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Review paper

Vedrana Švedl Blažeka, PhD student

Faculty of Law Josip Juraj Strossmayer, University of Osijek, Croatia

vedrana.svedl@gmail.com

CHALLENGES AND DOUBTS OF THE PRINCIPLE OF ACQUISITION OF A COMPANY SHARE IN GOOD FAITH

ABSTRACT

The principle of acquiring a company share in good faith (in bona fides) implies the possibility of acquiring a company share from an unauthorized person, which was not possible in Croatian legal system until the legislative intervention of 2009 implemented in the wake of the solution of the German legal system. Until the Company Act Amendment from 2009, any acquisition from an unauthorized person was presumed to be invalid. This paper primarily aims to expand scientific knowledge about this issue. It is based on the basic hypothesis that the principle of acquiring company shares in good faith in the existing theoretical and legislative frameworks does not provide a satisfactory degree of legal security to the acquirers of company shares. The functioning of the company itself is therefore also called into question, knowledge about company membership and decision-making in an unspecified period of time. In order to answer the hypothesis, it is necessary to consider the need to approach the trust that participants in legal transactions have in land registers, and it is also necessary to examine the need for legislative improvements to the current legislative framework. In conclusion, it will display the results of research into the issue of acquiring company shares in good faith, and point out the observed controversies and their possible solutions with the aim of more transparent application of this legal institute.

Keywords: company share, good faith principle, share transfer, unauthorised person, book of shares

1. INTRODUCTION

The principle of acquiring a company share in good faith essentially boils down to the possibility of acquiring a company shares from an unauthorized person, which was not possible until the legislative intervention in the Companies Act of 2009.¹ Even today, comparative legal systems consider whether legislative

¹ Companies Act, *Official Gazette*, No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/2022 (hereinafter: CA)

regulation of the principle of acquisition in good faith is advisable or not.² Despite the existence of theoretical doubts that theorists of comparative legal systems recognized regarding the issue of acquiring company shares in good faith, domestic doctrinal analysis was absent. With the aim of expanding existing knowledge on the issue of acquiring company shares in good faith, the introductory part of the paper will present the very principle of acquiring company shares in good faith after the described legislative interventions in CA from 2009. Furthermore, the most prominent controversies and doubts will be presented. The contribution of this research can also be seen in the presentation of comparative legislative solutions of related legal systems (German and Serbian). The conducted research shows that the existing legislative arrangement raises the question of the actual effect of the principle of acquiring company shares in good faith in practical application. The main source of controversy is reflected in the gap in the application of this principle in the context of company law through the acquisition of company shares in relation to the ownership context, specifically the acquisition of real estate by trusting the state derived from land registers (the principle of trust in land registers). In this paper, on that track, we will start from the basic hypothesis that the principle of acquiring company shares in good faith in the existing theoretical and legislative frameworks does not provide a satisfactory degree of legal security to the acquirers of company shares. In conclusion, it should be pointed out that the principle of acquisition in good faith undoubtedly makes a significant contribution to the transparency of the process of acquiring company shares through legal work, but it opens up some significant controversies and doubts. Therefore, the final considerations will present the results of research into the issue of acquiring company shares in good faith with the aim of more transparent application of this legal institute in practice.

2. ACQUISITION OF A COMPANY SHARE IN GOOD FAITH (*IN BONA FIDES*)

2.1. The principle of acquiring a company share in good faith

In CA from 2009, following the example of the German legislation, the possibility of acquiring company shares in good faith (*in bona fides*) was introduced. This type of legislative intervention can be justified primarily with

² Rober, H., *Gutgläubiger Erwerb von GmbH-Anteilen*, Dr. Guyyter, Berlin 2011, p. 7; Wagner, J., *Der gutgläubige Erwerb von Geschäftsanteilen in Recht der GmbH, Ein teilweise verfassungswidriges Rechtsinstitut?*, Europäische Hochschulschriften, Peter Lang, Frankfurt a. M. 2010, p. 131.

the goal of achieving greater legal certainty for the acquirer in the process of acquiring company shares. In the older legal doctrine, positions were observed that indicated the problems caused by the lack of protection of good faith when acquiring company shares.³ Until the CA Amendment from 2009, any acquisition from an unauthorized person was presumed to be invalid. The legislative intervention is aimed at the acquisition of company shares from the (presumed) authorized owner in compliance with the requirements of legal certainty and transparency in legal transactions with company shares.⁴ On the other hand, the real holder of the right is thus obliged to suffer an intervention in his right, which consequently leads to the loss of that right, specifically company shares, in the public interest. The amendment of the CA limited the cases in which the acquisition of company shares from an unauthorized person would be legally valid, protecting the honest acquirer and trust in the competent registers (the book of company shares and the court register).⁵ It is therefore a matter of a limited right to acquire company shares in good faith from the disposal of the transferor without the power of disposal.

The protection of acquisition in good faith covers the acquisition of company shares exclusively by legal action.⁶ The principle of acquisition in good faith is associated with the honesty of the acquirer in the realization of a certain legal work, and on the other hand with the authority of the transferor to properly dispose of the business share.⁷ In this context, the literature shows an inconsistent use of the terms power of disposal and right of disposal. The difference is that the right of disposal consists of two elements: the power to dispose of the right and the authority to dispose of that right, that is, the actual legal basis for disposal.⁸ An unauthorized transferor has the power to dispose of company shares, but not the authorization or the right to legitimately dispose of that share.⁹ Thus, it could be concluded that in case of disposal by a person who does not have the power of disposal, the transfer would not be legally valid.¹⁰

³ Rober, H., *op. cit.* note 2, p. 7.

⁴ Rober, H., *op. cit.* note 2, p. 39.

⁵ Verspay, H., *GmbH- Handbuch für den Mittelstand*, 2. Auflage, Springer Vieweg, Köln 2014, p. 123.

⁶ Bartl, H. et. al., *GmbH-Recht, Heidelberger Kommentar*, 7. Auflage, C.F. Müller, Heidelberg 2013, p. 206.; Rober, H., *op. cit.* note 2, p. 25.; Wagner, J., *op. cit.* note 2, p. 157.

⁷ Latin: „*nemo plus iuris potest quam ipse habet*“

⁸ Wagner, J., *op. cit.* note 2, p. 132.

⁹ Bartl, H. et. al., *op. cit.* note 6, p. 206; Walek, T., *Kein gutgläubiger Erwerb gemäss § 16 Abs. 3 GmbHG bei Verausserungsverboten, bedingten Verfügungen, Navherbschaft und Testamentsvollstreckung*, Juristen Zeitung, year 67, 12/2012., p. 614.

¹⁰ Markovinović, H., *Prijenos poslovnog udjela-što jest, a što ne bi trebao biti*, Zbornik Pravnog fakulteta u Zagrebu, year 72, 1-2/2022, p. 220; Wagner, J., *op. cit.* note 2, p. 135.

Legal doctrine considers two aspects of the problem of acquiring company shares in good faith: a) through the protection of the right to act from an obligatory relationship and b) through an institutional guarantee.¹¹ The basic goal in the implementation of this institute is, therefore, to balance private and public interest. This implies finding a balance in the extent to which the state is obliged to protect the interest of the acquirer of company shares and, secondly, to the extent to which the loss of the rights of the actual right holder can be legalized. The point of view is accepted that the provisions on the acquisition of company shares in good faith cannot be followed only through the private-legal relationship of the acquirer and the transferor, but to a certain extent the public interest must also be taken into account.¹² Acquisition in good faith allows the "expropriation" of the actual holder of a certain right, for which a solid foundation is required from which the justification of such encroachment on his rights arises.¹³ Encroachment on the rights of the actual right holder can only be justified if the legislator in the interest of the benevolent acquirer (acquirer in good faith) enables the loss of his right, and the principle of proportionality must be taken into account.¹⁴ The principle of proportionality implies that the intervention in the rights of the real holder of the rights must be appropriate, necessary and adequate to achieve the goal.¹⁵

2.2. Acquiring a business interest in good faith in the domestic and comparative regulatory framework

In determining the acquisition of company shares in good faith, it is based on the provisions of Art. 410 and Art. 411 of the CA according to which the person to whom the company shares are transferred is considered a fair acquirer with regard to the data available to him through the book of company shares, as well as in relation to the data notified to the registry court. It is a limited right to acquire a business share in good faith from the disposal of the transferor without the power of disposal. On the other hand, the role of the company's management and notaries is emphasized, who in the process of transferring a business share are obliged to ensure that the data kept in the book of company shares and in the court registry are up-to-date and transparent.¹⁶

¹¹ Rober, H., *op. cit.* note 2, p. 7.

¹² Rober, H., *op. cit.* note 2, p. 17.

¹³ Kochel, M., *Gutgläubiger Erwerb von GmbH-Geschäftsanteilen*, Studentarbeit, 1. Auflage, Grin Verlag, 2012., p. 1.

¹⁴ Rober, H., *op. cit.* note 2, p. 17 and 19.

¹⁵ *Ibid.*, p. 19.

¹⁶ Barbić, J., *Pravo društava, knjiga druga, Društva kapitala, Društvo s ograničenom odgovornošću, društvo za uzajamno osiguranje, Kreditna unija*, peto izmijenjeno i dopunjeno izdanje, Organizator, Zagreb 2010, p. 174; Dopke, J.; Spiller, M., *Gutgläubiger*

The basis and restrictive requirement for the acquisition of a business share in good faith is the list of company members from the book of business shares, which is submitted to the registry court.¹⁷ The principle of acquisition in good faith protects the position of the acquirer of a business share based on the information entered in the list of company members from the book of business shares and their power of disposal, but not beyond that.¹⁸ The protection of the honest acquirer therefore includes only confidence in the truthfulness and validity of the entry of the owner of business shares in the book of business shares, which is also notified to the registry court.¹⁹ By provision of Art. 411, para 1. of the CA, it is stated that in favor of the acquirer who acquires a company share or the right to that share through a legal transaction, the content of the list submitted to the registry court is valid as correct, unless the acquirer was aware or due to gross negligence did not remain unaware that the entered information was incorrect. The acquisition of a business share in good faith by an unauthorized person is excluded in cases where the time of incorrect registration in the registry court is shorter than three years from the date of submission of incorrect information for registration in the registry court and the acquirer knew or could not have remained unaware that the transferor was an unauthorized person.²⁰ Outside of these cases, it can be considered that the business share was validly acquired from an unauthorized person. In the specific case, the term "authorized" is not completely clear, so it is possible that it is an incorrectly specified term. The assumption is that the unauthorized registered owner is meant, although this cannot be used as a precise term.

Erwerb von GmbHG- Geschäftsanteilen kraft Inhalts der Gesellschaftsliste gemäss 16. Abs. 3. GmbHG- ein Überblick, Bonner Rechts Journal, 2/2009, p. 125; Gottschalk, E., *Neue Regelungen für die Gesellschafterliste und die Geschäftsanteile sowie der gutgläubige Erwerb von Geschäftsanteilen nach dem MoMiG*, Deutsche Zeitschrift für Wirtschafts und Insolvenzrecht, 19. Jahrgang, 2008, p. 46.

¹⁷ Dopke J.; Spiller, M., *op. cit.* note 16, p. 125; Gottschalk, E., *op. cit.* note 16., p. 45; Lutter, M.; Hommelhoff, P., *GmbH-Gesetz, Kommentar*, Köln 2004, p. 610; Rober, H., *op. cit.* note 2, p. 33; Wilhelm, J., *Kapitalgesellschaftsrecht*, 3., neu bearbeitete und erweiterte Auflage, De Gruyter Recht, Berlin 2009, p 260.

¹⁸ Barbić, J., *op. cit.* note 16, p. 182; Lutter, M.; Hommelhoff, P., *op. cit.* note, p. 612; Wagner, J., *op. cit.* note 2, p. 135.

¹⁹ Bartl, H. *et. al.*, *op. cit.* note 6, p. 244; Dopke J.; Spiller, M., *op. cit.* note 16, pp. 125 - 126; Gottschalk, E., *op. cit.* note 16, p. 49; Verspay, H., *op. cit.* note 5, p. 123.

²⁰ Lutter/Hommelhoff: *GmbH-Gesetz, Kommentar*, *op. cit.*, str. 611 and 620.

"...The plaintiffs, at the relevant time of registration of the contested mortgage in favor of the defendant, were not holders of registered property rights and as such were not registered in the land register; they were registered later....", County Court in Rijeka, decision number: GŽ- 4149/2013 from 06.07.2016., available at Court practice portal of SCRC, 22 February, 2024.

Here, the law provides a negative determination of the acquirer's honesty requirements, therefore, it regulates what the acquirer should not know, and not what the acquirer should know. For example, in the ownership-legal sense, in the spirit of the provisions of Art. 150, para. 1 of the Law on Land Registers, the holder of a registration right that has been violated by registration in favor of a person is authorized, in order to protect his right, to demand the deletion of any registration that offends him and the establishment of the previous (land) registration status by erasure with a lawsuit until circumstances arise on the basis of which the violated right should cease.²¹ In accordance with the provisions of Art. 15, para. 2 of the LLR, an annulment action cannot be filed against a person who, acting in accordance with the truthfulness of the land records, and in good faith, registered his right deriving it from the registered, but untrue right of the legal predecessor with two exceptions. An annulment action would be founded if the holder of the infringed registered ownership, who was delivered a decision on registration in favor of that person's legal predecessor, filed an appeal, requested a record that the entry was disputed and filed an annulment lawsuit within sixty days, or if the said holder of registered ownership was not delivered a decision on registration, and filed a cancellation claim within three years from when registration was requested.

A comparative analysis of the solutions of the German legal system, which served as a model for the Croatian legislator in the implementation of provisions on the acquisition of company shares in good faith in CA, shows that the provisions of Art. 16 of the German Law on Companies with Limited Liability stipulate that in the event of a change in the company members or the extent of their company shares in relation to the company, only persons who are registered as members of the company in the list of company members in the commercial register are considered company shareholders.²² A legal action undertaken by the acquirer of company shares in order to acquire membership in the company is considered valid from the beginning if the list is entered in the commercial register immediately after the execution of the legal action (Art. 16. para. 1. GmbHG). The acquirer can legally acquire company shares or the right to it from an unauthorized person if the seller is entered as the owner of the company shares in the list of shareholders in the commercial register, but the above does not apply if the list was incorrect regarding the share for less than three years at the time of acquisition and the inaccuracy cannot be attributed to the authorized party (Art. 16, para. 3 GmbHG). An acquisition made in good faith is also not possible if the acquirer is aware of the lack of authorization or is not aware of it

²¹ Law on Land Registers, *Official Gazette*, No. 63/19 (hereinafter: LLR)

²² German Law on Companies with Limited Liability, *Official Gazette* No. 5/2023 (hereinafter: GmbHG)

due to extreme carelessness or if an objection has been filed against the list of company members (Art. 16, para. 3 GmbHG).

A comparative analysis of the solutions of the Serbian legal system established that the provision of Art. 143 of the Law on Commercial Companies stipulates that the status of a company member is acquired on the day of registration of ownership of company shares in accordance with the local legislation on the registration procedure in the Agency for Business Registers.²³ The status of a member of the company ends on the day of registration of the termination of the status of a member of the company in accordance with the RA. The director is responsible for the correct and timely entry of data on the members of the company into the records, and issues a certificate of the completed entry or the status of those records. RA regulates the procedure of registration, recording and publication of data and documents which, in accordance with a special law, are the subject of registration, records and publication in registers and records kept by the Agency for Business Registers, as well as other matters of importance for registration, records and publication (Art. 1 RA).

2.3. The principle of acquiring a company share in good faith vs. the principle of trust in land registers

The principle of conscientiousness and honesty is the basic principle of mandatory law, known since Roman law (*bona fides*).²⁴ In establishing mandatory relationships and exercising rights and obligations from those relationships, participants are obliged to adhere to the principles of conscientiousness and honesty (Art. 4 Law on Obligatory Relations).²⁵ The LOR does not regulate the content of this principle, but it is concretized through legal science and judicial practice. According to the principle of conscientiousness and honesty, the contracting parties are expected to respect each other's interests, and

²³ Serbian Law on Business Companies, *Official Gazette*, No. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021 (hereinafter: srbLCC); Law on the registration procedure in the Agency for Business Registers, *Official Gazette*, No. 99/2011, 83/2014, 31/2019 i 105/2021 (hereinafter: RA)

²⁴ See Osrečak, J., *Poredbeno-pravni prikaz načela savjesnosti i poštenja*, *Zagrebačka pravna revija*, year 3, 1/2014, pp. 53 - 55 and Pavlović, M., *Dužno poštovanje sudionika u ispunjavanju obveza*, *Zbornik radova Pravnog fakulteta u Splitu*, year 51, 3/2014, pp. 578-580.

²⁵ See Decision of the Constitutional Court of the Republic of Croatia number U-III-5262/2010. from 06.06.2014. published in the book by Crnić, I., *Zakon o obveznim odnosima s izmjenama iz 2018. g. i dodatnom sudskom praksom, sedmo, izmijenjeno i dopunjeno izdanje*, Organizator, Zagreb 2018, p. 9.

²⁶ Law on Obligatory Relations, *Official Gazette*, No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23 (hereinafter: LOR)

this principle also imposes on them the obligation of loyal and honest behavior, so it can be said that it regulates the mutual relations of the contracting parties.²⁶ At the same time, each participant in a mandatory relationship is obliged, in exercising his right, to refrain from actions that would make it difficult for the other participants in the mandatory relationship to fulfill their obligations.²⁷

The main objection to the existing arrangement and the application of the principle of acquiring company shares in good faith is that registration in the public court register (court register) is not a sufficient guarantee for the acquirer of a legitimate acquisition, unlike, for example, an honest acquirer of real estate and the protection he enjoys through the application of the principle of trust in the land registry. In addition, a company share is considered a right, not a thing, so in foreign literature the view is expressed that it lacks the material quality of, for example, real estate.²⁸ It is also objected that the registration of company share ownership is a double record of membership, which does not provide a sufficient degree of legal certainty.²⁹ In the spirit of provisions of Art. 411, para. 1 of the CA, in the event of a discrepancy between the entries in the book of company shares and the list of members submitted by the management board to the registry court, it is considered first of all that the founding members of the company are listed in the social contract. This raises the question of the need to approach the trust that participants in legal transactions have in land registers when acquiring real estate, as a result of which it is necessary to consider the need for legislative improvements to the current legislative solution. It can be seen that the acquirer faces considerable risk when acquiring company shares since the actual possibilities of researching the legal position of the acquirer in the process of acquisition, for example the encumbrance of company shares, is questionable, which threatens legal certainty and creates an unequal legal position of the acquirer and the transferor. Anything beyond what is entered in the book of company shares is thus potentially dangerous for the acquirer. The Croatian legislator nevertheless set up some additional protection mechanisms for the acquirer by prescribing the obligation for the management board of the company to enter information on e.g. liens and usufructuary rights in the book of company shares, but given the possible unavailability of this information, their actual effect is questionable. Therefore, the strength of the entry in the book of company shares in the context of acquisition in good faith lacks an objective

²⁶ Osrečak, J., *op. cit.* note 24, p. 54; Pavlović, M., *op. cit.* note 24, p. 588.

²⁷ Pavlović, M., *op. cit.* note 24, p. 577.

²⁸ Reichert, J.; Weller, M., *Der GmbH- Geschäftsanteil, Übertragung und Vinkulierung, Kommentierung zu 14.-18. GmbHG*, Verlag C.H. Beck, München 2006, p. 64.

²⁹ Dopke J.; Spiller, M., *op. cit.* note 16, p. 130.; Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 61.

criterion that will enable the actual realization of the principle of acquisition in good faith.³⁰

The principle of trust in land records, on the other hand, is unambiguously regulated by the provision of Art. 122 of the Law on Property and Other Real Rights (hereinafter: LoP).³¹ In this sense, it is prescribed that the land registers are considered to truly and completely reflect the factual and legal state of the real estate, so who acted in good faith with trust in the land registers, not knowing that what was entered in them was not complete or that it was different from off-book status, enjoys protection in accordance with ZoP.³² The acquirer was in good faith if at the time of entering into the legal transaction and at the time of requesting registration he did not know or, given the circumstances, had no reason to suspect that the item did not belong to the transferor, therefore he was not obliged to investigate off-book balances. In doing so, the principle of truthfulness and the principle of trust in the completeness of the entered data should be kept in mind. Therefore, the acquisition in good faith of the acquirer reflects confidence in the content of the entries in the land registers, which in practice provides a basis that ensures legal certainty. This principle was put to the test for a long time through various interpretations of judicial practice, which threatened its actual implementation, and thus legal certainty.³³ The main doubt in the application of this principle, as well as in the finality and the principle of acquisition in good faith, is the civil law principle that no one can transfer more rights than he has. At the same time, the position that property law regulations are *lex specialis* in relation to the general principle of civil law, which contributes to legal certainty, seems justified.³⁴ Thus, it is emphasized that the basis of acquisition is the fulfillment of legal conditions on the part of the acquirer, not

³⁰ Wagner, J., *op. cit.* note 2, p. 133.

³¹ Law on Property and Other Real Rights, Official Gazette, No. NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17 (hereinafter: LoP)

³² Žuvela, M., *Zaštita povjerenja u pravnom prometu u nekretninama: stjecanje stvarnih prava na temelju povjerenja u zemljišne knjige*, In: *Pravo u gospodarstvu: časopis za gospodarsko-pravnu teoriju i praksu* year 46, 6/2007, pp. 75 - 112.

³³ Golub, A., *Stjecanje prava vlasništva nekretnina s povjerenjem u zemljišne knjige - (1. dio)*, In: *Informator: instruktivno-informativni list za ekonomska i pravna pitanja*, year 60, 6065/2012, pp. 8 - 10; Ivančić, V., *Povjerenje u zemljišne knjige nakon odluke Ustavnog suda br. U-III-1719/2014 od 10. prosinca 2015. godine: mogu li založni vjerovnici napokon „mirno spavati“*, In: *Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu*, year 25, 6-7/2016, p. 60.

³⁴ Golub, A., *op. cit.* note 33, pp. 8 - 10; Golub, A., *Stjecanje prava vlasništva nekretnina s povjerenjem u zemljišne knjige - (2. dio)*, In: *Informator: instruktivno-informativni list za ekonomska i pravna pitanja* year 60, 6066/2012), pp. 13 - 14; Zrilić, Z., *Zaštita povjerenja u zemljišne knjige: kako funkcionira u praksi*, In: *Hrvatska pravna revija*, year 3, 10/2003, p. 8.

legal work.³⁵ Therefore, it is the legislative framework that gives legitimacy to this type of acquisition. In this sense, there is no conflict between the stated principles and specific circumstances, the principle of trust in land registers is an exception to the rule. The acquirer will obtain the real estate in good faith if he acquired it from a person who was registered as the owner even though he was not, and if the registration is not deleted due to the invalidity of the legal predecessor's registration within three years from when the legal predecessor's registration was requested (Art. 123 LoP). Furthermore, the acquirer who in good faith acquired the right of ownership of the real estate, acquired that real estate as if there were no other rights, encumbrances or restrictions on it that were not registered, nor was it evident from the land registers that the application for registration had been submitted (Art. 124 LoP).³⁶

Thus, it is emphasized that the basis of acquisition is the fulfillment of legal conditions on the part of the acquirer, not a legal transaction.³⁷ Therefore, it is the legislative framework that gives legitimacy to this type of acquisition. Namely, the acquisition occurs on the basis of the law, by fulfilling the assumption that the real estate is acquired on the basis of a legal transaction, that the acquirer acted with confidence in the land registers when concluding the legal transaction and submitting the application for registration, that the alienator is registered as the owner and that the acquirer's right shall not be erased by an annulment action due to invalidity.³⁸

3. ACQUIRING A COMPANY SHARE IN GOOD FAITH - SOME CHALLENGES AND DOUBTS

3.1. Who is an unauthorized transferor of a company share?

The analysis of legislative solutions in the Croatian and comparative systems leads to the conclusion that the basis of acquisition in good faith is the acquisition from a person who, as the owner of company shares, is registered in the book of company shares, therefore, with regard to the data that is available to the acquirer through the book of company shares, as well as in relation to information in the court registry.³⁹ Other persons in that case would be

³⁵ Zrilić, Z., *op. cit.* note 34, p. 6.

³⁶ Giunio, M., *Jesu li načela: povjerenja u ZK-stanje i "nemo plus iuris ad alium transferre potest quam ipse habet" - u sukobu?*, In: Pravo u gospodarstvu: časopis za gospodarsko-pravnu teoriju i praksu, year 46, 6/2007, pp. 520 - 521.

³⁷ Zrilić, Z., *op. cit.*, note 34, p. 6.

³⁸ Golub, A., *op. cit.* note 33, p. 8.

³⁹ Rober, H., *op. cit.* note 2, pp. 37 - 39.

unauthorized persons for the transfer or disposal of company shares. In reality, however, unauthorized persons are those who do not have the authority to dispose of company shares, because they are not the real holders of rights. So, although they essentially do not have the legal authority to dispose of the company shares, a registered person in the status of owner of company shares (member of the company) in relation to the acquirer who relies on the relevant registers is presumed to be an authorized transferor. Thus, the acquirer, with the fulfillment of conditions from Art. 411 of the CA, can validly acquire company shares in good faith from an unauthorized person. However, it should be kept in mind that before the acquisition from an unauthorized person taking place, the legal transaction between the registered owner of the company shares and the member of the company on the one hand, and the acquirer on the other hand, must meet the legal requirements of validity (contract form, consent of the company for the transfer etc.) otherwise there is no acquisition in good faith, as in the legal validity of the legal transaction itself.⁴⁰

It is necessary to distinguish acquisition from an unauthorized person from acquisition from a person with limited right of disposal. A person with a limited right of disposal would be one who transferred company shares contrary to the statutory restriction arising from the social contract. The difference is that acquisition in good faith from an unauthorized person is possible, but it is not with the limitation of the right of disposal in case of transfer.⁴¹ In the context of the protection of violated rights of the real holder of rights against the dishonest transferor and acquirer, the protection can be realized according to the general rules of compulsory law.

When an unauthorized person is incorrectly entered in the book of company shares, the actual authorized person is actually in a situation where he is not a member of the company. The transferor may find himself in the status of an unauthorized person, for example, if it has been established that there was a will, so the heir is not actually an heir, also if the transferor previously acquired company shares from an unauthorized person, if the transferor is commercially incompetent, etc..⁴² Acquisition by an unauthorized person also includes the case in which a company share is disposed of by a person who is not registered in the book of company shares or is registered based on invalid registration and does not have the power of disposal under formal law (e.g. a spouse or an heir who has not regulated the status of company membership). The inaccuracy of the entry should also be seen as the responsibility of the authorized person, i.e. the real holder of the right, to request the implementation of the entry in the book of

⁴⁰ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 616.; Rober, H., *op. cit.* note 2, p. 31.

⁴¹ Walek, T., *op. cit.* note 9, p. 618.

⁴² Jula, R., *Der GmbH-Gesellschafter*, Springer, Berlin 2020, p. 308.

company shares at the moment of acquisition. In doing so, it is recommended that he take the action without delay, because in this way he can most effectively eliminate actions that potentially threaten his acquired rights.

Furthermore, the following most common registration errors causing the invalidity of the application are observed, namely the change of legal status without registration in the book of company shares, e.g. multiple transfer of company shares where the registered member of the company transfers the company shares to the customer, while using the existing status in the list of company members for other disposals (further transfer or encumbrance) and incorrect list of company members (deliberate creation of an error, intentional fraudulent behavior, etc.).⁴³ Entry errors can include entries that would incorrectly reflect the consequences of the division or merger of company shares, so acquisition in good faith would not be applicable here.⁴⁴ Other cases, for example an increase in the share capital and the division of company shares), are more theoretical than they have practical reflections in business practice, so they will not be analyzed in more detail.⁴⁵ Minor data entry errors that can be objectively identified, such as an error in the date of birth or the number of company shares, are not a problem for a good faith acquisition, but otherwise there are significant omissions in determining the subject of legal work.⁴⁶ Mistakes that are a reflection of the intentional fraudulent behavior of the transferor as the owner of company shares, for example providing incorrect information, withholding certain circumstances relevant to company membership (e.g. the circumstance of inheritance), which the company could not have had knowledge of according to some doctrinal points of view, do not enable acquisition in good faith even after the expiration of the three-year period (Art. 411, para. 2 of the CA).⁴⁷

3.2. On the legal position of the acquirer of company shares

In order to show the real meaning of the limited protection of the honest acquirer, the emphasis is that protection cannot be counted on, even though the acquisition occurred by relying on the relevant registers in the event that the real holder of the rights realizes any of the previously mentioned rights within the stated deadlines. In this sense, the provision of a certain degree of protection of the private interest of the actual right holder can be supported. However, from the

⁴³ Rober, H., *op. cit.* note 2, pp. 54 - 60.

⁴⁴ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 613.

⁴⁵ Rober, H., *op. cit.* note 2, pp. 171 - 211.

⁴⁶ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, pp. 611 - 612.

⁴⁷ Barbić, J., *op. cit.* note 16, p. 184.

perspective of the acquirer, and in the context of Art. 411 of the CA, there is a possibility of an error by entering clearly incorrect or incorrectly stated data. In such circumstances, it is certain that each real holder of the right will successfully realize legal protection in the event that he requests it within the prescribed period, even if the acquirer has acted conscientiously, honestly and with confidence in the relevant registers, in certain cases even after the three-year period has passed (error which results in inaccuracy in the authorized person's actions). However, it seems that the stated situation, which can be confirmed by analyzing the existing legislative solution, is not appropriate and essentially seriously threatens the goal and purpose of protecting the honest acquirer, on the one hand, but also seriously calls into question the functioning of the company, knowledge of membership and decision-making in an unspecified period of time. On the other hand, judicial practice makes a clear distinction when it comes to acquiring trust in land records when it comes to the active identification of a person who was invalidly deleted (e.g. by forgery, harmless legal work, etc.), who formally and legally has the status of book ownership legal predecessor, compared to persons who do not hold the right to the books (e.g. unregistered authorized person or spouse).⁴⁸ Therefore, a collision is observed in the acquisition application of company shares in good faith and the acquisition of real estate under the same criteria in the form of more efficient protection of the honest acquirer of real estate from the acquirer of company shares.

With the aim of realizing the status of an honest acquirer, the question arises whether the acquirer's trust in the content of the list of company members is sufficient and whether the acquirer failed to apply due diligence if, before entering into a legal transaction, he did not check the data in the book of company shares and the data kept by the registry court. The acquirer is freed from an in-depth analysis of the state of the company in which he wishes to acquire membership by acquiring company shares, except in case of doubt that would prompt him to perform such an analysis. CA does not require active actions of the acquirer. However, the opinion derived from the legal doctrine is that they nevertheless derive from the provisions of the LOR on the fundamental principles of mandatory law and the rules on concluding contracts. Therefore, the minimum of honest and conscientious behavior cannot be ignored when

⁴⁸ The holder of the book right is actively legitimized to file an annulment claim, that is, the one who was registered in the land register immediately before the contested change in the land register, as well as his universal successors. See decisions number; County Court Split: Gž-1705/2018 from 19.11.2018 and Gž- Zk-325/2019 from 24.02.2020, High Commercial Court of the Republic of Croatia: Pž-350/2023 from 28.03.2023, all available at Court practice portal of SCRC, 22. February, 2024; Gž- Zk-76/2022 from 20.04.2023 available at the *Ius Info* Portal, 14. March, 2024; SCRC Rev-257/2013 from 30.10.2018 in possession of the author.

participating in legal transactions.⁴⁹ The above is reflected in the necessity of inspecting the book of company shares and checking the status in the registry court in the process of acquiring company shares, if the company shares are to be acquired in good faith. Therefore, in relation to the acquirer, it is requested that he does not miss the obvious circumstances essential for the conclusion of the legal transaction.

On the other hand, the legal issue of trust should be distinguished from the acquirer's bad faith. First, it refers to the case that the acquirer did not check the state of the list of company members at all, and secondly, that despite this, he implemented a legal transaction for which he knew that there were disputed circumstances for its implementation.⁵⁰ The first problem is essentially compensated today by the participation of public notaries and the formality of the process of acquiring company shares through legal work. Namely, in the context of the protection of the acquirer, the obligation of the public notary to promptly notify the registry court of a change in the membership structure is highlighted. However, the above has certain shortcomings. The possibility that incorrect data will not reach the registry court should be taken with caution despite the involvement of public notaries in the process of changes that should be carried out at the registry court in the event of a change in membership. Namely, the data is entered in the book of company shares without the participation of a public notary, so it cannot be ruled out that incorrect data could be entered into the book of company shares (e.g. in the case of forgery).⁵¹ The fact is that joint and unlimited liability of management members is prescribed for damages caused to creditors, members of the company and other persons due to incorrect registration, but with the application of general assumptions of liability for damage. In order to strengthen the guarantees aimed at preventing non-transparent actions, one of the proposals for such action is to extend the authority of public notaries in the process of entering and changing data in the book of company shares.⁵² However, this did not take root in practice.

3.3. The principle of acquiring a company share in good faith and other legal processes

In cases of acquiring company shares on other legal grounds than legal business, as explained earlier, acquirers do not enjoy legal protection based on the

⁴⁹ See SCRC decision number Rev- x 686/2014 from 02.09.2015, available at the Court practice portal SCRC, 22 February, 2024.

⁵⁰ Rober, H., *op. cit.* note 2, p. 92.

⁵¹ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 61.

⁵² Kochel, M., *op. cit.* note 13, p. 4.

principle of acquisition in good faith.⁵³ Acquisition in good faith, in the existing framework of company law, does not refer to the previously mentioned acquisition contrary to statutory restrictions, but also, for example, in the case of acquiring unpaid company shares (danger of forfeiture according to Art. 400 - 403 CA), inheritance etc.⁵⁴ The most relevant examples will be presented here.

In the case of inheritance, the legal consequences of acquisition occur *ex lege* and there is no assignment or request for a special form, so the rules on acquisition in good faith do not apply to inheritance.⁵⁵ Heirs thus definitely acquire company shares as universal successors of the decedent, and are legitimized to society as new members, as a rule, by a decision on inheritance.⁵⁶ The heir of an incorrectly registered person (unauthorized person) does not become a member of the company.⁵⁷ However, what if the transferor claims that he acquired the company shares by inheritance, therefore, *ex lege*, and transfers the company shares before he was legitimized by the company and regulated his status by entering it in the book of company shares. Acquisition in good faith is not possible if the company shares are acquired from an heir who has not been legitimized by a valid decision on inheritance.⁵⁸ German legal doctrine considers the economic aspects of the disposal of company shares in the context of acquisition in good faith, stating that in the event that the heirs are the transferors of company shares to other co-heirs, there is no commercial transaction and the rules on acquisition in good faith do not apply to such a transfer.⁵⁹

The acquisition of company shares in good faith should also be considered in relation to the acquirer/buyer who, in enforcement proceedings, acquires company shares at a public auction against a person who is not the actual owner of the company shares, but is entered in the book of company shares. In this case, is it possible to talk about the defects of the purchased item, since company shares that do not belong to the bailee were purchased (Art. 151, Para. 6 Enforcement Law)?⁶⁰ In fact, it could be concluded that the acquirer in that case would acquire a thing with a defect, while the buyer does not have rights based on the defects of the thing. This would mean that in the end, the enforcement

⁵³ Rober, H., *op. cit.* note 2, pp. 27 - 28; Wagner, J., *op. cit.* note 2, p. 157.

⁵⁴ Barbić, J., *op. cit.* note 16, p. 183; Lutter, M.; Hommelhoff, P., *op. cit.* note 17, pp. 614 - 615; Rober, H., *op. cit.* note 2, p. 211; Wagner, J., *op. cit.* note 2, pp. 133 - 134.

⁵⁵ Bartl, H. *et. al.*, *op. cit.* note 6, p. 206; Verspay, H., *op. cit.* note 5, p. 123.

⁵⁶ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 612; Verspay, H., *op. cit.* note 5, p. 156.

⁵⁷ Drygala, T.; Staake, M.; Szalai, S., *Kapitalgesellschaftsrecht, Mit Grundzügen des Konzern- und Umwandlungsrechts*, Springer, Leipzig 2012, p. 266.

⁵⁸ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 615.

⁵⁹ Rober, H., *op. cit.* note 2, p. 27, pp. 37 - 39.

⁶⁰ Enforcement law, *Official Gazette*, No 112/12, 25/13, 93/14, 55/16, 73/17, 131/20, 114/22, 06/24 (hereinafter: EL)

creditor could be liable for damages to the acquirer according to the general rules of the LOR on liability for damage. Therefore, there is a collision between the rules of enforcement procedure and the acquisition of objects of enforcement and the rules of company law on acquisition in good faith. However, by applying the *lex specialis* rule on the acquisition of company shares in good faith at the time of the decision on the award, in the event that the object of enforcement is a company share that does not belong to the enforcement creditor as the actual right holder, and was purchased in the enforcement procedure, the buyer acquires the company shares based on the decision on the enforcement (in accordance with Art. 130 LoP).⁶¹ In this way, the buyer is in the same legal position as other contractors who rely on the status of the book of company shares in concluding legal transactions, while being protected by the rules of enforceable law (and in the case when the pledgor is not the actual owner of the pledged thing/right that is activated in execute). Namely, until the decision on the enforcement is made, there are mechanisms of legal protection of the actual right holder (e.g. objection, postponement and declaration of enforcement as inadmissible from Art. 59 and 67 with the exception of Art. 61, para. 1 EL).⁶²

The law does not regulate the process of merging business shares, however, it stipulates that a decision of the company's assembly is required for merging business shares (Art. 440 CA). One comes across the point of view that in the event that two business shares are merged, one of which does not belong to the merger participant, then the acquisition of a business share in good faith could only occur through a relatively fair disposition of the real owner (i.e. the acquirer acquires only one business share).⁶³ It is stated that the book of business shares contains two incorrect data, one about the (un)authorized owner, and the other about the invalid merger.⁶⁴ However, it seems that this attitude needs to be tested, since the decision on the merger is made by the company's assembly, and based on the merger and the new status in the book of business shares, the process of possibly changing the membership structure is then carried out. Therefore, the position regarding the absence of grounds for the acquisition of merged business

⁶¹ Rober, H., *op. cit.* note 2, p. 30.

The Civil Division of the SCRC at its session of February 22, 2018 under the number: Su-IV-4/18-4 adopted the legal understanding that reads: "*The alleged owner can successfully protect his right in the foreclosure case when prove that the bailiff was unscrupulous, dishonest, or that he abused his right.*", in authors possession.

⁶² "... an honest acquirer will be legally protected regarding the acquisition of a registered right only if, acting in good faith, he registered his right in the land register on the basis of a legal transaction, and if the claimant acquired ownership of the real estate on the basis of the law before the initiation of enforcement proceedings..." , SCRC decision number Revd-2609/2023 od 28.09.2023, available at the *Ius Info* Portal, 14 March, 2024

⁶³ Rober, H., *op. cit.* note 2, p. 207.

⁶⁴ *Ibid.*, p. 208.

shares in good faith does not seem justified as long as the decision of the company assembly on the merger of business shares is valid.

3.4. Some challenges in applying the principle of acquisition in good faith

One of the challenges in the application and realization of the principle of acquiring company shares in good faith is the question of whether the acquisition of company shares in good faith results in unencumbered company shares. In this sense, the analogous application of the provisions of the LoP (Art. 118, para. 5, Art. 124, para. 2, and Art. 243 and 349) according to which an honest acquirer does not enjoy protection from unregistered encumbrances and restrictions if they are based on the law, while the lien on real estate and usufruct ceases if the real estate or servient thing is acquired by an acquirer who did not know that an unregistered lien existed.

In the domestic legal framework, and according to the provisions of Art. 410 of the CA, the registration of the burden of pledge and usufruct is mandatory, so the domestic legal system should reconsider the paradigm of acquiring unencumbered company shares in good faith. This legal point of view needs to be reviewed in the spirit of the provisions of Art. 410 of the CA, according to which it is required that the obligations imposed on the company shares (which are pledge, usufruct, fiduciary) are visible, regardless of the fact that it is an internal document of the company, and not a public register. Notifying the registry court about encumbrances over the company shares is not a legal obligation, while it is in relation to the list of members kept in the book of company shares. In the event that encumbrances are not entered in the book of company shares, the honest acquirer should be protected, because the fact that the entry of that encumbrance as a legal right of the creditor was not requested, represents their responsibility for the consequences of not registering the encumbrance and, in connection, accepting the accompanying legal consequences. It is difficult to justify why the creditor's inaction would have negative effects on a conscientious acquirer who acted with confidence in the state reflected in the book of company shares and its mandatory content. The acquirer could reasonably conclude that there are no encumbrances on the acquired company shares and they are a dead letter to the creditor if they are not transparently recorded by third parties. Essentially, the options of obtaining information about unregistered encumbrances would be excessively burdensome for the acquirer and practically difficult to achieve, which would put him in an unequal position in relation to the relationship between the acquirer and the transferor and the relationship of conscientiousness and honesty of the creditor of security assets (encumbrance on the company shares).

In the case of a partnership based on company shares, the partnership, due to the legal nature of the internal relationship of partners (*res inter alios acta*), does not transfer to the acquirer.⁶⁵ However, legal doctrine considers controversial the question of the extent to which the acquisition of company shares with a co-ownership relationship in good faith reaches. In the case of a co-owner relationship on company shares, the book of company shares can and should contain information about the co-owners. However, the situation in practice does not show that the authorized relationship is regularly entered in the book of company shares (the most common example are spouses as authorized persons on company shares).⁶⁶ In German legal doctrine, the position is observed that the acquirer is not protected in the event that an authorized relationship is based on the company shares, if the transferor transfers more rights than belong to him.⁶⁷ However, following the normative framework provided by the CA and domestic court practice, this point of view is not applicable. Namely, the analogous application of the rules of the LoP can be considered authoritative for the case of off-book burdens on the company shares that is the subject of the transfer, which leads to the actual realization of trust in the status of the book of company shares. Moreover, an unregistered authorized person does not meet the legal requirements to be considered a member of the company. Since the CA for the acquisition of company shares in good faith presumes the acquisition from a registered member of the company, it is difficult to justify the position that the acquirer is not protected by this principle. The protection of an honest acquirer should be provided in the spirit of information that is visible by inspecting the book of company shares, even if this information is not kept at the registry court.⁶⁸

The issue of acquiring company shares in good faith should also be considered in the case of double or multiple transfer of company shares, and the legal position of the participants in such a legal relationship should be considered in relation to their honesty, and thus the option of acquiring company shares in good faith. In relation to the multiple acquisition of real estate, the applicable rule is from the provisions of Art. 125 of the LoP, if he transfers more rights than those belonging to him. The first acquirer is protected as an acquirer in good faith in accordance

⁶⁵ Barbić, J., *op. cit.* note 16, p. 183; Rober, H., *op. cit.* note 2, p. 100.

⁶⁶ "...a third person can, on the basis of a legal transaction, which was not concluded with all joint owners, acquire the right of ownership of real estate under the assumptions under which trust in the land registers is protected, if the ownership was not registered in the land registers...", SCRC decisions number: Rev-2203/2016 from 04.10.2016, available at the *Ius Info* Portal, 14 March, 2024 and Rev-1867/2012 od 29.10.2013, in possession of the author.

⁶⁷ Rober, H., *op. cit.* note 2, pp. 158 - 159.

⁶⁸ Wagner, J., *op. cit.* note 2, pp.161 - 162.

with relevant provisions of the CA. Such an acquirer is a formal and legal new owner of company shares, in other words, an authorized person with an entry in the new list of company members. In the case of multiple acquisitions, if the first acquirer acquired company shares in good faith, this should also apply to subsequent acquirers. Therefore, both the first and later acquirers enjoy equal protection of the principle of acquisition in good faith.

In the case of acquisition of company shares, the problem may also arise due to the fact that this company share has already been transferred earlier, but under a deferred condition. During the period from the conclusion of the legal transaction for the acquisition of company shares to the recording in the book of company shares, it is possible for someone else to be entered in the book of company shares on the basis of a legal transaction that was concluded after the first one, but realized according to the company before the first transaction.⁶⁹ In the event that the acquirer does not apply for registration on the basis of the first legal transaction, and in the meantime a third acquirer is registered, protection of the rights of the first acquirer cannot be claimed based on the principle of acquisition in good faith. In the aforementioned circumstances, the position is taken that later acquirers cannot be excluded from the protection guaranteed to every honest acquirer in good faith. Legal mechanisms for the protection of the first acquirer from the transferor (termination of the contract and/or compensation for damages) can be considered.

What if the company share that is the subject of disposal does not exist at all? In that case, there is no right holder, because formally and legally the company share does not exist. In the specific case, the expected situation in the company is that the sum of the nominal amount of company shares from the list of company members is greater than the sum of the nominal amount of company shares that actually exist.⁷⁰ It is considered that such a disagreement should be noticed by an honest acquirer through inspecting if the sum of the nominal amounts of company shares in the book is greater than the registered share capital. A non-existent right, such as non-existent company shares, cannot be subject to disposal in any legal transactions.

4. CONCLUSION

The principle of acquiring company shares in good faith (*in bona fides*) implies the possibility of acquiring company shares from an unauthorized person through

⁶⁹ Rober, H., *op. cit.* note 2, p. 95.

⁷⁰ *Ibid.*, p. 95.

a legal transaction. Analogously applying the theoretical determinations of the principle of acquisition by trust in land registers, it can be concluded that in essence it is about the legalization of the process of acquiring company shares, which was disposed of by a person who does not have the authority to dispose of it. In order to protect conscientious and honest participants in legal transactions on the one hand, but also to obviously encourage the real holders of rights to take care of them, the law made it possible to acquire in good faith. Namely, it is considered that the legislative framework requires interventions in regulating the process of acquiring company shares in good faith, and as stated earlier, by choosing a membership registration model and relevant data for membership and company shares. When acquiring company shares in good faith, there are too many exceptions to the rules that complicate its goal and purpose and threaten legal certainty. This results in an additional narrowing of the scope of application of the principle of acquisition in good faith, which in the regulatory framework is already limited by the term in which such acquisition can occur due to incorrect or incorrect registration. Therefore, the acquirer's legal position in the existing researched aspects of acquisition is threatened by various errors, and within the three-year period (and even after) they can represent the basis for invalidity of the legal transaction of the realized acquisition of company shares. In this sense, the protection of the rights of an honest acquirer is connected with the circumstance of whether a legal predecessor was previously registered, and on the other hand, whether the legal transaction or the act of disposing of company shares is valid, or whether there is a mistake in the registration made by the authorized person, which causes the invalidity of the acquisition. The above, in relation to, for example, the disposal of real estate, can have harmful consequences on internal relations and decision-making in a company that is an independent legal entity. Although the legislative framework that solves the issue of acquiring company shares in good faith is quite limited, it is clear that the basic criterion is the mandatory data that is kept in the book of company shares and the state that the book of company shares reflects. In this sense, the author is of the opinion that it would be advisable in the legislative framework to give this principle an unequivocal strength of truthfulness and trust in the book of company shares or at the registry court. It is also recommended to prevent double registration of membership, which is subject to possible deviations, and thereby endangering the transparency of data. Also, the operation of this principle should be balanced in the relations between the honest acquirer and the unregistered rights of real holders and third parties (e.g. lien creditors). It is therefore considered instructive to determine the circle of persons who are legitimized and by which legal mechanisms to judicially exercise rights from the transfer of company shares carried out in the circumstances of incorrect and erroneous registrations. In the context of the hypothesis of this paper, that the principle of acquiring company shares in good faith in the existing theoretical

and legislative frameworks does not provide a satisfactory level of legal security to the acquirers of company shares, the answer is partially affirmative. Therefore, it is concluded that minor legislative measures would reduce the scope of theoretical doubts and ensure a more efficient and transparent application of this principle in practice and bring it closer to the principle of acquisition with confidence in land registers.

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13. Decision of the County Court in Rijeka number: Gž- 4149/2013 from 06.07.2016
14. Decision of the County Court in Split number: Gž-1705/2018 from 19.11.2018., Gž- Zk 76/2022 from 20.04.2023., Gž- Zk-325/2019 from 24.02.2020., Gž- Zk 76/2022 from 20.04.2023