Summary

The Old - New Legacy of the General Partnership and Limited Partnership. Observations on the Rules for the ipso iure Dissolution of General Partnership and Limited Partnership

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The study examines the case where a member of a general partnership or limited partnership dies and the partnership becomes a single-member partnership, although the law requires it to have at least two members. Until recently, the law dealt with this situation by providing that the company would automatically cease to exist after a certain period of time. This paper describes the recent change and the legal policy reasons for it.
Keywords: *general partnership, limited partnership, death of one of the members, ipso iure dissolution, Civil Code*

In this paper we deal with a very important issue, the rules for the *ipso iure* dissolution of general partnerships and limited partnerships which become single-member companies due to the death of one of the members (a natural person). The currently applicable Civil Code, Act V of 2013, § 3:152, contains the following rules in this regard:

Section 3:152. § [Reduction of the number of members of a partnership to one]
(1) If the number of members of a general partnership drops to one, within six months from that time the partnership shall report to the court of registry the admission of a new member to the partnership, or shall resolve the transformation, merger, dissolution without succession of the partnership.
(2) Until the new member is registered, until the transformation, merger, dissolution without succession is carried out, or failing this until a liquidator is appointed the sole remaining member is entitled to resolve matters falling within the competence of the meeting of members, and shall be regarded as the partnership's executive officer, provided that he is able to meet the requirements pertaining to executive officers.

This rule was introduced in this form by Article 14 of Act XCV of 2020 and has been in force since 1 July 2021. Prior to that, the Civil Code provided as follows:

Section 3:152. [Dissolution of a partnership without succession]
(1) Apart from the general cases of dissolution of a legal person without succession, a general partnership shall be dissolved without succession if only one partner remains, and the partnership does not apply for the registration of a new member at the court of registry within a preclusive period of six months from that time.
(2) Until the new member is registered, or failing this until the time of dissolution without succession or until a liquidator is appointed the sole remaining member is entitled to decide matters falling within the competence of the meeting of members, and shall be regarded as the partnership's executive officer, provided that he is able to meet the requirements pertaining to executive officers. If no such member remains in the partnership, the court of registry shall appoint a supervising commissioner for the partnership.

Below we review the main elements of the legislation, starting from the version that is no longer in force. We will briefly analyse some of the essential features of the rule, which has more than three decades of history in Hungarian company law.[1] The cited rule, which has not been in force since 01.07.2021, may be considered modern in its possible wording, but it contains few differences compared to the relevant provisions of the first company law, Act VI of 1988. However, the economic role and impact of this rule may be significant.

The 1988 Civil Code regulates this issue as follows:

Section 46
(1) An economic association shall cease to exist when
a) the period of time stipulated in the articles of association (statutes) has expired, or another condition for termination has been realised;
b) the economic association decides to terminate its existence, without a legal successor;
c) the economic association consolidates with another economic associa-

1 On the rules of the limited liability company and the limited partnership in relation to the preparation of the currently effective Civil Code, see Wellmann Gy., *A közkereseti* és *a betéti társaság szabályozása az* új *Polgári Törvénykönyvben.* Gazdaság és Jog, 2011/7-8., 10-13. pp.

tion, merges into another economic association, de-merges or is transformed into another form of economic association;

d) the number of the members of the economic association - with the exception of a limited liability company and a company limited by shares - is reduced to one, and a new member is not registered with the court of registration within six months;

e) the court of registration declares the economic association terminated;

f) the court dissolves the economic association in the course of liquidation proceedings;

g) provisions of this Act relating to the various forms of economic association so stipulate.

The second Gt, Act CXLIV of 1997, reads as follows:

Section 98

(1) If, as a result of termination of membership, the number of the members of the partnership decreases to one, the partnership shall terminate only in the event that no new members are reported to the court of registration within a three month non-appealable deadline.

(2) If a partnership terminates on the grounds set out in subsection (1), a person in charge of voluntary dissolution shall be appointed by the court of registration.

A procedural, but very important difference is that the second Gt does not have a six-month deadline, but it contains a three-month-long one.

The legislation that preceded the present Civil Code, Act IV of 2006, reads as follows:

Section 105

(1) If, as a result of termination of membership, the number of the members of the partnership declines to one, the partnership shall cease to exist only in the event that no new members are reported to the court of registry within a six-month forfeit deadline.

*(2) * Until the new member is admitted, or until the opening of involuntary de-registration procedure the sole remaining member shall be considered to be entitled to manage and represent the partnership, even if did not have this entitlement previously..*

The essence of the regulation has not changed, but there are some differences in the location of the rule within the framework of the act and also

there are divergences in some details (e.g. deadlines), as well. It is clear from the three acts on companies and the new Civil Code that in the case of general partnerships and limited partnerships, if and to the extent that, for essentially any reason, the number of members is reduced to one and no new member is registered with the Companies Court within a specified period, i.e. the company is not again a partnership with more than one member, the company will *ipso iure cease* to exist. As it will be explained later, the reason for the reduction to one person is in most cases the death of the natural person.

For the sake of interest, it is also worth referring to the following provisions of Article XXVII of Act No. of 1875, the Commercial Code (Kt.):

§ 98 *The general partnership shall be dissolved:*
2. if a member dies, unless it has been contractually agreed that the company shall be continued with the heirs of the deceased member.

Thus, the rules of the Kt. expressly allowed the parties to agree in the partnership agreement that the partnership would continue to operate in the event of the death of a member with his or her heir and that the partnership would not be dissolved. Under the current version of the Civil Code Section 3:149 on the other hand, provides that the heir of a deceased member or, in the case of a legal person, the legal successor of a dissolved member may join the company by agreement with the other members of the company.

In the following, we will examine the legal policy rationale for the *ipso iure* termination rule described above and the practical and other problems that may have arisen in its application.[2]

The general partnership and the limited partnership are, as in other European legal systems, the basic type of partnership.[3] It is undoubtedly the

2 On the development of company law in the earlier company laws and its relationship with the Civil Code, see in particular Sándor I.: *A társasági jog fejlődése az első Gt-től a Ptk-ba való integrálásáig.* Gazdaság és Jog, 2019/2. 13 - 18. pp. For an overview of the relationship between company law and the Civil Code, see Sárközy T.: *Társasági jog a Polgári Törvénykönyvben. Előnyök, hátrányok, vitás kérdések.* XXI. Század Tudományos Közlemények 2012/27. http://epa.oszk.hu/02000/02051/00027/pdf/EPA02051_Tudomanyos_Kozlemenyek_27_2012_aprilis_017-023.pdf (Last accessed: 26.05.2021).
3 In German and Austrian law, these forms of company are known as *offene Handelsgesellschaft* or *Kommanditgesellschaft*, while in Anglo-Saxon law they are known as *partnership* or *general partnership.* For more details see Sándor I.: *A társasági jog története Nyugat – Európában.* Budapest,

case that the limited partnership is the more popular of the two forms of company in Hungary. According to the records of the Hungarian Central Statistical Office, as of 31 December 2018, 122,126 limited partnerships and 3096 general partnerships were registered companies, while in 2018, 2171 limited partnerships and 13 general partnerships were established.[4] However, in view of the fact that the Civil Code provides for the application of many of the rules of the general partnership to limited partnerships, it is also relevant to analyse the relevant provisions of the Civil Code.

In the case of limited liability companies and joint-stock companies, the personal contribution and personal involvement of the members is of fundamental importance for historical reasons and due to the nature of the operation of the companies. This is also reflected in the assumption of liability, since while in the case of general partnerships all members are jointly and severally liable for the company's obligations with their own assets if the company's assets are insufficient to settle the debt, in the case of limited partnerships this applies only to the full members.[5] For example, BH 2013.130 states that a member of a general partnership is liable for the debts of the partnership that have fallen due up to the date of termination of his membership.[6]

Looking at the above-mentioned legislation, it can be seen that all deadlines are terms of limitation, the failure of which will result in the dissolution of the company, which will take place in a compulsory liquidation procedure, in the context of a supervision procedure. The legal policy rationale for the regulation is based on the need to ensure the security of turnover and to protect creditors.

It is important to point out that in Hungary, small businesses in the form of general partnerships and limited partnerships are typically owned by private individuals and operated with the personal involvement of private individuals, although many economic project investments are often carried out in the form of general partnerships, as legal entities are also very often found among the members of the general partnership.[7] When a general partnership

2005. pp. 200 - 203 and 241 - 250.

4 See https://www.ksh.hu/docs/hun/xftp/gyor/gaz/gaz1812.pdf (Last accessed: 26.05. 2021)

5 On certain forms of liability in company law, see Sándor I.: Észrevételek *a társasági jogban a felelősségi alakzatokról*. Jogtudományi Közlöny 65 (2010) pp. 147 - 152.

6 See in this context Osztovits A. (ed.): *A Polgári Törvénykönyvről szóló 2013.* évi *V. törvény* és *a kapcsolódó jogszabályok nagykommentárja. I.* Budapest, 2014. p. 553.

7 A relatively large number of family businesses in Hungary operate as limited

is used for the purpose described above, i.e. to carry out a project investment, the personal involvement of the members of the general partnership is overshadowed as a characteristic. It is clear that it is the unlimited pecuniary liability of the members that is decisive in this novel application of the general partnership.

As mentioned above, the termination of a general partnership and a limited partnership takes place in most cases due to the death of a natural person member. Analysing the rules, we can see that a conflict of laws arises in the event of the death of one of the members. The six-month limitation period starts to run on the death of the member. Although Hungarian law is based on the principle of *ipso iure* succession, this raises a number of difficulties in practice. After the death of the testator, a long probate procedure, possibly lasting more than a year, may have to be carried out, and the notary may not even wish to include a share in a limited liability company or a partnership in the estate, as he or she considers that it cannot form part of the estate and should be treated separately from the estate.

If there is unity of wills between the parties, heirs or beneficiaries, this is not a problem. The technical solution to avoid the six-month limitation period in this case is to register a new member with the consent of all the heirs. A problem arises if there is no agreement of wills between the heirs and an attempt is made to reach an agreement during the probate proceedings. The threat of a six-month limitation period may force a settlement between the parties, even against their original will. If the heirs are unable to reach an agreement, the six-month time-limit, which is not very long, and its restrictive nature, may lead to agreements which the parties would not otherwise have concluded, since it may create situations which are open to abuse by the heirs in the settlement of other assets in the estate, which is essentially a legal rule. In our view, a possible solution to this situation could be if and when the above time limit would not be six months, but would last

partnerships. For more information on family businesses and the types of companies and operational characteristics that are otherwise specific to them, see: Arató, Balázs: *A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspektusai*; in: Glossa Iuridica 7:1-2.; pp. 141-177; 2020, see also: Arató, Balázs: *The Legal Institutions of Asset Preservation and Asset Transfer in Hungary*; in: Karoli Mundus 1:1; pp. 229-240.; 2021., or Arató, Balázs: *A családi vállalkozások jellegmegóvásának eszközei* (Instruments to preserve the character of family businesses), in: Gazdaság és Jog 3-4.; 2023.; Orac; p. 31-38., and Arató, Balázs: *Családi vállalkozások nemzetközi kitekintésben: Jogalkotási irányok, jó gyakorlatok*; in: GLOSSA IURIDICA 7: 3-4; pp. 263-285., 23 p. (2020).

until the final conclusion of the probate proceedings.[8] (Of course, the current legislation created another solution as it is discussed by this paper.)

It may also be the case that there remains only one member of the company who is not otherwise a director of the company. In such a case, it is necessary to provide for the appointment of a managing director until the company's articles of association are amended or, in the absence of an amendment, until the company is dissolved without succession or until the liquidator is appointed. According to the provisions of the Civil Code, in such a case, a member who meets the statutory requirements for executive officers is deemed to be an executive officer. In this case, an external member of the company may also be a managing director. Here we find an important exception to the Civil Code. 3:156, which precisely states that an external member cannot be a managing director of the company.

Previous case law also recognises the possibility mentioned above. According to the case-law of the BH 2007.82, following the order of liquidation proceedings, the managing member of a limited partnership may appoint an external person to carry out the tasks falling within the scope of the liquidation.

The termination of a limited partnership for a special reason is approached from a procedural point of view by the decision of the Metropolitan Court of Appeal No.14.Cgtf. 44.579/2009/2. This decision states that in the case of a limited partnership that is forced to cease to exist for a statutory reason, the occurrence of the condition for termination and the date of termination are determined by the commercial court in a special procedure for the supervision of legality. If the court is informed of the occurrence of the condition for dissolution in the course of its own proceedings, it will take its decision of its own motion.

It is also important to refer to the decision of the Debrecen Court of Appeal Cgtf.III.30.394/2017/2, which is also important for the practice with regard to the dissolution of the company. Based on the decision, the Court of Registration may order the payment of a supervisory fee by the company whose illegal operation is established by the Court of Registration in the course of the legal supervision procedure. Where the sole purpose of the supervision procedure is to determine the dissolution of a company which has ceased to exist under the law and to order the opening of compulsory liquidation proceedings, the company subject to the procedure cannot be ordered to pay the company court supervision fee.

8 See: Boóc Á.: Új Polgári Törvénykönyv, változó polgári perrendtartás: *régi-új kérdések és régi-új válaszok.* Jogi Tájékoztató Füzetek, (ed: Szakál R,) Budapest, 2016. 85 – 91. pp.

In the literature, the question has been raised as to whether § 3:158 of the Civil Code can be considered as a potentially dispositive provision. Marianna Dzsula highlights the following in this regard. The parties may not derogate from the 6-month limitation period set out in Article 3:158 (1) of the Civil Code. Article 3:158 (1) of the Civil Code, as well as the provisions of the Civil Code cited in the appeal, do not regulate the legal relationship between the members of the association and the legal personality of the company. Article 3:152 (1) of the Civil Code sets a time limit for the submission of a declaration to the registration authority, thus it concerns a so-called external regulatory issue. Article 3:4 of the Civil Code does not extend to this legal provision and the time limit laid down therein. Therefore, the members may not derogate from this deadline in the articles of association; this provision of the Civil Code, which essentially affects the status of the company, is a cogent provision.[9]

Pursuant to the above-quoted decision of the Debrecen Court of Appeal - and analysed in detail by Marianna Dzsula -Article 3:158 of the Civil Code is expressly cogent, from which derogation is not possible. In this connection, it is worth referring to the opinion of the academic Lajos Vékás, who explained that the regulations on corporate law of the Civil Code contain more provisions of a cogent nature than the rules of contract law.'[10]

From the recent judicial practice it is worth referring to the case BDT2018. 3887. This decision states that the fact that the heir acquires the estate *ipso iure* on the death of the testator does not mean that the heir of the deceased member automatically becomes a member of the limited partnership. Membership is not the object of the estate, and its creation requires the agreement of the heir and the other members and an amendment of the partnership agreement. The absence of proof of heirship is not in itself an obstacle to the agreement and the amendment of the articles of association. The decision also stipulates that the existence of a full member and an outside member is a defining characteristic of a limited partnership, and that the termination of either of these two positions will result in the dissolution

9 See Dzsula M. *A gazdasági társaságok szervezeti és működési kereteit meghatározó diszpozitív és kógens szabályok.* Polgári Jog, 2017/10.; Dzsula M.: *Miért kógens a diszpozitív?* Céghírnök 2014/2. 3-5. pp. For a summary, see:
Auer Á.: *Gondolatok a Ptk. III. könyvének diszpozitív szabályozásáról* OPUSCULA CIVILIA 2016/3. https://antk.uni-nke.hu/document/akk-uni-nke-hu/2016_-evi-3_-szam_opuscula-civilia.original.pdf (Last accessed 26.05.2021).
10 Vékás L. : *A diszpozitív szabályozás elve* és *az elv kérdőjelei a gyakorlatban.* Magyar Jog 2018/7-8. p. 388.

of the limited partnership by operation of law. This legal consequence does not apply if the members duly amend the articles of association within six months and notify the Company Court. The decision also states that the six-month time limit for notifying the restoration of the conditions for operating as a limited partnership is a term of limitation.

In the same context, a relatively recent decision of the Constitutional Court, the decision No 3366/2020 (X. 22.) on the rejection of the constitutional complaint, is also worth mentioning.[11] The petitioner claims that the Civil Code. The petitioner invokes Article 3:158 of the Civil Code, which, in his view, is contrary to Article II and Article XIII(1) of the Fundamental Law. According to the petitioner, Article 3:158(1) of the Civil Code infringes Article II of the Fundamental Law because it is unfair that the entry of the heir into the company is subject to an ad absurdum agreement with a third person.

The Constitutional Court rejected the petition. In its ruling, it referred to an earlier decision of the Constitutional Court, No. 3222/2019 (X.11.) on the rejection of a judicial initiative, which dealt with the same problem. The Constitutional Court emphasised that, in the absence of a fundamental change of circumstances, there is no place for a constitutional complaint for a declaration of unconstitutionality or for an examination of the unconstitutionality of a judicial initiative, based on the same legal provision and the same right guaranteed by the Fundamental Law, and in the same constitutional context. As regards the substance of the question, the Constitutional Court has defined its practice in relation to Article XIII as follows: *"The legal concept and content of property are not generally defined directly by the Fundamental Law, but by other legal norms. However, the scope and content of the rights protected by the Fundamental Law must be determined on the basis of the Fundamental Law. ... The petitioner considered that the Civil Code should be applied to the person who becomes a member of the limited partnership (the heir of the deceased member or a person other than the heir). The petitioner considered that Article 3:158 (1) of the Civil Code infringed the right to property.*

However, the Constitutional Court has already pointed out above that - contrary to the petitioner - a new member, in particular the heir of a deceased member, is always entitled to join the company on the basis of an agreement with the other members of the company, in accordance with the Articles 3:155 and 3:149 of the Civil Code, which also apply to limited partnerships. Thus, upon the death of a member, his share in the company is not automatically

11 For the full text of the order, see: http://public.mkab.hu/dev/dontesek.nsf/0/ca4f24822207e57cc125853c005c9530/$FILE/3366_2020%20AB%20order.pdf (Last accessed: 25.05. 2021)

transferred to the heir by operation of law. Since the heir does not automatically acquire the company's shares, the Civil Code does not provide for the automatic transfer of the shares. Analysing Article 3:158(1) of the Civil Code, it cannot be stated that this provision restricts the heir's acquired property (company share) and thus the right to property in the constitutional sense. In the case of a person other than the heir, the challenged provision does not constitute a restriction of property already acquired and thus of the right to property." (Abh. [19]-[20])". Accordingly, the Constitutional Court has interpreted Article 3:158 of the Civil Code, and the Constitutional Court did not find a violation of human dignity or of the constitutional protection of property in relation to the petition, which is in line with the subject of the present study.

The Act XCV of 2021 amending Act V of 2013 on the Civil Code (the Amendment Act) affects company law to a relatively large extent. The Amendment Act actually also affects important substantive legal issues, but in certain places it provides detailed rules and clarifies certain terms. The Amendment Act was published in the Hungarian Gazette (Magyar Közlöny). It was submitted to Parliament in May 2021 in the form of a bill *(Bill No. T/16207.)* amending Act V of 2013 on the Civil Code, which contains a relatively detailed General Explanatory Memorandum.

Until 1 July 2021, the situation was that the dissolution of the one-person general partnership and the one-person limited partnership occurred after six months. The legislator's intention was that these companies, which by their very nature could not operate as one-person companies, could only operate with one member for a transitional period, which of course also served legal security purposes.

In this respect, the explanatory memorandum of the Act states that it removes the limitation period of six months and does not link the legal consequence of the dissolution of the company to the failure to comply with this obligation. In the future, in the event of a failure to comply, the company will be subject to a legal supervision measure by the registry court and will only be dissolved if the measure is unsuccessful. Obviously, delay will not go unpunished by the application of the legality supervision procedure, but we all know that the seriousness of dissolution and the legality supervision measure are not comparable, since the *ipso iure* dissolution of a company is done with the claim and legal effect of finality, whereas in the context of a legality supervision procedure, there is still a lot that can be done, including the disclosure that there is a succession dispute between the parties and that the restoration of the legal operation is therefore pending. The room for manoeuvre for the company and its surviving members is therefore much wider in this case.

On the basis of the above, Article 3:152 of the Civil Code, already quoted above, but quoted here for the sake of clarity:

Section 3:152. § [Reduction of the number of members of a partnership to one]

(1) If the number of members of a general partnership drops to one, within six months from that time the partnership shall report to the court of registry the admission of a new member to the partnership, or shall resolve the transformation, merger, dissolution without succession of the partnership.

(2) Until the new member is registered, until the transformation, merger, dissolution without succession is carried out, or failing this until a liquidator is appointed the sole remaining member is entitled to resolve matters falling within the competence of the meeting of members, and shall be regarded as the partnership's executive officer, provided that he is able to meet the requirements pertaining to executive officers.

The importance of the issue is shown by the fact that the number of general partnerships and limited partnerships is still very high, including the forced companies created in the 1990s as well as successful micro-enterprises in many professions, e.g. in the health sector, such as doctors, where it is of course possible that a member may be eliminated at any time, for example due to death, and in such cases the fact that partnerships have got rid of the old legacy of *ipso iure* dissolution can be a great relief.

It is an essential rule of law that these new rules (Article 3:152 and Article 3:158) apply if the six-month period provided for therein has already started on 1 July 2021, but the last day of the period falls on or after the date of entry into force of these provisions. Although there is not yet any significant case law on the provisions in force since 1 July 2021, there is a good chance that these new provisions will lead to a satisfactory resolution of the issue outlined in this paper, which has a very long history and, as we have shown, could in some cases give rise to serious problems.

The Habsburg Family Statute as a Historical Forerunner of Family Constitutions

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Looking at the historical antecedents of family constitutions, the Habsburg Family Statute hardly differs from the family constitutions of today. In terms of its purpose and its system of rules, it is a clear predecessor and historical antecedent of today's family constitutions. In general terms, it can therefore be said that the roots of today's family constitutions are to be found in the noble and ruling families, despite the fact that the latter also contained public law provisions in addition to the predominantly private law provisions. This paper reviews the development, function and content of the Habsburg Family Statute on the basis of archival research.
Keywords: *general partnership, limited partnership, death of one of the members, ipso iure dissolution, Civil Code*

Documents in archives confirm that the roots of family constitutions are not really to be found in family businesses but in historical monarchies. The family constitutions of the Habsburgs and the Wittelsbach Statute, for example, were documents that regulated property relations within the family and succession issues in a uniform and comprehensive manner, and were even family constitutions in name.[1] A further distinctive feature of these documents was that, since they were linked to rulers, they had both public and civil law attributes. To illustrate these points, it is now worth taking a closer look at the history of the Habsburg family statute, which is also rich in Hungarian aspects.

Whereas before the Napoleonic Wars, the individual German principalities had provisions on only certain details of legal relations within the ruling

1 The author's findings from research carried out in the Haus-, Hof- und Staatsarchiv in Vienna in the summer of 2019, supported by the Austrian-Hungarian Action Foundation (Stiftung Aktion Österreich-Ungarn). See for example the following documents: Kaiserlich österreichisches Familienstatut, anno 1839 and Bayerisches Königliches Familienstatut, anno 1819.

family, typically in wills, succession and other property contracts, following the Battle of Waterloo, all German ruling families in quick succession felt the need to consolidate the customary laws that had been established previously and to create a new complex system of rules in many areas of family relations.

Whereas the earlier documents had mostly been drawn up between the head of the family and the closest heirs or family members, or had taken the form of contracts within the family, from 1806, and even more so from 1815, a comprehensive legislative process was initiated which brought about the regulation of a very wide range of family relationships at the level of law. The aim of the German princely families in enacting family or house laws was to ensure the sovereign unity of the dynasties and the long-term order of succession.

The Bavarian Wittelsbachs were the first of the major ruling families to draw up a family law in 1819, which later served as a model for the Habsburg family statute. The Bavarian family law was followed in order by Würthenberg (1828), Hanover (1830) and Saxony (1837).

Although the Habsburgs had a well-developed system of succession which had been established over the centuries and which governed succession to the throne in common law sense, the codification practices of the German princely families had a clear influence on the Austrian Emperor Franz.[2] The main reason for this was that although Maria Theresa's consort, Franz Stephen of Lotharingia, thanks to his brilliant economic expertise, created a family property fund that was partially separated from the state property, it was not until the early 1800s that the family's private property was precisely and effectively separated from the state property.

It was Emperor Franz's intention to finally have a clear definition of what was private Habsburg family property and what was to be included in the state property. The question was therefore raised as to which of the monarch's expenses should be covered by private property and which by state property.

In addition, as the Habsburg family had become very extensive since Maria Theresa, the property issues between family members also had to be settled. This meant, of course, that the family law had to include - in addition to the long-standing customary arrangements - the newly created rules which were intended to settle legal relationships which had not previously been covered in a reassuring way.

On 28 March 1829, Emperor Franz addressed a letter to Minister Metternich, requesting that, since the Austrian House had no definite and consistent house law, the Chancellor should propose one, with due regard for the constitutions of the provinces, including Hungary and Transylvania. So

2 Franz I, Emperor of Austria and King of Hungary, who reigned from 1792 to 1835.

far, only the succession, the age of majority and the apanages have been regulated by the ad hoc and often contradictory provisions of the Habsburg and Lorraine ancestors. Emperor Fraz also instructed Metternich that the family law to be drafted should not only provide for the rights of family members, but also impose obligations on them, and even lay down the rules of succession to the throne, including the marriage, majority and appanage of archdukes and archduchesses.

It is clear from all this that Franz expected a family law to be drawn up which would take into account the Hungarian and Transylvanian constitutional order, would refer to the rules of family property law, both customary and written, and would also take as a basis the Lotharingian Family Act, which had existed since the 15th century, and the Wittelsbach Family Law of 1819.

The Emperor Franz thus ordered a comprehensive codification, calling for a family or "house law" which, precisely because of its all-encompassing nature, would have had to include both public and private law provisions, thus disproportionately prolonging the legislative process. Since Emperor Franz only wanted to promulgate the Domestic Law, even though it would have had to be approved in Hungary because of the public law provisions affecting the Hungarian constitutional order, or even in conflict with it, the comprehensive Family Law met with resistance from Hungarian jurists and failed.

Ádám Reviczky, the Hungarian Chancellor of the Court and a member of the Board of Directors of the Hungarian Academy of Sciences, suggested that instead of a family law it would be more appropriate to draft a simpler family statute, which would not concern public law issues and would only provide for the mutual private rights and obligations of the monarch and the other family members. This document would not have to be adopted by Parliament, as it would not function as a law.

It can be seen that, while in the German princely courts the terms house law, family law or family statute were essentially synonymous terms, Reviczky's argument led to the Habsburgs giving these terms different meanings.

This illustrates the marked difference between Hungarian and German public law thinking. According to Reviczky's argument, a law is something that is created or approved by the Diet. By contrast, the head of a family may at any time create a set of rules for himself and his family members, which, if they have no effect on public law, need not even be promulgated.

By contrast, in contemporary German public law thought, the monarch was a sovereign with unlimited legislative power. The main reason for this different public law approach can be traced back to the Hungarian historical constitution, according to which the sovereign did not have unlimited legislative power in matters of public law.

Emperor Franz accepted Reviczky's argument and his proposal with the restriction that family statue should include the long-discussed issue of the family fund. After such a background, by 1837 a draft of the family statute was ready for comment by both the Emperor and the family members concerned. As the members of the lateral branches of the family were only covered by the statute if they voluntarily accepted its provisions, including their successors in title, they were consulted on the draft. Because of the clash of views, a consensus was finally reached in 1839. The most controversial issue was the question, unresolved for decades, of how lateral relatives could share in the family fund. Eventually, this issue was also settled amicably, with mutual concessions between family members.

The family statute that was drawn up consisted of six chapters and sixty-one sections. The declared fundamental aim was to preserve the unity of the family. Chapter I, similar to the Bavarian Family Law, essentially defines the concept of family, and in this context provides who is a member of the family, who belongs to the royal house, and then goes on to discuss the rights and obligations of family members in general. The family consists of the head of the family, i.e. the monarch, his wife, the surviving widows of the monarch's ancestors, the archdukes and archduchesses who are descended from the monarch, descendants of one of the sons of Maria Theresa and Emperor Franz I as common ancestors, provided that they were born of a marriage approved by the head of the family at the time on the paternal side. Archduchesses were only considered family members until they married "in rank" outside the imperial family. The recognised wives and widows of the archdukes were also family members as long as they remained in the widow's line, i.e. did not remarry.

Thereafter, the Family Statute provides for the general rights of the head of the family in relation to the members of the family. This gives the sovereign the right of judgement and supervision over the other members of the family. The latter mainly concerned matters of guardianship, trusteeship and marriage, and in general also covered all the acts and legal relations of the members of the family which might affect the honour, dignity, tranquillity, order and welfare of the monarchy.

Article 3 deals with the rights of family members. In addition to any claim to the throne acquired by birth, they are entitled to be treated as members of the royal house, to enjoy the privileges of their rank, and to claim from the head of the family the care and maintenance due to their rank.

Chapter II has both private and public law implications, as it deals with reaching the age of majority, guardianship and trusteeship, which, because of the Hungarian institutional system of palatine, also have public law implications in the case of the heir to the throne.

It is interesting to note that the age of majority was set at a different age for the heir to the throne of the deceased monarch and for archdukes and archduchesses, the former at the age of 16 and the latter at the age of 20. Chapter III deals with marriages. It was an extremely strict restriction that family members could not marry without the consent of the monarch. This point of the Statute expressly provides that a marriage contracted without the written consent of the monarch is null and void. Chapter IV deals with the right of the head of the family to exercise custody over the members of his family. Exercising the right of supervision in this respect meant that the head of the family had to be informed about the training and education of the minor family member. Although the head of the family could not interfere in the methods of education, he could determine which family members should acquire which knowledge, which skills they should acquire and in which direction they should expand their knowledge. The aim was to ensure that the family members acquired knowledge that was important for the family as a whole, that the family could use to increase its wealth, influence and power.

Chapter V declares the judicial power of the head of the family over the members of the family.

According to the provisions of the statute, the high court of lords had jurisdiction in principle in all matters concerning the persons or property of the members of the imperial family. The high court of lords also had jurisdiction in matters relating to deaths and succession. In all cases, this court made its decisions on the basis of the laws in force.

The statute also provided for the rules governing the publication of the will of a deceased family member. Accordingly, the will could not be published and executed until the head of the family had established that the contents of the will were in the interests of the family as a whole and did not conflict with the provisions of the statute or any other contract concluded between the members of the family.

In practice, this meant that the members of the family sent their wills to the head of the family, who checked that their content did not conflict with a family document or jeopardise the unity of the family. If the head of the family considered that the will complied with these criteria, he signed the document approving it. Once the will had been approved, the probate procedure could be carried out without delay and without loss of time. The privileged status of the members of the family was also ensured by the fact that they could only bring an action before the high court of lords and that that court had exclusive jurisdiction in any legal proceedings brought against them. Family members were not exempt from this in their contractual relations with non-family members. However, the high court of lords did not have jurisdiction over disputes concerning immovable property, even if they concerned a

family member. In all cases, these disputes were brought before the general court. The Family Statute required the high court of lords to endeavour, as far as possible, to reach an agreement between the parties in proceedings before it involving a family member. The aim was clearly to ensure that the court would try to bring the case to a speedy conclusion so that the dispute would not damage the family's reputation. It is noteworthy that civil litigation between family members was removed from the jurisdiction of the high court of lords, apparently to prevent possible family disputes from becoming public.

The interest behind the measure is clear: to protect the family's reputation in all circumstances. The statute provided that civil disputes between family members should be settled by arbitration in the modern sense of the term.[3] This meant that the parties had to agree on the arbitrators who would take part in the proceedings, in the tradition of the old German princely law. The agreement on the composition of the arbitral tribunal had to be submitted to the head of the family, who had the right of veto. If the parties did not reach a consensus on the arbitrators, it was the duty of the head of the family to appoint the arbitrators. The arbitrators had to decide the case according to the substantive law in force. As a rule, the decision was the final settlement of the dispute. The arbitrators' decision had to be accepted by the parties. Only in exceptional cases could they appeal to the monarch as head of the family. In these special cases, the final word was given by the head of the family, whose decision was unquestionable to all family members. This dispute settlement mechanism achieved the main objective of reaching a decision on the dispute as quickly as possible, in accordance with the law and the 'overall interests' of the family, and without publicity.

Chapter VI of the Statute, the most extensive, deals with the rights and claims of family members and regulates their property relations. The basic idea behind this section is that family members are entitled to certain rights and privileges in return for the private restrictions they have to bear in the interests of the family as a whole.

The statute states that family members may acquire private property by savings, inheritance, gifts or other lawful means, which is separate from the family property and which they may dispose of independently, freely and with-

3 For details of how the institution of arbitration dates back to ancient times: Boóc, Ádám: Az arbiter fogalma a római jogban; in: Magyar Jog, 2020/4., 221-226. and Boóc, Ádám: Comments on the Concept of Arbiter in Roman Law; in: Journal on European Histroy of Law, 10 (2) pp. 133-138., ISSN 2042-6402, see also: Boóc, Ádám: Some Basic Questions of Hungarian Arbitration Law; Oradea, România; Partium Kiadó; 2023; ISBN: 9786069673508 138 p.

out restriction in accordance with the rules of civil law.[4] Under the statute, the legal inheritance of such private property was governed in principle by the rules of the Civil Code, except that only the male member of the family could inherit, and female descendants could become heirs only if all the male heirs eligible under the law had already died, leaving no living male descendants.[5]

However, as regards private property, family members had the right to make a free will and could also transfer their private property to their spouse, for example by marriage contract or gift. The statute ensured that female members of the family would receive a pension commensurate with their rank until marriage and a dowry commensurate with their rank on marriage.

The rationale behind the strict limitation on the inheritance of family property by women was that women would take the property out of the family when they married. Allowing women to inherit would violate the ancestral obligation of descendants that that family wealth must be enriched by each generation. This argument was, moreover, very common at the time, as the same sex-discriminatory provisions are to be found in the Bavarian Family Law.

Family property, consisting of so-called ancestral property and the family fund created by Franz Stephan, was declared to be in contrast to private property. Ancestral property also included the manor of Mannersdorf in Lower Austria and all the funds linked to Charles VI. As mentioned above, the family fund was backed up by the age-defying economic expertise of Maria Theresa's spouse. The fund was set up by Maria Theresa on the advice of Kaunitz in 1765 from her late husband's wealthy estate. It was also supported by Joseph II. Within the family, and between the various branches of the family, the question of which family members should be entitled to the family fund, or more precisely to its proceeds, and to what extent the fund should cover the costs of providing for family members, was a matter of debate for decades. The dispute was finally settled by the creation of the Family Statute. The document thus stipulated that the proceeds of the family fund should cover the reimbursement of expenses which the Sovereign, as administrator of the fund, would grant to family members in need, in addition to the benefits payable from the Treasury.

4 For comparison, see for example: Boóc, Ádám: Az ajándékozási szerződés néhány kérdése a magyar magánjogban; Állam- és Jogtudomány; 2005; 46:1-2.; pp. 53-76.
5 Compare this with some of the issues in modern inheritance law here: Boóc, Ádám: Quo vadis heredis substitutio?: Észrevételek az utóöröklés szabályaihoz Magyarország új Polgári Törvénykönyvében; in: Földi, András; Sándor, István; Siklósi, Iván (ed.): Ad geographiam historico-iuridicam ope iuris Romani colendam: Studia in honorem Gábor Hamza; Budapest, Magyarország: ELTE Eötvös Kiadó; 2015; pp. 77-87.

This provision precludes the family fund from financing the care of a family member, which had to be covered by the Treasury. It was also specified that the assets of the family trust could not be reduced, and that only the interest could be distributed among the various branches of the family in accordance with a fixed scale.

The importance of the separate family estate, separate from the Treasury, increased in the 1800s, mainly because of the French Revolution and Napoleon. Ruling families feared that the revolutions would deprive them, even temporarily, of their sovereign rights, with the direct consequence that the treasury would not cover their expenses. It was therefore considered essential to create a core of wealth that was not tied to the family's role as monarch, so that it could provide for the family members in times of revolution.

To give an idea of the extent of the Habsburg fortune, here is a snapshot of the family's separate wealth. In 1848, the separate family estate consisted of the following assets: securities: 8 120 379 Ft, real estate: 5 353 319 Ft, and the yield on the family estate was 276 000 Ft per year. The size of the assets and the wide-ranging and complex family relationships were strong reasons for the creation of a comprehensive family document, but the multiplicity and complexity of the situations to be regulated meant that the statute took an extremely long time to reach its final form.

The last part of Chapter VI summarises the claims that the archdukes and archduchesses could make on the State.

It may serve as a warning to the owners of family wealth today that, despite the Habsburgs' recognition of the importance of separate family wealth and the fact that they owed their enormous wealth to the clever decisions of the economic genius Franz Stephan, this wealth was almost entirely lost at the beginning of the 20th century. The reason was that the family's estates and properties in the Czech and Austrian territories, as well as securities held in Austria, were the main source of wealth, and after the defeat of the World War, both the newly-formed Czechoslovakia and the new Austrian parliament, invoking the Treaty of St. Germain, legally confiscated the family's property with a single stroke of the pen. When the statute was drawn up, no thought was given to diversifying their property geographically. This was the only way to ensure that they would have access to at least part of their wealth even in the most difficult times. Of course, no one at that time had thought, or could have thought, of the tectonic socio-political changes that occurred in the 20th century.

Summary

Archival research has also shown that the Habsburg Family Statute differs little from the family constitutions of today in terms of its provisions. In

terms of its purpose and its system of rules, it can be said that the document is a clear predecessor and historical forerunner of today's family constitutions. On the basis of the above, it can be concluded in general that the roots of today's family constitutions can be found in the statutes of noble and ruling families, including the Habsburg Family Statute described in detail above, despite the fact that the latter also contained public law provisions in addition to the predominantly private law provisions.

On the Responsibilities and Risks of the Activities of Senior Officials of Economic Companies

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The responsibility of the senior officials of business companies is multifaceted. They are liable to the company on the basis of breach of contract, while to third parties, mainly creditors, on the basis of non-contractual damages. Today, business risk is extremely high for senior executives. It is very difficult to calculate unexpected risks because you have to prepare for invisible damages. During managerial decision-making, exemption must be provided for unforeseen and unexpected circumstances, even with the help of liability insurance.
Keywords: *liability, damage caused by breach of contract, non-contractual damage, risk, foreseeability, blameworthiness, careful procedure*

"A careful person only undertakes what
he is good at and what he knows..."
(Ignác Frank)

Introduction

Risk-taking has become the biggest challenge in the management of business companies in our world. Risk-taking is unavoidable in managerial decision-making. The managers of the companies must also be prepared for the fact that legal responsibility can often be established for failure to make a risky decision[1].

The executive activity of managers requires that the aspects of efficiency and economy are applied at the same time. In the case of business companies, the main attraction of business management is efficiency, ensuring the greatest possible profit. In the world of companies, the owner's expectation from

1 Kölner Kommentar zum AktG (1970) 93.§. 12. 36 Punkte, a Fischer/Lutter, GmbH Kommentar, 11. Auflage (1985) 43.§. 2.,4.Punkte. and D. Vidal. Droit des siciétés, 3. Edition, L.G.D.J. Paris, 2001, 204-205.

the management is based on the "even more... principle", if the management is unable to provide this, then the need for transformation and change is immediately raised. Every manager must consider this risk. A certain degree of protection today is provided by the outstanding remunerations, which represent an existential net regarding the uncertain future[2].

Business management requires a permanent managerial activity. In view of the increased risks, senior officials are expected to continuously perform operational management duties. Representing the company in the property market and ensuring the continuity of the business-like economic activity also clearly fit into the scope of executive duties.

The following can be highlighted from the list of main business management and authority responsibilities of senior officials: legal representation of the company, ensuring legal operation, in accordance with the law or fulfillment of reporting and data provision obligations prescribed in other laws, ensuring the operation of the organization and the regularity of certain procedures within the company, preventing the adoption of illegal corporate resolutions, implementing legal resolutions, inspection obligations, the company or regarding the fulfillment and implementation of the obligations imposed on some of its bodies, cooperation with other bodies of the company, or with its senior officials, ensuring the economic activity of the company - competitiveness, liquidity, enforcement of claims, ensuring the exercise of the rights of the company's members (including members in the minority) and the protection of creditors' interests

In view of their obligations to the company, the executive officers' liability for damages is typically one-way, i.e. the liability based on the breach of contract towards the company. Damage to third parties entering into a legal relationship with the company (typically creditors), whether based on a breach of contract or out of contract, is considered the illegal conduct of the company and not the conduct of the executive officer. The liability shield of the company, based on its independent legal entity, protects the senior official by removing his harmful behaviour from the behaviour of the legal entity and imputing it to the latter.

The so-called based on the doctrine of strict separation of corporate liability - which is otherwise a risk-mitigating factor - the "crossing" of liability over the corporate legal entity wall can only be justified in exceptional cases. The direct suing of a senior official can only be justified in the event of liability for damages when the behaviour of the person who caused the damage cannot be attributed to the company because it is not causally related to the

2 Ulrich Hübner,Managerhaftung C.H.Beck'Sche Verlagsbuchandlung München 1992. p. 27-34.

authority attached to his status. Such a case is typically the commission of a crime, a fraudulent, bad-faith procedure that caused the damage[3].

In order to support all these mentioned theses, we will further outline the legal situation of liability, which also shows the risks of the activities of senior officials.

On the risks arising from the peculiarities of the legal relationship between the executive and the company

To the rights and obligations of the senior official in this capacity, the rules of the Civil Code regarding assignments (corporate legal relationship) or, if he is employed by the company, the governing rules of Mt.

The risk dimensions of this duality are often spectacular, because the labor law rules and the rules governing civil law commission contracts do not result in the same liability situation, which in itself can be a risk-increasing circumstance. Such a difference is apparently caused by the fact that the labor law compensation liability is maximized for wages

The senior official performs his duties independently. In this capacity, it is only subject to the laws, the partnership agreement, and the decisions of the company's supreme body, and the sole proprietorship. and sole proprietorship with the exception of - it cannot be rejected by the members (shareholders) of the business association (principle of self-responsibility). The supreme body of the company can only remove the executive officers' or the executive board's powers in the company's management in the case and scope, if this law or the company contract allows this. (prohibition of removal of powers) These rules undoubtedly increase the executive the risks of their decisions[4].

It is also an undoubted fact that the duration of the managerial relationship also carries a kind of risk. If the articles of association do not provide otherwise, senior officials must be elected for a fixed term, but not more than five years, or appointed in the articles of association. If the members (shareholders) do not stipulate the duration of the executive officer's appointment in the company contract, the executive officer shall be considered elected for a five-year term, unless the business association was established for a shorter

3 Schneider, Uwe H. Haftungsminderung für Vorstandsmitglieder und Geschäftsführer bei fehlerhafter Unternehmensleitung? Festschrift Für Wilfried Werner, Berlin 1984 p. 795. old., Hübner, Managerhaftung i.m. p. 2., M.Cozian-A Viandier-F.Deboissy: Droit des sociétés, 16. Edition, Litec, Paris 2003. p. 149. D. Vidal. Droit des siciétés,3e Edition, L.G.D.J. Paris, 2001, p. 205.

4 Robert R. Drury, The Liability of Directors for Corporate Acts in England Law p. 110-111.

period of time. The appointment of a senior official is established by acceptance by the person concerned and not at the time of appointment.

Executive officers can be re-elected and recalled by the company's highest body at any time without any obligation to provide reasons. Within fifteen days from the acceptance of the new executive assignment, the senior official must inform the companies in which he is already a senior official or member of the supervisory board in writing. The senior officials - with the exception of the first mandate created when the company contract is concluded - are elected by the company's highest body (this does not include the case when a decision-making supervisory board is elected).

On the liability of the senior executive for damages caused to the company

If the senior official causes damage to the company in the course of his business management activities, he is liable to the company according to the rules of liability for damage caused by breach of contract. This breach of contract is realized if you violate your obligations either stipulated in the contract or according to the law[5].

The application of this contractual liability can be traced back to the contractual legal relationship, which is either an employment law relationship or a civil law assignment-type legal relationship[6]. By accepting their status, the senior officials of business companies undertake to act with the care normally expected in the given situation in the interest of the company.[7] The fulfillment of this duty of care determines whether there will be a way to establish liability[8]. If the behaviour does not meet the requirements of the expected care, it is considered a breach of contract. The level of care expected of senior officials is

5 PJD2021.26

6 Mónika Csöndes, A Ptk. vagy az Mt. alapján kell megítélni a vezető tisztségviselő kártérítési felelősségét, ha a tisztségét munkaviszonyban látja el? Magyar Jog, 5/2017. p. 280

7 Special considerations may apply if, due to the nature of the business, the manager must also take into account the interests of a wider group of persons, such as the family, in addition to his or her basic duties. See in this context for example: Arató, Balázs: A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspektusai; in: Glossa Iuridica 7:1-2.; pp. 141-177; 2020, see also: Arató, Balázs: The Legal Institutions of Asset Preservation and Asset Transfer in Hungary; in: Karoli Mundus 1:1; pp. 229-240.; 2021., or Arató, Balázs: *A családi vállalkozások jellegmegóvásának eszközei* (Instruments to preserve the character of family businesses), in: Gazdaság és Jog 3-4.; 2023.; Orac; p. 31-38., and Arató, Balázs: Családi vállalkozások nemzetközi kitekintésben: Jogalkotási irányok, jó gyakorlatok; in: GLOSSA IURIDICA 7: 3-4; pp. 263-285., 23 p. (2020).

8 Ádám Fuglinszky: Kártérítési jog Budapest 2015. p. 136.

high for several reasons. The performance of such a task requires appropriate competence, subordinating one's own interests to the interests of the legal entity. The measure of increased management care is objectified, which means that it is a risk-laden measure in many respects. The care expected in the management of the company's affairs must always be judged in connection with a specific obligation. If you perform the required diligence during your business management activities, we cannot speak of a breach of contract. The senior official violates his contract if he does not show the increased care expected of persons holding such a position. The lack of business results does not in itself constitute a breach of contract if the senior official acted with the increased care normally and expected of him during the performance of his duties[9].

The liability legal situation of a senior official changes if he intentionally causes damage to a third party. The effective Civil Code according to: "If a senior official of a legal entity (business company) intentionally causes damage to a third party in connection with this legal relationship, he and the legal entity are jointly and severally liable to the injured party". It is necessary to emphasize that the joint and several liability applies only if the intentionally caused damage occurred in connection with the legal relationship.

This consequence of executive joint and several liability is useful for prevention purposes, but the legal personality (organizational legal entity) cannot provide the management with a lighter liability situation due to the main rule of joint and several liability in the case of fraudulent and illegal procedures unrelated to their legal relationship. Serious abuses cannot be covered even partially by the cloak of legal personality. The responsibility of an official who deliberately causes damage outside of his authority, abuses the company's legal personality, acts illegally and fraudulently is an independent sui generis responsibility that crosses the wall of a legal personality, resulting in full standing[10].

Exemption from liability for damages caused by breach of contract must be based on the date of the breach of contract in terms of the foreseeability criterion, because at the time of the establishment of the contractual relationship, the possible breach of contract related to business management cannot yet be calculated in advance. to fulfill etc. are connected.

The date of creation of the management relationship can therefore be used as a basis for damages caused during the performance of the executive's usual duties. These tasks and the risks associated with their performance can be assessed when assuming the leadership position, and they can be foreseen - considering their nature.

9 Kemenes István: A vezető tisztségviselő kártérítési felelőssége, Magyar Jog 1/2017.
10 Tibor Nochta, Társasági jog. Dialóg Campus Kiadó Budapest-Pécs 2011. p. 246.

However, in the case of extraordinary obligations, unusual tasks, damages caused during the fulfillment of specific obligations arising in the course of business activity, the time of undertaking the given task must be taken into account from the point of view of predictability, since the risks associated with them can only be calculated then[11].

The injured party bears the burden of proof regarding the extent to which the breaching party foresaw or should have foreseen the damaging consequences of the breach of contract. Since the damage to be compensated (and its extent) is one of the basic prerequisites for the liability of the breaching party, the burden of proving it is on the contracting party who suffered the damage. The realization of the purpose of the foreseeability clause also requires this solution. In order for the subsequent party in breach of contract to be able to make a well-founded and conscious decision on risk-taking when concluding the contract (a senior official taking on an extraordinary task), among other things, his contractual partner (the later injured party) must put him in an appropriate factual situation. He must provide adequate information to ensure that he is able to make a decision on taking the risk, the price of taking the risk, or on the protection of the risk with insurance, based on the most accurate knowledge of the risk of expected damages[12].

The senior official's liability for damages caused to third parties

If the senior official of the legal entity causes damage to a third party in connection with this legal relationship, the legal entity is liable to the injured party (principle of attribution). The theoretical explanation for this can be found in the fact that management officials are the factors that bring the legal entity to life and keep it alive, and their activities are considered the activities of the legal entity to the outside world. This legal fact applies to official damages that are related to the executive relationship[13].

Therefore, the senior official can only be held responsible if the conduct of the tortfeasor cannot, due to its nature, be classified as damage caused by a legal entity, or if the damage was caused intentionally while acting in his managerial capacity. Civil Code on the responsibility of senior officials. 3:24 am. The phrase "acting within the scope of this authority" in paragraph (2) of Sec. 6:540.

11 Ádám Fuglinszky, Az előreláthatósági klauzula alkalmazhatóságának újabb dilemmái. Gazdaság és Jog 2019.XXVII.6-8pp. p.1-7.
12 Máté Mohai: Felelősség és helytállási kötelezettség a társaságok jogában. Pécs, Magyarország: Menedzser Praxis Kiadó 2019. p. 196.
13 Le Cannu: Droit des sociétes, 2. Edition, Montchrestien, Paris, 2003. p. 283.

(1)-(2) of §, the provision regarding the legal relationship of employee and member. The legislator therefore chose the solution of regulating liability for damages caused by a senior official acting in his capacity in the same way as the provisions on liability for damage caused by employees and members.

If the damage is the result of a breach of contract in the contractual relationship between the legal entity and the 3rd party, then the breaching party is the legal entity itself and not the executive officer. The legal entity (organizational legal entity) cannot provide the senior official with a "liability" situation in the event of fraudulent and illegal procedures that are outside of his legal relationship. Serious abuses cannot be covered even partially by the cloak of legal personality. The responsibility of an official who causes damage while acting outside of his authority, abuses legal personality, acts illegally and fraudulently is an independent sui generis branch of responsibility that crosses the wall of legal personality. In the Book on Legal Entities, there are also special rules for additional liability arising from business-like business activities for senior officials of business companies. We consider that the special liability provisions governing the senior officers of business companies can serve as a good example when explaining the legal position.

The senior official manages the company's affairs independently based on the priority of the company's interests. In this capacity, it is subject to the laws, the company contract and the decisions of the company's supreme body. Due to the principle of self-responsibility, a member of the company cannot dismiss the executive officer, and his authority cannot be revoked by the supreme body. As can be deduced from the different ownership situation, in a sole proprietorship, the sole member can give instructions to the management, which the senior official must carry out.

It follows from the special power-sharing structure of companies, which also affects management responsibility, that the so-called exemption institution, which undoubtedly has a risk-mitigating effect. The Civil Code also accordingly provides that if, at the request of the executive officer, the company's supreme body grants a dispensation establishing the adequacy of the business management activities carried out in the previous business year at the same time as the report is accepted, the company may file a claim for damages against the executive officer based on a breach of management obligations, if the facts or data on which the exemption was granted were untrue or incomplete.

If the senior official's legal relationship is terminated between two consecutive meetings dealing with the report, the senior official may request that the supreme body decide on the release of the exemption at its next meeting.

In addition to the responsibility of senior officials towards the company - on the basis of which, in principle, a claim for damages can be asserted by the

company at any time during the company's operation within the limitation period - the members can only bring a claim for compensation against the former senior officials of the company that has already ceased to exist without a legal successor. Based on this rule of the code, after the termination of the business company without a legal successor, the claim for compensation against the company's senior officials can be asserted - within the one-year limitation period from the company's deletion from the register - by those who were members at the time of the deletion. The member may claim compensation in proportion to his/her share of the assets distributed upon dissolution of the company. This provision partially takes into account the criterion of separation of responsibilities, which is so important in corporate law, as well as the exclusion of possible acquisition of damages, as well as the enforcement of parallel claims for damages[14].

If the business company is dissolved without a legal successor, in addition to the members, the creditors may also file a claim for compensation against the senior officials according to the following rules: Creditors may assert a claim for compensation to the extent of their unsatisfied claim against the senior officials of the company in accordance with the rules of liability for damages caused outside of the contract, if the senior official did not take creditor interests into account after the situation threatened the company's insolvency.[15] However, this provision cannot be applied in case of termination by liquidation.

On the issue of responsibility breakthrough and responsibility transfer in the area of risks

Due to the unlawful harmful behaviour of members, senior officials, and trustees, private liability can have branches that cross the wall of legal personality. On the basis of this general theoretical responsibility thesis, the doctrine of breach of responsibility, and the doctrine of ``piercing the corpo-

14 Tibor Nochta: A polgári jogi felelősség változásairól a társasági jogban. Gazdaság és Jog 27, 7-8pp. 12-18.7.p. 2019

15 See for example: Arató, Balázs: A gazdasági társaság tagjainak és szerveinek felelőssége tőke- és hitelezővédelmi szemszögből; MAGYAR JOG 70: 6 pp. 371-383., 13 p. (2023), see also: Arató, Balázs: A vezető tisztségviselő magánvagyoni felelőssége; in: Arató, Balázs (szerk.) Jogalkotási tükör 2010-2018, Budapest, Magyarország: Patrocinium Kiadó (2018) 358 p. pp. 191-224., 34 p., or Arató, Balázs: Haftung des Geschäftsführers mit seinem Privatvermögen während des Liquidationsverfahrens: Derzeitige Regelung und Rechtsprechung in Ungarn; in: Winner, Martin; Cierpial-Magnor, Romana (szerk.) Sanierung, Reorganisation, Insolvenz: Internationale Beiträge zu aktuellen Fragen. Wien, Ausztria: Nomos (2018) 267 p. pp. 9-38., 30 p.

rate veil" of the legal person as a model can be applied to legal persons in general[16].

The solutions of each legal system have in common that the limited liability of the members (founders) and the directed liability of the senior officials towards the legal entity can only exist as long as the legal entity is not used to deceive or harm creditors, commit crimes or carry out procedures that harm the public interest.

Legislation (and also legal practice) - mainly for the protection of creditors and the public interest - go beyond the limit of the separation of liability principle in the case of certain behaviours. This is especially visible in corporate law, where the cases of transfer of limited member liability (Haftungsdurchgriff) and piercing the corporate veil created by the legal personality of the company are shaped by both legislation and judicial practice.

The legal entity may not provide members (founders) and officials with liability protection without exception, either by legal or contractual limitation of liability. Fraudulent and illegal procedures and abuses cannot be covered by the guise of legal personality. Abuse of the personality of the legal person and the limited liability, as illegal behaviour, is a very visible cross-cutting branch of responsibility on the wall of the legal entity[17].

The prevailing theoretical and jurisprudential position in Hungary is that transfer of responsibility is an independent form of sui generis delictual liability. The reason for this is that the Civil Code and other laws regulate the cases of transfer of responsibility item by item, which can only be broadened by a statutory provision. The cases of transfer of responsibility are based on responsibility, sanctioning, and can be based on the member's illegal and reprehensible behaviour (abuse of limited member responsibility). The reason for the transfer of responsibility is that the member's illegal and reprehensible behaviour prevented the legal entity from paying its debt to the creditor.

The member's liability is only for those damages that are causally related to his blameworthy conduct, and not for all damages that the legal entity has not satisfied as a claim against him. The creditor's claim is an independent claim for compensation, in which the member can no longer dispute the basic claim, which, however, must be a claim that has not yet been barred in the liquidation procedure.

The basis for withdrawing the member's limited liability protection is the abuse of a right, which resulted in "undercapitalization" of the legal entity. The conversion of liability into unlimited liability appears as a sanction for

16 Marta Brehoszki, PhD Értekezés Kézirat Budapest 2007. p. 11.
17 Tibor Nochta: A magánjogi felelősség útjai a társasági jogban. Dialóg Campus Kiadó Budapest-Pécs 2005. p. 94-95.

illegality manifested in the abuse of rights. As a result of the member's illegal behaviour, the creditors can be harmed the most. In such a case, the court may determine that the members must meet the debts of the terminated legal entity with their private assets or possibly the companies they founded to meet the demands of the creditors.

It is a well-known jurisprudential position based on which a member (shareholder) of a business company can assert a claim against a third party in a contractual or non-contractual legal relationship directly due to the occurrence of a disadvantage affecting his own private property or personality, if the legal conditions for non-contractual liability for damages are met. This jurisprudential understanding is actually based on the fact that the order of alterum non laedere behind the prohibition of non-contractual damages can be extended to the contracting parties. In other words, it is a matter of broadening the contractual duty of care and protection (culpa in contrahendo, Vertrag mit Schutzwirkung für Dritte) in order to establish liability for non-contractual damages. A contract must also serve to protect third parties. Thus, in the event of a breach of a contractual obligation, in addition to the contractual partners, third parties may also be harmed. They are because the breaching party did not fulfill his general duty of care and protection towards them.

A condition for delictual liability to arise is that the tortfeasor (breacher of contract) foresees the consequences of his u resulting in damage to the company's member (shareholder). If the valuelessness of the member's (shareholder's) company share, business share, and shares were demonstrably foreseeable, the drastic decrease in their market value, then the possibility of delictual liability of the breaching contract cannot be ruled out.

Unlawful unilateral termination of a contractual relationship may have the following consequences for a shareholder's financial situation and the market value of his shares:

The mobilization rights attached to the share ownership belonging to the shareholder's private property become limited or cease. A share is a security embodying shareholder rights with a freely transferable nominal value, the market value of which is determined by market supply and demand. It's always worth what you pay for it in the end. If it loses its market value, the owner of the share will not even receive the amount corresponding to its nominal value. The trading value of the share at a given time therefore actually represents an abstracted market value separate from the nominal value.

The legal basis of the injured shareholder's claim for damages is therefore the unlawful behaviour by which the market value of the shares was reduced, and is based on the cause-and-effect relationship on the basis of which the tortfeasor had to reckon with the consequences of pecuniary and non-pecuniary damage.

Based on the published decisions dictating legal practice directions, the abuse of the legal personality of the company and the limited liability of members was the first legal consequence of liability in our law.

The liability shield created by the legal entity is, as a general rule, impenetrable to the members (founders) of the non-economic company with membership, even in the case of non-profit organizations (associations), because the legal entity is obliged to cover its obligations with its own assets; the members and the founder of the legal entity are not responsible for the debts of the legal entity. If the member or founder of the mentioned non-profit organization-legal entity abused their limited liability, and because of this unsatisfied creditor claims remained at the termination of the legal entity without a legal successor, the member or the founder is obliged to pay for these debts without limit.

Non-profit legal entities and business associations have the same responsibility for their intentional harmful behaviour as a senior official in their field of business.

Amendment of the Condition Suspending the Entry into Force of Public Contracts

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Among other legal bases, a modification of public contracts is possible if the modification is a so-called non-substantial modification. The law lays down the definition of a non-substantial modification. The present study seeks to answer the question of whether a non-substantial modification is the correct legal basis for a modification of a contractual term in a contract which suspends its entry into force. It may be necessary to agree with the position of the Authority/Arbitration Committee, which considers another legal basis (reference to unforeseeable circumstances) to be more appropriate, provided that the conditions for such a basis are met.
Keywords: *public procurement, contract modification, entry into force, suspensive condition, layer of law theory*

Introduction

Contracts concluded under the Public Procurement Act in force (hereinafter referred to as „public contracts") may be amended under strict conditions, on the basis of the situations specified in the legislation, the so-called „cases"[1]. The case-law is laid down in Directive 2014/24/EU (the Directive), which is the codification of the findings of the Court of Justice of the European Union in the Presstext case (C-454/06)[2]. Cases, or legal bases, are distinct sets of facts, which are distinguished one by one, the so-called de minimis modifications, modifications based on special circumstances and cases where the modifications are not considered to be substantial modifications[3].

1 Act CXLIII of 2015 on Public Procurement, Kbt.
2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC
3 See Article 141a of the Public Procurement Act and Article 72 of the Directive.

The purpose of the Directive is not to limit private contractual will, but to define the new procurement need.[4] The limit to modifications is in fact the circumstance whose emergence constitutes a new procurement need on the part of the contracting authority, forcing the parties to renegotiate the terms of the contract[5].

The present study examines the case of non-substantial modifications, comparing them with the provisions of the current Civil Code governing the formation of a contract and ‚agreement on matters which are material and which are considered by either of them to be material[6]. The essence of the analysis is to determine whether there is a link between the private law ‚material issue' and the public law ‚material term' or ‚significant term'. The study also discusses the recent decision of the Arbitration Committee for Public Contracts, which found an infringement in relation to the modification of an entry into force condition, and which has been received with interest by the jurisprudence[7].

The main question is whether a modification of a contract that has not entered into force, where none of the conditions for performance are changed, but only the condition that brings the contract into force is modified by the parties, can be considered as non-substantial or whether another legal basis is clearly required. The essence of the term, floating line' used by László Leszkoven, following Szászy-Schwarz, is to highlight the difficulties and blurring of the boundaries, where there are no clear lines and where the application of the law may be difficult[8].

The present study seeks to clarify whether the modification of an effective condition can be considered as a new procurement requirement and whether the parties should terminate the contract in the absence of any other element or whether the condition is not an essential element for which the

4 For a comparison between classical civil law and public procurement contract law, see in detail: Arató, Balázs: A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása, In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70: Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019) 546 p. pp. 31-35., 5 p.

5 Dezső Attila: Magyarázat az Európai Unió közbeszerzési jogához (Szerk. Dezső Attila) Wolters Kluwer Hungary Kft. Budapest, 2015. p. 757.

6 Ptk. 6:63 § (2) para.

7 D.134/12/2023 https://dontobizottsag.kozbeszerzes.hu/adatbazis/megtekint/dbhatarozat/portal_588334/

8 Leszkoven László: „Érvénytelenségi határkérdések" – úszó határok az érvénytelenség és hatálytalanság problémakörében (MJSZ 2021/2.) Különszám p. 24. illetve Szászy-Schwarz Gusztáv: „Úszó Határok a jogban"

application of the legal basis under Article 141 (6) of the Public Procurement Act is appropriate[9].

Essential question, contractual intent in private law contracts

According to the Public Procurement Act, an amendment is relevant if the new conditions could have had an impact on the willingness to tender and if they change the economic balance of the contract or introduce a new element into the contract. As established by case law and doctrine, the above limits must always be assessed in the light of all the circumstances of the case

According to the provisions of the substantive law, a contract is formed when the parties mutually and unanimously declare their intention to that effect and agree on the material matters which either of them considers material[10]. It is not necessary to specify here that a contract under the Civil Code is a consensual contract, no other legal fact (real act) being necessary for its formation. What is more important is what is to be regarded as the material element of the contract and the point of reference of the material element. The material elements of a contract are not defined by the law, but must be identified by the court on the basis of the will of the parties, in the event of a dispute, taking into account all the circumstances of the case.

On the basis of the case law, the definition of service and consideration is clearly an important issue. Thus, in the case of a contract for the sale of immovable property, the property to be purchased is clearly identifiable by the terms of the contract, and this material element of the contract can be considered to be given[11]. Furthermore, agreement on the purchase price is necessary for the conclusion of a contract of sale[12].

However, „agreement on a matter which is regarded as material is a condition for the conclusion of the contract if the party expressly states that, in the absence of agreement on that matter, it does not intend to conclude the contract[13] „. The clarifying rule (based on the previous GK Resolution No 5) avoids cases where, in the course of performance, the parties are faced with the situation that, in the absence of agreement on the material elements, the contract has not been concluded. Under the current rules, if a party has not indicated during the pre-contractual process, negotiations, etc., that it does not intend to conclude the contract in the absence of agreement on the mate-

9 Legal layer theory: hell
10 Ptk. 6:63 § (1)-(2) para.
11 EBH 1999.98
12 BH 2003.409
13 Ptk. 6:63 § (2) second sentence

rial terms, it cannot subsequently claim that the contract has not been concluded (unless the issue is considered by law to be material)[14].

Importantly, under the above approach, the contracting party, in fact one of the parties, is the benchmark on whom the law makes it dependent whether an element (‚issue') of the contract is, in legal terms, material[15]. In fact, it is the latter circumstance that has made it necessary to go into the material element of the contract, since, in the case of a public contract, the agreement on the material elements is not made in the manner typical of private law contracts.

Material terms of public contracts

In the process leading to the conclusion of public contracts, the contractual freedom of the parties in the award procedure is exercised in a specific, clausal manner. The terms of the contract to be concluded are determined by the contracting authority, the freedom of the tenderer to accept these terms in full, or, to put it another way, the parties' freedom to determine the content is limited[16]. If the tenderer does not accept them, it cannot participate in the award procedure (and the contract is not concluded with it). Contract terms (material terms) cannot be negotiated in public procurement procedures, except in certain less frequent cases[17]. In this case, the case-law must look elsewhere for reference points when it comes to taking a position on the agreement on the material element.

In view of the fact that there is no possibility to negotiate the contract terms on the merits, the CBA places the reference point of „material question" (or „material modification" in the award procedure) outside the legal relationship. When Article 55(6) of the Public Procurement Act states that ‚the amendment of the invitation to tender and of the other tender documents may not have the effect of modifying the terms and conditions relating to the subject-matter of the procurement or the terms and conditions of the contract to such an extent that knowledge of the new terms and conditions could have had a

14 Vékás Lajos új Ptk. - Kommentár a gyakorlat számára, (szerk: Wellmann György) HVG-ORAC Lap- és Könyvkiadó Kft., 2022.
15 Szalma József: A francia Code Civil kötelmi jogi reformjáról, különös tekintettel az új magyar Ptk. korrelativ, vagy konvergens szabályaira I. rész (MJSZ, 2021/1., 1/1. szám p 13.)
16 Juhász Ágnes, A közbeszerzésről másképpen közjog és magánjog határán Lectum Kiadó Szeged 2014, p. 195.
17 Such procedures are the negotiated procedure under Section 85 of the Public Procurement Act, the competitive dialogue (Section 90 of the Public Procurement Act) and the innovation partnership (Section 95 of the Public Procurement Act), as well as concession procedures.

significant influence on the decision of the economic operators concerned as to whether they were able to participate in the procurement procedure or to submit a tender', the yardstick is in fact set from the point of view of economic operators who are not parties to the procedure and who do not participate in it. In so doing, the legislature in practice makes the subjective element objective, since, in the absence of a precise definition, it is possible to infer what is to be regarded as a material change in the light of all the circumstances of the case. On the other hand, the specific law cannot do otherwise, since the legal relationship is ‚open' at the stage of the tendering procedure, before the opening of the tenders, since only the identity of one of the parties (the contracting authority, later the contracting entity) is known. Therefore, in the absence of any other option, the legislator places the principles in the position of the beneficiary, enforcing the principles of transparency and equal treatment[18].

The connection between the above-quoted provision of the Public Procurement Act and Paragraph 141 (6) of the Public Procurement Act is based on the existence of the ‚material question', the ‚material condition', in that the legal relationship is already complete in the performance of the contract, since the parties have concluded the contract. Both provisions are intended to give effect to the requirements of the principles of equal treatment and transparency already mentioned[19]. In essence, the rules do not allow any modification, including at the award and performance stages, which could have an impact on the willingness of economic operators not participating in the procedure or not winning the tender[20]. This cannot, of course, be objective, as it is not possible to identify all the factors which may influence the decisions of economic operators, and it is therefore up to the application of the law to fill in the gaps. The practice is consistent in that all the circumstances of the case will determine what is to be considered a material (or significant in the award) condition, but the time limit for performance, the quantity of the procurement are conditions whose variation will clearly affect the willingness to tender[21].

As it can be seen, in the case of private law contracts, the ‚material question' is a condition relating to the formation of the contract which is linked to its validity. In private contracts, the reference point for the ‚material element' is a party to the legal relationship, and therefore the examination (and decision) in the application of the law can be limited to the will of the parties. In contrast, for public contracts, the reference point for the ‚material element'

18 Directive 2014/24/EU Recital 81
19 See. D.438/14/2019.
20 Hubai Ágnes: Nagykommentár a közbeszerzési törvényhez (szerk: Dezső Attila) Wolters Kluwer Hungary Budapest, 2021. p. 345.
21 D.608/6/2017

remains outside the legal relationship throughout, since the law enforcement will be looking for the answer to the question of which other party would have concluded the contract (or made the offer) under the changed conditions. In effect, what is happening is that the Public Procurement Act is hypothetically replacing the successful tenderer with another (ideal?) economic operator, thereby assuming that another contract has been concluded on the modified terms. If this is the case, the enforcement authorities must establish the infringement and, where appropriate, apply the legal consequences, since, in view of the principle of sound management of public funds, there cannot be more than one public contract for the same subject and the same service[22].

Countless variations of the facts can be imagined, so deciding on non-substantial changes can easily be a speculative exercise, and the benchmarks remain principles and principled decisions[23]. In conclusion, any change in the subject matter of a public contract, in its consideration and in the time limit for performance must always be considered material, any change in other terms and conditions requires careful consideration. As indicated in the introduction, this can be illustrated by a case law.

Brief summary of the case

According to the facts, the parties entered into a contract for the supply of goods, the entry into force of which was conditional upon the occurrence of a certain condition within a certain period[24]. As the condition did not occur within the specified period, the parties extended the period for entry into force by approximately twice the period (by amending the contract, the parties increased the period for the condition suspending the entry into force from the original 90 days to a further 120 days). Otherwise, none of the terms of the contract were changed. The parties have referred to Article 141(6) of the Public Procurement Act as the legal basis for the amendment, i.e. they have invoked a non-substantial amendment.

22 The legal consequence of the unlawful amendments, apart from the finding and imposition of a fine by the Public Procurement Arbitration Committee, is nullity, which the court is competent to judge (Art.175 (1) of the Public Procurement Act).

23 Kristian Hartlev - Morten Wahl Liljenbøl - Changes to existing contracts under the EU public procurement rules and the drafting of review clauses to avoid the need for a new tender - Public Procurement Law Review 2013/2. Sweet & Maxwell and its Contributors p. 4

24 In private law, the term „purchase of goods" means a contract of sale, see Art.8 (2) of the Public Procurement Act.

Following an ex officio initiative by the Public Procurement Authority, the Public Procurement Arbitration Committee found that the amendment was unlawful. It is worth quoting verbatim the relevant part of the Arbitration Committee's decision:

„The Arbitration Committee points out that the Public Procurement Act does not contain a normative definition of what constitutes a condition in the case of a call for tenders, the tender documents and, within them, the draft contract. In the absence of normative rules, the Arbitration Committee has thus interpreted which definitions and specifications of the contracting authority may constitute a condition. According to the legal interpretation established in case law, as set out in Decision D.561/7/2007 of the Arbitration Committee, the term „condition" means a condition necessary for the existence or realisation of something, a stipulation concerning the requirements to be fulfilled.[25] This means, in the context of public procurement procedures, that the contracting authorities must specify in their invitation to tender and in their contract documents all the requirements and conditions which must be fulfilled in order to ensure the valid submission of a tender, the fulfilment of the eligibility criteria, the selection of the successful tenderer, the conclusion of the contract and its performance. In the view of the selection board, the essential condition for the conclusion of the contract is the date of entry into force. Therefore, for the purposes of the application of Article 141(6) of the Public Procurement Act, it can certainly be considered a material change of substance if the period of time fixed in advance as a suspensive condition for entry into force is more than doubled by the parties"[26].

As can be seen, the Arbitration Committee decided the dispute on the basis of case law, rather than on a normative basis, in the absence of a specific definition. It is a question of what kind of findings an exploration of the doctrinal and fundamental layers of law may lead to in the present case.

Analysis using legal layer theory as a method of interpretation

According to the layer theory, law is composed of a layer of written law, a layer of legal doctrine, a topical layer of judicial casuistry, and a layer of fundamental rights[27]. With respect to the layers, the interpretative functions are

25 See in detail how public procurement remedies have evolved over the years: Arató, Balázs: A közbeszerzési jogorvoslat története; in: Jogelméleti szemle 16: 3; 2015, pp. 2-33., p. 32.

26 Decision D.134/12/2023, points 61-63

27 Pokol, Béla Jogelmélet: Társadalomtudományi trilógia II. Budapest: Századvég Kiadó 2005. pp 11-195

the focus of this study, as legislative and interpretative sections of the layers of law can be distinguished[28].

With regard to the material question and material element, the text admittedly does not give any guidance as to which terms and conditions should be classified as such for certain contracts. According to the Civil Code, all terms which a party to a contract treats as such are to be regarded as such. A substantially different substantive condition in the case of the CBA is one which, if it had been included among the conditions of the award procedure, could have had an impact on the award of the contract. In effect, the rule defines itself by itself - the material by the material[29]. The Directive is somewhat more specific when it considers as a material modification (condition) the terms and conditions that define the scope of the contract and the mutual rights and obligations of the parties[30].

Private law doctrine considers the definition of a material element, a material question, as an open question, and under this heading, the analysis of the case law of the judiciary is found, with the conclusion that it is possible to determine which condition or question is material on the basis of all the circumstances of the case. This is logical, with reference to what has been said above, since it is not possible to identify all the variables which may be regarded as material in a legal relationship within a single type of contract, even at the normative level.

The public procurement law doctrine provides somewhat more specific answers, given that the reference point mentioned above is not identified within the legal relationship. It is interesting to note, moreover, that the doctrinal statements of public procurement law on the material terms have largely been developed by case law (Pressetext judgment[31]. Accordingly, (material) conditions cannot be altered where economic operators who were not able or did not intend to participate in the original procedure would have been able or would have intended to participate in the procedure if the altered conditions had been included in the original invitation to tender[32]. As highlighted in the related literature: for example, which can be linked to the technical requirements (e.g. functional or performance specifications), suitability requirements (e.g. professional, technical equipment), evaluation criteria of

28 Cservák, Csaba A jog rétegelméletének új kihívásai In: A Jog többrétegűsége (szerk. Tóth J. Zoltán) Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar 2020. p. 111
29 Smaraglay Gábor, A közbeszerzés jog, kommentár a gyakorlat számára (Szerk: Patay Géza) HVG-ORAC Lap- és Könyvkiadó, Budapest 2023.
30 See recital 107 of the Directive
31 Press release news agency (C-454/06).
32 Hartlev-Liljenbov 2013. p 54

the subject of the procurement. More importantly for the present topic, they are linked to the conditions of contracting (e.g. liability insurance) or are a material condition for the performance of the contract (e.g. delivery date)[33]. This circumstance in itself does not say much without the layer of fundamental rights/principles to be mentioned later, and it is therefore necessary to return to this later. Suffice it to note here that the limit to modification in the case of a public contract - both in general and in relation to the legal basis under consideration - is in fact the emergence of a new procurement need. This is not relevant in the case of private contracts. The parties may subsequently modify any of the conditions, including the legal title of the commitment[34].

In private contracts, the case law of the courts remains to explore the will of the parties and all the circumstances of the case[35]. The case law of the arbitration panel, referring to the above, concludes that all the conditions imposed by the contracting party as contracting authority in the award of the contract can be considered material (taking into account all the circumstances of the case[36]). In fact, it is an exemplification which, given the diversity of legal relationships, is an understandable interpretation.

Condition determining entry into force

According to the case-law cited, the parties did not change any of the performance conditions of the contract. Neither the subject-matter of the contract, nor the consideration, nor the time-limit for performance were changed. Only the time-limit for entry into force was extended, on the ground that this could not have affected the willingness to tender and that the amendment also complied with the conditions of Article 141(6)(b) and (c) of the Public Procurement Code.

It is worth mentioning the legal nature of the condition to be put into effect. The public procurement law allows the application of the condition precedent to contracts concluded on the basis of conditional tendering procedures. In essence, if, in the contract notice, the contracting authority has drawn the attention of economic operators to the fact that it will be released from the obligation to conclude the contract in the event of the occurrence of a specific uncertain future event outside its control. Such circumstances

33 Fazekas Szilvia In. A közbeszerzésekről szóló 2015. évi CXLIII. törvény kommentárja, Magyar Közlöny Lap- és Könyvkiadó Kft. Budapest, 2019 p. 497
34 Cf. 6:191 (1).
35 Cf.: precedent-setting decision of the Curia Pfv.20725/2022/6.
36 See also: D.103/11/2023, D.85/10/2023

include, inter alia, the - unfavourable - assessment of a grant application. The CBA also allows contracting authorities to impose such a condition as a condition suspending the entry into force of the contract[37].

The Civil Code sets out the conditions for the duration of a contract under Title VII of Book Six[38]. In essence, the concept of ineffectiveness means that a contract has been validly concluded but has no legal effect. The legal consequence of a contract without effect is that performance cannot be claimed. The period between the creation of the contract (typically its signature) and its entry into force is a so-called ‚contingent situation', during which any conduct prejudicial to the rights of the other party is prohibited, having regard to the principles[39].

The question is whether the extension of the period of pending legal status, in relation to public contracts, is a condition that affects the willingness to bid. The entry into force itself can be stated to be a material condition, since the obliged party is not indifferent as to the time within which performance must begin, resources must be allocated, etc., after the conclusion of the contract. However, all this can only be inferred from the interpretation of the doctrine and case-law, since the text does not contain any specific reference to this. In similar cases, the Arbitration Committee has referred to a previous decision as justification for declaring an amendment unlawful[40]. The reasoning must be accepted, the key being knowledge of the contract portfolio, since it is sometimes the case that, in the knowledge of a shorter entry into force period, all those operators whose capacity has been reserved in advance for the period in question will withdraw their interest. However, if they had known of the longer period, they would have taken a different decision.

Conclusions

In the case of the arbitration panel decisions cited above, it seems as if they omit any reference to specific circumstances, remaining within the framework of a general statement of the infringement with regard to the modification of the suspensory condition[41].

37 This is a legal exemption from the obligation to keep the offer. Cf. § 53 (5)-(6) and § 135 (12) of the Public Procurement Act.
38 Cf. 6:116. §
39 Wellmann György A Ptk. Magyarázata (Szerk: Wellmann György) HVG-ORAC Lap és Könyvkiadó Kft. 2018. Budapest, p.270.
40 See: D.561/7/2007. Interestingly, the decision was based on Act CXXIX of 2003.
41 https://www.palyazat.gov.hu/download.php?objectId=72649

As a consequence of Article 28 of the Fundamental Law, originalism necessarily complements textualist interpretation, i.e. if there are several interpretations of the legal text, the interpretation must be led in the direction that corresponds to the legislator's purpose and is in accordance with the Fundamental Law[42]. As can be seen from the above, the analysis of the textual layer (textualism) provides little guidance, and the other layers of interpretation (dogmatics and the application of the law) are interlinked, often remaining at the level of generality. At the same time, the fourth layer of law (and thus of interpretation), that of fundamental law, can support and complement interpretation. According to Advocate General Kokott's Opinion in Presstext (Opinion C-454/06, Opinion 76-77), a change in the performance conditions is relevant if it is liable to distort competition on the market in question and to favour the contractor over other economic operators[43]. This interpretation is also a way of enforcing the principles of transparency and equal treatment already mentioned. If a new request for a contract is made, the terms and conditions are renegotiated and the principles invoked are therefore necessarily infringed.

It can be seen from the above that, where a floating boundary is identified in the application of the law, an interpretation according to the principle layer can and should be useful. If the new procurement requirement cannot be identified on the basis of the facts (all the circumstances of the case), it is necessarily not possible to establish a distortion of competition, and such a modification may therefore be lawful. In fact, it is the combination of the four layers, considered in conjunction with each other, that provides an interpretation of the norm that can lead to a decision that is in line with the legislator's purpose and with the Fundamental Law.

42 Varga Zs. András: Törvényjavaslatok indokolása – az Alaptörvény hetedik módosításának 8. cikkéről – Philosophus trium scientiarium Pokol Béla 70 Századvég Kiadó Budapest, 2021. p. 372
43 Miklós Gyula (2015.) p. 784

The Analysis of the Contracts of the Professional Athletes Based on the Hungarian Classification System

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The contracts of the professional athletes pose several issues including the classification of their legal status. Regarding the constantly changing business aspects, the traditional civil law and labour law paradigms are bent by the unique nature of the professional sports activity, therefore it is important to establish a guideline that helps to determine the relevant regulations relating to these professional sports contracts consisting of different special aspects. As per the Hungarian legislation and practise the contractual relationships are assessed by primary and secondary criteria laid down by the Directive 7001/2005 (MK 170) FMM-PM on the criteria for classifying contracts of performing work. However, the directive cannot always offer the necessary guideline to classify professional sporting contracts. Therefore, this study aims to point out the inadequate or obsolete aspects of the primary criteria that causes the directive to fail in terms of classification..
Keywords: *professional athletes, sporting contracts, classification, civil law, labour law*

As the field of sport evolved, it offered a unique opportunity to establish businesses based on the sport events and the sport activity of the professional athletes. This business formula started to take shape in the second half of the XIX century due to a strong commercialisation process. Therefore, the growth of the sport businesses required the sport sector to utilize the corresponding contract types for the employment of the professional athletes. As for concluding a contract, the parties will shall align and the terms of the contract shall determine the type and the legal frame of the contract. This principle also should prevail in respect of the sport sector, but the unique characteristics of the sport activity provide additional aspects that forces the sport sector to deviate from the conventional practice in respect of contract negotiation and employment. Therefore, the classification of the professional athletes' contract poses intriguing questions whereof some shall be discussed in this study.

Scope of the study

This study aims to observe some of the questions arising from the classification of the professional athletes' contracts. The analysis is based on the Hungarian classification system set forth in the Directive 7001/2005 (MK 170) FMM-PM on the criteria for classifying contracts of performing work[1] (hereinafter FMM-PM Directive or Directive). According to the Hungarian classification system, a contract is either deemed a contract of employment or another type of contract. So, this approach constitutes a binary classification system meaning there is no in-between legal status causing collisions among the provisions and dogmatical perspectives of the Hungarian Labour Law codex and Civil Law codex. Therefore, observing the questions posed by the classification of the professional athletes' contract, in my opinion, is quite significant without a doubt.

The reasons for classifying contracts

First of all, it is also important to have an overview of the reasons for classifying contracts since the chosen type of the contract determines the corresponding Act that governs the terms and conditions of that certain contractual relationship. Another reason for classification is relating to the tax regulations because different types of contracts of work require different taxation that usually provides an outstanding opportunity for the employers to avoid paying higher taxes after their employees by disguising employment relationships.[2] Unfortunately it is not hard to achieve since one can do so by creating a deceptive appearance that the performing party is an independent contractor.

In Hungary before the regime change, the classification of the contracts fulfilled the purpose of revealing which terms and conditions govern the parties' relationship. After the regime change, it became important to determine which tax regulations govern the contracts of work.[3] As per the Act I of 2004

1 See the title of the directive in Hungarian: 7001/2005. (MK 170.) FMM–PM együttes irányelv a munkavégzés alapjául szolgáló szerződések minősítése során figyelembe veendő szempontokról

2 For contracts at the intersection of several areas of law, see: Arató, Balázs: A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása, In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70: Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019); pp. 31-35.

3 Hovánszki Arnold: *A munkaviszony és munkavégzésre irányuló egyéb magánjogi jogviszonyok elhatárolása,* Cég és Jog 2001/7-8. 9.

on the Sports (hereinafter Stv.) 8.§ section 1 the agency fee paid for the professional athletes shall be accounted as wage cost, so there is no reason for trying to avoid the less beneficial taxation since the same taxes shall be deducted from the salary of the professional athletes. Therefore the importance of the classification lies within another aspect that is determining the corresponding terms and conditions of the contract.

In the following chapters the primary classification criteria shall be analysed set forth in the Directive having regard to the limited scope of the study and the nature of the primary classification features since in the event of identifying even one of the primary criteria is enough to consider the contractual relationship as a contract of employment.

The nature of the performance and the functions of the job

The duty of performing work incurs in a continuous and recurring way within the frame of an employment relationship. Therefore the set of work required to be performed by the employee are determined collectively as job that incorporates the duties of the employee who does not undertake to achieve a specific result by performing a task, but rather agrees to perform a job including several subtasks that is a fairly unknown condition is respect of the contractual relationships governed by the civil law.[4] However, there are some exceptions caused by certain financial progress that agency contracts are also likely to be concluded to establish a long term business relationship. Due to this practice one can notice that the purpose and aspects of the employment contract and the agency contract are getting closer to each other.[5] It is interesting to see such paradox since it means that the certain contracts governed by the civil law are not just concluded to undertake a specific task, but assign the work to the care of the agent to perform it regularly for a longer period of time.

In respect of the sport activity, one can notice the before mentioned paradox even more due to the fact that it is hard to determine the work to be performed by the athletes as a continuously and regularly incurring task as it is required within the frame of an employment contract. It also poses a problem to assign the work to the athlete as a single task within the frame of an agency contract. The reason for this lies within the description of the duty of the athletes set forth in the contracts of professional sport employment con-

4 Directive 7001/2005. (MK 170.) FMM–PM [IV. 2.]

5 Prugberger Tamás – Szekeres Bernadett: *Az új típusú foglalkoztatási formák és azok kihatása a tevékenységgel összefüggő szerződések dogmatikájár,* Állam- és Jogtudomány 2022/2. 68-69.

cluded between the athlete and the sport club. In one of the decisions of the Curia one can find that according to the terms and conditions described in the contract of the sport activity, the athlete is required to perform the sport activity within the frame of that certain sport and strives for a successful performance during the championship.[6] At first glance, it seems that this kind of activity could be solely carried out within the frame of an employment contract since the aspects of the duty aligns with a job description, but it also poses the question of how does the nature of the sport activity affect the subject of the service. In my opinion, it should not be ignored that the successful performance also falls within the interest of the athletes since this is the key for them to acquire sponsorship and be enlisted to the national team.[7] This aspiration of the athletes, carrying out their activity based on an agency contract, ipso iure creates a situation in which the they must take part in different sort of trainings and submit themselves to the orders of the coach since without doing so there is no other way to achieve the required performance level needed for the successful competing.

The duty of performing work in person

The Act I of 2012 on the Labour Code (hereinafter Mt.) 52.§ (1) point c) declares one the most significant aspect of the employment contract stating the employer shall carry out the work in person which also means they are unable to assign the work to a subcontractor of their own. However, it is possible to substitute an employee with another one, but this decision falls within the authority of the employer. On the contrary, within the frame of the business contracts or the agency contracts it is not uncommon to have a subcontractor to perform the work due to the regulations of the Civil Code.[8]

The before mentioned aspect is not eligible in the terms of the classification since having regard to the sport activity neither the employment contract nor the agency contract is suitable for having a subcontractor to substitute the athlete which is a rather obvious fact due to the nature of the sport, meaning the interest of the athletes requires them to carry out their activity in person, otherwise they would risk their successful performance. Furthermore, the unique nature of the sport and competitions conceptually excludes the possibility of having a subcontractor due to the regulations relating to the game

6 See the decisions of the Curia (Supreme Court of Hungary) and the Tribunal of Kaposvár: Kúria Mfv.10082/2022/4. [1]; Kaposvári Törvényszék M.70087/2021/24. [1].
7 Baker, Bradley J.: Competitive Balances. In: Pedersen, Paul M. (szerk.), *Encyclopedia of Sport Management*, Edward Elgar Publishing, Northampton, 2021, 93-94.
8 Directive 7001/2005. (MK 170.) FMM–PM együttes irány [IV. 2.]

license of the athletes that they convey to the sport club so as to carry out their sport activity. The nature of this legal institution poses a few intriguing questions but most of it falls outside the scope of this. However, it still have to be mentioned that the game license is a personal right of pecuniary value[9] which cannot be aligned with the concept of subcontractor. In case of substitution the sport activity of the athlete cannot be interpreted properly since it would be perceived as the sport activity of the subcontractor. Beside all of the before mentioned aspects, it is important to notice that depending on the will of the parties a subcontractor shall contribute to the performance of the work but they can also exclude it in the scope of a traditional agency contract. So this ambiguity makes this classification aspect quite controversial.

According to the FMM-PM Directive the presence of even one primary criteria of classification can be significant in terms of deeming a contractual relationship to an employment contract.[10] However, this criteria is not eligible for the classification due to the aforementioned reasons which might imply that based on this criteria the classification of the contract of the professional athletes ceases to be possible.

Duty of providing work and be at the disposal of the employer

The duty of providing work for the employee is also considered a prominent classification criterion declared by the Mt. 51. § section (1). Compared to civil law, it is a crucial difference that in the scope of employment relationship the employee is entitled to their personal base wage if the employer is unable to provide work according to Mt. 147. § section (1). Essentially the employee is entitled to the fee set forth in the employment contract even if there is no work to be performed while in most of the cases the agent is entitled to the agency fee if they perform the specified task. So, the agent as an independent contractor is not necessarily obliged to be at the disposal of the principal since they undertake a specific task meaning the principal is neither obliged to regularly provide work. However, as per Act V of 2013 on the Civil Code (hereinafter Ptk.) 6:276. § section (1) the agent shall be entitled to the agency fee even if their performance did not produce results. Taking a look at these regulations, in some cases within the frame of both contractual relationships the performing party shall be entitled to the agreed fee apart from the lack of work.

In my opinion, it is possible that the border line between the previously mentioned contract types are close to merge since the athletes performing

9 For more details see Burján Anna: *Csődbe ment terv? A sportolók játékjoga biztosítékként való felhasználásának nehézségei*, Sportjog 2021/2-3. 43-50.
10 Directive 7001/2005. (MK 170.) FMM–PM [IV. 1.2.]

sport activity based on agency contract aspire to participate in competitions in a certain period of time according to their schedule. On the other hand, it would be a mistake to ignore that the athletes performing as agents have the right to decide which competition they participate in. Within the frame of employment relationship, it works in the way around since the athletes shall perform sport activity as they are instructed by the employer.

Continuing the previous thought, there is a decision of the Curia delivered during the Covid-19 pandemic that is worth considering due to its relevant factors of performing sport activity.[11] The decision addresses the concerns whether the restrictions due to the pandemic caused a downtime of work during the championship. The answer for this question has significant consequences since it determines whether the sport club was obliged to provide work for the athlete or not at that time. If so, the athlete is entitled to their base wage in case the sport club fails to provide work for them. Curia declared that the employees fulfil their obligations even if they perform only a specific part of the job since in some cases certain subtasks are not possible or necessary to be performed. Furthermore, the different tasks belonging to the job can be complex that are determined by the needs and instructions of the employer. Therefore, performing only a certain amount of the job does not provide sufficient legal basis for deducting the base wage of the athlete.[12] There are several significant aspects of the decision, but one must be highlighted in connection with the topic of this study. The decision declares that partly performing the work is not necessarily considered a default performance which makes the borderline of employment contract and agency contract more ambiguous since according to the regulations of agency contract the agent can be entitled to the agency fee even if their performance did not produce results. However, it is undeniable that this specific trait of the employment relationship still firmly prevails compared to the other classification features, therefore this aspect itself seems to perpetuate the employment contract as a separate contractual relationship. However, this concept is not flawless unless we ignore that the parties of agency contracts can agree on the submission of the athlete to the coach who carries out instructions and determines the method of the training. This type of activity also consists of several subtasks as well as a job.

11 For a segment on the difficulties caused by COVID-19, see here: Arató, Balázs: Jogi lehetőségek a gazdasági társaságok működésének és pénzügyi egyensúlyának fenntartására a járványügyi veszélyhelyzetben; in: GLOSSA IURIDICA 7: különszám; 2020; pp. 95-120.

12 BH 2022.10.271 [34]-[35].

Subordinate to superior relationship

Without a doubt, the subordinate to superior relationship is a unique characteristic of the employment relationship which aspect obviously is impossible to be interpreted within the frame of civil law relationships since according to the concept of such relationships the contracting parties are in a side-by-side status. The hierarchy can be realised by the observing the extent of the integration in the organization of the employer that shows how much the employee depends on the organization of the employer while performing work. This amount of exposure conveys the superior position to the employer entitling it to instruct the employee.[13]

Considering the classification, the aforementioned aspect is of particular importance in general unless it has to be interpreted within the frame of professional sport activity since athletes performing as agents also have to submit themselves to instructed trainings so as to achieve compelling results both for themselves and the sport club. This phenomenon is supported by the following court decision[14] declaring that the regular personal performance of work and submission to the instruction of the coach in general does not provide enough legal basis for deeming the certain contractual relationship as an employment relationship. The court elaborated that the same terms and conditions can be incorporated into agency contracts. Furthermore, having the contractual relationship deemed an employment relationship it is not sufficient to observe only the terms and conditions relating to the fee since the athlete as an agent can be paid on monthly basis as well.

Conclusion

The parties may also conclude mixed agreements based on the principle of freedom of selection regarding the type of the contract.[15] Therefore, following the aforementioned principle the athletes and the sport clubs could also conclude an atypical contract consisting of mixed terms and conditions deriving from traditional contracts. In my opinion, the following concepts seems reasonable according to which concluding agency contract for solo sports and competitions is justified whereas the contract of employment may not be appropriate for spectacle team sports since the subject of the contract hardly

13 Directive 7001/2005. (MK 170.) FMM–PM [IV. 2.]
14 Decision of the Supreme Court: Mfv.11076/2009/5.
15 Hovánszki Arnold: *A munkavégzésre irányuló vegyes szerződések megítélése*, Cég és Jog 2001/9. 5-6.

suits the frame of the employment.[16] However, in certain extent it is also a relevant problem in respect of the agency contract that it cannot be aligned with the nature of spectacle team sports since as it was mentioned previously there are some aspects that fall outside of the frame of civil law contracts.

There is a significant discrepancy that might turn the tide over to the employment contracts in respect of the classification. That tipping point occurs due to the fact that the athlete is subordinated to the instructions of the employer causing the athlete to obey the instructions relating to the method of the trainings and performance. In the scope of agency contract the agent is not obliged to do so according to the general terms, moreover in theory the agent is entitled to decide when to compete, but as it was previously mentioned the athletes are compelled to submit themselves to the instructions otherwise they were unable to achieve the necessary performance level which is indispensable to have sponsorships and earn sufficient wage. Therefore there are a legal and socio-psychological trust between the parties in respect of both contractual relationship types since the contracting parties are forced to establish a strong and trustful relationship to achieve the common goals in which they depend on one another. To certain extent, within the frame of both contract types the performing party is obliged to carry out their obligations based on duty of care which poses the question of how can be separated the two types of contractual relationship. Also, another important question is to what extent can be separated these types of contracts and is it necessary at all to do so in respect of the professional athletes based on the traditional categories of contracts. The last question is escalated by the fact that the nature of the sport requires a performance based on duty of care causing the borderlines of both contract types to become ambiguous.

Apart from the traditional classification features and categories of the contract, another aspect might serve as a guidance. The subject of the contract marks the service to be performed by the obliged party whereas the content of the contract addresses the rights and obligations of the parties.[17] It regulates the dynamics of the contractual relationship and the conduct relating to the performance. However, it shall be considered that the contract law is meant to regulate the economic activities and relationship of the society, therefore the practice of transactions reflects on the contracts and form it. Eventually the market economy resulted in such globalization, commercialization and production workflow that stretches the frame of the currently

16 Ibid. Horváth 5.

17 See the Commentary on the Hungarian Civil Code: *Polgári jog I-IV. - régi Ptk. - Kommentár a gyakorlat számára*, A HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012, Kötelmi jog fejezet [IV. 1.]

known categories of the contracts creating new types of contracts and contracting techniques in respect of certain traditional civil law contracts.[18] In this manner, the diligent performance of tasks is the only clear aspects of the professional sporting contracts since the field of sport is constantly evolving, therefore the newly adapted practices of the market have significant impact on the agreements concluded between the parties.

18 Papp Tekla, *Atipikus szerződések,* A HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2019, 14.

Competition Damages Actions and Leniency Programmes Irreconcilable Conflict, or Potential Harmony?

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The present study examines the relationship between the private enforcement of competition law and the most important legal instrument in the toolkit of public enforcement of competition law, the leniency policy, through the EU legal environment relevant to this legal instrument and the case law implementing it. The present paper will discuss the impact of Directive 2014/104/EU of the European Parliament and of the Council of the European Union on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Directive) on the relationship between private enforcement of competition law and leniency. I will assess the impact of the private enforcement of competition law on the application of leniency policy. The main aim of the study is to present and evaluate the solutions and their results that the Directive has sought to resolve the conflict between the private enforcement of competition law and the application of leniency.
Keywords: *public law, private law, competition law, damages, leniency, European Union law*

Introduction

Advanced societies operate a fundamentally capitalist economic system, based on private property, free enterprise and economic competition, making free economic competition one of the fundamental drivers of modern economies. Competition encourages businesses to offer high quality goods and services at the lowest possible prices in order to attract customers and increase their market share, i.e. their profits. In free market competition, businesses, by pursuing their own self-interest (i.e. profit orientation) in their economic relationships, ideally ultimately contribute to the welfare of the whole community. In the words of Adam Smith, "*It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities*

but of their advantages."[1] Competition also encourages innovation, as businesses try to produce products that are more attractive to consumers in order to compete economically. Competition thus forces firms to be creative and innovative, for example in the design of their products or in the use of technology. Restrictive practices, on the other hand, prevent, distort or reduce economic competition in the market. Anti-competitive practices typically lead to market distortions, resulting in higher prices, lower quality products, poorer quality service and a deterioration in innovation.[2]

Action against restrictive practices is therefore central to competition law, and its positive economic effects have long been recognised.[3] So-called hardcore restrictive practices have a number of very negative effects on the economy (e.g. *deadweight-loss*, *welfare transfer*, *X-efficiency loss*, *rent-seeking*), and thus on society, innovation and ultimately consumer welfare.[4] Optimising action against anti-competitive behaviours is therefore a high public policy priority.

The main objective of competition policy, in the light of the above, is to maintain economic competition, including by combating restrictive agreements between undertakings. In continental jurisdictions, such as the European Union, competition rules are enforced through the instruments of public law.[5] The public interest is therefore a fundamental motive for the public enforcement of competition law, which in the case of competition law is the public interest in maintaining competition in the marketplace for eco-

1 Adam Smith, The Economy of Nations - An Examination of the Nature and Causes of this Economy, 1776, Translated by Rudolf Bilek, Budapest, Akadémiai Kiadó, 1959, p. 64.
2 There is an increasingly sophisticated toolbox of anti-competitive practices. A good example is the classification of certain relevant information as business secrets in public procurement procedures, which the legislator has eliminated by amending the law. See also in this respect: Arató Balázs: A titok fogalma a jogban; in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp.29-39.; and BALÁZS Géza: A titok antropológiája és szemiotikája, in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp. 15-28.
3 The competition law approach quickly took root in other areas of law. See for example: Arató, Balázs: A közbeszerzési jogorvoslat története a rendszerváltozástól; in: Jogelméleti Szemle 16:3; pp. 2-33.; 2015.
4 See more in Hal R. Varian: Microeconomics at the intermediate level. Budapest, Közgazdasági és Jogi Könyvkiadó, 5th edition, 2001, p. 443.
5 On the incorporation of public law into civil law, see for example: Arató, Balázs: A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása, In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70: Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019) 546 p. pp. 31-35., 5 p.

nomic efficiency and social advancement, and in protecting the interests of businesses and consumers who respect the requirements of business fairness.[6] Therefore, in a broad sense, the public enforcement of competition law should be understood as the public intervention in the public interest to maintain the smooth functioning of the market economy, to ensure the freedom and fairness of competition and to enforce competition law provisions in the interest of long-term consumer welfare and competitiveness.

In a narrow sense, the public enforcement of competition law is carried out through the intervention of a public authority with the necessary powers and competences, the most tangible form of which is the competition supervision procedure, whereby the competent authority, acting within its remit, applies public sanctions to protect the freedom and fairness of competition in the market, which is a prerequisite for economic efficiency, in a preventive and repressive manner, with the primary - and most resource-intensive - task of detecting infringements. The detection of restrictive agreements is a major challenge for public authorities due to the secretive nature of cartels, as the strict action of public authorities and the possibilities offered by technology make it all the more difficult for cartelists to find creative ways to create and maintain cartels, which makes it very difficult to trace them and thus to detect them,[7] and many cartels remain undetected.[8]

In the context of public enforcement of competition law, an effective tool for the authorities to detect cartels is the leniency policy based on the prisoner's dilemma[9], as known in game theory, whereby cartel undertakings are encouraged to disclose evidence of cartels in order to avoid full or partial immunity from competition fines for restrictive conduct or criminal prosecu-

6 See as an example the preamble to the Civil Code.

7 Combe, E., C. Monnier and R. Legal (2008), „Cartels: the Probability of Getting Caught in the European Union", Bruges European Economic Research papers. page 17.

8 Ormosi, P. (2014), „A tip of the iceberg? The probability of catching cartels", Journal of Applied Econometrics, Vol. 29/4, pp. 549-566.

9 A dilemma is a type of non-zero-sum game. At its heart is whether one of two prisoners suspected of a serious crime will confess against the other (i.e. defect, since in the materials dealing with the prisoner's dilemma, cooperation is not cooperation with the authorities but refusal to confess). As in the other non-cooperative game theory problems, it is assumed that each player is concerned with his own gain, regardless of the gain of the other participant. In the prisoner's dilemma, the Nash equilibrium does not lead to an optimal solution for both parties, because in this case it means that each prisoner testifies against the other, even if their gains would be greater with cooperation. Even though both prisoners would be better off if they cooperated and neither testified against the other, it is still in the personal interest of both to testify even if they had previously promised each other cooperation. This is the essence of the prisoner's dilemma.

tion. Leniency policy is an effective tool for competition authorities[10] , as it not only increases deterrence from engaging in restrictive conduct by breaking trust within the cartel and destabilising agreements, but also facilitates prosecution by the authorities, as leniency applicants are obliged to disclose the cartel and provide evidence to the authorities in order to obtain immunity from fines. Leniency was first used in the United States in 1978[11] , in the European Union in 1996 and in Hungary since 2003.

However, in addition to the wider public interest harm, cartels can also harm private interests, as the price increases, quality losses or market foreclosure caused by cartels can cause quantifiable harm to competitors, suppliers or other stakeholders, which can lead to victims bringing damages actions against cartel participants. The dominant motive for private enforcement of competition law is the coexistence of private interest and, by the very nature of competition law, public interest, the harm to which private enforcement seeks to remedy through the private law instrumentality, primarily reparation.[12] For the success of an action for damages under competition law, it is in the fundamental interest of the parties bringing the action to establish the details of the anti-competitive conduct, the fact and time of the infringement itself, the damage caused by the infringement and the extent of that damage, the identity of the infringing undertakings and the evidence necessary to prove the causal link between the infringement and the damage caused. The private enforcement of competition law can take place after the public enforcement of competition law (so-called follow-on actions) or in the absence of such enforcement (so-called stand-alone actions). There is a significant difference in terms of evidence between the two types of action, given that in follow-on actions the cartel has already been discovered by the authority and the claimant has the decision of the authority finding an infringement.

As the conflict between leniency policy and private enforcement can only be understood in relation to follow-on actions, I will refer to private enforcement of competition law as follow-on actions. The aim of my paper is therefore to describe the conflict and the relationship between private enforcement of competition law and leniency policy, as described above, and to analyse and assess the impact of private enforcement on leniency policy and the theories for resolving the conflict.

10 Combe, E., C. Monnier and R. Legal (2008), „Cartels: the Probability of Getting Caught in the European Union", Bruges European Economic Research papers. page 19.
11Scott D. Hammond, Antitrust Div. Deputy Assistant Attorney Gen., Address at the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades Feb. 25, 2010, page 2
12 Tóth, 2016. p. 191.

Steps taken to resolve the conflict in the Directive

It was suggested relatively early on that damages litigation could reduce the attractiveness of leniency programmes for cartel participants if their cooperation with the competition authority increases the chances of being sued by cartel victims.[13] This apparent conflict between public and private enforcement called for a legal compromise.

The usability of leniency statements and the liability of the leniency applicant for damages is one of the most critical issues for the private enforcement of competition law, given that both leniency and damages actions are preventive in nature against competition law infringements, at the same time, whereas leniency encourages cartel undertakings to disclose their infringing conduct by offering them the possibility of immunity from competition law sanctions, competition damages actions, by contrast, still hover over cartel undertakings as a private sanction for competition law infringements, despite the fact that they have made a leniency declaration, and the two instruments therefore necessarily affect each other's effectiveness.

The objective of the Directive includes the need to ensure that undertakings remain prepared to approach competition authorities voluntarily with leniency notices or settlement submissions. This is to avoid disproportionate exposure of immunity beneficiaries to the risk of being sued for damages under worse conditions than those applicable to other infringing undertakings not participating in the leniency programme. To this end, the authors of the Directive considered it necessary to exempt leniency documents from the obligation to disclose evidence[14] and to exempt undertakings benefiting from immunity from joint and several liability for all damages by limiting the contribution to be made to other infringers by the undertakings benefiting from immunity to the amount of the damage caused to the direct or indirect customers of the undertaking benefiting from immunity.[15]

This objective is based on the recognition that there may be a significant disincentive for undertakings to participate in leniency programmes and to cooperate with competition authorities if they are required to disclose self-incriminating settlement submissions made solely for the purpose of cooperating with competition authorities and if they become the primary target of damages actions as a result of the earlier entry into force of a decision of a

13 See for further details Wilsher, Dan: The public aspects of private enforcement in EC law: some constitutional and administrative challenges of damages culture, CLR, 2006, no. 3. p. 30; and

14 Directive 26, preamble paragraph.

15 Preamble paragraph38 of the Directive.

competition authority finding an infringement than is the case for undertakings not benefiting from immunity.[16]

It can be seen from the above that the harmonisation of the two legal instruments in the Directive has been reflected in the limitation of the extent of the liability of leniency undertakings and the exclusion of the use of leniency statements in competition damages actions. Under the Directive, national courts are precluded from considering the admissibility of leniency statements and are obliged to reject all applications for the disclosure of leniency statements.[17] The Directive thus gives priority to the protection of the leniency institution, which I consider to be the most important, over the enforcement of damages actions, although it seeks to maintain a balance between the two. It is noticeable that, on the basis of the Directive, the Commission has sought to establish a symbiosis between public and private interests.

The relationship between private enforcement and leniency

It is clear that the public interest leniency policy of promising immunity in exchange for cartel detection as an incentive to destabilise cartels is being countered by the - eminently "*fact intensive*" - competition law tort litigant, the private interests of the injured party, who is in a more disadvantaged position as a result of extreme information asymmetry, in obtaining evidence of infringement and thus in recovering his loss through a successful damages action, seem irreconcilably opposed.

Despite the Directive's efforts to resolve conflicts, while leniency applicants are granted full or partial immunity from competition fines, they remain vulnerable to subsequent damages actions.

Leniency applicants cannot appeal against the infringement decision, which makes the decision final against them first.[18] The Directive's provision protecting leniency applicants, i.e. exempting leniency statements from discovery, covers statements and verbatim quotations from them, but does not cover decisions which, although not citing leniency applications, refer to them. Furthermore, immunity does not extend to other evidence which must be offered together with the leniency application in the context of the cooperation obligation under the leniency programme, so that the protection

16 Directive, recitals 26 and 38.

17 Micklitz, Wechsler, 2016, p. 144.

18 They could theoretically do so, but a recent case, VJ/29/2021 Danube Passenger Carriers, is an excellent example, where the Hungarian Competition Authority considered the companies' action against the infringement decision as a breach of the duty of cooperation, as confirmed by EU competition case law, and as a result the Hungarian Competition Authority withdrew the leniency notice.

afforded by the Directive may not always be considered sufficient for leniency applicants.[19] The Directive also limits the extent of the joint and several liability of immunity recipients. Participants in the leniency programme are only vicariously liable, i.e. they are fully jointly and severally liable to the victims if full compensation cannot be recovered from other undertakings involved in the same infringement. In the latter case, the amount of the contribution of the immunity beneficiary cannot exceed the amount of the damage caused to its own direct or indirect customers or service providers. [20]

The Directive's rules on the universal liability of leniency applicants are seems to be a step backwards compared to Article 88/D of the Hungarian Competition before the implementation of the Directive. Prior to the implementation of the Directive, pursuant to the provisions of the Hungarian Competition Act under Article 88/D, immunity applicants were only liable for the damage caused if the other members of the cartel were unable to pay the damages awarded to the claimants in private enforcement actions. In Lena Hornkohl's view, the earlier Hungarian rule went beyond the Directive's rule on joint and several liability, since the Directive's provision limits the liability of the beneficiaries of the immunity by way of leniency to their entire liability for damages to their direct or indirect customers.[21]

However, there is a reason why the legal exclusion and limitation of civil liability is rare in continental legal systems and is linked to the injured person's own fault or special circumstances. In particular, the exclusion and limitation of liability in the private enforcement of competition law may have an unintended effect and limit the chances of obtaining full compensation for the damage caused by a breach of competition law.[22]

Article 101 of the TFEU, which governs EU antitrust law, does not contain a provision on private law claims, which have been repeatedly laid down by the Court of Justice of the European Union (**"CJEU"**) in its interpretative work. One of the fundamental prerequisites for the private enforcement of competition law is the direct application of the primary law of the European Union, in this case the provisions of the TFEU relevant to competition law, and the

19 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

20 Directive Article 11(5)

21 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

22 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

general principles developed by the CJEU. The principle of direct effect was established by the CJEU in the Van Gend en Loos judgment[23] , while the direct effect of EU competition law provisions, i.e. Articles 101 and 102 TFEU, was established by the CJEU in the SABAM judgment.[24] And the CJEU has established the right to sue for damages for breach of competition law in the Courage case.[25] Article 3 of the Directive also expressly mentions the right of victims to full compensation. The right of victims of a cartel to full compensation is therefore derived from primary law and permeates the private enforcement of competition law at a fundamental level.

Consequently, the exclusion of liability for leniency applicants must be carefully considered in order to ensure the effectiveness of the leniency policy and respect the general principles of primary law. In any event, any limitation of the liability of leniency applicants must comply with the principle of proportionality. It can therefore be seen from the above that the conflict between leniency and private enforcement has not yet been resolved.

The impact of CJEU case law on the relationship between leniency policy and private enforcement

In the European Union and the European Economic Area, since the Courage judgment, approximately 300 national competition damages actions have been brought in the European Union and the European Economic Area, of which 58 cases have resulted in damages awards, 93 in a finding of liability for competition law infringements and 134 in a dismissal of the action.[26][27] A number of these judgments have also been referred to the CJEU, which has given the CJEU the opportunity to further refine the details of the Directive's competition damages litigation, such as the question of leniency.

Even before the Directive was drafted, the CJEU was dealing with the highly controversial issue of the use of leniency statements in competition damages actions. In Pfleiderer, the CJEU still allowed access to leniency statements, but left it to national courts to weigh the conflict of interest between

23 Judgment of 5 February 1963 in Case C-26/62, Van Gend & Loos v Nederlandse administratie der belastingen.

24 Case C-127/73 BRT v SABAM [1974] ECR 51, paragraph 16.

25 Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraphs 26-27.

26 Laborde, 2021. pages 232-242.

27 In relation to the figures, it is important to point out that the research cited above - quite rightly - drew a distinction between actions brought and judgments handed down in relation to them, or counted judgments handed down in relation to the same infringement as one case.

public and private enforcement.[28] In Donau Chemie, the CJEU did not wish to establish a sharp hierarchy between private and public interest enforcement, but pointed out that to exclude access to leniency documents altogether would infringe the right to compensation itself.[29]

The CJEU has also given judgments on the use of leniency statements after the Directive was adopted. In the Axa and Degussa cases, the scope for victims to obtain information on leniency statements has been outlined. In the Axa case, it was held that while the substance of a leniency notice cannot be disclosed, the references contained in it can.[30] In the Degussa case, the CJEU ruled that knowledge of the European Commission's infringement decision does not result in the disclosure of leniency notices, so that the fact that an undertaking has participated in a leniency programme can be disclosed.[31]

While not solving all the problems, the interpretative work carried out by the CJEU has tangibly eased the uncertainties surrounding competition damages actions. This can be seen from the gradual increase in the number of actions for competition infringement compared to the period 2001-2009, when the Commission ordered a study on the quantification of damages in the context of private enforcement of EU competition law, which produced a total of 46 relevant judgments.[32] As the data are spread across Europe, there is a very significant variation in the number of judgments in competition damages actions from one country to another. This variation in activity may mean that the case-law of countries with more competition damages litigation and more judgments may provide a guide for judges in countries where the experience needed for future competition damages litigation is lacking. This phenomenon would, in my view, have a fundamentally positive effect on both damages actions themselves, which would be much more predictable in a country with relatively less case law, and would also bring about a convergence of national judicial practices in relation to competition damages actions, which would make them more universal. There are already indications of the above-mentioned trend, as there are an increasing number of judgments which explicitly refer to judgments handed down by courts in other Member States.[33] An

28 Judgment in Case C-360/09 Pfleiderer AG v Bundeskartellamt [ECLI:EU:C:2011:389], paragraph 32.

29 Judgment in Case C-536/11 Bundeswettbewerbsbehörde v Donau Chemie AG and Others, ECLI:EU:C:2013:366, paragraph 27

30 See Case T-677/13, first paragraph of the decision.

31 See Case C162/15, point 83 and answer to the first question.

32 See Oxera et al., 2009, pp. 150-153, and Laborde, 2021, p. 235.

33 See, for example, judgment of the Commercial Court of Valencia No 3, 7 May 2019, No 338/2018; judgment of the Rechtbank Amsterdam, 15 May 2019, ECLI:NL:RBAMS:2019:3574; judgment of the Regional Court of Valencia, 16 December 2019, No 1126/2019; judgment of

example is the judgment of the Amsterdam District Court[34] , which referred to the conditions of proof in the Dortmund Regional Court judgment, which imposed similar requirements on the parties to support their claims. In this context, it is also worth mentioning the judgment of the German Federal Court of Justice[35] , which referred to the judgment of the UK Supreme Court[36] on the interpretation of the Directive's effective application. Last, but not least, I consider it important to mention the judgment of the Commercial Court of Oviedo, in which the decision-making forum did not merely refer to a judgment of a court in another Member State in a similar case and on a similar point of law, but carried out a proper comparative analysis of the assessment of the level of damage, taking as a basis the relevant German, Italian, French, Belgian and, not least, Hungarian practice and, not least, the relevant national legislation.[37]I believe that these national court judgments outline a trend towards legal and jurisprudential unification at Member State level with regard to legal issues in competition damages actions.

The impact of private enforcement on leniency policy

Despite the institutional protection mechanism established by the Directive and the CJEU's case-law-shaping activity, in recent years, the number of leniency applications in the European Union has fallen significantly. The increase in the number of antitrust damages actions for competition law infringements is widely seen as the main reason for the decrease in leniency applications.[38]

There is a broad consensus on the factors that ensure the success of leniency programmes, which some authors refer to *as the* "6C *criteria*"[39] ((i) clarity; (ii) commitment from both sides (i.e., authorities' limited discretion and firm's duty of full co-operation); (iii) credibility (in terms of credible threat of

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the Bundesgerichtshof, 2020. judgment of 23 September 2018, KZR 4/19; judgments of the Regional Court of Dortmund, 27 June 2018, 8 O 13/17, and 30 September 2020, 8 O 115/14; and judgment of the Commercial Court No 1 of Oviedo, 12 April 2021, 245/2019-B.

34 Case C/13/639718 / HA ZA 17-1255 [ECLI:NL:RBAMS:2019:3574], point 3.28.

35 Bundesgerichtshof, KZR 4/19, point 50

36 UK Supreme Court, [2020] UKSC 24 para 194 et seq - Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC

37 Oviedo Commercial Court No 1, Case 245/2019-B, pages 5-6

38 Olivia Bodnar, Melinda Fremerey, Hans-Theo Normann, Jannika Schad, The Effects of Private Damage Claims on Cartel Activity: Experimental Evidence, Duesseldorf Institute for Competition Economics, June 2021, pp. 3 and 36.

39 Volpin, C. and P. Chokesuwattanaskul (2023), Leniency programmes, Edward Elgar Publishing Limited pages 305., 307. and 562.

detection irrespective of leniency); (iv) confidentiality; (v) co-operation and co-ordination between authorities; and (vi) context and culture).[40]

Despite the widely accepted consensus and the fact that legislators have implemented a number of reforms, including the Directive, the number of leniency applications has drastically decreased between 2015 and 2021. In OECD countries, the number of leniency applications fell by 58%.[41]

It is interesting to note that from 2016, the deadline for transposition of the Directive, the number of leniency applications started to decrease. The German competition authority mentions a drastic decrease in the number of leniency applications in its annual report 2019/2020.[42] The German Competition Authority's annual report clearly shows that the number of leniency applications submitted over the last ten years has been decreasing significantly since 2016/2017, for example, from 36 applications in 2016 to 11 in 2020 and 10 in 2021[43] . According to the assessment of the German Competition Authority, this trend is in particular due to the uncertainty of potential leniency applicants about future claims for damages. The Directive was transposed in Germany in June 2017. The annual report of the German competition authority also shows that this trend is also relevant for other ECN competition authorities, including the European Commission. In Hungary, 10 leniency applications have been submitted to the ECN in 2017, 5 in 2018, 4 in 2019, 5 in 2020 and 3 in[44] 2022.[45] The GCR Rating Enforcement statistics show a similar picture for other ECN competition authorities, including the European Commission. The overall decrease in the number of applications is a cause for concern given the prominence of leniency programmes in cartel detection, as prior to the decrease, the majority of competition enforcement proceedings were initiated on the basis of leniency applications.

A study carried out in cooperation with the Düsseldorf Institute for Competition Economics (DICE) at the Heinrich Heine University in Düsseldorf[46] shows that while the propensity to form cartels and the stability of cartels has decreased with the introduction of private litigation, infringing firms are less likely to seek leniency, i.e. the overall incidence of cartels is lower in the shadow of competition damages actions, which is positive, but competition damages claims have a negative impact on the success of leniency policy.

40 OECD: The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, 2023. page 6.
41 Lapenta et al, OECD, 2023. p. 6.
42 Tätigkeitsbericht des Bundeskartellamtes 2019/2020, page 39, point (c).
43 The Bundeskartellamt Annual Report 2021/22, 32nd page.
44 For 2021, no public data on the number of leniency applications submitted was available.
45 See annual reports of the GVH.
46 Bodnar et al, 2021. p. 36.

A study by the OECD confirms this trend. That study examined the reasons for the decline in leniency applications, noting a global trend of a 58% decrease in the number of leniency applications in OECD countries between 2015 and 2021.[47] However, the study on the interaction between leniency and competition damages actions somewhat nuances the picture and examines the impact of follow-on and stand-alone damages actions on leniency. The study highlights that while follow-on actions clearly show a negative impact on leniency policy, stand-alone actions, where there is no conflict with leniency in the first place, may increase the efficiency of cartel detection by increasing the detection capacity of EU and national competition authorities, which may also lead to an increase in the number of leniency applications. However, in light of the predominance of follow-on actions compared to stand-alone actions, the negative impact of antitrust damages actions on leniency is clear.[48]

The use of leniency is still widespread throughout the European Union and relies heavily on leniency applicants to detect and investigate cartels, with a significant proportion of cartel cases being initiated on the basis of a leniency application.[49] For example, according to the report cited by the OECD study, leniency applicants were present in 100% of cartel cases brought under the jurisdiction of the European Commission and the United Kingdom, but also in the majority of cases in Spain and Hungary.[5051] In light of this, the negative impact of competition damages litigation on leniency policy is a significant problem. However, it is important to underline that the study cited also recognises the importance of the fact that over-reliance on leniency by competition authorities at the expense of other investigative tools may reduce the overall deterrent effect, which in turn negatively affects the effectiveness of leniency,[52] and thus somewhat nuances the negative impact of antitrust damages actions on leniency.

47 Lapenta et al, OECD, 2023. pp. 6-8.
48 Lapenta et al, OECD, 2023. p. 18.
49 Lapenta et al, OECD, 2023. p. 9.
50 In Hungary, 3 leniency applications were received for 6 cases opened in 2022, 5 leniency applications were received for 6 cases opened in 2020, 4 leniency applications were received for 4 cases opened in 2019 (each of which was related to a separate procedure), and 11 leniency applications were received for 10 cases opened in 2018 (each of which was related to 5 cases).
51 Mansfield et al, Allen&Overy, 2020 London, p. 2.
52 Lapenta et al, OECD 2023. p. 15.

Theories for resolving the conflict between private enforcement and leniency

To counterbalance the trend described above, academics consider that the civil liability of leniency applicants should be limited by exempting them from further actions for damages, in large part or even in full.

The idea of Buccirossi, Marvao and Spagnolo in this respect is to minimise the amount of compensation to be paid to the undertaking benefiting from immunity by submitting a leniency application, while at the same time maximising the amount of information (including leniency statements) collected by the competition authority and made available to the applicants. Buccirossi, Marvao and Spagnolo thus propose a solution to resolve the conflict described above in which the cartelists are jointly and severally liable, except for the first successful leniency applicant, who is exempted from both the competition fine and civil liability,[53] irrespective of the latter, whether the other cartel members are able to pay the damages awarded[54] , but all documents, including the leniency notice, should be made available to the victims of the cartel[55] , as it may not be appropriate to continue to protect the leniency notice if the leniency applicant is not exposed to the damages action.[56] The solution proposed is currently quite different from the current EU framework, which already provides for a variety of protections for leniency applicants.[57]

However, Thomas G Funke rightly pointed out that the idea of Buccirossi, Marvao and Spagnolo is not feasible under EU law, because if the full amount of damages could not be recovered from the other cartel members, this would violate one of the most important principles of competition law damages actions, the principle of full compensation.[58] As the ECJ has held, it follows from the direct effect of EU primary law that any individual can claim compen-

53 Buccirossi, P, Marvão, C, and Spagnolo, G, „Leniency and Damages: Where Is the Confl ict?", The Journal of Legal Studies , 2020 49:2, at 335-379.

54 Paolo Buccirossi, P, Marvão, C and Spagnolo, G, „Leniency and Damages: Where Is the Confl ict?", The Journal of Legal Studies , 2020 49:2, at 335-379.

55 Buccirossi, P, Marvão, C, and Spagnolo, G, „Leniency and Damages: Where Is the Confl ict?", The Journal of Legal Studies , 2020 49:2, at 335-379.

56 Monopolies Commission, Competition 2022, XXIV Main Opinion, https://www.monopolkommission.de/images/HG24/HGXXIV_ Gesamt.pdf, para 322.

57 For an overview of incentives and legislative options that were considered in the EU and in the UK prior to the Damages Actions Directive, see Cauffmann, C, https://papers.ssrn. com/sol3/papers.cfm?abstract_id=1941692.

58 Thomas G Funke: The leniency comeback A view from Germany, Competition Law Insight - Lloyd's List Intelligence, https://www.competitionlawinsight.com/

sation for the damage suffered if there is a causal link between the damage and the infringement of EU competition rules· [59]

Another theory is that the problem could be solved by closer involvement of competition authorities. In Lena Hornkohl's view, a solution to the problem would be to exempt leniency applicants from liability by distributing the fines collected through the Fair Funds[60] - from which the immunity recipient is also naturally exempted - to the victims of the competition law infringement to compensate the claimant-to-be for the loss of a defendant in the upcoming potential follow-on action.[61] While in my view the idea is not at all unacceptable, it may be severely limited by the fact that under EU and Hungarian competition law there is a cap on the amount of the fine that can be imposed, which may not be sufficient - especially in a class action - to satisfy all the injured parties for example in case of an action for damages for a single and continuous infringement that has caused a large amount of damage to many participants over a long period of time, in addition the loss of the fine as government revenue itself may not be welcomed by any public administration.

Conclusion

In the light of the interaction between leniency policy and private enforcement, it is essential that competition authorities guarantee the attractiveness of leniency programmes and maintain the dilemma it creates. At the same time, the public interest in the success of leniency programmes should not disproportionately hinder the right to full compensation. As can be seen from the above, the European interpretation of private enforcement of competition law is not yet complete, and the negative effects on leniency policy have created new problems to be solved. The EU legislator has not yet managed to resolve the tension between public and private enforcement of competition law.

While leniency programmes and damages actions serve the same purpose, at least to some extent, of increasing compliance with competition rules, as we have seen above, the increasing number of damages actions may under-

59 See for example judgments in C-453/99 Courage; C-295/04 Manfredi; C-557/12 Kone; C-435/18 Otis; C-724/17 Skanska; and C-882/19 Sumal.

60 The Fair Funds for Investors provision was introduced in 2002 under Section 308(a) of the Sarbanes-Oxley Act (SOX). The Fair Funds for Investors provision was put into place to benefit investors who have lost money because of the illegal or unethical activities of individuals or companies that violate securities regulations. The provision returns wrongful profits, penalties, and fines to defrauded investors.

61 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

mine national and EU leniency programmes, as the risk of further damages actions may deter potential leniency applicants from coming forward. In order to enhance the successful coexistence of leniency programmes and damages actions, the law can intervene in two steps: it can prevent public disclosure of leniency applications and it can reduce the risk or amount of compensation to be paid by the beneficiaries of leniency applications.

Leniency programmes are a useful tool for competition authorities, as they enhance cartel deterrence, by destabilising cartels, and also ease their prosecution by competition authorities. Therefore, some jurisdictions have over reliance on leniency applicants to detect and investigate cartels and a significant number of their cases benefited from this tool. Therefore, in my view, the decline in the number of leniency applications is a serious problem that needs to be addressed as soon as possible. A deeper involvement of competition authorities in compensating injured parties may, in my view, be a workable concept, but I also do not consider it inconceivable that the destabilisation of cartels could be achieved by a shift of focus to other detection tools.

Other detection tools and legal instruments and measures from competition authorities – such as facilitating complaints, whistleblowing, fast track sector inquiry, formal notice, improvement of cartel screening methods, strengthening authorities' internal skills on the digital economy, Close international co-operation to enhance cartel detection – could be strong enough to complement leniency, the sharp decline the number of leniency applications may constitute a serious threat for the public enforcement of competition law, therefore the situation may require investments in other detection tools as well as possible reforms of leniency programmes and/ or competition damages actions, in order to counter this declining trend and ensure their continuous effectiveness.

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Freedom of Contract and the Constitution

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This paper deals with the constitutional foundation and features of freedom of contract. It attempts to describe the dogmatic relations that exist between the market economy, general freedom of action, and the right to self-determination on the one hand, and the market economy on the other. The essay examines the constitutional limits of the freedom of contract and presents the most important findings of the Hungarian Constitutional Court on the issue.
Keywords: *private law, constitution, freedom of contract, freedom of action Constitutional Court*

The Constitution (the act 1949. XX. which was amended several times) following the change of system in Hungary mentioned the market economy in two places: on the one hand, the preamble contained the term "social market economy"[1], and 9. § (1), according to which Hungary's economy is a market economy in which public and private property have equal rights and receive equal protection. Paragraph 9. § (2) added to this that the Republic of Hungary recognizes and supports the right of entrepreneurship and the freedom of economic competition. It is a historical fact that the market economy is only really functional on the basis of private ownership. This basis of private property presupposes the freedom of private property and, as part of it, the freedom of contract. These two freedoms function as a social organizing principle and force in the civilization that is now called European. Both freedoms – based on the principle of equality before the law – were based on the equality and subordination of the parties entering into a property relation-

1 See Muzslay's definition of this: "The social market economy is based on a free, self-disciplined, responsible person, who strives for initiative, economic activity and private property, who can take care of himself under normal circumstances. The human person as a free and independent citizen is the human ideal of the social market economy." István Muzslay: *Gazdaság és erkölcs. (Economy and morality.).* Márton Áron Publishing House, 1995. 134. p.

ship with each other, which was based on the assumption of real, economic and social equality of the parties.[2]

Although before the entry into force of the Basic Law, the Constitutional Court dealt with the issues of the market economy in a number of decisions, it did not develop the principle of the market economy in such detail as, for example, the rule of law.[3] After quite a few fundamental decisions, the decisions contain rather "defensive" arguments. So, for example, that the market economy is a constitutional task, which, apart from its connections with the basic institutions of the rule of law, is irrelevant to any constitutionality investigation. No one has a right to the market economy, and no violation of fundamental rights can be based on it. As a result, some legal provisions cannot directly violate the constitutional principle of the market economy, and no constitutional objection can be directly based on it.[4] Similarly: the market economy is irrelevant in all constitutionality investigations. No one has a right to the market economy, that is, it cannot be classified as a fundamental right. The unconstitutionality of the violation of any fundamental right cannot be decided by referring to the violation of the market economy. In other words, the constitutionality of an intervention or legal restriction cannot be made dependent on the extent to which the restriction serves the development of the market economy, or whether it serves at all.[5]

The reason for the relegation of the constitutional clause concerning the market economy is, that in a stable market economy, the assessment of the state's economic policy is fundamentally not a question of constitutionality. Aspects that serve the market economy typically come into effect through issues within the scope of fundamental rights protection, but fundamental rights also have an independent content that goes well beyond the market economy, and are only partially connected to the constitutional principle of the market economy.[6]

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2 See more about this: Lenkovics Barnabás: Szerződési szabadság – alkotmányos nézőpontból. (Freedom of contract – from a constitutional point of view.) In: *Liber Amicorum Studia Gy. Boytha Dedicata.* Edited by: király Miklós, gyertyánfy Péter. ELTE 2004. 247-249. p.

3 It is typical of the Constitutional Court that it derives certain fundamental rights from the rule of law. See, for example, in this respect in detail: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9-30.

4 1524/B/1992. AB decision, ABH 1995, 651., 655.

5 668/B/1996. AB decision, ABH 1996, 636, 637.

6 See Balogh – holló – kukorelli – sári: *Az Alkotmány magyarázata. (Explanation of*

The Basic Law, which entered into force in 2012, no longer includes the term market economy, but it speaks about the freedom of entrepreneurship, linking it with the freedom to choose work and occupation [Article M) paragraph (1), and XII. Article (1)]. This is the constitutional context, as well as the declaration of the right to property [XIII. Article (1)] form the appropriate basis for the use of the doctrine developed by the previous practice of the Constitutional Court regarding freedom of contract.[7] The Constitutional Court, following the entry into force of the Basic Law, in 3192/2012, (VII. 26.) AB decision explained, that although the Basic Law does not contain the term market economy, this textual change does not mean that the freedom of contract – which by its nature is closely related to the freedom of the enterprise – will no longer be enjoyed protection of the Basic Law. The omission of the reference to the market economy can be evaluated as a consequence of the fact, that special emphasis on this circumstance has become unnecessary nowadays.[8]

The freedom of contract and the private autonomy of property transactions are one of the main inherent and inseparable conceptual elements of the private property system. However, the last hundred years have brought restrictions on freedom of contract in market economies based on private property. Either ensuring the balance of national economic processes, or other general societal needs (e.g. environmental protection), or social aspects (requirements to protect the "weaker party") can all make it necessary to limit the freedom of contract. In addition to the limits of cartel law and competition law, strict private law regulations cannot remain free from prohibitions that limit freedom of contract. This is reflected in the private law codes, which frame the fundamentally dispositive norms expressing the principle of freedom of contract with an ever-increasing number of cogent norms.[9]

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the Constitution) KJK - Kerszöv, 2003. 245. p.

7 According to the fourth amendment of the Basic Law, which entered into force in 2012, "[t]he decisions of the Constitutional Court, made before the entry into force of the Basic Law shall lose their effect." (Final and miscellaneous provisions, point 5) Given that the provisions of the Basic Law and the previous Constitution on the market economy are almost verbatim, according to the above, references to constitutional court decisions that have "lost their effect" in this way – under certain conditions – by the Constitutional Court does not consider it excluded either. The basis of their reference in this study is our belief that the dogmatic propositions formulated in these decisions have not lost their importance from both a historical and a scientific point of view.

8 See: JUHÁSZ Zoltán: *A szerződési szabadság és határai alkotmányjogi és magánjogi nézőpontból, valamint a „clausula rebus sic stantibus" elve. (Freedom of contract and its limits form the point of view of constitutional law and private law, and the principle of „clausula rebus sic stantibus.)* Közjogi Szemle, 2015/1. 34-35.

9 The creators of the German BGB considered the enforcement of freedom of contract

A question that is different from this, and only posed by the legal development of the 20th century is, where the constitutional boundaries of the legal transactions of private owners and the freedom of contract are drawn.[10] The freedom of contract includes the freedom to enter into a contract[11], the freedom to choose a contractual partner (in this context, issues of the obligation to enter into a contract) and, of course, the freedom to form the content of the contract. In this respect, the basic question of private law is, what kind of limits are raised by the constitutional fundamental rights to the basic expression of the freedom of contract, as the right of disposal arising from private property. In a constitutional approach, the same question means whether the restriction of contractual freedom is really done for the purpose of implementing a fundamental right, or whether the restriction of contractual freedom is a necessary condition for the enforcement or realization of a constitutional fundamental right.

Regarding the legal relationship between constitutional fundamental rights and private law contracts, the starting point is that private legal entities are not direct recipients of constitutional articles establishing fundamental rights; their obligees are the organs of the state, above all the legislative power, the legislator. It follows from this that the obligations arising from constitutional fundamental rights do not bind private law entities directly in their contractual relations, fundamental rights exert their effect on contracting parties through the mediation of private law rules.[12] Accordingly, the permissibility of contractual limitations of constitutional fundamental rights does not depend on whether the fundamental rights themselves permit such a limitation or not, but on the extent to which and in what way private law regulations mediate fundamental rights requirements.[13] It is clear that the

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so obvious that principle itself was not included in the code. Later legal codes, however, already include the autonomy of the contracting parties one by one: Articles 19 of the Swiss ZGB, 1322 of the Italian Codice Civile, or the Hungarian Civil Code, which entered into force in 1960. § 200. See: Vékás Lajos: *A szerződési szabadság alkotmányos korlátai. (Constitutional limitations of contractual freedom.)* Jogtudományi Közlöny, 1999/2. 53. p.

10 See: Harmathy Attila: *Droit civil – Droit constitutionnel.* Revue internationale de droit comparé, 1998. 45–56.

11 For the limitation of this, see Gadó Gábor: *A szerződési szabadság egyes kérdései, figyelemmel a Ptk. felülvizsgálatára. (Certain issues of freedom of contract, taking into account for review of the Civil Code.)* Gazdaság és Jog, 1998. 16–26. p.

12 Canaris, C-W.: *Grundrechte und Privatrecht.* Archiv für die civilistische Praxis, 1984. 201., 222–245. page

13 Lajos Vékás also refers to several authoritative German authors, according to whom constitutional fundamental rights have a direct impact on the subjects of private law;

latter approach is of fundamental importance from the point of view of constitutional adjudication.

Among the private law norms mediating fundamental legal requirements, the positive norms – representing the majority of the rules of contract law – are of particular importance. These norms are permissive only against the agreement of the contracting parties, and are just as binding for courts and other state bodies as other rules of law.

However, in the dispositive norms, the legislator strives to balance the typical interest position of the parties in the contract by considering the conditions of presumed agreement of reasonably acting contracting parties as a model.[14] In this case, we are talking about the fact that in the relationship between dispositive private law norms and constitutional fundamental rights, the constitutional reference bases can gain their content – much more than in the case of cogent private law rules – by weighing the public and private interests. This means that the dispositive norms framing private autonomy can limit the constitutional fundamental right of one party to the extent that the protection of the other party requires it – without disproportionately harming the limited contracting partner. Thus, achieving the constitutionality of the legislation and the legal transaction is logically divided: the cogent and dispositive norms of private law are also directly bound by the limitations of the constitutional fundamental rights; these limits reach the sphere of private autonomy and the freedom to form contracts only indirectly, through private law legislation.[15]

In accordance with all of this, the practice of the Constitutional Court – which examined the constitutionality of legislation in general – does not distinguish between cogent and dispositive rules for the regulation of contracts.[16] The essence of the issue of freedom of contract, unlike the dogmatics

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NIPPERDEY, H.C.: *Grundrechte und Privatrecht.* In: Festschrift Molitor, 1962.; SCHWABE, J.: *Die sogenannte Drittwirkung der Grundrechte.* 1971; STEINDORFF, E..: Persönlichkeitschutz im Zivilrecht.1983. 12.; discusses the issue in detail: GÁRDOS-OROSZ Fruzsina: *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban.* (*Constitutional civil right? Application of fundamental rights in private law disputes).* Dialogue Campus, 2011.

14 For this see: CHARNY, D.: *The New Formalism in Contract.* The University of Chicago Law Review, 1999. 66. 842., seq. page

15 VÉKÁS: op.cit. 58. p.

16 The dispositivity of the rules is of course important from the point of view of the "low" constitutionality standard of restricting the freedom of contract. "Nevertheless, the Constitutional Court points out that the provision of the Civil Code objected to in the motion and in the constitutional complaint does not limit freedom of contract. There is no rule that prohibits the contracting parties from the Civil Code. 478. § (2). ('The principal may claim his fee even if his procedure did not lead to a result. The

of private law, is precisely the dogmatics of constitutional law, namely, on what basis and in what contexts freedom of contract, which is not included in the text of the constitution, enjoys constitutional protection. The principle of freedom of contract is contained in the Civil Code[17], and its guarantees and limitations are consequently not directly defined by the Constitution, but by the Civil Code, determined by its provisions. The constitutional protection of any type of freedom of contract as "freedom" essentially means that the Constitutional Court elevates one of the important institutions of civil law to the constitutional level. The "only" question is, with the help of which constitutional institutions this "raising to a constitutional level" takes place, to which constitutional category does the Constitutional Court link the institution of freedom of contract.

It can be forwarded: the practice of the Constitutional Court, which was followed from the beginning – and described in detail below – implemented the protection of the freedom of contract in connection with the market economy contained in 9. § of the Constitution at that time. However, this connection was not necessary (but remained so). In its very first decision regarding freedom of contract, the Constitutional Court briefly stated that the essential element of the market economy defined in 9. § (1) of the Constitution is freedom of contract, which the Constitutional Court considers an independent constitutional right (but not a fundamental right).[18] The dogmatic problem is that fundamental rights cannot be derived from the category of the market economy – which, like other state goals that are not classified as fundamental rights, is realized through nominal fundamental rights.[19]

After making this decision, the Constitutional Court stated that it interprets the right to human dignity defined in 54. § (1) of the Constitution (Articles II. of the Basic Law) as a general personality right, and this means,

principal may reduce the fee or refuse to pay it, if he proves that the result was partially or entirely due to a reason for which the appointed responsible.') differ by agreement of will. The provision of the Civil Code complained of in the constitutional complaint is therefore a law that allows deviations, which is based on the principle of general dispositivity for contracts, so the enforcement of the petitioner's right to freedom of contract is neither excluded nor limited by this provision." 1414/D/1995. AB decision, ABH 1999, 539, 541.

17 Civil Code (Ptk.) 6:59. § (1): The parties may freely enter into a contract and freely choose the other contracting party. (2) The parties are free to determine the content of the contract. They may deviate from the rules of the contracts regarding the rights and obligations of the parties by mutual consent, if this law does not prohibit the deviation.

18 13/1990. (VI. 18.) AB decision, ABH 1990, 54, 55.

19 21/1994. (II. 16.) AB decision, ABH 1994, 117, 120.

among other things, the general freedom of action.[20] Based on this, the freedom of contract could not necessarily be linked to the institution of the market economy, but also to the autonomy of action, which freedom of contract is the basic manifestation of autonomy of action in the field of the economy, and in civil law based on private autonomy in general. Instead of applying the freedom of contract derived from the general personal law, the Constitutional Court decided the dogmatic uncertainty expressed in the terminology by considering the freedom of contract derived from the market economy as a constitutional right, but not as a fundamental right.[21]

Subsequently, on only one occasion, in its decision regarding the unconstitutionality of the Ministerial Decree on the regulation of certain issues of fine art, applied art, photography and industrial design, the Constitutional Court classified freedom of contract under the concept of general freedom of action. This decision established that the provision according to which a work of art can only be acquired (put on the market, or used) after an assessment required from an artistic point of view constitutes an infringement of the general freedom of action. In principle, the Constitutional Court in 8/1990. (IV. 23.) AB decision[22] pointed out that the right to human dignity protected in 54. § (1) of the Constitution is the so-called one of the manifestations of "general personal right". The freedom to create legal transactions, the independent decision-making right in such transactions, free from any power influence, can be regarded as one form of manifestation of the general freedom of action. The

20 8/1990. (IV. 23.) AB decision, ABH 1990, 42. "The decision of the Constitutional Court is based on the interpretation of the right to human dignity. This right is declared as an innate right of every human being at the head of the chapter "Basic rights and duties" in 54. § (1) of the Constitution. The Constitutional Court recognized the right to human dignity in the so-called considers it one of the formulations of 'general personal right'. Modern constitutions and the practice of the Constitutional Court refer to the general personality right with its various aspects: e.g. as the right to the free development of the personality, as the right to freedom of self-determination, as general freedom of action, or as the right to the private sphere. The general personality right is a 'mother right', i.e. a subsidiary fundamental right that both the Constitutional Court and the courts can invoke in any case to protect the autonomy of the individual, if none of the specific named fundamental rights can be applied to the given facts." 44–45.

21 See: Sólyom László: *The beginnings of constitutional adjudication in Hungary.* Osiris, 2001. 657–658. p. Sólyom refers to the fact, that the decision on freedom of contract was made by the Constitutional Court on April 12, 1990. (ABH 1990. 56), although it was only published on June 18. However, the decision on general personal rights was issued five days later on April 17 (ABH 1990, 45). According to the president of the Constitutional Court at the time, if the decisions were made in a different order, the freedom of contract could also have been replaced.

22 ABH 1990, 42.

constitutional requirement of general freedom of action also gives rise to the possibility that anyone can buy a work of art without the obligation to express an objectionable opinion. In order to protect other constitutional rights and constitutional values, the general right of action can also be limited by law, but this limitation must be necessary and proportionate to the goal to be achieved. However, the restriction of the freedom of access to works of art – with the general requirement of obtaining a mandatory art review – cannot be constitutionally justified, and is therefore an arbitrary restriction.[23]

Thus, in the very first related decision of the Constitutional Court, freedom of contract was linked to the market economy, and it was defined as an independent constitutional right and raised to the level of constitutional protection. This fact – at the beginning of the regime change – also had a symbolic significance. Subordination manifests itself in freedom of contract, and just as the extension of the right to self-determination in 1990 can be understood as a reflection of the relationship between the state and citizen, the subordination manifested in freedom of contract also reflects a new aspect of the relationship between state and citizen.[24]

In terms of its constitutional status, freedom of contract in 32/1991. VI. 6.) AB decision (ABH 1991, 146.) is related to interest on housing loans, it received its final place in the sístem of constitutional adjudication, according to which it is not a fundamental right, but a constitutional right, which can be limited on the basis of appropriate constitutional reasons; such an acceptable reason can be a substantial change in – external – circumstances *(clausula rebus sic stantibus).*

The possibility of interference in contracts and the restriction of freedom of contracts, which can also be recognized in international legal comparisons, are related to the fact that the behavior of state bodies in relation to contracts has changed significantly in our time globally due to changes in economic life. The state has become an important factor in civil law contracts. Today, in many cases, the state does not give the parties completely free space for

23 24/1996. (VI. 25.) AB decision, ABH 1996, 107., 111. However, in the context formulated in the decision, the reference to general autonomy of action can be misleading, as it uses the same concept with regard to the nature of protection existing on the basis of completely different conditions from a constitutional point of view. Depending on the nature of the organization, organizational autonomy can be protected either on the basis of the market economy, freedom of competition, the right of association, or other constitutional provisions that actually apply to organizations as well. Invoking the right to human dignity causes conceptual uncertainty in this context. See Balogh Zsolt: *Az Alkotmány fogalmi kultúrája és az alkotmánybíráskodás*. *(Conceptual culture of the Constitution and constitutional adjudication*.) Fundamentum, 1999. 2. 30. p.

24 Ld. Balogh – Holló – Kukorelli – Sári: op. cit.: 252. p.

agreement, but imposes various limits on agreements by means of rules defined in laws and regulations and determines the content of contracts, from which the parties cannot deviate. A major transformation is therefore taking place in the area of contracts, contracts are becoming "public law in nature".[25]

International experience clearly shows that overall economic and national economic aspects sometimes make it necessary to limit freedom of contract in the public interest. In advanced contemporary legal systems, such areas of restriction are in particular the law of competition restrictions, cartel law, abuse of economic dominance, control of organizational mergers, price regulation, standard contracts, environmental protection, consumer protection, etc. areas.[26] In these regulatory circles, the parties' freedom to enter into contracts, the definition of the content of the contracts by the parties, and even the fact that the content of the contracts remain unchanged, often become doubtful.

The freedom of contract – which the Constitutional Court considers an independent constitutional right – is enforced in the general rule of the Civil Code, according to which the parties are free to determine the content of the contract, and can deviate from the provisions of the contract by mutual consent. The contractual will of the parties when concluding the contract is obviously that they wish to fulfil their contractual obligations under external conditions existing at the time of the conclusion of the contract, and the parties undertake to bear the reasonably foreseeable risk of possible subsequent changes when concluding the contract. If, on the other hand, these conditions change significantly, the basic assumption related to contracts ceases to exist. In such cases, in addition to the given changes, it is no longer fair to enforce the performance of the contract with the original content, to maintain the contractual obligations, because the burden of the service, as well as the ratio of the service and compensation, has become completely different from what the parties stipulated in the contract. Due to a significant change in circumstances, the performance of the contract may differ significantly from the goal stated at the time of the conclusion of the contract, so that the original condi-

25 See for example: Arató, Balázs: *A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása,* In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70 : Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019) 546 p. pp. 31-35., 5 p.

26 The public interest did also have a very important role on the field of contract law during the pandemic period (COVID-19) in Hungary. See: Boóc Ádám: *Megjegyzések a Covid-19 vírus hatásairól a magyar szerződéses jogban, különös figyelemmel a vis maior fogalmára. (Notes on the effects of the Civid-19 virus in hungarian contract law, with special attention to the concept of vis maior.)* Glossa Iuridica 7 (2020). pp. 85 – 94. 69

tions of the contract are no longer fulfilable, unrealizable. In this case, the courts have the possibility to amend the contract by applying the *clausula rebus sic stantibus*, on the basis of the Civil Code 6:192. §.[27] In such a case, the court must weigh the trust of the other party in the contract against the difficulty of one party's service and, after reconciling them, solve a new, fair distribution of the contractual burdens.

A general clause similar to this – with a more general wording – is found in the Civil Code. 6:60. §. The "exceptionality" formula of paragraph (2) of §, based on which legislation may exceptionally change the content of contracts concluded before its entry into force. In this case, if the changed content of the contract violates the essential legal interests of one of the parties, this party may ask the court to amend the contract or withdraw from the contract. Both individual legal relationships, i.e. changing the content of a specific contract, and changing legal relationships on a social scale, i.e. through legislation, can only be done within a constitutional framework. The constitutional guarantee of the change is the judicial control with regard to individual legal relations, and the constitutional court's control with regard to changes of legal relations on a social scale.

According to the position of the Constitutional Court, therefore, exceptionality – in the case of which the content of existing legal relationships can be modified by legislation – must be examined case by case, by legislation, as well as the applicability of court contract amendments in individual legal relationships. The question to be decided separately for each legal regulation is, therefore, when state intervention in existing contractual relations complies with the Constitution and the above criteria. Deciding this is primarily the responsibility of the legislator, but the constitutionality of the intervention is decided by the Constitutional Court.

The state may constitutionally change the content of contracts with the rule of law only if the same conditions exist as the conditions requires to amend the contract through court. This can be done by applying the *clausula rebus sic stantibus*.[28]

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27 Civil Code (Ptk.) 6:192. § (1) Any party may request a court amendment of the contract if, in the permanent legal relationship between the parties, as a result of a circumstances that arose after the conclusion of contract, the fulfillment of the contract under unchanged conditions would harm its substantial legal interest, and
a) the possibility of a change in circumstances was not foreseeable at the time the contract was concluded;
b) he did not cause the change in circumstances; and
c) changes in circumstances do not fall within the scope of your normal business risk.
28 32/1991. (VI. 6.) AB decision, ABH 1991, 146., 153–154.

According to a later decision, since the freedom of contract cannot be considered a constitutional fundamental right, it is consequently not governed by the constitutional principle of inviolability and inviolability of the rights included in the constitutional system of fundamental rights. Constitutionally, therefore, it can be limited even in terms of its essential content, as long as there are constitutional reasons for the final means of restriction.[29]

Dogmatically, therefore, the situation is clear in one aspect: freedom of contract is not a fundamental right, it is not subject to the restrictions set out in 8. § (2) of the Constitution [Article I. (3) of the Basic Law], so it can be restricted even in terms of its essential content, if there are constitutional reasons. Although the freedom of contract, which is considered a constitutional right, receives stronger constitutional protection than the state goal (market economy), the question still remains as to what this protection consists of and what are the methods of judging the restriction.

A summary of this is contained for the first time in the parallel justification attached to the decision containing the constitutionality examination of the Land Act. According to this, the absence of a violation of fundamental rights does not mean that the legislator could limit other rights at will. Non-fundamental rights can also enjoy the protection of the Constitution; however, if such a case does exist, the criteria for protection are different – lighter – than those prescribed by 8. § (2) of the Constitution for fundamental rights. We must be careful not to paralyze the legislator's freedom and the fulfillment of his constitutional role by raising every step of his actions into a constitutional problem.

A violation of a non-fundamental right may be assessed by the Constitutional Court if it is related to a rule of the Constitution. A variety of rights can be included in the protection of fundamental rights; the Constitutional Court decides when it can still refer to a fundamental right, and when it establishes the lack of connection. If the violation of rights raised in a motion cannot be considered a violation of a named fundamental right, it may still conflict with a state goal, the basic principle of the rule of law, equality of law as broadly interpreted by the Constitutional Court, and ultimately with the general personality right derived from the right to human dignity or general freedom of action.

In its practice so far, the Constitutional Court has used a standard that is lighter than necessity/proportionality to determine the violation of a "right" that is not considered a fundamental right, but is derived separately from a constitutional value or a state goal. Freedom of contract, for example, is not

29 61/1993. (XI. 29.) AB decision, ABH 1993, 358., 361.

protected by fundamental rights – "it can be restricted even in terms of its essential content" – but the Constitutional Court requires the restriction to be "constitutionally justified". Rights that do not qualify as fundamental rights can be included in constitutional protection through the prohibition of discrimination, the requirement of the rule of law and the protection of human dignity.

The prohibition of discrimination can be safely extended to all kinds of rights other than human and civil rights. (Most such discrimination is also certainly unconstitutional due to the violation of another fundamental right; for example, discrimination based on religion, political or other opinion is also a violation of the right to express an opinion; discrimination based on gender is also a violation of the equal rights of men and women; national minority rights, etc.)

Discrimination based on any other aspect that affects non-fundamental rights is also unconstitutional if it violates the right to human dignity. This was the permanent practice of the Constitutional Court. If the discrimination – according to the criteria used by the Constitutional Court up until now – is "arbitrary", i.e. "unjustified", i.e. there is no reasonable reason, then it violates the right to human dignity, because in such a case the persons concerned were certainly not treated as persons of equal dignity and were not evaluated the aspects of each of them with similar attention and fairness. Consequently, with respect to a non-fundamental right, discrimination is unconstitutional if there is no reasonable justification.

This criterion for establishing a violation of human dignity – arbitrariness – can be used in all cases as a measure of the unconstitutionality of non-fundamental rights violations, if the Constitutional Court considers these violations either under the title of equal treatment or violation of the rule of law, or directly due to the restriction of the general right to privacy (freedom of action) subject to constitutional review. The arbitrariness of legislators or law enforcement officers is contrary to the rule of law, equality of law and human dignity, even if it does not affect a fundamental right. According to the above, the previous practice of the Constitutional Court was also based on this common criterion, even if the connection was not made obvious by the different use of words, especially in terms of equal treatment.

The Constitutional Court also has to decide a Case-by-case basis When it examines the violation of the right to human dignity according to fundamental law criteria, and when it applies it to include originally non-fundamental rights violations under the protection of the Constitution. In the latter case, you should measure with the lighter standard. Borders cannot be drawn in general; special protection of certain living conditions may be necessary, or a stricter standard may be justified by a violation of a legal institution. By

applying a stricter standard, the Constitutional Court can raise certain rights to the status of fundamental rights, i.e. separate fundamental rights from the mother right of human dignity. It could justify invoking the fundamental right of human dignity if it were about the application of objective responsibility in criminal law, or something similar; an extensive restriction of contractual freedom that threatens the validity of the institution may justify direct fundamental rights protection.[30]

The essence of the line of thought is therefore that constitutional rights receive less protection than fundamental rights. However, if the restriction – even minimally – violates one of these constitutional principles or rights through the mediation of the rule of law, general equqlity of law, or personal rights (in principle, sny other fundamental right or constitutional principle), i.e. based on a remote connection, the freedom of contract – as constitutional right – its protection can be justified.[31]

In order to establish a violation of the constitution, it is necessary that a violation of a fundamental right or a constitutional institution closely related to the freedom of contract (as an abstract right) that implements and includes the freedom of contract must also occur. A milder restriction of the freedom of contract than the one mentioned does not usually constitute a direct violation of the constitution. These fundamental rights, state goals, and constitutional values do not, however, ensure the constitutionally based subject right to the immutability of the regulation of legal institutions.[32]

This latest decision requires the actual restriction of another right or constitutional principle in order to establish a constitutional violation, and stipulates that the restricted right or violated principle is closely related to the freedom of contract. In this case, however, it is obviously no longer about the freedom of contract or the autonomy of action that is part of human dignity (general personality right), but about the protection of the given fundamental right or constitutional principle.[33]

Freedom of contract is an essential element of the market economy, free trade and systems that profess its principles, which ensure that the contracting parties are free to decide on essential issues related to their agreement. However, the task of the state is to ensure stability, to influence economic development, and to protect the weaker party. However, it can be stated that

30 35/1994. (VI. 24.) AB decision, ABH 1994, 197. Parallel justification of László Sólyom 214–216.

31 See: Balogh – Holló – Kukorelli – Sári: op. cit.: 255. p.

32 327/B/1992. AB decision, ABH 1995, 604, 607; similarly to 897/B/1994. AB decision, ABH 1995, 726.

33 Balogh – Holló – Kukorelli – Sári: op. cit.: 256. p.

these limitations do not absolutely and completely empty the freedom of contract and only come to the fore in socially and economically justified cases. Without the principle of freedom of contract, it would not be possible for the parties to decide on their own whether they wish to enter into a contract or to determine their contractual partner, the content and type of their contract, and without freedom we cannot even talk about actually a contract as an agreement created by the free will of the parties.[34]

From a constitutional point of view, the true importance of freedom of contract lies in the general freedom of action, the exercise of the right to self-determination. The freedom of legal entities in relation to the conclusion of contracts within the framework of the given legal system basically determines their scope in all areas of the economy. Freedom of contract is an inseparable part of the market economy, including the freedom of entrepreneurship. For all these reasons, the constitutionality of the restriction of contractual freedom always remains a cardinal question in a democratic legal state based on a market economy.[35] Freedom of contract also has its own significance, which, however, cannot fulfill its social organizing function only within the framework of the basic constitutional rights that carry the human rights value system.[36]

34 vízkeleti Edit: A szerződési szabadság elve alkotmányjogi nézőpontból. (The principle of freedom of contract from a constitutional point of view.) In: *Alapelvek és alapjogok. (Basic principles and fundamental rights).* Edited by: lajkó Dóra, varga Norbert. Szeged, 2015. 485-486. p.
35 Juhász Zoltán: op.cit.: 40. p.
36 Lenkovics Barnabás: op.cit.: 254. p.

The Path of the Legal Language in the Hungarian Language

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This paper presents the emergence of the concept of law and the word law (jog) itself in the Hungarian language, the development of its meaning; the birth and the Hungarianization of the Hungarian legal language (the continuous efforts of language renewal); the critical approach of linguists to legal language; the new linguistic approaches to legal language and communication, and especially the present-day programmes of public comprehensibility (e.g. norm clarity), and proposes the linguistic strategy to be pursued in this field.
Keywords: *law (jog) - legal language - legal communication - ladder of abstraction - norm clarity - language strategy Constitutional Court*

1. The semantic origins of the concept of jog (law) and the path of the word jog (law) in the Hungarian language

An important addendum to the history of culture and language in relation to legal language is the history of the word jog (law) itself, which sheds light on the background of this powerful, social and professional activity. János P. Balázs writes that the basic word of jurisprudence, jog (law), is an old element of our vocabulary.[1] Its first known record is a place name from 1326, which suggests that it is even older as a common name.

The first time it is described as a common name is in the Jókai Codex researched by János P. Balázs (a text dating from after 1372 in a copy dating from around 1448). At that time, it had two meanings: (1) right side, right hand, (2) good, justice. The word jog is thus a derivative of the adjective jó; and this original, Old Hungarian meaning is still unconsciously preserved, since jog is meant to serve a good cause, to make people's lives better. In other languages, too, there is a connection between the two. For example: the

1 Balázs János, P.: Jogi szókincsünk történetéből; 1973; Magyar Nyelvőr 97: 484–490.

German Recht (right hand) ~ Recht (right, justice), the English right (right hand, right side ~ right), the French la droite (right hand) ~ le droit (right). The Latin ius (right) goes back a long way, the Old Indian word yoh (happiness, luck) refers to it. The Old English word for law became obsolete after the age of the codex and was not used until the 19th century. The meanings jobb kéz (right hand), jobb oldal (right side) are taken by the middle form of the adjective jó: jobb (hand, side). And the Latin ius was either used in Latin (jus, from which comes the Hungarianized juss, i.e.: law given by law) or was denoted by the word law, justice.

The linguistic innovators of the early 19th century wanted to find a Hungarian equivalent for Latin ius, and that is when they found the Old Hungarian word jog. In the collection of the Great Dictionary of 1799, it is written: "because, under the law, immovable properties (javak) are not transferred (radicaliter)". According to the Dictionary of the Hungarian Language Revival (Szily 1902: 155), the first use of the word was by Gábor Döbrentei in 1822: "the right to it makes no distinction between them".[2] And János Fogarasi (1833) is the first to dictionary it: "Jus, jog v. ig". At that time, the root of the word igaz (true) was also seen in the word jog, and the word ig was also used. However, the verb or verbal version of this (in the sense of someone's right) easily caused confusion. So the Hungarian ig did not take root, and in the reform era both the Latin jus and jog were used. The prevalence of jog is shown by the reformed forms: jogja (joga), jogos (in Dániel Berzsenyi, 1832), jogosít, feljogozás, jogozat, jogsérelem, jogviszony (1838), jogtalan, jogszerű (1838), jogilag (1843), jogos, jogérvényes, jogügylet (1851), jogerő, jogosítvány (1853), etc.[3]

The word jog is derived from the conceptual circles of job oldal (right side), jó (good) and igaz (just). The expressions and conceptual expansions of the word jog in the 19th century show that its role and significance expanded, and this process has continued ever since. The etymology of the word jog is discussed in this way in the most recent Etymological Dictionary (Zaicz 2021: 384).[4]

2 Szily Kálmán: A magyar nyelvújítás szótára. Hornyánszky Viktor kiadása; 1902; Budapest. (Reprint: Nap kiadó, 1999.)
3 Szily Kálmán: A magyar nyelvújítás szótára; Hornyánszky Viktor kiadása; Budapest; 1902; (Reprint: Nap kiadó, 1999) p. 155.
4 Zaicz Gábor: Etimológiai szótár; Tinta Könyvkiadó; Budapest; 2021; p. 381.

2. The birth of the Hungarian legal language, the Hungarianisation of the legal language

Mária B. Kovács (1995) summarized the birth of the Hungarian legal language, so I will rely on her work for a concise presentation of its antecedents. The litigation documents of the late 1700s still contain a large number of Latin terms, but there are also attempts at change and attempts at Hungarianization. From the beginning of the 1800s, there was a proliferation of manuals and dictionaries (e.g., officer's dictionaries), but the emerging legal terminology still showed regional differences, and the second half of the 19th century and the 20th century marked the next step towards unification.

The following dictionaries (and authors) were at the forefront in the birth and establishment of the Hungarian legal language: Dániel Ottlik: A tisztbeli írásmód saját szavai (Pest, 1806), Pesti gyűjteménye a tisztbeli írásmód saját szavainak (Pest, 1807), Imre Péchy: A magyar nyelvről a polgári és peres dolgok folytatatásában (Pest, 1806), Sámuel Pápay: Észrevételek a magyar nyelvnek a polgári igazgatásra, és törvénykezésre való alkalmaztatásáról és az oda tartozó kifejezések gyűjteményével (Veszprém, 1807), Károly Pauly: A magyar tiszti írmód a polgári igazgatás és törvénykezés szótárával (Buda, 1827), A pesti királyi Curia szótára (Pest, 1837), Császár Ferenc: Váltójogi műszótár (Pest, 1837), Fogarasi János: Jogtani műszókönyv (Pest, 1838), Törvénytudományi műszótár (Pest, 1843). In the early 20th century, the issue of legal terminology became more important because of the need to explain German terms. After Rusztem Vámbéry's initiative, Izidor Schwartz and Ödön Hojtás published a Legal Dictionary (Budapest, 1908).

3. Linguistic criticism of legal terminology

From the beginning, the linguistic movement was hostile to legal language. Therefore, the initial language renewal and Hungarianization efforts, i.e. the efforts to establish the Hungarian legal language, were later followed by new ones. In fact, there is a continuous renewal of the language.[5] This is also valid for the legal language.[6] At first, the intention is rather language-fearing and language-protecting, then from the second half of the 20th century, professionalism, accuracy and emancipatory aspirations in the spirit of democratism, such as the public comprehensibility (norm clarity), are the focus.

5 Minya Károly: Mai magyar nyelvújítás. Szókészletünk módosulása a neologizmusok tükrében. A rendszerváltozástól az ezredfordulóig. Tinta Könyvkiadó; 2003; Budapest.
6 Balázs Géza: Folyamatos nyelvújítás. A magyar nyelvújítások és értékelésük; Glossa Iuridica; Új folyam (Károli Gáspár Református Egyetem), 2014. I/1: 21–28.

Legal terminology, which had already become more hungarianizated, posed a new problem because of the excessive striving for professionalism: it became increasingly unintelligible to the masses, and even contained linguistic inconsistencies and errors. Although it is customary to look askance at and condemn linguistic endeavours, I will give an example which clearly demonstrates the need for a linguistic critique of legal terminology.

Lajos Seregy (1989) begins his analysis and critique by stating that law is a discipline which "in its entirety and in all its manifestations has only a linguistic mode of existence.[7] Whether we are talking about a jurisprudential treatise, a law, the provision of legal services or other legal activities, these activities are also linguistic manifestations." Therefore, a text cannot be technically sound from a legal point of view if it is not linguistically sound. The example is taken from an (unnamed) legal encyclopaedia:

"Grammatical interpretation is concerned with the syntactic and semantic analysis of the linguistic form of the normative structure; logical interpretation with the analysis of the logical interrelationship between the structure and its linguistic form; taxonomic interpretation with the analysis of the interrelationship of the normative structure in larger units, ultimately the legal system as a whole; and the historical analysis with the the historical context of the legislative development of the norm structure, i.e. the legislative purpose enshrined in the norm structure.

In the grammatical interpretation, the analysis of legal language as an artificial language, distinguished in principle from natural language; in the logical interpretation, the examination of historically traditional (and partly in opposite directions and leading to opposite results) logical arguments; in the taxonomic interpretation, the deduction of inconsistencies arising from possible facts of consistency or contradiction within the legal system; and, finally, in the historical interpretation, the examination of the materials which prepared the legislation comes to the forefront."[8]

7 Seregy Lajos: Nem szakszerű, ha érthetetlen. Nyelvi normák a szakszövegekben. In: Bíró Ágnes szerk.: Szaknyelvi divatok. Gondolat; 1989; Budapest; pp. 28–36.; p. 31.

8 The quoted text reads as follows in Hungarian: „A *nyelvtani* értelmezés a norma-struktúra nyelvi formájának szintaktikai és szemantikai elemzésére; a *logikai* értelmezés a struktúra és nyelvi formája logikai összefüggéseinek az elemzésére; a *rendszertani* értelmezés a norma-struktúrának nagyon egységekben, végső soron a jogrendszer egészében mutatkozó összefüggései elemzésére; a *történeti* elemzés pedig a norma-struktúra jogalkotói kialakítása történelmi összefüggéseinek, vagyis a norma-struktúrában rögzített jogalkotói cél elemzésére irányul. A nyelvtani értelmezésben a jogi nyelv mint a természetes nyelvtől elvileg megkülönböztetett *mesterséges nyelv* elemzése; a logikai értelmezésben a történelmileg hagyományosult (és részben kölcsönösen ellentétes

The text is incomprehensible on first reading, perhaps somewhat comprehensible on second reading, but even then it is obscure, and the serious errors of grammatical correctness to which Lajos Seregy draws attention are striking:

"By way of explanation: the "norm-structure" is the totality of legislation. Instead of "grammatical interpretation", we should understand linguistic interpretation (...) the text describes legal language as an "artificial language", although this term denotes a different concept. An artificial language is Esperanto, or perhaps various computer languages, etc., but not legal language. In this case, the practitioners of one discipline, jurisprudence, have ignored the results of another, linguistics. They have attributed a different meaning to a linguistic term... (...) The complex structure of the two sentences quoted, their impossible possessive chains and incorrect word usage make them barely intelligible. The fact that linguistic and logical interpretation are to a certain extent in conflict with each other is also puzzling, even though logic as a science also exists in linguistic forms, i.e. the logical analysis of a text is always based on a linguistic interpretation."

There is a widespread view that linguists or linguists persecute the use of technical language. But there are plenty of counter-examples. For example, a university textbook used for decades says: "Vocabularies are an evolving, useful branch of the national language." (Rácz 1968: 472.)

This linguistic criticism was also adopted by the earlier legal linguistic criticism. László Kiss (later a constitutional judge) speaks out in connection with the problems of interpretation and comprehensibility of legal language: "The language of the law is such that one cannot even fully understand a legal rule written in one's own mother tongue. Today, it is hard to find a law whose wording would help to improve the terms. (It is said that Stendhal, before he began his daily work as a writer, always read a page of the Code Napoleon to ensure that his expressions were accurate.)"[9] He also points to specific linguistic phenomena: too many words, over-abundant verbosity. And finally, he quotes Klaus-Michael Groll (In der Flut der Gesetze. Düsseldorf, 1985): "The flow of laws also threatens legality". So it is when the language of laws is incomprehensible.

irányú és eredményekre vezető) logikai *argumentumok* vizsgálata; a rendszertani értelmezésben a jogrendszeren belüli *összhang* vagy ellentmondás esetleges tényeiből adódó következetlenségek levonása; és végül a történeti értelmezésben a jogszabályok alkotását *előkészítő anyagok* vizsgálata lép előtérbe."

9 Kiss László: Jogállam – jogalkotás – önkormányzatok (Örökségünkről mai szemmel); Jegyzők dokumentumtára 12. Közigazgatás-módszertani Betéti Társaság; Pécs; 1998; p. 94.

The interrelationship between legal and linguistic norms (norm clarity) is addressed by Balázs Arató and Géza Balázs (2022) in a theoretical approach: "As a starting point, it should be noted that an essential component of the rule of law is the accountability of public authorities to the laws and the requirement of legal certainty. For example, the requirement of the clarity of norm, or access to and comprehensibility of the text of laws, the predictability of the law as a whole and of its individual rules."[10]

4. Making legal language intelligible

A new approach to legal language is that of Sándor Karcsay (1981). In his view, the language of law cannot be expected to become simpler, since the circumstances to be regulated are becoming more and more complex, which naturally leads to over-regulation, but the application of the law could do much to make complex legislation understandable.[11] Over-regulation is indeed a characteristic feature of the Hungarian legal system, but since the 1980s there have been serious efforts to improve the clarity of the law, both in the field of legislation and in the field of law enforcement.

As the world becomes more and more complex, the use of language is also trying to follow suit, and the language used in certain fields is therefore becoming increasingly detached from the vernacular. The emergence of increasingly complex (or more specialised, compound) technical languages is therefore a natural process. It must be accepted that a specialised language in a given field is intended to ensure accurate understanding by professionals in that field.[12] This is a feature of the internal communication of a given discipline, what we call professional language, technical language or, less elegantly, jargon (or even "thieves' tongue"), and a central part of this is terminology, i.e. a vocabulary. As Sándor Karcsay succinctly summarises: "the purpose of a technical language is to ensure communication, i.e. understanding, in a pre-

10 Arató Balázs – Balázs Géza: The linguistic norm and norm of legal language; Magyar Nyelvőr 146: 91–103.; 2022; DOI: 10.38143/Nyr.2022.5.91.; https://nyelvor.mnyknt.hu/wp-content/uploads/146507.pdf.

11 A good example of this is the increasing complexity of public procurement law due to the diversity of situations. See for example the evolution of the legal terminology of public procurement here: Arató, Balázs: A közbeszerzési jog jogorvoslati rendszere; speciális közbeszerzési jogviszonyok; Szegedi Tudományegyetem (SZTE), Állam- és Jogtudományi Doktori Iskola; PhD disszertáció; 2014; p. 189.; pp. 34–35.

12 Making legal language understandable for those involved in a legal case, often even for practitioners, is a major challenge. See for example: Visontai-Szabó, Katalin: Hogy mondjam el, hogy te is megértsd? A bírói kommunikáció és a gyermek tájékoztatáshoz való joga egy angol példa tükrében; in: CSALÁDI JOG 16:1; pp. 1–8., 2018.

cisely defined and unambiguous way in a definable professional field".[13] To avoid misunderstanding. The communicative situation of misunderstanding shows some affinities with judicial legislation.[14] Arató points out that the latter is actually a reflection of decades of case law in the text of the law.[15]

Understandably, some professional languages, including legal language, raise the need and necessity of transprofessional communication. After all, legal issues are not confined to the profession, but extend to practically everything and everyone, and this raises the need to be able to apply them on several levels, i.e. not only to internal professional language use, but also to external language use that affects others.[16] And hence the aspirations and considerations of language teachers (language users). Edina Vinnai (2017) formulates a double task and need for legal language. From the definition of legal language arises the criticism of legal language: why it is not sufficiently clear for the layperson. The reason is that legal language has the task of "ensuring that all professionals always, in all circumstances, attribute the same meaning to certain legal words and expressions, which is also a primary requirement for legal certainty." I used to call this internal (professional) communication. "At the same time, compared to other professional languages, lay people have a justified expectation of greater clarity in legal language, since law, as a system of norms that plays a prominent role in maintaining social order, regu-

13 Karcsay Sándor: Jog és nyelv; Jogtudományi Közlöny; 36/4.; 1981; pp. 325–338. p. 329.
14 Tahin Szabolcs: A közérthetőség érvényesülése a bírósági határozatokban és a bírósági tárgyaláson; In: Mailáth György tudományos pályázat 2017; edited by: dr. Ábrahám Márta; Országos Bírósági Hivatal, Budapest; pp 8-43. https://birosag.hu/sites/default/files/D%C3%ADjazott%20dolgozatok%20Mail%C3%A1th%20Gy%C3%B6rgy%20Tudom%C3%A1nyos%20P%C3%A1ly%C3%A1zat%202017._0.pdf;, a theoretical approach to the pragmatics of misunderstanding: Vesszős Balázs: A félreértés pragmatikája; Magyar Nyelvőr 146; 2022; 458–475 DOI: 10.38143/Nyr.2022.4.458. This question also emerges in case of the commercial arbitration procedures, especially on the field of challenging arbitral awards. See in this regard: Boóc Ádám: *A választottbírósági ítéletek érvénytelenítése: Jogösszehasonlító elemzés és az új magyar szabályozás bemutatása*. Budapest, 2018.; Boóc Ádám: Észrevételek a kereskedelmi választottbírósági ítéletek érvénytelenítéséről a közrendbe ütközés okán a magyar jogban. Jogtudományi Közlöny 75 (2020) pp. 167–173. Boóc Ádám: *Elméleti észrevételek a nemzetközi kereskedelmi választottbírósági ítéletek érvénytelenítése vonatkozásában.* Jogtudományi Közlöny 74 (2019) pp. 367–372.
15 Arató Balázs: A titok fogalma a jogban; in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp. 29–39.
16 The use of legal language has been also an important issue during the COVID-19 pandemic era, as well. See in this regard: Boóc Ádám: *Megjegyzések a Covid-19 vírus hatásairól a magyar szerződéses jogban, különös figyelemmel a vis maior fogalmára.* Glossa Iuridica 7 (2020). pp. 85–94.

lates the lives of all citizens and an ever-increasing number of areas of their lives, and it is our civic duty to know, follow and apply the law."[17] There is also another aspect of the complexity of legal language: "the law is increasingly regulating a growing number of fields (e.g. technical, medical, economic, financial, IT), and in many cases the complex language of these fields makes legal language difficult." These give its twofold character: „Legal terminology thus belongs within the national language to a group of specialised languages which can be distinguished from ordinary language, but because of its function in the life of society it is in a special position compared to other specialised languages."[18]

Legal language is thus multi-layered. Just as there can be several levels of intelligibility, because there is no intelligibility in general.[19] In his paper, Szabolcs Tahin (2017) mentions the following layers of intelligibility: rhetorical, grammatical, stylistic, semantic, grammatical.[20] I would rather emphasize the concrete-abstract use of language (in the context of the use of language in the media, it is common to speak of the so-called ladder of abstraction, on which the increasingly abstract language stands on the broad ground of concrete language use.[21]

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17 This question is especially important in the case of contracts with significant economic content. See in this regard: Boóc Ádám: *Gazdasági szerződések Magyarország új Polgári Törvénykönyvében.* Gazdaság és Jog 21 (2013). pp. 3–8.

18 Vinnai Edina: Harc a szavakért – közérthetőség a jogban. Alkalmazott Nyelvészeti Közlemények; Miskolc; 2017; XII/1: 42–53.; pp. 137–139. On the field of contract law the language has a special role in the area of contract of donations. See in this regard: Boóc, Ádám: *Az ajándékozási szerződés néhány kérdése a magyar magánjogban.* Állam- és Jogtudomány 46 (2005). pp. 53–76.

19 For an illustration of the accessibility of legal documents, can be found here: Arató Balázs: A végrendeletek értelmezésének egyes kérdései; in: Magyar Nyelvőr 147; 2023; pp. 78-92.; DOI: 10.38143/Nyr.2023.1.78. On the law of succession in Hungary in general see: Boóc, Ádám: *Comments on Some Important and Current Problems of the Law of Succession in Hungary – Considering Historical Aspects.* Journal on European History of Law 11 (2020) pp. 104–110. Regarding the last wills the question of the legal language has an important role, when such delicate legal institutes as substitute succession or substitute legatee are applied. See in this regard:
Boóc Ádám: *Quo vadis heredis substitutio? Észrevételek az utóöröklés szabályaihoz Magyarország új Polgári Törvénykönyvében.* In: Földi András, Sándor István, Siklósi Iván (ed.): *Ad geographiam historico-iuridicam ope iuris Romani colendam: Studia in honorem Gábor Hamza.* Budapest, 2015. pp. 77–87.

20 Tahin Szabolcs: A közérthetőség érvényesülése a bírósági határozatokban és a bírósági tárgyaláson; In: Mailáth György tudományos pályázat 2017; edited by: dr. Ábrahám Márta; Országos Bírósági Hivatal, Budapest; pp. 8–43.

21 Balázs Géza: A sajtónyelv szociokultúrája; Valóság 7; 1997; pp. 51–57. and Balázs Géza:

Intelligibility is achieved by more concrete forms of language use (and these can indeed be described by grammatical, stylistic, rhetorical features).

In the work of the judiciary, for the sake of social acceptance, particular efforts must be made to achieve comprehensibility: "court judgments can be comprehensible to the public if they comply with the categories of "common sense", "economy", "morality" and "public good" as laid down in Article 28 of The Fundamental Law of Hungary.

I believe that these categories are the ultimate justifying principles which the judge must constantly bear in mind. That is to say, judicial judgments which, although lawful, i.e. based on positive law, fail the test of interpretation of Article 28 of The Fundamental Law of Hungary, are incomprehensible to citizens seeking justice, since they are contrary to the convictions at work in all of us, i.e. in the political community."[22]

We can therefore formulate a triple linguistic and functional characteristic of legal language:

linguistic feature:	function:
1. internal legal jargon, technical terminology	clarity within the profession, legal certainty
2. cross-disciplinary technical terminology	cross-disciplinary compliance
3. colloquial usability (norm clarity)	public comprehensibility, democratic participation

Linguistic features and functions determine the spaces and possibilities for action:

spaces for action:	possibilities for action:	
technical terminology	terminological, technical language development	LANGUAGE STRATEGY
technical terminology in several fields	interdisciplinary cooperation	
colloquial usability	norm clarity programme	

Implementation cannot be disorganised and therefore requires a strategy, a management body and joint programmes. Some of these are presented below.

Médianorma. A nyilvános megszólalás esztétikája; Magyar Rádió; Budapest; 2000.

22 Tahin Szabolcs: A közérthetőség érvényesülése a bírósági határozatokban és a bírósági tárgyaláson; In: Mailáth György tudományos pályázat 2017; edited by: dr. Ábrahám Márta; Országos Bírósági Hivatal, Budapest; p. 8.

5. Comprehensibility programmes

In the 2000s, the constitutional judge László Kiss regularly organised legal language training courses at the Faculty of Law and Political Sciences of the University of Pécs. In a short paper, the constitutional judge ridiculed the language of local government decrees.[23] In a magazine for lawyers, poorly worded legal documents were published as a lesson under the title Pocsék irat (Lousy document).

2012-2014: the Ministry of Public Administration and Law's programme for the linguistic simplification of legislation ("simplification programme"), which was triggered by a speech by Tibor Navracsics, Minister of Justice: "It is a serious problem that even a citizen with an average level of education has little chance of understanding his rights and obligations from legislation, so we need simpler structure, language and shorter legislation".[24]

Géza Szőcs, the State Secretary for Culture, would have employed linguists (language guards) to check the linguistic adequacy of the legislation in preparation, but he could not provide the financial resources to implement the idea. It turned out that both simplification by lawyers alone and simplification by non-lawyers (e.g. linguists) alone had their limitations.

In the final phase of the programme, the Ministry also brought in external linguistic assistance. The Hungarian Language Service Office was involved at this time and "produced a specific guide on language correctness for those carrying out simplification, and Professor Géza Balázs was involved in the training sessions. During the training, the questions and problems of both simplification staff and managers were discussed, the most important of which was whether all the simplification possibilities identified should necessarily be transposed into the legal system. After discussing this issue, the consensus was that no".[25] (As written earlier, it must be accepted that the language in a given field is intended to ensure accurate understanding by professionals in that field.)

There was no resolution or well-communicated statement at the end of the programme, but there were some results: "Some ministries have trans-

23 Kiss László: Jogelkövetés; Népszabadság; 2007. márc. 22.
Közérthetőség a bíróságokon – a bíróságokba vetett bizalom erősítése. https://birosag.hu/sites/default/files/users/K%C3%B6z%C3%A9rthet%C5%91s%C3%A9g%20k%C3%B6zlem%C3%A9ny.pdf

24 Nagy Balázs Ágoston: Miért olyan nehéz a jogszabályok egyszerűsítése? In: Glossa Iuridica, I/2.; 2014; pp. 101–113.; p. 103.

25 Nagy Balázs Ágoston: Miért olyan nehéz a jogszabályok egyszerűsítése? Glossa Iuridica, I/2.; 2014; pp. 101–113. p. 111.

posed certain language simplification elements in the forthcoming revision of their regulations, which will be amended in any case in terms of content", and: the experience of the programme "may help to design further attempts to address the problem and may have had a positive impact on the attitudes and expertise of government officials involved in the work".

It should also be added that linguists were involved only in the final phase of the multiannual programme. If this had been done at the beginning of the programme, many theoretical issues could have been clarified and the practical results could have been more impressive, since linguists have experience in transforming (in this case simplifying) texts.[26]

The intelligibility programme continued at the Curia (the Supreme Court of Hungary). On 17 January 2013, the President of the Curia set up a jurisprudence analysis group entitled Decision Drafting. It was headed by the Council President, Árpád Orosz.[27] In addition to lawyers, a dramaturge (Krisztina Kovács) and a linguist (Géza Balázs) were also involved in the work of the group. The linguistic result of the group's work was the publication of the Stylebook (Guide to the Drafting of Curia Decisions, 2013) by the Curia, which included the Hungarian Language Service Office's rules system: Possibilities for linguistic simplification and unification.[28]

Legal language training has also been regularly provided at the Hungarian Judicial Academy since the 2000s.The National Office for the Judiciary has dedicated 2017 to the „Year of the Accessible Court", with the aim of making the written and oral language used by the courts easy to understand. The programme, which was implemented in cooperation with the National University of Public Service, focused on three areas: court administration, judging and press communication.[29]

In 2022, the editorial team of the Magyar Nyelvőr (Hungarian Language Monitor) published a special issue in English entitled Norm clarity, dedicated to plain legal language. The editor of the issue, Balázs Arató, formulated the

26 for example: Minya Károly-Vinnai Edina: Hogyan írjunk érthetően? Kilendülés a jogi szaknyelv komfortzónájából. Magyar Jogi Nyelv; 2018/1. pp. 13–18.

27 Orosz Árpád: A „határozatszerkesztés" vizsgálatának tárgykörében felállított joggyakorlat-elemző csoport összefoglaló véleménye; Glossa Iuridica; I/2.; pp. 165–180.

28 Stíluskönyv. Útmutató a kúriai határozatok szerkesztéséhez; Kúria, Budapest, 2013. (sokszorosított anyag) p. 41.

29 Antal Zsolt (ed.): A bírósági szervezet sajtóközleményei a médiaképesség tükrében; authors: Antal Zsolt, Bódi Zoltán, Toót-Holló Tamás; Országos Bírósági Hivatal; Budapest; with appendix: A bírósági szervezet sajtóközleményei a médiaképesség tükrében; authors: working group members of the „Közérthetően a bíróságokról Team"; Országos Bírósági Hivatal; Budapest; 2018.

objective as follows: "In the domestic legal system, norm clarity is not only a linguistic and drafting requirement for legislation, but also a much more complex requirement affecting the application of the laws. In this context, the role of the courts in interpreting the meaning of laws and the obligation to draft court documents and decisions in plain, simple and clear language should be emphasised."[30]

In this context, the role of the courts in determining the meaning of legislation and the obligation to draft court documents and decisions in plain, simple and clear language should be highlighted. The concept itself can be derived from the Constitution: "The Constitutional Court has dealt with the issue of norm clarity in detail, and as early as 1992 it stated, as a matter of principle that "the clarity, intelligibility and proper interpretation of legislative content is a constitutional requirement for the legislative texts. Legal certainty which is an important element of the rule of law declared in Article 2(1) of the Constitution requires that the text of laws must contain a meaningful and clear legislative content that can be recognised in the course of the application of the law."[31] Thus, the requirement of norm clarity is inextricably linked to the principles of the rule of law and legal certainty, and can be derived from them in the practice of the Constitutional Court." [32]

6. Further tasks

Language issues often give rise to legal problems. Balázs Arató (2020) has examined the types of problems that have arisen in judicial practice in recent years and decades that require linguistic expertise. He found that courts more often appoint forensic linguists in criminal cases, but are still reluctant to involve linguists in civil and public law cases. "The concept of "intelligibility" for the average consumer is becoming more and more defined, but its content is still relatively uncertain and there is a lack of a uniform and standard definition." Another important observation is that "the courts do not approach

30 Arató, Balázs: Norm clarity in the light of Hungarian case law; in: Magyar Nyelvőr 146; 2022; pp. 81–90.; DOI: 10.38143/Nyr.2022.5.81. For more details on the requirements of legislative clarity, see: Tóth J., Zoltán: Clarity of norms in the light of the content requirements of legislation, legislative errors and their consequences – in general and with particular regard to legislative requirements in Hungary; in: Magyar Nyelvőr 146; 2022; pp. 3–15.; 2022; DOI: 10.38143/Nyr.2022.5.3.

31 Arató, Balázs: Norm clarity in the light of Hungarian case law, Magyar Nyelvőr 146; 2022; pp. 81–90.; DOI: 10.38143/Nyr.2022.5.81.

32 Arató, Balázs: Norm clarity in the light of Hungarian case law, Magyar Nyelvőr 146; 2022; pp. 81–90.; DOI: 10.38143/Nyr.2022.5.81.

what is and is not understandable to the average consumer from a linguistic perspective, but consider this group of persons as a kind of legal abstraction. Understandability for the average consumer is therefore a legal issue in the practice of the courts, and not a dilemma within the competence of experts."[33] He also suggests that "a positive change in the attitude of civil courts could be brought about if a uniform, objective methodology and terminology were to make the procedure and competence of forensic linguists clear and verifiable".[34] In another paper, Arató points out the requirements for a fair expert procedure.[35] Also it needs to be mentioned that there are several challenges on the language of contracts concluded on online surfaces (via Internet, through electronic way of communications). [36]

All this can be achieved within the framework of a well thought-out language strategy and the institution that implements it. The framework of the Hungarian language strategy has already been defined by Géza Balázs and published in various places and in various versions.[37] Following this, the Hungarian Language Strategy Institute (Manysi) was established in 2014, but due to management incompetence, the institute's activities went astray, and the institute was closed down in 2018, with some of its staff being transferred to the then estabilished Hungarian Studies Institute, where they also do not carry out professional language strategy work under the title of "language planning".

Thus, for the time being, the existing language strategy tasks in the field of legal languages continue to be carried out without any organisation or management. There is still a need for a language strategy institution or a language ombudsman (guardian of the law).

In the meantime, the description of legal language has been discussed in

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33 Arató Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8–15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/.

34 Arató Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8–15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/.

35 Arató Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9–30.

36 See: Boóc Ádám: *Az online szerződéskötés magánjogi problémái.*In: Homicskó Árpád Olivér (ed.): *Egyes modern technológiák etikai, jogi és szabályozási kihívásai*. Budapest, 2018. pp. 37–48.

37 See: Balázs Géza: Magyar nyelvstratégia; Magyar Tudományos Akadémia; Budapest; 2001; and Balázs Géza Euroterminológia és a magyar nyelv (Szaknyelvi kommunikáció és nyelvstratégiai munka); 2004; pp. 279–288. In: Balázs Géza (ed.): A magyar nyelvi kultúra jelene és jövője I.; MTA Társadalomkutató Központ, Budapest; 2004.

a philosophical and theoretical framework, and the linguistic framework of legal terminology has also been described.[38] Csilla Dobos (2010) published a thorough descriptive study and Edina Vinnai (2017a) a book on legal language and communication.[39] In addition to definitions, she gives a good description of the morphological, syntactic, stylistic features of legal terminology, its subdivision according to legal branches, fields of application, areas of legal linguistics (legal communication, legal semantics, legal argumentation and rhetoric, legal terminology, language criticism, legal history and language history, legal theory and language theory, linguistic rights, forensic linguistics, legal language teaching), etc.[40]

For further professional work in legal language, there is therefore already practical experience (results) and a good theoretical basis.

38 Varga Csaba: A jog nyelvi dimenziója. Jog *és* nyelv? Jog *mint* nyelv? Ontológia és episztemológia különneműségéről és végső egységéről; in: Szabó Miklós (ed.) 2015.; pp. 11–28.; Cs. Kiss Lajos Megjegyzések a jog és nyelv viszonyához; in: Szabó Miklós (ed.). és Kurtán Zsuzsa; 2015; pp. 53–92.; A magyar jogi szaknyelv leírásának kutatási programja; in: Szabó Miklós (ed.) 2015; pp. 189–202.; Szabó Miklós (ed.): A jog nyelvi dimenziója; Miskolci Egyetem Jogelméleti és Jogszociológiai Tanszék; Miskolc; 2015; (Prudentia Iuris, 31.).

39 Dobos Csilla: Jogi szaknyelv és szakmai kommunikáció; in: Dobos Csilla (ed.): Szaknyelvi kommunikáció. Miskolci Egyetem, Miskolc, Tinta Könyvkiadó, Budapest; 2010; pp. 257-284.; see also: Vinnai Edina: Jog és nyelv határán. A jogi nyelvhasználat nemzetközi és hazai kutatása. Budapest: Gondolat; 2017.

40 For a discussion of the effects of classical rhetoric on linguistic correctness and thus legal language, see: Pölcz Ádám: A nyelvművelés retorikai gyökerei. A nyelvhelyesség retorikai alapjainak hagyományáról. MNYKNT—IKU, Budapest; 2021; (IKU-monográfiák, 8.) and for a discussion of forensic linguistics, see Tolnainé Kabók Zsuzsanna: Interdiszciplináris kapcsolatok a rendészettudományok és az alkalmazott nyelvészet között – különös tekintettel a törvényszéki nyelvészetre; Magyar Rendészet 2015/5.; pp. 131–145. https://folyoirat.ludovika.hu/index.php/magyrend/article/view/3632/2916.