbuches wurde 2006 veröffentlicht. Das Gesetzbuch wird das Gesetz IV von 1959, das derzeit geltende Zivilgesetzbuch, aufheben. Der Grund für diese Reform ist, dass das geltende...

1. INTRODUCTION

At the end of December 2006, the complete proposal of the new Hungarian Civil Code was published on the website of the Ministry of Justice and Law Enforcement. This article can at best achieve no more than to outline the reasons, which have led to the preparation of a new Code and its major novelties, by presenting the structure of the new Code and raising some of the most interesting issues.

2. A BRIEF HISTORY OF THE CODIFICATION OF CIVIL LAW IN HUNGARY

2.1 CODIFICATION MOVEMENTS AT THE TURN OF THE 19TH/20TH CENTURIES

The current Civil Code (Act IV of 1959) was adopted in 1959 and has been in force since 1 May 1960. The adoption of the Civil Code was the result of a long evolution. The idea of the comprehensive codification of civil law was already formulated in the middle of the 19th century. The revolution of 1848 led to the adoption of Act XV of 1848, which provided for the preparation of ‘a civil code on the basis of the absolute and complete abolition of entailment’ and the introduction ‘of the bill for this code to the next Parliament’. However, the failure of the Revolution and the War of Independence made its realisation impossible. In 1852 the emperor ordered that the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) – with minor exceptions – was to be applied in Hungary as well. Besides the ABGB, the Austrian insolvency law and bill of exchange act were applied amongst others.

It was only after the 1867 Compromise that the first partial drafts of a civil code were prepared (between 1871 and 1891). Legislation in the field of commercial law was also

launched: the Commercial Code was adopted in 1875; an act on bills of exchange was also adopted etc. The first comprehensive draft of a civil code was published in 1900. This draft was later revised and presented to the Parliament in 1913. A parliamentary committee was launched with the mandate to examine the draft. The committee prepared a draft (a so-called committee text), which was submitted to the Parliament in 1915, but the discussion was adjourned until the end of World War I. After 1922 the work was continued, and finally a new text was prepared and presented as a bill to the Parliament (Private Law Bill) in 1928, however, due to political reasons, this had never been adopted. In spite of this, the bill was widely applied and referred to by the courts and scholars.

2.2 CODIFICATION IN THE SOCIALIST REGIME

The preparation of the Civil Code started in 1953, in a regime, which was based on the idea of the abolishment of ownership (and, finally, of law itself). The first draft was prepared in less than three years within the framework of a governmental committee set up under the auspices of the Minister for Justice. Following lengthy discussions, a revised draft was presented to the Parliament, and finally 111 years after the first attempt, the Civil Code was enacted in Hungary. The aim of the legislator was to prepare a civil code that would break with the conservatism of the Hungarian civil law tradition, which had preserved the traditional legal relations of a feudal society, and ‘to regulate the new legal relations of a society eliminating exploitation and anarchy’. The Code intended to create a sophisticated regulation; it was not, however, to provide detailed, casuistic regulation, but merely to provide solutions for the typical cases, without using too many definitions and explanations. This regulatory technique is one of the main reasons why the code has managed to survive for almost 50 years, which also included the transformation from a centrally planned socialist economy to a multi-party democracy with market economy in 1989-1990. It is not surprising that in the past 46 years the Code has been amended more than 150 times.

2.3 RECODIFICATION OF THE CIVIL CODE

Based on the aforementioned circumstances, the Hungarian Government decided in 1998 that a new civil code shall be prepared. ‘The direct aim of the revision is the preparation of a modern civil code, which measures up to international practice and expectations, and which will be, as the constitution of economy, the basic law in the field of private law. In addition, the indirect aim is to increase the level of legal certainty, and to make the relations between the code and other acts and decrees, rules and exceptions, concise and clear, and thus to help orientation in private law relationships. The new Civil Code shall, thus be, by synthesising legislation in the field of private law after 1990, the legislative conclusion and summarisation of the process of the change of regime’.

The Government Decision also established the regime for codification. Working groups were formed, consisting of lawyers, judges, governmental institutions, representatives of non-governmental organisations. Their role was to prepare drafts for certain areas of

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3 Official Explanation, p. 28–29.
private law (e.g. there were working groups set up in the field of insurance law, the law of securities, the law of financial contracts etc.). Parallel to their work there were studies prepared for the codification (e.g. on the basic principles of private law, on damages, on fiduciary securities etc.). The Editorial Committee, the number of which amount to ten, forms the second level of the hierarchy, consisting of professors, judges and the representatives of the Ministry of Justice and Law Enforcement. It is their role to coordinate the working groups and the preparation of the materials based on the recommendations of the working groups. The Codification Committee, as the major organ of the organisation, counts ministers, and the presidents of the Supreme Court, of the Hungarian Bar Association, and of the Association of Hungarian Lawyers among its members. Its secretary is András Kisfaludi (former head of department at Eötvös Loránd University, Budapest) and Ágnes Sáríné Simkó (head of the Department for the Codification of Civil Law at the Ministry of Justice and Law Enforcement), whilst the head of the Codification Committee is Prof. Lajos Vékás. Although the Department for the Codification of Civil Law in the Ministry of Justice and Law Enforcement has formally only technical tasks, in reality it also plays an important role in the preparation works: besides supervising and co-coordinating the drafting procedure, certain parts of the draft were prepared by the Department.

The first document issued by the Codification Committee in 2002 was titled ‘Conception of the new Civil Code’. After having published, a public discussion was launched about the Conception. Based on the comments received in these discussions, the Codification Committee published a new version (‘Conception and Regulatory Syllabus of the New Civil Code’ in February 2003, which comprised of two parts. The conception itself, embodying the most important elements of the new Code was adopted by the Government, these statements, therefore, may only be amended with the approval of the Government. The regulatory syllabus serves merely as a guideline for the codification. This was approved of by the Codification Committee, thus no Government approval is necessary for deviation.

Following the approval of the Conception, the drafting of the Code could be started. Books I and II were published in January 2006, whilst Books III and IV in spring 2006. The first two Parts of Book V were released in July, and the remaining Parts of Book V and Book VI in December 2006.

Since the publication of Book I, a public discussion has been initiated. Comments are welcome from lawyers and ‘laymen’ alike, until the close of the discussion in the second half of 2007.
In the course of this year the published draft will be revised, and a new draft will be submitted to the Government at the end of 2007, which will then be sent for intergovernmental co-ordination. The submission of the revised text to the Parliament is foreseen for 2008. Supposing that the text is approved in time, the new Civil Code might be applied from as early as 2010.

3. BASIC QUESTIONS OF CODIFICATION

3.1 CHANCES FOR CODIFICATION IN THE 21ST CENTURY

The advantages of codification in general have often been stated. ‘The core advantages of codification are typically seen as being that the system is made explicit and that rules can more easily be found’.11 As the Conception poetically states, ‘Abstract and systematised, i.e. codified norms can more efficiently follow the quick changes life create, than the labyrinth of custom-made norms, quickly chasing each other, which get lost in details’.12

Still, the first question that has to be answered is whether codification is possible at all in the 21st century. ‘The creation of a civil code today is in certain respects even more difficult than a century ago. Confidence in the success of comprehensive codification is lost, the perspectives of national legislation have been challenged, and – last but not least – the legal relations that a civil code needs to regulate have become even more complex’.13

The problem has become even more complex since Hungary’s accession to the European Union. A couple of years ago European legislation in the field of civil law was clearly limited; the directives regulated almost exclusively consumer-related issues. This could change fundamentally in the coming years. The publication of the Commission’s Communication on European Contract Law led to two projects namely the revision of the consumer directives and the creation of a Common Frame of Reference, the outcome of which is difficult to predict.14 The former is clearly defined in the First Annual Progress Report on European Contract Law and the Acquis Review,15 aiming a thorough revision of the consumer acquis. The green paper of the Commission on the Review of the Consumer Acquis was released in February 2007.16 The second project is more difficult to define, as the purpose of the Common Frame of

Hungarian Civil Code, comments can be sent to the Department for Civil Law Codification and Private International Law, Ministry of Justice and Law Enforcement, Kossuth tér 4., Budapest, Hungary,H-1055.

12 Conception, p. 21.
Reference (CFR) has never been clarified. Although the First Annual Report stated that this would not measure up to a European Contract Code, this could result in a significantly deeper level of harmonisation in the field of civil law.

It is also important to mention the various academic initiatives in the field of civil law. Since the preparation of the Principles of European Contract Law, different organisations were formed with the intention of harmonising smaller or larger parts of contract law. One of the most ambitious of these groups is the successor body of the Lando Commission (i.e. the Commission on European Contract Law), the Study Group on a European Civil Code, which ‘has taken upon itself the task of drafting common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in movables which are especially relevant for the functioning of the common market’. It is almost impossible to foresee the outcome of this project.

When the original Conception was adopted in 2002, the drafters could not anticipate these developments. The Conception concluded, therefore, that ‘[a]lthough legal harmonisation of the European Union in the past two decades reached the field of private law, and national legislations are strongly influenced by this, private law as such can, at this point in time, only be codified on a national level’.

3.2 IMPLEMENTATION OF THE CONSUMER ACQUIS

One of the first preliminary questions was to define the scope of persons to whom the new Civil Code shall apply. Should the Code deal with questions of consumer law? Should the Code apply to commercial transactions? And if the legislator intends to extend to scope of the Civil Code to these transactions, what should the new Code focus on?

Different models exist within the European Union regarding how the directives of the European Union relating to consumer law are implemented into the national laws. There are countries, which have adopted consumer contract codes (e.g. Austria, France, Greece, and Italy), while other countries attempted to incorporate these rules – to a larger or a smaller extent – into their Civil Codes.

Hungary follows a mixed approach. Certain provisions of certain directives are transposed into the Civil Code (e.g. 93/13/EEC Directive on unfair terms in consumer contracts), other provisions were implemented in Government Decrees (e.g. Government Decree 17 of 1999 incorporating 97/7/EC Directive on the protection of consumers in respect of distance contracts), while certain rules can be found in Act CLV of 1997 on Consumer Protection.

The rules of the Civil Code have been amended twice in the past few years regarding the rules on standard contract terms and unfair terms in consumer contracts. The latest amendment (Act III of 2006) incorporated the principles that can be drawn from the case law of the European Court of Justice (most importantly Oceano Grupo Editorial SA v. Rocio Murciano Quintero C-240/98, Cofidis SA v. Jean-Louis Fredout C-473/00,

18 Conception, p. 21.
and Commission v. Spain C-70/03). The Conception foresaw, however, the incorporation of almost all directives.19 These could either take place in the general part of contract law (e.g. 2000/31/EC (E-Commerce) Directive), or among the specific contracts (e.g. 94/47/EC directive on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis).

The Conception states that the main reason why the directives are not organically incorporated into the national civil codes is that the directives contain a minimum level of consumer rights, which are mandatory for the professional. ‘Such an exclusion of dispositivity is not common in the field of the original approach of contract law based on the principle of freedom of contract’.20 This, however, could only be one of the reasons. From a codification point of view, there are at least two other basic problems: the low level of abstractness and the poor quality of the directives.

The levels of abstractness of the civil codes and European directives differ significantly. The consumer directives embody regulations which can hardly be regulated in a civil code. If the legislator intends to implement the E-Commerce Directive into the Civil Code, this would mean that the Civil Code has to define terms like information society, and to contain provisions relating to the correction of input errors. The German Civil Code (Bürgerliches Gesetzbuch, BGB) shows that this is possible to achieve (see Sections 312e of the BGB), but the provisions do not fit into the very abstract, scholarly categories of the BGB.

The problems regarding the quality of the various directives are well presented in the communications of the Commission, it is, therefore, not necessary to elaborate on these. Just to pick one example, it is often criticised that there are directives which calculate the time for withdrawal in working days, while other directives calculate this in calendar days. (Directive 97/7/EC calculates in working days, Directive 90/314/EEC simply refers to days, while computation of time is based on calendar days in Directive 94/47/EC). The Hungarian Civil Code, just like all other civil codes on the Continent clearly defines how time shall be computed.21 The implementation of the differing directives raises significant problems.22

It is not surprising, therefore, that the published draft deviates from the original principle. Part II of Book V (i.e. the general part of contract law) will contain rules implementing directives 93/13/EEC on unfair terms in consumer contracts and 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Directives 87/102/EEC on consumer credit and Directive 90/314/EEC on package travel, package holidays and package tours will be regulated among the specific contracts (Part III of Book V). Directive 85/577/EEC on the protection of consumers in

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19 Conception, p. 78
20 Conception, p. 78
21 Cf. Section 3 of Act-Decree 2 of 1978; see further Article 1:304 of PECL, with reference to the 1972 Convention on the Calculation of Time-Limits
22 The Green Paper analyses the fragmentation of the rules and states that ‘many issues are regulated inconsistently between directives or have been left open. … The differences usually trigger extra compliance costs for businesses, including costs of acquiring relevant legal advice, changing information and marketing material or contracts, or in the event of non-compliance, possibly litigation costs’. (Green Paper p. 6) From a legislator’s point of view it maybe added that these not only trigger higher costs, but also makes codification more difficult.
respect of contracts negotiated away from business premises, Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 2000/31/EC on E-Commerce will not be incorporated into the new Civil Code, as their implementation would cause more trouble than the legislator would gain by regulating all areas of private law in the Civil Code.

3.3 MONIST APPROACH

Besides the question whether the new Civil Code should cover business-to-consumer relationships, a decision was required whether the Code should also deal with business-to-business, i.e. commercial transactions. Hungary already enacted a Commercial Code in 1875 prior to having a Civil Code. However, with the adoption of the Civil Code in 1959 the dualist approach ceased to exist. Civil law legislation in Hungary has followed a monist approach ever since, which will not be changed by the recodification either. The Conception stated that the new Code shall be formulated in a way that fits professionals and non-professionals alike.23 The Codification Committee examined the foreign examples, and came to the conclusion that the distinction between classical private law and lex mercatoria leads to more problems than it solves. It causes parallel regimes and thus leads to difficult cases of distinction.

The question whether a certain legal institution is applied typically by professionals or non-professionals shall be examined when drafting the regulations. Three scenarios may be distinguished.

There are types of transactions, which are typically applied by professionals (e.g. carriage contracts, certain contractual securities etc.). In these cases the provisions have to be drafted in a way that fits the expectations of the world of business.

There are contracts which are used almost exclusively by private persons (the most typical examples could be gift agreements). These contracts have to be drafted to serve a different purpose.

Problems of the monist approach could arise in the third group, which covers transactions equally used by professionals and laymen (e.g. sale, lease etc.). The Codification Committee stated that – as a result of the improving level of education and the general acquisition of business knowledge – general contract law itself has been commercialised in the last decades. The Codification Committee also concluded that ‘[d]evelopment of law in the twentieth century clearly demonstrates that, while a modernised general contract law is able to balance the requirements of professional commerce, the contracts used in business have no characteristics that would necessitate special legal provisions’.24 Legal institutions belonging to this third category will, therefore, be drafted in a way that would primarily meet the higher expectations of professionals.

4. THE STRUCTURE OF THE CODE

If one compares the current Code with other civil codes on the Continent, one finds that

23 Conception, p. 22.
24 Conception, p. 10.
its scope is surprisingly narrow. Not counting the last part of the Code, which regulates when and how the regulations of the Code enters into scope, the Code consists of five parts. The First Part contains seven paragraphs under the title of ‘Introductory provisions’. This part sets the scope and deals with the basic principles of the Code (e.g. the principle of good faith and fair dealing, obligation of cooperation, prohibition of chicane etc.). The Second Part (§ 8-87) embodies the provisions on natural and legal persons and the personality rights. The Third Part provides for the rules on things (§88-197): ownership, possession and limited real rights. The Fourth – and by far the longest – Part of the Code regulates the law of contract (§198-597): the general part of contract law, contracts, tort liability and unjustified enrichment. The Fifth Part deals with the law of succession. There are no rules on family law, employment contracts and – more importantly – company law.

The Conception stated that the intention of the drafters was to extend the scope of the new Civil Code. The goal and purpose of all codification is that a code makes the application of the rules easier as it – by regulating homogenous norms in terminological consistency – leads to shorter rules. The guideline for such extension was the following. ‘Codifying rules in one code is preferable and practicable as long as these rules are methodologically consistent and the systematisation brings with it the advantages of codification: i.e. systematic rationality, economic and coherent structure of law, certainty of terminology and clear results’.25 After lengthy discussions the structure of the new Code will be the following. The Code will be divided into six books.

Book I contains the principles of civil law, i.e. principles that are equally applicable to the law of persons, family law, property law, contract law and the law of succession (e.g. the principle of good faith and fair dealing). This leads to the reduction in the number of general principles; e.g. the principle of cooperation is not stated here, but in Book V as a principle of the law of obligations.

Book II provides the rules on persons. This Book consists of six parts. Part I contains the rules on natural persons (capacity), Part II contains the general rules on legal persons, Part III regulates the rights of personality equally applicable to natural and legal persons. The last two parts embody two types of legal persons: foundation (Part IV) and association (Part V).

Book III deals with family law also in five parts: basic principles (Part I), marriage (Part II), partnership (Part III), kinship (Part IV) and tutelage (Part V).

Book IV regulates property law. Part I regulates possession, Part II ownership, Part III limited real rights, and Part IV contains the rules pertaining to land registry.

The longest of the books is Book V on the law of obligation. It consists of five parts: general rules of obligations (Part I), general part of contract law (Part II), specific contracts (Part III), rules on negotiable instruments (Part IV) and, finally, tort liability and unjust enrichment (Part V).

Book VI contains the law of succession.

25 Conception, p. 21.
5. HIGHLY DEBATED ISSUES OF THE CODIFICATION

After introducing the process and some fundamental concerns of the codification, and the structure of the new Civil Code, the article presents in the followings some of the most debated issues of the drafting process. A thorough analysis would exceed the limits of this article, so what follows is a subjective selection.

5.1 COMPANY LAW

The new Code intends to systematise and generalise the provisions applicable to legal entities, however, it will not contain provisions on company law. The Parliament promulgated the new Companies Act in January 2006. Although dogmatically company law could have been incorporated into the new Code (as it had been done in Switzerland and the Netherlands), the Ministry of Justice and Law Enforcement argued that company law included many elements of public law (especially the provisions on companies limited by shares). The Second Book, therefore, contains a Chapter on the common rules of legal persons irrespective of where they are regulated, which – contrary to the current six sections – consists of 75 sections. This could help to create a common background for all types of legal entities. These rules are partially based on directive 68/151/EEC of the Council. The Codification Committee concluded that these rules might be necessary for legal entities other than companies limited by share. The new rules intend to create a flexible regime; most of the rules apply only if the members of a given legal entity do not otherwise agree. These rules serve, therefore, as models, which create a fair and balanced regime. This regime applies unless other laws or the bylaws of the legal entities not provide otherwise.

The drafting of this part of the Code reflects the difficulties of codification in a continuously changing legal environment. It is worth noting that the Parliament also adopted a new act on Company Register and significantly amended insolvency law.

5.2 PROVISIONS ON JURISTIC ACTS VERSUS GENERAL PART OF THE LAW OF OBLIGATIONS

Since the codification movement of the 19th century, one of the most controversial questions was whether it was necessary to have a General Part containing rules on juristic acts. The German BGB is a scholarly masterpiece in this respect, which created one single definition of Rechtsgeschäft and applies that (or at least tries to apply that) throughout the Code, i.e. for contractual and family law legal declarations alike. The counterpoint of the BGB in this respect is the Swiss Zivilgesetzbuch (ZGB). As Zweigert-Kötz claims: ‘all the good practical sense of the Swiss led them to realise that these general rules are applied principally in the law of obligations and that it is essentially doctrinaire to insist that rules for the whole Code be contained in a separate General Part’. Art. 7 of the ZGB states that the general provisions of the law of obligations regarding the creation, performance and termination of contracts (...) are

26 Act IV of 2006.
27 See the commentary to the new Companies Act written by Gábor Gadó, the Secretary of State, who is in charge both for issues relating to private law and company law. G. GADÓ, ‘Introduction’, in: T. Sárközy, Companies Act, Companies Register Act 2006, HVG Orac, Budapest 2006.
applicable to other relationships of private law. Both codes, therefore, reflect a clear decision of the drafters: dogmatic clarity or pragmatism.

The Hungarian Civil Code of 1959 also reflected a clear choice. The drafters discussed whether the juristic act or the contract should be the basic category, and the drafters chose the latter. ‘Some of the traditional elements of the general part functions merely as an ‘empty’ logical abstraction, as they are torn apart from the rules with which they are in reality in closest relationship. ( . . . ) The notion of juridical act, its types, creation, amendment, fulfilment and termination is in the closest relationship with the rules of contract; the juridical act as such is nothing else than a common denominator of artificially abstracted elements of contract and the exceptional cases of unilateral declarations’.29 Section 199 states, therefore, that the rules applicable to contracts shall also be applied to unilateral declarations unless otherwise provided by law.

The solution of the Swiss and the Hungarian legislators might seem similar at first sight. Article 7 of the ZGB and Section 205 of the Hungarian Civil Code both serve a practical reason: the legislator regulates only contracts, and then extends the scope of the contractual rules to other legal relations. There is, however, one significant difference between the two codes. The ZGB extends these rules to all relationships of private law, while the Hungarian Civil Code extends the scope merely to unilateral declarations. This leads to the result, that certain legal relationships are not regulated by the Code. There are no rules e.g. for the so-called dingliches Rechtsgeschäft (see below in more detail), and the structure of the Code suggests that e.g. the rules of prescription are only applicable in contractual relationships. Under the current regime, it is the task of the judiciary to remedy this problem.

The Conception was not too verbose on this issue. One has to analyse the structure of the Book on Obligations to realise that the drafters intend to break with the original approach. Book V will distinguish between general rules applicable to obligations and general rules applicable to contracts. Part I will contain rules on prescription, computation of time, some major rules on performance (e.g. the time and place of performance) etc., while Part II will contain the ‘classical’ rules of contract law. The Conception contained a longer list, e.g. all rules of unilateral declarations was planned to be regulated in Part I, but the published draft contains a moderate scope.

The draft tries to avoid the intricate and far too scholarly structure of the BGB, and intends to provide a clearer structure at the same time. Those legal institutions, which are very closely linked to contracts will be regulated in Part II (e.g. representation), although the drafters are aware of the fact that these are also applicable to other obligations as well. Part I tries to list those legal institutions, which are applicable to all obligations alike.

Although the intention of the legislator could be supported, the outcome could lead to confusion. The judiciary under the current regime is given complete freedom to decide what rules can be applied to unilateral declarations. The draft changes the situation, and it does not refer to the fact that Part I does not contain an exclusive list of common rules applicable to contracts and obligations as well. A further – and probably more significant – problem is that the draft does not give a solution to juristic acts outside the

29 Official Explanation p. 26; see further p. 229 explaining Section 205 (currently Section 199).
field of the law of obligations. We still do not have an answer on what rules are applicable to juristic acts in the field of property law. Can a juristic act outside of the field of contract law be invalid? If yes, what rules will be applicable to this invalidity, if the rules applicable to invalidity are regulated in Part II of Book V (i.e. among the general rules of contract law)?

5.3 TRANSFER OF RIGHTS

The current code contains no rule for the transfer of rights. Property in a broad sense may be divided into three groups: things (both movable and immovable), rights and claims. These groups are handled differently: things are regulated in property law, while rights and claims are the subject of the law of obligations. This differentiation is also present if one compares the transferability of these groups.

Section 94 (1) of the Civil Code states that ‘[a]ll things are capable of being subject to ownership that can be taken into possession’. Legal literature concludes from this provision that things in this sense are those objects, which can be taken into possession. The definition of things is important because ownership can only exist over things. Ownership can be transferred either byway of a sales contract (Section 365 (1)) or – in case of gratuitous transfer – byway of a gift contract (Section 579 (1)). The transferability of things can only exceptionally be limited or excluded.

Besides things, rights and claims represent financial value as well, it is, therefore, crucial that these are transferable as well. As under the current Hungarian regime rights and claims are not things, therefore they cannot be subject to a sales contract. The rules of assignment (Sections 328-331) make the transfer of claims possible. Due to the fact that claims represent a personal bond between the debtor and the creditor, the transferability of claims is more frequently limited and excluded than the transferability of things. Personal claims and rights (e.g. right to alimony) are not transferable. Legal literature qualifies rights as personal if a transfer would significantly modify its content. *Pactum de non cedendo*, i.e. the agreement of the assignor and the debtor, which prohibits the assignment arising from their agreement is regarded as having effect *vis-à-vis* third parties, which leads to the unassignability of such claims.

The current code lacks a rule that would provide for the transferability of rights (e.g. the transfer of a call option, rights arising from participation in a company etc.). This does not mean that no rights can be transferred under Hungarian law, but rights can only be transferred in case of a statutory provision. (The civil code itself empowers the lessee under certain conditions to sublease the leased property, IP/IT legislation also makes the transfer of certain rights possible etc.)

The Private Law Bill of 1928 regulated assignment as the transfer of claims, but the last section stated that the rules applicable to the transfer of claims are also applicable to the transfer of rights. This is the approach e.g. of the BGB as well. The current Code rejected this approach in 1959 without providing any reason for the change. The

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30 Cf. Macleod: ‘If we were asked – Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer – The man who first discovered that a Debt is a Saleable Commodity’. H.D. MACLEOD, *Principles of Economical Philosophy*, 2nd edn, 1872, p. 481.

31 See Section 413 of the BGB.
intention of the Conception was from the very beginning to solve this problem, but the way of proceeding was highly debated. ‘The Conception foresees the solution of the problems arising in practice not by way of extending the definition of things, but (…) among the rules applicable to the transfer [of ownership]’.

Theoretically at least four solutions exist: (i) the Code could amend the definition of things so that it would cover rights and claims alike; (ii) the Code may contain a rule on the transferability of rights among the rules of the sales agreement, and examine each right regulated by the Code and state whether that specific right can or cannot be transferred; (iii) the Code could implement the structure of the Dutch civil code, which would mean that the current definition of ‘thing’ does not need to be amended, but then a new Book shall be drafted, which would contain -among others – the rules applicable to the transfer of rights; or (iv) the rules of assignment can be extended to rights as well. During the codification of the published draft, the task was further detailed: one of the tasks was that the rules should make the limitation and exclusion of the transferability of claims exception, the second task was to provide for the transferability of rights and the third task was to create rules that would enable the transfer of contractual positions as such.

The draft code fulfils the first task with the rule regulating pactum de non cedendo. Section 5:167 states that the assignment is effective vis-à-vis third parties regardless of a clause in the original contract that excludes the assignability of the claims arising from the contract. The validity of such assignment does not affect the liability of the assignor for the breach of the pactum de non cedendo. The second task was only partially solved as the draft of the new code only handles the transferability of the so-called Gestaltungsrechte, i.e. rights which empower someone to unilaterally create, amend or terminate a legal relationship. During the revision of the draft it is necessary to include a provision stating that unless the civil code or other laws provide differently, all rights – just like claims – are transferable. The third task, i.e. the transferability of contractual positions, was not accomplished at all. Under the current regime one party may only transfer his contractual position if the law so provides, as it is the situation in case of credit agreements and insurance contracts. The new civil code shall contain rules stating that if all three parties – following the terminology of the UNIDROIT Principles the assignor, the assignee and the other party – agree, the assignor can transfer all the rights and obligations arising from his contractual position to the assignee, who steps in the shoes of the assignor.

6. CONCLUSION

The Hungarian Government decided in 1998 that a new civil code shall replace the Civil Code in force, which was enacted in 1959. After lengthy discussions the first draft of the new Code was published at the end of 2006.

The legislator is well aware of the fact that this is not the best time for creating a new civil code. The European Commission is currently working on the thorough revision of the consumer acquis; and parallel to this work, it also launched the Common Frame of Reference project. Although it is difficult to predict the outcome of this project, it is very likely to lead to further harmonisation in the field of civil law, which will
inevitably have significant effect on the Civil Code. Despite these considerations, the Hungarian Government decided that the new Code shall be prepared as the current Civil Code was amended more than 150 times.

The consumer law directives have already caused headache to the legislator. Since the level of abstractness of the directives is much lower than that of the Civil Code, it is very difficult to incorporate these directives into the Code. Although, the original intention was that all directives shall be embodied in the Civil Code, the outcome is very similar to the current regime. There are directives on the one hand which are regulated completely outside of the Code (e.g. the E-Commerce Directive), on the other hand there are directives, which are transposed in the Code (e.g. the Unfair Terms Directive). The third category consists of directives which are only partially implemented in the Code, while the provisions too detailed for the Civil Code are included in decrees.

The scope and the structure of the new Code will be different from the current Code. The Code will consist of books. Book I contains the general principles of civil law, while Book II regulates the law of persons. The most significant change in this area is that the new Code will include detailed rules on legal persons, which are intended to serve as model for the regulation of the various legal entities. Book III deals with family law, which is a significant novelty as this area was regulated outside the Civil Code. This new structure could enable the organic implementation of the main rules pertaining to family law. Book IV regulates property law. The draft incorporates the substantive rules of land registry rules, which are currently regulated in an act containing substantive and procedural rules, as well. The structure of the rules related to of the law of obligations (Book V) has also significantly changed. The current Civil Code does not regulate the law of obligations in general, only embodies rules regulating the law of contracts. This was the result of a clear choice made by the drafters of the Code. This draft, on the contrary, chooses a different solution: Part I of Book V contains the rules applicable to all obligations (e.g. prescription, rules on performance etc.), while Part II covers only the rules related to contracts. This may render the situation more clear with respect to obligations, however the draft Civil Code still does not define the rules applicable to juridical acts in property law.

The year 2007 will be a crucial one from the perspective of the draft Civil Code. If the key market players participate in the codification by expressing their needs, the new Civil Code may play a significant role in the removal of trade obstacles and may contribute to the reduction of legal uncertainty and, thus, lead to an enhanced economy with lower transaction costs and more easily accessible credit.

See Section 413 of the BGB.