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Mongolian Investment Regulation and Arbitration

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Abstract. The author of the study presents the Mongolian legal environment regulating foreign direct investment. The evolution of the rules governing this field is presented in a chronological order from the democratization of Mongolia in the early 1990s to the present day. The author remarks the changes in the rules over time, which show an evolution towards a more level playing field between foreign investors, who were initially in a privileged position when compared to domestic investors. Other changes concern the authorization requirements for foreign investments, which evolved in order to hinder the activity of foreign state-owned enterprises in Mongolia and also to safeguard Mongolian mineral wealth. Investor protection mechanisms are emphasized, such as state commitments to not modifying the taxation environment. The study analyses international arbitration case-law pertaining to foreign investment protection in Mongolia.

Keywords: foreign direct investment, state-owned enterprise, expropriation, arbitration, Mongolia

1. Introduction

Foreign investment constitutes a considerable part of the Mongolian economy. Many immense projects and most of the mining industry is operating through foreign investment. Hence, foreign investment regulation has always been a sensitive yet very important part of Mongolian legislation. It had to synchronize the operations of government and the privileges of foreign investors in order to maintain the balance, which would consider the well-being of the nation and its environment on the one hand and preparing a pleasant legal and administrative atmosphere for the investor so that the investor would feel secure to invest in Mongolia on the other hand.

The Mongolian legislators' attempts to regulate this field started after 1991, when Mongolia became a democratic country. A number of specialized laws were enacted that would enable economic and social developments in the country. Foreign investment legislations were one of the very first projects which started after the transition to democracy and the introduction of market economy. A first draft of the proposed norms was introduced in 1990, but it was not adequate for the establishment of long-term investment operations due to the applicable rules, which limited the acquisition of foreign-owned shares in Mongolian business entities to just 49%.[1] Since then, the foreign investment law has changed several times and finally acquired its current form, with the Mongolian Investment Act of 2013. Following the entry into force of the new Mongolian Investment Act, its predecessors were repealed. This paper will analyse the past and current investment legislation of Mongolia. For obvious reasons, when the amount of investment increases, international arbitration is inevitable. So far, Mongolia has been part of five international arbitrations, before ICSID and UNCITRAL. We will discuss the most famous ones of them: Paushok v Mongolia and Khan Resources v Mongolia.

2. Past and Current Investment Laws of Mongolia

2.1. The Foreign Investment Act of 1993

The Foreign Investment Act (FIA) of 1993 was the first investment act in the country. It introduced the definitions of *investment* and *investor*, made clear the distinction between foreign and domestic investors, enacted special tax preferences exclusively for foreign investors, aimed to encourage the entry of direct foreign investment into the country, and established the rules of investor protection. FIA defined foreign investment as: 'Every kind of tangible and intangible property which is invested in Mongolia by a foreign investor for the purpose of establishing a business entity with foreign investment within the territory of Mongolia or for the purpose of jointly operating with an existing business entity of Mongolia'.[2]

It is safe to say that the FIA defined 'investment' in the broadest sense and gave the greatest possible amount of freedom to invest. Furthermore, the FIA differentiated domestic and foreign investors. Foreign investors which operated

1 *Investment Guide for Mongolia policy paper*. https://read.oecd-ilibrary.org/finance-and-investment/investment-guides-investment-guide-for-mongolia-2000_9789264189607-en (accessed on: 10.05.2021). 49.

2 Foreign Investment Law 1993, Art. 1. Translation by the author. Unless otherwise specified in the footnotes, all translations are by the author.

through business entities with foreign investment had special preferences and privileges. Such privileges would include exemption from taxes on special business capital, including technological equipment and machinery.

The substantive law clauses of FIA acknowledged the supremacy of international treaties over domestic norms,[3] expropriation became unlawful unless foreign investments were expropriated in the public interest, under due process of law, on a non-discriminatory basis, and against full compensation,[4] and it expressly secured the free remittance of income, profits, and payments of foreign investors outside the host country.[5] Furthermore, it included the duties of the investor to comply with domestic laws and corporate partnership agreements, to protect and restore the natural environment, 'to respect the customs and traditions of the people of Mongolia',[6] and to employ primarily Mongolian citizens.[7] Procedural law provisions on the settlement of investor–state disputes were constituted by the explicitly local-jurisdiction requirement. This meant that any legal dispute arising from investment between foreign investors and Mongolian natural or legal persons, including the state and its authorities, had to be resolved in the national courts unless provided otherwise by an international treaty or by a contract between the parties of the dispute.[8]

The FIA was amended dramatically in 2002 in order to comply with the requirements of the World Trade Organization and domestic investors in the country. Domestic investors were frustrated with the fact that only foreign investors could benefit from a tax-exempt status and demanded an amendment. The amendments increased the permitted percentage of foreign capital in business entities and reduced business activity exclusions from formerly 36 areas to just six.[9] Furthermore, they removed all taxation preferences that exclusively applied to foreign investors; however, the general norms of tax law in Mongolia still favoured foreign investors over domestic ones.[10] The most essential modification was the introduction of 'stability agreements', which were a legal guarantee for a stable legal environment to conduct business activities. Such agreements were granted – upon request – to investors who had invested over 2 million USD in Mongolia.[11] The main agenda of these stability agreements was to secure investors' tax privileges for a certain period of time, which differed depending on the investment amount. For example, when investors made an investment

3 Foreign Investment Law 1993, Art. 2.2.
4 Foreign Investment Law 1993, Art. 8.
5 Foreign Investment Law 1993, Art. 10.4.
6 Foreign Investment Law 1993, Art. 10.2.
7 Foreign Investment Law 1993, Art. 24.
8 Foreign Investment Law 1993, Art. 25.
9 Organization for Economic Cooperation and Development 2000. 55.
10 Scharaw 2018.
11 Foreign Investment Law 1993, Art. 19.

in Mongolia between USD 2 and 10 million or an investment of more than USD 10 million, the government was authorized to sign a stability agreement for 10 to 15 years respectively. In the matter of *Paushok v Mongolia* subjected to arbitration, the arbitration tribunal dealt with a stabilization agreement issued under the 2002 FIA. The tribunal defined it as an agreement 'between a State and an investor for the purpose of stabilizing (freezing), at least to a certain extent and for a certain period of time, the taxes payable by an investor and/or other legislative, regulatory, or administrative measures affecting it'.[12]

The Foreign Investment Act of 1993 aimed to encourage foreign direct investment (FDI) by defining special tax preferences and privileges and instituted a clear distinction between foreign and domestic investors. It introduced the basic rules of investment protection, defined 'investment' and 'business entities with foreign investment' in the broadest sense, and gave the greatest amount of freedom to invest.

2.2. Act on Foreign Investment in Strategic Sectors of 2012

The Act on the Regulation of Foreign Investment in Entities Operating in Strategic Sectors (in the following abbreviated as: SEFIA) was adopted by the Parliament of Mongolia in May 2012.[13] The purpose of the new law was to retain control over Mongolia's natural resources, the exploitation of which was becoming more and more dynamic at that time.[14] Mining being the main area of foreign investment, the scale at which natural resources were being exploited skyrocketed. The Government of Mongolia started to fret about the mineral wealth in the country, and it became a sensitive political issue.[15] SEFIA's purpose was to regulate investment-related cooperation between domestic entities and foreign investors, particularly in strategically important sectors that impacted national security. To put it in a simple way, Mongolia was trying to maintain control over foreign investments in the public interest as the further development of mineral resources was at stake. On top of that, the Government of Mongolia had to restore its reputation as a reliable and liberal investment partner.[16]

The law defined the 'mining', 'banking and finance', and 'media, information, and communications' sectors as strategic 'for the purposes of national security with a view to ensuring the basic needs of the population, the independence, the normal operations of the economy, and the national revenues and reinforcing national security'.[17] SEFIA established an obligation for investors to obtain

12 *Paushok v Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 97.
13 Foreign Investment Law 1993, Art. 10.2.
14 Scharaw 2018.
15 Jackson 2018. See the letters referenced in the article by Dolgorsürengiin Sumyaabazar.
16 Scharaw 2018.
17 SEFIA, Art. 5.

permission from the Government of Mongolia on certain contracts and transactions between domestic business entities and foreign investors.[18]

SEFIA grouped investors into private and state-owned categories, and each investor would have different procedures for obtaining permits.[19] This way, investments by a foreign business entity partly or fully owned by a foreign government were subject to permission requirements without exemption, regardless of the sector in which the investment was made or the percentage of shares and interests in the Mongolian business entity. This was a strategic move to protect the market from state-owned enterprises (SOEs) of foreign countries. Permission was needed in situations where investors obtained a higher degree of control of the business entity, created a monopoly in the field in which the investment took place, and impacted the market price of mining products for export.[20] On the other hand, private foreign investors were either subject to a simple formal registration or had to obtain government permission as well, depending on the amount of investment and its respective sector. In continuation of the strategic policy on mineral resources, the Parliament of Mongolia adopted the 'Mineral Resource Policy Strategy' in May 2014, which aimed to reduce the negative impacts of natural resource exploitation on the environment and to maximize revenue while preserving the nation's mineral wealth.

SEFIA awarded public authorities ample discretionary powers when screening foreign investment projects in Mongolia.[21] It implemented a strict screening process among the foreign investments due to concerns of national security. In the meaning of SEFIA, concerns for national security permitted the proportional (reasonable) exploitation of natural resources and required maintaining the market monopoly free. The law was in force for seventeen months, and it was obvious that Mongolia needed a new complex legislation on investment matters. Hastily drafted, the SEFIA of 2012 resulted in major concerns on the part of established and potential investors who were met with uncertainty. SEFIA was cited numerous times for having contributed to the significant decline in FDI inflows along with external factors such as the slowdown of the Chinese economy and the fall in commodity prices.[22]

18 SEFIA, Art. 4 and 6.
19 SEFIA, Art. 5.
20 SEFIA, Art. 6.
21 UNCTAD noted that the importance of mining deposits has raised legitimate policy concerns related to national security and economic interests, including control over national resources. United Nations Conference on Trade and Development 2013. 40.
22 Forneris et al. 2018. 39.

2.3. The Mongolian Investment Act of 2013

In 2013, as a relief from the effects of SEFIA, a new Mongolian Investment Act (MIA) was developed and enacted.[23] The MIA entered into force in November 2013, and other relevant laws, such as the Act on the Registration of Legal Entities, the General Taxation Act, the Mineral Act, and the Nuclear Energy Act, were modified accordingly.

According to the MIA, in order to start business operations in Mongolia, investors must incorporate either a business entity with foreign investment or a representative office with a minimum capital requirement of USD 100,000 or more, 25% of which is invested by a foreign investor (or investors).[24] For the investors who are willing to make smaller investments at first, instead of committing the full amount, the mandatory minimum foreign contribution can be a burdensome requirement. There is no minimal equity requirement for representative offices as these function on a proxy basis, but such offices do not have the power to earn revenue from business activities in Mongolia.[25] Article 4.2 of the MIA excludes restrictions to private investment, which means that investors, domestic or foreign, may invest in any sector without any limitation or government approval. The only exception applies to foreign SOEs which seek to acquire more than a third of the equity of a Mongolian company in a few strategic areas, such as mining, media and telecommunications, banking, and financial services.[26]

The main novelty of the tax incentives in the MIA is the tax rate stabilization certificate, the purpose of which is to stabilize the rate and amount of tax and payment specified in the MIA, to an investing legal body that fulfils the requirements specified therein.[27] These certificates imitate the 2002 FIA's stability agreement, which was broader in its coverage. Tax rate stabilization certificates cover four types of state revenues: 1. the corporate income tax, 2. the custom duty, 3. the value-added tax, and 4. the royalty on mineral resources. The general criteria for issuing the certificates are the total amount of investment, which has to meet the required amount set forth by the act, the presentation of an environmental impact assessment, the creation of a stable workplace, and the introduction of modern, high-tech methods of production.[28] The certificates

23 In the summer of 2012, national parliamentary elections were held, and the new coalition started the discussion of a new fundamentally revised domestic investment law system to send a clear message to investors. In UNCTAD's opinion, 'the revision was necessary to restore adequate legal certainty and provide a coherent message regarding the country's openness to investors, while public concerns regarding competition, environment, and health are protected'. United Nations Conference on Trade and Development 2013. 40-1.

24 SEFIA, Art. 3.1.5.

25 SEFIA, Art. 3.1.6.

26 SEFIA, Art. 21 and 22.

27 SEFIA, Art. 3.1.9 and 13–19.

28 SEFIA, Art. 16.1.

can be invalidated if the investor was subjected to insolvency proceedings, moved out of the country, or – most importantly – if the investor concluded an investment contract. According to Art. 20, the investment contract is concluded by the Government of Mongolia with the investor, which is to invest more than 500 billion MNT. Finally, tax rate stabilization certificates do not cover the production, import, and trade of tobacco and alcohol.

The MIA considers land as a non-tax promotion for investment.[29] Based on the contract, foreign investors may lease land for use for a period of up to sixty years, and an extension is possible once, for up to a supplementary period of forty years, which limits the use of the land for up to a total of one hundred years. In its Art. 17.1, the Land Act of Mongolia states that land lease contracts with foreigners require consent by the Mongolian Parliament. Further, it states a local jurisdiction requirement for non-contractual disputes arising from the land use of business entities with foreign investment,[30] which means that international arbitration is excluded with respect to non-contractual land-use-related disputes between host country and investor.

In addition, the Government of Mongolia set a quota for hiring foreign employees by investors. This quota ranges from 5% to 80%, 5% being the default. Employers also have to pay a workplace fee on a monthly basis, set at twice the minimum wage for every foreign employee in the company.[31] However, mining licence holders and their sub-contractors may have in their workforce a quota of up to 10% of foreign employees.[32] If the number of foreign employees exceeds the given ten percent, employers have to pay a penalty set at ten times the minimum wage for every employee by which the quota was exceeded. In this regard, the World Bank mentions that even the relatively new MIA has not provided a consolidated negative list placing restrictions on foreign investment. This has made it difficult to provide statistics in areas pertaining to the limits on foreign equity participation, partnership requirements, and the identification of restricted sectors.[33]

2.4. Investment Protection

In customary international investment law, there are four main principles that should be followed in the case of expropriation: 1. it must be for a public need or public purpose, 2. it must be preceded or followed by due compensation and payment, 3. it must be completed under due process of law, and 4. it must be non-

29 MIA, Art. 12.1.1.

30 Mongolian Law on Lands 2002, Art. 20.

31 Part 2, *Government Charter on Employment Payment*. In Mongolian available at: https://www.legalinfo.mn/annex/details/6652?lawid=10913.

32 Mineral Law of Mongolia 2006, Article 43.1.

33 Forneris et al. 2018. 44.

discriminatory.[34] The fundamental right to property and its protection is stated in Art. 5.2 of the Constitution of Mongolia, which says that the state recognizes the forms of both public and private property and shall protect the rights of the owner by law. However, the wording of Art. 16.3[35] explicitly provides that only citizens of Mongolia may own land. In the sense of the Constitution, only citizens can benefit from compensation forms subsequent to expropriation, and foreign investors are not covered by the expropriation clauses deriving from land ownership rules. According to the MIA, properties could be expropriated only in the public interest, on the condition of full compensation of expropriated owners, and in accordance with the procedures set forth by law.[36] Expropriated property shall be valued at the market rate of the assets when it was expropriated or the pending expropriation notified to the investor or the public.[37] In this regard, the important novelty of the MIA was that it filled the gap of foreign investor protection, which was covered vaguely in the Constitution. The MIA removed the definition of 'foreign' and stopped differentiating foreign and domestic investors, bringing them together under the umbrella definition of 'investor'.

The next fundamental guarantee of investment protection for foreign investors is the ability to freely repatriate funds and capital from the host country. In other words, it is the certainty that the investor may exit the host country without hassle whenever the investor sees it appropriate. Domestic law can make alterations by adding specific requirements such as the fulfilment of all fiscal duties by the foreign investor, subject the legal guarantee to foreign exchange regulations, or confer upon the host governments the right to limit the free transfer of funds and capital during balance-of-payment difficulties.[38] An exhaustive list of assets and revenues which investors can transfer out of Mongolia was given in Art. 6.7 of the MIA, and it stated that investors transferring monetary assets shall be entitled to convert their assets into any internationally freely convertible currency.[39] A precondition to the transfer was to properly fulfil the tax obligation in the territory of Mongolia.[40]

National treatment is mostly preferred in developed countries in order to provide the same privileges to the foreigners as are provided for nationals. However, some countries put foreign investors higher in privileges than their own nationals:

34 Subedi 2008, Sornarajah 2010.

35 Art. 16.3 of the Constitution of Mongolia reads: 'Right to fair acquisition, possession and inheritance of moveable and immoveable property. Illegal confiscation and requisitioning of the private property of citizens shall be prohibited. If the state and its bodies appropriate private property on the basis of exclusive public need, they shall do so with due compensation and payment.'

36 MIA, Art. 6.4.

37 MIA, Art 6.5.

38 Scharaw 2018.

39 MIA, Art. 6.8.

40 MIA, Art. 6.7.

for example, the 1993 FIA provided comprehensive tax preferences to foreign investors, while domestic investors could not apply for such a tax preference. Nonetheless, national treatment does not mean that the foreign investor would have all the rights that nationals have, such as political rights. As for the 2013 MIA, it does not contain direct or explicit clauses for the national treatment of foreign investors. Yet the MIA removed the wording 'foreign' form its title, and Art. 4.1 states that the act applies to investments 'made by foreign and domestic investors in the territory of Mongolia'.

An internationally recognized fair and equitable treatment guarantee is not included in the 2013 MIA. Usually, it is provided by the vast majority of international investment treaties, and thus the national legislator did not see the need to include the clause in domestic law.[41] This does not mean that investors should be alarmed. As stated in the Constitution, Mongolia must adhere to the universally recognized norms and principles of international law.[42] Hence, even if the 2013 MIA does not contain directly the principles of equating foreign entities with domestic ones as a form of an investment protection guarantee, the investors will be protected by international norms and treaties.

The Investor–State Dispute Settlement (ISDS) clauses are an important part of the Mongolian investment protection framework, especially in situations where the investor is not protected by an international investment treaty, which usually allows investors to initiate ISDS. As a general rule, the domestic investment protection clauses are focused on customary international law and international investment treaties with their substantive standards of investment protection and investor–state dispute settlement mechanisms. Unless the host state has consented to investment arbitration by international treaty, arbitration agreement, investment contract, or in their domestic laws, the ISDS is subject to the jurisdiction of the host state. The inclusion of arbitration clauses in domestic laws is a standalone and unilateral offer to settle arising disputes by an independent international tribunal.[43] And this unilateral offer should be accepted by the investor, usually when initiating the ISDS procedure itself. The downside of the standing offer is that the host state could revoke the offer anytime by amending the law. However, it is suggested that the performance of some reciprocal act leads to the perfection of the host state's unilateral arbitration offer, which thereby becomes similar to a binding bilateral instrument.[44] As Schreuer mentioned, once the instrument is perfected, consent to arbitrate investor–state disputes becomes isolated from the state's unilateral arbitration promise in the domestic investment law and is maintained in effect even if the legal norm containing the promise is itself

41 Parra–de Alwis 1992.
42 Constitution of Mongolia, Art. 10.1.
43 Dolzer–Schreuer 2012.
44 Scharaw 2018.

repealed.[45] Furthermore, the host state might include some preconditions and general rules for ISDS issues such as a negotiation period, exhausting the local remedies before invoking ISDS, etc.

The 1993 FIA and the 2012 SEFIA did not expressly direct consent to the ISDS nor contained a standing offer to arbitrate. Investment-related disputes were solely under the jurisdiction of the national courts of Mongolia.[46] But the 2013 MIA has corrected that situation and included an explicit arbitration offer in Art. 6.9, which states that 'unless it is provided by law or in the international treaties, to which Mongolia is a party, an investor is entitled to select an international or domestic arbitration to settle any disputes which may arise regarding the contract concluded with the state authority of Mongolia'. However, this offer is limited to disputes arising with respect to 'investor–state contracts'.

3. A Survey of Arbitral Jurisprudence

3.1. Khan Resources v Mongolia

CAUC Holding Company Ltd (abbreviated in the following as CAUC Holding) was an offshore company registered in the British Virgin Islands (BVI), investing in the Dornod Project for uranium exploration and extraction through its majority-owned Mongolian subsidiary, the Central Asian Uranium Company (abbreviated as CAUC). Khan Resources B.V. (abbreviated as Khan Netherlands) was a Dutch company investing in the Dornod Project through its fully owned Mongolian subsidiary, Khan Resources LLC (abbreviated as Khan Mongolia). Khan Resources Inc. (abbreviated as Khan Canada) was a Canadian company that wholly owned both CAUC Holding, through a Bermuda-registered offshore entity (investment vehicle), and Khan Netherlands. The latter companies brought a claim against the Government of Mongolia. They claimed that their investment in a uranium exploration and extraction project in the Mongolian province of Dornod was wrongfully and indirectly expropriated when the Government of Mongolia annulled their licences. CAUC operated in the Dornod Project under mining Licence No 237A, initially covering two deposits, but which later, on CAUC's application, was reduced to exclude a segment in order to save on taxes and fees. The excluded segment was later acquired by Khan Mongolia and covered by a separate mining licence, No 9282X.

45 Schreuer 2009.

46 Art. 25 of both FIA and SEFIA stated that disputes should be generally settled in competent national courts unless Mongolia gave consent to international arbitration in BITs, ECT, or via direct arbitration agreement with the foreign investors.

In October 2009, the Mongolian Nuclear Energy Agency (NEA) suspended the claimants' licences No 237A and No 9282X among others. The licences were then invalidated and subjected to re-registration under the Nuclear Energy Law of 2009. In March 2010, after inspecting the Dornod Project, NEA concluded that the project failed to rectify violations mentioned during the time of licence invalidation. In April 2010, the NEA declared that licences No 237A and No 9282X remain invalidated and could not be re-registered to the claimants' name. The claimants initiated the arbitration in 2011. Khan Canada and CAUS Holding invoked the Founding Agreement, which created the joint venture CAUC. They claimed that the suspension and invalidation of the licences constituted an unlawful expropriation, in breach of Mongolia's obligations under the Founding Agreement, Mongolian law, and customary international law. Khan Netherlands invoked the Energy Charter treaty via the umbrella clause on the allegations of Mongolia's breach of Foreign Investment Law.

The case presented two jurisdictional challenges. Firstly, whether Khan Canada, a non-signatory of the Founding Agreement, may be party to the dispute (the problem of *locus standi*). On Mongolia's objection to the tribunal's jurisdiction over Khan Canada, the tribunal found that the latter is not a signatory; however, as a non-signatory it could become party to the agreement and consequently to the dispute if it shared the common intention with the signatory (the claimant).[47] As the burden of proof of the matter at hand fell on the claimant, the tribunal held that the evidence the claimant presented sufficed to prove such a common intention between CAUC Holding and Khan Canada. Secondly, the question arose whether the Government of Mongolia and MonAtom (the Mongolian state-owned nuclear monopoly) are different entities or not. Mongolia further argued that it should not be bound by the arbitration clause of the Founding Agreement as it was not a party to that agreement. However, based on the claimant's legal expert's testimony, the tribunal found that MonAtom, a Mongolian company wholly owned by the state, acted as Mongolia's representative and undertook obligations that only a sovereign state could fulfil, namely committing to reduce the natural resource utilization fees to be paid by CAUC, thereby giving the tribunal personal jurisdiction over Mongolia under the Founding Agreement.[48]

The tribunal disagreed with Mongolia on the interpretation of Mongolian law. Mongolia first argued that the mining licences were outside the scope of its Foreign Investment Act, which defined 'foreign investment' as 'every type of tangible and intangible property'. Mongolia further argued that mining licences were not 'properties' under Mongolian law as a decision of the Mongolian Supreme Court

47 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, paras 329–330.

48 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, para 345.

had held that '[a] mining licence […] is possessed but not owned by any entity, and therefore there is no legal ground to consider such mining licence to be a property right which is transferable to the ownership of others'.[49] The tribunal held that the general notion of rights under licences as well as contractual rights to exploit natural resources constitute intangible property,[50] hence invalidating the Mongolian Supreme Court's interpretation.

On the validation of the licences, the tribunal conducted a proportionality analysis and concluded that the penalty of invalidation was not appropriate for the alleged violations. The tribunal stated that Mongolia failed to 'point to any breaches of Mongolian law that would justify the decisions to invalidate and not re-register' the mining licences.[51] During the analysis of the evidence, the tribunal found that Mongolia's motive for licence invalidation was to develop the Dornod Project deposits at a greater profit with a Russian partner.[52] The tribunal found that Mongolia had an obligation to re-register the mining licences as there was 'no legally significant reason why the Claimants would not have fulfilled the [prescribed] application requirements'. By failing to do so, Mongolia denied due process of law.[53] Based on all these reasons, the tribunal concluded that the Mongolian Government had breached the Energy Charter Treaty[54] (ECT) by invalidating licences of uranium mining of CAUC Ltd. Consequently, when the tribunal found that Mongolia had breached the Foreign Investment Act, it also found its violation of the ECT under its umbrella clause. In calculating damages, the tribunal valued the investment of the Dornod Project by analysing the offers received from 2005 to 2010. Thus, the final damages were set at USD 80 million as opposed to USD 358 million claimed by the investors.

3.1. Paushok v Mongolia

Sergei Paushok, sole shareholder of the CJSC Golden East Mongolia (abbreviated as GEM) and CJSC Vostokneftgaz brought a claim against the Government of Mongolia in 2007 following the introduction of a Windfall Profit Tax Act[55] (WPT)

49 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, para 303.

50 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, para 302.

51 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, para 319.

52 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, paras 340–342.

53 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, paras 359–360.

54 *The Energy Charter Treaty*. https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (accessed on: 10.05.2021).

55 Law on Imposition of Price Increase (Windfall) Taxes on Some Commodities, 2006.

by the Parliament of Mongolia, which placed a 68% tax on gold sales exceeding USD 500 per ounce. Furthermore, the claimant was affected by the newly enacted Mineral Law clause that imposed a monthly penalty of 10 times the minimum wage for every foreign employee that exceeded the usual 10% quota of foreign workers.[56] By the time the arbitration proceedings were initiated, 50% of GEM's employees were Russian nationals. GEM invoked the Russia–Mongolia Bilateral Investment Treaty[57] of 1995 (BIT) and claimed that the respondent Mongolian Government breached its treaty obligations on fair and equitable treatment, expropriation and compensation, full protection, and security by introducing discriminatory tax rates and employment rules.

According to the claimant, its competitor, KOO Boroo Gold, a Canadian-owned gold mining company, was not affected by the WPT as it had a stabilization agreement with the Government of Mongolia.[58] Negotiations between GEM and Mongolia were not successful as GEM was not willing to make long-term future investments requested by the Government of Mongolia. When the WPT came into force, GEM entered into a contract with the Central Bank of Mongolia (MongolBank), according to which gold was placed under the custody of the Bank for safekeeping and subsequent sale, and GEM would get 85% of the sale price.[59] However, MongolBank, without notifying GEM, used the gold for refinement purposes in the United Kingdom. Following this issue, the arbitral tribunal found that even though Mongolia was not a party to the contract between MongolBank and GEM, it breached its fair and equitable treatment obligation by removing ownership of GEM's gold in contravention of the safe custody contract with MongolBank.[60]

By default, the Government of Mongolia was liable for actions of the Mongol Bank under the international law rules of attribution.[61] With respect to the introduction of the WPT, the tribunal did not find a breach of the BIT, stating that a breach of an investment treaty did not automatically occur only because a legislative act may be considered as ill-conceived, counter-productive, or excessively burdensome.[62] And the tax rate increase is one of the great risks that an investor ought to know, especially in developing countries.[63]

56 Art. 16.3 of the Constitution of Mongolia.

57 *Mongolia–Russian Federation Bilateral Investment Treaty (1995)*. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2568/mongolia---russian-federation-bit-1995- (accessed on: 10.05.2021).

58 See Part 2.1.

59 Paushok v Mongolia, Award on Jurisdiction and Liability, 28 April 2011, paras 97, 111.

60 Klager 2012.

61 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, para 576.

62 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, paras 298–299.

63 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, paras 302, 305.

On the foreign employee penalty, the tribunal decided that the Respondent could not violate 'fair and equitable treatment' as stated in Article 3.1 of the BIT by enacting the Mining Law of 2006 and increasing the penalty for exceeding the 10% quota of foreign employees.[64] Consequently, the tribunal brought other mining companies as an example and noted that 10% of the foreign employee quota was manageable and setting a foreign worker quota would not qualify as a breach of fair and equitable treatment requirements.[65] The bottom line was that in such circumstances investors should enter a stability agreement covering taxation and other matters, otherwise the investor would face a much more difficult task to demonstrate that breach of a BIT occurred.[66]

4. Conclusions

Certain challenges and opportunities exist in international investment. Overviews of these challenges should be updated frequently as the regime governing the relations between international investors and governments constitutes the most important form of international economic transaction in the globalizing world economy. In addition to that, the role of international tribunals in these updates is significant. We analysed the arbitration procedures that Mongolia has been a party to. Such cases as Khan Resources v Mongolia and Paushok v Mongolia touch upon all the necessary issues within the area, and the tribunal sets out the interpretation to eliminate further misunderstandings. As most of the host states are implementing new legislation to attract more investors or make the legal environment more favourable to them, these cases point out that the legislator should be more careful in order to ensure investor protection.

Further, we focused on Mongolian domestic legal statutes on foreign investment. Effectiveness and predictability provided by domestic laws have a great impact on attracting new investments to the country. Mongolia enacted its first ever Foreign Investment Act in 1993, which aimed to encourage foreign direct investment by defining special tax preferences and privileges only available to foreign investors, creating a clear distinction between foreign and domestic investors, introducing the basic rules of investment protection, and defining 'investment' as well as 'business entities with foreign investment'. The definition of 'investment' in the 1993 FIA had the broadest sense and gave the greatest amount of freedom to invest. The 1993 FIA was amended in 2002 as a result of complaints from

64 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, paras 360–362.

65 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, para 368.

66 Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia, para 370.

domestic investors regarding foreign investors' exclusive tax preferences and requirements of the WTO regarding the safety and stability of investments.

In 2012, Mongolia enacted the Act on Foreign Investment in the Strategic Sector, the main agenda of which was to maintain control over Mongolia's natural resources and prevent the establishment of undesired foreign investment in strategic sectors by foreign state-owned entities. With its strict screening process, SEFIA aroused some uncertainties among investors alongside with the significant drop in foreign direct investment, which limited the longevity of the law to only one year.

In 2013, the Mongolian Investment Act was adopted to cover all the gaps that its predecessors had left. The MIA applies to both foreign and domestic investors, which avoids the reverse discriminations of the latter and secures equal legal treatment for the former. The MIA kept the controls for the entry of state-owned enterprise investors in place. The main novelties of the MIA were to introduce tax stabilization certificates, which are issued by the Government of Mongolia to the investors who qualify for certain requirements of the law, making an open offer to arbitrate investment-treaty-related disputes in international arbitration and enacting a number of clauses to aid sustainable development in the host country. We believe that Mongolia is still learning from its mistakes and works vigorously towards keeping the balance between its own advantage and the foreign investors' interests.

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*** *Government Charter on Employment Payment*. https://www.legalinfo.mn/annex/details/6652?lawid=10913 (accessed on: 10.05.2021).

*** *Mongolia–Russian Federation Bilateral Investment Treaty (1995)*. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2568/mongolia---russian-federation-bit-1995- (accessed on: 10.05.2021).

*** *The Energy Charter Treaty*. https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (accessed on: 10.05.2021).

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Paushok v Mongolia, Award on Jurisdiction and Liability, 28 April 2011, para 97. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/276/paushok-v-mongolia (accessed on: 10.05.2021).

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International Investment Arbitration in the European Union[1]

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Abstract. The author analyses the regulation of institutional arbitration under investor–state dispute settlement mechanisms, with an emphasis on such arrangements to which the European Union is a party. The functioning of the EU's Investment Court System is presented in detail as a major reform to the status quo, along with some questions raised when qualifying this system as a means of arbitration, especially for the purposes of recognition and enforcement of decisions rendered, both in jurisdictions party to the Comprehensive Economic and Trade Agreement between Canada and the European Union and third countries. The latter problem is identified as a significant aspect of international investment arbitration.

Keywords: arbitration, European Union, investor–state dispute settlement, CETA, ICSID

1. Introduction

Several experts have expressed their criticisms of investment protection arbitration in the previous years. Critics of the current system of dispute resolution method (Investor–State Dispute Settlement, abbreviated as ISDS) between a foreign investor and the host state generally complain that the case-law is unpredictable and inconsistent, the procedure is indistinct, and the substantive review of arbitration awards is not possible. The way arbitrators are nominated by the parties has also been criticized, given that it can negatively affect the impartiality of arbitrators, which may have serious consequences in resolving investment disputes affecting the public interest. Nevertheless, there is

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no doubt that arbitration has numerous advantages over state-/court-administered litigation proceedings, which essentially mean the widespread recognition and enforceability of arbitration awards in almost every country in the world. This is basically made possible by two international conventions, the ICSID Convention[2] and the New York Convention.[3] Although the ISDS system has many advantages, the European Union (EU) has set itself the goal of setting up an investment dispute settlement court.

As a first step, the establishment of a bilateral Investment Court System (ICS) is being planned, which would be institutionalized in trade and investment agreements concluded with third countries (e.g. in a Comprehensive Economic and Trade Agreement between Canada on the one side and the European Union and its Member States on the other; hereinafter referred to as: CETA). However, due to its 'bilateral' nature, the ICS is not able to remedy all criticisms of investment arbitration; therefore, as a second step, the Union is working to establish a Multilateral Investment Court (MIC).[4] It should be noted that the EU intends to lay the current system of investment arbitration on completely new foundations, while it seeks to make the existing system of rules on the mutual recognition and enforcement of judgments applicable to ICS rulings. The questions may arise: will this new investment court system be able to solve the problems; will it be able to act as an effective dispute settlement mechanism? Will the Conventions actually be applicable to subsequent ICS judgments, or in which other direction would the recognition and enforcement of new court decisions in third states develop?

To answer these questions, it is necessary to briefly examine the current system of ISDS. In addition, it is important to know the main features of the proposed EU investment court system, including any of the concerns and criticisms that may arise. The rules of procedure for arbitration tribunals in investment protection disputes are also worth reviewing, in particular the rules on the recognition and enforcement of their decisions. The study intends to follow these outlined directions.

2 *Convention on the Settlement of Investment Disputes between Natural and Legal Persons of States and Other States, adopted on 18 March 1965.* https://treaties.un.org/doc/Publication/UNTS/Volume%20575/v575.pdf (accessed on: 25.04.2020).

3 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958.* https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf (accessed on: 25.04.2020).

4 *Council Decision Authorizing the Opening of Negotiations for a Convention on the Establishment of a Multilateral Court for the Settlement of Investment Disputes, Brussels, 13 September 2017.* https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A52017PC0493 (accessed on: 23.04.2020).

2. The Current System of ISDS

2.1. International Investment Agreements

After the Second World War, in addition to international trade, foreign investment[5] played a key role in shaping the global economy. The liberal market economies emerging around the world and the technical breakthroughs that took place at the time further increased the flow of foreign direct investment. There have been several challenges to the operation of foreign investment – for example: the pursuit of maximizing advantages and minimizing disadvantages, expropriation trends, the treatment of foreign investors, and individual state investment support policies. In view of all this, the implementation of the protection of foreign investments within national borders required international regulation.[6]

International legal protection for foreign investors is primarily provided by international investment agreements (IIAs). There are currently more than 3,000 bilateral investment treaties (BITs)[7] in force worldwide, and a number of chapters in trade agreements contain substantive rules on investment and arbitration, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID, also referred to as the Washington Convention), the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), etc.

Although there are several differences between international investment agreements, whether we look at the number of parties or the obligations involved, they still have common features. They offer investors various international legal solutions that reduce business risks arising from the unknown legal environment of the foreign state, including standard 'clauses' that set out, inter alia, the treatment of foreign investments, compensation for expropriation, and investor and state dispute resolution rules (e.g. non-expropriation principles, non-discrimination principles, right to adequate treatment, etc.).[8] In addition, they include investor–state dispute settlement rules (ISDS), thus allowing a foreign investor to bring proceedings before an institutional arbitral tribunal against the host state if it has violated any of its obligations under an international investment protection agreement concluded between the investor's home state and the host state.

5 The general characteristics of the investment are described in Salini Costruttori S.p.A. v Morocco, ICSID Case No ARB/00/4. https://www.italaw.com/cases/958 (accessed on: 20.04.2020). According to these, an investment is to be considered as falling within the scope of Article 25(1) of the ICSID Convention if it means a contribution of the investor, it includes a certain duration of performance and a participation in the risks of the transaction; also, it shall constitute a contribution to the economic development of the host state of the investment.

6 Dimopoulos 2011. 11.

7 Conventions currently in force are available at: *International Investment Agreements Navigator*. http://investmentpolicyhub.unctad.org/IIA (accessed on: 30.05.2020).

8 Dolzer–Schreuer 2009. 220–221.

2.2. Dispute Settlement Methods

As one of the options, ICSID dispute resolution shall be mentioned. The rules of this procedure are framed by the ICSID Convention itself, which is the only legal source for the procedure. It is a self-regulating autonomous system, which is independent of any national legal implications. This regulation seeks to provide certain benefits to both parties. On the one hand, the investor does not have to fear that its home state may not support its activities for diplomatic or other reasons and thus be unable to assert its claim. Claims are enforced internationally, objectively, and free of political considerations. On the other hand, the host state (the place of investment) is assured that the home country of the investor will not attempt to assert claims at the interstate level.[9] The rules of procedure provide for independence and neutrality as well as flexibility and relatively low costs, just as arbitration in general. It is important to emphasize that the enforcement of an arbitration award made by ICSID is also ensured by the ICSID Convention itself, and it is possible to review and – in some exceptional cases – annul the award before the institution's own forum.[10] Since its establishment, the vast majority of investment disputes have taken place before this forum.[11]

The other option is to use the procedure of other international investment arbitral tribunals, the enforceability of which is based on the New York Convention, as in the case of commercial arbitral tribunals. The procedure is based on a regulation developed jointly by the parties (e.g. a BIT), which is based on the national law of the place of the procedure. Consequently, the legal basis for decisions varies from case to case. However, when interpreting similarly worded provisions in conventions, courts generally take into account the decisions of cases that have already been closed, and, if they wish to deviate from a previously established practice, the deviation is justified in the reasoning.[12]

In summary, although the two dispute settlement methods have the same purpose, there is a great contrast between them. If we systematize further differences, we can observe even more specific differences, including in the examination of the jurisdiction and procedure of the arbitral tribunal and the annulment of the arbitral award. As far as ICSID is concerned, a dispute directly arising from the investment is required to establish jurisdiction; the dispute must meet three conditions in order for proceedings to be instituted in that forum: the consent of the parties, the status of the parties, and the nature of the dispute

9 A common feature of all investment dispute resolution forums is that the investor and the country where the investment is located reach an agreement directly outside the judicial system of the state where the investment is made as well as the fact that the investor does not require the support of his home state in bringing his claims to the appropriate forum.

10 Schreuer 2009. 398.

11 Dimopoulos 2011. 14.

12 Katona 2014. 3.

shall be in accordance with the rules of the ICSID Convention.[13] Both the host state and the investor or the national of the investor must be a party to the ICSID Convention. For the other modes, it is sufficient if the disputed issue relates to an investment. It can be seen that in the latter case the jurisdiction is wider than in the case of ICSID disputes. A dispute is of a legal nature if its subject concerns a right, a legal obligation, or the breach of such an obligation, and it is not merely a dispute of interest. The biggest difference between the procedures is that the ICSID arbitration procedure has no legally defined place, only geographically, so other legal instruments than the ICSID Convention have no legally binding effect. Another major difference is that the ICSID Convention also authorizes arbitrators to take interim measures (unless the parties have ruled out the possibility thereof). Arbitration courts do not generally have such jurisdiction, but in many cases they allow the parties to apply to national courts for defence. (This type of rule can also be observed in ICC, UNCITRAL, and other arbitration regulations.) In this respect, parties to proceedings before a non-ICSID forum may in some cases be able to defend themselves more quickly as the ICSID will have to wait for the arbitrators to be selected and set up.[14]

3. Reform Efforts – The European Union's Investment Court System

In this section, I briefly present the legal background to foreign investments, which establishes the competence of the European Union, and the main features of the judicial system for investment disputes that is proposed to be established.

Article 3(1) of the Treaty on the Functioning of the European Union (TFEU) lists the areas of exclusive EU competences. Paragraph (e) of this article sets out the common commercial policy, the precise scope and concept of which are set out in Article 207 of the TFEU.[15] Accordingly, following the Lisbon Treaty,[16] foreign direct investments, including the negotiation and conclusion of international agreements on foreign direct investment, became an exclusive EU competence, as confirmed by the Court of Justice of the European Union in its Opinion No 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore.[17]

It is important to note that there is no uniform definition for the concept of foreign direct investment (FDI). According to the settled case-law of the Court of Justice of

13 ICISD Convention, Article 25(1).

14 Hajdú 2015. 17.

15 Király 2010. 265–271.

16 Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community. *Official Journal of the European Union* C 306 of 17 December 2007.

17 *Opinion 2/15 of the Court of 16 May 2017 (EU:C:2017:376).* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CV0002(01). (accessed on: 30.05.2020).

the European Union, 'direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity'. In addition to acquisitions, real estate investments and loan transactions are also included. However, the purchase (acquisition) of company shares for financial investment purposes without the intention to influence the management and control of the undertaking (so-called 'portfolio' investment) does not fall into this category.[18]

The Court also emphasized in Opinion 2/15 that the competence to regulate investor–state dispute settlements is shared between the Union and the Member States, given that not only the Union but also individual Member States may act as parties in the proceedings. Consequently, the binding effect of investor–state dispute settlement provisions in Union trade and investment agreements shall be recognized by each and every Member State.[19]

Under the mandate provided by the Lisbon Treaty, the European Commission presented a proposal in May 2015 for the first time, to establish a two-stage investment court with the United States during the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) and with Canada during the negotiations of the Comprehensive Economic and Trade Agreement (CETA).[20] Although the fate of TTIP is now quite uncertain as the European Commission declared the partnership guidelines 'obsolete and no longer relevant' in April 2019,[21] the CETA negotiations were more successful: the EU and Canada signed CETA on 30 October 2016, and, following the adoption of the necessary implementing rules, the agreement entered into force provisionally on 21 September 2017.[22] It shall be noted, however, that with respect to the findings of the Opinion 2/15 of the CJEU, the full implementation of CETA is conditional on the ratification of the dispute settlement mechanism provided in the agreement by all EU Member States, in accordance with the respective constitutional requirements. As soon as the full implementation of CETA happens, the investment protection arbitration contained in the bilateral trade and investment protection agreements previously concluded by and between the EU Member States and Canada shall be replaced by the ICS institutionalized in CETA.[23]

18 Ibid. Paragraphs 227–228.

19 Sardinha 2017. 627.

20 Happ–Wuschka 2017. 113–114.

21 *European Commission, 6052/19*. https://www.consilium.europa.eu/media/39180/st06052-en19.pdf (accessed on: 20.05.2020).

22 *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*. Accessed at: https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017 (accessed on: 20.05.2020).

23 *EU–Canada Trade Agreement Enters into Force*. https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3121 (accessed on: 20.05.2020).

Given that the two-stage judicial reform of investment protection governed by CETA also serves as a model for future trade and investment agreements to be concluded by the EU,[24] the rest of this study presents the key characteristics of the ICS that are relevant to the recognition and enforcement of its decisions, based on CETA provisions.

CETA's new dispute settlement regulation system, in response to the criticisms on investment protection arbitration, mixes the elements of traditional arbitration with elements of pre-trial proceedings.[25] On the one hand, CETA does not define a specific set of procedures that would take into account the specifics of the legal dispute, but it provides the possibility to apply the rules of procedure normally taken into account in investment arbitration (e.g. ICSID Convention and ICSID Arbitration Rules, UNCITRAL Arbitration Rules).[26] Besides this, in accordance with the widely accepted practice of investment arbitration, also known as 'arbitration without privity', CETA expressly provides that the consent of the respondent or the approval by the plaintiff for the submission of the claim to the Tribunal shall satisfy the requirements of Article II of the New York Convention for an agreement in writing.[27] Furthermore, to make arbitration more transparent, as CETA orders the application of the Transparency Rules in Treaty-Based Investor-State Arbitration[28] that was adopted within the framework of UNCITRAL, it also refers to the provisions of the New York Convention and the ICSID Convention to foster the recognition and enforcement of the Tribunal's judgments in third countries.[29]

At the same time, the ICS, which is institutionalized by CETA, shows a resemblance to permanent judicial bodies. For example, 15 members of the Tribunal are appointed by the CETA Joint Committee, composed of representatives of the European Union and Canada, for a five-year, renewable term, who discuss cases in a randomly appointed three-member panel.[30] Conclusively, contrary to arbitration, the new dispute settlement mechanism to be set up by the EU does not provide any control for the disputing parties to choose the judges to deal with the case. Another important difference compared to arbitration is the two-tier nature of the procedure (Investment Tribunal and Appeal Tribunal), the broad provision of the right to appeal to eliminate possible errors in first instance judgments and thus develop a predictable and consistent case-law in the field of investment law.[31] Accordingly, not only can the judgment be set aside on the ground of a

24 See, for example, the EU–Vietnam Free Trade Agreement or the EU Singapore Investment Protection Agreement.
25 Potestà 2018. 161–162.
26 CETA, Article 8.23(2).
27 CETA, Article 8.25(2)(b).
28 CETA, Article 8.36.
29 CETA, Article 8.41(3)–(6).
30 CETA 8.27(2)–(6), Horváthy 2020.
31 Bernardini 2017. 38.

breach of procedural law during the appeal proceedings, but a substantive review of the judgment may also be requested from the Appeals Tribunal.[32]

In addition to the above, the transparency of the procedure is intended to be increased. As a consequence, the procedure is based on the principle of full disclosure, defining the range of documents to be disclosed. The participation of advocacy or other civil organizations is also facilitated as *amicus curiae* interveners in the proceedings. The reform would also be a step forward in terms of ethical rules as the convention contains detailed rules on ethics and conflict of interests. One of its biggest innovations is 'stability' stemming from permanence, coherent jurisprudence, as it is not based on an *ad hoc* judicial forum. However, critics say the use of a two-tier system will undoubtedly prolong and make dispute resolution more costly, thus leaving dispute resolution unavailable to investors with less capital.[33] Furthermore, the parties' right of appeal is likely to be adversely affected by effective and prompt decisions.[34]

In coherence with the longer-term objectives of the European Union, CETA also envisages the establishment of a multilateral investment justice tribunal and appellate mechanism in the future, which would replace the bilateral dispute settlement mechanism included in EU bilateral trade and investment agreements.[35]

4. Application and Enforcement of ICS Judgments under the ICSID Convention

Despite the criticism levelled against it, arbitration under the ICSID Convention is considered the most popular one among the currently available investment protection dispute settlement mechanisms. According to statistics, nearly 60 percent of known arbitration proceedings have been initiated before ICSID.[36] The popularity of arbitration under the ICSID Convention can be explained, among other things, by its enforcement mechanism. The ICSID Convention establishes an autonomous system by regulating in detail the entire arbitration procedure, which includes the regulation of the remedies available against the arbitral award, and the issues related to the recognition and the enforcement of the award. Therefore, it is completely separated from the laws in force in the Contracting States and from other international treaties.[37] Thus, an ICSID arbitration award can only be the

32 CETA, Article 8.28(2).
33 Katona–Kende 2016. 7–8.
34 Charris-Benedetti 2019. 83–115.
35 CETA, Article 8.29; Horváthy 2016.
36 *World Investment Report 2019 – Special Economic Zones*. https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf (accessed on: 20.04.2020).
37 Musa–Polasek 2015. 13.

subject of an appeal under the ICSID Convention.[38] In addition, the Convention expressly obliges all contracting states to recognize the awards rendered pursuant to the Convention and to enforce the pecuniary obligations included in it in case of non-performance, just as if the arbitral award had been ordered by the final judgment of the court of the contracting state.[39] Consequently, the possibility to review the arbitral award in enforcement proceedings is not provided to the courts of the contracting states, not even based on purely formal grounds, so that, for example (contrary to the provisions of the New York Convention), recognition and enforcement of the award cannot be refused based on public policy reasons or citing lack of arbitration.[40]

Although arbitration awards rendered under the ICSID Convention are extremely easy to enforce in the territory of the Contracting States, and therefore it would significantly increase the effectiveness of the ICS if its awards were enforceable in third countries under the provisions of the ICSID Convention, it is the unanimous opinion of the scholars on this point that decisions taken in the context of the institutional reform implemented by the European Union cannot be considered as arbitration awards under the ICSID Convention.[41] The reason for this is that the new judicial system differs from the basic principles of arbitration that are considered to be traditional and that are at the same time laid down in the ICSID Convention to such an extent that it, at best, can be considered as an agreement between the Contracting States to the ICSID Convention.

Both features of the newly developed court system, that is, the broad opportunities to review the ICS decisions as well as the regulations on the establishment on the Permanent Tribunal and on the selection of members of the tripartite panel are significantly different from the investment arbitration procedure stipulated in the ICSID Convention. Although the literature is not uniform on the question of whether Article 41 of the Vienna Convention on the Law of Treaties,[42] which codifies the rules of customary international law, allows contracting parties to amend the provisions of the ICSID Convention and, accordingly, whether it is possible for the states that introduce ICS to enforce ICS judgments under the regulations of the ICSID,[43] there is no doubt that under the ICSID Convention third states are not obliged to recognize and enforce ICS judgments.

38 ICSID Convention, Article 53(1).

39 Ibid.

40 Szabados 2017. 37.

41 Potestà 2018. 169. Kaufmann-Kohler–Potestà 2016. 82–85.

42 *Vienna Convention on the Law of Treaties, May 23, 1969*. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed on: 20.04.2020).

43 At the same time, according to the literature, the states that have set up the ICS model shall not amend the basic provisions of the ICSID Convention among themselves. See: Calamita 2017. 604–613.

In the light of the above, it is an essential question whether the New York Convention on the Facilitation of the Recognition and Enforcement of Arbitral Awards is applicable, and, if so, under what conditions it is possible to enforce ICS judgments in third states. If the answer to the first question is negative, the enforcement of judgments will be governed by the domestic state law of the place of enforcement, which in most cases contains provisions that are less favourable than what is laid down in the New York Convention. Consequently, if the provisions of the New York Convention shall not apply to judgments given under the new dispute settlement mechanism to be set up by the EU, it could also have adverse consequences for the future of this reform.

5. Application and Enforcement of ICS Judgments under the New York Convention

The New York Convention, adopted in 1958, was not designed specifically to facilitate the recognition and enforcement of investment protection arbitration awards. However, practice has clearly demonstrated its applicability in this area as well.[44] Thus, if ICS judgments meet the requirements prescribed in the New York Convention for arbitration awards, the recognition and enforcement of those judgments may also be ensured under its provisions in third states.

The New York Convention does not define the concepts of arbitration, arbitral tribunal, or arbitral award. However, Article I (2) of the Convention provides some guidance in this regard, stating that '[t]he term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted'. Although the New York Convention does not define the concept of permanent arbitral tribunals, it can be concluded from the *travaux préparatoires* that the authors of the Convention considered the most important distinguishing feature of arbitration from other means of dispute settlement to be that the parties to the dispute voluntarily give their consent to this alternative form of legal dispute resolution and thus derogate from the state court proceedings. In essence, any permanent body whose procedural power is not based on a binding statutory legal provision but on the private autonomous will of the parties is a body within the concept of Article I(2) of the New York Convention. By contrast, the authors of the Convention did not attach any particular importance to the manner how the arbitrators are appointed, wherefore an award rendered by a body that was not set up by the parties can also be considered as an arbitral award.[45]

44 Barbosa 2009.

45 Káposznyák 2018. 559.

While the provision of a broad right of appeal is incompatible with the institution of the annulment of the award provided in Article 52 of the ICSID Convention, the New York Convention, taking into consideration the possibility of two-stage arbitration proceedings, expressly provides the recognition and enforcement of an arbitral award if it has not yet become mandatory (final) to the parties,[46] i.e. if the deadline to file an appeal has not yet expired.[47] Thus, the two-step procedure of the ICS model is also not contrary to the spirit of the New York Convention. Overall, the enforcement mechanism of the New York Convention is flexible enough to ensure the recognition and enforcement of judgments of the newly established ICS in third states. It is very important, however, that ultimately the courts of the Contracting States are those that will rule regarding the compatibility of ICS judgments with the concept of an arbitration award under the New York Convention, and, therefore, the courts will provide the exact answer to the question of the applicability of the Convention to national law.

6. Concluding Remarks

The European Union launched a system-wide, comprehensive reform process in the field of ISDS a few years ago, which has raised several issues. One of the most important of these is the issue of recognition and enforcement of the awards in third countries made by the newly established EU investment arbitration system. Although the EU intends to lay down the current system of investment arbitration on completely new foundations, at the same time it strives to create a more favourable set of rules for the recognition and enforcement of judgments applicable to ICS rulings.[48] Thus, a judgment rendered under CETA under ICS should be considered an enforceable arbitral award under the New York Convention or the ICSID Convention, depending on what arbitration rules (e.g. ICSID Arbitration Rules, UNCITRAL Arbitration Rules) have been applied during the proceedings. However, the position of the literature can be considered uniform on the issue that explicit provisions of CETA concerning the applicability of the two international conventions have no legal effect in third states under the principle of *res inter alios acta* of international law, wherefore the conventions constitute an international legal obligation only for the contracting states to recognize and enforce ICS judgments. Thus, when enforcing ICS judgments in third states, the favourable enforcement rules contained in the Conventions can only be applied if the ICS judgments actually meet the requirements for an arbitration award.

46 New York Convention, Article V, paragraph (1).
47 Potestà 2018. 177–178.
48 Titi 2017. 122; Potestà 2018. 169.

Regarding the implementation of the European Union reforms, other issues may arise. For example, on 6 September 2017, the Kingdom of Belgium submitted a request for an opinion to the Court of Justice of the European Union under Article 218(11) of the TFEU regarding the compatibility of the Treaties of the European Union with the new investment protection dispute settlement mechanism contained in CETA.[49] On 30 April 2019, the Court ruled that:

> Section F of Chapter Eight, of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, that concerns the establishment of a mechanism for the resolution of investment disputes between investors and States, is compatible with the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.[50]

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Certain Issues of Innovations Affecting the Insurance Business in the Light of the GDPR and Hungarian Insurance Law[1]

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Abstract. Technological innovations affect many sectors of the economy, including the insurance business. Among these innovations, IoT-based (Internet of Things) solutions can be highlighted, the main feature of which is that real-time and continuous data collection is performed using the Internet, thus optimizing the risk management of the insurer. Given that a significant part of the data thus collected constitutes personal data, the rules of the General Data Protection Regulation (GDPR) should apply. The data protection examination of the technologies affecting the insurance institution raises several issues, which, in my view, significantly impede the application of these technological achievements. The study aims to explore these problems and attempts to make proposals to solve them.

Keywords: insurance, GDPR, insurance and IoT, GDPR and IoT, data protection and insurance

1. Introductory Thoughts

Thanks to the technological development that began explosively at the beginning of the 21st century[2] and has been going on continuously ever since, it is now essential that all actors in the economy apply new technological solutions adequately. These innovations are taking advantage of the almost limitless possibilities of information technology, digitization, and the Internet and take

1 The study was accomplished as part of the EFOP-3.6.1-16-2016-00011 *Younger and Renewing University – Innovative Knowledge City – Institutional Development of the University of Miskolc Aiming at Intelligent Specialisation* project implemented in the framework of the Széchenyi 2020 programme. The realization of this project is supported by the European Union and co-financed by the European Social Fund.

2 Kerényi–Müller 2019. 7 (DOI: 10.25201/HSZ.18.1.533).

a completely different approach to practice in the concerned field. The wave of innovative development has also reached the financial sector, so the actors of that field prefer to use financial technologies (Fintech) which can help in the economic and financial management and operation of the company.[3] Fintech solutions can be used throughout the financial service sectors, including the insurance sector, so insurers are already moving to technologies (Insurtech) that develop this legal institution and benefit both insurers and 'clients'.[4]

This study aims to examine the data protection issues related to the technological means applied in each insurance form in the light of the General Data Protection Regulation of the European Union[5] (hereinafter: Regulation or GDPR). We can distinguish between two levels of innovation affecting the insurance business. One of them has an impact on insurance coverage – for example, the emergence of self-driving vehicles, which pose significant problems for vehicle insurance (such as damage and liability insurance).[6] The other includes innovations that are specifically designed to 'serve' the insurance institution by placing an element of insurance in a different light from the traditional or by changing the usual (meaning: traditional) mechanisms. Each chapter details issues from a data protection point of view, which often comes into sight concerning the use of different technological solutions in each type of insurance.

In the study, in addition to the norms defining the data management rules, I also examine the legislation on insurance contracts both from the private and public law perspective, such as Act V of 2013 on the Hungarian Civil Code (hereinafter: Civil Code) and Act LXXXVIII of 2014 on Insurance Business (hereinafter: Hungarian Insurance Act, or Insurance Act); the latter lays down specific data processing rules, the most important of which I highlight and examine through the lens of the GDPR.

3 Kagan 2019.

4 In this case, I consider using the term 'client' of the Hungarian Insurance Act because these technologies do not exactly affect just a contracting party of the insurer or the insured person but may affect any person involved in the insurance legal relationship.

5 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

6 Serious questions from the data protection point of view can also arise concerning self-driving vehicles. In particular, it is expected that vehicles may only be started by an authorized person, which requires the utilization of some means of unique identification. Regarding a unique identifier, especially because they are typically biometric data, the dilemma of determining the legal basis for the lawfulness of data processing, the establishment and maintenance of strict data retention requirements, and the possible transfer of data may raise data protection and data security issues. These issues are even more important if the self-driving vehicle is connected to the Internet as well. In connection with the assessment of damages caused to the owner or caused by the user of the motor vehicle within the framework of the insurance contract, all of these also add to the insurer's requirements for data processing, the legality of which must be ensured. In this context, see the Recommendations of the EDPB no. 1/2020. Besides, data

We cannot find extensive literature on the specific topic, so, basically, the problems are explored, and solutions are proposed using a descriptive method. Of course, the Hungarian and foreign literature, the opinions and decisions of the Hungarian Data Protection Authority, the National Data Protection and Freedom of Information Authority (hereinafter: NAIH or Hungarian DPA), and the guidelines of the Article 29 Data Protection Working Party as well as the guidelines of the European Data Protection Board (EDPB) established under the GDPR will help us explore the specific topic.

It can be stated in advance that the basis of all innovations is the Internet-based flow of information (Internet of Things – IoT), which helps these to function.[7] The applicability of the Internet of Things is virtually inexhaustible; with some estimates, the number of devices based on this technology will reach 125 billion by 2030.[8] Connecting to the Internet enables real-time data collection and data flow, which hide as yet untapped opportunities for its user.

Noteworthy – although it will not be explained in detail, as it would go beyond the topic of this paper – is the possibility of using blockchain technology among the increasingly widespread smart contracts. Due to the decentralization of the blockchain (known as 'distributed ledger technologies'), several problems may arise, as we are already experiencing difficulties in examining the first and most important question: who is the data controller?[9] On this issue, prior to the GDPR becoming applicable, the Hungarian DPA also accepted an opinion[10] stating that the identity of the controller is very difficult to ascertain; in fact, all users are data controllers. We can also find an example of the applicability of smart contracts in insurance contracts in practice.[11] The essence of the operation of a smart contract is that the contract 'comes to life independently', and its fulfilment takes place automatically, without the need for any human intervention. Obviously, this can only be achieved in a contractual construction in which human behaviour can truly be avoided.

Furthermore, when using smart contracts, data controllers must comply with data protection standards, as it is emphasized by the European Parliament in its resolution on this subject.[12]

protection issues may arise concerning the processing of environmental data recorded by self-driving vehicles during movement if the vehicle records an image of a natural person.

7 Alföldy–Seregdy 2015. 48.

8 Kounoudes–Kapitsaki 2020. 1.

9 I note that a preliminary question already arises as to whether the GDPR with a centralized approach applies at all to systems based on blockchain technology operating on a decentralized basis. In my view, it does, in which all participants should be considered data controllers. Also, the author of a recent study, given that this issue is not explicitly addressed, believes that the application of the GDPR to blockchain-based technologies is a fundamental proposition. See Eszteri 2020. 9–27.

10 See NAIH 2017.

11 About the applicability of the blockchain system in insurance contracts, see Gatteschi–Lamberti–Demartini–Pranteda–Santamaría 2018. 1–16.

12 See European Parliament 2017.

2. Insurance and Data Processing – Basic Concepts

A legal relationship of insurance is extremely complex because it can have many actors related to each other in different ways. Given this complexity, I use the concept of an insurance relationship here, which opens up a broader framework for examining individual data processing issues.

Due to its complexity, it is extremely difficult to adjust to the maze of data processing in the context of the insurance relationship. In this chapter, I would like to identify the cornerstones of data processing in the context of an insurance relationship. In this context, I define the purpose of data processing in the light of legal provisions as well as the range of persons who may be considered as data subjects in the insurance relationship, and I also define the concept of personal data in the light of the speciality of the topic. Finally, I outline the range of persons who may arise as data controllers and data processors. I will examine the question of possible legal bases for data processing in the light of the application of the technological means concerning each form of insurance in the following chapters.

2.1. The Legal Purpose of Data Processing in the Light of the Hungarian Insurance Act

The 'Alpha and Omega' of data processing is to determine the legitimate purpose of data processing, which is essential to comply with one of the most important[13] data protection principles, i.e. the limitation of purpose,[14] which must be complied with throughout the data processing.[15] Section 135 of the Insurance Act defines exclusively, but at the same time extremely broadly, the possible purposes of data processing in connection with insurance activities, according to which 'processing of such data shall take place only to the extent necessary for the conclusion, amendment, and maintenance of the insurance contract and the evaluation of claims arising from the contract or for any other purpose specified in this Act'.[16] Concerning the topic, the primary goal of data processing is to determine the fulfilment of the obligations arising from the insurance contract, and within this we can identify several sub-goals.[17]

13 It should be emphasized that there is no hierarchical distinction between the principles of data management; however, the very purpose of the limitation principle is to be 'first among equals'. See: Révész 2018. 96.

14 See Article 5(1)(b) of the GDPR.

15 Révész 2018. 96.

16 Translation by the author. Unless otherwise specified in the footnotes, all quotes from non-English source materials are translations by the author.

17 It should be noted that the purpose of data processing can be approached from two directions: (i) the purpose of data processing as a set of personal data; (ii) the purpose for which each personal data item is processed. The first one forms a set of personal data, so the two categories are in a

2.2. Personal Data and the Data Subject in Insurance

From the data protection point of view, the complexity of insurance as a legal relationship is primarily due to the fact that the insurer can process the personal data of several data subjects, who are named by the Insurance Act as a 'client'. The definition of client is set forth by Section 4(101) of the Insurance Act as:

> *'client' shall mean the policyholder,*[18] the insured person,[19] the beneficiary,[20] the injured party,[21] any other person who makes a contractual offer to the insurance company[22] and who is entitled to receive benefits[23] from the insurance company; furthermore, in the case of independent insurance intermediaries, any person who enters into a contract with an independent insurance intermediary for the purpose of brokering.

The GDPR does not explicitly define the concept of data subject, but we can identify these persons from the concept of personal data, according to which personal data means that 'any information relating to an identified or identifiable natural person ("data subject") is considered as a personal data'.[24] If we compare the concept of 'customer' to the concept of 'data subject', we can conclude that

part–whole relationship with each other. The former has a broader purpose, while the processing of individual personal data may have a narrower purpose (possibly several purposes), which is either the same or different from the broader purpose, but should also be in line with it in the event of a discrepancy. However, the GDPR does not require the purpose of data processing but the purpose of the processing of individual personal data.

18 The policyholder is the person who concludes the insurance contract with the insurer. See Sections 6:439(1) and 6:440 of the Civil Code.

19 An insured person is a person 'who, on the basis of a financial or personal relationship, has an interest in avoiding the occurrence of the insured event, or, with respect to life insurance conditional upon reaching a certain age, birth, or conclusion of marriage, has an interest in the occurrence of the insured event'. See Section 6:440 of the Civil Code. I note that the policyholder and the insured are basically the same, but they may also be separated if the policyholder contracts in favour of a person who has an insurable interest.

20 The beneficiary is the person who is primarily entitled to the service of the insurer.

21 The injured party will be the client of the insurer if, under the liability insurance contract, the insured will be entitled to be exempted from compensation for the damage caused by him/her and the payment of restitution. In this case, the insurer generally performs the service for the injured party. To perform this service, the insurer has to determine the conditions of performance (to investigate the circumstances of the insured event); so, before the performance, it is necessary to process the injured party's personal data, often also special data.

22 This person is the potential contracting party if s/he has made an offer to the insurer, but the insurance contract has not yet been concluded or will not be concluded.

23 This person can be, e.g. in the case of a liability insurance contract, the relative of the injured party if the injured party loses his/her life during the insured event. Also, the client status of third parties may arise in several other cases, which I do not intend to outline in full.

24 See Article 4(1) of the GDPR.

only natural persons as an insurer's clients can be considered as data subjects, so legal persons as policyholders are not considered as data subjects.[25]

The processing of data in connection with an insurance relationship covers the personal data of the data subject. It is clear from the definition set out in Article 4(1) of the GDPR that all information relating to the data subject is personal data. Concerning the insurance relationship, it is also a feature that this information is considered not only personal data but also an insurance secret.[26] Because of this, the Insurance Act essentially lays down rules on the treatment of insurance secrecy, which obviously includes personal data. The specific scope of personal data that may be processed in connection with the performance of the insurance contract shall be determined by the insurer under the provisions of Chapter XXII of the Civil Code and must specify, in the light of the law applicable to the contract in its entirety, the purpose of the specific contract and the nature of the risk covered by the insurance.

Special categories of personal data are subject to special consideration.[27] Among the sensitive data, the processing of genetic[28] and biometric data[29] of the data subject as well as the health data[30] of the data subject may arise in the context of the insurance relationship, the most prominent of which may be the processing of the latter. The processing of health data may arise in many forms of insurance, but primarily in fixed-amount insurance, especially in life

25 I note that natural and legal persons are treated by the insurer in the same way for the protection of insurance secrecy, but the application of the GDPR is relevant only to the former. I further note that although they do not qualify as a client, the GDPR covers the personal data of natural persons acting on behalf of a legal person as a client, so the provisions of the Regulation already apply to them.

26 The definition of insurance secrecy is established by Section 3(1)(12) of the Insurance Act as follows: 'insurance secret shall mean all data – other than classified information – in the possession of insurance companies, reinsurance companies, and insurance intermediaries that pertain to the personal circumstances and financial situations (or business affairs) of their clients (including claimants), and the contracts of clients with insurance companies and reinsurance companies'.

27 The scope of specific data can be deducted from Article 9(1) of the GDPR as follows: 'personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation'.

28 See Article 4(13) of the GDPR: 'genetic data means personal data relating to the inherited or acquired genetic characteristics of a natural person, which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question'.

29 See Article 4(14) of the GDPR: 'biometric data means personal data resulting from specific technical processing relating to the physical, physiological, or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data.'

30 See Article 4(15) of the GDPR: 'data concerning health means personal data related to the physical or mental health of a natural person, including the provision of healthcare services, which reveal information about his or her health status'.

and accident insurance contracts. Furthermore, the processing of health data may arise in liability insurance as well, wherein the insurer may process health data of the insured party and the injured party. In this study, I will emphasize the rules of processing sensitive data, especially health data in insurance contracts.

2.3. Data Controller and Data Processor

In the context of an insurance relationship, several persons as data controllers or data processors may come into contact with the personal data of the data subject.[31] Of course, one of the most important data controllers will be the insurer with whom the policyholder concludes the insurance contract, but the data processing of certain contributors (e.g. a person involved in claims settlement) may also arise in connection with the performance of the insurance contract.[32] Also, especially in the case of electronic contracting – if the electronic interface is not provided by the insurance agents or the insurer's own system –, the data processing of individual software providers may also arise. The IT innovations discussed in the study (software, telematics and telemetry systems, individual smart meters) can be said to be operated not by insurers – although this possibility is clearly not ruled out – but by other persons, in the name and on behalf of insurers.

First of all, we need to examine the relationship between the insurer and software providers in the context of data processing. The definition of data controller is in Article 4(7) of the GDPR, which establishes that 'controller means the natural or legal person, public authority, agency or other body that, alone or jointly with others, determines the purposes and means of the processing of personal data'. The most important aspect of data controller quality is that the purposes and means of data processing are independently determined by the data controller, which covers a number of 'partial decisions'.[33] In contrast, 'data processor means a natural or legal person, public authority, agency or other body that processes personal data on behalf of the controller.'[34] The most important difference between a data processor and a data controller is that the former acts on behalf of the latter,[35] so it does not determine the purpose and means of data management independently.[36] Concerning the data processing performed within the framework of the insurance legal relationship, the definition of the data controller is simple as the purpose of all data processing performed in connection

31 Zavodnyik 2018. 19.
32 Zavodnyik 2018. 19.
33 Osztopáni 2018. 81.
34 See Article 4(8) of the GDPR.
35 Bölcskei 2019. 65.
36 The criteria for the demarcation of the data controller, the data processor, and the joint controller are defined by the EDPB in Guideline no. 7/2020. It is currently in the post-social consultation phase, so its text is not yet final. See EDPB Guideline no. 7/2020.

with the insurance contract is established by Section 135(1) of the Insurance Act, the addressee of which is the insurer. The data processes related to the performance of the insurance contract, including the manner of risk management mechanisms, are determined by the insurer – of course, in agreement with the policyholder, which is reflected in the contract and its provisions –, thus independently determining the purpose and means of data management. If the insurer outsources[37] certain subtasks required for the performance of the contract (e.g. data collection and even data analysis), for example, when the insurer performs risk management using an IoT-based device operated by an external person, we can conclude that this service provider qualifies as a data processor. It is noteworthy that the content of the legal relationship between the controller and the processor must be governed by a contract defined in Article 28(3) of the GDPR, which specifies the details of the data processing. The relationship between the data controller and the data processor is subordinate, as the data processor is obliged to perform the data processing operations under the instructions of the data controller and only within the framework of a contract. This rule does not mean that the data controller cannot make an independent decision regarding data processing, but this has to be accordant with the contract.[38] It is important to determine the details of the data processing precisely (e.g. data processing specifically) in the contract concluded between them. It is also important to emphasize that the data controller is primarily responsible for the legal compliance of data processing. The data controller is responsible for ensuring the lawfulness of the data processing and for taking the appropriate technical and organizational measures, including the provision of appropriate instructions to the processor.

3. Data Processing Issues related to Innovations in Damage Insurance Contracts

One of the most important parts of individuals' interests is wealth. The protection of property interests is the task of non-life insurance and, as such, it serves a societal interest. There can be many types of external influences on property, the foresight and prevention of which, and handling of adverse events if they

37 Osztopáni 2018. 83.

38 According to Guideline no. 7/2020 of the EDPB, we can distinguish between 'essential' and 'non-essential' decisions. The former is closely related to the purpose and scope of data processing, while the latter involves deciding issues related to the practical implementation of data management. The guideline provides the data processor with the possibility to make the non-essential decisions. I note that the GDPR does not allow a distinction to be made between individual data processing decisions. It is important that decision-making is an option and not a given requirement; in the contract, the parties have the opportunity to regulate even the smallest detail of the data processing.

occur, are important issues in non-life insurance. The risk management methods of the 21st century are constantly changing and are being taken to a new level of complexity by taking advantage of technological achievements. The innovations mentioned below reinforce the preventive purpose of the insurance institution so that effective measures can be taken to avoid damaging events, in the interests of the parties involved in the insurance.

One of the areas of useful innovations may cause significant changes in the field of home insurance. Insurers can offer a number of benefits when using telemetry systems[39] in a home. These include various camera, sensor, and fire protection systems, which are primarily used to prevent damage.[40] The basic function of these systems is to continuously monitor the assets of the data subject,[41] which results in different data processing than usual. In view of the broad definition of personal data, e.g. technical data on the condition of the piping of a house, the fact whether the door of the building is closed or not, etc., may qualify as a personal data as this information is indirectly relevant to the insured as a data subject. The question may arise as to whether an impact assessment[42] is required prior to such data processing. This data processing is not covered by the mandatory impact assessment[43] and should also be considered[44] under Article 35(1) of the GDPR, but, given the content of the impact assessment list published by the Hungarian DPA[45] under Article 35(4), an impact assessment must be carried out.

The number of motor vehicles is gradually increasing, which raises the risk for insurers, so insurers must strive to develop the most accurate risk management methods,[46] to which each technological achievement can make a major contribution. In this context, both forms of motor insurance, such as damage and liability insurance, may come to the fore. I deal with the former here and with the latter in the next chapter. In motor insurance, telematics systems seem to be the most applicable.[47] The telematics system allows for the real-time collection and analysis of personal data concerning policyholders, thus making the insurance conditions, the content of the insurance contract, in particular the payment of premiums,[48] flexible and unique while allowing for more effective risk analysis.[49]

39 Telemetry is a typically wireless communication system that enables long-distance data transmission, remote measurements, and control.
40 Alföldy–Seregdy 2015. 51.
41 Wágner 2017. 61.
42 See Article 35 of the GDPR.
43 See Article 35(3) of the GDPR.
44 In my view, given the nature, circumstances and purpose of the data processing, it is unlikely to pose a high risk to the rights and freedoms of data subjects.
45 See the List of Assessment under Article 35(4) of the GDPR published by the NAIH.
46 Wang 2020. 582.
47 Hauer–Góg–Horváth–Hrabár–Pálinkás–Urbán 2017. 23–24.
48 Sallai 2019. 102.
49 Kadocsa 2018. 85.

Among the telematics systems,[50] the use of a 'black box' in a vehicle, which records information about the operation of a vehicle, is most common.[51] The system works on the basis of GPS, so the risks associated with the operation of the vehicle can be assessed on the basis of a comparison of the positioning data and the data recorded as a result of the use of the vehicle, i.e. driving style.[52] All this can be applied by insurers to the calculation of the insurance premium,[53] which thus becomes essentially usage-based and thus fairer than the methods currently used (age of the vehicle, age and driving experience of the policyholder, history of claims, etc.).[54]

By using the telematics system, the insurer collects data on the condition of the vehicle (i.e. tire pressure, brake status, etc.) and information on the driver's driving style based on which the insurer can send alerts to the driver to prevent damage.[55] The purpose of all this is primarily to avoid events which may cause damage to the insured; furthermore, a more precise assessment and faster settlement of the circumstances (i.e. whether the occurred event is also an insured event) and the extent of the damage. However, for this purpose, the insurer carries out unusual – real-time and continuous – data collection, which monitors and evaluates the use of the vehicle by employing an automated system and which may lead to a more serious debate, for example, concerning the driver's

50 In this context, the European Data Protection Board has adopted Guideline No. 1/2020.

51 In this context and for other telematics system-based solutions, see: Hauer–Góg–Horváth–Hrabár–Pálinkás–Urbán 2017. 33, 24–25.

52 Assessing driving style means two things. One of them is that by following the rules of the traffic, which reduces risks arising from participation in transport (e.g. by respecting the speed limits, tracking or overtaking distances, etc.); so, compliant drivers have to pay a lower fee given that they drive less riskily. Another aspect that evaluates driving style is the actual use of the vehicle's equipment (e.g. brakes and steering use), so the risk of the driving is lower when the driver makes smaller and safer brakes or careful and not sudden steering movements.

53 The insurance premium basically consists of two premiums, one of which is the 'basic premium', which must be paid even if the vehicle is not used in traffic. The other fee is a 'variable fee' calculated based on the use of the vehicle, which changes depending on what data are stored about the operation of the vehicle. As the telematics system can provide real-time data on vehicle position, utilization, and driving characteristics related to driving style, the pricing developed in this way makes the insurance conditions much more transparent. See Alföldy–Seregdy 2015. 51–52.

54 I would like to emphasize a view which is one of the primary sources of the reluctance of society to use the telematics system. This is due to the fear that this system will or may provide data to the police on traffic compliance. In my view, this is not a real fear because the data collected using the telematics system cannot be accessed directly by the authority, as there is no legal basis for data processing on the part of the insurer. I do not consider it viable to create a legal provision that makes the provision of data mandatory as this would mean a level of restriction of personal rights that would probably fail the test of proportionality of the restriction of fundamental rights. I note that the exceptions to the obligation of professional secrecy contained in Section 138(1) of the Insurance Act do not apply in this case, as it regulates the provision of information to the authorities acting in a specific case (i.e. the procedure must have already been started) and does not mean a continuous – pre-procedure – provision of information.

55 Alföldy–Seregdy 2015. 55.

driving style. The collected data can also be used by the insurer to develop its products and to make the content of individual insurance contracts (e.g. setting a more favourable premium) and risk management more efficient. The purpose of the data processing is thus clarified and can be considered lawful; however, questions may arise in connection with the determination of the legal basis of the data processing.

The use of new technology may require a prior impact assessment (see above), and the continuous monitoring and evaluation of driving style makes it mandatory in accordance with Article 35(3)(a) of the GDPR.[56] The use of telematics systems can only work effectively if it covers the entire risk pool. So, the first condition for the application of this rule (i.e. it must affect more than one natural person) is fulfilled. As the data processed in this way is a personal characteristic of the insured (driving style as a personal characteristic), which is assessed through an automated system during systematic monitoring, the other two conditions for the application of the provision are also fulfilled. The last condition for the application of the provision, according to which data processing in this form must result in a decision having a legal effect on the data subject or a significant decision on the data subject, is also fulfilled as the purpose of data processing is to determine the insurance premium to be paid by the insured, which is a decision affecting the insured.

It is also necessary to define the legal basis of data processing, in which we must first examine whether the data processing constitutes automated decision-making.[57] As the data processing performed by the system – from data collection to decision-making – is free from human intervention, it can be concluded that data processing based on an IoT system is considered to be automated decision-making, including profiling.[58] Article 22(2) of the GDPR allows for the lawfulness of automated individual data processing in the presence of three legal bases, one of which is the applicability in the present case of the provision in point (a) that the use of automated decision-making is lawful if 'the decision is necessary for entering into or for the performance of a contract between

56 On this basis, a preliminary impact assessment must be carried out if the data processing is 'a systematic and extensive evaluation of personal aspects relating to natural persons, which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person'.

57 I note that the notion of automated decision-making is not defined in the GDPR. Article 22(1) establishes only the right of the data subject to be excluded from the scope of automated decision-making.

58 I note that it constitutes automated decision-making if a decision which affects the data subject is made. If no decision is taken but the data is collected, we can talk about profiling according to Article 4(4) of the GDPR (without a decision), which can later be used by the data controller to make a decision, but this can only be done by human intervention. If the whole process is automated, then we are talking about automated decision-making that includes profiling.

the data subject and a data controller'. Based on this, therefore, if the parties expressly agree on the use of telematics systems, this provision can be applied, and the data processing will be lawful.

Spiced up with a measure of utopian naivety, but with even greater data protection awareness, I consider it conceivable to apply Article 22(2)(b) of the GPDR, which prescribes that the automated individual decision-making is lawful 'if the decision is authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests'. Thus, if the Member State legislator regulates at the national level or the EU legislator at supranational level certain data protection issues regarding automated individual decision-making related to the insurance contract, or, rather with sufficient abstraction, to the use of IoT systems, this provision could become applicable. If this happens, I would primarily consider as appropriate the adoption of directly applicable norms at the EU level (meaning a European Union regulation-level norm) to ensure that all insurers treat the issue in the same way.

4. Data Processing Issues related to Innovations in Liability Insurance

The telematics system can also be used in liability insurance, under which motor liability insurance can be highlighted. This will or may put this insurance product on a new basis, resulting in a much fairer premium system and a more sensitive risk pool for users. However, it has a positive effect on insurers as it can lead to a more prudent and accurate assessment and continuous monitoring of financial risks, thus reducing their financial losses. In connection with the issues related to the legal basis of the data processing and impact assessment in this context, I consider the explanations expressed in the case of non-life insurance.[59]

Nevertheless, serious data protection issues may arise if the policyholder and the insured are different. Moreover, according to Section 3(4) of the Hungarian motor liability insurance Act,[60] the person driving the motor vehicle – who is not necessarily the same as the former – is also considered an insured person. These issues arise in the context of the legal basis of data processing since if the policyholder is not the insured – so, the data processing cannot be based on the insurance contract [on the Article 6(1)(b) of the GDPR], as in this case –, then the insured does not appear as a party to the contract. In this case, the question arises as to whether or not the insurer processes personal data. This

59 I note that the opinion expressed on the applicability of Article 22(1)(b) of the GDPR could be the most feasible in the case of motor liability insurance.

60 Act LXII of 2009 on Motor Liability Insurance.

may arise because the natural person about whom the data are collected is not known, and thus the condition of the concept of personal data that it refers to an 'identified or identifiable natural person' is not met. Such a person cannot be considered identified in any way as his/her identity is not known to the insurer, but it can be identified indirectly if the insured event occurs. Until it becomes clear to the insurer that the recorded data do not relate to the policyholder, it will link it to the policyholder (considered as information about the policyholder), as it determines the primary obligation of the policyholder (i.e. the payment of premiums). If the insured event never occurs, the insurer may process these data in such a way that the data subject will not be identifiable.[61]

5. Data Processing Issues related to Innovations in Fixed-Amount Insurance Contracts

Fixed-amount contracts, such as life and accident insurance contracts, are based on risks related to the person, health, and life of the insured, some of which qualify as health data. In the field of traditional data collection, the policyholder typically provides answers to questions related to the health condition, so the insurer determines the extent of the risk according to the health condition at the time of contracting. The insurer may make it compulsory to use the services of a health professional designated by them to assess the contractual risks and will determine the extent of the risk based on the expert opinion.[62]

Technological achievements applicable to life and accident insurance contracts – e.g. smartwatches, smart bracelets, various sensory patches, etc. – are used for continuous monitoring of the client's health; so, the insurer uses real-time data collection. The purpose of this is to enable the insurer to continuously monitor the development of insurance risk and even to become immediately aware of the increase in insurance risk. All this can also result in a fairer and more equitable calculation of premiums, so the amount of the insurance premium increases or decreases depending on the risk borne by the insured. In this case, the insurer may also take preventive measures (e.g. it can draw the client's attention to the need to contact a medical professional or proceed to some form of medical analysis), and it can even provide a partial diagnosis of the client's condition or ascertain its possible deterioration.

61 This data processing falls within the scope of Article 11 of the GDPR, according to which the insurer does not have to request additional information to identify the data subject to comply with the Regulation. The purpose of data processing can be achieved without the data subject being identified by the insurer. The identification of the data subject will be necessary in case the purpose of the data processing expands with the occurrence of the insured event.

62 In this case, the legal basis for the processing will be Article 6(1)(b) of the GDPR, and the lawfulness of the processing of specific data will be based on Article 9(2)(h).

Real-time, continuous data recording is considered to be a form of automated individual decision-making concerning the insured as a data subject as the amount of the insurance premium is determined in an automated manner, depending on the health risk. Because of this, the decision-making clearly has an impact on the insured as it affects, reduces, or increases the extent of the insured person's obligation. It has been stated above that the lawfulness of data processing as automated decision-making may be based on Article 22(2) of the GDPR. However, Article 22(4) of the GDPR limits the lawfulness of processing the special category of personal data in the course of automated individual decision-making to the expressed consent[63] of the data subject.[64] In this context, I would like to highlight a significant problem, which also reveals two possible issues at once. In this context, the processing of special data is necessary for the performance of a contract concluded between the data controller and the data subject. There can be no dispute about the need as the parties have agreed in their contract to use these technologies (meaning a risk management mechanism). Under Article 22(4) of the GDPR, given that automated data processing is carried out on specific data, in addition to the legal basis in Article 6(1)(b) of the GDPR, only Article 9(2)(a) shall apply.[65] Here I would like to draw attention to Section 136 of the Insurance Act: 'According to the relevant Act,[66] insurance companies shall be authorized to process any data pertaining to the medical condition of clients only for the reasons set out in Section 135(1) and only in possession of the express consent of the data subject.' This provision is seemingly in line with the cited provision of the GDPR as it does not regulate the requirement to process health data in the same way but, incorrectly, for the following reasons.[67] According to Article 7(4) of the GDPR, consent cannot be interpreted in contractual data processing because one of the conditions for the validity of the consent, its voluntary nature, cannot be ascertained. The assessment of volunteering should also take into

63 See Article 9(2)(a) of the GDPR.

64 For the sake of completeness, I note that under Article 22(4) of the GDPR, automated individual decision-making on specific data is lawful even if it is justified by the condition in Article 9(2)(g), but in my view this provision does not apply.

65 Although there is no complete agreement in the literature on the relationship between Article 6(1) and Article 9(2) of the GDPR, in my view, the provisions of the latter do not constitute a separate legal basis, but they shall be considered as a standard supplementing the legal bases set out in Article 6(1), needing an additional requirement given the specific quality of the personal data. Because of this, the lawfulness of the processing of special data requires one of the legal bases provided for in Article 6(1) and the existence of one of the conditions laid down in Article 9(2).

66 See Act XLVII of 1997 on the Processing and Protection of Personal Data in the Field of Medicine.

67 The primary source of the problem, in my view, is that the provisions of the Insurance Act have not been properly adapted after the applicability of the GDPR; it follows the old (pre-GDPR) view of the Hungarian Privacy Act (hereinafter HPA), which regulated data processing based solely on the law and the consent of the data subject. In contrast, the GDPR mentions six legal bases for data processing and provides for the examination of the existence of ten additional conditions for the lawfulness of the processing of the special category of personal data.

account the need for the data subject to be able to withdraw the consent at any time without restriction, all this without disadvantage to the data subject. It is difficult to judge the legal consequences of the withdrawal of consent in the context of a contractual relationship, and it is hardly conceivable that a consent withdrawn in the context of a contractual relationship would not adversely affect the data subject. Therefore, the consent given in the framework of the contractual relationship cannot be valid for the personal data related to the performance of the contract, so it cannot be interpreted.

As I have explained, processing of special categories of personal data is necessary for the performance of the insurance contract; thus, the lawfulness of the data processing is ensured by the contract concluded between the parties. Provisions of the GDPR for processing special data and cited rules of the Insurance Act for health data limit the additional condition to consent, which cannot be valid because of Article 7(4) of the GDPR; so, the processing of special data cannot be lawful. Given this, automated individual decision-making on specific data, which is linked to a contract, cannot be lawful as the data subject cannot give his/her consent validly. Concerning the examined topic, this problem results in the fact that data processing based on automated individual decision-making related to the insurance contract, which is performed on special data, is not feasible; so, this rule hinders such technological efforts and the development of insurance in this direction. We cannot ignore the fact that insurance contracts under which an insurer processes any special category of personal data are specifically contracts that require the processing of these data. However, we cannot find in Article 9(2) of the GDPR a condition that would allow the processing of special data on a contractual basis, and – given the nature of the data – it is not sufficient to process data regarding Article 6(1)(b); the condition laid down in Article 9(2) for the lawfulness of the processing must also be met.

As I explained above, the insurer may process health data in connection with the insurance contract only with the consent of the data subject, and the lawfulness of data processing through automated decision-making based on the GDPR may only be ensured with the data subject's consent. Does the question arise as to whether the expression of the will required for the conclusion of the contract can constitute the consent of the data subject? In the light of the rules set out above, we must give a clear negative answer, but, hopefully, the status will change in virtue of Guideline no. 6/2020 of the EDPB.[68] The EDPB commented on the requirement for explicit consent in Article 94(2) of the PSD2 Directive in the Guidelines.[69] Accordingly, the provisions on consent in Article 94(2) of the PSD2 Directive

68 EDPB Guideline no. 6/2020.

69 According to this provision: 'Payment service providers shall only access, process, and retain personal data necessary for the provision of their payment services, with the explicit consent of the payment service user.'

and Article 6(1)(a) of the GDPR are not the same – the latter must be regarded as a 'contractual consent'. This opinion is based on a view that the processing of personal data is an essential condition for the provision of this service, in particular because the processing of personal data of the person using the service is always to perform the contract; so, it has a contractual nature, which embodies the will necessary for the contracting.[70] As the processing of specific data is not a priority for services provided under the PSD2 Directive, the content of the 'contractual consent' does not cover these data, i.e. the additional conditions set out in Article 9(2) of the GDPR. The questions arise as to whether the processing of specific data is a condition of the performance of the contract and whether the 'contractual consent' can be regarded as a consent within the meaning of Article 9(2)(a) of the GDPR. If the express consent provided for in Article 136 of the Insurance Act and Article 22(4) of the GDPR could be considered as having been given at the time of the contracting, we would find a solution to the problems expressed above concerning the consent. The adoption of this is only one step away from the provisions of this EDPB guideline, which does not harm the interests of the data subject in the protection of the special category of personal data.

6. Conclusion and Proposal for the Improvement of Legislation

I believe that innovation in insurance will increase significantly in the future as the use of IT-based tools increases daily, and the societal utility of these tools is indisputable for insurers in order to 'serve humanity'. The most important goal of the innovations affecting each insurance type is to optimize the risk management mechanism by continuous and real-time data collection and analysis, which can lead to more flexible contract structures. From the customer's point of view, this means primarily a use-based or risk-based fee calculation, and thus the fair distribution of the risk to the risk pool. From the insurer's point of view, the determination of the real and actual extent of the risk requires a more precise definition of the capital requirements, including the amount of disposable income, which results in a more stable business for the insurer and a more reassuring capital coverage for customers.

The most important and common feature of insurance innovations is that they perform real-time data collection and data analysis, most of which is personal data about the customer. It may therefore be a challenge for insurers to suit the use

70 I agree with Zsolt Bártfai's comments on Guideline no. 6/2020 of the EDPB that 'a contract may not be concluded without the parties agreeing on the terms of the contract'. Because of this, its essential element is the expression of the contractual will, and thus of the consent to data processing. See Bártfai 2020.

of these innovations to the data protection requirements, in particular provisions of the GDPR. The technological solutions used in insurance automatically collect personal data about the customer, thus automatically performing a risk analysis according to a predefined algorithm and, as a result, determining the consideration for the insurers' risk taking. From a data protection point of view, this constitutes automated individual decision-making based on profiling, which is generally prohibited by Article 22(1) of the GDPR.

Article 22(2) of the GDPR sets out the exceptions for which automated individual decision-making is considered legitimate. The biggest challenge in the insurance business is the processing of specific data, especially health data. The source of the problem is the rule in Article 22(4) of the GDPR that the processing of specific data by automated individual decision-making can only be lawful with the consent of the data subject. However, the study explained that the validity of the consent given in the context of a contractual relationship cannot be established for several reasons, thus not ensuring the lawfulness of such data processing. As a result, it may become impossible to apply innovations related to the insurance business based on automated individual decision-making concerning the processing of sensitive data.

The problem would be solved if all the legal provisions related to the insurance contract which require consent to the processing of any special category of personal data necessary for the performance of the contract in the given legal relationship would be interpreted as 'contractual consent', an expression of the contractual will. I believe that the general acceptance of this view, in addition to the controversy that has been mentioned, could also eliminate a lot of the problems affecting the contracts.

We have a similar problem if we examine Section 136 of the Insurance Act, as this provision makes the consent of the data subject mandatory for the lawfulness of the processing of health data, regardless of the use of technological means. This provision is contrary to the requirements of the GDPR, which can be resolved by legislative intervention, repealing the provision. Until that happens, insurers will find themselves 'between Scylla and Charybdis' to comply jointly with the provisions of the rules of the Regulation and the Insurance Act.

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Autonomous and Automated Vehicles in Germany and Hungary, with Special Attention to the Question of Civil Liability

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Abstract. The most frequent questions associated with autonomous vehicles both in the world press and in legal literature are those that look for the answer as to who is responsible for the accidents caused by these machines. However, only a few such questions deal with the issue that all factums apply different definitions, and the terminology is the basis of applying the particular factum. So, among others, answering the question is inevitable as to whether the autonomous or automated vehicle can be considered a 'vehicle', or the human sitting in the car can be considered the 'driver'. If we decide not to consider the autonomous vehicle to be a vehicle, and – ad absurdum – we create an independent, sui generis category of vehicles, then the legal factums regarding the definition of the vehicle will not be applicable to the factum concerning the history of autonomous vehicles; however, their applicability will surely be questioned. With regard to this, I focus in my study on how the German Road Traffic Act (*Straßenverkehrsgesetz*) accommodates more advanced automated vehicles, and after this I compare the Hungarian and German rules that are relevant in terms of civil liability if we study the vehicles in question.

Keywords: autonomous vehicle, automated vehicle, liability, Germany, Hungary

1. Introduction

The aim of this study is to provide a brief insight into German legislation that regulates issues where autonomous vehicles are concerned or refers to civil liability regulations that can be applied in connection with autonomous vehicles as well. Furthermore, the study also aims to compare these laws with the Hungarian laws currently in effect. The role of Germany as a global powerhouse of automotive

vehicle manufacturing makes the analysis of its legislation inevitable, as it is clear that the German state does not want to fall behind its competitors. The study focuses on the regulations of the German Road Traffic Act (*Straßenverkehrsgesetz*, hereinafter StVG), the Product Liability Act (*Produkthaftungsgesetz*, hereinafter ProdHaftG), and the German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter BGB), and it strives to cast light on the current state of German legislation relating to autonomous vehicles.

2. The German Road Traffic Act (*Straßenverkehrsgesetz*)

2.1. Regulation of Vehicle Categorization

The bill on automated vehicles was adopted in June 2017, which modified the StVG and defined the requirements towards highly and fully automated vehicles, and it also addressed the rights of the driver.[1]

Paragraph (1) of § 1a of StVG primarily states that the use of highly and fully automated vehicles is permitted under proper use.[2] Further, paragraph (2) of § 1a of StVG specifies the defining features of highly and fully automated vehicles:

– they are able to undertake driving tasks – with special attention to longitudinal and lateral control;

– they comply with traffic regulations during the operation of automated functions;

– the driver can manually override or deactivate the operation of the automated system at any time;

– they are able to recognize human intervention and to pass control over to the driver when it becomes necessary;

– they are able to warn the driver with visual, acoustic, palpable (haptic), or other signals about the necessity of resuming control; and provide sufficient advance warning for that;

– they are able to warn the driver if the system is not being operated in accordance with legal requirements.

It is worth noting that the StVG distinguishes two categories; however, these are not sharply separated.[3] The most developed automated vehicles – in other words, *self-driving vehicles* – are not included in the legislation. Certainly, the reason is that legal regulation would be too early for this field.[4]

1 Autovista Group 2019.

2 However, the StVG does not define the notion of proper use and who (the manufacturer or the legislator) has the right to define the indicative system of conditions.

3 Juhász 2020. 135.

4 Juhász 2020. 133–134.

In Hungary, Act I of 1988 on Road Traffic (hereinafter abbreviated as RTA) serves as the general legislation for road traffic. Paragraph (2) of § 47 of RTA defines a road traffic vehicle as 'road transportation and tow equipment (including self-propelled and towed equipment); the individual types of vehicles are defined in accordance with road traffic regulations'. The definition is rather abstract, the 1/1975. (II. 5.) joint Decree of the Ministry of Transport and Postal Services and the Ministry of Home Affairs on road traffic (hereinafter KRESZ) is commissioned to define the detailed regulations of individual types of vehicles.

As § 2 also suggests, Annex 1 of the KRESZ defines the various notions used in the decree:

– Part II point *a)* defines the notion of vehicle;
– Part II points *b–c)* provide the definitions of vehicle and automobile;
– Part II points *d–zs)* distinguish specific vehicle categories.

The KRESZ does not contain definitions either for automated or autonomous vehicles; however, it is becoming inevitable for the legislator to amend the annexes of the regulations as this is the only way to ensure that applying the framework disposition based on the notions employed by the KRESZ does not pose problems for the legislating bodies.

It is noteworthy that both Decree no 5/1990 (IV. 12.) of the Ministry of Transport, Communication, and Construction (abbreviated as KöHÉM) on road traffic vehicle safety inspection (hereinafter ER) and Decree no 6/1990 (IV. 12.) of the Ministry of Transport, Communication, and Construction (KöHÉM) on the technical conditions of first registration of vehicles and of maintaining them in traffic (hereinafter abbreviated as MR) are aware of the notion of autonomous vehicles for development purposes. According to point *b)* of paragraph (3b) of § 2 of the ER, an autonomous vehicle for development purposes is a 'vehicle for development purposes, which is designed to serve partially or fully automated operation and in which a test driver is seated who is considered as the driver of the vehicle and who can manually control the operation to the necessary extent in case of any situation that endanger traffic safety and who can resume manual control at any time of the operation'. Thus, these vehicles can be used only for testing purposes; their operation and their further technical conditions are regulated by Annex 17 of the MR. It demonstrates forward thinking that Annex 18 of the MR defines further categories: it distinguishes non-autonomous vehicles for development purposes, autonomous vehicles serving the development of partially automated operations, and autonomous vehicles serving the development of fully automated operations.

While German law defines the notions of highly and fully automated vehicles, Hungarian legislation operates with the notion of autonomous vehicle for development purposes. I am of the opinion that taking the content of ER and MR into account, Hungarian legislation should also discuss at least the use of

automated vehicles in road traffic as current practice shows that drivers already use various driving support systems.

2.2. The Notion of 'Driver'

Paragraph (4) of § 1a of the StVG clearly defines the driver also as a person who activates and uses the highly or fully automated driving functions, even if they do not have the type of control over the operation of the vehicle that the normal use of the automated function would require. The legislator requires all that from the driver of an automated vehicle, just like from other vehicle drivers. In this case, however, the goal of automated functions could fail easily.[5]

The KRESZ defines the driver as follows: 'the person who drives a vehicle or drives animals on the road'. The person riding a moped or a bicycle is not considered to be a driver. The same applies to student drivers as well: while learning to drive and during the driving examination, the instructor is to be considered as the driver of the car.

The criteria of driving are defined in § 4 of the KRESZ. The driver must have the necessary licence, cannot be banned from driving vehicles, and must be in a condition that ensures safe driving. The normative description clearly indicates that only a natural person can be considered as a driver,[6] wherefore the liabilities of the driver do not impose obligations onto other persons, such as the manufacturer of the autonomous vehicles, and cannot be applied to passengers as they are not considered as drivers.

Although the StVG explicitly states that the person activating and using the automated driving function is to be considered as the driver, I would argue that we can come to the same conclusion when assessing Hungarian law as well, as the notion of 'driver' defined by the KRESZ may also accommodate the users of automated vehicles.

Thus far, the users of automated vehicles are not discussed in either German or Hungarian legislations. Therefore, it can be noticed that in a legal case of a traffic situation involving an autonomous vehicle, neither the German nor the Hungarian court will have the means to treat the parties involved as 'equal', as the persons in the autonomous vehicle are not considered as being drivers according to the effective regulations of the StVG or the KRESZ.

5 Juhász 2020. 138.
6 Somkutas–Kőhidi 2017. 255–256.

2.3. Liability

Although the amended StVG added much to the legal text in force so far, the liability rules applicable to road traffic were not affected by the change.[7]

§ 1b of StVG regulates the rights and duties of the driver. Even though the highly or fully automated vehicles allow the driver not to focus their attention constantly on traffic and on the operation of the vehicle, they must still stay alert enough to be able to fulfil their responsibilities outlined by the regulations even while using the automated functions. In this respect, the most important task for the driver is to resume control over the vehicle immediately when the system warns them to do so or when they recognize that the conditions of the use of the automated functions are not proper anymore. It can be stated clearly that the StVG does not allow for the use of autonomous vehicles just yet.

It is worth discussing the issue of liability in more detail. § 7 of the StVG regulates the liability of the driver, according to paragraph (1) of which the owner of the vehicle is responsible for any damage or injury caused to people or property resulting from the operation of the vehicle, and paragraph (2) defines that being exonerated from the liability can only happen under *vis maior* (force majeure) conditions.[8] Paragraph (3) of § 7 of the StVG also regulates the case when a vehicle used without the awareness or the permission of the owner causes injury or damage. In such cases, the user is responsible for the injury or damage caused instead of the owner, on the stipulation that the liability of the owner prevails if the use of the vehicle became possible due to their fault. The rule is not to be applied if the user is employed by the owner to operate the vehicle, or the owner allowed the user to drive the vehicle. The liability of the owner is therefore objective: they can avoid liability only by referring to reasons outside their control such as being forced or the behaviour of a third party.

Vis maior (force majeure) in German law also indicates such an external reason that cannot be foreseen and avoided. It is easy to identify that the chances of referring to external reasons in connection with automated vehicles are rather low; however, such an external reason is possible if the vehicle becomes a victim of a hacker attack and the harm or damage results from that, or a certain defect in the transport infrastructure impacts on the operation of the vehicle.[9]

Paragraph (1) of § 12 of the StVG maximizes the limit of damages which may be awarded. While damages cannot exceed 5 million euros as a rule for causing bodily harm to a person, if the injury was caused by the use of a highly or fully automated system, the upper limit of damages is 10 million euros. If the vehicle causes damage to property, the maximum amount of damages is 1 million euros

7 Juhász 2020. 144.

8 However, the StVG 18. § (1) paragraph also defines drivers' liability on the basis of guilt.

9 Norton Rose Fulbright 2016.

as a rule, while in the case of damage caused by an automated system the damages that may be awarded are capped at 2 million euros.

The KRESZ in Hungary does not contain any special rules relating to the liability for compensation by the driver or other person, these issues being dealt with in Act V of 2013 on the Civil Code (hereinafter the Hungarian Civil Code).

3. The German Product Liability Law (*Produkthaftungsgesetz*)

German law also ensures the injured party the right to claim damages from the manufacturer of the product if the injury or damage was caused by a product defect. Paragraph (1) of § 1 of ProdHaftG declares that if a product defect results in injury or damage to persons or property, the manufacturer of the product must pay damages. Due to the harmonization of legislation in the European Union, the system of exceptions does not differ significantly from the content of the Hungarian Civil Code. Based on paragraph (1) of § 10 of ProdHaftG, the maximum amount of compensation cannot exceed 85 million euros in the case of personal injury. If the damage or injury is the result of some kind of product defect, the injured person can decide whether s/he claims compensation from the registered owner or from the manufacturer (just like in Hungary).

As the product liability rules in the European Union are harmonized (we can say unified; there are only slight differences among the Member States),[10] the comparison of the ProdHaftG and the Hungarian Civil Code is not necessary. However, it is worth mentioning that the Hungarian Civil Code does not maximize the amount of compensation; furthermore, it does not allow for defining the amount of compensation to be less than the total damage caused even under circumstances which would require special consideration.

It is also worth noting that the appearance of autonomous vehicles will demand the review of product liability rules in force as the injured party will not be able to prove the product defects in those cases when the accident has occurred due to a so-called design error. A possible solution could be presuming the existence of a product defect if the vehicle does not comply with the requirements laid down by public law rules.[11]

10 Lévayné Fazekas 2020. 238.
11 Ebers 2017. 119.

4. The German Civil Code (Bürgerliches Gesetzbuch)

4.1. Extra-Contractual Liability

The liability of the registered owner to pay compensation in German law is regulated not solely by the StVG. Paragraph (1) of § 823 of BGB declares that a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property, or another right of another person is liable to provide compensation to the other party for the damage arising from this. There is a significant difference though: while the StVG maximizes the limit of compensation in connection with the objective liability, the BGB does not contain regulations relating to liabilities. Thus, the injured party can decide to claim compensation for his/her damage based on either one of these rules; however, if s/he can prove the wrongdoing of the registered owner, s/he might be entitled to a significantly higher amount compared to claiming compensation based on the objective liability regulated by StVG.

In Hungarian law, paragraph (1) of § 6:535 of the Hungarian Civil Code defines that a person carrying out hazardous activities shall compensate for the resulting damage. S/he shall be exempted from liability if s/he proves that the damage was caused by an inevitable event outside the scope of the hazardous activity. Operating any vehicle is always considered as a hazardous activity, which underpins the objective liability of the registered owner. Compared to the German law, the Hungarian law does not maximize the limit of compensation, and there is also no reason for the injured party to claim compensation based on wrongful conduct. The registered owner will therefore always be acutely liable for the damage caused, while based on the German law it might be justified to investigate whether the damage was caused by the registered owner deliberately or by negligence.

4.2. Contractual Liability

Besides the main regulation of liability based on wrongful conduct, the BGB contains various other factums of liability. It regulates extra-contractual and contractual liability; so does the Hungarian Civil Code. Paragraph (1) of § 280 of BGB states that if the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty. Based on the wording of the law, it can be concluded that the BGB provides the opportunity for compensation for the damage caused if four criteria are fulfilled simultaneously:

– there has to be a contractual situation;
– the liable party must breach their obligations arising from the contract;
– the liable party must be responsible for the breach of the contract;

– there must be a consequential relationship between the behaviour of the party breaching the contract and the damage caused to the injured party.[12]

Paragraph (2) and (3) of § 280 of the BGB identify two independent bases for liability; the German law makes a distinction within contractual liability, depending on whether the claimant claims compensation parallel to the fulfilment of the obligation, or the compensation is in lieu of the fulfilment of the obligation.

The key point of compensation instead of the fulfilment of the obligation is that the contract has not been fulfilled, wherefore the claimant claims compensation instead of the performance of the service. The law clearly defines the cases when the claimant is entitled to claim compensation instead of performance of the service. According to paragraph (1) of § 281 of the BGB, the first case is when the contracting party is in delay, meaning they do not perform the service by the time it is due. The same applies for defective performance if the defect is of such nature that it is not in the claimant's interest to accept the performance. The second case conforms to § 282 of the BGB, where the contracting party is obliged to consider the other party's rights or the contractual or other interests of the other party, but s/he does not do so, and with respect to this it cannot be expected from the other party to accept the performance. In case the performance becomes impossible, § 280 of the BGB allows a claim for compensation instead of performance.

According to paragraph (1) of § 286 of the BGB, compensation parallel to performance can primarily be claimed if the contracting party is in delay and does not perform in spite of the explicit notice from the claimant. Paragraph (2) of § 286 of the BGB defines the cases in which such an explicit notice from the claimant is not necessary. It is also possible that the contracting party does not fulfil his/her obligation of consideration (due care and attention). For example, if the object of the contract is the walls of a room getting painted, and the decorator spills paint on the carpet.[13] Despite breaching the contract, both parties are interested in maintaining the contract; both performance and compensation for the damage caused by the contracting party can be claimed.

Another condition of establishing liability is the consequential relationship between the behaviour resulting in the breach of contract and the damage caused as well as the contracting party being responsible for the breach of contract. According to paragraph (1) of § 276 of the BGB, the obligor is responsible for intention and negligence if a higher or lower degree of liability is neither laid down nor to be inferred from the other elements of the subject matter of the obligation, including but not limited to the provision of a guarantee or the assumption of a procurement risk. Paragraph (2) of § 276 of the BGB states that a person acts negligently if s/he fails to exercise reasonable care. The focal points

12 Belling–Szűcs 2012. 39.
13 Id. 38.

of the notion of due care are foreseeability and evitability; both categories require objective interpretation.[14] Paragraph (3) of § 276 of the BGB does not allow for stipulating exemptions from under liability for any damage caused deliberately.

In Hungarian law, § 6:142 of the Hungarian Civil Code states that a person who caused damage to another contracting party by breaching the contract shall be required to compensate for it. S/he shall be exempted from liability if s/he proves that the breach of contract was caused by a circumstance that was outside of his/her control and was not foreseeable at the time of concluding the contract, and s/he could not be expected to have avoided that circumstance or to have averted the damage. The liability of the person breaching the contract is therefore objective, and it is completely independent from his/her wrongful conduct; thus, Hungarian contractual liability is stricter than its German counterpart.

It is noteworthy that according to paragraph (2) of § 6:174 of the Hungarian Civil Code the obligee may claim damages for harm occurring in the subject of the service as a result of defective performance if repair or replacement is not possible, or if the obligor did not undertake to provide repair or replacement or was unable to perform this obligation, or if the obligee's interest in the repair or replacement has ceased to exist. Compensation therefore is the legal consequence for breach of contract with defective performance rather than instead of performance in general. The same applies to delay as well: the claim for compensation does not exclude the request of fulfilling the contract. The compensation for impossible performance is an exemption, which replaces performance in Hungarian law as well.

Similarly to the provisions of the BGB, § 6:152 of the Hungarian Civil Code states that contractual clauses limiting or excluding liability in case of damage caused by an intentional breach of contract or in case of a breach of contract which resulted in harm to human life, physical integrity, and health shall be null and void.

Furthermore, the Hungarian Civil Code specifies the so-called *non-cumul* principle, which excludes the claim of compensation of the injured party that is based on the rules of delictual liability, such as product liability, as long as the damage establishes the contractual liability of the obligor, too. In contrast, the *non-cumul* principle does not apply in the German law.

5. Concluding Remarks

According to Zsolt Ződi, 'the autonomous vehicle provides a great example that regulations have to be shaped when their application is close enough in time, as it is rather difficult to legislate for the unimaginable'.[15] Although the

14 Maklári 2005. 239.

15 Ződi 2018. 211–212.

time of autonomous vehicles has not come yet inevitably, automated vehicles may already be present. These vehicles provide the opportunity for the driver to suspend his/her control over the vehicle until the vehicle warns him/her about the necessity of retaking control. However, this is a new situation, so it may call for the amendment of effective regulation not only in the area of civil liability but also in that of road traffic law. If legislation in this field will not be subjected to harmonization within the European Union, the German practice may become an example to follow for other countries, including Hungary.

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Audiovisual Media Regulation during the COVID-19 Pandemic – Measures Undertaken by the Romanian Authorities during the State of Emergency

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Abstract. The present study aims to offer a review of measures taken by the Romanian authorities in the field of audiovisual media regulation during the state of emergency instituted in March 2020 following the COVID-19 outbreak. The legal framework has been adjusted, drawing both from extant norms, such as the 2003 Constitution of Romania, and from newly adapted legal norms such as the Presidential Decree declaring the state of emergency. Also, the competent authorities have been invested with additional powers, this being the case of the National Audiovisual Council and the National Authority for Management and Regulation in Communications. These institutions have faced multiple challenges regarding the clash between freedom of opinion and freedom of speech and the right to correct information of the public and the campaigns to counter misinformation.

Keywords: audiovisual media regulation, fundamental rights, right to correct information, COVID-19, Romania, sanctions for disinformation

1. Introduction

Scientific literature on human rights and fundamental rights during the COVID-19 pandemic is abundant although barely more than a year has passed since the World Health Organization (WHO) made the assessment on 11 March 2020 that COVID-19 could be characterized as a pandemic.[1] The declaration of the Director-General of the WHO 'called (…) for countries to take urgent and aggressive action'

1 Naming here only a very few from the year 2020, selected from various reviews after a quick browsing of academic databases such as Spadaro 2020. 315–325; Sándor 2020. 385–412; Joseph 2020. 1–21.

and to take a whole-of-government, whole-of-society approach built around a comprehensive strategy to prevent infections, save lives, and minimize impact.[2]

This prompted states worldwide to adopt measures tailored to their respective national legal backgrounds and their population, while all the same bearing in mind that provisions of certain international treaties remain effective. A great deal of research articles focus on restrictions of human rights and fundamental rights during the period which is commonly defined at present as the 'first wave' of COVID-19 (February–June 2020), but only a few works deal with the case-law comprising the response of the national bodies or national regulating agencies.

The present study aims to offer a review of measures taken by the Romanian authorities in the field of audiovisual media regulation during the state of emergency instituted in March 2020 following the COVID-19 outbreak. The legal framework has been adjusted, drawing both from extant norms, such as the Constitution of Romania, and from newly adapted legal norms such as the Presidential Decree declaring the state of emergency. Also, competent authorities have been invested with additional powers, this being the case of the National Audiovisual Council (Consiliul Național al Audiovizualului – CNA) and the National Authority for Management and Regulation in Communications (Autoritatea Națională pentru Administrare şi Reglementare în Comunicații – ANCOM). These institutions have faced multiple challenges regarding the clash between freedom of opinion and freedom of speech and the right to correct information of the public and the campaigns to counter misinformation.

The timeframe referring to the problem raised in this study is well defined by the Presidential Decree following the declaration of the general pandemic, issuing the state of emergency in Romania starting from 16 March 2021 and its conclusion on 14 May 2021.

From a legal viewpoint, the most challenging issues to examine in this paper are the efficiency of the national law-making and national regulating authorities in offering an adequate response to a new and unprecedented situation where swiftness and flexibility are considered key elements.

2. The General Framework of Legal Norms Covering Audiovisual Media Content in Romania

The protection of fundamental rights in Romania, comprising – among other rights – also the freedom of opinion and freedom of speech as well as the right to

2 *World Health Organization*. https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline?gclid=CjwKCAjwy42FBhB2EiwAJY0yQnetQvmJoncXLbeb4AX_poDosAVF3dqkQhskegr8-nmmxrWSiTnFCxoCikwQAvD_BwE#! (accessed on: 18.05.2021).

any information of public interest – which are of interest in the present paper – are enshrined in the amended Constitution of Romania (2003).[3] The constitutional protection of fundamental rights is reconfirmed also in various other primary sources of law (such as the Civil Code of Romania[4]) and in normative acts of different public authorities.

Article 30 of the Constitution of Romania states the following:

> (1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds, or other means of communication in public are inviolable.
> (2) Any censorship shall be prohibited.
> (3) Freedom of the press also involves the free setting up of publications.
> (4) No publication may be suppressed.
> (5) The law may impose upon the mass media the obligation to make public their financing source.
> (6) Freedom of expression shall not be prejudicial to the dignity, honour, or privacy of a person and the right to one's own image.
> (7) Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class, or religious hatred, any incitement to discrimination, territorial separatism, or public violence as well as any obscene conduct contrary to morality shall be prohibited by law.
> (8) Civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offences of the press shall be established by law.[5]

Moreover, Article 31 of the Constitution of Romania states the following:

> (1) A person's right of access to any information of public interest cannot be restricted.
> (2) The public authorities, according to their competence, shall be bound to provide for correct information of the citizens in public affairs and matters of personal interest.

3 Act No 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I No 758 of 29 October 2003, republished.

4 Act No 287/2009 on the Civil Code of Romania, published in the Official Gazette of Romania, Part I No 511 of 24 July 2009, modified by Act No 71/2011 published in the Official Gazette of Romania, Part I No 427 of 17 June 2011, and in the Official Gazette of Romania, Part I No 489 of 8 July 2011.

5 English translations from the *Chamber of Deputies*. http://www.cdep.ro/pls/dic/site.page?id=371 (accessed on: 28.05.2021).

> (3) The right to information shall not be prejudicial to the measures of protection of young people or national security.
> (4) Public and private media shall be bound to provide correct information to the public opinion.
> (5) Public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to be on the air. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.[6]

Examined in the broader context of media landscape, these fundamental rights draw also on legal provisions contained in civil law as well as in administrative codes of national regulating authorities (such as the Code of the National Audiovisual Council[7] or the Statutes of the National Authority for Management and Regulation in Communications). Ample case-law in the field of personality rights as well as the substantial body of decisions issued by regulating authorities as part of their monitoring and sanctioning attributes complement the existing theoretical aspects with the necessary practical aspects of jurisprudence.

However, several issues arise upon a closer examination of the scope of the national regulatory framework that is to be applied in this case. For instance, in Article 253(3)(b), the new Romanian Civil Code grants people who suffered a prejudice in their personality rights 'any means deemed necessary by instances' in order to cease the perpetuation of the illicit action or to restore the prejudice caused. It must be said that the expression 'any means deemed necessary' is a very generally and broadly worded formula that presents a challenge when trying to apply it to social media or to online platforms (such as personal blogs).[8] The fact that there is precedent in Romanian jurisprudence where social media (Facebook) is assimilated with public spaces[9] indicates that posting content to social media platforms equals with expressing views in public sphere.

A particular issue in dealing with the problem of monitoring and regulating audiovisual media content in the Romanian perspective in the indicated timeframe (March–May 2020) was the problem of online content. Though effective European legislation would ensure competences and power of exercise for national authorities also in the field of online audiovisual media content, as the main media policy tool of the European Union, the Audiovisual Media

6 Ibid.
7 Decision No 220 of 24 February 2011 regarding the Code of Audiovisual Content.
8 See a decision by the High Court of Justice and Cassation of Romania regarding a sanction applied to the administrator of a website for failing to remove content deemed offensive. Î.C.C.J., s. civ. dec. civ. nr. 3216/19.11.2014.
9 See a decision by the High Court of Justice and Cassation of Romania regarding the quality of Facebook as public space. Î.C.C.J., s. cont. admin. şi fisc. dec.civ. nr. 4546/27.11.2014.

Services Directive (AVMSD)[10] establishes the legal framework for a convergent media landscape and covers all services of audiovisual content irrespective of the technology used to deliver the content, Romania has not yet succeeded in transposing the Directive into its national law after the conclusion of the revision process in December 2018. In consequence, this means that the material scope of the AVMSD, which now extends certain audiovisual rules to video-sharing (online) platforms (VPS-s), such as YouTube, and user-generated content shared on social media services, such as Facebook, could not yet be applied by Romanian lawmakers or legal practitioners in the timeframe of our study.

3. The Framework of Legal Norms Covering Audiovisual Media Content in Romania during the State of Emergency

The legal background for instituting the state of emergency in Romania in March 2020 was based on three pillars: the Constitution of Romania, the Emergency Ordinance No 1/1999 issued by the Romanian Government regarding the institution of the state of siege or state of emergency,[11] and the Presidential Decree No 195/2020 regarding the institution of the state of emergency.[12]

What will be of interest to our paper is to examine if these provisions were able to offer a solid and at the same time versatile base of interpretation to be applied to cases discussed during the period of state of emergency and, ultimately, if they were successful in accommodating the need of public authorities to contain the pandemic by protective and preventive measures and also in accommodating the need of the general population to exert their fundamental rights and to be correctly and objectively informed on matters of public interest.

The first pillar for the special 'COVID-19 Regulation' is comprised by Article 93(1) of the Constitution of Romania, stating that the President of Romania shall, according to the law, institute the state of siege or state of emergency to the entire

10 Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. O.J., L 303 of 28.11.2018, p. 69.; Directive 2010/13/EU of European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) OJ L 095 15.4.2010, p. 1.

11 Government Emergency Ordinance No 1/1999 regarding the state of siege and state of emergency. Published in the Official Gazette of Romania, Part I No 22 of 21 January 1999.

12 Presidential Decree No 195/2020 for instituting the state of emergency on the territory of Romania. Published in the Official Gazette of Romania, Part I No 212 of 16 March 2020.

country or in some territorial-administrative units and ask for the Parliament's approval for the measure adopted, within 5 days of the date of taking it, at the latest.

It is important to remember that, as Article 49(1) states it, the exercise of certain rights or freedoms may only be restricted by law and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

Proportionality and non-discrimination are key issues when dealing with restrictions of rights, as they should be ordered only if necessary in a democratic society. Article 49(2) formulates that the measure shall be proportional to the situation having caused it, applied without discrimination and without infringing on the existence of fundamental rights or freedoms.

As one can see, the relevant articles in the text of the Constitution offer general guidelines and deal mainly with the material scope of these provisions.

Secondly, Article 3(1) of the Emergency Ordinance states that the state of emergency represents the ensemble of exceptional measures in the field of politics, economy, and public order, applicable to the entire territory of the country or in some administrative-territorial units, and it is instated in the following situations:

> a) the existence of acute or imminent grave danger regarding national security or the functioning of constitutional democracy;
> b) the need to prevent, reduce, or eliminate the consequences of a disaster in case of imminent calamity or a calamity that has taken place.[13]

Articles 3^1 and 3^2 shed further light on these provisions and state that:

> Art. 3^1
> The state of siege and the state of emergency can be instituted and maintained only to the extent the situation in case requires it and respecting the obligations Romania has assumed according to international law.

> Art. 3^2
> During the state of siege and the state of emergency, it is forbidden to:
> a) restrict the right to life, with the exception of cases where death is the result of explicit acts of war;
> b) inflict torture and punishment or inhuman or degrading treatments;
> c) convict for acts not punishable by national or international law;
> d) restrict free access to justice.

13 Translation by the author. Unless otherwise specified in the footnotes, all translations are by the author.

Article 4 of the Ordinance continues in the same note, stating that during the state of siege or the state of emergency exercise of certain rights and fundamental liberties can be restricted, excepting human rights and fundamental rights listed under Article 3^2 only to the extent the situation in case requires it and respecting Art. 53 of the Constitution of Romania.

A more defined set of rules, procedures, and provisions relating to obligations and responsibilities of authorities is given in Article 20:

> In applying the provisions of the present emergency ordinance as well as the provisions contained in the decree instituting the state of siege or the state of emergency, the military authorities as well as the other public authorities listed in Art. 7(1) have the following competences and responsibilities:
> (…)
> k) to temporarily suspend the edition or the distribution of certain publications or radio or television programmes.

As it becomes clear from the above-cited norms, the text of the first two pillars in the general framework for audiovisual media legislation during the state of emergency in Romania refers only to classic channels of distribution of mass media: radio or television programmes.

The third pillar of the framework is comprised by the Presidential Decree of March 2020, stating in Article 2 that in order to prevent COVID-19 infection and to ensure damage control during the evolution of the epidemiological situation, the exercise of the following rights is restricted during the state of emergency, in proportion with the level of fulfilment of the criteria defined in Art. 4(4) of this Decree:

a) freedom of movement;
b) right to intimate, family, and private life;
c) inviolability of one's home;
d) right to study;
e) right to gathering;
f) right to private property;
g) right to strike;
h) economic liberty.

The framework laid down by the provisions of the Presidential Decree for audiovisual media during the state of emergency in Romania offers well-defined sets of procedures to address the specific issues of media content distribution in exceptional times. While, by its nature, the text of the Constitution offers a more general, theoretical background, which is neutral as far as IT/C technology is concerned, the Presidential Decree addresses the most pertinent problem during

the state of emergency, that is, the problem of fake news and disinformation via online platforms and offers solutions by investing a public authority (acting as a national regulating agency) with additional competences.

We will cite here the provisions referring to media content in their entirety as they are worded in Article 54 of the Decree, given the fact that they have constituted the bases for a series of decisions issued during the state of emergency:

> *Art. 54*
> (1) Public institutions and public authorities as well as private operators contribute to the campaign of public information regarding measures adopted and activities conducted at the national level.
> (2) In the case of fake news propagated in mass media and in the online media regarding the evolution of COVID-19 as well as measures of protection and prevention, public institutions and authorities undertake the necessary methods to inform the population correctly and objectively.
> (3) The National Authority for Management and Regulation in Communications is empowered to emit motivated decisions requiring hosting service providers and content providers to immediately interrupt the transmission of certain content in electronic communication networks or to suppress it at its source if by such content fake news is propagated regarding the evolution of COVID-19 and the means of protection and prevention.
> (4) In case suppression at the source of the content indicated at para (3) is not feasible, the National Authority for Management and Regulation in Communications is entitled to emit motivated decisions requiring providers of electronic communication networks designated for the public to immediately block the indicated content and to inform their users.
> (5) The National Authority for Management and Regulation in Communications is empowered to emit motivated decisions requiring providers of electronic communication networks designed for the public to immediately block access for Romanian users to content propagating fake news regarding the evolution of COVID-19 and the means of protection and prevention in case the content is transmitted via electronic communication networks by persons listed under para (3) who do not fall under the jurisdiction of national law.

4. Case-Law regarding Audiovisual Media Content during the State of Emergency

The investment of the National Authority for Management and Regulation in Communications – ANCOM – with a temporary new competence in restricting the transmission of media content has resulted in a number of decisions issued in the timeframe of 20 March and 14 May 2020.

In close collaboration with the Group for Strategic Communication (a taskforce operating under the Department for Emergencies of the Ministry of Internal Affairs), ANCOM has reviewed several websites promoting fake news or content provoking panic and unrest or undermining the attempts made by Romanian authorities in preventing the infection.

In its new capacity, ANCOM issued its first decision on 20 March 2020,[14] following a notification by the Group for Strategic Communication. The notification indicated that the website *stiridemoment.ro* had published several articles meant to induce panic in the general population, operating with clickbait titles and unsubstantiated claims or truncated excerpts from statements by doctors, politicians, or others. In this case, ANCOM did not issue a decision as the assessment conducted proved that the site had already shut down, thus rendering the procedure redundant.

More notifications followed suit, the ANCOM having cases where it was necessary to suppress the content from the source page and also cases where the servers were operated from overseas, and only a block was possible. The reviewed websites were: *bpnews.ro*, *breackingnews.xys*, *www.cohortaurbana.ro*, *blacktopics.wordpress.ro*, *genocid.ro*, *bn-news-romania.info*, *ortodoxinfo.ro*, *www.justitiarul.ro*, and *danielvla.wordpress.com*. For instance, in a decision of 26 March 2021, ANCOM reviewed an article published on 20 February, falsely claiming to identify a cure for COVID-19.[15] After reviewing the claim and after obtaining an official point of view of denial from Cantacuzino Institute, the administrator of the website was summoned to interrupt the transmission of the article in electronic communication networks.

In a case of 6 May 2021, ANCOM deemed unfeasible the elimination of a series of articles able to produce panic and to promote conspiracy theories among the general population.[16] So, after having established that the sites were operating from IP addresses outside of Romania, originating from the United States of America, a decision was taken to block access to the site from Romania. The national regulator for the audiovisual sector in Romania, the National Audiovisual Council of Romanian (CNA), has issued a guide regarding proper communication about

14 ANCOM – Decision No. 431 of 20 March. 2020 Decizia ANCOM 431 din 20 martie 2020.
15 ANCOM – Decision No. 453 of 26 March 2020. Decizia ANCOM 453 din 26 martie 2020.
16 ANCOM – Decision No. 523 of 6 May 2020. Decizia ANCOM 523 din 6 mai 2020.

the novel coronavirus on 16 March 2020.[17] This guide (designed to be used during the state of emergency) asserted the *obligation* for audiovisual media content providers to broadcast the decree instituting the state of emergency following its entry into effect, the obligation to *broadcast only official information received from the Group for Strategic Communication* in their entirety. Priority was to be given also to official information received from public authorities implicated in crisis management during the state of emergency.

The CNA has required providers of audiovisual media services to apply all necessary editorial means in order to fulfil their legal obligation to correctly inform the general public by:

– editing and presenting news responsibly and accurately, avoiding clickbait titles and 'overabundance of news' that can produce confusion;

– disseminating information only from national or international official or trustworthy sources in order to efficiently combat fake news spreading on social media platforms;

– fact-checking all information directly or indirectly related to coronavirus;

– respecting ethical rules and treating every broadcast responsibly, without playing on emotions, panic, or the uncertainties of the general public.

4. Conclusions

One of the main issues to be determined in this paper by the examination of the generated legal background and of the case-law was to determine whether it constituted a solid and yet flexible enough instrument for public authorities in dealing with an unprecedented situation.

The exceptional nature of the timeframe in question (state of emergency) means that solutions applied are not automatically applicable after the lifting of restrictions. However, it offers in retrospect a good chance to examine whether the swiftly constituted legal background was able to accommodate the needs of the public authorities. After examining the provisions of the Constitution and those of the Emergency Ordinance, completed by the Presidential Decree, it is our opinion that it offered a solid background.

Another key issue was the response to online formats – not having transposed the revised AVMSD, this could have presented a complication, but the temporary investiture of ANCOM has dealt with the problem efficiently.

As a conclusion, the response offered by the Romanian authorities indicates a generally swift and flexible though, of course, perfectible response.

17 *2nd Guide of the CNA for 2020*. https://cna.ro/IMG/pdf/INSTRUCTIUNEA_nr._2_din_16_martie_2020.pdf (accessed on: 28.05.2021).

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Remarks on the Contractual and Delictual Issues of Slaves in the *Lex Baiuvariorum*

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Abstract. This paper intends to analyse those provisions of the *Lex Baiuvariorum* that regulate the position of persons in non-free status, i.e. slaves (*servi*, *mancipia*, and *ancillae*). In the course of our endeavour, we make efforts to find an answer to the question as to what extent the significant ecclesiastical impact, far exceeding the effect of the rest of German folk laws, becomes evident in *Lex Baiuvariorum*: to what extent acknowledgement of the human quality of slaves appears in the code. Not incidentally, at the end of the paper, we try to answer the question whether the meaning of the phrases *mancipium*, *servus*, and *ancilla* – which are usually translated by the words *servant* and maidservant – can be conveyed in theory by translating them by the word *slave*, or they require any other, more differentiated term to reveal the legal content of these phrases.

Keywords: slave, servant, *servus*, *mancipium*, *Lex Baiuvariorum*

1. Issues of Terminology

In terms of the view of society depicted in *Lex Baiuvariorum*, it is a highly interesting issue, widely disputed in literature, how the position of slaves is reflected in the text of the code. It is a generally asserted view in literature that in the strict sense of the word slavery (*servitus*) as an institution can be hardly found among the Germans tribes. This standpoint goes back primarily to the interpretation, or misinterpretation, as the case may be, of the 25th *caput* of Tacitus's *Germania*. The phrases *servus* and *mancipium* are translated in literature – also in the analysis of *Lex Baiuvariorum* to be investigated in this study – consistently by the words *Knecht*, *Höriger*, or *Leibeigener,* and not by *Sklave*,[1] that is, by terms that suggest some kind of – and compared to the

1 Nehlsen 2001. 505–521.

content of the Antique meaning quite significant – improvement in the position, *status* of persons in this social standing, a tendency pointing towards the acknowledgement of their personality.[2] This somewhat commonplace approach was opposed by Hermann Nehlsen, who examined the position of slaves in depth in eastern and western Gothic, Frankish, and Langobardic laws and drew the conclusion that compared to the declining Western Roman Empire in the German states of early Middle Ages the number and economic significance of slaves definitely increased instead of decreasing.[3] Furthermore, in his view, this tendency was the reason for legislation moving from the *ex asse* German *conpositio* system towards norms of more public law / criminal law nature[4] and from full-scope owner's liability towards the system[5] of noxal liability.[6]

In what follows, we briefly look into whether *mancipium* and *servus* – and the female equivalent of the latter, *ancilla* – as terms cover any legal difference in *Lex Baiuvariorum* and when each of these phrases is used as a general rule. *Mancipium* as slave is referred to as the maker of a thing constituting the subject of sale as well *(quod mancipii mei ex proprio meo materia laboraverunt et fecerunt)*,[7] which indicates their scope of occupation.[8] It arises as a reasonable question whether the term *mancipium* can be considered a synonym of *servus* and *ancilla* or some kind of marked difference in meaning can be demonstrated between these terms. Most probably, it is possible to accept Nehlsen's opinion claiming that *mancipium* is a collective noun and as such denotes both *servus* and *ancilla*. In the 5–7th-c. sources, the phrases *servus* and *ancilla* are undoubtedly more frequent since these texts are closer to the antique sources owing to their age, and, accordingly, the phrase *servus* – as it is a peculiar feature of classical Latin – denoted both male and female slaves; later, however, when the content of the meaning of *servus* served to name male slaves only, the term *mancipium* as a collective noun came to the front since it would have been complicated to list both *servus* and *ancilla* on each occasion.[9]

On the other hand, it should be underlined that in *Lex Baiuvariorum* the term *mancipium* almost exclusively appears as the subject of the transaction (sale, donation, etc.); on the contrary, *servus* and *ancilla* occur as acting – proceeding or committing – subjects as well as the subject of transaction. The latter is exemplified by the provision on sale of alien or stolen things stating that a person who sells

2 Chabert 1852. 110; Brunner 1906[3]. 368 et seq.; Goetz 1999. 1845–1848. On the contrary, see Nehlsen 1998. 464–470; Nehlsen 1984. 219–230.
3 Nehlsen 1972. 58 et seq.
4 Nehlsen 1972. 140 et seq.; 220 et seq.; 319 et seq.; 378 et seq.
5 On the Roman law aspects, see Nótári 2011a. 336 et seq.
6 Nehlsen 1972. 133 et seq.; 191 et seq.; 274 et seq.; 376 et seq.
7 *Lex Baiuvariorum* 16, 14.
8 Nehlsen 2001. 509.; Nehlsen 1981. 267–283.
9 Nehlsen 2001. 509 et seq.

another person's thing in spite of the owner's will (either his servant or maidservant or any other thing) shall return it on the strength of the law and shall give a thing of similar value.[10] Yet, from the fact that *mancipium* is not used to name an acting slave who enters into a transaction or commits a crime, it is not possible to draw the conclusion that his/her legal or social standing would have been different from that of a *servus* or *ancilla*.[11] It is worth adding that it was among the Franks where, in addition to *mancipium* and *servus,* the phrase *sclavus* appeared for the first time: since the Franks pursued several campaigns against the Slavs, and they made the prisoners of war taken their slaves, that is how the meaning slave *(slave*, *Sklave*, *esclave)* developed from the Slavonic word (*Sclavus*).[12]

The code gives the reason for creation of servitude,[13] specifically in relation to warranty of title. Regarding sale, it sets two alternatives: (i) the case of a slave acquired as a prisoner of war in a campaign led by the duke beyond the borders (*istud mancipium ego prehendi extra terminum, ubi dux exercitum duxit*), and (ii) the case of a slave given in slavery by the duke to another person as punishment (*dux illum per debita et iusta culpa tulit et mihi licenter tradidit*).[14] Furthermore, the code reckons with (iii) the case of a slave received as paternal inheritance (*pater meus mihi reliquid in hereditatem*) and (iv) a slave brought up as successor of a slave living in one's own house (*ego in propria domo enutrivi eum a proprio meo mancipio natum*).[15] After that, the code notes that the latter two alternatives as form of acquisition can be referred to with respect to draught animals as well;[16] so, we need to notice reference to slaves as being equal to animals.[17]

2. Slaves as Subjects of Legal Transactions

Among donations made to the church, servants (*mancipia*) are listed in addition to country houses, land, and money.[18] And in case of killing a priest, if the perpetrator cannot pay the three hundred *solidi* calculated in gold, then s/he shall give other money, servants, land, or other things owned by him/her as redemption.[19]

In the regulation of sale, in addition to animals, *mancipium* is explicitly referred to among the subjects of the transaction mentioned as examples – as

10 *Lex Baiuvariorum* 16, 1.
11 Nehlsen 2001. 510.
12 Babják 2011. 33 et seq.
13 Nehlsen 2001. 508 et seq.
14 *Lex Baiuvariorum* 16, 11.
15 *Lex Baiuvariorum* 16, 14.
16 *Lex Baiuvariorum* 16, 14.
17 Nehlsen 2001. 509.
18 *Lex Baiuvariorum* 1, 1.
19 *Lex Baiuvariorum* 1, 9.

Babják calls attention to this fact –,[20] for the code pronounces that compliance with required formalities of sale is of key importance in sale of any given thing, slave or animal, to ensure that nobody could attack the validity of purchase claiming that s/he assigned his/her property at a very low price.[21] It is worth underlining that this rule shows close relation to the relevant provision of *Lex Visigothorum*.[22] Regarding implied warranty provisions, servants are referred to together with horses and other domestic animals; more specifically, in the case of defects, blindness, fracture (of bone), epilepsy, or leprosy concealed by the seller, the buyer can return the goods within three days.[23] It should be added that the *redhibitio* rule of Bavarians, which allows a three-day period to the buyer, cannot be found in any other German folk law; yet, the Bavarian law follows the provision of Roman law that – just as the *edict* of the *aedilis curulis* –[24] obliges sellers of slaves, horses, and draught animals to supply information.

3. Transactions Entered into by Slaves and the Issue of *Peculium*

The code regulates in detail the validity of transactions, especially sale, entered into by slaves.[25] In case a person bought something from a *servus* without the owner's knowledge, who had not approved of the transaction subsequently, the purchase price was returned to the buyer, and the transaction was considered invalid; however, if the subject of the sale no longer existed, the buyer had to return a similar thing to the master of the slave who entered into sale without any authorization or commission.[26] Therefore, the starting point regarding this provision is the validity of the transaction, and invalidity shall be reckoned with only when it is aimed against the will of the owner of the slave. It should be noted that in this respect *Lex Baiuvariorum* sharply contradicts Frankish rules because *Lex Salica* ordered to punish transactions entered into without the knowledge of the owner of the *servus*,[27] and *Lex Ribuaria* excluded the owner's liability.[28] Babják points out that in this issue it can be demonstrated that the Visigothic pattern prevailed in the Bavarian *lex*.[29] Consequently, it was presumed that the owner of the slave must have known of the conclusion of the transaction, and as

20 Babják 2011. 187 et seq.
21 *Lex Baiuvariorum* 16, 9.
22 *Lex Visigothorum* 5, 4, 7. Cf. Nótári 2011b. 94[314].
23 *Lex Baiuvariorum* 16, 9.
24 Cf. Nótári 2011a. 318 et seq.
25 Nehlsen 2001. 514.
26 Lex Baiuvariorum 16, 3.
27 *Lex Salica* 27, 33.
28 *Lex Ribuaria* 77.
29 Babják 2011. 183.

a general rule the code took a stand for keeping the sale in force, and somehow – e.g. by implied approval – the owner of the *servus* had to take part in the transaction: in such cases, Bavarians kept the interests of both parties in view and made the risk of sales entered into with an alien *servus* predictable.[30]

If the owner sold his/her slave but was unaware of the separate property, *peculium*, that s/he had – although it should be noted that this passage of the text of the code does not contain the phrase *peculium*, which is, however, referred to by the *Traditiones* of Passau and Freising as well[31] –, the former owner had the right to demand subsequently that the separate property should be surrendered.[32] Similarly, the rule is in harmony with Visigothic regulation,[33] which states that if a *servus* redeemed his/her freedom from his/her *peculium* and the owner did not know about this *peculium*, the transaction was invalid; in other words, the slave's *status* and the identity of his/her owner did not change.[34] Regarding this provision, the code obviously sets out from the fact that the *servus* was given the separate property by somebody else than his/her owner – which increased the owner's assets –, and so there was increment in the slave's value.[35]

As Nelsen establishes, this provision clearly shows that the 8th-c. Bavarian law defined slaves' free right of disposal over their *peculium*, and whenever the *servus* entered into a transaction with his/her master or a third party, the owner's consent (or at least subsequent *ratihabitio*) was an indispensable condition.[36]

4. Damage Caused to a Slave as Injury to Property

Killing or causing bodily injury to an alien *servus* is regulated in a separate *title* in the code.[37] In what follows, it is worth surveying these provisions in order to establish to what extent *Lex Baiuvariorum* considers the killing or mutilation of alien slaves purely injury to things, a kind of *damnum iniuria datum* – just as the regulation known from Roman law[38] –, or whether it is possible to discover any acknowledgement of the human quality of the slave in them. In the case of killing an alien slave, the perpetrator was obliged to pay the holder of the slave twenty *solidi*.[39] It arises as a question what the proportion of this twenty *solidi* to the market value of the *servus* was. The *titulus* on theft (*De furto*) of the code speaks about a higher

30 Babják 2011. 184.
31 See *Traditio Pataviensis* Nr. 16; *Traditio Tegernseensis* Nr. 68. 85; *Traditio Frisingensis* Nr. 1168.
32 *Lex Baiuvariorum* 16, 3.
33 Cf. *Lex Visigothorum* 5, 4, 16.
34 *Lex Baiuvariorum* 16, 3.
35 Nehlsen 2001. 514.
36 Nehlsen 1972. 168 et seq.; Nehlsen 2001. 515.
37 *Lex Baiuvariorum tit.* 6.
38 Nótári 2011a. 334 et seq.
39 *Lex Baiuvariorum* 6, 12.

value in the case of objects attaining or exceeding twelve *solidi*, and it stresses the example of a horse and *mancipium* of such value.[40] This makes it unambiguously clear that the *conpositio* to be paid to the owner in case of killing the slave did not amount to even half of the market value of the *servus* and was far below the one hundred and sixty *solidi* redemption[41] payable in case of killing a freeman.[42] If the *servus* was not owned by a private person but belonged to ecclesiastical slaves, *servi ecclesiae*, who were *de facto* in a somewhat better position, then his/her killer had to give the church two servants in value identical with the killed slave.[43] The question arises – which can be hardly answered here absolutely clearly – whether the lawmaker associated this with the *duplum* stipulated in *lex Aquilia*.[44] (The fact that the legal relationship did not completely terminate between the freedman and the former owner – just as in Roman law[45] – is well exemplified by the fact that in case of killing a *frilaz* the former owner was entitled to forty *solidi*.)[46]

The state of facts of bodily injury is regulated in detail in the code and contains several elements of facts and forms of commission that are defined in the case of freemen and freedmen (*frilaz*) as well. For this reason, it is worth analysing the former by comparing it to the latter. A person who hits another person's servant out of anger – that is, out of sudden passion – shall pay one *tresmisse*.[47] *Tremisse* (*tremissis*) as a monetary unit introduced in the late antiquity was worth one-third of a *solidus*, and it retained its function as this unit in the early Middle Ages.[48] The same case of commission – supplemented by the phrase *pulislac* as the term for hitting – brought about one *solidus* in the case of a freeman[49] and half a *solidus conpositio* in the case of a liberated party.[50] (*Pulislac*, i.e. *Beulenschlag*, is hitting that leaves a visible trace, literally, a hump on the head.)[51] A person who assaults another person's slave, and blood is shed, shall pay the owner half a *solidus*.[52] The *conpositio* of the same act, i.e. *plotruns* – hitting that results in shedding of blood (*Blutrünse*)[53] or, in accordance with *Lex Alamannorum Chlothariana*, blood flowing to the ground[54] – is one and a half *solidi*[55] if the injured party is a

40 *Lex Baiuvariorum* 9, 3.
41 *Lex Baiuvariorum* 4, 28.
42 Cf. Nehlsen 2001. 513.
43 *Lex Baiuvariorum* 1, 5.
44 Cf. *Institutiones Iustiniani* 4, 6. 22.
45 Nótári 2011a. 194 et seq.
46 *Lex Baiuvariorum* 5, 9.
47 *Lex Baiuvariorum* 6, 1.
48 Cf. Nótári 2011b. 31[23].
49 *Lex Baiuvariorum* 4, 1.
50 *Lex Baiuvariorum* 5, 1.
51 Cf. Nótári 2011b. 51[106].
52 *Lex Baiuvariorum* 6, 2.
53 Cf. Nótári 2011b. 51[108].
54 Cf. *Lex Alamannorum* 59, 2. *ut sanguis terram tangat…*
55 *Lex Baiuvariorum* 4, 2.

freeman and eight and a half *saica* if s/he is a freedman.[56] (*Saiga*, or *saica*, is a monetary unit worth half *tremisse*, that is, one-sixth of a *solidus*.)[57]

The next provision covers several forms of conduct defined in states of facts detailed separately in the case of freemen. A person who raises his/her hands against another person's slave, wounds him/her in the head so that the skull bone becomes visible, hits his/her artery, and the wound swells shall redeem his/her act by one *solidus* to the owner.[58] The name of the first form of commission is *infanc* – i.e. attacking with hostile intention, 'taking' (*Einfang*)[59] –, and its *conpositio* is three *solidi* if the injured party is a freeman[60] and one and a half *solidi* if s/he is a freedman.[61] (The phrase *infanc* always means some kind of attack, act of violence; as a technical term, it can be taken as the equivalent of the state of facts of *manus inicere in aliquem*, i.e. *raising one's hands against somebody, attack somebody*.)[62] In the case of the other three forms of wounding, the code stipulates six *solidi conpositio* when the injured party is a freeman[63] and one and a half *solidi* if s/he is a freedman.[64] Injury to the artery where bleeding cannot be stopped without burning is called *adarcrati*, while a wound making the skull bone visible is called *kepolsceni* in the code. *Adarcrati* literally means *opening the vein*; etymologically it is connected with the words *adar* (*Ader*, *vein*) and *crat* (*Grat*, *splinter*).[65] The first morpheme of the phrase *kepolsceni* can be related to the Old High German word *gebal/kebul* having the meaning *skull* and the second morpheme with the Old High German words *scînan*, *scein* with the meaning *to appear*, *to become visible*;[66] accordingly, the term can be translated by the phrase *apparitio testae* (*Schädelschein*).[67]

The redemption of hitting a slave resulting in fracture of bone is one and a half *solidi*.[68] The code does not specify the type of the fracture of bone and the part of the body affected; however, from the description of the fracture of the bone of a freeman to be redeemed by six[69] and of a freedman by three *solidi*[70] it can be deduced that this case of assault covers the bone sticking out of the wound caused to the head or the arm above the elbow. The next provision again embraces several forms of

56 *Lex Baiuvariorum* 5, 2.
57 Cf. Nótári 2011b. 31[22].
58 *Lex Baiuvariorum* 6, 3.
59 Cf. Nótári 2011b. 51[110].
60 *Lex Baiuvariorum* 4, 3.
61 *Lex Baiuvariorum* 5, 3.
62 von Kralik 1913. 90.
63 *Lex Baiuvariorum* 4, 4.
64 *Lex Baiuvariorum* 5, 3.
65 Cf. Lexer 1872–1878. I. 1073; Kralik 1913. 48; Nótári 2011b. 51[112].
66 Graff 1834–1842. IV. 127; VI. 499 et seq.
67 Kralik 1913. 91.
68 *Lex Baiuvariorum* 6, 4.
69 *Lex Baiuvariorum* 4, 5.
70 *Lex Baiuvariorum* 5, 4.

commission. In accordance with it, a person who wounds another person's slave and the brain becomes visible or injures his internal parts – which is called *hrevavunt* – or beats and pushes him/her around until s/he remains there half dead shall redeem this act by four *solidi*.[71] Regarding freemen and freedmen, *Lex Baiuvariorum* refers to fracture of the skull that makes the cerebrum visible and injury caused to internal parts, called *hrevavunt*, and it stipulates twelve[72] and six *solidi conpositio* in the case of the former and the latter respectively.[73] The first morpheme of the phrase *hrevavunt* (*Leibwunde*)[74] is connected with the Old High German words *href*, *ref* and the Anglo-Saxon word *hrif* having the meaning *body*, *lower parts of the body*,[75] which are etymologically related to the Latin word *corpus*.[76] The second morpheme of the word, *wunt* (*uunt*) should be interpreted as *participium*, i.e. in the sense of *wounded in its internal parts*.[77] (The word *hrevawunti*,[78] which means injury to internal parts,[79] is closely related to this phrase.)

The next passages regulate the *conpositio* of various mutilations. A person who knocks out the eyes, cuts off the hands or feet of another person's servant shall pay the owner six *solidi*.[80] The *conpositio* of the same act is forty[81] and ten *solidi*[82] in the case of a freeman and a freedman respectively. In the case of cutting off the thumb, the index finger or the little finger, the middle or the ring finger, the perpetrator shall pay the owner of the slave four, two, and two and a half *solidi* respectively.[83] When the injured party is a freeman, the above amounts will be as follows: the *conpositio* shall be twelve *solidi* for cutting off a thumb, eight for the index and little finger, and five for the middle and ring finger. It should be noted, however, that the amount increases by one-third if the finger is preserved but paralysed, because the lack of a finger was a smaller impediment in handling arms than a paralysed finger.[84] Regarding freedmen, the fee of *conpositio* amounted to six, one and a half, and two *solidi* in the above order.[85] In their case – just as in the case of slaves, of course –, the code does not refer to bodily injury causing a paralysed finger, because the issue of handling arms was not taken into account with respect to such persons. On the other hand, it should be noted that

71 *Lex Baiuvariorum* 6, 5.
72 *Lex Baiuvariorum* 4, 6.
73 *Lex Baiuvariorum* 5, 5.
74 Cf. Nótári 2011b. 51[117].
75 Du Cange 1883–1887. IV. 256; Graff 1834–1842. IV. 1153.
76 Walde–Hofmann 1954[2]. I. 194.
77 Kralik 1913. 88.
78 *Lex Baiuvariorum* 1, 6; 10, 1. 4.
79 Kralik 1913. 89.
80 *Lex Baiuvariorum* 6, 6.
81 *Lex Baiuvariorum* 4, 9.
82 *Lex Baiuvariorum* 5, 6.
83 *Lex Baiuvariorum* 6, 7.
84 *Lex Baiuvariorum* 4, 11.
85 *Lex Baiuvariorum* 5, 7.

there is almost no difference between the amounts of *conpositio* to be paid for the loss of fingers of a freedman and a slave, or sometimes the fee to be paid to the owner of the slave is higher: there are good chances that this is related to decrease in capacity to work and thereby the volume of the damage caused to the owner.

Piercing the nose of the *servus* resulted in the payment of two,[86] injury to the lower lip, the ears, and the lower eyelid one and a half, injury to the upper lip and upper eyelid one,[87] knocking out the molar, called *marchzand*, three, other teeth one and a half,[88] cutting off the ears one and a half, piercing the ears one, and deafening them four[89] *solidi conpositio*.[90] The *conpositio* of piercing the nose of a freeman was nine,[91] piercing the ears – although the code refers to other injuries to the ears as well – was three, deafening them was forty *solidi*,[92] the *conpositio* of the lips and eyelids were again three *solidi*, but this sum amounted to six *solidi* in the case of lower lips and lower eyelids when the wound resulted in the person concerned being unable to retain saliva or tears[93] – there are good chances that this increment was to sanction aesthetic shortcomings. Knocking out the *marchzand* was punished by twelve, other teeth by six *solidi conpositio*.[94] (The word *marchzand* literally meant a corner tooth – *Markzahn* –, so, presumably, it must have been used for teeth other than molars, such as eye-teeth and incisors as well.[95] The phrase *marchzand* occurs also in *Lex Alamannorum*[96] and corresponds to the Middle High German phrase *marczan*.)[97] It is worth adding that the code does not contain any regulations on injuries to the face with respect to freedmen. In case of beating up the *servus* causing lameness – i.e. a *taudregil* state –, thrusting him from the riverbank or a bridge into the water, the owner was entitled to four *solidi*.[98] In case of thrusting a freeman into water, called *inunwan* by the code, the redemption was twelve *solidi*.[99] Causing injury to the extent that the person remains a cripple, i.e. his feet – as the code puts it – touches dew (*taudregil*), brought about twelve[100] and six *solidi conpositio* in the case of a freeman and a freedman respectively.[101]

86 *Lex Baiuvariorum* 6, 8.
87 *Lex Baiuvariorum* 6, 9.
88 *Lex Baiuvariorum* 6, 10.
89 *Lex Baiuvariorum* 6, 10.
90 *Lex Baiuvariorum* 6, 8–11.
91 *Lex Baiuvariorum* 4, 13.
92 *Lex Baiuvariorum* 4, 14.
93 *Lex Baiuvariorum* 4, 15.
94 *Lex Baiuvariorum* 4, 16.
95 Cf. Nótári 2011b. 53[130].
96 *Lex Alamannorum* 67, 22. Si autem dentem absciderit, quod marczan dicunt Alamanni…
97 Lexer 1872–1878. I. 2044.
98 *Lex Baiuvariorum* 6, 8–11.
99 *Lex Baiuvariorum* 4, 17.
100 *Lex Baiuvariorum* 4, 27.
101 *Lex Baiuvariorum* 5, 8.

Taudregil is nothing else than a person who drags his feet, in other words, whose feet *touch dew* (*Taustreifer*, *Taustreicher*).[102] This phrase can be found in the same sense and with the same explanation in *Lex Alamannorum* as well.[103] The etymology of the first morpheme of the word is absolutely clear: it is related to the Old High German word *tau*, i.e. *dew*.[104] The morpheme *dregil*/*dragil* can be related to the Gothic verb *þragian* having the meaning *to run*, as Grimm has already pointed out.[105] The phrase *in unwan* (*inunwan*) occurs in the text of the code in the state of facts of thrusting a freeman from the riverbank or a bridge into the water,[106] thrusting a freeman from a ladder,[107] wounding a freeman by a poisonous arrow,[108] and arson as well as deaths occurring in relation to it.[109] Linguistically, the phrase can be related to the Old High German word *wân* (*uuânî*) having the meaning *opinion*, *view*, *hope* [110] consequently, the explanation of the locus quoted as the fourth item, which states that the word *unwan* can be conveyed by the phrase *desperatio vitae*, that is, *despair over life*, or in free translation: *danger of life*,[111] seems to be sound. It is worth adding that in case of thrusting a slave into the water, the lawmaker defined *conpositio* probably due to causing danger of life; however, the lawmaker could not think of breach of honour occurring in relation to freemen in such cases because this was out of the question concerning slaves. For the same reason, the code does not mention the case of throwing a slave off a horse as an act to be sanctioned either.[112]

In view of the fact that *Lex Baiuvariorum* contains an independent *titulus* dealing with acts related to women as well,[113] it is justified to analyse the passages that can be found under this title in terms of persons in servant *status*. There is a sharp difference between women in free standing and maidservants in case of assault causing abortion. In the case of free women, if as a result of assault 'the not yet viable' foetus – by which the text of the code, most probably, means foetus in an early stage, not viable even in case of naturally occurring premature birth – died, the amount of *conpositio* was twenty *solidi*, and if the foetus already 'lived' (i.e. was considered viable), the usual redemption for homicide, i.e. one hundred

102 Cf. Nótári 2011a. 55[143].
103 *Lex Alamannorum* 57, 62. Si quis autem alium in genuculo placaverit, ita ut claudus permaneat, ut pes eius ros tangat, quod Alamanni taudragil dicunt…
104 Graff 1834–1842. V. 346.
105 Grimm 1922[4]. II. 187.
106 *Lex Baiuvariorum* 4, 17.
107 *Lex Baiuvariorum* 4, 19.
108 *Lex Baiuvariorum* 4, 21.
109 *Lex Baiuvariorum* 10, 4.
110 Graff 1834–1842. I. 857.
111 Grimm 1922. II. 187; Kralik 1913. 120 et seq.; Baesecke 1935. 18.
112 Nehlsen 2001. 513.
113 *Lex Baiuvariorum* tit. 8.

and sixty *solidi*,[114] had to be paid.[115] Concerning maidservants, in the case of the same acts, the amount of *conpositio* was as follows. If the foetus did not 'live' yet, four,[116] and if the foetus already lived, ten *solidi* had to be paid to the owner[117] by the perpetrator causing premature birth by assaulting the *ancilla*.[118] It is worth noting that in the case of death of a free woman's foetus deemed viable, the perpetrator had to pay the complete *Wergeld* of a free person, i.e. one hundred and sixty *solidi*, whereas for a maidservant's viable foetus it was not the usual twenty *solidi conpositio* of live slaves[119] but only half of it, ten *solidi*, that had to be paid to the owner.[120]

Just as in the case of abusing or killing a *servus* and *ancilla*, in case of sexual relation with maidservants, the *conpositio* was payable to the owner. The code provides that a person who sleeps with another person's married maidservant shall pay twenty *solidi* to the owner – so, not to the husband of the maidservant.[121] In the case of unmarried maidservants, this sum amounts to four *solidi*.[122] (In the case of liberated and married women, the amount of *conpositio* will be forty[123] while in the case of unmarried *frilaza* eight *solidi*.[124])

A person who brings a false charge against a freeman shall suffer the same punishment that would have threatened the accused person if s/he had been condemned.[125] This provision is in harmony with the sanction of *calumnia* known from Roman law: if somebody was condemned due to *calumnia*, that is, slanderous charge, in the period of the Roman Empire, the false accuser (*calumniator*) was usually punished by the same penalty that would have been imposed on the accused if s/he had been condemned; in other words, the *talio* principle was applied over and above *infamia*.[126] On the contrary, a person who brought false accusation against another person's slave who was for this reason tortured had to give the owner a slave of a similar value; and if the slave died during interrogation, s/he had to give two slaves, but if s/he could not fulfil this provision s/he became a slave because s/he caused an innocent person's death.[127]

Quite interestingly, the code discusses the state of facts of inducing another person's slave to run away under the *titulus* (*De pignoribus*) on right of pledge.

114 *Lex Baiuvariorum* 4, 28.
115 *Lex Baiuvariorum* 8, 19.
116 *Lex Baiuvariorum* 8, 22.
117 *Lex Baiuvariorum* 8, 22–23.
118 *Lex Baiuvariorum* 8, 23.
119 *Lex Baiuvariorum* 6, 12.
120 Cf. Nehlsen 2001. 513 et seq.
121 *Lex Baiuvariorum* 8, 12.
122 *Lex Baiuvariorum* 8, 13.
123 *Lex Baiuvariorum* 8, 10.
124 *Lex Baiuvariorum* 8, 11.
125 Lex Baiuvariorum 9, 19.
126 Nótári 2011a. 423.
127 *Lex Baiuvariorum* 9, 20.

A person who induces another person's slave to run away and leads him/her across the border shall pay twelve *solidi* redemption and shall bring the runaway back.[128] In the case of maidservants induced to run away, the *conpositio* – without any explanation provided by the code – is twenty-four *solidi*.[129] The sanction of the same act is somewhat different when the slave or maidservant belongs to the church; this issue is regulated in the *titulus* on the affairs of the church.

A person who induces a servant or maidservant of the church to run away and leads them across the border shall pay fifteen *solidi* and shall call the runaways back; until the persons induced to run away are recovered, they shall be replaced by servants as pledge; and if s/he cannot recover them, in addition to the amount of the *conpositio*, s/he shall give the church similar servants or maidservants to replace them.[130]

There is a sharp dividing line between persons in servant and free *status* with respect to their death and corpse as well. The state of facts of desecration of a grave protects the grave of a freeman only.[131] Also, there is a significant difference with respect to homicide committed in secret or by stealth. A person who kills a freeman in secret and throws him/her in the river or throws him/her to a place from where s/he cannot retrieve the corpse – which is called *murdrida* by the code – shall pay forty *solidi* due to making a decent burial impossible and shall repay the *Wergeld* in accordance with the victim's *status*.[132] A person who kills a servant in such fashion and hides his/her corpse in a similar form shall pay ninefold of the redemption payable for stealing a slave, that is, one hundred and eighty *solidi*.[133] So, while in the case of a freeman deprivation of the last honours is also sanctioned, in the case of slaves only the value of the property taken stealthily from the owner was taken into account by ninefold redemption.[134]

Below, two loci will be analysed because these are the only two provisions in *Lex Baiuvariorum* which show some kind of tendency that the lawmaker acknowledged the human quality of slaves by judging their fate and act identically to that of freemen.

With respect to death, the corpse of a freeman and a *servus* will be judged identically only in the burial of the found corpse. In harmony with the provisions of *Poenitentiale Gregorii* and *Ponitentiale Cummeani*,[135] to ensure[136] that the dead person should not lie unburied and should not end up in the bowels of pigs and

128 *Lex Baiuvariorum* 13, 9.
129 *Lex Baiuvariorum* 13, 9.
130 *Lex Baiuvariorum* 1, 4.
131 *Lex Baiuvariorum* 19, 1.
132 *Lex Baiuvariorum* 19, 2.
133 *Lex Baiuvariorum* 19, 3.
134 Nehlsen 2001a. 511.
135 Cf. *Poenitentiale Gregorii* 137. 138; *Poenitentiale Cummeani* 1, 26. 27.
136 Cf. Nótári 2011b. 105[338].

dogs or other beasts, the code orders that the burier must be given one *solidus* as reward by the relatives of the dead person or the master of the slave.[137] It should be added that it is not possible to clearly identify the Biblical correspondence of the quotation or reminiscence from the Holy Scripture referred to above (*mortuum sepelire*); the quotation is the closest to the relevant locus[138] of the *Genesis*.[139]

On the other hand, the code provides right of asylum in church (*asylum*) for slaves as well.[140] Pursuant to this provision, anybody who takes refuge in a church shall not be removed from there by violence but shall be chastised there in accordance with the priest's advice – at this point, *Lex Baiuvariorum* refers (by some kind of reminiscence rather than literal quotation)[141] to the locus from the *Gospel according to St Matthew*,[142] which states that s/he who forgives will be forgiven, and s/he who does not forgive will not be forgiven.[143] A person who drags his/her runaway servant or anybody else by violence out of a church shall pay the church forty *solidi* and the treasury also forty *solidi*.[144]

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137 *Lex Baiuvariorum* 19, 7.

138 *Genesis* 23, 6. 15.

139 Cf. Nótári 2011b. 105[340].

140 Nehlsen 2001. 512.

141 Cf. Nótári 2011b. 35[29].

142 Cf. *Evangelium secundum Matthaeum* 6, 14. f.

143 *Lex Baiuvariorum* 1, 7. *Si quis culpabilis aliquis configium ad ecclesiam fecerit, nullus eum per vim abstrahere ausus sit, postquam ianuam ecclesiae intraverit, donec interbellat presbiterum ecclesiae vel episcopum, so presbiter representare non ausus fuerit. Et si talis culpa est, ut dignus sit disciplina, cum consilio sacerdotis hoc faciat, quare ad ecclesiam confugium fecit. Nulla sit culpa tam gravis, ut vita non concedatur propter timorem Dei et reverentia sanctorum, quia Dominus dixit: 'Qui dimiserit, dimittetur ei; qui non dimiserit, nec ei dimittitur'.*

144 *Lex Baiuvariorum* 1, 7.

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Regulation of Work Breaks in Hungary with a European Perspective

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Abstract. The basis for the review of the Hungarian and European rules of the rest break during the working day was the fact that there was a lawsuit to establish the illegitimacy of termination, in which I represented the plaintiff. The reason for the summary dismissal on the part of the employer was that the employee was playing cards while on a rest break during the working day. In his action, the plaintiff sought a declaration that his employer had unlawfully terminated his employment. By the judgment of the Court of First Instance, the action was dismissed, and the plaintiff was ordered to bear the court costs. By the judgment of the Court of Law proceeding by the plaintiff's appeal, the judgement was reversed, and it ordered the defendant to pay the plaintiff severance pay as well as compensation. The defendant presented an application for review, which was not upheld. After completing the matters of fact, the Court of Appeal correctly stated that, at the time of the inspection, the plaintiff availed himself of a rest break during the working day, which was lawful; moreover, it was not disputed by the defendant. The Court of Appeal rightly concluded that the employer may prohibit the employee from playing cards during breaks in the workplace, but this must be communicated unequivocally to him, and this expectation must be consequently carried out. The Court of Appeal also rightly pointed out that in the case of explicit prohibition of some behaviours, employees must also be informed of the legal consequences, which are applicable in case of infringement of the rule. However, in the present case, this was not established, so that the lawsuit ended with the full recovery of a favourable judgment of the employee plaintiff at the Supreme Court of Justice.

Keywords: working hours, work break, employee, working day, holiday, rest day

1. Historical Overview

The industrial laws of the age of dualism[1] set the duration of working time in a broad framework, according to which it was forbidden to start the day's work before five a.m. and to do work after nine p.m. The break time was half an hour in the morning and in the afternoon, and one hour at noon. In the field of metal ore mining, there were eight working hours a day, in the case of coal mines, this was 12 hours, with a one-hour break.[2] According to the rules of agricultural work,[3] a day labourer's working day lasted 'from sunrise to sunset', with a half-hour break in the morning, an hour at noon, and only in summer an additional half-hour break in the afternoon. At the very end of the 19th century, some changes were made to break time,[4] but in practice these rules were often ignored, and thus the afternoon breaks were not granted.[5] Under the Servants Act,[6] the servant had to be given enough time to rest at night according to the season, but if the servant did not find the rest time sufficient, he or she could resign.

Legislative Decree No. 7 regarding the Labour Code of 1951 regulated the provisions of break time in a comprehensive way among the rules of the rest period and leave (vacation), and then it regulated the rules of break time in a direct way. In general, the text stipulates that the Hungarian People's Republic regulates the right to rest by providing break time, daily rest periods, a weekly rest day, public holidays, and yearly leave. It ensures that workers can preserve their health and ability to work and enjoy the works of socialist culture and the natural beauties of their free homeland during their free time. Ignoring this pathetic motivation and apart from the picturesque content detailed in the last sentence not being really typical of the early fifties, it can be stated that the Labour Code Decree did not omit to regulate the rest period of the workers, nor the break time. With regard to the specifics, the legislator has determined, still in a general way, that a worker is entitled to a break every day given that he or she spends time at work corresponding to his or her daily working hours. The break time is usually half an hour – continues the legislator. It is not clear from the text or, in the absence of a specific decision in case-law, from elsewhere what the definition of 'usually' means, ergo to whom it can be applied, whether the break time may be a little more or less than half an hour, etc. Neither the job nor the time spent at work nor any other point of reference can be discovered, so the 'usually half an hour' clause of this regulation remains in the mist of the former socialist legislation. According to the tight rule of that period, workers whose job

1 Act No VIII of 1872, Act No XVII of 1884.
2 Decree No 82118/1896 of the Ministry of Commerce.
3 Section 103 of Act No XIII of 1876.
4 Section 49 of Act No II of 1898.
5 Lőrincz 1974. 106.
6 Act No XLV of 1907.

was otherwise provided with the opportunity to eat and bathe were not entitled to break time. These jobs were established by the competent ministry.[7] It can be deduced from all this that it was not possible to eat during working hours on all jobs, and the possibility of bathing clearly depended on the position. The organization of break time was regulated by the work schedule. Furthermore, there were no additional regulations on this issue during this period.

The Labour Code regulated by law,[8] which replaced the first Labour Code, and then the Implementing Decree[9] attached to it more than a decade later also provided for break time. According to the regulations of the law, the worker must be provided with the opportunity to eat (break time) by interrupting working hours. If, due to a three- or multi-shift or uninterrupted operation a break cannot be granted by interrupting working hours, the employment rule may provide for a break of up to 20 minutes a day within the working hours. According to the implementing decree, there is no break time for workers who, by reason of their duties, may eat at any time during working hours or whose job wholly or partly is of a standby type or whose regular daily working hours do not exceed six hours. A break time may not be granted on those working days on which working time does not exceed four hours. The duration of the break time is twenty minutes a day unless the employment rule provided for a longer period. For every three and a half hours of uninterrupted overtime performed, a half-hour break was provided. The collective agreement could derogate from this provision. The implementing decree did not specify in whose favour the derogation was granted. The detailed rules of break time are laid down in the collective agreement. As part of this, it regulates the remuneration of break time. Other breaks in connection with work were governed by special provisions.

In the time following the regime change, the drafting of a new labour code became topical, which reflected a completely new approach. It becomes immediately apparent when reviewing the text that the new law[10] no longer mentions 'worker' but 'employee' among the subjects of the employment relationship. Dogmatically, the rules of break time have been placed again in the normative system of working time and rest time by the legislature. Working time was defined as the duration from the commencement until the end of the period prescribed for working, covering also any preparatory and finishing activities related to working. Unless otherwise provided or agreed, the duration of a break, with the exception of stand-by jobs, was not included in the working time. The text of the Labour Code had, of course, to be constantly amended in connection

7 See the decision reported under 24453/1951. BM HIG (Belügyi Közlöny XI. 4.), provision point 2.

8 Act No II of 1967.

9 Decree on the implementation of the Labour Code No 48/1979 (XII.1.).

10 Act No XXII of 1992 on the Labour Code.

with the harmonization of EU law, as it had to be compliant with EU law by the time of accession. In this context, the Working Time Directive also had to be transposed into the domestic legal environment.[11] The problems of the regulation in connection with on-call duty have reached the point where a decision of the Constitutional Court has been made.[12]

With regard to break time, the 1992 Labour Code stipulates that if the daily working time or the duration of overtime work performed exceeds six hours, then after each additional three hours of work, with the interruption of work, the employee shall be entitled to at least twenty minutes but not more than a one-hour-long break time, of which at least twenty minutes shall be taken uninterruptedly. If, during the daily working hours, the employee is entitled to break time more than once, their combined duration may not exceed one hour.

With regard to this regulation, collective agreements for employees working as navigators, flight attendants, and aviation engineers or engaged in providing ground handling services to passengers and aircraft, employees working in travel-intensive jobs in the domestic or international carriage of passengers and goods by road, carriers and traffic controllers working in a local public transport system for the carriage of passengers or in a scheduled intercity transport system inside a fifty-kilometre radius, travelling workers and traffic controllers working in the carriage of passengers by rail and in the carriage of goods by rail may derogate from the provisions. In addition, working time limits of up to one year and up to fifty-two weeks may be set. Among the different provisions for young workers,[13] there are deviations from the general ones, according to which if the daily working time of a young worker exceeds four and a half hours, he or she should be granted a break of at least thirty minutes.

2. Daily Working Time and Rest Periods in the System of Provisions in Force

The Labour Code, which was adopted in 2011 but regulated by Act I of 2012,[14] clearly states in the system of its conceptual network that working time shall

11 With regard to Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, and related judgments of the European Court of Justice and the resolution of the European Commission amended Act XXII of 1992 on the Labour Code and other laws transposing the Working Time Directive.

12 The Constitutional Court ruled in its decision No 72/2006(XII.15.) AB the method of regulation related to healthcare as constitutional and therefore annulled the relevant provisions of Government Decree No 233/2000(XII.23.) on the implementation of Act No 33/1992 on the Legal Status of Public Servants in the health sector.

13 It was inserted in the previous Labour Code by Section 15 of Act No XVI of 2001.

14 Published: 6 January 2012.

mean the duration from the commencement until the end of the period prescribed for working, covering also any preparatory and finishing activities. 'Preparatory or finishing activities' are taken to mean operations comprising a function of the worker's job by nature that is ordinarily carried out without being subject to special instructions.

The daily working time in full-time jobs is eight hours, which, based on an agreement between the parties, may be increased to not more than twelve hours daily if the employee works in a stand-by job or is a relative of the employer or the owner. The owner is also defined by the Labour Code as someone who, in the light of these provisions, is the member of the business association holding more than twenty-five per cent of the votes in the company's decision-making body.[15] The daily working time applicable for a specific full-time job may be reduced by agreement of the parties, which is called part-time work.

The employer may define the working time of an employee in terms of the 'banking' of working time or working hours as well, which shall be arranged based on daily working time and the standard work pattern. In this context, the public holidays falling on working days according to the standard work pattern shall be ignored. In determining the working time, the duration of absence shall be ignored, or it shall be taken into consideration as the working time defined by the schedule for the given working day. In the absence of a work schedule, the duration of leave shall be calculated based on the daily working time whether ignored or taken into consideration. Where working time is defined within the framework of working time banking, the beginning and ending date shall be specified in writing and shall be made public.

The finding according to which the coexistence of working time and rest time is conceptually ruled out is entirely exact.[16] With regard to the rest period, the Labour Code, as a general rule, names daily rest periods, weekly rest days, and weekly rest periods. The daily rest period shall be afforded to the employees as an uninterrupted period of at least eleven hours after the conclusion of daily work and before the beginning of the next day's work, weekly rest days are two days a week, and the weekly rest period shall be in lieu of weekly rest days, an uninterrupted weekly rest period of at least forty-eight hours each week. Compared to the old Labour Code, this is an innovation because the weekly rest period and the weekly rest day have not been separated before.[17]

15 All this was necessary because for a long time it was the practice to elect an employee as a member of a (micro-) partnership, who had a nominal, few percent voting right, so as a quasi-owner there was no obstacle to working regular overtime without overtime pay and working without compensation even on days of repose. This was intended to be abolished by the Labour Code when under a 25% voting right it did not consider a member of the company as the owner for the purpose of calculating working time.

16 Zaccaria 2013. 136.

17 In more detail, see Novák 2013. 10–13.

Conceptually, therefore, working time is the time required to work, while all the other is rest time.[18] The time required for work, i.e. working time, is considered to be when the employee performs work or is available.[19]

2.1. Regulation of Break Time

Break time is located in the matrix of working time and rest time. According to the Labour Code, working time shall not cover break time, with the exception of stand-by jobs, and travel time from the employee's home or place of residence to the place where work is in fact carried out as well as from the place of work to the employee's home or place of residence. According to the law, working time shall mean the duration from the commencement until the end of the period prescribed for working. During the period prescribed for working, the employee is obliged not only to be available but also to work; he or she is available at that time specifically to carry out the work for the entire duration of it. Consequently, periods during which the employee only fulfils the duty of availability but does not perform actual work are not considered as working time (e.g. on-call and stand-by duty). However, for the purpose of applying certain working time rules, these periods should also be treated as working time.[20] Preparatory or finishing activities are taken to mean operations comprising a function of the worker's job by nature that is ordinarily carried out without being subject to special instructions. It does not include changing and bathing time before or after work unless the change is necessary for occupational safety and takes a longer time. According to the law, a break time is not considered working time if the employee works in a non-stand-by job. During break time, the employee is released from his or her obligation to be available and to work, basically in order to be able to eat.

If the scheduled daily working time or the duration of overtime work performed exceeds six hours, twenty minutes of break time and if it exceeds nine hours, an additional twenty-five minutes of break time shall be provided. The duration of overtime work performed must be included in the scheduled daily working time. Break time provided to employees by agreement of the parties or in the collective agreement may not exceed 60 minutes. During break time, work must be interrupted. Break time is to be provided after not less than three and before not more than six hours of work. The employer is entitled to schedule break times in several lots. In this case, derogation from the above-mentioned rules is allowed; however, the duration of the break provided within the timeframe must be at least twenty minutes. It can be stated that compared to the previous Labour Code, the law simplifies the regulation of break time. The agreement of the parties

18 Radnay 2003. 17.
19 Prugberger 2004. 22.
20 See: e.g. Section 97(5) point b) of the Labour Code.

or the collective agreement may differ in favour of the employee, thus providing for the granting of a rest break during the working day. Compared to the previous ones, the law clearly defines the employer's obligation to provide break time in accordance with the purpose of the break. If the scheduled daily working time or the duration of overtime work performed exceeds six hours, 20 minutes of break time and if it exceeds nine hours, an additional 25 minutes of break time shall be provided, i.e. a break of 45 minutes must be given to the employee, with the interruption of work. Alternatively, by way of contract or collective agreement, the employer and the employee may provide for a longer break time, but not more than 60 minutes. At least 20 minutes of the break time must be uninterrupted and shall be provided after not less than three and before not more than six hours of work; if the break time is longer than 20 minutes, the remaining part may be provided at any time, in several lots. Break time is not part of working time, nor is it remunerated, except in the case of an employee in a stand-by job.[21]

According to the practice followed by the Curia[22] (the Supreme Court of Hungary), the record of working and rest time must be such that a clear conclusion can be drawn from it regarding the observance of the provisions of the law; changes in the schedule of working time must be properly documented in the record of working time. Work on a rest day other than the stated working time schedule is considered overtime work.

It is not necessary to provide an employee with flexible working arrangements with break time separately.[23]

2.2. International Outlook

According to the explanatory memorandum of the law, the Hungarian regulation has become more transparent, but its extent still does not reach the duration specified in the German *Arbeitzesitgesetz*, which in my opinion is more forward-looking than the domestic regulation because it determines the amount of the break time not in 20 but in 30 minutes.[24] The Hungarian regulations do not contradict the previous EU directive,[25] nor the current

21 Section 86(3) point a) of the Labour Code.

22 Decision reported under BH.2013. 226.

23 Pál 2012. 198.

24 According to § 4 of the German ArbZG: „Die Arbeit ist durch im voraus feststehende Ruhepausen von mindestens 30 Minuten bei einer Arbeitszeit von mehr als sechs bis zu neun Stunden und 45 Minuten bei einer Arbeitszeit von mehr als neun Stunden insgesamt zu unterbrechen. Die Ruhepausen nach Satz 1 können in Zeitabschnitte von jeweils mindestens 15 Minuten aufgeteilt werden. Länger als sechs Stunden hintereinander dürfen Arbeitnehmer nicht ohne Ruhepause beschäftigt werden."

25 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time. OJ L 307, 13.12.1993. 18–24.

one,[26] the first of which stipulating that after six hours of uninterrupted work and then after another three hours, a break of at least 20 minutes must be provided, while the latter does not specify the minimum rate of break time.[27] The Austrian legislation, which has obviously taken over the German provision of a 30-minute break, goes further and also allows it to be used in two 15-minute blocks if the employee's interests so require.[28]

The essence of the English regulation is completely the same as the Hungarian regulation.[29] In Italy, under the authority of Book 5 of *Codice Civile*, *Collegato Lavoro*[30] regulates break time, which provides for a break every six hours, but the extent varies from sector to sector. According to the Dutch Act on Working Time (abbreviated ATB in Dutch), a 30-minute break can be taken after five and a half hours, or – as in the Austrian rules – twice in 15-minute periods. In the Netherlands, after 10 hours of work, there is an additional 45-minute break.[31] In Denmark, where women work 35 hours a week and men 41 hours, break times are also 30-minute long, but the legal text explicitly states that an employee is entitled to go home or have lunch with colleagues during this time. In companies that have a restaurant, employees can eat there, but they also have the option to eat their own food brought from home.[32] The provisions of the French *Code du travail* also provide the employee with a 20-minute break after six hours of work, with the possibility

26 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time. OJ L 299, 18.11.2003. 9–19.

27 On the possible effects of this on the latter acceding states, see: Prugberger 2011. 546.

28 According to § 11 Section 1 of the Austrian AZG: „Beträgt die Gesamtdauer der Tagesarbeitszeit mehr als sechs Stunden, so ist die Arbeitszeit durch eine Ruhepause von mindestens einer halben Stunde zu unterbrechen. Wenn es im Interesse der Arbeitnehmer des Betriebes gelegen oder aus betrieblichen Gründen notwendig ist, können anstelle einer halbstündigen Ruhepause zwei Ruhepausen von je einer Viertelstunde oder drei Ruhepausen von je zehn Minuten gewährt werden. Eine andere Teilung der Ruhepause kann aus diesen Gründen durch Betriebsvereinbarung, in Betrieben, in denen kein Betriebsrat errichtet ist, durch das Arbeitsinspektorat, zugelassen werden. Ein Teil der Ruhepause muß mindestens zehn Minuten betragen."

29 Workers have the right to one uninterrupted 20-minute rest break during their working day if they work more than six hours a day. The break does not have to be paid – it depends on their employment contract.

30 Legge 4 novembre 2010, n. 183 Deleghe al Governo in materia di lavori usuranti, di riorganizzazione di enti, di congedi, aspettative e permessi, di ammortizzatori sociali, di servizi per l'impiego, di incentivi all'occupazione, di apprendistato, di occupazione femminile, nonche' misure contro il lavoro sommerso e disposizioni in tema di lavoro pubblico e di controversie di lavoro. (10G0209) (GU Serie Generale n.262 del 09-11-2010 – Suppl. Ordinario n. 243).

31 „Als u langer dan 5,5 uur werkt, heeft u recht op minimaal 30 minuten pauze. U mag de pauze splitsen in 2 keer een kwartier. Als u langer dan 10 uur werkt, heeft u recht op 45 minuten pauze. De pauze mag worden gesplitst in meer pauzes van minimaal een kwartier. In uw cao kunnen andere regels staan. Zoals geen, minder of kortere pauzes."

32 Employment contracts. http://europa.eu/youreurope/business/staff/employment/index_en.htm (accessed on: 20.04.2021).

that the collective agreement may deviate from this.[33] French labour law also allows a five-minute smoking break four times.[34]

3. Closing Remarks. Judicial Practice

Basically, the Hungarian regulation on break time is the same as the Western European regulation, the reason for which is to be found in the directive. Although the legal text does not stipulate what an employee can or cannot do during the period of a break time, it has happened that an employee who played cards during a legally taken break from work was terminated by the employer with immediate effect. In the proceedings at first instance, the employee's action was dismissed by the Court of Justice, while in the proceedings at the second instance, the General Court reversed the judgment rendered in the first instance and found that the dismissal was unlawful. Given that the lawsuit had already been adjudicated by the Curia in the review proceedings,[35] its findings were as follows: If the applicant was able to spend his rest period during that time, it is irrelevant what duties he was still required to perform during the shift. It was necessary to examine what was the applicant able to spend his time with during the break, which was not disputed and was part of his working time, and whether the defendant prohibited playing cards during that period. According to the Curia, the appellate court was right to conclude that the employer may prohibit the employee from playing cards during rest time in the workplace, but this must be made clear to him, and the expectation must be consistently enforced. The employer claimed that a written prospectus had been set up prohibiting playing cards, but it could not be established with judicial certainty, in particular that its contents were available to all employees, including the applicant. It has not been established how long the prohibition notice was issued and whether it was still in force during the litigation period. The appellate court also rightly pointed out that in the event of an explicit prohibition of a conduct, employees must also be informed of the legal consequences applicable in the event of a breach of the rule. However, that was not the case here. Nor could it be established with judicial certainty that the employer had monitored the implementation of the regulation

33 „Le Code du travail (article L 3121-33) impose un temps de pause minimum égal à 20 minutes dès lors que le temps de travail atteint 6h par jour. C'est un temps de pause minimal: une convention collective ou un accord collectif peut notamment prévoir des temps de pause d'une durée supérieure, particulièrement en ce qui concerne la pause déjeuner (voir plus bas). En revanche, aucune disposition conventionnelle ne peut prévoir un temps de pause inférieur à 20 minutes."

34 „Il peut tout à fait fractionner cette durée (exemple: une pause de 10 minutes le matin et une pause de 10 minutes l'après midi, ou 4 pauses de 5 minutes pour fumer des cigarettes)."

35 Reported under Mfv. I.10.266/2016.

that had been imposed (prohibition on playing cards). The applicant based his claim for compensation for the wrongful termination of the legal relationship on Section 82(2) of the Labour Code and also submitted a claim for severance pay on the basis of Section 3. Pursuant to Section 82(1) and 82(2) of the Labour Code, the employer is obliged to compensate for the damage caused in connection with the wrongful termination of the employment relationship. Compensation claimed for the income foregone may not exceed the amount of the employee's 12-month absence pay. As a legal consequence of the wrongful termination of the legal relationship, the actual damage can be enforced, which rule also applies to the lost income. The law placed the legal consequences of the wrongful termination by the employer on a compensation basis, wherefore the employee has an obligation to mitigate the damage compared to the previous regulation. There is no need to reimburse the part of the income that arose from the failure to fulfil that obligation. Upon wrongful termination of employment, the employer who caused the damage must prove that the employee has not fulfilled his/her obligation to mitigate damage.[36] Consequently, if the employer does not invoke the employee's obligation to mitigate damage in the labour lawsuit and does not make a motion for proof, then its fulfilment cannot be examined ex officio, so the court must judge the income foregone by disregarding the mitigation obligation. The applicant sought compensation for the loss of income in his claim, proved the lack of recovered income, and the defendant claimed, even in his application for review, that the employee had not fulfilled his obligation to mitigate damage. Consequently, the trial courts made a correct decision in accordance with Section 82(2) of the Labour Code, when based on the available data established a compensation equal to the absence fee.[37]

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36 See judgment reported in EBH.2015.M.23.

37 Labour Principles Resolution No. 2/2017.

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Status Report on the Regulation of Insolvency Law at an EU Level and Its Trends of Transformation and Development

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Abstract. In the last almost one decade, a number of initiatives were launched in the European Union to reinforce the development of treating cross-border insolvency cases in a unified manner and to strengthen cooperation in the field. The primary aim of this study is to review the results of legislation in the field of insolvency law and to provide an analytical assessment of the level of cooperation based on the legal sources in force. Beyond a critical appraisal, the author intends in this status report to foreshadow a comprehensive picture of the anticipated trends for development too.

Keywords: insolvency, European Union, international cooperation, reorganization, bankruptcy

1. Introduction

Both in the European[1] and in the Hungarian literature,[2] several authors have pointed out that since December 2012 a change of concepts has been tangible in the consultation and legislation initiative of the European Commission to settle insolvency procedures at an EU level: '[...] the interest of the Commission shifted from liquidation proceedings to preventive restructuring procedures [...]'.[3] In conjunction with the view of these authors, this research study aims to explore in a comprehensive way what other changes and trends of transformation can be

1 Jaufer 2017. 255.
2 Nagy 2018.
3 Nagy 2018. 12. Translation by the author. Unless otherwise specified in the footnotes, all translations from non-English source materials are from the author.

traced as a result and beyond the preventive restructuring procedures gaining the foreground and what consequences the current level of cooperation bears on the regulation of Hungarian substantive and procedural law.

2. Levels of Cooperation

The need for a unified regulation of insolvency law in the European Community first arose in the 1990s, as a result of which Member States signed the Convention on Insolvency Proceedings in 1995. Although this convention did not take effect owing to the United Kingdom,[4] it meant the reinforcement of integration and the initial milestone for creating Council Regulation (EC) No 1346/2000 on insolvency proceedings.[5] During the compilation of the first insolvency regulation, it became clear that the material law regulations of certain Member States are so different that they do not enable the unification of insolvency proceedings,[6] and, secondly, the cooperation mechanism cannot lead to civil material law unification. Between 2002 and 2017, the coordination of Member State insolvency proceedings was implemented in the field of insolvency law that was rooted in the definition of the applicable law and the acknowledgment of the common principles of insolvency proceedings in the Member States. Pursuant to Article 46 of Council Regulation (EC) No 1346/2000, the Commission is obliged to review the practical application of the insolvency regulation until 1 June 2012 and thereafter every five years and submit the results of the review and its proposals to amend the regulation to the European Parliament, the Council and the Economic and Social Committee. Based on the authorization granted by this article, a consultation mechanism was initiated on 30 March 2012 to execute the necessary amendments of insolvency rules.[7] Taking into consideration the results of the consultation mechanism, the Commission submitted its report[8] and its proposals on the amendment of the European insolvency regulation.[9] The report found that the regulation fulfils its purpose in terms of ensuring creditor demands appearing in cross-border insolvency proceedings and the measures related to the assets of insolvent debtors. Nevertheless, increasing the efficiency of insolvency proceedings raised the necessity for a reformulated regulation.

4 Kengyel 2009. 193.
5 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. Official Journal of the European Communities L 160/1. 30.06.2000.
6 Kengyel 2009. 193.
7 Hess–Oberhammer–Pfeiffer 2014.
8 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee COM(2012) 743 final 12.12.2012.
9 Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings /COM/2012/0744 final – 2012/0360 (COD) / 12.12.2012.

Besides the applicable law and the rules of acknowledging the insolvency proceedings of Members States, the revamped insolvency regulation published in the Official Journal of the European Union on 5 June 2015[10] also realized a deeper level of cooperation in the following areas: 1. The exact definition of the material scope of the new regulation: the material scope of the new EU Insolvency Regulation does not include only insolvency proceedings aimed at the actual insolvency of a debtor but so-called proceedings treating imminent insolvency. 2. The further clarification of the connecting factor pertaining to the jurisdiction governing the main insolvency proceeding: definition of the debtor's centre of main interest.[11] 3. A supplemented system of rules on jurisdiction: Article 4(1) of the regulation sets forth the court's obligation of examining ex officio its jurisdiction and naming the grounds for jurisdiction in the resolution to open an insolvency proceeding; the active involvement of creditors in the definition of the jurisdiction of an authority;[12] integrating the jurisdiction rules pertaining to claims closely related to and derived from insolvency proceedings into the regulation. 4. Placing limitations on the opening of secondary insolvency proceedings. 5. Creating insolvency records. 6. Unified EU-level treatment of insolvency cases concerning groups of companies or certain members of a group. When drawing up the balance on the regulations applicable from 26 June 2017, it can be stated that the primary aim of the revamped insolvency regulation is still the coordination of insolvency proceedings among Member States through procedural law tools and institutions. In spite of the regulation, the further reinforcement of the procedural law regulation forming the base of judicial cooperation did not lead to the unification of the rules of either the civil material laws or the procedural laws of Member States. At the same time, in my opinion, limiting the opening of secondary insolvency proceedings can be viewed as the first step of intervening in Member State procedural law regulations.[13]

10 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Official Journal of the European Union L 141/19. 05.06.2016.

11 According to Article 3, paragraph (1): 'The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. […] In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. […] In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. […] In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary.'

12 If the circumstances of a given case question the jurisdiction of the court, beyond the court calling on the debtor to submit evidence in support of their statements, the debtors must be provided with the opportunity to elaborate their standpoint about jurisdiction pursuant to paragraph (32) of the Preamble.

13 See i) determining the persons entitled to initiate secondary proceedings [Article 37 paragraph (1)]; ii) fixing the time limit for opening secondary insolvency proceedings [Article 37 paragraph (2)]; iii) the possibility of suspending the opening of secondary proceedings [Article 38 paragraph (3)].

The Commission Recommendation (No 2014/135/EU) on the new approach to business failure and insolvency was published in the Official Journal of the European Union on 14 March 2014.[14] The *Entrepreneurship 2020 Action Plan*[15] formed the preamble of the recommendation and was approved on 9 January 2013, where the Member States were invited to reduce the discharge time and debt settlement for honest entrepreneurs after bankruptcy to a maximum of three years by 2013 and to continue offering support services to businesses for early restructuring. Although a recommendation as a European Union legal source does not have a legally binding effect,[16] it still foreshadows the future legislative policy of the Commission. In my view, based on the action plan, it was clear already in 2013 that besides the Commission's legislative direction switching from insolvency proceedings aimed at liquidation to preventive restructuring[17] and beyond the previous procedural law of harmonization, it was also pointed into the direction of material law harmonization. Although the recommendation about a new approach to business failure and insolvency promoted the strengthening of the level of mostly procedural law cooperation through the harmonization of other procedural law institutions, as set forth in Council Regulation (EC) No 1346/2000, the implementation of the proposals in the recommendation implied the necessity of fine-tuning and amending the civil material law legislation of Member States. The focal point of the recommendation was establishing and ensuring the framework for preventive restructurings and the provision of a so-called 'second chance' for entrepreneurs. In my view, the time limit for the rescue built in the 'second chance' element can be considered as the harmonization of material law regulations.

The Preventive Restructuring and Insolvency Directive constituted another stage of judicial cooperation in insolvency law.[18] Preamble paragraphs (12) and (13) of the Restructuring and Insolvency Directive defined the relation of the new insolvency regulation to the directive. The directive does not affect the scope of the regulation; it stipulates that by overriding the preventive proceedings under the scope of the regulation (which reinforces the rescuing of economically viable debtors and entrepreneurs and constitutes procedures discharging the debt of other natural persons), it prescribes the implementation of restructuring procedures which in effect fall under the scope of Member State material law. Preamble paragraph (12) of the Restructuring and Insolvency Directive openly sets forth that while the new insolvency regulation is aimed at settling cross-border situations, the directive intends to foster the unified treatment of clearly domestic insolvency cases by prescribing minimum standards. The obligations

14 COM(2014) 1500 final, 12.03.2014.
15 COM(2012) 795 final, 09.01.2013.
16 Harsági 2009. 42.
17 Nagy 2018. 12.
18 Official Journal of the European Union L 172/18, 26.06.2019.

formulated in the directive will give rise to legislative and legal amendment obligations for the Member States upon the deadline expiring on 17 July 2021 in three areas: 1. implementing and providing preventive restructuring frameworks for debtors struggling with financial difficulties to prevent insolvency and ensuring the viability of the debtor in the event of imminent insolvency; 2. the harmonization of procedures leading to the discharge of the insolvent entrepreneur's debt; 3. establishing measures aimed at increasing the efficiency of restructuring, insolvency proceedings as well as the discharge of debts. The question arises in me as to whether the so-called minimum standards laid down in the directive truly result in appropriate legal harmonization at the level of legislative acts (directives).

3. Interpretative Complications regarding the Concepts of Likelihood of Insolvency, Imminent Insolvency, and an Undertaking in Difficulty

By reviewing the European Union legislative actions primarily dominant in the field of insolvency law and the definitions therein, it can be stated that just as insolvency proceedings do not have a single autonomous definition independent of national laws, so the definition of imminent insolvency was not constituted at an EU level either. Although the strengthening of cooperation is carried out through the harmonization of the material law provisions pertaining to reorganization proceedings, the likelihood of insolvency, imminent insolvency, and an undertaking in difficulty are concepts posing interpretative difficulties.

Both the new insolvency regulations[19] and the Restructuring and Insolvency Directive set forth Member States' domestic law as being the one governing the interpretation of insolvency proceeding and the likelihood of insolvency.

The Commission published its guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty on 31 July 2014,[20] in which it provided a detailed definition of the concept of an 'undertaking in difficulty'. Highlighting the core of the definition, '[...] an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term'.[21] The guidelines provide an exhaustive definition of the conditions that must arise in a business for it to be listed under the term of an undertaking in difficulty. Nevertheless, the need for an interpretation of this notion was raised in front of the Court of Justice of the European Union.

19 See Article 2, paragraph (2).
20 Official Journal of the European Union 31.07.2014 – C 249/01.
21 Point 20 of the 2014 guidelines.

The *Tribunale amministrativo regionale per le Marche* (Regional Administrative Court for Le Marche, Italy) submitted a request for preliminary ruling in the ongoing proceeding between Nerea SpA and the Regione Marche with the cooperation of the Banca del Mezzogiorno – Mediocredito Centrale SpA.[22] The request for a preliminary ruling was submitted with regard to the interpretation of Article 1, Section (7) c) of Commission Regulation (EC) No 800/2008[23] on declaring certain categories of aid compatible with the common market in application of articles 87 and 88 of the Treaty on the Functioning of the European Union. In the procedure for a preliminary ruling, the interpretation of the concept of an undertaking in difficulty was of key importance. In the Opinion of the Advocate General published on 5 April 2017, Manuel Campos Sánchez-Bordona pointed out that '[a]t the time when the 2004 Guidelines were adopted, the Commission acknowledged that "there is no Community definition of what constitutes a firm in difficulty". As a result, the conceptual features of that term needed to be set out in a text, for on it depended the application of other provisions of EU law […].'[24] Based on the opinion of the Advocate General, the Commission used ad hoc conceptual constructions in its 2014 Guidelines, which became legally binding criteria constituting a normative concept through Regulation 800/2008, which referenced the guideline and transferred the concept.[25]

I believe that based on the findings of the Advocate General in the Nerea SpA v Regione Marche case, it can be clearly stated that the concept of an undertaking in difficulty is an autonomous EU concept independent of Member State laws, which can form the basis of interpretation for the terms of likelihood of insolvency and imminent insolvency applied in prevailing regulations and guidelines. This is because the conceptualization of these concepts has not yet happened not only at the European Union level but also at a national level in many Member States, including Hungary.

4. The Impact of Strengthening Cooperation in Hungarian Substantive and Procedural Law

Hungarian legislation complied with the content of the 2014 Commission Recommendation on a new approach to business failure and insolvency by drafting Act No CV of 2015 on the debt settlement of natural persons (the Debt

22 *Nerea SpA* v *Regione Marche*, Case *C-245/16*.

23 Official Journal of the European Union 09.08.2008 – L 214/3.

24 *Nerea SpA* v *Regione Marche*, Case *C-245/16* – the Opinion of the Advocate General, point 45.

25 It is important to highlight point 50 of the opinion submitted by the Advocate General, which calls the attention to the fact that 'the definition of "undertakings in difficulty" adopted by Regulation No 800/2008 is not exactly the same as that adopted by the Commission in the 2004 Guidelines but rather […] a *simplified* version thereof'.

Settlement Act).[26] Personal bankruptcy is a legal institution helping indebted private individuals to get out of the debt trap with the primary aim of restoring the solvency of the debtor through the harmonization of the debtor's and their creditors' interests. The Act allows for gaining private bankruptcy protection in a non-litigious civil proceeding at court or in an extrajudicial procedure.

Pursuant to Article 34 of the Restructuring and Insolvency Directive, Member States have until 21 July 2021 to ratify and publish the laws and make any necessary law amendments which provide adequate restructuring frameworks for debtors in financially difficult positions and grant a second chance for insolvent or excessively indebted yet honest undertakings.

Based on prevailing regulations, in Hungary, business entities may receive a payment moratorium based on Act XLIX of 1991 on bankruptcy and liquidation proceedings (Bankruptcy Act), whereas private individuals may be granted a moratorium pursuant to the Debt Settlement Act. The personal scope of the directive does not extend to insurance companies, credit institutions, investment undertakings or collective investment forms, other financial institutions and organizations, public law bodies established in conjunction with national law, and natural persons who are consumers. By extending the personal scope of the Debt Settlement Act, Zoltán Fabók would make it possible to apply 'private bankruptcy' to a wider scope,[27] whereas Adrienn Nagy sees the possibility of implementing the obligations set out in the directive in the further development of the rules pertaining to bankruptcy proceedings.[28] Supporting Adrienn Nagy's viewpoint, I believe the amendment and further development of the rules in the Bankruptcy Act[29] would make it possible to execute the provisions of the regulations the most effectively. In my view, by considering the primary goal of the Debt Settlement Act – i.e. providing private bankruptcy solutions for consumers –, the institution and the established procedures are not suitable for rescuing businesses in financial difficulties, and the extension of the personal scope of the act would only result in the institution of private bankruptcy becoming emptied out.

The Hungarian legislator is in a long delay with providing a definition for the concept of a situation threatening with imminent insolvency. Based on Zoltán Fazakas's approach, sections 27 (2) and 33/A (3) of the Bankruptcy Act do formally define the case of imminent insolvency, but do not do so in effect

26 The Debt Settlement Act § 106/A determines which source of EU law the legislation serves to comply with. The Act does not refer in this respect to the 2014 Commission Recommendation. Thus, the question may also arise as to whether the debt settlement of natural persons and business failure and insolvency are indeed the same platform.

27 Fabók 2016.

28 Nagy 2018. 30.

29 Nagy 2018. 31–32.

or in a correct way.[30] Based on Section 33A (3) of the Bankruptcy Act, 'the onset of a position threatening with imminent insolvency is the time from which the leaders of the economic operator could have or should have foreseen, as it is to be expected from persons in such positions, that the economic operator will not be capable of fulfilling its liabilities when they become due'. Therefore, it can be observed that if the formal conditions set out in the Bankruptcy Act exist and there is provided proof of them, the court rules for insolvency.[31] In agreement with Fazakas's approach, this definition '[...] may only provide a good starting point for the court proceeding to define the time aspect at most, but it is unable to grasp the essence of the threat'.[32]

In my view, during the implementation of the transposition obligations set forth by the directive, the Hungarian legislator must first establish the preventive restructuring framework for economic entities in financial difficulties by transforming the concept of imminent insolvency. Besides compiling a comprehensive concept, I find it worth considering the concept of an undertaking in difficulty as defined in the 2014 Guidelines of the Commission, which differentiate among the various company forms when defining the aspects of determining a 'difficult position'.

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31 Miskolczi-Bodnár–Török 2002. 134.

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State Immunity in Relation to Damage Caused by Legislation

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Abstract. Whenever we mention damage caused by legislation, the question arises if it is possible to talk about the liability of what defines the rules of liability. Is the civil court competent in deciding in these cases at all? It is doubtless that the concept of damage caused by legislation is on the threshold between public and private law, and immunity decides whether it is one or the other. More and more articles are written on the topic of damage caused by legislation, and their approaches to the root of the problem are all different. In this study, by analysing the issues of immunity with regard to damage caused by legislation, I try to reveal the past and present of regulations, and in this way the damage caused by legislation can be separated from the state's functional immunity.

Keywords: state liability, damage caused by legislation, state immunity, Hungary, Civil Code

1. Introduction

Article XXIV (2) of the Hungarian Constitution states that: 'Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an act.'[1] However, who shall we contact in case when the authorities are responsible only for the execution of the harmful legislative provision or if the cause of violation of civil interests is the legislation itself?

If we mention damage caused by legislation, the question arises if it is possible to talk about the liability of what defines the rules of liability. Is the civil court even competent in rendering decisions in these cases at all? It is doubtless that

1 Translation by the author. Unless otherwise specified in the footnotes, all translations from non-English source materials are from the author.

the concept of damage caused by legislation is on the threshold between public and private law, and immunity decides whether it is one or the other. 'Immunity is somewhat the counterpoint of responsibility; it means irresponsibility. More precisely, immunity is a category that includes cases of the lack of impeachment. Immunity is a case, a situation in which, for some reason, a given legal subject cannot be called to account, although in fact the terms are given.'[2]

Although when we talk about legislation, and so about the most important competence of the major supreme body of popular representation that forms the rules that determine our everyday lives, in the case of certain decisions, it is hard to shift from a hierarchical relationship to an equal one. Absolute immunity is merely history by now, though this does not mean that every damage caused by law can be mended.

More and more articles are written on the topic of damage caused by legislation, and their approaches to the root of the problem are all different. In this study, by analysing the issues of immunity with regard to damage caused by legislation, I try to reveal the past and present of regulations, and in this way the damage caused by legislation can be separated from the state's functional immunity.

2. Immunity of the State. Premise

Discussing liability for damage caused by legislation, the first topic that has to be mentioned is the state's immunity. The simple reason for this is that if the state's immunity is persistent during the performance of the legislative action, then we cannot talk about damage caused by legislation. Currently, the immunity of the legislative body is a hardly rebuttable ideology. First of all, in my opinion, to orientate in this topic in agreement with the current position of legal theory and judicial practice, a stand must be taken regarding whether the damage caused by legislation is in the category of public or private law. By answering this question, we already formulate a view on the issue of the degree of immunity that the state is entitled to.

> In Hungarian legislation, it was common that the institution of the state's liability for damage was not admitted by any of the two branches of law as their own. They did not compete to add the state's liability for damages to the list of their own subjects. This reflects that […] the state's liability for damages is between private and administrative law, and practically it can be negotiated in both networks of these two branches of law; still, once for

2 Kecskés 1988. 13.

> all, it remains a foreign body as well. Its insertion is not perfect into any of the branches of law.[3]

The divergence of the ideas expressed in the topic results from the fact that while the legislative activity is in the category of public law, the possible damage caused by the legislation's outcome, the legal act that comes into effect, is in the category of private law by its very nature.

According to Judit Czukorné Farsang, while examining the immunity of the legislative body, one should take into consideration not the legislative process but the result of legislation, meaning the content of the injurious law in force or the absence of the law.[4] Dániel Karsai stands for the view that the process of legislation – procedurally – is indisputably in the category of public law; in certain aspects, it has relevance for public law, from which the application of the rules of private law bindingly follow.[5] Therefore, damage caused by legislation can be approached from the perspective of public law as well, which focuses on the legislative activity itself, the institutions and measures created by a central power.[6] The renowned representative of this concept is professor Attila Menyhárd. With regard to the subject, according to his standpoint, the legislative activity of the state shall not enter into the framework of private law as responsibility relies on some kind of liability, in this particular case being a claim for damage, on some kind of private law obligation, which does not make the state, as the final lawgiver, liable. If, in accordance with private law, the state acts as an owner, then it is the only condition during which the state is responsible for private law obligations.[7]

In connection with state immunity, the first principle that should be examined is how the elements of public and private law affect the immunity of the state and its legislative body. In that respect, state immunity can be divided into two groups. In the first group, such cases are listed in which the state as a legal entity enters into a contract, and in the second group those cases are included in which the state as a legislative body unilaterally controls certain rules, which oblige and authorize those who apply the law. Indeed, in theory, it would be possible to regulate the immunity of the state's contractual relationship (civil, private law relations) separately from its immunity during the legislative procedure (expression of public law). Thus, examining the state's liability for damages, separation is possible between the tasks executed by the state in the name of its sovereignty and the state's acts that were not carried out from the position of

3 Kecskés 1988. 253.
4 Czukorné Farsang 2019. 478.
5 Karsai 2014. 313.
6 Harmaty 2018. 775.
7 Menyhárd 2018. 882–883.

authority.[8] Therefore, our first task is to detach from state immunity those actions of the state in which it acts as a legal entity and not as a legislative body. If we can carry this out successfully, then the contractual relationship can be removed from the topic of liability for damage caused by legislation.

3. Functional Immunity

The doctrine of functional immunity contains situations in which the state takes part in the market economy and enters into a contract primarily as a legal entity and not as a legislative body since, 'in addition to exercising public authority, the state increasingly appears as an economic operator'.[9] Therefore, the doctrine of functional immunity has evolved to solve problems in which the state decides itself that in order to take part in the economic life, it enters into civil legal contracts. The state is in the special situation that it can decide for itself, for example, when using certain public assets, whether it wants to choose public law rules or private law rules; however, later there is no possibility in terms of switching from one to the other.[10]

The necessity of functional immunity and the unsustainability of the state's immunity was historically recognized when the state became involved in economic life and entered into trade by concluding private law contracts; however, in a possible legal dispute, the State utilized its sovereignty to exempt itself from the consequences.[11]

> In 1873, in the Charkieh affair, Justice Phillimore claimed as follows: The concept of giving the toga of a merchant to the state only in advantageous situations is untenable. However, when the State has to fulfil its obligations as a merchant, soon the toga is taken off, saying that it was just a disguise, and it puts on the ornate of the sovereign governor, as now it is advantageous, and it shirks its obligations, while its partner in business remains without compensation, back to square one.[12]

Pursuant to this view, the doctrine of functional immunity was integrated into the legal system first on the national and then on the international level as well. It declares that: 'the state is not entitled to immunity when the state acts not in

8 Boóc 2013. 507.
9 Lehotnay 2010. 396.
10 Papp 2018. 788.
11 Mádl–Vékás 2015. 184.
12 Id. 185.

its public law function (iure imperii) but in its private and commercial law role (iure gestuonis)'.[13]

In Hungary, Decree No 50 of 1953 (X. 23.), the Hungarian Labour Code (abbreviated according to its Hungarian name as the MT), was the first act in which the state's legal personality under private law was defined, in the following way:

> [t]hose assets which are not specifically attributed to any of the public entities by the national budget, and also assets which do not have specific purposes, yet as a result of legal provision or the provision of the claimant the state is entitled to them, the state directly obtains them, and the responsibility deriving from them is also the liability of the state. In such a case, the state is represented by the Minister of Finance.[14]

The 1959 edition of the Civil Code removes the state from the group of legal persons and defines it as a special, particular legal entity. Since the doctrine of functional immunity began to shake slightly during the socialist legal system, this special categorization made possible its empowerment with additional rights.[15] Thus, according to the doctrine of functional immunity, when the state enters into contracts as a party under private law, it cannot intervene in the same contract as a public entity. However, this doctrine was not fully implemented in practice.[16] The state as one of the contracting parties remains a Janus-faced institution. Thus, the state enters into a schizophrenic situation in private law relations and with a view to the protection of public interests, as in certain cases it may appear as a public law entity as well, blurring the boundaries between the roles of public and private law.[17] An example for the public law element merging into private law contract is the maximum sentence that can be imposed by the state in the case of a breach of contract of the other contracting party in concession contracts.[18] Thus, it is clear that in case of a breach of a concession contract the consequence is not a civil liability claim for damage but a public law sanction; however, it affects the non-state contracting party only. On the other hand, the state's actions – from a private law position – in case of any breach of contract do not have any consequence either on the level of private or on the level of public law. It may arise as a question whether this contractual concept can be inserted into the framework of public or private law or perhaps into the framework of contract law.

Based on the above, according to one definition, what we mean by functional immunity is each situation when the state as a legal subject enters into a private

13 Id. 185.
14 Kecskés 1988. 268.
15 Kecskés 1988. 269–271.
16 Zoványi 2016. 359.
17 Zoványi 2016. 360.
18 Zoványi 2016. 360.

law relationship; however – examining the theories –, it must be stated that in practice functional immunity does not include every private law situation, but only those cases are involved in which the state acts as a contractual party. Naturally, in this study, the idea of functional immunity is used in this sense. The system of principles invoked by Attila Menyhárd embodies the doctrine of functional immunity. Although this system acknowledges the liability of the state in private law contracts, it adds a special norm to the state's conduct of private relations and its ownership under private law. Namely, the state, even in its position of an owner, may be subject to the liability for enforceable obligations – such as in the case of failure with the consequences of compliance or compensation – only in cases regulated by public law instruments, primarily according to the rules of national asset and public finance management.[19]

To support his standpoint, the author refers to the judicial opinion on the decision of the legal proceeding for the so-called Budapest Metro Line 4. Indeed, the legal proceedings of Metro Line 4 focused on this question, where the courts in charge lined up contradictory arguments concerning state immunity. As a conclusion of the legal proceedings, it can be stated that the financing of the construction of Metro Line 4, which connects the south of Buda with Rákospalota, was divided in 60%–40% between the investor BKV and the Municipality of Budapest. However, in 1999, the State intended to exercise the right of withdrawal from their commitment, so the appropriation of the support of this investment was not submitted to the Parliament in the draft on that year's budget,[20] and thus it was not part of the budget bill either. Shortly afterwards, the State informed the Mayor of Budapest that it no longer supports the investment and that in the future the contract would be repealed.[21] After that, the Municipality of Budapest as the first and the BKV as the second plaintiff filed a lawsuit against the Hungarian State based on Section 123 of the Act on Civil Procedure (abbreviated as Pp.) in force at the time, to determine whether the termination of the contract was illegal, rendering the termination void, so the contract may be kept in force and the State can be obliged to fulfil the initial commitment. The courts of first and second instance found that the contract is still in force, its termination having been unlawful; however, the State maintained their decision of not fulfilling the contractual obligations of supporting the investment.[22] The subject matter of the second proceeding was about the performance of the State's contractual obligations and the fulfilment of the claim for damages. It is highly relevant to our topic that in this proceeding it was adduced by the defendant that the rules of private law should not be applied for this contract since it is not a private

19 Menyhárd 2018. 882.
20 Nagy 2003. 55.
21 Gárdos 2000. 2.
22 Gárdos 2000. 3.

contract but a public law instrument, and it is such a contingent category in which the performance depends on the state's financial situation; however, the last phrase of the contract in this legal proceeding is frequently used also in private law contracts, stipulating that 'issues not covered by this contract shall be ruled by the Civil Code' and that in case of dispute the judicial process was a contractual term as well.[23] Recorded by the court of first instance, it is stated that in the contentious case the main executive body of the State, the Government (the Cabinet), did not provide the DBR Metro project's budget appropriation for the subject year in the draft bill of the 1998 and 1999 budget. The defendant may not rely on its own failure with the purpose of deriving benefit from it.[24] Consequently, the legal basis and the suitability of use of the plaintiff's main claim proved to be well founded.

However, the Supreme Court opted for an opposing position and declared that the state was not entitled to have unlimited autonomy – namely, it may not have disposal of its assets indefinitely; as a result, the state as such may not enter into a direct private law relationship at the expense of the budget since the presentation of the Government's budget proposal is an administrative legal act, in which if the Government does not include the proper accomplishment in agreement with its private law relationship, this presentation cannot later be taken into account in a private law procedure. It clarifies in relation to the judgement rendered by the court of first instance that private law obligations cannot be guaranteed financing by the central government budgets and that also the compliance with such obligations are unenforceable.[25] The judgement about the rejection of the claim of the Municipality of Budapest was based on the fact that the State cannot be obligated to fulfil its liabilities concerning state assets in cases when the Parliament's legal declaration is needed to maintain the obligation. As a result, the bill on the central budget is approved by the Parliament as a sovereign legislative body, and it need not take into account the liabilities of the Government. Furthermore, concerns were raised that if the court obliged the Government to fulfil the contract, then the Parliament would in this way be ordered to amend the bill on the central budget. In the light of the above, in practice, the implementation of functional immunity of the state was not successful even at the dawn of the 21st century, and since then, by all means, the principle is applied that 'state immunity is a legal institution which affects fields in which its presence and operation cannot be explained either economically or socially or politically'.[26]

Concerning the question of state immunity, analysing its public and private law elements, we can state that if the state's conduct is viewed as a duty to

23 Gárdos 2000. 4.
24 Nagy 2003. 57.
25 Supreme Court Decision reported under No Gfv. X. 31.639/2001/12.
26 Kecskés 2001. 11.

compensate for damages only in its quality as an owner and in a way governed by public law elements, then in this case a contract concluded this way confuses elements of public and private law so that neither state liability nor private law claims shall arise from it. We can consider it as a step forward in legal development that the gain of these trials was Section 28, subsection (2) of the former Civil Code (abbreviated as the Ptk.), which stated that even in the absence of financial coverage or in case of exceeding the financial coverage provided for this purpose, the state shall remain liable for damage claims, reimbursement and compensation, and the contractual obligations committed to persons of good faith. According to the ministerial explanation attached to the phrases in parallel with public law regulations, the legislative body should settle the legal scope of state commitments also in the field of private law, and it can be solved by the amendment of the Ptk. The Ptk. was inconsistent with regard to budgetary institutions – it stated that even in cases of exceeding their financial coverage, they are still liable for damage claims, reimbursement, compensation, and their obligations incurred towards third parties; however, the same was not deemed compulsory for the Hungarian State as a private legal entity, a legal person. This deficiency contradicts the requirements of legal certainty, and it violates the security of economic exchange. The Hungarian State should be treated the same way by private law as other legal entities are, also including budgetary agencies in particular.[27]

The principle – still – maintained by Attila Menyhárd, according to which the state may hold liability as a public law entity only, in the course of which these contracts cannot be removed in practice from the scope of public law, became outdated from the aspect of legal theory with the legislative changes performed for this case already following the binding decision closing the legal proceedings of Metro Line 4.

Practically, the new Ptk. (the New Civil Code) maintained the former provisions, as recorded by its sections 3:405 and 3:406 that the state participates in private law relations as a legal entity. The representative of the state in private law relations is the minister responsible for state property. The obligation arising from laws controlling civil obligations is mandatory for the state and the legal entity as part of public finances also in the absence of financial coverage.[28]

In my consideration, based on the laws in force, the state's accountability in its contractual relations should not be a problem as a consequence of the fact that in these cases the state itself enters into legal relations; thus, it is obliged to bear the consequences related to it. Therefore, in my opinion, the issue of functional immunity is detachable from the topic of damages caused by legislation.

27 Czukorné Farsang 2019. 479.

28 Act No V. of 2013 regarding the Civil Code, § 3:405. § 3:406.

4. Legislative Immunity

Although the state's successful activity in economic life is not the most significant self-expression of the state, still '[w]e can get much closer to the very essence of the institution if it is assumed that the liability of the state is an integral part of the state's autonomous structure of legal subjectivity and constitutes one segment of the state's liability for regulations in property law (private law and international private law)'.[29] Nevertheless, state presence in the economy – in the 19th century – brought along the downfall of absolute state immunity. In that time period (1853–1861), Hungary adopted Austrian law, which repealed immunity.[30] Between 1874 and 1876, the alienation of Austrian law brought about the demand for the destruction of state immunity, which primarily incorporated state liability for damages caused by public officials, under the conditions of certain procedural criteria.[31] The expansion of the liability of the state is presented in Act No VIII of 1871 on the liability of judges and court officials, Act No XXXIII of 1896 on wrongful convictions in criminal law measures, and Act No XX of 1897, which provides for state liability for the damages caused by public officials in charge of asset management.[32] According to the views of Miklós Borsodi and László Kecskés, state liability, even without the detailed explanation, is accepted based upon customary law in Hungary from the 1890s. The Act on Private Law of 1900, however, states in its reasons significant and reformist principles when it 'refutes the financial concerns that were raised solely against the principle of state liability, demonstrating that in those states in which liability has existed for a long time, it has never brought about a considerable charge on the treasury'.[33] In the 1920s, the private legal nature of the subject fades away, and then the Soviet-type legislation repeatedly restored state immunity, which evidently, in principle, precludes any state liability for indemnification. This approach appeared not only in domestic but in international market associations as well. However, later, in the 1970s, exactly the rules of the code of private international law regulated the 'functionally relative' principle of immunity; still, this cannot be acknowledged as a form of real progress.[34]

In legislation, immunity was still irrebuttable based on Act IV of 1959 of the former Ptk. As the former Ptk. stated nothing about damage caused by legislation or about its precedent and method of compensation, the BH (judicial decision) No 1994.312 of the Supreme Court settled the issue as follows:

29 Kecskés 1988. 266.
30 Kecskés 1988. 251.
31 Kecskés 1988. 257.
32 Kecskés 1988. 258.
33 Kecskés 1988. 259.
34 Kecskés 1988. 320–328.

> the law sets universal and abstractly expressed rules of conduct, and thus in the case of legislation – also including the liability related to it – the rules of public law shall apply to it, which also provide protection for the legislative body in case of constitutional violations even if the Constitutional Court annuls the law and the annulment has a retroactive effect. The executive body's activity in creating norms is under constitutional control, but the occurrence of any possible damage brought about by the enactment of the normative general law does not create a private law legal relationship between the legislative body and the aggrieved party, wherefore the rules of civil liability for damages cannot be applied.

The Supreme Court of Justice of the time explained in the following way in its decision BH No 1998/334 that the rules of public law, more specifically the rules of constitutional law, shall apply to legislation, so that in this case an obligational relationship does not form between the legislative body and the aggrieved party. However, as the Supreme Court does not distinguish between certain legislative bodies, immunity applies to all lawmakers.[35] No significant change occurred even with the entry into force of the new Ptk., and for this reason the text in effect does not contain damage caused by legislation although there were plenty of proposals for it.

One of these proposals is the Concept (thesis) of the new Civil Code, which was accepted at the Codification Committee's meeting on 8 November 2001. In Book 6 of the new Civil Code, item V/10 records regarding state liability that:

> the rule of liability for damages caused in the exercise of public administration needs to be reconstructed. Accordingly, the state, regarding state bodies and organs of local government, is obligated to pay compensation for the damage caused by the activities of planning and management during its performance of public authority or because of the failure of these activities. It may not be held liable if it can prove that the damage was caused by a reason outside of its scope of activities, administration, control system or caused due to circumstances that could not be avoided or due to the unavertable conduct of the aggrieved party. The culpable contribution of the aggrieved party shall lead to the apportionment of the payable compensation.

It also states that these rules shall be applied in the case of claim for damages for wrongful arrest or unlawful detention. It points out that: 'The new Code should also set forth state liability for damages caused by legislation in case of unconstitutional legislation only.'[36] The first part of the proposal refers to damage

35 Lehotnay 2010. 400.

36 *Az új Polgári Törvénykönyv koncepciója* 2002.

caused in the exercise of administrative law, while the last sentence refers to damage caused by legislation. From the justification linked to the proposal, it is clear that practically the Concept intended to include (Civil Chamber, abbreviated as PK) statement No 42 of the Supreme Court of Justice (the Curia), according to which the liability for damages caused by the state, the local government, and their organs may be confirmed if the tort was performed during exercising public authority, i.e. in the framework of public authority activity or their failure to perform.

A significant idea of the Concept is that the rule of state liability for damages caused by legislation should be settled to some degree in the Code. However, this did not happen, and the bill justified it as follows: Based on the rules of the Ptk., the actions for compensation for damages caused by legislation was adamantly rejected by legal practice. The Proposal does not contain a specific regulation for the liability for damages caused by legislation, by reason of which, on the basis of a general liability structure, the legislative body is liable for the damage thus caused. There is no doubt that damage can be caused by unconstitutional legislation or by the failure of implementing EU obligations. In these cases, based on the general rule of delictual obligation, the aggrieved party may request the court to compensate for the damages caused.[37]

It is unfortunate to settle this way such a debate that is solved with exactly the opposite result in judicial practice;[38] however, it is certain that for the judicial practice the justification linked to the bill proved to be sufficient to prevent the exclusion of state liability in individual cases.

The general rules thus shall apply also to the legislative body according to Section 6:518 of the Ptk., which states the general prohibition of tort, Section 6:520 of the Ptk., which sets up the presumption of the tortious damage, and according to letter d) of the same section, it is not a tortious act if the injuring party caused the damage with a conduct protected by law and the conduct does not interfere with the legally protected interests of another person or the law obliges the injuring party to pay compensation. However, the debate of state immunity seems to be settled in a way that the state shall not benefit from it in case of damage caused by legislation, and thus with the tortious act it steps into the framework of private law, so sections 3:405 and 3:406 of Ptk. can apply to it as well. However, in the present case, the state, after determining the legal basis of damage caused by legislation, can be held liable as a legal entity. Based on this concept, sections 3:405–406 of the Ptk. are applicable not solely in cases of functional immunity but also in all cases in which the state enters into the frame of private law; consequently, also in the case of contractual liability of damage.

37 Bill No T/7971 on the Civil Code. http://www.parlament.hu/irom39/07971/07971.pdf (accessed on: 15.01.2018). 665.

38 Chiovini 2013.

5. Current Judicial Practice in the Field of Legislative Immunity

The absence of the legislative body's immunity was examined by the Municipal Court of Budapest in the legal proceeding related to liability for damage caused by legislation, in which the Municipality of Budaörs brought an action against the Hungarian State. The Hungarian State as the defendant argued for functional immunity, according to which in the absence of the normative provisions contributing to it, damage caused by legislation is not enforceable. By contrast, the court stated that according to Paragraph (2) of Article R) from the Hungarian Constitution the law shall be binding on every person, consequently on the state as well. Accordingly, the state shall be exempted from civil liability only if this exemption would be provided by law; however, there is no provision with such content in Hungarian legislation. The court in this round explained that the previous judicial practice deduced state immunity from the fact that they placed damage caused by legislation into the category of public law; however, none of the court judgements specifies the provision under law on which the position statement was based. Consequently, contrary to this judicial practice, it set law principles, namely popular sovereignty and the principle of the rule of law, against each other, and it explained that although it can be deduced from the principle of popular sovereignty that the people are the source of public authority, who exercise their power via elected representatives, the principle of the rule of law states that under the rule of law the only absolute authority is the constitutional authority though state bodies may exercise, solely within the framework of their competence, their authority deriving from the sovereign, the people. The sovereign does not empower the legislative body to overstep its constitutional framework; should this happen, then the legislative body is not performing its given duties entrusted to it by the sovereign, and thus it can be held accountable for this conduct.[39]

In my view, this question is in fact directly related to the fact that the reason why the legislative body has not yet declared either its own immunity or the absence of it is because it is not entitled to immunity by means of its derivative power. It is evident that in the non-factual private law cases the legislative body may not be held liable for every kind of detriment to citizens' financial circumstances by reason that as long as the law does not contravene a constitutional principle, the borders of public law are not crossed. However, when legislation causes damage in a verifiable manner, so that the injured party is subject to the disadvantage of the absence of liability, and the injuring party's conduct is part of the facts, a delictual (extra-contractual) relation arises by operation of law. Thus, in that case, the court examined the reference of the defendant, according to which the consequences of an instrument of legislation that goes beyond the limits of the

39 Decision of the Tribunal of the Capital reported under No P.20810/2017/28, para 6.

rule of law shall be the imposition of sanctions based solely on constitutional or political grounds, and it stated that:

> according to Section 6:2, subsection (1) of the Ptk., liability is a fact giving rise to an obligation. Obligation is a relation governed by private law. If the state, or the legislative body who is obliged to assume its liability, causes damage, then such obligation arises to which, by operation of law, the subject is the state.[40]

In the course of the same legal action, during the proceedings of the court of second instance, the Budapest Capital Regional Court also stated that the relevant form of the Ptk., related to delictual liability for damage caused by legislation, shall be applied. Its argument was based on the statements of ministerial justifications of the Ptk. Furthermore, the Regional Court also explained that based on the EU law for the damage of individuals the state shall be held liable, i.e. also when legislation breaches EU law, and thus it would not be compatible with the Constitution, nor with the principle of equality before the law if the state were exempted from liability with the existence of a domestic legal situation.

In the light of the above, it can be stated that state immunity cannot be justified by either the present theory or the practice in force. So, in terms of private law legal relations, meaning owner's liability, entrepreneurial responsibility, or liability for damage, the state does not benefit from immunity.

6. Conclusions

Damage caused by legislation is a complex and difficult category. In many cases related to this subject, judicial practice is consistent neither in situations seemingly clarified by legal provisions nor in the issue of functional immunity. Against this background, it is perhaps hardly surprising that we are still in the dark in terms of damage caused without legislative regulation, by pure legislation.

We cannot ignore the gratifying fact that the reputation of the legislative body previously benefiting from total immunity has changed dramatically, as while previously the state was entitled to unlimited immunity both in public and private law relations, the judicial practice has by now overcome this obsolete practice and declared the absence of state immunity in its private law relations, and thus also the possibility of the theoretical implementation of the liability for damage caused by legislation.

It is regrettable that – although with the enactment of the new Ptk. it would have been a possibility to regulate the issue, and the demand for it has already

40 Decision of the Tribunal of the Capital reported under No P.20810/2017/28, para 6.

been recognized by the legislative body – this possibility of law enforcement was only included into the rationale for legislation, and even there the only thing mentioned about it is that general rules shall apply to it. It might not have been the most appropriate wording in the circumstances of such a practical and legislative ambiguity.

We can thank judicial practice for the absence of state immunity, which proves to be the base of the enforceability of damage caused by legislation; however, with regard to the practical implementation of this legal statement, there are still a great number of tasks that need to be fulfilled by the judiciary, also the legislative body, the representatives of jurisprudence, and the appliers of the law as well.

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Should Surrogacy Be Legally Regulated in Romania?

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Abstract. Maternity surrogacy aims to provide a child for one or more adults. This consists in the deliberate conception of a child, who is without a family of origin, by manipulating his/her birth and his/her biological mother to satisfy the desire of the beneficiary adults. Therefore, the legitimacy of surrogacy is at least debatable. However, considering the old realities of the current Romanian society, in the present study we proposed by lege ferenda the possible implementation in the legislation of maternity-altruistic surrogate, under certain conditions.

Keywords: surrogacy, beneficiary parents, biological father, infertility, human rights

1. Preliminary Remarks

The desire to have children has led numerous infertile couples, as well as single men and women, to resort to one of the most controversial legal and moral measures: surrogacy. The institution of *surrogate pregnancy*[1] is in growth. The

1 A surrogate mother is a woman who, following an agreement, accepts to carry a pregnancy with the purpose of giving birth to a child who will be raised by a different family or person as his/her own. In such cases, surrogacy is based on a contract or surrogacy agreement. The embryo or foetus that is carried by the surrogate can be a biological one or can result from a previously fertilized egg, obtained from another woman. In the latter case, the surrogate mother has no genetic connection to the child she is carrying. Usually, surrogate mothers agree to the surrogacy in exchange for a sum of money. There are also surrogate mothers who do this for altruistic reasons, especially for a sister or daughter who cannot carry a pregnancy to term, is infertile or suffers from an illness that, if associated with pregnancy, could endanger her life.

first cases of surrogacy have been documented in the 1970s in the USA. In order to better understand the reason why it is such a sensitive legal institution and biological process, we must first analyse what the term 'surrogate mother' means in the legal and medical sense and what the relationship is between the surrogate and the people who are in close contact with her.

At least six persons participate during surrogacy, namely:

1. the biological mother, who is the egg donor;
2. the surrogate mother, who carries the child;
3. the 'beneficiary' mother, who becomes the parent of the child upon birth;
4. the biological father, who is the sperm donor;
5. the possible life partner of the surrogate mother, who is legally presumed to be the father of the child;
6. the 'beneficiary' father, who will become the parent of the new-born.

The subject in question raises unanswered questions not only in the field of law but also in the field of health and psychology. The analysis of the institution of surrogacy in the Romanian legal system is tightly connected to the case-law of the European Court of Human Rights[2] as well as the case-law of courts in other jurisdictions. Surrogacy is not regulated in our country,[3] according to the provisions of our Civil Code (art-s 441–447); only medically assisted human reproduction using third party donors is allowed. Before the implementation of the present Civil Code, surrogacy was not regulated in Romania. The law did not expressly prohibit it, and according to legal literature,[4] the procedure was indirectly tolerated in Romania. Romanian laws in force confirm the presumption of maternity in favour of the woman who gave birth to the child, Art. 408(1) of the Civil Code stating that 'the mother becomes a parent as a result of having given birth'.

In the silence of the law, but taking general regulations into consideration, the interested parties may choose between traditional maternity, surrogacy, and gestational surrogacy, but only in the case of an altruistic surrogacy. The reasoning

2 See the following cases: Mennesson v France, Labassee v France, D. and Others v Belgium (no 29176/13), Paradiso and Campanelli v Italy, C. and E. v France (nos 1462/18 and 17348/18), D. v France (no 11288/18), Valdís Fjölnisdóttir and Others v Iceland. See also the Advisory Opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (Request No P16-2018-001). For a short description of the above, see: *Gestational Surrogacy*. https://www.echr.coe.int/Documents/FS_Surrogacy_ENG.pdf (accessed on: 15.04.2021).

3 Romanian law does not regulate surrogacy as such. However, the term 'surrogate mother' is used in a ministerial order, excluding medically assisted human reproduction from the *in vitro* fertilization programme, which is financed by public funds – see Part IV. 3.3. In vitro and embryo transfer programme, letter C, pt. 3 from the addendum to Order No. 377/2017 issued by the Minister for Public Health, regarding the approval of the technical norms governing national public health programmes for 2017–2018, with later amendments (published in the *Monitorul Oficial* [the Official Journal of Romania] No 223 of 31 March 2017.

4 Florian 2018. 123.

of the present statement can be found in the provisions of Art. 60 of the Civil Code, according to which a natural person has the right to freely dispose of oneself if by doing so he or she does not infringe the rights and freedoms of others or public order or morals. (The provisions are identical to Art. 26(2) of the Romanian Constitution).[5] Public order sums up all principles and rules of public order and morals that the lawmaker thinks are essential to society at a certain point in time. All public norms governing public order are imperative. When signing a surrogacy contract, the imperative norms that protect the interests of the society are not being breached, which means that public order is not infringed upon.

The purpose of providing these services is mentioned in the provisions of Art. 66 of the Civil Code, with the marginal title *The Prohibition of Certain Patrimonial Acts*: 'Any act with the object to give a monetizable value to the human body or certain parts and products of the human body shall be null and void, with the exceptions mentioned by Law.' Consequently, even though a woman may provide a service as a surrogate, she cannot ask to be paid because that would mean giving a monetizable value to her body. A surrogate mother may – at least taking only the text of the law in consideration – carry a pregnancy for someone else, for altruistic reasons. More precisely, a surrogate 'sacrifices' herself out of generosity and good will, exposing herself to serious risks that can affect her health, and sometimes even her life, without asking for anything in exchange, out of the desire to help an infertile couple or a person unable to give birth for other reasons. Moreover, the surrogate is not allowed to ask for or even accept any remuneration because it would affect her human dignity[6] as indirectly imposed by the law.

However, things are different in reality. In Romania, there is a 'market for surrogate mothers, ruled by the economic laws of offer and demand […] the prices can come up to 50,000 euros'.[7] In a court ruling, the judge's approach was different, meaning that a woman cannot be a surrogate because 'renting one's uterus contradicts the general principle according to which the human body cannot be disposed of, and surrogacy agreements that benefit a third party are null and void, even in the absence of an explicit legal provision, stating [...] that such conventions aim at trading certain values that are related to public order and morals (civil status, public health)'.[8] In our opinion, if the surrogate mother agrees to the surrogacy for altruistic reasons, she can sign a contract with the beneficiary parents as long as the contract is gratuitous.

5 For further details, see: Ungureanu 2019a. 9 et seq.; Cercel 2009. 7 et seq.; Irinescu 2019. 208 et seq.

6 Walker–van Zyl 2017. 165.

7 Nicolescu 2018. 1081. Translation by the authors. Unless otherwise specified in the footnotes, all translations from non-English source materials are from the authors.

8 Craiova Court of Appeal, Civil Section No I, Civil Decision No 1048/2016. https://legeaz.net/spete-civil-curtea-de-apel-craiova-2016/stabilire-maternitate-decizia-1048-17-02-2016-4iy (accessed on: 21.12.2020).

2. Traditional and Gestational Surrogacy

A surrogate pregnancy is 'a procedure through which a woman becomes pregnant with the intention of giving the child to someone else after birth'.[9] This is a basic definition that can be applied to two situations: *traditional or gratuitous surrogacy*, when a woman accepts to carry out a pregnancy for the recipient parents without receiving any kind of compensation, and *gestational surrogacy*, where a woman receives compensation for carrying the child.

From the standpoint of the genetic connection between the surrogate mother and the child, *two forms of surrogacy*[10] can again be identified:

– *traditional surrogacy* (partial surrogacy), where the surrogate mother is also the biological mother of the child born through surrogacy;

– *gestational surrogacy* (complete surrogacy), where the surrogate mother is not genetically connected to the child born through surrogacy.

Traditional surrogacy 'is a method for assisted reproduction, where a woman consents to becoming pregnant with the purpose of carrying and giving birth to a child that will later be raised by someone else'.[11] Because it is a non-commercial procedure, it occurs more frequently in rich families. It is about 'renting a uterus' through which a baby is 'acquired' without needing to pay any money. It is without doubt that the financial element – expressed in money – is not only present in commercial surrogacy, because the woman who is carrying another family's baby receives some kind of remuneration for taking care of the foetus; however, in the case of traditional surrogacy, the compensation is not immediately apparent.

In order to define the terms of surrogacy, a contract is concluded between the parties. The surrogate mother has the obligation to carry the pregnancy to term and hand over the new-born. *The object of the surrogacy contract* is the conceived child – therefore, the child is considered to be a commodity, as in commercial transactions.[12] The commercial aspect is expressed by a sum of money; more precisely, the woman carries the child and gives birth to the child in exchange for a sum of money. There are countries where surrogacy for commercial purposes is not prohibited by law. Ukrainian law does not forbid commercial surrogacy. In this country, the law is exhaustive regarding the legal status of the surrogate mother and the beneficiary parents. Ukraine has a complex legislation regarding

9 Brunet–Carruthers–Davaki–King–Marzo–McCandless 2013. 12.

10 *The 7 "Pros" and Cons of Surrogacy*. https://www.hli.org/resources/surrogacy-pros-and-cons/ 04.02.2019 (accessed on: 21.12.2020).

11 Kumar–Sharma 2013. 65–70.

12 *Studiu. Maternitatea surogat şi drepturile omului. Analiză a problemelor umane, legale şi etice (de Claire de La Hougue şi Caroline Roux).* http://www.culturavietii.ro/2017/01/24/studiu-maternitatea-surogat-si-drepturile-omului-analiza-a-problemelor-umane-legale-si-etice-i/ (accessed on: 16.12.2020).

the surrogate mother, the fertilization and usage of sperm and ovules.[13] This way, surrogacy is permitted in the Ukraine, the latter becoming a lucrative industry.

The only resemblance between traditional and gestational surrogacy is the fact that in both cases an egg is implanted into the woman's uterus, which was fertilized beforehand by a man known or unknown to her. If we compare traditional and gestational surrogacy, we can say that in the case of the first institution, the woman carries the foetus out of a simple favour, and in the case of the latter, the woman carries the foetus in exchange for a sum of money.[14]

Countries can be divided into five categories with respect to the institution of surrogacy: countries where surrogacy is prohibited by law;[15] most EU jurisdictions such as Greece, Spain, the Czech Republic, or Portugal,[16] where only traditional surrogacy is allowed; jurisdictions such as Ukraine, Venezuela, Mexico, and a few US states; states that allow both traditional and gestational surrogacy;[17] states such as Romania that have chosen not to regulate this institution. *Fertility tourism is therefore being encouraged by Romania*, resulting in the export of ethical, religious, and legal issues regarding surrogacy outside the borders of the country. By allowing fertility tourism, countries have found a pragmatic solution[18] towards the admission of the transformations that occur mainly due to recent advancements in biotechnology. This is also the reason why these cases

13 In Ukraine, the field of human reproduction is regulated by the Family Code. In accordance with the provisions of Art. 123 of the said code, in case of human procreation via a surrogate and through IVF, if the woman is fertilized with an ovum conceived by the biological father, the spouses who opt for this procedure shall be the parents of the child. In this case, the interested parties must submit the document that confirms the birth of the child through a surrogate and the notarized consent of the surrogate in order for the spouses to be noted in the child's birth certificate as the parents. Regarding ovum donations, the donor must sign a written consent for voluntary donation. In essence, like with other types of donations, Ordinance no. 787/2013 issued by the Health Ministry of Ukraine contains a detailed description of the non-legal aspects in the field of medically assisted human reproduction. These include guidelines for surrogacy and IVF with a donated ovum, a list of compulsory medical tests and investigations, the requirements the surrogate mother and the ovum donor must fulfil, laws and regulations and aspects that involve the confidentiality of these procedures. *Ukrainian Surrogacy Laws*. https://www.hg.org/legal-articles/ukrainian-surrogacy-laws-28807 (accessed on: 16.12.2020).

14 Even though in the past the interested parties could use this institution in numerous countries around the world, today some of these countries have shut their door to surrogacy – for example, India. *The tourism for surrogacy has ended*. https://epochtimes-romania.com/news/turismul-pentru-maternitatea-surogat-in-india-ia-sfarsit---252796 (accessed on: 16.12.2020).

15 Austria, Belgium, Bulgaria, Canada (Québec), France, Germany, Italy, Island, Norway, Sweden, Switzerland, Saudi Arabia, Turkey, Pakistan, China, Japan, and a few US Sates (Arizona, Indiana, Michigan, and North Dakota) also fall into this category. Mohapatra 2015. 33.

16 Australia, Canada, Denmark, Greece, Hungary, Israel, Holland, Spain, South Africa, the United Kingdom, and the following US States: New York, New Jersey, New Mexico, Nebraska, Virginia, Oregon, and Washington also fall into this category. Mohapatra 2015. 33.

17 Armenia, Belarus, Cyprus, Georgia, Mexico, the Russian Federation, Ukraine, and the following US States: California, Florida, Illinois, Massachusetts, Texas, Vermont, and Arkansas also fall into this category. Mohapatra 2015. 33.

18 van Beers 2014. 117.

are insignificantly low in the Romanian jurisprudence, even though surrogacy is a growing phenomenon.

3. Foetal Rights

3.1. Personal (Non-Pecuniary) Rights

The first and most important fundamental right of a foetus is the right to life. The foetus has the right to be born from the moment of conception. Consequently, the pregnancy cannot be freely terminated in the absence of a serious medical emergency or unless serious consequences would follow. Such reasons exist when the mother is in danger of dying, and the pregnancy has to be terminated in order to save her life. Also, the foetus's right to life exists if the mother is in clinical death and is being kept alive by artificial means until the birth of the foetus.

The foetus/child, whether outside or inside the womb, has the right to dignity because it is not an object or a thing but a human being in development. This way, it cannot be used for the purposes of any research or experimentation and cannot be subjected to a medical intervention, with the exception of a case when its normal development is in danger. The termination of the pregnancy can be done for genetic reasons or in the case of a serious illness, but only if the foetus is unviable because otherwise there is a risk of taking the life of a healthy foetus.

3.2. Pecuniary Rights

The right of the foetus to inherit is an undisputed issue. Art. 36 of the Civil Code states that: 'The rights of a child are recognized by law from the moment of conception, but only if the child is born alive.' According to the provisions of Art. 957(1) of the Civil Code, in order to be able to inherit, the person must exist at the moment the succession is opened. The conceived child is considered to be alive in utero, while the child born dead is considered not to have existed.

A pregnant woman carries the foetus inside her womb; this way, the mother has the right to be cared for during pregnancy and to receive certain benefits from the State. Naturally, the fact that the foetus is in the womb of the mother is a condition to receiving these benefits. The right of the conceived child to receive the name of the person who recognizes it fits into the non-patrimonial rights category. The legal provisions of Art. 957 of the Civil Code state that the legal capacity of a person to receive an inheritance exists if the person is alive at the moment of opening the succession, and it is the foundation for the legal principle according to which an unborn child can inherit his ancestor who had died before his/her birth. This implies the determination of the moment of conception

because this is the only way to know if the child can be considered alive at the moment the right he was going to acquire was born. According to the Romanian legal literature,[19] a conceived child can be the object of recognition of paternity, with the condition that at the time of birth s/he is in the same situation as a child born outside of wedlock. A conceived child also has the right to the same respect that is shown towards every human being. The European Court of Human Rights has also ruled in this sense.

The foetus is a human being in development. Before birth, the embryo is not considered a person, its identity is tied to the mother, even though – as we have seen in some cases –, the law attributes it certain patrimonial and non-patrimonial rights. In other words, the human embryo does not have a real legal existence and becomes a subject of law at the moment of birth if it is born alive.

4. The Rights of a Surrogate Mother

Carrying the pregnancy and assuring the healthy development of the foetus play a significant role in shaping a surrogate mother's patrimonial and non-patrimonial rights and obligations. The role of taking care of the foetus is assigned mostly to the surrogate mother due to the fact that she is carrying the foetus inside her body. During the process of surrogacy, we can talk about a clear breach of the woman's right to dignity, because the unborn child is the object of a contract, and the surrogate mother has to take a risk regarding the health of the foetus. This way, ensuring that the foetus is healthy is the main condition for the surrogate mother to fulfil her contractual obligations. With all this being said, the beneficiary parents can ask for an abortion in case serious malformations or illnesses occur during the pregnancy (for example, Down syndrome). Moreover, in most cases, beneficiary parents can have other claims towards the surrogate mother who is carrying the child – for example, ordering the woman to seek regular medical attention during her pregnancy.

The surrogacy procedure is not forbidden in Romania; however, it is not a legal arrangement recognized by law. Considering that the law does not allow it but also does not prohibit it, we think that this legal and medical institution must not infringe on public order, good morals, the rights and freedoms of others, and it must not have an illicit cause. Surrogacy must be based on the written agreement of the parties and must be moral and licit.

Medically assisted human reproduction is a procedure that is being used in our country, too.

19 Bacaci–Dumitrache–Hageanu 2006. 199.

5. Medically Assisted Human Reproduction

Medically assisted human reproduction (abbreviated as MAHR) consists of clinical and biological techniques and practices that allow for procreation to take place in a different way (without a sexual act), through the intervention of a doctor. MAHR is used when regular, hormonal, or drug infertility treatment is ineffective.

There are different MAHR methods and practices (artificial insemination (AI), in vitro fertilization (IVF), embryo transfer (ET), surrogate mother),[20] the differences consisting in the number of people involved and the time and place of the fertilization. These practices have become more and more frequent because there is a growing number of sterile and infertile couples,[21] an estimated 10–15% of the couples being unable to naturally conceive children.

Art. 441 and Art. 447 of the Civil Code contain provisions regarding medically assisted human reproduction. The provisions of Art. 441(1) state that 'medically assisted human reproduction through a third-party donor does not establish kinship between the child and the donor', and the provisions of paragraph (2) of the same article specify that 'in this case, no one can bring an action for liability against the donor'. A restriction is also mentioned, according to which *only a man and a woman or a single woman can become parents*.[22] This way, it is forbidden for the parent/parents to be homosexual or a single man. This way, in analysing surrogacy, we can conclude that a connection will be established between the surrogate mother and the child through surrogacy.[23]

This way, the surrogate mother will be the only legally recognized parent – regardless where the biological material came from –, and if a woman becomes pregnant having received biological material from a donor, she will be regarded the sole parent of the child. The donor will have no rights and legal connection to the child.

As a result, a legal agreement about carrying a child is null and void, and if the contracting parties were to stipulate that the mother is obliged to give the child up for adoption after birth, it would be also null and void. Moreover, it could also be considered a criminal act according to the provisions of Art. 107(1) of Act No 273/4004 regarding adoption procedures, according to which 'the act by a parent or legal guardian of the child consisting of asking for or receiving

20 *Fertility Treatment Explained*. https://www.varta.org.au/information-support/assisted-reproductive-treatment/types-assisted-reproductive-treatment (accessed on: 21.12.2020).

21 Pittman 2013.

22 Art. 441(3) of the Civil Code. In our opinion, the provisions are arguable from the standpoint of equality between women and men; there is no reason why a single man should not be considered a parent.

23 *Mamă surogat în România. Cum poate fi legal?* http://www.drepturile-omului.eu/news/params/post/1424361/mama-surogat-in-romania-cum-poate-fi-legal (accessed on: 21.12.2020).

money or other material benefits in exchange for giving up a child for adoption is punishable between 2 to 7 years of imprisonment and the termination of parental rights, regardless whether the money or other benefit served the interest of the perpetrator or of other persons'.

We can find a famous case about surrogacy in the case law of the Timişoara Court of Appeal, from February 2014, where the judges ruled in favour of recognizing a woman as the biological mother of twins even though her sister was the one who gave birth to the children, through surrogacy. The sister was artificially inseminated with the mother's embryos. After birth, the biological parents filed a case before a court of law in order for them to be recognized as the natural parents of the children. According to Romanian case-law, the biological mother of the child is the one who gave birth to the child. The Timişoara Local Court only recognized the father as a natural parent because 'kinship could only be established towards the father'. After the appeal before the Court of Appeal, the court held that the mother, whose eggs were harvested should be considered the natural mother. The reasons presented were the following: 'Resorting to a different procedure – such as surrogacy – undertaken by the parties of the trial, even though not regulated by law, cannot be deemed illegal as long as there is a principle in civil law according to which everything that is not prohibited by law is legal.' The sentence also underlines the following: for 'minor applicants, the legal impossibility to recognize their biological mother as their real mother – their real genetic identity – could lead to an infringement of their rights to private life, guaranteed by the provisions of Art. 8 of the European Convention on Human Rights'.[24]

Art. 442(2) of the Civil Code describes the conditions that have to be met for MAHR to be possible. Firstly, the parents must give their prior consent, 'in conditions that guarantee complete confidentiality, before a notary public who will explain the consequences of their act regarding filiation'. Their consent remains without effect 'in case of death, of a divorce or separation that took place before the conception of a child through the methods of medically assisted human reproduction'.

Moreover, the legislator specifies that no one, not even the child, can dispute his/her own filiation in reference to medically assisted human reproduction. However, a denial of paternity can be accepted in case 'the mother's husband [...] has not given his consent to medically assisted human reproduction through a third donor' and 'in case the child was not conceived this way'.[25]

24 *Un pas înainte spre transformarea României într-o „colonie reproductivă".* http://www.culturavietii.ro/2014/02/12/un-pas-inainte-spre-transformarea-romaniei-intr-o-colonie-reproductiva/ (accessed on: 21.12.2020).

25 According to the provisions of Art. 443(2)–(3) of the Civil Code.

6. The Main Issues of Surrogacy

6.1. The Mother's Dignity in Relation to the Foetus's Right to Life

There seems to be a moral dilemma between the mother's right to autonomy/self-determination and the foetus's right to life. *Who must be prioritized in case of a life-threatening situation?* The case-law has provided examples to both issues over the course time. No one has the right to make decisions regarding the life of the foetus; however, the mother can decide about issues involving her own life. One must consider both legal capacity and the capacity to act. From this standpoint, we can say that the balance slightly inclines towards the mother because she has discernment; in other words, she has full legal capacity and the capacity to act.

What happens if the child is born with a mental disability? When a couple chooses the services of a surrogate mother, they wish to have a child that is born healthy. However, complications can arise during the nine months of pregnancy and during the delivery. A naturally conceived child can be less exposed to health risks than a child conceived through medically assisted human reproduction. Medically assisted human reproduction can cause complications to the foetus (premature birth, low birth weight, foetal death, foetal anomalies, arterial hypertension, etc.) and to the mother (ovarian hyper-stimulation syndrome, chronic pelvic pains, early menopause, infertility, reproductive cancers, blood cloths, kidney disease, heart attacks, and hypertension). The mother cannot guarantee that the foetus will be born healthy, the situation being uncertain and unpredictable. The parties cannot stipulate a warranty in the provisions of the surrogacy contract because the child cannot be looked upon as a commodity and cannot be the object of a sales contract.

The presumption of maternity means that the woman who gave birth to the child is considered to be the mother; this way, in the event that the child is not born healthy, the beneficiary parents have the possibility to make a choice, to ask or not to ask to become the parents of the child. In case the answer is negative, the person who gave birth to the child will continue to raise the child as the mother.

6.2. May the Surrogate Mother Decide to Keep the Baby?

The surrogate mother is responsible for the foetus from the moment of fertilization until the end of the pregnancy. When the surrogate mother decides to undergo fertilization, she consciously decides to conceive a healthy child whom she will subsequently give birth to. The woman who freely and consciously agrees to this procedure, without any vices of consent – error, fraud, duress – has the right to keep the child after birth. In some cases, a mother who carried the child in her womb for nine months does not want to give up on her biological child easily. A

psychological bond can be formed between mother and child, causing the mother to not want to give up on her child. The negative psychological effects cannot only affect the mother but also the child, when the latter learns the truth about his/her personal and family situation.

6.3. The Child as the Object of a Surrogacy Agreement

It is evident that if the mother accepts to receive a sum of money in exchange for the child, the foetus will be the object of a surrogacy agreement from the moment of conception up until the moment of birth, which is followed by handing over the child. Besides the issue of pay, the moment the child becomes unwillingly the object of a contract, s/he will be qualified as a commodity. In the case of *Roe v Wade*,[26] the United States Supreme Court stated a principle according to which the foetus is not recognized as a person.

The beneficiary parents can sometimes not receive the child from the surrogate mother for certain objective or subjective reasons. In exchange for a sum of money, the mother and the beneficiary parents can come to an agreement regarding the health and sex of the baby.

There are situations when the mothers become victim of the surrogacy – for example, in the case of 'Baby 101'.[27] This landmark case dismantled an illegal network of surrogate mothers and set free a number of young women, who were drawn in by the promise of a decent job but who were later used as surrogate mothers, sometimes after having been raped.[28]

7. Conclusions

The commercialization of the human body has been in public attention the last few years, as organ trafficking and sexual slavery have become subjects of public attention. Yet, surrogacy has received comparatively little attention. Surrogacy is, after all, a form of commercializing the human body – the child becomes the subject of a contract, while the surrogate mother is used as a human incubator. Such transformation is in breach of the dignity of the surrogate mother and the child. The provisions of Art. 7 of the UN Convention are apparently breached pertaining to the right of the child to know his/her origins and identity.

26 *Roe v Wade Case (US)*. http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e564 (accessed: on: 21.12.2020).

27 *Escándalos relacionados con los vientres de alquiler. Niños devueltos, criaderos humanos… la oscura realidad tras los vientres de alquiler*. http://infocatolica.com/?t=noticia&cod=22828 (accessed on: 22.12.2020).

28 https://www.provitabucuresti.ro/docs/lobby/ruam2013/mama-purtatoare.pdf (accessed on: 22.12.2020).

Surrogacy is being presented as one of the many methods of human-assisted reproduction, as a treatment for infertility, a generous, altruistic action to help infertile couples conceive a child in order to experience the joys of parenthood. The reality is different from this marketing image. Even in countries where commercial surrogacy is prohibited, women can be coerced to accept it through emotional pressure, threats, and promises.

Often, the contracting parents are older, richer, and better educated than the surrogate mothers, which also adds to the risk of coercion. Also, even where the surrogate mother cannot be legally paid, she can receive a 'compensation', sometimes even a clear financial stimulant for the act of surrogacy. Nonetheless, commercial surrogacy is on the rise in several countries. Many agencies take advantage of the suffering of infertile couples and women's vulnerabilities. These agencies charge excessive fees, and after a highly intrusive recruitment process, can certify that the chosen women are medically fit. Artificial insemination clinics offer genetic diagnosis beforehand, not only to avoid genetic disease but also for couples to be able to choose the sex of the baby.

Surrogacy implies the physical and emotional detachment of the child from the surrogate mother, which has long-lasting effects on both of them. More and more medical and psychological studies underline the importance of this connection for the development of the child. The long-term consequences for the child can be compared to those of children offered for adoption or born through in vitro fertilization from a third-party donor, because surrogacy includes both aspects and also adds to the complexity of the problem.

Besides the difficulties in determining the child's nationality and filiation, other problems can also occur: the life or the health of the surrogate mother is in jeopardy during the pregnancy; the surrogate mother changes her mind and decides to keep the child; the beneficiary parents separate during pregnancy and no longer want the child; the child is born with a disability and neither the surrogate mother nor the beneficiary parents want the child, etc.

On the other hand, the child is being treated as a commodity, the object of a contract. The purpose of surrogacy is not in the best interest of the child; it is all about the fulfilment of the adults' wishes, which is contrary to the recommendations of the Parliamentary Assembly of the Counsel of Europe No 1443(2000), according to which 'the right to have children' does not exist. Surrogacy is contrary to the provisions of numerous European and international norms, especially those regarding human dignity, adoption, the protection of women and children, and human trafficking.

In conclusion, regarding the subject of discussion in Romania, we can state that concerning the issue of human rights in terms of the right to life and the right to family, the Romanian legislator has a passive attitude. While these aspects are being ignored, many Romanian couples choose to resort to this procedure on the

territory of a different country where the legislation is permissive or illegally resort to such a convention in Romania. While we wait for a regulation that is in favour of surrogacy, we express our conviction that it must follow the best interest of all parties involved in the process of surrogacy and must clarify the legal status of the children, according to the principle of the supreme interest of the child.

As part of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine),[29] also known as the Oviedo Convention, it is stated in the provisions of Art. 12 that the human body and its composing parts cannot give rise to financial gain. Romania cannot enact a law that allows commercial surrogacy. In agreement with an opinion presented in the literature,[30] it is necessary to adopt a model for altruistic surrogacy with authorization from a state agency or a court of law, in the present context of technological development and cyber-commodification of human being.[31]

We believe that in the event the surrogate mother is animated by altruistic beliefs, she could sign a contract with the beneficiary parents as long as the contract does not stipulate a financial gain in favour of the surrogate mother.

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29 See *Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS no. 164), Oviedo, 1997*. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164 (accessed on: 22.12.2020).

30 Ungureanu 2019a. 25–26.

31 For further analysis, see Ungureanu 2019b. 29–48.

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Working Time and Work–Life Balance in Romania during the Pandemic. Issues and Evolutions

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Abstract. The effects of the coronavirus pandemic did not leave the world of work untouched. In the new circumstances, challenges and tasks that had previously been widely debated came to the fore. Among these, we can list the issues of working time and rest time, and consequently the work–life balance or sometimes imbalance of the employees. As a result of the pandemic, some processes that have been observed in labour law for a long time have been accelerated. In our opinion, the particularity of the current situation is based on the considerable size of digitalization, the use of new technologies in work, and the widespread use of atypical labour relations, which had a major impact on the solutions that were chosen to countervail the effects of the pandemic.

Keywords: working time, work–life balance, labour law, teleworking, atypical employment

1. Introduction

The coronavirus pandemic affected our lives in many ways and domains, including the working conditions and working time, our situation as employees, and, finally, the way we manage to realize a sometimes tenuous balance between our family life and leisure time on the one hand and working time on the other hand. Still, as it is demonstrated in the labour law literature, crisis situations created by pandemics or other kinds of disasters are well-known in history, and they are important experiences to learn from when speaking about legal measures needed to combat crises.

In order to learn more about this kind of crisis management in labour law, we must see what kind of special provisions were brought into law and what practices were used concerning the employment relationship.

The starting point of studying these legal measures must be the fact that employer–employee interaction in the workplace is covered by labour regulations applicable to that particular location. These legislative enactments, regulations, policies, and guidelines determine the allowable distances between two workstations, the method of working, protective gear that need to be utilized, the level of ventilation, sanitation, hygiene levels that need to be maintained, sick leave, illness benefits, and many other workplace aspects. Both global pandemics and epidemic situations alter the conditions governing employment, the ability of employees to report to and engage in work, and the ability of employers to keep the worksites open and accessible to employees.[1]

Though crisis situations influencing the labour market and labour regulations have been experienced several times in history, the COVID-19 pandemic brought into light some different aspects and variables. In our opinion, the particularity of the current situation is based on the considerable size of digitalization, the use of new technologies in work, and the widespread use of atypical labour relations, which had a major impact on the solutions that were chosen to countervail the effects of the pandemic. The impact of new technologies on working time and work–life balance has been much discussed in the last few years. The ILO, for example, drew attention that the information and communication technologies are having an increasingly important impact on the organization of work as well as on the length and arrangement of working time, contributing to the development of telework and the blurring of boundaries between working time and rest periods. The ILO documents and reports demonstrate that the development of the platform economy and on-demand work also have consequences for the organization of working time. While recognizing that these working arrangements may offer advantages for both workers and employers, the ILO observes that they are also associated with a number of disadvantages, including the encroachment of work on non-working time and rest periods, the unpredictability of working hours, income insecurity, and the stress associated with the perceived need to be constantly connected to work. That is why the Committee of Experts of the ILO emphasized the importance of these issues being regulated by national legislation, taking into account both the needs of workers in relation to their physical and mental health and work–life balance and the flexibility requirements of enterprises.[2]

All these novelties that characterize nowadays the labour market and the labour relations are the main reasons why traditional labour laws, which existed during the 'normal' times, were not sufficient to address the situations arising out of the COVID-19 pandemic, and thus special provisions had to be introduced in different countries.[3] A recently published research paper of the

1 Gunawardena 2021. 5.
2 ILO 2018. 328.
3 Gunawardena 2021. 8.

European Trade Union Institute underscored that Central European economies were similarly affected by the COVID-19 crisis-induced closures at home and along their value chains, yet their anti-crisis policy-making varied significantly.[4] Concerning labour law provisions brought into force during this period, we can still notice some significant similarities. A number of common tools were used, such as teleworking or short-time working, paid leave schemes as well as tax/social security payment deferrals. For example, research demonstrates that the core workforce received temporary protection through some forms of reduced working time programmes (*Kurzarbeit*) in all Central European countries.[5]

Despite the efforts made for the COVID-19 crisis management of the countries, we must notice that the conflicts between labour legislations and the state rulings on pandemic prevention mechanisms are increasingly pushing the legislators in all countries towards amending the labour laws to suit the necessities of the current pandemic situation,[6] and that implies negative effects on the labour market and labour relations as well.

Regardless of the provisions and measures introduced in different countries, it seems that from the labour law point of view there are no winners of the situation, a large part of the workers facing a deteriorative status instead. Unfortunately, it is very clear for now that the already disadvantaged categories of workers are bearing the brunt of the losses that stem from the newly created legal measures necessary for the management of the pandemic crisis. In this context, the effects of the shocks are particularly harsh on specific groups of workers. These are the less educated workers, who are typically engaged in low-paying, precarious, and unstable work arrangements in sectors that have been the hardest hit by the shocks. Furthermore, the less educated are typically employed in sectors where the first-order effects of the pandemic have been severe and the options for remote work are either limited or non-existent. In contrast, high-end service sectors (such as finance, business, real estate and public administration, health, and education) are more amenable to remote work and have a higher share of regular formal employment.[7]

Those workers who are considered to be in a better situation compared to precarious workers, because of their possibility of continuing to work from home office as remote workers, are facing other kinds of difficulties. In their case, the risk of imbalance between work and family life is also high because of the blurred boundaries noticed between working time and free time, as it is regulated in general terms by labour law.

4 Podvršič et al. 2020. 38.
5 Podvršič et al. 2020. 39.
6 Gunawardena 2021. 9.
7 Kapoor 2020. 1.

2. The Legal Background in Romania and the Main Issues Concerning Work–Life Balance before the Pandemic

As we mentioned before, most of the labour regulation issues brought into light because of the COVID-19 pandemic were present before and were widely researched and debated by scholars. These issues are rooted mainly in the transformations of working technologies, digitalization, and the widespread use of atypical forms of employment as teleworking, part-time work, or other atypical labour relations. All these transformations have a serious effect on working time and work–life balance, especially for some particular categories of workers, for example, women (with children), elderly people, or young employees. These effects are not always considered to be negative, but there is a considerable risk inherent in them for negative outcomes. In this context, the role of labour regulations able to ensure flexibility and at the same time security for workers is of the utmost importance.

The Romanian Labour Code (abbreviated as LC) regulates only a few of the atypical employment forms such as temporary work, part-time employment, working from home, and agency work.

According to Article 82 of the LC, an individual labour contract of limited duration can be concluded only as an exception to the rule provided for in Article 12(1) and only in the cases enumerated by the law, with the express mention of its duration.

Articles 88–102 regulate temporary agency work in accordance with the EU directive, specifying that temporary agency work is an activity performed by a temporary employee who, at the direction of the temporary employment agency, carries out an activity for the benefit of a user undertaking.

A part-time employee is an employee whose number of normal working hours, calculated weekly or as a monthly average, is lower than the number of normal working hours of a similar full-time employee, according to art-s 103–107 of the Romanian LC.

And, finally, based on Article 108 LC, it is stated that the employees performing, at their residence, the specific tasks of their position shall be considered home workers.

Apart from the LC, Act No 81 of 2018 (the Teleworking Act) specifies the rules on teleworking. Before the COVID-19 pandemic, the use of these flexible employment forms was quite low. For example, according to data provided by Eurostat, when the European average of remote workers was more than 5%, in Romania there were about 0.4–0.8% of the employees of that status in 2018–

2019.[8] In the same period, the percentage of part-time workers was just about 6% in Romania, while the EU average was 18.5%.[9]

Flexibility is one of the key factors in labour law these days. This flexibility does involve all aspects of employees' working time and working programme. Looking at the evolution of the quantity of working hours, it is obvious that throughout the 20th century the tendency was to decrease the working hours. But, on the other hand, the new need for flexibility brought to light another problem, that of the scattering of these working hours throughout the day. As a result, many workers are facing a severe blurring of the boundaries between working time and leisure time. This tendency is aggravated by digitalization and the use of information and communications technology in the working process. As a response to this phenomenon, the ILO urges the attention of the states to give a strict regulation to the weekly and daily limits of working time. While recognizing that working-time flexibility may be important for enterprises in order to adapt to the requirements of modern work organization, the ILO emphasizes the importance of reasonable limits and protective safeguards in devising such flexible arrangements so as to ensure that their implementation takes into account the need to protect the health and well-being of workers and to make it possible for them to reconcile work and private as well as family life.[10]

Working time is one of the most important factors when speaking about work–life balance, but it is not the only one, especially in the case of atypical employment. In the case of part-time workers, for example, shorter working hours can be associated with unpredictable and split shifts, which may have an impact on family life.[11]

As flexibility is vigorously increasing, the organization of work starts to attain a bigger role in achieving an acceptable work–life balance than working time itself. Of course, the organization of work is also changing: some people work in their free time because they are asked to, others because they feel expected to do so, and yet others because they just want to, while some can work pretty much anywhere, anytime using information and communications technology (ICT). Research demonstrates that more ICT mobile workers report a poorer work–life balance than other workers do. Still, in this field, the experiences of different countries and the results of the research are somewhat ambiguous. For example, the publication of Eurofound and ILO concluded that both positive and negative effects of ICT on work–life balance are reported by nearly all of the national studies, sometimes even by the same individuals. At the same time, most of the national

8 See: https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180620-1 (accessed on: 15.02.2021).

9 See: https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20190621-1 (accessed on: 15.02.2021).

10 ILO 2018. 325–326.

11 Parent-Thirion 2016. 3.

studies include findings related to the 'blurring of boundaries' phenomenon – the overlap of the borders between the spheres of paid work and personal life.[12] The quoted publication contains several findings that clearly show the ambiguous nature of the work–life balance experience of the ICT employees. For example, the findings from the European national studies suggest that, although there is substantial scope for improved work–life balance when working in a flexible way using ICT, a relatively high share of employees report that they occasionally, or more often, miss or neglect family activities due to work activities interfering with personal life and at the same time are missing or neglecting work due to family responsibilities. As a conclusion, once more, the outcomes appear to be ambiguous: although ICT workers can use working remotely to improve their work–life balance, they are also at greater risk of working in their free time (their non-paid work time) and reported 'blurring' between paid work and other personal commitments such as family responsibilities.[13]

Changes in work organization have now made it possible for some of the employees to access work 24 hours a day, 365 days a year. This is likely to be of growing concern as Europe looks to become more skilled and more digital.[14] And the experiences are not always positive.

The same conclusion is emphasized by many scholars when discussing the Romanian labour market situation. On the one hand, flexible arrangements can play a key role to help various categories of workers (women with children, for example) to make a professional career, but on the other hand it seems that working time arrangements are not favouring workers with children, especially women.[15] This phenomenon is more or less the same everywhere in the world: women spend relatively more time on work and men on personal life. Differences are also noticeable in the time spent on sleep and other physiological needs. Men spend more time on sleep and other physiological needs than women do.[16]

Data from a recent research – but one based on a survey made before the pandemic – demonstrate that studies found some variables as prominent to impact work–life balance, most remarkably the work-related variables such as working hours, shift work, and the character of work. Employees working in more than one shift, for example, score significantly lower on the work–family scale.[17]

The appropriate allocation of time is obviously crucial for work–life balance. The studies led by the International Labour Office came to the conclusion that employed persons who do not allocate time between private life and work properly experience a conflict of work and/or personal life. So, this is a negative

12 Eurofound–ILO 2017. 29.
13 Eurofound–ILO 2017. 30.
14 Parent-Thirion 2016. 3.
15 Leovaridis–Nicolăescu 2011. 109–110.
16 Lydeka–Tauraite 2020. 111.
17 Sántha 2019.

consequence of time allocation imbalance. Moreover, there can be more negative impacts of this situation on personal career, employee health (physical and psychological), work quality, personal relationships (e.g. social skills), and other problems.[18]

3. The Effects of the Pandemic on Work–Life Balance and the Case of Romania

The effects of the COVID-19 pandemic are visible in the world of work in many aspects of it such as unemployment, flexible working arrangements, the rapid spread of teleworking and home office, and, as a conclusion, on employees' working hours and work–life balance. As the pandemic is not yet history but continues to make part of our very life even today, we cannot make any final analysis of the subject; however, there are several findings that are relevant already.

Based on a large e-survey across the EU Member States, the Eurofound research report entitled *Living, Working and COVID-19* dedicated a whole chapter (Chapter 3) to work–life balance problems during the first period of the pandemic. Among the main findings, it is noticeable that at the peak of the COVID-19 pandemic in April 2020, the e-survey respondents – especially women with children under 12 – were struggling to balance their work and personal life. Indeed, although teleworking was a key factor in ensuring business continuity, it has led to a rise in the number of people working from home, resulting in difficulties in managing work–life conflicts and an increase in the incidence of overtime. Women reported more difficulties in combining work and private life than men, particularly when it came to feeling too tired after work to do household work.[19] The updated Eurofound factsheet published a year after the first research shows a very similar state of fact. First of all, despite more severe restrictions being imposed throughout Europe in early 2021 compared to the summer of 2020, teleworking was now less prevalent. While the incidence of working from home has declined in the latest phase of the pandemic, the preference to do so every day has increased since summer 2020. Most employees still express a preference to combine working from home and from the employer's premises. The most popular choice being to work from home several times a week. The difference between men and women in terms of work–life balance, particularly for parents of young children, has been documented. As the pandemic progressed, it was women with young children who declared they were often too tired to carry out household tasks, particularly women who worked exclusively from home.[20]

18 ILO 2011.
19 Eurofound 2020. 21–22.
20 Eurofound 2021. 2–3.

Concerning the Romanian situation, based on the little research already published, we can observe that there are many similarities with the general reports throughout Europe. In Romania, working from home was a new experience for many employees, and their perceptions were very different; however, most viewed this experience positively. The COVID-19 crisis has led to increased competition in the labour market, increased unemployment, and a general halt in hiring by companies, which instead resort to various policies to reduce staff and expenses. In the current pandemic context generated by COVID-19, there can be observed a risk of a significant increase in the number of hours worked due to staff shortages, restructuring of the business activity, and carrying out tasks under new conditions, including telework.[21]

The deteriorating situation of work–life balance for women is observable in Romania, too. The main part of the different household tasks still falls to women. In this context, working from home office and in flexible forms because of the COVID-19 has affected women more than male workers. The increased tasks of parents due to online schooling has aggravated the situation of women. The combination of all these variables caused a serious work–life 'imbalance' on the women's side, especially those with school-aged children in the pandemic context.[22]

While women in Romania are suffering from serious work–life imbalance, the young generation (age-group 20–29), generally without children, are much more prone to agree to flexible working arrangements. They would prefer to work with a schedule of partly or fully flexible working hours than in full-time, fixed, or non-fixed working hours and think that a work–life balance can be found, it is only a matter of perception.[23]

As it is remarked by research, the effects of the pandemic on work–life balance and the situation of workers in Romania are quite common. However, at the same time, there is a visible difference between not only the perception and situation of male or female workers but between different generations or professional categories too. As Kapoor emphasized in the quoted publication, the impact of the COVID-19 crisis on workers varies and depends on the nature of the employment arrangement and the sector of employment. There are the more educated workers who are engaged in work arrangements that offer a steady source of income and some degree of social security and who are able to shift their work online. Then there are those who have low levels of education and are engaged in precarious and low-paying work of the kind that does not offer them the luxury of working from home. It would not be unreasonable to expect the latter to account for a disproportionate share of the pandemic-related job losses.[24]

21 Tecău et al. 2020. 1049–1067.
22 Nistor et al. 2020.
23 Musinszki et al. 2020.
24 Kapoor 2020.

Another classification of the workers, often used recently, is into key (or essential) workers and non-essential workers. Despite the fact that this classification can be quite ambiguous, as it is based on not very strictly determined criteria, it was widely used during the pandemic, and it is widely used even in some of the newly introduced legal provisions concerning labour relations. In most of the countries, those working in sectors absolutely necessary for the community, such as healthcare, public services, education, etc., were considered key workers. On the other hand, those who were employed in sectors that have often been forced to close were categorized as non-essential workers. In both cases and for both categories, the legal provisions newly brought into force concerning their labour conditions had a serious impact on work–life balance, pushing it to an increasing imbalance. In his study, Hodder explains that key workers usually could not work from home, and in the context of the pandemic they were facing increasing working hours, precarious working conditions, and exhaustion. The workers deemed non-essential were massively sent to home office and started to work as remote workers. Interestingly enough, in this new situation, many employees found themselves working from home even if they had been told for some time that flexible work was not an option for them. There is, however, a danger of working from home being presented as a panacea in the current context, when research shows that this is actually far from the truth,[25] and there is a price to pay in the field of work–life balance of the employees.

The future evolutions are still uncertain in many ways, especially as the COVID-19 pandemic is far from over, but several international surveys seem to predict a wider expectation of the employees for flexible arrangements, at least in terms of working time and the location of the working activity.

4. Concluding Remarks

The impact of the COVID-19 pandemic is so outstanding that the ILO compared its effects in many ways with the effects of the 2nd World War on labour market and labour relations.[26] This unexpected global crisis showed us lessons that are to be learnt. It is almost as if we had the opportunity to have a glance at the future in labour law, and it would be probably wise to use this knowledge after the pandemic to influence the development of labour regulation in a positive direction.

The number of flexible working arrangements is increasing, and that determines an urgent need for a very precise labour regulation concerning working time, the registration of working hours, and working schedules, which sometimes is very problematic for flexible or individualized work, teleworking or home office.

25 Hodder 2020. 263.
26 ILO 2020.

The situation of women (especially those with children) has become more difficult in the newly introduced flexible working arrangement conditions and with regard to the shift to homeworking, and that reinforced gender inequality. Research proves that work–life imbalance is affecting women in a much greater percentage than it does the men. But all employees are endangered by this imbalance that can cause health-related problems and burn-out. In this context, the relevance of the debate about employees' right to disconnect is of an increasing interest. The right to disconnect can be described as the right of workers to switch off their devices after work – without facing consequences for not replying to e-mails, calls, or messages –, and it can be operationalized through a variety of hard and soft measures, determined primarily via company-level agreements.[27]

As a conclusion, the COVID-19 pandemic has flooded the world of labour with a diversity of problems that need to be debated and solved. Right now, there are many questions to be answered, and labour law must find the adequate answers as quickly as possible for the protection of employees and for the right function of labour relations.

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