

COMPARATIVE ANALYSIS OF THE LEGAL DEFINITION OF STRATEGIC ENTERPRISES IN ROMANIA AND HUNGARY

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ABSTRACT: *In crisis situations, regardless of their origin, whether financial or caused by natural disasters, or even caused by exceptional health conditions, such as an epidemic, extraordinary measures must be taken. From legal point of view, on the basis of the available governmental decisions, measures are needed in order to mitigate immediately and efficiently the adverse effects and consequences of these events on communities, regardless of their size: local, regional, national or global. Strategic enterprises, whose activities are carried out in key areas of the national economy, are an easy and convenient tool for public authorities. These companies, which operate in key areas, cover among others the ensuring the access to utilities and services of public interest and are largely controlled by the state or local public authorities. This is why the identification and legal definition of the area of strategic enterprises in our country and a comparative analysis of the legal regulations in the neighboring country, Hungary, might be of interest. Present study also contains a historical retrospective on defining the enterprises that fall into the category of strategic enterprises in terms of legal regulations in our country in the previous century. Moreover, this study also aims to present the evolution of legal regulation in the field of defining economic branches and strategic enterprises beginning from the fall of the political regime in 1989 to the present, marked by the COVID-19 pandemic.*

KEYWORDS: *strategic enterprise; legal definition; historical retrospective; Romania; Hungary.*

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1. INTRODUCTION

At first, the legal definition of strategic enterprises and of the strategic economic branches does not appear as a challenge. What's more, it might be considered in a superficial way that the propriety of these enterprises is not of major interest if they represent state monopoly or if the state has control on them, or if these are private

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companies. Contrary to this simplistic approach, the analysis of the role of strategic enterprises in various global crises, of the promotion methods of national interests for the development of economy as well as of the protection of the wellbeing of population during crises, outlines the significance of the topic. Some researchers do not consider the term "strategic" as having scientific value, they rather think it is part of the political language. (Voszka, 2018, p.63) It is presumed that Lenin (1922) was first to consider the need of delimiting strategic branches of the national economy when defining the new Soviet economic policies. The strategic document called New Economic Policy, in Russian: novaja ekonomiceszkaja polityika (NEP) refers primarily to the agricultural sector, production means and branches of the economy (transport, etc.), being under supreme control which needed to be kept as state property.

In Romania, after 1989 the representatives of the scientific-economic life made analyses and made strategy proposals in order to facilitate the transition from the economy based on five-year plans to market economy. When setting short-term goals, they proposed making state investments focused primarily on areas with high potential for technological development. Examples were mentioned from the United States of America, Japan, the Federal Republic of Germany, which invest significant state resources in the fields of electronic components and especially in microelectronics, considered to be strategic branches of development of the national economy. (<http://www.cide.ro/tezaur%20I.pdf>, 1990)

In the 1990s, the term "hard core" was used as a synonym for strategic branches, covering the areas of national security and serving the population, including agriculture. (Voszka, 2018, p.63)

2. HISTORICAL RETROSPECTIVE ON ESTABLISHING STRATEGIC ENTERPRISES

In the last century, in Romania, there is an approximate definition of enterprises of special importance in a Law no. 129 from 1924 concerning the trade and control of the economic enterprises of the state, was promulgated on the 6th of June 1924 through the Decree no. 1769 and published in the Official Monitor no. 121 of the 7th of June 1924. The act was initiated by the Ministry of Industry and Trade and regulated the issue of public enterprises. The law refers to state-owned enterprises, which depending on the field of activity, as well as the importance in the general equation of the national economy may be of strategic interest. Accordingly, public or "state" enterprises of an economic nature have been divided into two main categories: enterprises of general interest and those of purely commercial nature.

Enterprises of general interest were defined those that were "meant to perform important public services on which the course of the national economy depends, or those which are the subject of a state monopoly, as well as those which exclusively concern national defense" based on Art. 2 para. 1 let. A) of the Law no. 129/1924. In other words, the law very clearly established the area of strategic enterprises, namely those that performed essential and decisive public services for the development of the national

economy, enterprises that represented a state monopoly, as well as those related to national defense. This category included: Romanian Railways (C.F.R.), Postal-Telegraph-Telephone Service (P.T.T.), State Monopoly (R.M.S.), special workshops of the army, Pyrotechnics and Gunpowder Works.

As we will see below, in the next hundred years, too little has changed in the approach to strategic enterprises.

3. CONTEMPORARY LEGAL RESOURCES REGARDING THE DEFINITION OF STRATEGIC ENTERPRISES

3.1. Analysis of Law no. 15/1990 regarding the reorganization of state-owned enterprises and transformation into self-governing administrations and trading companies and of the G.D. no. 266/1993 on the branches and domains in which the self-governing administrations of national interest operate

In 1990, in Romania, state-owned enterprises were reorganized as self-governing administrations and trading companies based on Law no. 15/1990. According to the normative act, the self-governing administrations operate in the strategic branches of the national economy. According to the law, strategic areas are: military industry, energy industry, mine and natural gas exploitation, postal service and railway transport, as well as in some areas belonging to other branches established by the government based on Art. 2 of Law no. 15/1990.

Based on the power of attorney received under the aforementioned law, in 1993, the Government of Romania established those branches and domains of the economy, in which the autonomous companies of national interest can carry out their activity based on G.D. no. 266/1993 concerning the branches and domains in which the self-governing administrations of national interest can function. The normative act classified the economic branches into two categories, strategic branches and other branches. According to the G.D., the production and distribution of electricity and heat, the exploitation of ores, the postal service and telecommunication, railway and subway transport, the production of weapons are considered strategic branches.

The following observations are immediately apparent from the brief analysis of the two normative acts, the law and the G.D. First of all, with regard to the strategic branches, the G.D. does not necessarily contain other areas of interest than those established by law. Although the law, after clearly establishing the strategic branches, namely the military industry, energy industry, mine exploitation, postal service and railway transport, contains the expression of other branches established by the government, but in this case, there is only a reconfirmation of them, with some additional clarifications and details.

The second observation refers to the fact that the normative acts define self-governing administrations strictly as a form of legal organization of the enterprises that carry out their activity in strategic branches. However, later, in the evolution of economic development, some self-governing administrations were transformed into trading companies, without changing their main object of activity. These companies continue to

operate in strategic branches of the economy, the form of legal organization being the joint stock company. As an example, the state company for the production, distribution and supply of electricity and heat, after the change of regime, in 1990 was transformed into the National Electricity Authority - RENEL. And in 1998, following the restructuring that occurred through the application of G. D. no. 365 / 03.07.1998 for the reorganization of RENEL, the National Electricity Company (CONEL) is established. CONEL had three subsidiaries: S.C. Termoelectrica S.A. - for the production of electricity and heat in thermal power plants; SC Hidroelectrica S.A. - for the production of electricity in hydropower plants and S.C. Electrica S.A. - for the distribution and supply of electricity. (<https://www.electrica.ro/en/the-group/about/hystory/>)

The comparative analysis of strategic branches defined by normative acts	
Law no. 15/1990	G. D. no. 266/1993
arms industry	production of weapons, ammunitions, explosives and combat techniques
energy industry	production and distribution of electric energy and heat
exploitation of mines and of natural gases	exploitation of useful mineral substances and their delivery for procession in specific forms, except for the exploitation of common rock masses, quarries of building materials and peat deposits
postal service	postal service and telecommunication
railway transport	railway and subway transport

Source: Table made by the author

In this respect, it cannot be considered a wrong approach that it does not necessarily depend on the form of organization of the public enterprise, i.e. self-governing administrations, whether it is part of the category of strategic enterprise, but it is rather relevant if the public enterprise, regardless of the form of legal organization, activates or not in one of the branches defined by the normative acts presented as being strategic. The third observation concerns the ownership of enterprises operating in branches classified as strategic. The normative acts analysed above could be interpreted as meaning that only state-owned enterprises of national interest could carry out their activity in branches considered strategic. As we have presented, in the case of the state-owned company for the production, distribution and supply of electricity and heat, over the years, after successive reorganizations and divisions, some subsidiaries have been privatized. In conclusion, the reality of the practice of economic development reveals that any enterprise, both public and private, can operate in the strategic branches of the national economy.

The fourth remark is that by the G. D. there are also defined additional criteria that must be met by the self-governing administrations that carry out their activity in the strategic branches of the economy. They must meet one of the following criteria: they

should represent a natural monopoly, or be of national public interest, or produce goods and services essential to the defense of the country and to national security.

3.2. Analysis of the E.G.O. no. 88/1997 on the privatization of companies

In 1997, based on the obligation assumed by the leadership of the country, the government adopted several normative acts in order to facilitate and accelerate the privatization of some state-owned companies. The E. G. O. adopted in 1997 no. 88 concerning the privatization of trading companies in the form modified and amended by Law no. 99/1999 regarding some measures to accelerate economic reform, contains a definition of the companies of strategic interest, according to which they are national firms and national companies. In addition to these companies, the Government may establish by decision other companies, largely state-owned as being of strategic interest based on Art.3 par. 1 let. b) of E. G. O. no. 88/1997.

There are two aspects to note, this time the normative act does not refer to the self-governing administrations, which are essentially wholly owned by the state, but to trading companies, regardless of whether the state is the sole or the major shareholder. The second distinguishing feature of the first normative acts analysed, from 1990 and 1993 is that the ordinance refers to companies of strategic interest and not to the branches of the economy considered to be strategic.

Furthermore, the E. G. O. in its original form, before the repeal of this provision by Art.34 para. 1 of E. G. O. no. 88/1997, also defined the strategic branches of the national economy, in which joint-stock companies are organized. The chapter on special rules for the privatization of national companies lists the strategic branches, namely the production and distribution of electricity, heat and nuclear energy, mining and natural gases, oil processing, postal service, telecommunication and railway transport.

This article was first modified and amended in 1999, by Law no. 99/1999 concerning some measures for accelerating the economic reform, title I, art. I, point 46 and instead of listing the strategic branches, there are mentioned the companies that resulted from the reorganization of the self-governing administrations and other companies of strategic interest. As defined in the 1999 law, companies of strategic interest refer to national firms and national companies, without defining the branches in which they operate. Subsequently, this article was repealed in 2005, by Law no. 185/2005 for the repeal of art. 34 of G. E.O. no. 88/1997 concerning the privatization of firms, art. I as a result of which the nominative control shares held by the state are legally transformed into ordinary shares.

The comparative analysis of strategic branches defined by the normative acts	
G. D. no. 266/1993	E. G. O. no. 88/1997
production of weapons, ammunitions, explosives and combat techniques	-
production and distribution of electric energy and heat	production and distribution of electric energy, heat and nuclear energy

exploitation of useful mineral substances and their delivery for procession in specific forms, except for the exploitation of common rock masses, quarries of building materials and peat deposits	mining and natural gases, oil procession
postal service and telecommunication	postal service and telecommunication
railway transport and subway	railway transport

Source: Table made by the author

3.3. Analysis of law no. 137/2002 on some measures to accelerate privatization

In 2002, the Romanian Parliament adopted the Law no. 137/2002 concerning some measures for accelerating privatization. As modified and amended in 2004, by G. O. no. 36/2004 for the modification and amendment of Law no. 137/2002 concerning some measures for accelerating privatization, art. I, point 3, a distinction is made between the rules of the privatization process in the case of companies of strategic interest and utility companies, but without defining these companies or the criteria on base of which they can be classified as strategic enterprises. However, it should be noted that the legislator, as a hallmark of the previous regulations, treats strategic companies separately from those in the field of utilities this time. As defined by law, as modified and amended in 2004, based on Art. I point 2 of G. O. no. 36/2004 “utility companies mean companies that produce, transport, dispatch, distribute or supply electricity, heat, natural gas, steam, fuel and other utilities.” It is not very clear what the reasoning of the legislator was when treating utility companies separately from strategic ones, although until the adoption of this normative act, the utility companies were each time part of the category of branches of strategic interest.

3.4. Analysis of the 2017 draft law on some measures to protect the economic interests of the state

10 years after Romania joined the European Union, the consolidation of the market economy foundation, the increase of cash availability of the National Bank of Romania, respectively the continuous improvement of macroeconomic indicators, the adopted financial and fiscal reforms, the strengthening of the financial discipline of state-owned enterprises resulted in an initiative of a parliamentary group. In 2017, by substantiating the draft law, they proposed suspending the specific privatization procedures for a period of 5 years, mainly in the case of economic operators functioning in sectors of strategic economic interest. (<http://www.cdep.ro/proiecte/2017/400/80/9/em621.pdf>)

The initiators also referred to the provisions of the Romanian Constitution, based on Art. 135 ind 2 let. b) which stipulates that the state must ensure the protection of national interests in economic, financial and foreign exchange activity, as well as to the practice of other member states, where the state has maintained its presence through participations in economic operators in the strategic sectors of the economy. The draft law from 2017 concerning some measures for protecting economic state interests, in the

form adopted by the Senate, as first chamber, contains the list of the sectors of strategic interest and security of the state. (<http://www.cdep.ro/proiecte/2017/400/80/9/se621.pdf>)

The comparative analyses of strategic branches defined by the normative acts	
E. G. O. no. 88/1997	Draft law of 2017
explosives and combat techniques	production and trade of arms and ammunition
production and distribution of electric energy, heat and nuclear energy	production, transport, distribution and supply of electric energy and heat
mining and natural gases, oil procession	exploring, exploiting, extracting, production and procession of mineral resources
postal service and telecommunication	postal service, communication and information technology
railway transport	construction and management of road, rail, sea, air, port, airport infrastructure and of traffic control and management infrastructure
	medical and paramedical services, production and marketing of medicines, medical devices, serums and vaccines
	water management, hydro-technical arrangements, capture, treatment and distribution of drinking water and irrigation water
	agriculture, fishing and auxiliary activities, food production and food security
	forestry - logging, hunting, forestry and wood processing
	education, scientific research, conservation of the national cultural heritage and sport

Source: Table made by the author

Since the entry into force of the law, the draft law stipulated the suspension for a period of 5 years of the privatization procedures of companies operating in the economic sectors of strategic interest and state security mentioned above, except those in which total assets did not exceed 2 million lei. Subsequently, in 2020, the draft was definitively removed from the agenda of the Parliament. Following the analysis of the 2017 draft law on some measures to protect the economic interests of the state, it can be seen that it extends the area of strategic branches of the economy, by including in it the security of the state. From this extrapolation it can be deduced that the legislator intended in fact to emphasize that the strategic economic areas include those related to state security, implicitly subject to the same legal regime of protection by the state, by virtue of the

obligation of the state stipulated by the Constitution. This logic also includes the previous legal regulations in the field, respectively Law no. 15/1990 and the G. D. no. 266/1993, which also made partial distinction between the strategic branches and those related to state security (eg. the production of weapons, ammunition, explosives and combat techniques).

On the other hand, state security can be considered as an additional criterium, an essential identification element, meaning that in order to be part of the strategic branches, the object of activity of the enterprise has to contain elements of state security as well. Thirdly we can note that compared to previous regulations, the draft law initiators widened the essential economic fields of the state, such as medical industry, agriculture, food safety, natural heritage and education.

3.5. Analysis of Law no. 173/2020 on some measures to protect national interests in the economic activity

Although the law was not adopted, in 2020, given the outbreak of the COVID-19 pandemic, the 2017 project was nevertheless adopted under a different title and in a modified form as Law no. 173/2020 concerning some measures for protecting national interests in the economic activity. In the statement of reasons, the initiators resume the arguments from the Romanian Constitution, according to which the state has the obligation to protect the national interests in the economy. (<http://www.cdep.ro/proiecte/2020/300/10/4/em406.pdf>) Furthermore, the initiators claim that the pandemic causes fluctuations in the value of shares "at a rate and in ways that are difficult to predict, which can lead to significant losses." Regarding this they propose the prohibition of the alienation of any participation of the state for a period of 2 years. At the same time, the state must be ensured to have the possibility of acquiring shares in companies in the areas of strategic importance, corresponding to the period of crisis. The adopted Law no. 173/2020 lists those areas being of strategic importance for the management of the health crisis, in which companies operate and whose participation can be acquired by the Romanian state.

Comparative analysis of the strategic branches established by the normative acts	
Draft law of 2017	Law no. 173/2020
production and trade of arms and munition	-
production, transport, distribution and supply of electric energy and heat	production, transport, distribution and supply of electric energy and heat
exploring, exploiting, extracting, production and procession of mineral resources	exploring, exploiting, extracting, production and procession of mineral resources
postal service, communication and information technology	postal service, communication and information technology
construction and management of road, railway,	transport, construction and

naval, air transport, port, airport infrastructure and of traffic control and management infrastructure	management of the road, railway, naval and air transport infrastructure
medical and paramedical services, production and marketing of medicines, medical devices, serums and vaccines	production and trade of medication, medical devices, serums and vaccines, medical and paramedical services
water management, hydrotechnical arrangements, capture, treatment and distribution of drinking water and irrigation water	capture, treatment and distribution of drinking water and irrigation water
agriculture, fishing and auxiliary activities, food production and food safety	food industry, agriculture
forestry - logging, hunting, forestry and wood processing	forestry, logging
education, scientific research, conservation of the national cultural heritage and sport	-
-	machine industry, metallurgy

Source: Table made by the author

The economic branches established by the law adopted in 2020, in which the state can acquire participations, are almost identical to those found in the 2017 draft law, as being considered sectors of strategic interest and state security. Compared to the 2017 draft law, the law adopted in 2020 does not include two areas, namely the production and sale of weapons and ammunition, respectively education, scientific research, conservation of national cultural heritage and sports. Instead, in the law adopted in 2020, machine industry and metallurgy were included additionally to the 2017 draft law.

Another distinct feature of the 2020 law, compared to the 2017 draft, which referred to the prohibition of the sale of state holdings only to economic operators in strategic sectors, namely the interdiction operated for a period of 5 years, the adopted normative act introduces the prohibition of the sale of state participations in all enterprises, in which the state has the quality of shareholder, and the established period is 2 years. Moreover, in the statement of reasons of the 2020 law there is a referral to companies in areas of strategic importance, though this definition does not appear in the content of the law and only lists the economic areas. Thus, based on the analysis of the arguments and the logical thread of the statement of reasons of the two laws, respectively the overwhelming identity between the listed branches, the conclusion is that in fact the law adopted in 2020 contains a true listing of the strategic branches of the national economy.

4. DEFINITION OF STRATEGIC ENTERPRISES IN HUNGARY

In Hungary, the normative act that regulates the definition of strategic enterprises is Law no. 196/2011 on concerning national patrimony. It was adopted by the Hungarian Parliament on the 23rd of December 2011 and was published on the 30th of December 2011. (<https://njt.hu/jogszabaly/2011-196-00-00.56>) This law regulates the requirements regarding the maintenance, protection and exploitation of the national patrimony, the patrimony owned exclusively by the state and local public authorities, the limits and conditions of the right of disposal over the national patrimony and the economic activities carried out exclusively by the state and local public authorities.

The law defines, among other things, the national patrimony of special importance for the national economy, as the goods owned by the state or local public authorities and whose maintenance in the property of the state or local public authorities is justified in the long run based on Art. 3 ind. 1 point 12 of Law no. 196/2011. This category of goods that form the national patrimony of special importance for the national economy includes the state participations from the enterprises listed in annex no. 2 of the law, as well as those established by special laws and governmental ordinances. Annex no. 2 point I of the law contains a nominal list regarding the enterprises that are part of the sphere of national patrimony of special importance for the national economy, as well as the minimum participation percentage that the state must keep in them.

As of January 1, 2022, the list includes a number of 57 enterprises, from the following branches of economy: energy, forestry, financial institutions, postal service, railway, road network, gambling, sanitation, drinking water, defence. In the case of most enterprises, exclusive state ownership is required, but the list also includes enterprises in which the state must maintain at least a minimum shareholding of 25% + 1 vote and up to 75% + 1 vote. Of the 57 strategic enterprises, 49 are organized in the form of closed joint-stock companies and 8 as limited liability companies.

5. CONCLUSIONS

In what Romania is concerned, the task of defining strategic enterprises is challenging. As results from the detailed analysis of the normative acts presented above, which regulate or refer to the issue of strategic enterprises of the national economy, a complex and consistent approach is needed in order to define the object of the analysis of present study. Based on the arguments and observations set out in detail, as well as through the analysis of the evolution of legal regulation, strategic enterprises are all those autonomous companies and trading companies - regardless of the form of public or private property - which operate in one of the strategic branches set by the normative acts, respectively if they represent a natural monopoly, or if they are of national public interest or if they produce goods and services essential for the defence of the country and for national security.

In contrast, the legislator in the neighbouring country, Hungary, approaches the issue of establishing the area of economy branches of particular importance and defining

strategic enterprises in a different way. Firstly, the Hungarian law contains a nominal list of these enterprises, secondly it establishes the minimum level of state participation in the listed strategic enterprises. Last but not least, the strategic enterprises or those that are part of the national patrimony of special importance for the national economy are wholly or mainly owned by the Hungarian state. Once humanity escapes the health crisis caused by COVID-19, we'll be able to analyse from all perspectives the effectiveness of legal measures and political decisions to mitigate the consequences on communities, and also its economic impact and the role played by strategic enterprises. I hope this analysis can be carried out as soon as possible, because it would mean that we have left behind this heavy ordeal, and it would also provide new tools for the development of the legislative framework on strategic enterprises.

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- G.D. no. 266/1993 concerning the branches and domains in which the self-governing administrations of national interest can function
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- Law no. 99/1999 concerning some measures for accelerating the economic reform
- Law no. 137/2002 concerning some measures for accelerating privatization
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Draft law from 2017 concerning some measures for protecting economic state interests
<http://www.cdep.ro/proiecte/2017/400/80/9/se621.pdf> (consulted on 30th of December 2021)

Law no. 173/2020 concerning some measures for protecting national interests in the economic activity

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