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THE ROLE OF THE NEW FINANCIAL INSTRUMENT IN REDEFINING OWNERSHIP OF A LIMITED LIABILITY COMPANY**

Summary: *In the legal system of the Republic of Serbia, a sui generis method of acquiring shares in a limited liability company has been accepted in the past several years as a successful corporate governance measure, known as the Employee Stock Ownership Plan (ESOP). This measure enables employees to become co-owners of the company in which they work. In comparative law solutions, this measure is typically reserved for employees. The Serbian legislator does not restrict the categories of persons who are entitled to use the ESOP model. The main difference from other comparative law solutions lies in the definition of two new legal institutes in the Companies Act: the financial instrument – the right to acquire shares, and the right to reserved own share. This paper analyzes this new financial instrument as a means for acquiring shares in a company. The author first examines the specific characteristics of this financial instrument and its similarities with other financial instruments in Serbian law, with specific reference to the ESOP model in comparative law. Then, the author analyzes the process of issuing and registering this financial instrument in the Central Securities Depository and Clearing House, as well as specific cases of its maturity. Next, the author focuses on the procedure for acquiring shares in the company, and the right to judicial protection for holders of this financial instrument and their heirs as a means of exercising the rights arising from it.*

Keywords: *preferential acquisition of shares, limited liability company, Employee Stock Ownership Plan (ESOP), financial instrument, right to acquire shares, employees*

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1. INTRODUCTION

Through various corporate governance measures, company management strives to retain top employees while simultaneously encouraging greater productivity in the future. One such measure is the so-called *Employee Stock Ownership Plan* (ESOP),[1] which was introduced into the legal system of the Republic of Serbia by amendments to the Companies Act (CA) in 2019.[2] The implementation of the ESOP model serves as an important method of "rewarding" selected individuals (usually employees) with the aim of boosting their productivity and enhancing the company's innovative capacity.[3] This legislative change introduced the ESOP into Serbian law as an option that enables employees to become co-owners of the company where they work. The Serbian ESOP model has some similarities with equivalent models and similar mechanisms in comparative law but it also entails significant differences.

One of the key features of the ESOP model accepted in Serbian law is its exclusive application to limited liability companies. For the implementation of this corporate governance method, the Companies Act introduced two new legal institutes: the financial instrument – right to acquire a share (Art. 151 of the CA), and reserved own share (Art. 157 of the CA). These institutes are specific to Serbian legislation and do not have direct equivalents in comparative law, which makes them a distinctive characteristic of Serbia's legislative practice.

Unlike the comparative law, Serbian law does not impose restrictions on who can acquire a share in a limited liability company through this method.[4] Using the new financial instrument envisaged for acquiring shares within the implemented ESOP model, the share holder can be not only an employee but also a member of the company, a business partner, or a third party.[5]

1 The ESOP model represents the employees' collective ownership share in the equity capital of the company where they work (Domagoj Hruška, Milivoj Marković and Najla Podrug, 'Privatization in Croatia – transition into the free market competition – Case study of RVR', (2007) 10(2) International Journal of Management Cases 71). This co-ownership is acquired through an intermediary entity, financed from the company's profits which are proportionally distributed among the employees (Jens Lowitzsch and Hashi Iraj, 'The promotion of employee ownership and participation', (Inter-University Centre for European Commission's DG MARKT 2014) 7). This model is not limited to small and medium-sized enterprises but is also applicable to large corporations, as evidenced by its presence in companies such as Amazon, Microsoft, Motorola, Hewlett-Packard, Intel, and others.

2 The Companies Act (Zakon o privrednim društvima), Official Gazette of the Republic of Serbia/RS, 36/2011, 99/2011, 83/2014 – another act, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021 (Articles 159a – 159ž). It is important to note that there is no unified regulation at the EU level on employee ownership in companies. The European Parliament Resolution of 14 January 2014 on social protection for all, including self-employed workers (2013/2111(INI)), called on member states to develop national ESOP models. Concurrently, the European Commission was encouraged to consider the possibility of introducing a European optional model which would provide a common legal framework for ESOPs within the EU. Such a model has not been established yet (Gema Tomás Martínez, 'En busca de una alternativa al trust para articular planes de participación financiera: Employee Stock Ownership Plans (ESOPS)', (2014) 6(2) Cuadernos Derecho Transnacional 259).

3 Yixuan Zhang, 'Employee Stock Ownership Plans and Corporate Innovation', 2023 2(1) Academic Journal of Management and Social Sciences 54.

4 Studies on the effectiveness of the ESOP model were conducted in the 1980s. The results showed that companies that granted shares to employees through this plan progressed significantly faster than those that did not (Corey Rosen and Michael Quarrey, 'How well is employee ownership working?', 1987 65(5) Harvard Business Review 129). The positive effects of the ESOP model on employee performance, and consequently on the company's overall business performance, have also been confirmed in more recent research (Ni Made Sunarsih and Ni Putu Shinta Dewi, 'Pengaruh Penerapan Employee Stock Option Plan (ESOP) pada Kinerja Keuangan dan Nilai Perusahaan di Bursa Efek Indonesia', (2018) 13(2) Journal Ekonomi Dan Pariwisata 116; Fitri Handayani and Yurniwati Yurniwati, 'Analysis of the influence of employee stock ownership program (ESOP) application of company financial performance', (2020) 20(2) Journal Ilmiah Universitas Batanghari Jambi 617).

5 The application of the ESOP model may be often found in the practice of family-owned businesses. When the owners of these companies wish to step back from the business (e.g., retirement), they use the ESOP model to sell their shares to employees and managers who have contributed to building the company's success in the market (Joseph Blasi, Douglas Kruse and Richard B

This broadens the scope of individuals eligible to acquire a share in a limited liability company, giving them the opportunity to become co-owners of the company. The decision on who will be the holder of the mentioned financial instrument, and thus have the right to acquire a share under a special regime,[6] rests solely with the company issuing the instrument.

2. THE ESOP MODEL IN COMPARATIVE LAW

In comparative law, there are various models of employee participation in the ownership of the companies where they work. The most dominant among these is the American ESOP, which has influenced the regulatory framework for employee ownership in European companies.[7] Regardless of the presence of legal regulations, companies or majority shareholders can always find alternative ways to include selected employees in the ownership structure (e.g., through agreements for the transfer of shares or stocks).

The European regulation began developing this area at the end of the 20th century[8] but there are still no unified rules on this matter.[9] Despite numerous differences, a common denominator among all employee ownership models regarding shares, either normatively defined or alternatively regulated, is the company's influence on improving the financial status of employees.[10] As such, the ESOP model is a good opportunity for successful companies to motivate employees[11] while simultaneously achieving tax benefits that reduce business costs.

Freeman, 'Broad-based employee stock ownership and profit sharing: History, evidence, and policy implications', (2018) 1(1) Journal of Participation and Employee Ownership 39).

6 Unlike the Serbian ESOP model, which encourages individual employee ownership in a company, this is not the case with most European ESOP models. Namely, the British Employee Ownership Trusts (EOTs), the Spanish Sociedades Laborales (SLs) and others rely on collective employee ownership, which is one of the key issues in European ESOP models (David Ellerman and Tej Gonza, 'A Critical Analysis of Different Forms of Employee Ownership: A Preprint Forthcoming in the International Review of Applied Economics', (2024) International Review of Applied Economics 14).

7 Through the ESOP model, a company enables employees to acquire a significantly larger number of its shares than their financial status would otherwise allow. This mechanism not only provides employees with the opportunity to become owners of a substantial portion of the company but also allows the company to invest in its more successful future by applying this corporate method (Fitri Ismiyanti and Putu Anom Mahadwartha, 'Does employee stock ownership plan matter? An empirical note', 2017 14(3) Investment management and financial innovations 388). The ESOP model encourages employees to be more loyal and productive, thus contributing to the long-term business growth and sustainability.

8 Patrick Collin, 'Actualité du régime fiscal des management packages, des BSPCE et attributions gratuites d'actions', (2016) 499 Revue Française de Comptabilité 33.

9 Milena Jovanović Zattila, 'Pravo zaposlenog na sticanje udela u društvu sa ograničenom odgovornošću', 2023 100(62) *Zbornik radova Pravnog fakulteta u Nišu* 59; Pilar Alguacil, 'Tax treatment of co-operatives in Europe under the State aid rules' in Brazda Johann, Dellinger Markus, Rößl Dietmar (eds), *Genossenschaften im Fokus einer neuen Wirtschaftspolitik* (Teilband IV: LIT-VERLAG GmbH & Co KG 2012) 1092. The issue of employee financial participation was first addressed at the European level in the Second Directive 77/91/CEE of 1976, which enabled employees to acquire shares. Later, the European Commission continued analyzing and promoting this employee ownership model through the PEPPER reports (Promotion of Employee Participation in Profits and Enterprise Results). (Martínez (n 2) 259).

10 A common characteristic of both the American and the European ESOP models is that employees do not purchase shares with their own funds; instead, this process is periodically conducted by the company itself (David Ellerman, Tej Gonza and Gregor Berkopec, 'European Employee Stock Ownership Plan (ESOP): the main structural features and pilot implementation in Slovenia', (2022) 2(12) SN Business & Economics, Springer 4). However, there are exceptions, one of which is found in the law of the Republic of Serbia, where employees pay for acquiring shares in the company through the ESOP model.

11 The implementation of an ESOP model can also serve as a defense mechanism against hostile takeovers of the company (Stoyu I Ivanov and Janis K Zaima, 'Analysis of the effects of ESOP adoption on the company cost of capital', (2011) 37(2) Managerial Finance 187).

A prerequisite for implementing an ESOP model in comparative law is the establishment of a fund by the company that wishes to allocate shares to its employees.[12] The fund serves as an intermediary entity through which the purchase of shares for employees is financed.[13] In the countries of the Anglo-saxon legal tradition, the intermediary entity for employees is a trust. In the countries of the European-continental legal tradition, the intermediary entity is a company which can take various legal forms, most commonly a privately owned limited liability company, an employee buyout fund, a cooperative, or a foundation. The choice of legal entity depends on corporate law practices, the goal agreed between the employer and employees, and the regulations in the given country.[14] Depending on how this fund is financed, ESOP model in the USA can be divided into those that are solely funded by the company and those that involve the company taking on debt to realize the plan.[15]

The first group comprises funds financed by the company from its own resources. The company makes one or more payments to the fund during the year, which are used to purchase shares for employees. These funds are usually allocated from profits, but this is not always the case as the company can pay the agreed amount to the fund even in a year when it has not made profit.[16] In that case, the company would pay the money from a designated reserve; in case the company did not have such a reserve, it would incur debt to fulfill this obligation.

When purchasing shares through the ESOP fund, priority is given to repurchasing shares from employees who are terminating their employment (e.g., due to retirement or contract termination).[17] If there are no such employees at that time, the company may issue a new package of shares that is transferred to the employee fund.[18] There are also various modalities of this type of ESOP model, where employees can participate alongside the company in repurchasing shares, although their participation is usually symbolic.[19] The absence of exter-

12 There was a problem in adapting this ESOP model to Spanish civil law because such an institution did not exist in their legal system. Given that trusts are not recognized in Spanish law, it was proposed to use a fiduciary fund as a mechanism similar to a trust. This concept is based on separating certain assets (in this case, shares) into a special fund that does not have the status of a legal entity but is managed by a fiduciary (trustee) for the benefit of the employees (Martínez (n 2) 262, 279).

13 In terms of the implementation of an ESOP model in Spanish law, permanent employees must hold more than 50% of the company's shares, while at least two employees may be included in the ESOP plan. Additionally, no single employee can own more than one-third of the company's capital (Jens Lowitzsch, John D. Menke, Denis Suarsana, Graeme Nuttall, Tej Gonza, Thibault Mirabel, 'Launching a European Employee Stock Ownership Plan (European ESOP)', (2024) 7(2) Journal of Participation and Employee Ownership 183).

14 Lowitzsch, *et al.* (n 14) 171.

15 In comparative theory, this division is referred to as *leveraged* and *non-leveraged* (Quan Zhou, Heyang Han and Junhua Han, 'Does employee stock ownership plan have monitoring and incentive effects? – An analysis based on the perspective of corporate risk taking', (2024) 10(2) Heliyon 11; Ivanov, Zaima (n 11) 187).

16 Niels Mygind, 'Three Models of Employee Ownership: Worker Cooperative, EOT and ESOP – Overcoming Barriers – Important Choices: Pros and Cons', (2023) 6(3) Journal of Participation and Employee Ownership 274.

17 In Spanish law, when an employee (shareholder) leaves the company, his/her shares must be offered for sale within the company, whereby non-shareholder employees having the pre-emption right (right to prior purchase). In the United Kingdom, employees are required to sell their shares to the Employee Ownership Trust (EOT) upon leaving the company. This mechanism enables the creation of a stock fund within the EOT, with the goal of ensuring 100% employee ownership in the future (Lowitzsch, *et al* (n 14) 180, 183).

18 Jovanović Zattila (n 9) 60; Lovorka Galetić and Sandra Rašić Krnjaković, 'Dioničarstvo zaposlenih u Hrvatskoj – stanje, mogućnosti i perspektive', (2004) 55(9–10) Ekonomski pregled 754.

19 In the law of the Republic of Serbia, the holder of a financial instrument participating in acquiring shares in a company through an ESOP model is obliged to make the corresponding payment, which entails paying the purchase price for acquiring the shares. However, as the law does not stipulate a minimum threshold for determining that price, it can be symbolic and theoretically amount to just 1 RSD. The majority of active financial instruments (the right to acquire shares) have a value of 1 RSD. For more,

nal borrowing for achieving the goals of the ESOP fund indicates the company's stability and financial solvency.

The second typical group of ESOP models is characterized by a certain complexity, as the purchase of shares for employees is financed through indirect borrowing by the company.[20] In this case, the ESOP fund takes out a loan from a bank, while the company guarantees its repayment. The funds obtained from the loan are used to purchase a new issuance of the company's shares or existing shares from shareholders.[21] The repayment of the loan is financed through contributions that the company periodically pays to the ESOP fund. As the loan is repaid, shares are gradually transferred from the temporary account of the ESOP fund to the individual accounts of employees.[22]

If the ESOP fund does not repay the loan, which may occur if the company fails to make the required contributions to the fund, the bank would turn to the company as the guarantor for the repayment of the loan. In addition to the bank, a loan can also be taken from the seller of the shares, which is a simpler way to finance the ESOP fund but comes with the challenge that the seller must agree to be paid over several years.[23] Given the aforesaid, external financing of the ESOP fund brings additional risks for the company which are not present in terms of funds that the company finances independently.

A common feature of the first and second groups of ESOP models is the possibility for the company to finance the fund from the dividends of shares intended for employees.[24] The company can use these funds only for shares that are in the ESOP fund but have not yet been transferred to employees. In this way, the company uses the dividends from the shares in the ESOP fund (which are intended for employees but have not yet been transferred to them) for the purpose of purchasing new shares that will be deposited into the fund. The shares acquired by employees through the ESOP fund are actually purchased by the company on their behalf. These shares are subject to restrictions regarding their disposal; thus, the company repurchases them when employees leave the company or retire.[25] The repurchased shares are then redistributed to new employees. In this way, the company retains full control over its share capital through the ESOP fund, preventing third parties from acquiring the shares of employees.[26]

see: Centralni registar depo i kliring hartija od vrednosti (2024). Aktivni FI registrovani u CR HoV–Pravo na sticanje udela (PSU)/Active Financial Instruments registered in the Central Securities Registry: Right to Acquire Shares (RAS), <http://www.crhov.rs/?Opcija=5&TipHartije=prava> accessed on 3 Oct. 2024.

20 In the United Kingdom, employees are not expected to provide financing; instead, the sole source of funds for acquiring company shares is the company's own profits. Bank loans can be used to accelerate payouts, but these loans must be repaid with interest from the company's profits (Lowitzsch, *et al* (n 14) 180).

21 In Spain, the fund has the status of a separate asset distinct from the company's and the fiduciary's assets. Employees are the beneficiaries, while the fiduciary manages the shares on their behalf (Martínez (n 2) 282).

22 Scott Rodrick, '*An Introduction to ESOPs*', (The National Center for Employee Ownership 2023) 13.

23 Ellerman, Gonza, Berkopec (n 10) 10.

24 In Spain, a possible solution for the ESOP model is also the establishment of a holding company to manage the fund. This holding company would protect the interests of employees and ensure professional management of the share capital. For more, see Martínez (n 2) 288.

25 Joseph S Adams, Barbara Baksa, Daniel D Coleman, Daniel Janich, Blair Jones, Scott Rodrick, Corey Rosen, Martin Staubus and Dan Walter, '*Equity alternatives, Phantom Stock, SARs, Restricted Stock, Performance Awards, and More*', *21st ed.,* (The National Center for Employee Ownership 2024) 256.

26 Jovanović Zattila (n 9) 61.

Although this is the main reason for the existence of the ESOP fund, comparative practice reveals other reasons with various implications for the company in the application of this corporate governance measure.[27] Regardless of diverse motives, a universal characteristic of all forms of the ESOP model is that they enable employees to become co-owners of the company. A common feature of both American and European ESOP models is the financial assistance provided by the company, which means that employees do not personally purchase shares from their salaries or other income.[28]

Considering the comparative law solutions, we can conclude that the Serbian legislator, when implementing the ESOP model in the CA, did not have a specific legislative example from comparative law. This observation is supported by fact that the explanation of the Proposal for amending and supplementing the CA does not refer to a specific legislative example, as well as by the fact that the legal institutes for implementing the ESOP model in Serbian law are not present in the legislation of other countries.[29]

3. CHARACTERISTICS OF THE FINANCIAL INSTRUMENT: RIGHT TO ACQUIRE SHARES[30]

The right to acquire shares falls under the category of new financial instruments in the legislation of the Republic of Serbia.[31] It is recognized as such in the Companies Act (Art.

27 The ESOP model has been used as one of the models of privatization in countries transitioning from a communist to a market economy. The diversity of motives, application goals, circumstances of adoption, and expectations of actors (owners, managers, and employees) has led to various outcomes. For example, companies relied on the ESOP in the context of privatization to address financial issues and preserve jobs, which is a short-term strategy, while successful companies used the ESOP as a long-term strategy for retaining talented employees and increasing their loyalty (Darko Tipurić, Srecko Goić and Marina Lovrinčević, 'The effects of ESOP implementation on attitudes towards work and on ownership culture development – case study of AD Plastic Solin', (2007) 10(2) International Journal of Management Cases 6).
The application of the ESOP model in privatization in the UK during the 1980s and 1990s was significant, especially in industries, such as bus and rail transport (Andrew Pendleton, John McDonald, Andrew Robinson and Nicholas Wilson, 'Patterns of employee participation and industrial democracy in UK ESOPs', (London School of Economics and Political Science. Centre for Economic Performance 1995) 2). A similar application of the ESOP model in the privatization process was present during the transitional period of the Croatian economy in the 1990s. This application influenced the fact that neither employees or companies nor society as a whole could properly assess the potential risks and benefits of this corporate strategy (Marija Kaštelan Mrak, Danijela Sokolić and Nenad Vretenar, 'ESOPs In Croatia – Some Recent Developments and Issues', (6th International Conference "Economic Integration, Competition and Cooperation", Lovran, Hrvatska 2007) 9; Hruška, Marković, Podrug (n 1) 70).

28 Lowitzsch, *et al* (n 14) 177.

29 See the Proposed Act on amending and supplementing the Companies Act of 9 October 2019. (<http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/2816-19.pdf> accessed 3 October 2024).

30 The designation of the new institute as a "financial instrument – the right to acquire a share", even thought it does not have the essential characteristics of a financial instrument under the Capital Market Act, is a terminological issue which should be addressed in future legislative amendments. Namely, the current legal term suggests that it serves as a basis for acquiring a share in a limited liability company, but this characteristic derives solely from the second part of the term – "the right to acquire a share". A legitimate question arises as to why the Serbian legislator assigned the term "financial instrument" to this institute when it is uninheritable, non-transferable, cannot be pledged as collateral, and cannot be traded on a regulated market (e.g., a stock exchange). Accordingly, *de lege ferenda*, this term should not be defined as a "financial instrument" but should instead be replaced with a more appropriate term, such as "instrument", "means", or a similar designation (e.g., "instrument – the right to acquire a share"). This amendment would help eliminate any potential confusion that may be caused by the existing term.

31 It is not a typical financial instrument traded on the capital market. This follows from Article 159v (para. 4) of the CA RS, which stipulates that: "the issuance of a financial instrument – the right to acquire a share is not considered a public offering within

151 of the CA), but not in the Capital Market Act.[32] Given that the Capital Market Act is a *lex generalis* for financial instruments in the Republic of Serbia, it is necessary to include this new financial instrument in its content.[33] A member's share in a limited liability company is not considered a financial instrument and is not traded on an organized capital market (e.g., the stock exchange). This new financial instrument is not equivalent to a member's share in the company but represents a means for the "privileged" acquisition of shares in the company.

The functional applicability of the right to acquire shares stems from another new institute envisaged in the Companies Act: the right to reserved own share (Art. 157 of the CA).[34] These two institutes are envisaged in the Companies Act for the purpose of introducing new ways of acquiring shares in companies within the Serbian legal framework.[35] They are complementary, meaning that the absence of one of them results in the inability to implement the ESOP model under Serbian law. The correlation between the right to acquire shares as a financial instrument and the reserved own share is rooted in a causal link which ultimately results in the privilege of acquiring shares in a limited liability company. From the acquired, formed, and reserved own share, the company issues financial instruments on the basis of which their holders acquire the right to obtain a share on a specified (maturity) date at a predetermined price. Thus, the complementarity of these institutes arises from the impossibility of issuing the financial instrument – the right to acquire a share unless the company has previously established a reserved own share.

This financial instrument is issued in dematerialized form, after which it is registered in the Central Securities Registry, Deposit and Clearing (hereinafter: the Central Securities Registry). The removal of this financial instrument from the Central Securities Registry will occur after the right to acquire shares in the company is exercised, or in the case of its annulment, i.e., if the right to acquire shares in the company is not realized (Art. 306 of the Capital Market Act).

the meaning of the law governing the capital market". Accordingly, the financial instrument – the right to acquire a share – is an atypical or *sui generis* financial instrument in the Serbian legal system.

32 The Capital Market Act (Zakon o tržištu kapitala), Official Gazette RS 129/2021. Article 2 § 1 (item 1) of the Capital Market Act (CM Act) provides a list of financial instruments, but the right to acquire shares is not explicitly mentioned among the financial instruments. It may be inferred through an extensive interpretation of the general clause in this provision: "(...) and all other derived financial instruments, financial indices, or financial measures that can be settled physically or in cash."

33 The legislator may also be criticized when considering the fact that the financial instrument of the right to acquire shares was regulated by the Act amending the Companies Act (2019), while the current Capital Market Act was adopted in 2021.

34 The reserved own share is a share that a limited liability company (LLC) acquires free of encumbrance from existing members of the company for the purpose of issuing the financial instrument: the right to acquire shares. The company cannot dispose of this acquired share in any other way, nor can it use it as collateral in any legal transaction (Art. 159a §§ 1–2 of the CA). Unlike the LLC's own share, a single-member LLC can have a reserved own share. The primary limitations of this new institute are that it cannot exceed 40% of the shares in the company's registered capital, and that it can only be formed from the shares of members whose contributions have been fully paid (Jovanović Zattila (n 9) 63). For more on the reserved own share, see: Jovanović Zattila (n 9) 62.–64; Milena Momčilov i Ana Knežević Bojović, 'Rezervisani sopstveni udeo i finansijski instrument – pravo na sticanje udela: mehanizmi za realizaciju ESOP-a u Republici Srbiji', (2024) 119 Arhiv za pravne i društvene nauke 113.–115.

35 The reserved own share is formed from the shares of existing members of the company solely for the purpose of issuing the financial instrument: the right to acquire shares. Based on the company's decision to issue it, this financial instrument can be allocated to an existing member of the company, an employee, or a third party. Regardless of the motivation, the allocation of this financial instrument, as incentive to exercise the right to acquire shares in the company, will result in greater commitment from the holders of this financial instrument and their loyalty to the company and its operations (Johnston Birchall and Lou Hammond Ketilson, 'Resilience of the cooperative business model in times of crisis,' (International Labour Organisation 2009) 12).

Considering its status and legal nature, we can identify several essential properties of this financial instrument. First, the issuer of this financial instrument can only be a limited liability company.[36] While this financial instrument is also applicable to LLCs, the possibility of acquiring shares in a joint-stock company has already been envisaged in the Serbian legislation.[37]

Second, this financial instrument is non-transferable and is issued in the name of a specifically designated person.[38] In this way, the company ensures that only the person to whom the financial instrument is issued can exercise the rights arising from it. We consider this legal restriction to be appropriate, given that the ultimate goal of issuing financial instruments is for the shares in the company to be acquired by those individuals whom the company itself wishes to include in its ownership.[39] According to this view, the relationship between the company and the holder of the financial instrument represents a *de facto* personal obligation, an *intuitu personae* relationship.[40]

Third, the right to acquire shares as a financial instrument grants its holder the right but not the obligation to acquire a share from its issuer. The holder can exercise this right on a specified date, i.e. the maturity date, which cannot be earlier than the date of registration of this financial instrument.[41]

Fourth, the acquisition of shares in the company through the financial instrument is burdensome. Since this method of acquiring shares in the company is a form of incentive measure, it is expected that the financial instrument will be set at an amount lower than the market

36 The justification for such a restriction can be found in the fact that the majority of small and medium-sized companies (particularly in the IT sector) are registered in the form of a limited liability company and they face the most prevalent issue of employee turnover. By adopting the plan for acquiring shares in the company, the legislator aimed to address the existing problem but did not impose a restriction that the holders of this financial instrument, and subsequently the acquirers of shares in the company, can only be employees.

37 In a joint-stock company, there was already the possibility for the company to allocate shares to employees if the own shares are acquired for that purpose, provided that such a possibility is stipulated in the articles of association and that reserves for that purpose are secured (Article 282 § 4, Item 2 of the CA). Within the latest amendment to the Companies Act (2023), companies are allowed to allocate a maximum of 5% of shares to employees during the business year, compared to the previous limit of 3%. Unlike the distribution of own shares, employees can acquire shares of the company they work for through the process of conditional increase of share capital (up to 3% of the company's share capital), provided that this possibility is stipulated in the company's articles of association (Article 301 § 2 of the CA). For more on the privileged acquisition of shares, see: Vuk Radović, 'Pružanje finansijske podrške za sticanje svojih akcija', (2007) 12 Pravni život 183.–212.
In the law of the Republic of Croatia, a company can acquire a maximum of 10% of its own shares in order to allocate them to employees, provided that reserves for this purpose are secured and that these shares are transferred to employees within one year of their acquisition (Article 233 of the Companies Act of RC). Employees can also acquire shares of the company they work for through the process of conditional increase of share capital, but not exceeding 10% of the company's share capital. See: Article 313 of the Companies Act of the Republic of Croatia (Zakon o trgovačkim društvima), Narodne novine, broj 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 125/2011, 152/2011, 111/2012, 68/2013, 110/2015, 40/2019, 34/2022, 114/2022, 18/2023, 130/2023.

38 In addition to being non-transferable, this financial instrument cannot be subject to pledge or inheritance (Article 159v §2 CA RS), and thus is not considered a security (Nebojša Jovanović, Vuk Radović i Mirjana Radović, '*Kompanijsko pravo: pravo privrednih subjekata*', 3. izd. (Pravni fakultet Univerziteta u Beogradu 2023, 385).

39 Momčilov, Knežević Bojović (n 34) 117.

40 Jovanović Zattila (n 9) 64. The perception of these entities as *intuitu personae* is based on the discretionary right of the company to decide to whom it will grant this financial instrument, thus allowing the selected individuals to acquire or increase their share in the company in a privileged manner. It is reasonably assumed that the selection of individuals will be based on their contribution to the company's business in the previous period, but the financial instrument may be granted to someone else as well. For this reason, the discretionary decision of the company to issue the financial instrument is *de facto* a personal obligation between the issuing company and the future holder of this instrument.

41 Mirko Vasiljević, *Komentar Zakona o privrednim društvima: sa odabranom sudskom praksom i registrom pojmova: prema stanju zakonodavstva od 31. avgusta 2023. godine*, (Službeni glasnik 2023) 364.

value of the shares. Given that the law does not specify the criteria for determining the price of the financial instrument, the company may set its symbolic value at one dinar.[42] The company allows the acquisition of a share in the company at a price lower than the market value by means of the financial instrument – the right to acquire a share because this financial instrument is issued from the reserved own share that the company acquired without charge from a member of the company. Thus, the company first acquires the reserved own share by having the members transfer parts of their shares to it without charge, and then the company issues financial instruments on the basis of which their holders acquire the right to obtain a share in the company. The right to acquire a share arising from the financial instrument constitutes part of the reserved own share, but the holders of these financial instruments do not acquire the reserved own share; rather, they directly acquire a share in the company.

Fifth, according to the law regulating the capital market, the issuance of this financial instrument is not considered a public offering (Article 159v §4 of the BC Act). From this legal provision, it follows that the members of the company will not have the right of first refusal to purchase shares acquired based on this financial instrument. Additionally, they will not acquire the pre-emptive right (of prior purrchase) at the moment when financial instruments are issued, on the basis of which their holders will obtain the right to acquire a share in the company. This view is based on the fact that it is a *sui generis* method of acquisition and that general rules pertaining to the transfer and acquisition of shares in a company do not apply to it.

4. PROCEDURE FOR ISSUING FINANCIAL INSTRUMENTS

4.1. DECISION TO ISSUE A FINANCIAL INSTRUMENT – THE RIGHT TO ACQUIRE SHARES

The decision to issue a financial instrument - the right to acquire shares is made by the general assembly of the company. The assembly's authority to make this decision may be delegated to another body only if specified in the founding act and not by any other company document (Art. 159g §1 of the Companies Act RS).[43] The law does not specify the required majority

42 The majority of active financial instruments (rights to acquire shares) have a nominal value of 1 RSD. Some have values of 50 RSD, 100 RSD, and 1,000 RSD, but there is one financial instrument with a value of 275,400 RSD. For more, see: Centralni registar depo i kliring hartija od vrednosti (2024). Aktivni FI registrovani u CR HoV–Pravo na sticanje udela (PSU)/Active Financial Instruments registered in the Central Securities Registry: Right to Acquire Shares (RAS), <http://www.crhov.rs/?Opcija=5&TipHartije=prava> accessed 3 October 2024.
Given that the value of the company is variable, and thus the value of its shares, it may happen that the market value of the shares at the time the financial instrument matures is lower than the amount the holder of the instrument is obligated to pay to acquire the shares, even though this was not the case at the time the instrument was issued. This situation could have a demotivating effect on the holder of the financial instrument to exercise the right. In this context, comparative practice indicates negative consequences of applying an ESOP model in cases where there is a change in price to the detriment of the person offered the opportunity to acquire shares in the company (Yohanes Cores Seralurin, Rudiawie Larasati and Victor Pattiasina, 'Institutional Ownership as Moderation of Execution Price Relationship and Employee Stock Ownership Program (ESOP): A Company Performance Evaluation', (2020) 2(2) The International Journal of Social Sciences World 95).

43 Considering that the law does not specify other possible bodies, it follows that it could be the director in a unitary management structure or the supervisory board in a dual management structure (Vasiljević (n 41) 365). However, from the imperative provision defining the competence of the general assembly, it does not follow that a decision on the issuance of this financial instrument can be made by any other body (see: Article 200 of the CA).

for the assembly to adopt this decision, in which case the general provision for decision-making applies, requiring a simple majority of the votes from the members present, unless the founding act provides for a two-thirds majority (Art. 211 §1 of the CA). When making this decision, a member of the company or related parties will not have the right to vote if the right to acquire shares as a financial instrument is issued to those individuals (Art. 214 of the CA). Namely, when granting the financial instrument, the company's assembly actually decides *ad personam* who it will be granted to. If the decision is made to grant this financial instrument to a member of the company, that member will not have the right to vote at the assembly meeting, as this would result in a conflict of interest. In addition to that member, voting rights will also be restricted for his/her related persons (e.g. next of kin, spouse, common-law partner, adoptive parent or adopted child, other individuals living in the same household, and other persons specified in Article 62 of the CA RS) if they are members of the company.[44]

Decisions made by the company's bodies will depend on whether the law prescribes their mandatory content or allows the company to regulate them dispositively. For the decision of the company's assembly or another body issuing this financial instrument, the law prescribes mandatory elements.[45]

For a person to acquire the right to obtain shares, or for a company to make a decision to issue a financial instrument and determine its holder, it is necessary for the future holder to provide consent.[46] In addition to consent on the acquisition, the future holder of the financial instrument and the company as the issuer must reach an agreement on the maturity date of the financial instrument, the purchase price of shares, and the conditions under which the financial instrument may be canceled before the maturity date.[47] Accordingly, a factual agreement between the company as the issuer and the future holder of the financial instrument is necessary, not only in terms of its issuance but also in terms of its content pertaining to the rights and obligations of the issuer and the holder of this financial instrument.[48] Otherwise, if the future holder does not agree with the elements of the company's decision to issue the financial instrument, the right to acquire shares arising from the financial instrument will not be exercised.[49]

44 See Article 62 of the CA RS.

45 The mandatory content of the decision on the issuance of a financial instrument – the right to acquire shares *ex lege* consists of eight elements. For more, see: Article 159g § 2 of the Companies Act RS.

46 In German law, not all employees are eligible to acquire a share in the company through an ESOP model but only those who have been employed in the company for more than one year. In the UK, this restriction is set at 18 months (Lowitzsch, *et al.* (n 14) 184).

47 The Bank of Zagreb (*Zagrebačka banka*) was the first in the region to include employees in its ownership structure through an ESOP model. Thus, only employees who meet the following criteria could acquire shares: 1) employees of Zagreb Bank, but not employees from the Zagreb Bank group; 2) permanent employees, including interns with a university diploma; and 3) employees who have not been subject to disciplinary penalty since 1 January 1995, and whose performance has not been rated below the established minimum (Srećko Goić, 'Employees' attitudes towards employee ownership and financial participation in Croatia: Experiences and cases', (1999) 21 Journal of Business Ethics 150).

48 When the holder of the financial instrument exercises the right and acquires a share in the company, there is no increase in the share capital; instead, there is a transformation of the reserved own share into a member's share in the company. The reserved own share held by the company is reduced by the percentage of the company that the holder of the financial instrument acquires, without changing the company's share capital.

49 On the basis of possession, the holder of the financial instrument, acquires the right to acquire a share in the company on the maturity date and after paying the price determined at the time of its issuance. If the company granted the financial instrument to a person who is not interested in acquiring a share in the company or who does not agree with the conditions for acquisition, the right arising from this financial instrument would not be exercised.

In contrast to the comparative law solutions, the Serbian legislator does not apply the ESOP model to all employees but envisages the company's discretionary right to decide *ad personam* who will be able to acquire a stake in the company over time.[50] This is a good aspect of the Serbian ESOP model because it encourages employee competitiveness, with the aim of increasing the company's productivity and effectiveness.

4.2. REGISTRATION OF FINANCIAL INSTRUMENTS

Once the company makes the decision to issue this financial instrument, it is obliged to submit a request to the Central Securities Register for its entry and registration to the legal holders. It is important to note that the company cannot submit the request directly; for this purpose, it must engage one of the members of the Central Securities Register.[51] The time limit for submitting the request is five working days from the date the decision to issue the financial instrument is made. This deadline is preclusive, meaning that after its expiry, the company loses the right to registration (Art. 159g § 5 of CA). The law explicitly stipulates that after the expiry of this period, the company loses the right to register the issued financial instrument - the right to acquire shares with the Central Register. The Central Register monitors this deadline *ex officio*.

Taking into account the process of forming the reserved own share, as well as the subsequent issuance and registration of the financial instrument – the right to acquire shares, it follows that the process of implementing the ESOP model under Serbian law is extremely complicated. The complexity of this process stems from multiple referrals and interactions with the Business Registers Agency and the Central Registry; as a result, a justifiably low number of companies have included their employees or business partners in the company's ownership structure. Although companies may directly interact with the Central Registry on the matter of registration of the financial instrument, due to the complexity of this process, they frequently hire a broker, thus incurring additional costs for the company. For this reason, the process should be simplified by excluding the Central Registry and involving only the Business Registers Agency. In order to simplify the process, it is also necessary to amend the financial instrument- the right to acquire shares in the next legislative amendment, which will be discussed later on in this paper.

50 The new proposal for establishing a unified ESOP model for the EU, originating from Slovenia, stipulates that all employees who meet certain conditions related to their length of service will acquire shares in the company (Lowitzsch, *et al.* (n 14) 182).

51 Vasiljević (n 41) 364. In the process of registering the decision to issue financial instruments, the Central Register carries out the transfer of financial instruments from the issuer's emission account to the account of the holder of the financial instrument – right to acquire shares. This holder's account is maintained by the Central Register (Milan Marinković, 'Participacija zaposlenih u vlasništvu kompanije: Vodič za ESOP strukture u Republici Srbiji. Finansijski instrument – pravo na sticanje udela', (ICT HUB-a i Inicijative Digitalna Srbija 2023) 15).

5. SPECIAL CASES OF MATURITY OF THE FINANCIAL INSTRUMENT

One of the mandatory elements of the company's decision to issue a financial instrument is the due date. Its role is significant in the process of acquiring shares in a company *sui generis*, as it corresponds to the obligation of the holder of the financial instrument to pay the price for acquiring the shares, and subsequently the obligation of the company (the issuer of the financial instrument) to submit a registration application to the Business Registers Agency RS.[52] Exceptionally, in legally prescribed cases, the right to acquire shares may become payable even before the due date. The Companies Act lists three such cases: liquidation of the company, status changes, and changes in legal form. Upon their occurrence, the financial instrument's due date is advanced, and the payment deadline will be 40 days from the date of the early due date occurrence (Art. 159e § 2 of the CA).[53] This will certainly not affect the rights and obligations arising from the financial instrument for its holder.[54]

Cases that lead to an early maturity date of the financial instrument cannot be concluded until the company regulates the status of the existing financial instrument and the reserved equity share from which it arises.[55] Given that extraordinary procedures cannot be concluded until the company regulates the status of the aforesaid institutes, this is simultaneously a prerequisite for their completion. In this regard, a distinction is made between the liquidation process (on the one hand) and the process of status change and change of legal form (on the other).

The first difference is that a decision to delete the company from the Central Securities Register cannot be registered after the voluntary liquidation process has been conducted until the status of the financial instrument is resolved in one of the following two ways: 1) payment of the price by the financial instrument holder, which is followed by the registration of their acquisition of shares in the company, and 2) cancellation of the financial instrument due to non-payment by its holder and cancellation of the unutilized reserved own share, which will lead to a reduction in the company's capital.

52 The Business Registers Agency of the Republic of Serbia is a legal entity (government agency) that manages registers as a unique centralized electronic database, including the register of business entities.

53 As this deadline is set as fixed, it is considered to be exclusive, and if the holder of the financial instrument does not pay the price determined by the decision on its issuance by the expiration of this period, they will lose the right to acquire shares in the company.

54 The payment of the price cannot be viewed as the primary obligation of the holder of the financial instrument, considering that the holder has not committed to such an obligation anywhere. The issuance of the financial instrument is not based on a contractual relationship between its issuer and the holder (which does not exist at any stage of the incentivized acquisition process of shares in the company), but rather on the previously made decision of the company to issue the financial instrument – the right to acquire shares, which is registered with the Central Register. If the holder of the financial instrument wishes to exercise the right to acquire shares in the company that arises from it, they will be obligated to pay the price within the period specified by the decision on its issuance.

55 The company is required to notify all holders of the financial instrument in writing about the occurrence of the early maturity date no later than the next working day from the date of the announcement of the initiation of liquidation, the draft agreement on status change, the draft plan for the division of the company, or the proposal for a decision on the change of legal form. The notification must include a call for payment of the price for acquiring shares in the company within 40 days from the occurrence of the early maturity of the financial instrument (Art. 159e § 3 of the Companies Act RS). Although this provision establishes an obligation for the company, the law does not specify a sanction in case of non-compliance.

In addition to these two options, there is another method regarding the regulation of the status of the financial instrument and the reserved own share for the registration of the decision on status change and the decision on change of legal form.[56] If the company has an unutilized reserved own share, it can choose not to cancel it but to use it as a new reserved own share from which it will issue new financial instruments after the status change or change of legal form has been carried out.[57]

There is a legal obligation that the draft contract on status change and the proposal for the decision on change of legal form shall mandatorily include information about the reserved own shares and the financial instrument – the right to acquire shares, which is the second difference.[58]

6. ACQUISITION OF SHARES IN THE COMPANY

If the holder of the financial instrument has duly paid the price within the prescribed period determined by the decision on its issuance, either after the maturity date or the early maturity date, all conditions for acquiring an ownership share in the company have been fulfilled.[59] In this case, the company is obliged to submit a request to the Central Securities Registry to remove all financial instruments issued from the same reserved own share, within 30 days from the expiry of the payment deadline specified in the decision on their issuance, to enable the exercise of the right to acquire the share in the company (Art. 159d § 5 of the CA).

Then, the company has a period of 60 days, from the expiry date for the payment of the price, to submit a registration application to the Business Registers Agency so that the holder of the financial instrument may acquire a share in the company, using the reserved own share.[60] This deadline is not preclusive, which means that even after it passes the holder of

56 This difference is reflected in the fact that, in the case of liquidation, the company that issued the financial instrument ceases to exist. In contrast, in the case of a status change or change of legal form, the company can choose not to cancel the unutilized reserved own share but to use it for issuing new financial instruments after the change has been carried out.

57 Vasiljević (n 41) 373.

58 In this case, the mandatory elements of the draft contract on status change, the division plan, and the proposal for the decision on change of legal form shall include the following information: 1) the reserved own share; 2) the number of issued financial instruments; 3) the percentage of shares that the holder of the financial instrument has the right to acquire in relation to the reserved own share; and 4) the amount of the price that the holder of the financial instrument must pay to the company for acquiring the shares and the deadline within which they are obliged to make the payment (Art. 159e § 5 of the CA).

59 By exercising the rights from the financial instrument, its holder acquires an ownership share in the limited liability company, along with all the rights and obligations arising from it. Comparative practice shows that there are no known cases in which individuals (employees) who acquired shares in the company through an ESOP model significantly influenced or prevented the adoption of any general assembly decision using their voting rights (Adams, *et al* (n 25) 253). This implies that individuals who acquire shares in this way attain the status of minority members.

60 When registering the acquisition of a share in the company based on a financial instrument, it is important to distinguish whether the holder of the financial instrument is an existing member of the company or a third party. If the holder is an existing member, their share in the company will increase after the registration is completed. If the holder of the financial instrument is a third party, they will become a new member of the company upon registration and will acquire a proportional share in the capital according to the decision on issuing the financial instrument, using the reserved own share.

the financial instrument retains the right to seek judicial protection to enforce their right to acquire a share in the company.[61]

The acquisition of a share in a company on the basis of this financial instrument represents a privileged way of acquiring ownership rights in the issuer company's equity capital.[62] Although the share is often acquired at a price lower than the market value (which is often symbolical), this method of acquisition is not considered financial assistance from the company.[63] Specifically, the law expressly prohibits providing any form of financial assistance to its members, employees, or third parties for acquiring a share in the company (Art. 159d § 9, in conjunction with Art. 154 of the CA).[64] In any case, this method of acquiring shares in the company is *de facto* financial support from the company to the holder of the financial instrument, given that shares are acquired under more favorable conditions. Concurrently, it does not constitute *de jure* financial support from the company, in accordance with the CA. Therefore, although a company cannot (directly or indirectly) provide any form of financial support for the acquisition of shares in the company, acquiring shares through a financial instrument at a price lower than the market value is not considered financial support from the company for the acquisition of its shares. Besides the legal prohibition, another reason this type of acquisition is not regarded as financial assistance is that the reserved own share is acquired free of charge, and from it, financial instruments – the right to acquire a share – are issued. Thus, the company does not allocate its own funds nor provide any support to the holders of financial instruments to acquire an ownership stake in the company's equity capital.[65]

Given the complexity of implementing the ESOP model under Serbian law, it is necessary to simplify the procedure by excluding the role of the Central Registry and allowing it to be conducted exclusively before the Business Registers Agency. This could be achieved during the next legislative amendment by replacing the financial instrument-the right to acquire a share with a new institute which may be designated as the right to "a temporary share in the company". This institute would retain all the characteristics of the existing financial instrument, whereby the holder of the temporary share would acquire full ownership of the share upon

61 In contrast to the Serbian ESOP model, where the holder of the financial instrument becomes an individual owner of shares in the company, in the United Kingdom, employees become collective owners of shares in the company after the implementation of the ESOP model through the EOT (Employee Ownership Trust) fund. Collective ownership is also present in other European legal systems, which is a key difference from the American ESOP model which envisages individual ownership, similar to the solution adopted by the Serbian legislator (Lowitzsch, *et al* (n 14) 180).

62 Acquiring ownership in a company through the ESOP model is a significant tool for strengthening corporate governance culture (Phan Huy Hieu Tran, Thu Ha Tran and Nicolas Aubert, 'Esops, Efficiency, and Transparency: A European Banking Perspective', Elsevier, (2023), available at SSRN: <https://ssrn.com/abstract=4679302> 21).

63 The formal legal absence of financial support from the company for share acquisition does not diminish the fact that employees acquire a share in the company through the ESOP model in a privileged manner. By being included in the ownership structures, it is expected that employees will develop a sense of belonging to the company, which will, in turn, improve the efficiency of their future work (Dini Latif Verdenia, Nurlan Ahmedov and Anton Abdulbasah Kamil, 'Efficiency Comparison between the Employee Stock Option Plan (ESOP) and Non ESOP Companies', (2023) 21 Review of Economics and Finance 1876).

64 In contrast to the rights envisaged in the Serbian legislation, under Belgian law, the ESOP model can only pertain to employees of the company (Lise Stas, 'What are the most significant effects of the Employee Stock Option Plan (ESOP) on the Belgian entrepreneurial landscape?', (Louvain School of Management, Université catholique de Louvain, 2022) 28).

65 The reserved own share is formed by the company when its existing members transfer parts of their shares to it without compensation. This share can only be acquired from the shares of members who voted in favor of the decision to acquire the reserved own share at the general assembly meeting. In other words, a member who did not vote for this decision cannot be forcibly deprived of a part of one's share without compensation. Additionally, a single-member limited liability company can also form a reserved own share, meaning that the sole member of the company can allocate a portion of ones share for this purpose.

the maturity date and payment of the agreed price determined at the time of its issuance. This solution would eliminate procedural obstacles to acquiring shares through the ESOP model in Serbian law, as well as the terminological confusion arising from the fact that the existing institute is referred to as a financial instrument although it lacks the fundamental features of a financial instrument.

7. TAX TREATMENT OF THE ESOP MODEL IN SERBIAN AND CROATIAN LAW

The tax treatment of acquiring shares in a company via a financial instrument- the right to acquire shares is regulated by the provisions of the Personal Income Tax Act.[66] According to Article 18 (para.1, item 11) of this Act, employees will not pay tax when selling shares acquired without compensation or at a discounted price from the employer.[67] Considering that the employee cannot acquire a share via the financial instrument without compensation, but rather at a nominal price that must be at least one dinar, the employee will be exempt from paying tax when transferring the share acquired in this way.

This tax relief is not unconditionally granted to the employee, as it is necessary to ensure that certain legally defined circumstances do not occur. These special circumstances primarily concern the condition that the employee does not alienate the share acquired through the financial instrument before the expiry of two years from the date of its acquisition.[68] Additionally, the employer or a party related to the employer must not buy back the share acquired through the financial instrument from the employee. The last legal condition states that the employee's employment relationship with the employer must not terminate before the expiry of two years from the acquisition of the share through this financial instrument (except in cases of termination of employment irrespective of the employee's and employer's will, in accordance with the law regulating employment, termination due to the right to old-age pension in accordance with pension and disability insurance law, or termination due to establishing an employment relationship with a party related to the employer). If any of these circumstances occur, the employee's income stemming from the alienation of the share acquired through the financial instrument will be considered taxable income at a rate of 10% (Article 16, Income Tax Act RS).

66 Income Tax Act RS (Official Gazette of the RS, No. 24/2001, 80/2002, 80/2002 – other law, 135/2004, 62/2006, ..., 94/2024, 101/2024 – harmonized din. amounts, and 8/2025 – harmonized din. amounts).

67 In Spain, a Sociedad Laboral (SL) can apply for exemption from taxes and notary fees incurred during the transfer of assets to the SL in the initial stage of operations. Additionally, worker cooperatives are exempt from paying: 1) notary fees when the worker cooperative acquires goods or rights from a company where the majority of its workers were previously employed; 2) taxes related to the establishment of the company, transformation from SLL (Sociedad Anónima Laboral) to SAL (Sociedad Anónima Laboral) or vice versa, as well as capital increases (with an additional tax relief of 99% on taxes related to the transfer of shares to employees) (Lowitzsch, *et al* (n 14) 183).

68 In Austria, since 2018, the employees who acquire shares of their employer company free of charge or at a subsidized price with a value up to 4,500 euros annually are exempt from paying taxes and social security contributions, provided that the shares are managed through a fiduciary arrangement by an employee ownership fund and remain in the fund until the end of employment (Lowitzsch, *et al* (n 14) 182).

In terms of tax incentives, the Serbian legislator's approach to the ESOP model is also specific because all holders of the financial instrument who acquire shares in the company will not have the same tax treatment. Under Serbian law, the ESOP model can apply both to existing members of the company who are not employees and to third parties to whom the company grants the financial instrument - the right to acquire shares.[69] Unlike employees, all other acquirers of shares in the company through the financial instrument will not benefit from tax incentives, as these are exclusively provided for employees.

In the law of the Republic of Croatia, the tax treatment of employees acquiring shares in a limited liability company (LLC) was less favorable in previous years because it was treated as income from employment. In contrast, the acquisition of shares in a joint-stock company (JSC) by employees was taxed as capital income. However, this unfavorable tax treatment for LLCs has been changed with the latest amendment to the Income Tax Act,[70] effective as of 1 January 2024). Pursuant to the current legislation, Article 68 of the Income Tax Act stipulates that the acquisition of shares in an LLC and the acquisition of shares in a JSC by employees will be taxed in the same way.[71] This change significantly expands the application of the ESOP model to LLCs because the allocation of shares to employees no longer requires the obligation to pay contributions for pension and health insurance on the determined value of shares but only income tax on capital gains at a rate of 12%.[72]

8. RIGHT TO JUDICIAL PROTECTION

The company, as the issuer of the financial instrument, is obliged to submit the appropriate request to the Central Securities Register and the Business Registers Agency to register the holder as the owner of the share in the company's capital. If the company fails to fulfill this obligation, the holder of the financial instrument cannot independently submit a registration request. Instead, the holder has the right to judicial protection regarding the rights arising from the financial instrument. In that case, the holder can file two types of lawsuits with the competent commercial court: 1) a lawsuit for establishing membership status – if they wish to acquire a share in the company and determine the percentage of the share that belongs to them based on the financial instrument; and 2) a lawsuit for determining compensation – if they want to receive compensation for the value of the share they were supposed to acquire, in case the company failed to meet its obligation.[73] These lawsuits are filed if the company

69 In the United Kingdom, in order to encourage employee ownership, tax incentives include the exemption from capital gains tax and income tax exemption (Lowitzsch, *et al.* (n 14) 180).

70 Income Tax Act (Zakon o porezu na dohodak, Narodne novine RH, broj 115/2016, 106/2018, 121/2019, 32/2020, 138/2020, 151/2022, 114/2023, Article 68.

71 The allocation of shares and other assets by a company to the employee ownership fund is exempt from the 2.5% capital transfer tax, which normally applies to the transfer of assets to private foundations, as well as from corporate income tax. However, this tax relief does not apply to limited liability companies. The only criticism of the Austrian regulation related to the Employee Ownership Foundation (EOF) is that its application is strictly limited to joint-stock companies (Lowitzsch, *et al.* (n 14) 183).

72 Income Tax Act, Article 70. A major drawback of the German ESOP model regulation is the lack of tax incentives. This certainly affects the weaker implementation of this employee participation plan in the ownership structures of companies.

73 The holder of the financial instrument who has duly paid the amount for acquiring a share in the company has the right to file a compensation lawsuit to determine and claim the value of the share that was to be acquired in case the company failed to register the acquisition of the share.

does not register the acquisition of the share within 60 days from the expiry of the payment deadline.[74]

If the company unjustifiably cancels the financial instrument before the due date, its holder has the right to compensation equal to the market value of the share they could have acquired on the due date of the financial instrument, minus the amount of the price they would have been obligated to pay.[75] In this case, the holder of the financial instrument has the right to file a lawsuit for the compensation of the value of the share that would have resulted from that financial instrument if the company fails to pay the prescribed compensation.[76]

Unlike voluntary liquidation, where the procedure cannot be concluded unless the status of the financial instrument – right to acquire shares is previously regulated, this is not the case in forced liquidation.[77] Specifically, the financial instrument ceases to exist on the day the company is removed from the register due to the conclusion of the forced liquidation procedure and is officially deleted from the Central Securities Register. In this case, the holder of the financial instrument becomes a creditor of the members of the company that has been removed from the register. After the company is removed from the Business Entities Register, the members of the removed company are liable for the company's obligations up to the value of the assets they received in exchange for the shares they held in the company. Exceptionally, the controlling member of the limited liability company still has unlimited joint and several liable for the company's obligations even after the company is removed from the register. The creditors' claims against the members of the company expire within three years from the date the company is removed from the register. Accordingly, holders of financial instruments have the right to pursue a claim in court for the payment of compensation equal to the market value of the share they could have acquired on the due date of the financial instrument, provided that the price has been paid.[78]

As the financial instrument belongs to the person specified in the decision on its issuance and is characterized by non-transferability and non-inheritability, a question arises regarding what happens to the financial instrument if its holder passes away before exercising the right to acquire shares in the company. In this context, two situations are possible: 1) If the holder of the financial instrument has paid the price after its due date but passed away before the company registered their ownership rights with the Agency for Business Registers, the heirs

74 The 60-day time limit is not calculated from the day the holder of the financial instrument makes the payment, but from the expiry date of the prescribed payment deadline. Specifically, the payment deadline for acquiring the share in the company cannot be shorter than 15 days or longer than 30 days from the due date (Article 159g § 2, item 5 of the CA), or within 40 days from the occurrence of the early due date (Article 159e § 2 of the CA).

75 The financial instrument – right to acquire a share can be canceled when its holder fails to make the payment to the company within the prescribed period and before the due date, provided that the conditions from the issuance decision are met (Art. 159d §1, item 2 of the CA). However, there is a risk of abuse by the company, which may decide to cancel the financial instrument even though there are no legal grounds for such action. In that case, the decision could be accepted by the Central Securities Register, which will issue a certificate of cancellation for the revoked financial instrument. The Central Securities Register does not examine the merits of the decision made but only its formal correctness.

76 In this case, the holder of the financial instrument may initiate proceedings for the compensation of the value of the share but cannot challenge the company's decision to revoke their financial instrument (Vasiljević (n 41) 376).

77 For more on the reasons for initiating the procedure of forced liquidation, see Article 546 of the CA.

78 If the holder of the financial instrument has not paid the price for acquiring shares in the company, he will have the right to claim compensation equal to the market value of the shares he would have been entitled to acquire on the day the company was removed from the register due to the conclusion of the forced liquidation procedure, reduced by the amount of the price specified in the decision on the issuance of the financial instrument (Art.cle 159ž, § 5 of the CA).

will have the right to compensation from the company; 2) If the holder of the financial instrument passed away before the due date or after the due date of the financial instrument but before making the payment for the acquisition of shares, the heirs do not acquire the right to claim compensation from the company (Art. 159z, § 3 of the Companies Act).[79]

From this perspective, it follows that the rights of the heirs are conditional and limited. The condition for inheritance is that the holder of the financial instrument must have died after the due date and must have paid the price for acquiring shares in the company. The limitation concerns the inability of the heirs to acquire the share that belonged to the deceased holder of the financial instrument. They can only demand compensation equivalent to the market value of the share that the deceased holder would have had the right to acquire on the due date of the financial instrument. The authorized persons who can assert a claim against the company or file a lawsuit against it in this context are those designated as heirs to the property of the deceased holder of the financial instrument by a final inheritance decision.

Considering all the aforesaid situations regarding the exercise of the right to acquire shares, judicial protection can be sought through two types of lawsuits: a lawsuit for establishing membership in the company, and a lawsuit for compensation for the value of shares. Both lawsuits aim to establish the rights arising from the financial instrument, but they differ in their subject matter and purpose.

8.1.1. A LAWSUIT FOR ESTABLISHING MEMBERSHIP STATUS

If the company has not registered the acquisition of shares based on the financial instrument within 60 days from the expiry of the payment deadline, the holder of that financial instrument who has duly paid the acquisition price has the right to file a lawsuit with the competent commercial court.[80] The claim will pertain to establishing the membership status and the percentage of shares that the plaintiff is entitled to based on the financial instrument. The right to file the lawsuit is limited by a preclusive period of six months from the expiration of the deadline in which the company was obligated to register the acquisition of shares based on the financial instrument (Art. 159ž § 1 of the CA).[81] If the court accepts the lawsuit, the

79 The justification for denying the heirs' right to compensation from the company, if the holder of the financial instrument has not paid the price for acquiring shares in the company, arises from the general characteristics of this financial instrument. The right to acquire shares in the company that derives from the financial instrument is not binding, meaning that the holder has the freedom to decide whether to exercise this right. The payment of the price by the holder of the financial instrument represents a clear intention and consent to acquire a share and become a member of the company. If the holder of the financial instrument passes away before paying the price, their heirs will not have the right to compensation from the company for the share that would have belonged to the deceased holder of the financial instrument. The heirs will only have the right to compensation if the holder of the financial instrument has made the payment, thus expressing the intention to acquire a share in the company.

80 The holder of the financial instrument will not have the right to judicial protection if he made the payment after the expiry of the payment deadline specified in the decision on the issuance of the financial instrument. In this case, the company, as the issuer of the financial instrument, will be obligated to return the paid amount to the holder of the financial instrument, in accordance with the rules on unjust enrichment (The Civil Obligations Act/Zakon o obligacionim odnosima, Official Gazette of SFRY 29/1978, 39/1985, 45/1989 – decision of the CC, and 57/1989, Official Gazette of FRY 31/1993, Official Gazette of SCG 1/2003 – Constitutional Charter, and Official Gazette of RS, no. 18/2020, Art. 210). If the company fails to fulfill this obligation, the holder of the financial instrument has the right to file a lawsuit against the company (*condictio sine causa*) for the recovery of unjustly acquired funds (lawsuit for unjust enrichment).

81 If the company submits a registration application for the acquisition of shares after the expiry of the stipulated 60-day period from the expiry of the payment deadline, the holder of the financial instrument will not have the right to file a lawsuit to establish membership status. In such a case, he may file a lawsuit for damages due to the period during which they were deprived

company, as the issuer of the financial instrument, will be required to submit a registration application based on the final judgment, allowing the holder of the financial instrument to acquire ownership shares in the company.[82]

8.1.2. A LAWSUIT FOR COMPENSATION OF SHARE VALUE

Unlike the lawsuit for establishing the membership status in the company, which can be filed on only one basis, there are multiple grounds for filing a lawsuit for compensation of share value. First, if the company has not registered the acquisition of shares based on the financial instrument within 60 days from the expiry of the payment deadline, the holder of the financial instrument who has duly paid the price for acquiring shares in the company has the right to file another lawsuit. This lawsuit is filed against the company, the issuer of the financial instrument, for determining compensation based on the market value of the shares that the holder would have the right to acquire on the due date of the financial instrument (Art. 159ž §2 of the CA). This alternative option allows the holder of the financial instrument to file a lawsuit for compensation if they do not wish to obtain membership status in the company.

Second, if the company unjustifiably cancels the financial instrument before its due date, the holder of the financial instrument has the right to sue for compensation for the value of the shares that would arise from it. In this procedure, the plaintiff is required to prove that the cancellation of the financial instrument was executed contrary to the conditions defined in the decision regarding its issuance. Upon accepting the claim, the court will determine the compensation in the amount of the market value of the shares that the holder would have had the right to acquire on the due date of the financial instrument, reduced by the amount of the price that they would have been obliged to pay (Art. 159ž § 4 of the CA).

The third ground exists if the holder of the financial instrument has paid the price after its due date but has died before the company registered his ownership rights with the Business Registers Agency. In this case, the heirs acquire the right to file a lawsuit against the company for compensation in the amount of the market value of the shares that the deceased holder would have had the right to acquire on the due date of the financial instrument.

The fourth ground is present if the financial instrument ceases to exist on the day the company is removed from the register due to the completion of the compulsory liquidation process. A holder who has paid the price stipulated in the decision on the issuance of the financial instrument has the right to file a lawsuit for compensation in the amount of the market value of the shares they would have had the right to acquire on the due date. If the holder of the financial instrument has not paid the price, they have the right to file a lawsuit for compensation in the amount of the market value of the shares they would have had the right to acquire on the day the company is removed from the register, reduced by the amount

of the exercise of membership rights in the company. The claim will pertain to compensation for the right to participate in the company's profits from the expiry of the period in which the company was obligated to carry out the registration of the financial instrument holder's acquisition of shares until the day when he acquired membership status in the company.

82 Exceptionally, if the company does not comply with the final judgment, the plaintiff, as the acquirer of shares, will be authorized to submit an application for the registration of his share acquisition in the company. See: Article 5a § 2, Item 1 of the Act on the Registration Procedures in the Agency for Business Registers (Zakon o postupku registracije u agenciji za privredne registre), Official Gazette of the Republic of Serbia, 99/2011, 83/2014, 31/2019, and 105/2021).

of the price from the decision on the issuance of the financial instrument (Art. 159ž § 5 of the CA). This lawsuit is not filed against the company, as it has been removed from the register, but against the members of the company who will be liable in accordance with the legal form of the company (Art. 548 of the CA).

The acceptance of the lawsuits based on all the previously mentioned reasons will result in awarding compensation in the amount of the market value of the shares related to the plaintiff's financial instrument or that of the plaintiff's heirs. Given that the market value of shares in a limited liability company is more of an exception than a rule, it will be determined by an expert in the field of economic and financial expertise during the court proceedings.[83] In this case, a difference arises regarding the date that will be considered relevant for determining the value of the share. On the one hand, if the holder of the financial instrument has paid the price for acquiring the share in the company, the expert will determine the market value of the share on the financial instrument due date. On the other hand, if the holder of the financial instrument has not paid the price for acquiring the share, the expert will determine the market value of the share on the date when the company was removed from the register due to the termination of the forced liquidation process. In that case, the holder of the financial instrument will be paid the amount of the determined market value of the share, reduced by the price they were supposed to pay for acquiring the share in the company.

The right to file this lawsuit is limited by a preclusive period of six months, calculated from the day the company was required to register the acquisition of shares based on the financial instrument. On the other hand, the Companies Act RS does not stipulate a deadline for heirs to file a claim for compensation of the value of shares arising from the financial instrument of the deceased holder, nor a deadline for filing a claim in case the company (issuer of the financial instrument) rejects the claim. In this context, if the company responds negatively to the submitted claim, the heirs of the deceased holder of the financial instrument may file a lawsuit for damages within three years from the date of the company's negative response, in accordance with the general rules of the Civil Obligations Act (Art. 376 § 1 of the Civil Obligations Act). This term relates to non-contractual (tort) damage, which is certainly applicable in this case considering that there is no contract between the issuing company and the holder of the financial instrument regarding its issuance. Namely, the company's assembly decides to whom it will allocate this financial instrument, thereby creating a legal basis for potential liability in case of damage.

9. CONCLUSION

More than four years ago, the Companies Act RS envisaged the acquisition of shares in a limited liability company *sui generis*, through the implementation of the ESOP model in the law of the Republic of Serbia. However, its application in practice is not widespread. Accepting this innovation represents a good strategic decision for companies but the process of its

83 When filing the lawsuit, the holder of the financial instrument will not be able to specify the exact amount of compensation they are seeking from the company (or from the members of the company in case of its deletion from the register following the conclusion of the compulsory liquidation procedure). Instead, they will be required to provide an estimated value of the subject of dispute and state that a more precise amount of compensation will be determined later, after an expert assessment by a specialist in the field of economics and finance.

implementation is complex and requires the application of newly adopted institutes without which this method of acquiring shares in the company cannot be executed. A particular complexity is associated with the new financial instrument – the right to acquire shares, which is exclusively applicable in limited liability companies. Bearing in mind that the current Capital Market Act RS was adopted after the financial instrument – the right to acquire shares had already been introduced into Serbian legal system, it was necessary for this financial instrument to find its place within the provisions of the Capital Market Act, which has not occurred yet.

The Companies Act does not prescribe any restrictions on who can be the holder of this financial instrument, and thus a potential acquirer of shares in the company. In this regard, with reference to the comparative law, the Serbian legislator may take into consideration that inclusion in the ownership structures of a company through an ESOP model represents a right of employees. Given that the ESOP model is not uniformly applied in comparative law, each state gives its ESOP model a specific identity through its implementation in its legislation. Such a solution is quite acceptable as it refers to a broader group of individuals, including employees. By applying this procedure, companies would enable certain employees to acquire shares in the company at a privileged price after a certain period, provided they do not leave during that time.

Due to the status of non-transferability and non-inheritability, and considering that it is not a security, the financial instrument – right to acquire shares is tied only to the individual who has been privileged by the company in order to acquire a share in the company's equity capital in terms of preferential acquisition of shares. The basis for the creation and allocation of this financial instrument is not found in a contract but in the company's decision, which is preceded by the formation of a reserved equity share. Regardless of this, it is reasonably assumed that the decision to issue this financial instrument is preceded by the oral consent of its future holder, or a *de facto* agreement between the issuer and the acquirer of the financial instrument. Unlike the solutions in Serbian legislation, the prerequisite for the application of the ESOP model in European and American legal norms and practices is the establishment of a fund that will finance the purchase of shares for employees. The fund is financed from the company's resources or through external borrowing, with the company guaranteeing the repayment of that debt.

In its decision to issue the financial instrument, the company sets one or more conditions under which the financial instrument may be revoked, in which case the holder loses the right to acquire shares in the company. If the financial instrument is unjustifiably revoked by the company's decision, the holder would have the right to judicial protection. The legal claim would not relate to the annulment of the decision in question; instead, it would entail a request for compensation of the market value of the shares which the holder of the financial instrument would have been entitled to, or a request to establish the membership status in the company. Although it is a non-inheritable financial instrument, heirs will have the right to file a lawsuit for the compensation of the market value of the shares that the holder of the financial instrument would have had the right to acquire on the date of maturity, provided that he has paid the price for acquiring shares in the company after maturity.

In response to the question why this method of acquiring shares in a limited liability company has not gained wider acceptance in practice in Serbia, it may be due to the complexity of the procedure as well as the lack of awareness of its advantages among entrepreneurs. The right to acquire shares, as a financial instrument, grants its holder certain rights, whereas the Companies Act provides adequate judicial protection for exercising this right.

Yet, for the ESOP model to be more applicable in practice in the Republic of Serbia, the existing regulations should be amended. First, it is necessary to remove the terminological deficiency caused by the designation "financial instrument – the right to acquire a share", which it contains the term "financial instrument" even though it does not have the fundamental characteristics of such an instrument. Thus, the Companies Act should be amended by designating a new institute "a temporary share in the company", which would replace the existing financial instrument. In addition to the terminological change, it is also necessary to simplify the procedure. In this context, it is necessary to exclude the authority of the Central Register and to ensure that the entire registration procedure is carried out through the Business Registers Agency. *De lege ferenda*, this new institute would have all the characteristics of a financial instrument – the right to acquire shares, and its registration would be conducted at the Business Registers Agency, in the same manner as for the reserved own shares. It would simplify the procedure, eliminate the terminological drawbacks, and reduce administrative costs, thus enhancing the applicability of the ESOP model in the Serbian economy.

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ULOGA NOVOG FINANCIJSKOG INSTRUMENTA U REDEFINIRANJU VLASNIŠTVA KOD DRUŠTVA S OGRANIČENOM ODGOVORNOŠĆU

Sažetak

U pravu Republike Srbije već nekoliko godina prihvaćen je *sui generis* način stjecanja udjela u društvu s ograničenom odgovornošću, kao uspješna mjera korporativnog upravljanja poznata kao *Employee Stock Ownership Plan* (*ESOP*). Njome se omogućava zaposlenima da postanu suvlasnici kompanije u kojoj rade. Za razliku od poredbenopravnih rješenja, gdje je ova mjera uglavnom rezervirana za zaposlene, srpski zakonodavac ne ograničava kategorije osoba na koje se *ESOP* model može odnositi. Glavna razlika u odnosu na druga rješenja iz poredbenog prava ogleda se u definiranju dvaju novih pravnih instituta u Zakonu o privrednim društvima: financijski instrument – pravo na stjecanje udjela i rezervirani vlastiti udio. U ovom radu analizira se novi financijski instrument kao sredstvo za stjecanje udjela u društvu. U uvodnom dijelu autorica sagledava specifičnosti ovog financijskog instrumenta i njegove sličnosti s drugim financijskim instrumentima u srpskom pravu, s posebnim osvrtom na *ESOP* model u poredbenom pravu. Zatim se analizira postupak izdavanja i registriranja ovog financijskog instrumenta u *Centralnom registru, depou i kliringu hartija od vrednosti*, kao i posebni slučajevi njegove dospjelosti. U završnom dijelu rada, autorica razmatra dostupnost tužbi imateljima i nasljednicima ovog financijskog instrumenta kao sredstva za ostvarivanje prava koja iz njega proizlaze.

Ključne riječi: *povlašteno stjecanje udjela, društvo s ograničenom odgovornošću, ESOP, financijski instrument – pravo na stjecanje udjela, zaposleni*

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