STUDIA IURISPRUDENTIAE DOCTORANDORUM

MISKOLCIENSIUM

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JOGTUDOMÁNYI TANULMÁNYAI

25.

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**Tartalomjegyzék**

**AIDA BEKTASHEVA***

# New Investment Policy of the Republic of Kazakhstan of 2022

**Abstract**
In modern conditions, issues related to investment law, the regulation of investment relations and the implementation of investment activities in Kazakhstan are becoming more and more relevant and of top interest. In this article, the author tried to describe the main patterns of formation and development of investment legislation in the Republic of Kazakhstan, investment legal relations, control over compliance with the terms of investment contracts taking into account a completely new investment policy from 2022 and the creation of the Astana Investment Center. A huge role in the formation of foreign investors' confidence in Kazakhstan as a source of reliable investments was played by the timely adoption of legislative acts that provided comprehensive protection and support for investors in Kazakhstan. This article analyzes both strengths and weaknesses through SWOT -analysis and also suggests the main next steps.

**Keywords:** Investment regime of Kazakhstan, legal framework, bilateral investment law, SWOT -analysis.

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## 1. Introduction

Kazakhstan is an upper-middle income and the world's largest landlocked developing country with the largest economy and highest GDP per capita in Central Asia. Since its independence in 1991, Kazakhstan has made significant progress toward creating a market economy and has attracted significant foreign investment given abundant mineral, petroleum, and natural gas resources[1]. For example, Kazakhstan is ranked 25th for Ease of Doing Business in the World Bank's Doing Business 2020 report.

Kazakhstan posted an annual average GDP growth rate of 5.2% from 2005 to 2019, with GDP in 2019 reaching US$180.2 billion (US$9,731.2 per capita). In the

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[1] Abykanova BT, Sariyeva AK, Bekalay NK, Syrbayeva S.J, Rustemova A.I, Maatkerimov N.O. Technology and prospects of using solar energy. News of National Academy of Sciences of the Republic of Kazakhstan, Series of Geology and Technical Sciences. 2019.

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first 9 months of 2019 the growth rate accelerated to 4.5% from 4.1% in 2019[2]. The country's GDP shrank by 2.6% in 2020 as it took a heavy hit from the coronavirus pandemic. In October 2020, the Ministry of National Economy of Kazakhstan announced an updated GDP forecast for 2021, predicting a real GDP growth rate of 2.8% in 2021[3]As of January 1, 2021, the stock of foreign direct investment in Kazakhstan totaled USD 166.4 billion, including USD 38 billion from the United States, according to official statistics from the Kazakhstani central bank[4]. There are 13 special economic zones and 36 industrial zones in Kazakhstan, which exempt investors from various types of taxes and customs duties.

Kazakhstan's investment climate is relatively strong to attract foreign investment. It receives the vast majority of foreign direct investment (FDI) in Central Asia. It has attracted significant foreign investment to develop its abundant mineral, petroleum, and natural gas resources. As of October 2021, the stock of foreign direct investment (FDI) totaled $170 billion, including $40.4 billion from the U.S., according to official central bank statistics.

While Kazakhstan's vast hydrocarbon and mineral reserves remain the backbone of the economy, the government continues to make incremental progress toward diversification into other sectors.

A positive element is the diversity of investment sources. During the last five years, massive foreign investment has poured into Kazakhstan from diverse countries like Netherlands ($33.8 billion), the United States ($19.4 billion), Switzerland $12.5 billion), China ($6.2 billion) and France ($4.7 billion). A bulk of this investment (60 percent) has been attracted into the non-extractive sectors such as trade, transportation, manufacturing, financial and insurance services. Kazakhstan joined the World Trade Organization (WTO) on 30 November 2015 as the 162nd member. From January 2020, the WTO framework has been implemented in Kazakhstan. Therefore, Kazakhstan has removed restrictions on opening branches of foreign banks and insurance companies.

In 2008, Belarus, Kazakhstan and Russia formed a customs union with the prim There are 13 special economic zones and 36 industrial zones in Kazakhstan, which exempt investors from various types of taxes and customs duties aim of eliminating interstate customs borders and customs clearances. With effect from 1 January 2015, the customs union was transformed into the Eurasian Economic Union (EEU). The EEU aims to promote cooperation among member countries in a number of areas, including the harmonization of macroeconomic policies, payment of indirect taxes in mutual trade, customs matters, nontariff regulations (such as import licenses and certificates of compliance), financial matters, intellectual

[2] World Bank Data.
[3] Data, the Ministry of the National Economy of Kazakhstan.
[4] World Bank Data.

property, procurement, energy, labor migration and transportation. In addition to Kazakhstan, the current members of the EEU are Armenia, Belarus, Kyrgyzstan and Russia.

Kazakhstan adopted the OECD Declaration and Decisions on International Investment and Multinational Enterprises and became an associate member of the OECD Investment Committee in June 2017.[5]

Kazakhstan does not have a screening system in place and does not have legislation specifically focused on the national security implications of FDI akin to the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). Kazakhstan's central bank (the National Bank of Kazakhstan) collects standard statistics on FDI and other forms of investments, but mostly for macroeconomic purposes.

Over the years of the existence of investment legislation, its change and transformation have systematically sought to implement the strategies laid down by the President of Kazakhstan at different times, the investment needs were different[6].

If at the dawn of the signing of the first edition of the Law of the Republic of Kazakhstan "On Investments" in 2003, the emphasis was generally only on the raw materials sector of the economy, then after 2008 the trend began to change. The state began to support investments in non-resource sectors of the economy, paid attention to investments of Kazakhstani capital in foreign markets, began to stimulate and promote the export of goods to foreign markets. This was due to the need to introduce measures of state support to exporters and domestic investors abroad. There were measures to stimulate exports based on state support[7].

In July 2018, the government of Kazakhstan officially opened the Astana International Financial Center (AIFC)[8], an ambitious project modelled on the Dubai International Financial Center, which aims to offer foreign investors an alternative jurisdiction for operations, with tax holidays, flexible labor rules, a Common Law-based legal system, a separate court and arbitration center, and flexibility to carry out transactions in any currency.

In 2019, the government founded Kazakhstan's Direct Investment Fund which became resident at the AIFC and aims to attract private investments for diversifying

[5] Madiyev, G., Kerimova, U., Yespolov, A., Bekbossynova, A., Rakhimzhanova, G. Fostering Investment-Innovative Activity within the Agro-Industrial Complex of the Republic of Kazakhstan, Journal of Environmental Management and Tourism 9, 2018.

[6] Tukulov, B. "Discussion of possible ways to reduce the legal risks faced by foreign investors in the implementation of activities in the Republic of Kazakhstan".2013.

[7] Boyd, S., Lalonde, M., & Hanotiau, B.Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, 2008.

[8] Constitutional Law of the Republic of Kazakhstan dated December 7, 2015 "On the Astana International Financial Center"

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Kazakhstan's economy. The state company KazakhInvest, located in this hub, offers investors a single window for government services[9].

Also, in April 2019, the Prime Minister created the Coordination Council for Attracting Foreign Investment. The Prime Minister acts as the Chair and Investment Ombudsman. In December 2018, the Investment Committee was transferred to the supervision of the Ministry of Foreign Affairs, which took charge of attracting and facilitating the activities of foreign investors. In January 2021, the Minister of Foreign Affairs received an additional title of Deputy Prime Minister due to the expanded portfolio of the Ministry. The Investment Committee at the Ministry of Foreign Affairs takes responsibility for investment climate policy issues and works with potential and current investors, while the Ministry of National Economy and the Ministry of Trade and Integration interact on investment climate matters with international organizations like the OECD, WTO, and the United Nations Conference on Trade and Development (UNCTAD)[10].

The protection of investors' rights and the stability of concluded contracts are guaranteed by law, and the work of state bodies in relation to investors is very clearly regulated (free movement of capital, repatriation of capital, freedom to use profits, the right of private ownership of land, including for foreign companies).

In its Strategic Plan of Development to 2025, the government stated that bringing up the living standards of Kazakhstan's citizens to the level of OECD countries is one of its strategic goals.

In addition to earlier approved program documents, the President adopted a National Development Plan to 2025 in February 2021. The Plan outlines objectives and parameters of a New Economic Course announced by President Tokayev in September 2020. A favorable investment climate is a part of this course.

## 2. Legal framework

The history of the formation and development of Kazakhstan's investment legislation begins with the adoption of the first legislative act in this area - the Law "On Foreign Investment in the Kazakh SSR" dated December 7, 1990. This law established a legal regime for investment protection, as well as a number of tax

[9] Abykanova BT, Sariyeva AK, Bekalay NK, Syrbayeva S.J, Rustemova A.I, Maatkerimov N.O. Technology and prospects of using solar energy. News of National Academy of Sciences of the Republic of Kazakhstan, Series of Geology and Technical Sciences. 2019

[10] Sanalieva LK, Baitenizov DT, Akhmetova GT, Biryukov VV, Maydyrova AB, Goncharenko LP. Intellectual potential of self-employment as the sign of the labor market. Bulletin of National Academy of Sciences of the Republic of Kazakhstan. 2018

benefits for foreign investors, which played a significant role in attracting the first foreign investments into the economy of the republic[11].

The next step was the Law "On Foreign Investments" of December 27, 1994, which is a kind of "second generation law". The changes that were made to it took into account changes in the state's policy towards investors, which was dictated by both the economic development of Kazakhstan as a whole and the beginning of the formation of a favorable investment climate in the country.

With the adoption of the Law "On State Support of Direct Investments" of February 28, 1997, investment legislation received its further development. This legislative act was designed to regulate relations related to investment activities in priority sectors of the economy, which gave a powerful impetus to the development of the production sector.

The adoption of the Law "On Investments" dated January 8, 2003[12] is a new confirmation of Kazakhstan's efforts to create a favorable investment climate and attract external resources to the country's economy. A characteristic feature of this legislative act is the creation of equal conditions, the provision of uniform guarantees and preferences for both foreign and domestic investors. Today, the republic faces the task of stimulating national capital by providing favorable conditions to domestic investors. The Law "On Investments" consists, in essence, of two parts, which were previously regulated by two separate aforementioned legislative acts. The first part establishes the legal regime of investments, the second contains provisions regulating relations on state support of investments.

The Leader of the Nation N.A. Nazarbayev to the people of Kazakhstan dated December 14, 2012 "Strategy "Kazakhstan-2050": a new political course of the established state".

The Government of the Republic of Kazakhstan approved Concept of the Investment Policy of the Republic of Kazakhstan until 2026.

Today, Kazakhstan is taking measures to develop investment activities on the territory of the republic, a legal framework has been formed (the Business Code, the Law of the Republic of Kazakhstan "On Special Economic and Industrial Zones", the Code "On Subsoil and Subsoil Use", tax, customs and land legislation).

The main regulatory act regulating relations related to investments in the Republic of Kazakhstan is the Entrepreneurial Code of the Republic of Kazakhstan[13], in particular Chapter 25 (hereinafter referred to as the "Entrepreneurial Code"). It defines the legal and economic basis for stimulating

[11] Suleimenov, M., & Osipov, E.Review the legal framework for investment in the oil and gas sector of Kazakhstan. Electronic resource, 2008.
[12] The Law of the Republic of Kazakhstan. (2003). No. 373. About investment, dated January 8, 2003.
[13] Code of the Republic of Kazakhstan dated October 29, 2015 No. 375-V "Entrepreneurial Code of the Republic of Kazakhstan" (with amendments and additions as of 11/18/2022)

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investments, guarantees the protection of investors' rights when making investments in Kazakhstan, defines measures of state support for investments, and the procedure for resolving disputes with investors.

In October 2015, the Entrepreneurship Code (as amended), which superseded the Law on Investments, was adopted in Kazakhstan. The code retained most of the earlier investment guarantees, such as the stability of contracts (with certain exceptions), free use of income, the transparency of state investment policy, the stability of tax and foreign labor law in relation to priority investment contracts, reimbursement of losses in the event of nationalization and requisition, and certain others.

## 3. The concepts of investment, investor, major investor and investment activity[14]

*Investments* are all types of property (except goods intended for personal consumption), including financial leasing items from the moment of conclusion of the leasing agreement, as well as the rights to them invested by the investor in the authorized capital of a legal entity or an increase in fixed assets used for entrepreneurial activity, as well as for the implementation of a public-private partnership project, including the number of the concession project.
*An investor* means individuals and legal entities that invest in the Republic of Kazakhstan.

### *3.1. Guarantee of legal protection of investors' activities on the territory of the Republic of Kazakhstan*

This guarantee implies the investor's right to compensation for damage caused to him as a result of the issuance by state bodies of acts that do not comply with the legislative acts of the Republic of Kazakhstan, as well as illegal actions (inaction) of officials of these bodies. The investor is provided with full and unconditional protection of rights and interests, which is provided by the Constitution of the Republic of Kazakhstan, and other regulatory legal acts of the Republic of Kazakhstan, as well as international treaties ratified by the Republic of Kazakhstan.

The Republic of Kazakhstan guarantees the stability of the terms of contracts concluded between investors and state bodies of the Republic of Kazakhstan, except in cases when amendments to contracts are made by agreement of the parties.

[14] Code of the Republic of Kazakhstan dated October 29, 2015 No. 375-V "Entrepreneurial Code of the Republic of Kazakhstan" (with amendments and additions as of 11/18/2022)

### *3.2. Guarantees of the use of income*

Investors have the right, at their discretion, to use the income received from their activities after taxes and other mandatory payments to the budget, as well as to open bank accounts in national currency and (or) foreign currency in banks in Kazakhstan in accordance with the banking and currency legislation of the Republic of Kazakhstan.

The Law on State Property primarily regulates the privatization of state-owned assets. Although the law allows (with certain exceptions) the privatization of any types of assets, typically, only shares in Kazakhstani companies are privatized. The Committee for State Property and Privatization of the Ministry of Finance carries out the privatization of assets owned by the state (as a whole). Regional executive authorities carry out the privatization of assets owned by various regions of Kazakhstan

## 4. The concept and types of investment preferences

Investment preferences are advantages of a targeted nature provided in accordance with the legislation of the Republic of Kazakhstan to legal entities of the Republic of Kazakhstan implementing an investment project and leasing companies importing technological equipment within the framework of an investment project on the basis of a financial leasing agreement for a legal entity of the Republic of Kazakhstan implementing an investment project.

### *4.1. Investment disputes*

Investment disputes can be resolved through negotiations, including with the involvement of experts, or in accordance with the dispute resolution procedure previously agreed by the parties.

If it is impossible to resolve investment disputes through negotiations, disputes are resolved in accordance with international treaties and legislative acts of the Republic of Kazakhstan in the courts of the Republic of Kazakhstan, as well as in international arbitrations determined by agreement of the partie[15]s.

International investment agreements to which Kazakhstan is party typically provide for the following substantive protections, subject to restrictions relating to public interest and sensitive sectors of the economy:

- fair and equitable treatment (FET);
- expropriation (direct and indirect) protections;

[15] Blackmon P. Connecting Specific Reform Policies to Investment and Business. In In the Shadow of Russia: Reform in Kazakahstan and Uzbekistan. Michigan State University Press; 2011

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- most-favoured-nation (MFN) treatment;
- non-discrimination/national treatment;
- full protection and security; and
- umbrella clause.

Kazakhstan is a party to the 1958 New York Convention "On the Recognition and enforcement of foreign arbitral awards"[16].

Kazakhstan has signed the Convention on the Settlement of Investment Disputes July 23, 1992 and according to the official case-database of ICSID Convention Kazakhstan[17] participated as a defendant in 14 cases initiated by the foreign investors. Kazakh claimants (with foreign investments) participated in five cases, including against the Republic of Kazakhstan.

Under the UNCITRAL rules Kazakhstan and Kazakh nationals participated in five cases regarding investment disputes. Also, under Stockholm Chamber of Commerce Kazakhstan participated as a defendant in three cases.

## 5. Bilateral Investment Treaties

Kazakhstan has concluded bilateral treaties on the encouragement and mutual protection of investments with 49 countries[18]. Kazakhstan is also party to a number of multilateral treaties concerning foreign investments (for example, the Energy Charter).

There is no publicly available repository of treaty preparatory materials. Kazakhstan has not yet adopted a model BIT, although there may be plans to do so (the details are not publicly available).

Kazakhstan's BITs typically define 'investment' broadly, although some of the more recent BITs (eg, with Singapore, UAE) expressly exclude certain types of assets (eg, natural resources, commercial loans) from the definition. The definition of 'investment' typically provides an illustrative list of investments, which is not exhaustive and generally includes:

- movable and immovable property and any other property rights, such as rent, liens and mortgage;
- shares, bonds, debentures of a company and other forms of participation in companies;

[16] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10 June 1958

[17] International Centre for Settlement of Investment Disputes 14 October 1966

[18] International Investment Agreements Navigator, Kazakhstan, Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/countries/107/kazakhstan

– intellectual property rights that are protected under the national legislation of the contracting party in whose territory the investments are made, including copyrights, trademarks, patents, industrial samples and technical processes, know-how, commercial secrets;
– business concessions that are given according to the law or contract; and
– licences, authorisations, permits and similar rights conferred provided according to the national legislation of the state of the party.

'Investors' are typically defined broadly as well, covering both natural persons (including persons with double citizenship) and legal entities (eg, companies, non-commercial organisations, and even legal entities registered in a third country but owned or controlled by a legal entity of a state party to another BIT with Kazakhstan).

| NO. | SHORT TITLE | STATUS | PARTIES | DATE OF SIGNATURE | DATE OF ENTRY INTO FORCE |
|---|---|---|---|---|---|
| 1 | Kazakhstan - Qatar BIT (2022) | Signed (not in force) | Qatar | 12/10/2022 | |
| 2 | Kazakhstan - Singapore BIT (2018) | Signed (not in force) | Singapore | 21/11/2018 | |
| 3 | Kazakhstan - United Arab Emirates BIT (2018) | Signed (not in force) | United Arab Emirates | 24/03/2018 | |
| 4 | Japan - Kazakhstan BIT (2014) | In force | Japan | 23/10/2014 | 25/10/2015 |
| 5 | Kazakhstan - Macedonia, The former Yugoslav Republic of BIT (2012) | In force | North Macedonia | 02/07/2012 | 21/05/2016 |

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| NO. | SHORT TITLE | STATUS | PARTIES | DATE OF SIGNATURE | DATE OF ENTRY INTO FORCE |
|---|---|---|---|---|---|
| **6** | Estonia - Kazakhstan BIT (2011) | In force | Estonia | 20/04/2011 | 26/08/2014 |
| **7** | Kazakhstan - Serbia BIT (2010) | In force | Serbia | 07/10/2010 | 07/12/2015 |
| **8** | Kazakhstan - Romania BIT (2010) | In force | Romania | 02/03/2010 | 17/07/2013 |
| **9** | Austria - Kazakhstan BIT (2010) | In force | Austria | 12/01/2010 | 21/12/2012 |
| **10** | Kazakhstan - Viet Nam BIT (2009) | In force | Viet Nam | 15/09/2009 | 07/04/2014 |
| **11** | Kazakhstan - Qatar BIT (2008) | Signed (not in force) | Qatar | 04/03/2008 | |
| **12** | Kazakhstan - Slovakia BIT (2007) | In force | Slovakia | 21/11/2007 | 29/06/2016 |
| **13** | Finland - Kazakhstan BIT (2007) | In force | Finland | 09/01/2007 | 01/05/2018 |
| **14** | Jordan - Kazakhstan BIT (2006) | In force | Jordan | 29/11/2006 | 01/07/2008 |
| **15** | Armenia - Kazakhstan BIT (2006) | In force | Armenia | 06/11/2006 | 01/08/2010 |

| NO. | SHORT TITLE | STATUS | PARTIES | DATE OF SIGNATURE | DATE OF ENTRY INTO FORCE |
|---|---|---|---|---|---|
| **16** | Kazakhstan - Sweden BIT (2004) | In force | Sweden | 25/10/2004 | 01/08/2006 |
| **17** | Kazakhstan - Latvia BIT (2004) | In force | Latvia | 08/10/2004 | 21/04/2006 |
| **18** | Kazakhstan - Pakistan BIT (2003) | In force | Pakistan | 08/12/2003 | 07/12/2009 |
| **19** | Kazakhstan - Netherlands BIT (2002) | In force | Netherlands | 27/11/2002 | 01/08/2007 |
| **20** | Greece - Kazakhstan BIT (2002) | Signed (not in force) | Greece | 26/06/2002 | |
| **21** | Kazakhstan - Tajikistan BIT (1999) | In force | Tajikistan | 16/12/1999 | 20/11/2001 |
| **22** | Bulgaria - Kazakhstan BIT (1999) | In force | Bulgaria | 15/09/1999 | 20/08/2001 |
| **23** | Kazakhstan - Russian Federation BIT (1998) | In force | Russian Federation | 06/07/1998 | 11/02/2000 |
| **24** | BLEU (Belgium-Luxembourg Economic Union) - | In force | BLEU (Belgium-Luxembourg Economic Union) | 16/04/1998 | 06/02/2001 |

https://doi.org/10.46942/SIDM.2023.1.7-28

| NO. | SHORT TITLE | STATUS | PARTIES | DATE OF SIGNATURE | DATE OF ENTRY INTO FORCE |
|---|---|---|---|---|---|
| | Kazakhstan BIT (1998) | | | | |
| **25** | France - Kazakhstan BIT (1998) | In force | France | 03/02/1998 | 21/08/2000 |
| **26** | Kazakhstan - Kuwait BIT (1997) | In force | Kuwait | 31/08/1997 | 01/05/2000 |
| **27** | Kazakhstan - Uzbekistan BIT (1997) | In force | Uzbekistan | 02/06/1997 | 08/09/1997 |
| **28** | Kazakhstan - Kyrgyzstan BIT (1997) | In force | Kyrgyzstan | 08/04/1997 | 01/05/2005 |
| **29** | India - Kazakhstan BIT (1996) | Terminated | India | 09/12/1996 | 26/07/2001 |
| **30** | Czech Republic - Kazakhstan BIT (1996) | In force | Czechia | 08/10/1996 | 02/04/1998 |
| **31** | Georgia - Kazakhstan BIT (1996) | In force | Georgia | 17/09/1996 | 24/04/1998 |
| **32** | Azerbaijan - Kazakhstan BIT (1996) | In force | Azerbaijan | 16/09/1996 | 30/04/1998 |

| NO. | SHORT TITLE | STATUS | PARTIES | DATE OF SIGNATURE | DATE OF ENTRY INTO FORCE |
|---|---|---|---|---|---|
| **33** | Kazakhstan - Malaysia BIT (1996) | In force | Malaysia | 27/05/1996 | 03/08/1997 |
| **34** | Kazakhstan - Romania BIT (1996) | Terminated | Romania | 25/04/1996 | 05/04/1997 |
| **35** | Kazakhstan - Korea, Republic of BIT (1996) | In force | Korea, Republic of | 20/03/1996 | 26/12/1996 |
| **36** | Iran, Islamic Republic of - Kazakhstan BIT (1996) | In force | Iran, Islamic Republic of | 16/01/1996 | 03/04/1999 |
| **37** | Israel - Kazakhstan BIT (1995) | In force | Israel | 27/12/1995 | 19/02/1997 |
| **38** | Kazakhstan - United Kingdom BIT (1995) | In force | United Kingdom | 23/11/1995 | 23/11/1995 |
| **39** | Hungary - Kazakhstan BIT (1994) | In force | Hungary | 07/12/1994 | 03/03/1996 |
| **40** | Kazakhstan - Mongolia BIT (1994) | In force | Mongolia | 02/12/1994 | 13/05/1995 |
| **41** | Italy - Kazakhstan BIT (1994) | Terminated | Italy | 22/09/1994 | 12/07/1996 |

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| NO. | SHORT TITLE | STATUS | PARTIES | DATE OF SIGNATURE | DATE OF ENTRY INTO FORCE |
|---|---|---|---|---|---|
| **42** | Kazakhstan - Poland BIT (1994) | In force | Poland | 21/09/1994 | 25/05/1995 |
| **43** | Kazakhstan - Ukraine BIT (1994) | In force | Ukraine | 17/09/1994 | 09/01/1997 |
| **44** | Kazakhstan - Lithuania BIT (1994) | In force | Lithuania | 15/09/1994 | 25/05/1995 |
| **45** | Kazakhstan - Switzerland BIT (1994) | In force | Switzerland | 12/05/1994 | 13/05/1998 |
| **46** | Kazakhstan - Spain BIT (1994) | In force | Spain | 23/03/1994 | 22/06/1995 |
| **47** | Egypt - Kazakhstan BIT (1993) | In force | Egypt | 14/02/1993 | 08/08/1996 |
| **48** | Finland - Kazakhstan BIT (1992) | Terminated | Finland | 29/09/1992 | 14/02/1998 |
| **49** | Germany - Kazakhstan BIT (1992) | In force | Germany | 22/09/1992 | 10/05/1995 |
| **50** | China - Kazakhstan BIT (1992) | In force | China | 10/08/1992 | 13/08/1994 |

| NO. | SHORT TITLE | STATUS | PARTIES | DATE OF SIGNATURE | DATE OF ENTRY INTO FORCE |
|---|---|---|---|---|---|
| **51** | Kazakhstan - United States of America BIT (1992) | In force | United States of America | 19/05/1992 | 12/01/1994 |
| **52** | Kazakhstan - Turkey BIT (1992) | In force | Türkiye | 01/05/1992 | 10/08/1995 |

## 6. Investment Bodies

The principal state body overseeing investments in Kazakhstan is the Committee on Investments within the Ministry of Foreign Affairs. Among other things, the Committee on Investments is charged with negotiating and concluding investment contracts with investors pursuant to the Entrepreneurship Code.

The Council of Foreign Investors under the President of the Republic of Kazakhstan, the Council for Improving the Investment Climate, the Council for Attracting Investors chaired by the Prime Minister of the Republic of Kazakhstan are functioning to address point and systemic problematic issues of investors. The functions of the Investment Ombudsman are assigned to the Prime Minister of the Republic of Kazakhstan.

In June 2014, the government created the position of investment ombudsman, i.e., a government official whose purpose is to review and try to resolve investment issues and disputes between investors and the state

### 6.1. Astana International Financial Center (AIFC)[19]

The Astana International Financial Center operates, modelled on the Dubai International Financial Center, one of the tasks of which is to assist in attracting investments into the country's economy on the principles of the law of England and Wales and the standards of international financial centers. It offers foreign investors an alternative jurisdiction for operations, with tax holidays, flexible labor rules, a Common Law-based legal system, and flexibility to carry out transactions in any

[19] Constitutional Law of the Republic of Kazakhstan "On the Astana International Financial Center", December 7, 2015

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currency. The GOK recommends that foreign investors use AIFC for contracts with Kazakhstani businesses.

## 7. Main problems and trends of attracting investments

The main problems hindering the attraction of investments into the country's economy include:

### *7.1. State regulation and management:*

- state intervention in the economy (pricing, monopolization, high proportion of quasi-public sector presence, requirements for Kazakhstani content;
- low investor confidence in the judicial system and law enforcement agencies, including weak protection of private capital by them (high risk of confiscation);
- insufficiently developed competition, including administrative barriers for businesses that restrict access to competitive markets for a wide range of entrepreneurs;
- insufficient efficiency of public investments (violations in the amount of 224.2 billion tenge according to the results of 5 state programs (2020), of which financial violations – 9.9 billion tenge, inefficient planning and use of budget funds – 214.3 billion tenge);
- insufficiently effective interdepartmental interaction between various government agencies and development institutions;
- excessive bureaucracy (delaying the allocation of funds, obtaining documents in various instances at the local level);
- absence of a policy to protect and promote external investments, including those aimed at achieving the goals of the ESG agenda;
- an insufficiently developed system of information and communication support for investors.

### *7.2. Problems of factors of production*[20]

- insufficiently developed engineering infrastructure and lack of ready-made industrial premises;
- lack of available land resources (often the best land plots have already been purchased);

[20] The concept of investment policy of the Republic of Kazakhstan until 2026 dated July 15, 2022 No. 482

- lack of available financial resources for the development of investment potential and their weak diversity;
- obsolescence of fixed assets (increase in depreciation of fixed assets – from 34.2% to 42.8% (2016-2020);
- shortage of skilled labor;
- low critical mass of industrial entrepreneurs in the manufacturing industry;
- the absence of a digital platform that promotes the unification of industry and related structures (training, logistics, sales, standards, etc.).

***7.3. Legal regulation:***

- imperfection of investment legislation (ambiguous interpretations of norms, frequent amendments and additions);
- low involvement of investors in the process of drafting and discussing draft laws and other regulatory documents.

***7.4. Structural problems[21]:***

- undiversified structure of investments in fixed assets and FDI by industries and regions;
- the small capacity of the domestic consumer market (according to the World Bank[22], this factor is in the top 6 out of 15 factors that investors pay attention to. Studies have confirmed the existence of a correlation between the number of FDI projects being implemented and the size of the population[23]. Kazakhstan with its vast territory has a population of only 19.1 million people.
- barriers to tariff and non-tariff regulation of partner countries;
- currency risks for investors;
- the absence of ESG country standards, including the carbon regulation system.

[21] The concept of investment policy of the Republic of Kazakhstan until 2026 dated July 15, 2022 No. 482
[22] https://openknowledge.worldbank.org/bitstream/handle/10986/33808 /9781464815362.pdf
[23] https://www.investmentmonitor.ai/analysis/fdi-drivers-and-domestic-markets- does-size-matter

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## SWOT - analysis of attracting investments[24]

| | |
|---|---|
| **Strengths:**<br>1. Increased attention on the part of the state to the issue of attracting investments within the framework of the implemented state policy.<br>2. Favorable business climate.<br>3. High investment attractiveness of the country due to the possession of a significant mineral resource base.<br>4. Favorable geographical position of Kazakhstan with access to the large consumer markets of the EAEU, Central Asia, China and India.<br>5. The existence of a system of development institutions aimed at promoting investment in the country's economy. | **Weaknesses:**<br>1. Low level of investor confidence in the judicial system.<br>2. Insufficient efficiency of public investments.<br>3. Insufficiently effective interdepartmental interaction between various state bodies and development institutions in the framework of attracting and retaining investments.<br>4. An insufficiently developed system of information and communication support for investors.<br>5. Lack of a policy to protect and promote external investments.<br>6. Insufficiently developed infrastructure for investors (transport and logistics, production, engineering, trade infrastructure).<br>7. A high degree of depreciation of fixed assets in the economy and, as a result, a high level of costs and low labor productivity.<br>8. Imperfection of investment legislation.<br>9. Low involvement of investors in the process of drafting and discussing draft laws and other regulatory documents.<br>10. Currency risks for investors. |
| **Opportunities:**<br>1. Further liberalization of the investment regime in the country, strengthening the positive investment image of the country in the world capital markets.<br>2. Revision of existing investment agreements considering structural changes in the world economy and the economy of Kazakhstan.<br>3. Implementation of projects that contribute to the gradual transition to a "green" economy and the development of digital technologies.<br>4. Implementation of projects focused on the EAEU markets, in particular, Russia and Central Asian countries.<br>5. Creation of separate incentive measures for investment projects that meet the Sustainable Development Goals.<br>6. Application of the MFC platform, including its rights and mechanisms for resolving investment disputes. | **Threats:**<br>1. The decline in the investment attractiveness of the country as a result of political instability.<br>2. Depletion of the mineral resource base.<br>3. The decrease in the investment attractiveness of Kazakhstan's natural resources as a result of the transition of countries to carbon neutrality.<br>4. Low investment activity of domestic investors and a decrease in the inflow of foreign capital.<br>5. The persistence of high risks in the economy due to structural imbalances of the economy and the direction of investment.<br>6. The loss of existing competitive advantages and industrial potential of the country due to a reduction in growth rates and (or) low investment in fixed assets, as well as foreign direct investment.<br>7. Aggravation of global competition for investment, including from neighboring countries, and as a result, a possible flow of foreign investment from Kazakhstan. |

[24] The concept of investment policy of the Republic of Kazakhstan until 2026 dated July 15, 2022 No. 482

## 8. Further Development of the Investment Ecosystem

In order to attract additional investment in the country's economy, measures will be taken to develop alternative sources of investment, strengthen the role of the banking sector in financing the economy, transform PPP mechanisms, and reduce the shadow economy.

As part of the implementation of the investment policy, priority will be given to the creation of new export-oriented and high-tech industries, integration into regional and global value chains and supplies, ensuring food security and the development of the domestic market, considering international commitments.

The key benchmarks for attracting investments in the non-resource sector and moving away from the raw material model of development will be labor productivity growth, increasing the volume and complexity of exports, as well as phased localization of production[25].

Work will continue on the implementation of projects aimed at introducing the best available technologies according to OECD standards at existing production facilities, and the development of "green" technologies, the development of alternative energy sources, including "green" hydrogen.

Such dialogue platforms as the Council of Foreign Investors under the President of the Republic of Kazakhstan, the Council for Improving the Investment Climate under the Prime Minister of the Republic of Kazakhstan and the Investment Ombudsman are actively operating in Kazakhstan, which are designed to promptly resolve problematic issues arising during investment activities in Kazakhstan.

## 9. Conclusion

At the moment, huge efforts are being directed by the government of the country to create conditions that would consolidate the image of Kazakhstan as an attractive country for investment, with minimal risk for its promotion. Towards improvement in the investment climate, a number of measures have been undertaken. Investment attraction function has been assigned to the Ministry of Foreign Affairs. Coordinating Council on Investment Attraction was created under the chairmanship of the Prime Minister.

At the same time foreign companies remain concerned about the risk of preferences for domestic companies and mechanisms for government intervention in foreign companies' operations, particularly in procurement.

[25] Olcott M. Is Kazakhstan Moving in the Right Direction? In Kazakhstan: Unfulfilled Promise (pp. 245-288). Carnegie Endowment for International Peace; 2010.

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The Law of January 8, 2003 No. 373-II "On Investments", which replaced them, as well as the current Business Code of the Republic of Kazakhstan contain only the definition of "investment", while the concept of direct investment has not received due attention. Given this, first of all it is necessary to define the concept of direct investment. The main regulatory act regulating relations related to investments in the Republic of Kazakhstan is the Entrepreneurial Code of the Republic of Kazakhstan[26], in particular Chapter 25 (hereinafter referred to as the "Entrepreneurial Code").

At the moment, huge efforts are being directed by the government of the country to create conditions that would consolidate the image of Kazakhstan as an attractive country for investment. The imperfection of investment legislation is noted in the concept of investment policy of the clear action program is needed to attract foreign investment, and on the basis of this program it is necessary to create leverage to attract and stimulate external investment. In this regard, Kazakhstan approved on July 15, 2022 until 2026 as one of the weaknesses of the policy, negatively affecting the effectiveness of attracting investment. In addition, the legislative framework should contain strong mechanisms for protecting investors. World practice has developed various forms of legal cooperation between the host country and foreign investors also.

Thus, during the implementation of the Investment Policy of the state, Kazakhstan has achieved significant success in the development of its socio-economic potential. Thanks to the foreign capital received, the Republic of Kazakhstan has strengthened its position as a country with powerful energy resources and ambitious, but at the same time sustainable plans for the future.

The activation of the investment process based on the state investment policy is one of the most effective mechanisms of socio-economic transformation. At the same time, the growth of the economy and the ever-increasing need for capital and technology require further institutional reforms to create attractive investment conditions and greater protection of investors' rights in Kazakhstan.

[26] Code of the Republic of Kazakhstan dated October 29, 2015 No. 375-V "Entrepreneurial Code of the Republic of Kazakhstan" (with amendments and additions as of 11/18/2022)

**Reference**

Abykanova BT, Sariyeva AK, Bekalay NK, Syrbayeva S.J, Rustemova A.I, Maatkerimov N.O. Technology and prospects of using solar energy. News of National Academy of Sciences of the Republic of Kazakhstan, Series of Geology and Technical Sciences. 2019.

Blackmon P. Connecting Specific Reform Policies to Investment and Business. In In the Shadow of Russia: Reform in Kazakahstan and Uzbekistan. Michigan State University Press; 2011

Boyd, S., Lalonde, M., & Hanotiau, B.Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, 2008.

Code of the Republic of Kazakhstan dated October 29, 2015 No. 375-V "Entrepreneurial Code of the Republic of Kazakhstan" (with amendments and additions as of 11/18/2022)

Concept of investment policy of the Republic of Kazakhstan until 2026 dated July 15, 2022 No. 482 https://openknowledge.worldbank.org/bitstream/handle/10986/33808/9781464815362.pdf

Data, the Ministry of the National Economy of Kazakhstan.

Madiyev, G., Kerimova, U., Yespolov, A., Bekbossynova, A., Rakhimzhanova, G. Fostering Investment-Innovative Activity within the Agro-Industrial Complex of the Republic of Kazakhstan, Journal of Environmental Management and Tourism 9, 2018.

Law of the Republic of Kazakhstan. (2003). No. 373. About investment, dated January 8, 2003.

Olcott M. Is Kazakhstan Moving in the Right Direction? In Kazakhstan: Unfulfilled Promise (pp. 245-288). Carnegie Endowment for International Peace; 2010.

Sanalieva LK, Baitenizov DT, Akhmetova GT, Biryukov VV, Maydyrova AB, Goncharenko LP. Intellectual potential of self-employment as the sign of the labor market. Bulletin of National Academy of Sciences of the Republic of Kazakhstan. 2018;

Suleimenov, M., & Osipov, E.Review the legal framework for investment in the oil and gas sector of Kazakhstan. Electronic resource, 2008.

Tukulov, B. "Discussion of possible ways to reduce the legal risks faced by foreign investors in the implementation of activities in the Republic of Kazakhstan".2013.

https://doi.org/10.46942/SIDM.2023.1.7-28

World Bank Data.

Olcott M. Is Kazakhstan Moving in the Right Direction? In Kazakhstan: Unfulfilled Promise (pp. 245-288). Carnegie Endowment for International Peace; 2010.

**ALIZ MÓRICZ***

# *Dogmatic issues of expert evidence in a comparative law approach***

**Abstract:** Before any codification, the role of the expert in civil proceedings was questionable. As legal scholars have interpreted the provisions on the expert differently, different views have emerged on the role of the expert. The question arises, what does an expert qualify as? Is he an assistant to the judge or a means of evidence? The present study aims to answer this question by examining the most relevant civil procedural codes of Hungary, analyzing the current regulations in force, and furthermore, by looking at the European perspective.
**Keywords:** expert evidence, role of the expert, officially appointed expert, party-appointed expert, civil procedure law, European civil procedure law

**Absztrakt:** A szakértő perbeli szerepkörének megítélése minden kodifikációt megelőzően kérdéses volt. Mivel a jogtudósok eltérően értelmezték a szakértőre vonatkozó rendelkezéseket, a szakértői szerepkört illetően különböző álláspontok alakultak ki. Így jogosan merül fel a kérdés, hogy minek is minősül a szakértő? A bíró segédszerve, avagy egy a bizonyítási eszközök közül? Jelen tanulmány erre a kérdésre kíván választ adni, hazánk polgári eljárásjogának legmeghatározóbb törvényeit vizsgálva, a hatályos szabályozást elemezve, továbbá egy európai kitekintés keretei között.
**Kulcsszavak:** szakértői bizonyítás, szakértői szerepkör, kirendelt szakértő, magánszakértő, polgári eljárásjog, európai polgári eljárásjog

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## 1. The initial estimation and the evolution of the role of the expert in Hungary

### 1.1. *Act LIV of 1868*

Expert evidence is a legal institution with a long history: it was first regulated in the *Act LIV of 1868* on the Code of Civil Procedure – the first civil procedural code in Hungary, which sought to regulate the whole Hungarian civil procedure comprehensively.

The Act only mentioned the activity of experts in connection with the judicial inspection. Accordingly, an expert could be called upon, if the court deemed it

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necessary.[1] The selection of the expert was primarily left to the parties, but it was also possible for them to decide on the appointment of an expert for several different subjects, and for the judge himself to appoint a third.[2] It should be stressed, that the relevance and applicability of the opinion of the expert in the legal dispute was decided by the court.[3]

It can be noted, that the court used the expert as an auxiliary to the court during the inspection, but at the same time, the opinion of the expert could be evaluated by the court in its decision, so he was also present as a means of evidence – thus, our first Code was characterised by the dual role of the expert.

### 1.2. *Act I of 1911*

The *Act I of 1911* (hereinafter referred to as the Plósz Act) was created with regard to the German model and was marked by the name of Sándor Plósz, who was a prominent Minister of Justice at that time. The Code was considered outstanding in its time and contributed greatly to the development of the provisions currently in force, regarding expert evidence.

Unlike the Act of 1868, the Plósz Act already had a separate chapter on expert evidence, the Chapter XII, entitled „Experts". According to Section 350, an expert was appointed, if special knowledge was required for the assessment of a significant fact in the case, or to carry out the inspection – it is important, that the absence of this special knowledge on the part of the court, as a prerequisite for appointment was first mentioned by the Plósz Act.

There are different views in the legal literature on the role of the expert. In the work of Géza Magyary, one of the most prominent legal scholars of that time, we can discover a certain duality: according to his view expressed in 1898, the expert is not a means of evidence, but only an assistant to the judge,[4] but at the same time, on the basis of his work related to the Plósz Act, he saw the expert as both a judicial assistant and one of the means of evidence.[5] However, pursuant to Marcel Kovács,

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[1] Act LIV of 1868 on the Code of Civil Procedure, Section 211.
[2] PARLAGI, M.: A szakértői bizonyítás újraszabályozásának szükségességéről. In: NÉMETH, J. – VARGA, I. (eds.): *Egy új Polgári Perrendtartás alapjai*. Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2014. 511.
[3] Act LIV of 1868 on the Code of Civil Procedure, Section 217.
[4] MAGYARY, G.: *A magyar polgári peres eljárás alaptanai*. Budapest, Franklin-Társulat Magyar Irodalmi Intézet és Könyvnyomda, 1898. 200.
[5] MAGYARY, G.: *Magyar polgári perjog*. Budapest, Franklin-Társulat Magyar Irodalmi Intézet és Könyvnyomda, 1913. 449-451.

under the Plósz Act the expert clearly functions as the assistant of the judge,[6] and his point of view was also supported by Andor Sárffy, when he said, that the expert is a quasi judge of fact.[7]

### 1.3. *Act III of 1952*

The Plósz Act was replaced by the *Act III of 1952*, which defined the civil procedural law of Hungary for more, than sixty years. During the codification process, the legislation underwent significant changes: the previous Code was shortened,[8] the normative regulations on expert evidence have been clarified.

According to Section 171, Subsection 1 of the Act, it declared, that if special knowledge (which the court does not have) is necessary to establish or assess a fact or other circumstances relevant to the legal dispute, the court shall appoint an expert. An expert could be anyone, who was able to substitute the lack of expertise of the court – only this special knowledge was required to act as an expert. The appointment could be made by the agreement of the parties, and the court was only entitled to decide, if this was not done. In addition, at the request of a party, the court could appoint another expert to replace the previously appointed one, if it was necessary for the purpose of taking evidence.[9]

Under Section 166, Subsection 1, the Act has taken a determined stand on the role of the expert, since the expert was placed among the means of evidence. However, problems arose in relation to the opinion of the expert appointed by the parties, as the Code of 1952 did not mention the party-appointed expert as a means of evidence. This „silence" of the Act has created difficulties for the judiciaries, which has resulted in inconsistent jurisprudence regarding to the assessment of the party-appointed expert and his opinion. This is best illustrated by the fact, that the legal practice has taken five different approaches to the assessment of the opinion of the party-appointed expert. On this basis, his opinion

- is not an evidence, equalled to the personal statement, the professional opinion of the party;[10]
- is indeed the personal statement, the professional opinion of the party, but must be assessed within the evidence;[11]

[6] Kovács, M.: *A polgári perrendtartás magyarázata I.* Budapest, Benkő Gyula Császári és Királyi Udvari Könyvkereskedése, 1911. 435-450.
[7] Sárffy, A.: *Magyar polgári perjog.* Budapest, Grill Károly Könyvkiadóvállalata, 1946. 290-297.
[8] See: Németh, J.: *A polgári perjogunk fejlődése a felszabadulás óta.* Magyar Jog, 1985/3-4. 290.
[9] Act III of 1952 on the Code of Civil Procedure, Section 177. Subsections (3)-(6)
[10] BH1996. 102., BH2004. 59.
[11] BH1999. 365., BH2007. 192.

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- is not stated as evidence, but treated as such, so contradictions must be resolved;[12] a means of evidence, not specified by the Act, but it has to be taken into discretion;[13]
- is an evidence in the legal dispute, so if it is contrary to the opinion of the officially appointed expert, then there are two opposite opinions, and, in pursuance of that, the joint hearing of the experts is necessary;[14]
- is a *sui generis* means of evidence, not mentioned in Section 166, Subsection 1 of the Code of 1952, which the court is obliged to assess in the context of the free taking of evidence.[15]

### 1.4. *Act CXXX of 2016*

In the context of the codification of the *Act CXXX of 2016* on the Code of Civil Procedure, the role of the expert was again on the agenda, which was an interesting issue in the codification process only in a theoretical manner. Since the earlier drafting and coming into force of the *Act XXIX of 2016* on judicial experts had already decided this issue, the regulation of the Code was bound to it in a sense. However, in the codification process, several people have stated,[16] that the Act should define the expert as an auxiliary to the court, and not as a means of evidence – furthermore, that the Hungarian system of expert evidence should be aligned with the one declared in the Italian Code of Civil Procedure. But on the other hand, the legislator had to take the fact into consideration, that the Concept,[17] which laid down the cornerstones of the Code, declared the need to carry through the principle of free disposition, which was enforced by the Act on judicial experts. In consideration with the circumstances, my opinion is, that the function of the expert as an assistant to the judge would have introduced excessive officialism into the evidentiary procedure, which would have been contrary to the fundamental objectives of the Code of Civil Procedure.

With regard to this, Section 268, Subsection 2 of the Code declares, that an expert, who may be employed in civil proceedings is a means of evidence – and his expert opinion can be used as evidence in the legal dispute, on the basis of this provision. Hereby, it can be determined, that the Code essentially adopted the

[12] BH1983. 233.
[13] BDT2003. 759.
[14] BDT2001. 181., BH2003. 17.
[15] BH2012. 175.
[16] See: VARGA, I. – ÉLESS, T. (eds.): *Szakértői Javaslat az új polgári perrendtartás kodifikációjára.* Budapest, HVG-Orac Lap- és Könyvkiadó Kft. – Magyar Közlöny Lap- és Könyvkiadó Kft., 2016. 618.
[17] Concept for a new Code of Civil Procedure – Concept adopted by the Government on the 14th of January, 2015.

provisions of the Act of 1952 with regard to the role of the expert, with the difference, that the Code also mentions an additional method of employing an expert: namely, private expert evidence. By arranging the party-appointed expert by legal means, the Code of Civil Procedure remedied the deficiencies of the Code of 1952, cut off the loopholes and the uncertain legal practice surrounding it – thus, creating one of the most significant reforms of the Code.

## 2. Expert evidence in the Hungarian civil procedure

### 2.1. *Employment of an expert*

An expert is a person, who, in addition to the court's lack of expertise, enables the court to ascertain facts relevant to the outcome of the dispute, or to make a proper assessment of the facts as they are perceived.[18] Generally speaking, an expert is a person with special knowledge, who, unlike the court, expresses his opinion on a question of fact, rather than on a question of law. This special expertise is usually understood as knowledge and experience outside the law, beyond general knowledge.[19] However, the effective and fair enforcement of substantive rights in litigation requiring special knowledge is also guaranteed by the highest possible level of impartial and independent performance of expert activity.[20] The Act XXIX of 2016 on judicial experts is intended to ensure this quality of expert activity, so the Code of Civil Procedure only allows the use of experts or ad hoc experts[21] listed in the register of judicial experts under the Act.

Under the provisions of the Code,[22] the party producing evidence may choose between two mutually exclusive ways of taking expert evidence: either he may appoint an expert himself, or the court may appoint one on his motion (as a sub-case of the employment of an officially appointed expert, the Act also allows the use of an expert appointed in other proceedings). So, as a general rule, the parties are primarily entitled to choose the expert. The court may decide on the person of the expert as a second choice, only if the parties cannot jointly appoint a person, who is otherwise eligible to be an expert in the dispute under the rules of the Code,

[18] FARKAS, J.: Bizonyítás. In: SZILBEREKY, J. – NÉVAI, L. (eds.): *A polgári perrendtartás magyarázata.* Budapest, Közgazdasági és Jogi Könyvkiadó, 1976. 927.
[19] BÁNYAI, I.: Igazságügyi szakértő a tárgyalóteremben – a kérdéskör vizsgálata a szakértő szemszögéből. In: SZAKÁLY, Zs. (ed.): *Tanulmánykötet – Igazságügyi szakértő a tárgyalóteremben.* Budapest, Magyar Közlöny Lap- és Könyvkiadó Kft., 2019. 11.
[20] ASZÓDI, L.: Szakértők. In: WOPERA, Zs. (ed.): *A polgári perrendtartásról szóló 2016. évi CXXX. törvény magyarázata.* Budapest, Wolters Kluwer Kiadó, 2017. 403.
[21] An ad hoc expert may be a person with appropriate expertise, who is not otherwise qualified as an expert. However, this is only possible in exceptional cases, where there is no registered judicial expert in the field in question, or there is one, but none of them can perform their duties, or where the field in question is not listed in the Act. See: Act XXIX of 2016 on judicial experts, Section 2. 4.)
[22] Act CXXX of 2016 on the Code of Civil Procedure, Section 300, Subsection 3.

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and is untouched for exclusion. Contrary to the previous law, the appointment cannot be made without questions being asked, but the court may only ask questions, if the party has done so, and only in relation to the facts, which the party has raised in his questions.[23]

The Code of Civil Procedure provides, that if a party has already requested the appointment of an officially appointed expert, or the use of an expert appointed in other proceedings, the employment of a party-appointed expert may no longer be a possibility in relation to the same matter.[24] Furthermore, if a party has requested the appointment of an officially or party-appointed expert, on the same subject matter, there is no way to employ an expert appointed in other proceedings.[25]

Although the possibility of choosing is the power of the party, this option is not only binding the court, but also the other party. Since in the area of means of refutation and overthrowing expert opinion, it limits the procedural space of the opponent of the party producing evidence: if the route of a party-appointed expert is chosen, the opposing party can only prove by private expert evidence, while if the route of an officially appointed expert is chosen, the opposing party can only prove in this way, and can only raise concerns about the private expert evidence and the evidence of an officially appointed expert proposed and obtained by the party producing evidence in the same way.[26]

The Act establishes a hierarchy of the ways in which an expert may be employed: private expert evidence is the primary method – an officially appointed expert may be employed, if the party cannot or does not wish to appoint a party-appointed expert, and does not commission a party-appointed expert to provide an expert opinion. This may be the case, for example, if the party producing evidence is not able to provide professional responsibility, or if he wants to make use of a legal aid, because his income and financial circumstances do not allow him to pay the fees of a party-appointed expert.[27] However, there are exceptions to the primacy of private expert evidence. For example, the Code may exclude the employment of a party-appointed expert in certain cases, as it does within the common rules on actions related to personal status, that the employment of a party-appointed expert is not possible in such actions.[28] In cases, where the court takes evidence of its own motion on the basis of a statutory mandate, it is also not possible to employ a party-

[23] Aszódi, L.: i.m. 412.
[24] Act CXXX of 2016 on the Code of Civil Procedure, Section 302, Subsection 5.
[25] Act CXXX of 2016 on the Code of Civil Procedure, Section 306, Subsection 4.
[26] Virág, Cs.: A szakértői bizonyítás egyes kérdései a polgári perben – A 2016. évi CXXX. törvény újításai a szakértői bizonyítás körében. In: Szakály, Zs. (ed.): *Tanulmánykötet – Igazságügyi szakértő a tárgyalóteremben c. konferencia*. Budapest, Magyar Közlöny Lap- és Könyvkiadó Kft., 2019. 25.
[27] Nagy, A.: A bizonyítás. In: Nagy, A. – Wopera, Zs. (eds.): *Polgári eljárásjog I.* Budapest, Wolters Kluwer Kiadó, 2021. 331-332.
[28] Act CXXX of 2016 on the Code of Civil Procedure, Section 434, Subsection 5.

appointed expert, but only an officially appointed expert can be employed for the relevant special questions.

With regard to the employment of the expert, it is important to note, that according to the regulations of the Code of Civil Procedure, the opinions of the officially and party-appointed expert are considered in the same context – they are assessed in the same circle in terms of evidentiary value.

### 2.2. *Regulations related to an officially appointed expert*

The court appoints the expert by court order, at the request of the parties. This appointment order is made after the parties have been heard and the facts and circumstances have been clarified in the course of the proceedings.

According to Section 307 of the Hungarian Code, upon a motion, the court shall officially appoint an expert, if regarding a given subject matter, the employment of a party-appointed expert or an expert officially appointed in other proceedings was not requested by any of the parties producing evidence, all the opinions of the party-appointed experts are inconclusive, or it is necessary to provide clarifications as necessary to address the inconclusiveness of the opinion of an expert officially appointed in other proceedings, or to answer any question proposed.

The motion for the appointment of an expert shall state all the questions, that needed to be answered by the expert, and the opposing party also has the right to request questions, which have to be asked. The court may also address questions to the expert, but as it is bound by the parties' motion, it cannot go beyond that, but only in relation to the factual allegations covered by the parties' questions.[29]

In its order, the court shall call upon the expert to submit a written expert opinion, or to supplement it. Exceptionally, it is also possible for the court to summon the expert for a hearing, if it appears appropriate. In particular, the expert may be summoned to a hearing, if the determination of the boundaries of the legal dispute, or the data necessary to form an opinion justifies the presence of the expert at the hearing.[30]

Since expert evidence is costly, Section 308, Subsection 4 states, that if justified, the court may also call upon the expert to produce a working schedule, which shall include his tasks and the expected costs. In such a case, the court may only call upon the expert to submit his written opinion, after the party has been informed of the working schedule and only, if the party declares, that he wishes the expert to carry out his activity. If the party does not request or does not make a statement within

[29] RÁCSKAY, J.: *A szakértőre vonatkozó szabályozás lényegesebb változásai a polgári peres eljárásban*. In: https://www.jogiforum.hu/files/publikaciok/racskay_jeno__szakertore_vonatkozo_szabalyozas_uj_ppljogi_forum].pdf (20th of December, 2022) 7.

[30] Act CXXX of 2016 on the Code of Civil Procedure, Section 308, Subsection 3.

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the time limit, the party shall be deemed to have withdrawn its motion to employ the expert.

The court shall discharge the officially appointed expert from his appointment ex officio, if the expert is not entitled to preceed under the official appointment by virtue of an Act, or he is prevented from proceeding for another important reason, or the expert cannot be expected to deliver an expert opinion on the subject matter, or if the court determined in its decision, that he refused to deliver an opinion valid grounds. The officially appointed expert must be also discharged, if the party withdrew his motion for the employment of an expert before the submission of the expert opinion, or if the court did not order or conduct the taking of expert evidence, or another reason specified by law exists.[31] If the expert was excluded from the action or discharged from the official appointment, the court shall appoint another expert ex officio.[32]

The court shall serve the written opinion of the officially appointed expert to the parties. The parties may request questions to be asked to the expert regarding his expert opinion, or on essential data in the action, that were not communicated to him, and may request clarifications to be made by the expert as necessary to address any inconclusiveness of his expert opinion. If the court accepts the proposal, it shall call upon the expert to supplement his expert opinion in writing, or, if it seems to be expedient, the court shall summon him to the hearing.[33] If the opinion of the officially appointed expert is inconclusive and the inconclusiveness could not be addressed despite the clarifications provided by the expert, the court shall, upon a motion, officially appoint a new expert.[34]

### 2.3. *Appointing a private expert*

The appearance of the legal institution of a party-appointed expert in the Code of Civil Procedure is a significant novelty – it was also required in order to ensure consistency with the substantive law on judicial experts.

A party-appointed expert has already been defined earlier as an expert, who gives his opinion on the basis of a civil law mandate from the party, based on the investigational material provided by the principal – but his opinion has not been accepted as an expert opinion by the courts in legal disputes. Judicial practice was inherently distrustful of the party-appointed expert, because the civil law mandate behind his opinion was not defined in the *Act IV of 1959* on the Civil Code. According to Section 474, Subsection 2 of the previous Civil Code, the expert was

[31] Act CXXX of 2016 on the Code of Civil Procedure, Section 310.
[32] Act CXXX of 2016 on the Code of Civil Procedure, Section 311, Subsection 1.
[33] Act CXXX of 2016 on the Code of Civil Procedure, Section 313.
[34] Act CXXX of 2016 on the Code of Civil Procedure, Section 315, Subsection 1.

required to perform his duties according to the instructions of the principal and in his interest, and this substantive rule, pursuant to the earlier view, brought into doubt the impartiality of the expert and the consideration of his opinion.[35] However, the Civil Code currently in force no longer contains a reference in the interest of the principal in the regulations on personal service contracts. The right to instruct, which is determined in Section 6:273, Subsection 1, in the *Act V of 2013* on the Civil Code (the agent shall follow the instructions of the principal) is not applicable in view of the special regulation, defined in Section 47 of the Act on judicial experts, since this Act provides, that the expert may not be instructed in connection with the professional findings of the expert opinion – he is obliged to act with regard to the principle of independence and impartiality.

The employment of a party-appointed expert cannot be made automatically, as in order to submit his opinion, according to Section 302, Subsection 1 of the Code of Civil Procedure, firstly, the party producing evidence must make a motion to the court – who has an interest in the fact to be proven by the expert by the court as truth. It is important to emphasise, that the „expert opinion" filed with the statement of claim may also be suitable to determine the boundaries of the legal dispute or explaining the claims of the plaintiff, and thus for serving the efficiency of the proceedings. But according to the provisions of the Code of Civil Procedure, it does not qualify as a private expert opinion, it cannot be considered as evidence, because the conditions set out in Section 303, Subsection 2 cannot be fulfilled with regard to the expert appointed before the statement of claim was filed.[36]

On the motion, the general rules of evidence and other relevant civil procedural regulations are normative, so the court applies them to decide whether or not to grant the motion and, if so, when. This method of using an expert, unlike the method of appointing an expert officially, does not require the motion to state the specific questions to be answered by the expert. In the case of an opinion of a party-appointed expert, the expert must act on the basis of the information provided by the party, and not in accordance with the instructions of the court in its order.[37]

The regulations on the rights and obligations of the party-appointed expert are settled in Section 303 of the Code. In this respect, it should be pointed out, that the provisions governing the party-appointed expert are almost consistent to the regulations in regard to the expert appointed ex officio,[38] but the Code imposes certain additional obligations on the party-appointed expert. According to these

[35] SZALAI, P.: Bizonyítás. In: WOPERA, Zs. (ed.): *Kommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez*. Budapest, Magyar Közlöny Lap- és Könyvkiadó Kft., 2017. 528.
[36] SZALAI, P.: i.m. 529.
[37] BARTAL, G.: Szakértők. In: PETRIK, F. (ed.): *Polgári eljárásjog I-II. – Kommentár a gyakorlat számára*. Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2022. 425-426.
[38] See: Act CXXX of 2016 on the Code of Civil Procedure, Sections 307-315.

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additional obligations, a party-appointed expert shall be obliged to inform the opposing parties of his principal of the subject matter of his mandate, the scope of matters to be examined, and any on-site inspection or examination scheduled by him, and allow the opposing party to make statements regarding the subject matter of the mandate, and to submit observations, that are relevant to the subject matter of the examination. The party-appointed expert also has to prepare his expert opinion, including the assessment of any statement or observation communicated to him by an opposing party, and answer questions asked by the court, the parties and the party-appointed expert of the opposing party during the hearing or taking evidence.[39] It is important to note, that a party-appointed expert – just like an expert appointed by the court – is bound by confidentiality with regard to personal data, facts and circumstances, that come to his knowledge in the course of preparing his opinion.[40] If the party-appointed expert fails to comply with these obligations, it may have serious consequences, as his expert opinion is then considered to be inconclusive, in view of Section 316, Subsection 2, and cannot be used as evidence in the legal dispute.

In the context of private expert evidence, the data and questions necessary for the preparation of an expert opinion are in principle provided directly to the expert by the party appointing the expert, as part of the mandate. It may be the case, that even the identification of the necessary relevant data requires special knowledge, that is why the Code explicitly and separately grants the party-appointed expert the right to inspect and copy documents, and to be present at the hearing or otherwise at the taking of evidence. In exercising these rights, the expert may be able to indicate to the party appointing him, that some informations, which are essential for the preparation of an expert opinion are missing from the case file, and that it is justified for the party to make further submissions or to request further evidence. According to the regulations of the Act, the party-appointed expert may have to supplement his opinion orally at the hearing, including the clarification of the reasons for the professional disagreement with the other party-appointed expert's opinion. In order to do this effectively, the Code empowers the expert to propose questions to the parties during the proceedings. However, it should be noted, that the party-appointed expert can exercise his rights (declared in Section 303, Subsection 1 of the Code) from the moment, the order for the taking of evidence is made, which is the moment, when he acquires his special status in the civil proceedings. If the party producing evidence has had a party-appointed expert's

[39] Act CXXX of 2016 on the Code of Civil Procedure, Section 303, Subsections 1-2.
[40] See: Act XXIX of 2016 on judicial experts, Section 53, Subsection 2.

opinion prepared before the trial, this does not entitle the expert to attend at the hearing, for example.[41]

The Hungarian Code of Civil Procedure gives any party submitting a party-appointed expert opinion the right to request, that the opinion of the expert has to be supplemented, for a number of specified reasons. In any case, the purpose of the motion is to ensure, that the party-appointed expert's opinion is capable of being proved or disproved – since the consequences of ground for supplementation and failure to supplement the opinion are the opinion cannot be taken into account as evidence. The supplementation may be justified by the questions of the opposing party and by any informations from the case, which are relevant to the issue and the expert did not take into account when preparing his opinion, for example because it was revealed by evidence taken subsequently.[42] The reason for supplementation may be any inconsistency with the opinion of the expert of the opposing party regarding the subject matter, in which case either party may request that both of the party-appointed experts supplement their opinions orally at the same hearing.[43]

Section 316, Subsection 2 of the Code specifically regulates the cases of inconclusiveness of the party-appointed expert opinion. In the first place, all the conditions, that lead to the inconclusiveness of the opinion of the officially appointed expert,[44] also lead to the inconclusiveness of the opinion of the party-appointed expert. However, there are several cases, where the opinion of the party-appointed expert may be inconclusive. The reason for imposing additional requirements is, on one hand, that the party-appointed expert has no connection with the court, acts essentially on the basis of a contractual relationship with the party appointing him, and the law must ensure, that the opponent of the party appointing him is also allowed to participate in expert evidence. It achieves this by making it a reason for inconclusiveness, if the party-appointed expert failed to perform his procedural obligations specified in the Act,[45] or it was not supplemented regarding the questions raised by the opposing party.[46] On the other hand, the speciality of private expert evidence is, that two private expert opinions can be produced, so it is easy for them to take opposing positions on a technical issue. The court cannot, of course, resolve the conflict on a professional basis, but neither can it establish the relevant fact, on which the expert is asked to give an opinion, without an expert opinion. In such a case, the private expert evidence is considered to be unsuccessful, to which the law attaches the legal consequence of

[41] NAGY, A.: Szakértők. In: WOPERA, Zs. (ed.): *Nagykommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez*. Wolters Kluwer Kiadó, 2022. (Online legal database)
[42] ASZÓDI, L.: i.m. 411.
[43] Act CXXX of 2016 on the Code of Civil Procedure, Section 304, Subsection 3.
[44] Act CXXX of 2016 on the Code of Civil Procedure, Section 316, Subsection 1.
[45] Act CXXX of 2016 on the Code of Civil Procedure, Section 316, Subsection 2. b)
[46] Act CXXX of 2016 on the Code of Civil Procedure, Section 316, Subsection 2. c)

inconclusiveness, but only, if there is no other cause for inconclusiveness with regard to any of the expert opinions. The opinion of the party-appointed expert is also inconclusive, if it has not been supplemented at a hearing as to the technical reasons for the conflict. Thus, if one private expert gives oral evidence on the reasons for the conflict and the other does not, the opinion of the first private expert may be taken into account as evidence, while the opinion of the other private expert may not.[47]

Experts are entitled to remuneration and reimbursement of expenses for their activity – the rules on remuneration are settled in Decree No. 3/1986 (II. 21.) IM on the remuneration of judicial experts. Although officially appointed expert evidence is equal with the party-appointed expert evidence, the provisions governing the remuneration of a court-appointed expert and a party-appointed expert are distinct. While for the officially appointed expert, Annex I to the Decree effectively sets out the fees for each expert act, the fees for the party-appointed expert are determined on a market basis, given the relationship of trust between the parties, and are therefore freely negotiated between the two parties. The fee paid to the party-appointed expert becomes part of the litigation costs, to which the party is entitled on the basis of the amount of the award, if the fee is charged. Therefore, since the party-appointed expert is chosen by the party and the questions to be answered are also determined by him, the fee must be paid by the party. It follows, that he also have to bear the risk of failure of the expert opinion.[48] However, if the party-appointed expert's opinion is considered to be inconclusive for the reasons listed in the Code, and the inconclusiveness cannot be eliminated (or the dissolution of the inconclusiveness has been unsuccessful), the fees of the party-appointed expert cannot be awarded as litigation costs in favour of the successful party.[49]

## 3. The European perception of the role of the expert

In fact, it is important to examine the impact of civil procedural law and judicial practice in countries of major European importance on our country. Thus, during the codification process of the Hungarian Code of Civil Procedure, the legislator had to take into account not only the Hungarian procedural traditions, but also the various European procedural solutions, with regard to the system of expert evidence. The subject of this study is the analysis of the system of expert evidence in the civil procedural codes of the United Kingdom, Germany, Austria and Italy.

[47] NAGY, A.: i.m. (Online legal database)
[48] PRIBULA, L.: *A szakértői díj meghatározásának gyakorlati problémái a megújított polgári perrendi modellben.* Jogtudományi Közlöny, 2022/2. 52-54.
[49] Act CXXX of 2016 on the Code of Civil Procedure, Section 318, Subsection 1.

The *Civil Procedure Rules* of England, created by Lord Woolf, date back to 1998. Expert evidence is regulated by Chapter XXXV, entitled „Experts and Assessors". Under this chapter, the task of the expert is to assist the judge in his field of expertise – this obligation overrides any other instructions.[50] This regulation sets out the English position on the role of the expert, right at the very beginning: the British procedural law explicitly determines the expert as an assistant to the judge, unlike the regulations declared in the Hungarian Code currently in force.

Two types of experts can be used in the British legal dispute: one is the expert acting at the unilateral request of the party with the burden of proof – who can be defined as a quasi private expert. Such an expert cannot be instructed by either party during the dispute, cannot be subject to any requirements on his part, and cannot accept any directions or other assistance from the parties, except, what the judge has expressly authorised him. However, the parties may submit written questions concerning the written opinion of the expert, within a statutory time limit of twenty-eight days.

On the other hand, at the joint request of the parties, it is also possible to use a single joint expert,[51] chosen jointly by the parties. The single joint expert, as opposed to an expert unilaterally appointed by the party producing evidence, may be instructed by the parties and they may also comment on his opinion or request, that he should be asked to answer further questions.[52] In the absence of the agreement between the parties, the court is entitled to choose the expert from the list of experts drawn up by the parties, or from the register of experts.

The opinion of the expert can only be submitted in writing, and the British Code sets out the mandatory contents of the opinion.[53] In addition, the court may, at any stage of the proceedings, consult separately and with the parties, ask the experts for information and order a meeting between the experts.[54]

Civil procedural law in Germany is governed by the long-established *Zivilprozessordnung* (ZPO), which has been in force since 1877. The subject matter of the evidence is clearly defined by the law: it is to be understood as the procedurally relevant facts declared by substantive law. The German legal literature defines the relevant facts for expert purposes as events and material phenomena in the external world (and their scientifically verifiable laws) and the state of human mind.[55]

[50] Civil Procedure Rules – Rule 35.3.
[51] Civil Procedure Rules – Rule 35.10. Subsection 1.
[52] Kúria Joggyakorlat-elemző Csoport: *A szakértői bizonyítás a bírósági eljárásban (Összefoglaló vélemény)*. In: http://www.kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_2.pdf (20th of December, 2022) 15.
[53] See: Civil Procedure Rules – Rule 35.10.
[54] Kúria Joggyakorlat-elemző Csoport: i.m. 15.
[55] ROSENBERG, L. – SCHWAB, K. H. – GOTTWALD, P.: *Zivilprozessrecht*. München, Beck, 16. Aufl., 2004. 751.

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It is important to note, that in German civil procedure law, the court plays an active role in the taking of expert evidence. The judge has the duty to warn the parties, if any relevant facts, aspects or circumstances have been disregarded, and must discuss them with the parties – this duty on the part of the court corresponds to the principle of case management, declared in the Hungarian Code. Once the court has successfully summarised the facts with the parties, it can qualify them both legally and factually, and then ask questions to the parties. In addition, the court has a duty to seek to ensure, that the parties of the dispute make their statements and requests for evidence on the facts in question, or to fill in missing informations.[56] The German procedural law prepares for the main hearing either by setting an early first hearing (*früher erster*[57]), or by ordering a written preparatory procedure (*schriftliches Vorverfahren*[58]). The most important and central issue of these legal institutions are the preparation of the evidentiary procedure.

The German procedural law knows the institution of an independent right to take evidence.[59] This has added the possibility of preliminary taking of evidence to the expert evidence system. Thus, not only it is possible before or during the proceedings, if there is a risk of loss of evidence or if it is difficult to use any of it, but any party may request its order, pursuant to Section 485, Subsection 2 of the ZPO. Its scope is defined normatively in the law: it is possible, if the expert has to determine the condition of a person or thing, the amount of personal or material damage, the cause of a contractual lack of supplies and the cost of compensation for all these.[60]

The German Code makes no difference between an expert opinion provided by an officially or party-appointed expert, and Section 411a states, that a written expert opinion may be used directly as evidence in other proceedings as well – clarifying the position of the German Code of Civil Procedure on the role of the expert in this way. In other respects, the rules of the Hungarian expert evidence system are identical in content to the German Code.[61]

The Austrian Code of Civil Procedure (*Die österreichische Zivilprozessordnung*) of 1895, drafted by Franz Klein, is similar to the German law in many respects, but reflects a completely opposite position on the issue of expert evidence. Because the expert opinion – including the inspection – is not a means of evidence, but is defined

[56] Zivilprozessordnung – Section 139, Subsection 1.
[57] Zivilprozessordnung – Section 272, Section 275, Subsection 1.
[58] Zivilprozessordnung – Section 276, Subsection 1.
[59] HARSÁGI, V.: *Közép-európai polgári perjogi reformok és kodifikáció az elmúlt negyedszázadban – Tradíció és megújulás*. Budapest, HVG-ORAC Kiadó, 2014. 42-61.
[60] Kúria Joggyakorlat-elemző Csoport: i.m. 14.
[61] Kúria Joggyakorlat-elemző Csoport: i.m. 14.

as a judicial act belonging to the discovery of the facts of the dispute, in order to enforce the principle of investigation.[62]

Sections 351-467 of the Austrian Code contain the rules on experts, who assist the court in its decision-making for the purpose of establishing facts, requiring special knowledge.[63] An expert may be employed, if it is deemed necessary in the legal dispute. In this context, the court has a wide discretionary power, which is not bound by the parties' statements, even if they are in agreement. Before appointing an expert, the parties must be heard, but the court may also appoint an expert of its own motion without the parties' request, or even another expert if it considers it necessary.

In accordance with the rules of the court, the expert submits his opinion either orally, but typically in writing, in response to the decision of the court to appoint him, which must, in any case be reasoned. A joint expert opinion may be ordered or several experts may be appointed in the same dispute, as there is no prohibition on this in the Act. Conflicts of expert opinions may take place within the framework of the free taking of evidence, on the basis of a court order, which may be available for both in-court and out-of-court expert opinions.[64]

The regulations of the Italian Code of Civil Procedure (*Codice di Procedura Civile*) are important, because the codification of the Hungarian rules on experts was intended to adapt the the Italian expert evidence system. This would undoubtedly have meant a major change in the role of the expert, since the Italian Code defines the expert as an auxiliary to the judge. The role of the expert in Italy is best illustrated by the fact, that the Code states the expert in civil proceedings not as an expert, but as a technical consultant (*consulente tecnico*) – the use of the term „expert" is limited to criminal proceedings.[65]

In the field of expert evidence, under Italian procedural law, the use of a technical consultant can take two forms: on one hand, the court may decide to appoint a consultant officially, who may act either independently or in cooperation with the judge. Furthermore, there is also the possibility of a consultant appointed by the parties (who, under the Hungarian Code of Civil Procedure, is a quasi private expert). However, it is important to stress, that the Italian Code of Civil Procedure does not know the legal institution of a consultant (expert) appointed in other proceedings.

According to Article No. 61 of the Italian Code of Civil Procedure, the court may, if necessary, be assisted by one or more technical consultants with specific

[62] KARLIK, W.: Die Verwirklichung der Ideen Franz Klein in der Zivilprozessordnung von 1895. In: HOFMEISTER, H. (ed.): *Forschungsband Franz Klein*. Wien, 1988. 91-92.
[63] KUHN, K.: *A szakértői tevékenység törvényi szabályozása az osztrák jogban*. Belügyi Szemle, 2005/10. 45-48.
[64] Kúria Joggyakorlat-elemző Csoport: i.m. 13.
[65] BARANYABÁN, J.: *Az olasz polgári perrendtartás bizonyítási szabályai*. (Manuscript) 2-3.

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competence for certain acts or throughout the entire proceeding. The law is rather restrictive in this regard, leaving it to the discretion of the judge to decide on the appointment of consultants: the judge can appoint a technical consultant anytime he needs the assistance of a qualified consultant to solve technical issues. The judge does that often, and then he charges the party, who repuested such appointment, or both parties, with the costs of the activities of the consultant. In this event, the parties will be able to appoint their own technical consultants to review the work of the consultant of the judge and comment upon it.[66] It is important to note, that more, than one consultant may only be appointed, if this is expressly required by law, or there is a serious necessity, which cannot be resolved otherwise.[67] However, the law does not specify, what is qualified as a serious necessity.

The court appoints the consultant from the register of technical consultants, defines his tasks and the questions he must answer – in this respect, the Italian Code is similar to the Hungarian Code of Civil Procedure. But unlike under Hungarian law, the court-appointed consultant may perform his duties independently, or in cooperation with the judge. If he performs his task alone – within the time limit specified by the court –, the consultant must inform both the court and the technical consultants of the parties about the results of his activities.[68]

The court-appointed consultant must make minutes of his investigations, if they are carried out with the assistance of the judge. However, if he has carried out his task independently, he must make a report (*rapporto*)[69] – this report will be the quasi „expert opinion", which, also because of the role of the expert, cannot be considered as evidence. This report is not obligatory for the judge to issue a judgment, as it is nothing else, than a logical sequence of thinking of an „expert", who acts as an assistant and not a member of the judiciary board.[70]

The Italian procedural law emphasises mediation, in which the technical consultant appointed by the court can also play a role, as the parties can conciliate in the presence of the consultant. This is very different from the Hungarian rules, since under the Hungarian Code, the task of the expert is to express his opinion on a specific issue as a means of evidence, and he does not take part in mediation proceedings. Pursuant to Article No. 197 of the Italian Code, if the president of the court deems it necessary, he shall invite the technical consultant to participate in the

[66] GROSSI, S.: A comparative analysis between the Italian Civil Proceeding and the American Civil Proceeding before federal courts. In: GROSSI, S. – PAGNI, M. C. (eds.): *Commentary on the Italian Code of Civil Procedure*. New York, Oxford University Press, 2010. 17.
[67] Codice di Procedura Civile – Article 191.
[68] GREBOWIEC-BAFFONI, J. – PAVONE, P.: Aspects of the function of technical consultants in civil and criminal proceedings in Italy. In: MALEWSKI, H. – MATULIENÉ, S. – JUODKAITÉ-GRANSKIENÉ, G. (eds.): *Developments of criminalistics theory and future of forensic expertology*. Vilnius, MRU, 2022. 372.
[69] Codice di Procedura Civile – Article 195.
[70] GREBOWIEC-BAFFONI, J. – PAVONE, P.: i.m. 369.

conciliation before the court, to hear the parties' opinions and to express his views in the presence of the parties, in an attempt to reconcile them.

It is important to note, that in his order for the official appointment of a technical consultant, the judge simultaneously gives the parties the opportunity to appoint their own consultant within a certain time limit – this is necessary under Italian procedural law, in order to ensure, that the parties' rights are not violated.[71] With this regard, a technical consultant appointed by the parties can be defined as a private expert. Importantly, the parties enjoy a relatively greater freedom of appointment, as the technical consultant of the parties does not have to be a registered consultant.

When analysing the procedural law solutions in Europe, it can be observed, that the majority of the regulatory systems I have examined are those, that define the expert as an auxiliary to the court. In these systems, a high degree of discretional power on the part of the court can be observed, as the employment of an expert is only possible, if the court deems it necessary. Moreover, in the procedural codes of the states, in which the expert is determined as a means of evidence, the disputes, in which he may be employed are specifically laid down. As far as the Codes of Civil Procedure of Germany and Austria are concerned, the two Codes are similar in many respects, except for expert evidence – because when it comes to defining the role of the expert, the two Acts reflect opposite positions, and at the same time provide a completely different system of expert evidence. So does the Italian Code of Civil Procedure, which also defines the expert as an assistant to the judge (technical consultant). Nevertheless, I believe, that the Italian regulation itself could be more thorough and detailed, as important provisions are missing from the Code, such as the question of inconclusiveness: when an opinion – or in this case, a report – is considered to be inconclusive, what the legal consequences are, or how the inconclusiveness itself can be eliminated. But the Act also does not specify the circumstances, in which an expert may be disqualified. Thus, in this respect, the Hungarian Code of Civil Procedure implements a more complex and comprehensive regulation.

## 4. Conclusion

During the codification process of the Hungarian Code, the legislator aimed at a consistently functioning expert evidence, free of the uncertainties surrounding the old Act – an objective, which, in my opinion, the legislator has met. With the Code

[71] GROSSI, S.: i.m. 17.

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coming into force, it has created the theoretical and legal basis for this, thereby providing a solid foundation for an effectively conducted expert evidence system.

From my point of view, one of the most significant innovations of the Code is the reform of the provisions on party-appointed experts. A party-appointed expert, like a court-appointed expert, is a personal means of evidence, his private opinion is also considered as evidence and, for the purposes of probative value, is considered as the same as the opinion of a court-appointed expert.

With regard to the role of the expert, based on a comparison of the positions in the legal literature and the European regulations, it can be concluded, that apart from the initial duality, the legislator has always maintained, that the use of an expert is a means of evidence, the expert himself is a personal means of evidence, and his opinion can be considered as evidence. Although, the expert is indeed different in nature from other means of evidence, since he has a specific task: to help establish the facts by deciding on a special issue, he still provides this assistance in the context of taking of evidence.

## Bibliography

ASZÓDI, László: Szakértők. In: WOPERA, Zsuzsa (ed.): *A polgári perrendtartásról szóló 2016. évi CXXX. törvény magyarázata*. Budapest, Wolters Kluwer Kiadó, 2017.

BARANYABÁN, Judit: *Az olasz polgári perrendtartás bizonyítási szabályai*. (Manuscript)

BARTAL, Géza: Szakértők. In: PETRIK, Ferenc (ed.): *Polgári eljárásjog I-II. – Kommentár a gyakorlat számára*. Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2022.

BÁNYAI, István: Igazságügyi szakértő a tárgyalóteremben – a kérdéskör vizsgálata a szakértő szemszögéből. In: SZAKÁLY, Zsuzsa (ed.): *Tanulmánykötet – Igazságügyi szakértő a tárgyalóteremben*. Budapest, Magyar Közlöny Lap- és Könyvkiadó Kft., 2019.

FARKAS, József: Bizonyítás. In: SZILBEREKY, Jenő – NÉVAI, László: (eds.): *A polgári perrendtartás magyarázata*. Budapest, Közgazdasági és Jogi Könyvkiadó, 1976.

GREBOWIEC-BAFFONI, Jolanta – PAVONE, Pietro: Aspects of the function of technical consultants in civil and criminal proceedings in Italy. In: MALEWSKI, Henryk – MATULIENÉ, Snieguolé – JUODKAITÉ-GRANSKIENÉ, Gabriele (eds.): *Developments of criminalistics theory and future of forensic expertology*. Vilnius, MRU, 2022.

GROSSI, Simona: A comparative analysis between the Italian Civil Proceeding and the American Civil Proceeding before federal courts. In: GROSSI, Simona – PAGNI,

Maria Christina (eds.): *Commentary on the Italian Code of Civil Procedure*. New York, Oxford University Press, 2010.

HARSÁGI, Viktória: *Közép-európai polgári perjogi reformok és kodifikáció az elmúlt negyedszázadban – Tradíció és megújulás*. Budapest, HVG-ORAC Kiadó, 2014.

KARLIK, Winfried: Die Verwirklichung der Ideen Franz Klein in der Zivilprozessordnung von 1895. In: HOFMEISTER, Herbert (ed.): *Forschungsband Franz Klein*. Wien, 1988.

KOVÁCS, Marcel: *A polgári perrendtartás magyarázata I*. Budapest, Benkő Gyula Császári és Királyi Udvari Könyvkereskedése, 1911.

KUHN, Kata: *A szakértői tevékenység törvényi szabályozása az osztrák jogban*. Belügyi Szemle, 2005/10.

Kúria Joggyakorlat-elemző Csoport: *A szakértői bizonyítás a bírósági eljárásban (Összefoglaló vélemény)*; In: http://www.kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_2.pdf

MAGYARY, Géza: *A magyar polgári peres eljárás alaptanai*. Budapest, Franklin-Társulat Magyar Irodalmi Intézet és Könyvnyomda, 1898.

MAGYARY, Géza: *Magyar polgári perjog*. Budapest, Franklin-Társulat Magyar Irodalmi Intézet és Könyvnyomda, 1913.

NAGY, Adrienn: A bizonyítás. In: NAGY, Adrienn – WOPERA, Zsuzsa (eds.): *Polgári eljárásjog I*. Budapest, Wolters Kluwer Kiadó, 2021.

NAGY, Adrienn: Szakértők. In: WOPERA, Zsuzsa (ed.): *Nagykommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez*. Wolters Kluwer Kiadó, 2022.

NÉMETH, János, *A polgári perjogunk fejlődése a felszabadulás óta*. Budapest, Magyar Jog, 1985/3-4.

PARLAGI, Mátyás: A szakértői bizonyítás újraszabályozásának szükségességéről. In: NÉMETH, János – VARGA, István (eds.): *Egy új Polgári Perrendtartás alapjai*. Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2014.

PRIBULA, László: *A szakértői díj meghatározásának gyakorlati problémái a megújított polgári perrendi modellben*. Jogtudományi Közlöny, 2022/2.

RÁCSKAY, Jenő: *A szakértőre vonatkozó szabályozás lényegesebb változásai a polgári peres eljárásban*. In: https://www.jogiforum.hu/files/publikaciok/racskay_jeno__szakertore_vonatkozo_szabalyozas_uj_ppljogi_forumj.pdf

ROSENBERG, Leo – SCHWAB, Karl Heinz – GOTTWALD, Peter: *Zivilprozessrecht*. München, Beck, 16. Aufl., 2004.

https://doi.org/10.46942/SIDM.2023.1.29-48

SÁRFFY, Andor: *Magyar polgári perjog*. Budapest, Grill Károly Könyvkiadóvállalata, 1946.

SZALAI, Péter: Bizonyítás. In: WOPERA, Zsuzsa (ed.): *Kommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez*. Budapest, Magyar Közlöny Lap- és Könyvkiadó Kft., 2017.

VARGA, István – ÉLESS, Tamás (eds.): *Szakértői Javaslat az új polgári perrendtartás kodifikációjára*. Budapest, HVG-Orac Lap- és Könyvkiadó Kft. – Magyar Közlöny Kiadó, 2016.

VIRÁG, Csaba: A szakértői bizonyítás egyes kérdései a polgári perben – A 2016. évi CXXX. törvény újításai a szakértői bizonyítás körében. In: SZAKÁLY, Zsuzsa (ed.): *Tanulmánykötet – Igazságügyi szakértő a tárgyalóteremben c. konferencia*. Budapest, Magyar Közlöny Lap- és Könyvkiadó Kft., 2019.

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**AURÉL CSÍK***

# Application of Article 3 of ECHR in Balázs V. Hungary

**Abstract**
My study will focus on the case of Balázs v Hungary, in which the European Court of Human Rights examined the application of Articles 3 and 14 of the European Convention on Human Rights. Article 3 is about the prohibition of torture and inhuman, degrading treatment or punishment, so I would like to start my study by looking at how torture is reflected in the more relevant international documents, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, naturally, the European Convention on Human Rights. In these, I would like to focus on the definition of the prohibition of torture (what is considered torture, who can be the perpetrator of torture, etc.), highlighting the differences and similarities between the documents in this aspect. Since the case in relation Article 3 were examined is related to Hungary, my analysis also covers how the prohibition of torture is mentioned in Hungarian legislation (primarily the Fundamental Law of Hungary and the Criminal Code). In the second, larger part of my presentation, I would like to present the case of Balázs v. Hungary and the legislation that has been adopted in the case.

**Key words** torture, Hungary, racism, hate-crime, hate speech, social media

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## 1. Introductory thoughts

Hate speech and its increasing spread in the online space is one of the biggest problems of our time. At the root of the problem is the difficulty of defining hate speech. The most important aspect to be taken into account when defining it is the definition of the target group. This is of cardinal importance, because if the scope is defined too broadly in this respect, it will be difficult to define who should really be protected from hate speech, and the group that really needs to be protected will dissolve into a sea of other groups. If, on the other hand, we are very strict, there is a possibility that the group to be protected will fall outside this circle and remain vulnerable. But what criteria should be taken into account to determine the potential victim group of such hate speech? In my view, the most important thing to consider here is the protected characteristics that may make a group a minority in society: religion, nationality, race, gender identity, sexual orientation, and so on. In my

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research on hate speech I came across the Balázs v. Hungary[1] case. I consider this case to be substantial in several respects. On the one hand, it illustrates that one of the most vulnerable groups in terms of hate speech in Hungary is the Roma minority. On the other hand, it shows that if the authorities do not act properly, this can also give rise to accusations of institutional racism. In the case, the applicant also invoked, inter alia, Article 3 of the European Convention on Human Rights, which focuses on the prohibition of torture. As will be seen later, there is an international consensus on the definition of torture. At first sight, it may seem that none of the characteristics of torture can be discerned in this case. Nevertheless, the Court has found that Article 3 of the Convention applies. In the first part of my study, I would like to look at the prohibition of torture. I would like to deal with the use of torture as a term in the vernacular, and then briefly touch upon the historical development of the prohibition of torture. I will then examine how the prohibition of torture is reflected in relevant international documents, highlighting possible differences and similarities between them. After examining the international conventions, I would like to look at the Hungarian legislation on this issue: the Fundamental Law of Hungary and the Criminal Code currently in force. Following the legal framework, I would like to continue my study with an analysis of the case, in which I would like to briefly describe the basic case. After the case, I would like to present the legislation that has been adopted in the case. Finally, I would like to describe the arguments used by the parties in the case, the counter-arguments to each other's arguments and the criteria used by the Court to decide the issues on which it sought to rule. I trust that by the end of my study it will become clear how unique this case is, both in terms of the definition of torture and in terms of the definition of the responsibility of the state to investigate a hate crime against a member of a minority.

## 2. The regulation of the Prohibition of Torture

### *2.1. Torture in general*

Before describing the legal regulation of torture, I would like to briefly discuss what "torture" means in the everyday language.

#### *2.1.1. Torture in the vernacular*

The word "torture" has several meanings in the Hungarian language. The most common form is the infliction of mental and physical pain. I think it is important to point out that in the Hungarian language torture can be two different but

[1] Balázs v. Hungary, 15529/12, 2016

synonymous term: torture used during interrogation and torture in general[2]. The Universal Declaration of Human Rights is a good example of this, where, unlike other international treaties where the word "kínzás" is used, the word "kínvallatás" is used here. In addition, there are other meanings of "torture" in Hungarian which are only loosely related to the original meaning of the word. One of these can cover the gratuitous harassment of another person (e.g. my son tortures me with silly questions) and, interestingly, can also mean the improper use of an instrument (e.g. his daughter tortured him all day long with her violin).

*2.1.2. Torture in history*

In terms of legal regulation, torture has come a long way. In the beginning, torture was part of the criminal procedure, the main purpose of which was to extract a confession. In antiquity and the medieval times, various forms of torture were known[3], the purpose of which was to obtain information. Torture was sometimes combined with the death penalty, which led to the development of more notorious methods of execution, such as crucifixion[4] . In ancient times, torture was used only on slaves by the Greeks, but in early Roman history it was used only in exceptional cases, and in the imperial period it was used without restriction on free men[5]. Torture also had its own rules, framework and limits, which were described in detail[6] . It is clear from this that torture, as part of the criminal procedure, was an element to be regulated, but in this capacity it also reflects the vision that later became dominant in the face of torture: torture is one of the deepest interferences with the personal integrity of the individual and its use should be avoided as far as possible. The most notorious practitioners of torture in the medieval times were the Inquisitors[7]. The Inquisitors developed a complex system of torture. The function of torture in this case was also to extract confessions and, where appropriate, testimony. The greatest change in the use of torture occurred during the Enlightenment, in parallel with the emergence of human rights. After the Enlightenment, torture became a criminal offence in national law and eventually

[2] In Hungarian the word „kínvallatás" refers exclusively to torture as tool used during interrogation, however the word „kínzás" descirbes torture more broadly

[3] KISS, B.: A kínzás és más kegyetlen, embertelen, megalázó büntetés vagy bánásmód tilalma az emberi jogok rendszerében (Prohibition of torture and other cruel, inhuman, degrading punishment or treatment in the system of human rights) http://acta.bibl.u-szeged.hu/61950/1/juridpol_forum_008_002_197-212.pdf (accessed: 01.12.2022.)

[4] KOVÁCS L. – SÁNTA F.: A kínzás bűntette a nemzetközi büntetőjogban (The crime of torture in international criminal law), *Miskolci Jogi Szemle*, 2010., pp. 12-30

[5] KOVÁCS – SÁNTA, op. cit.

[6] Ibidem

[7] http://lexikon.katolikus.hu/I/inkviz%C3%ADci%C3%B3.html (accessed: 01.12.2022.)

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became an international crime, with the addition of the prohibition of inhuman, cruel and degrading treatment[8].

### *2.2. The prohibition of torture in international documents*

It is important to underline that there is no single definition of torture as an international crime, but its content can be found in the international instruments that regulate it[9]. In the following I would like to highlight the most relevant ones. From the point of view of the prohibition of torture, I have grouped the Universal Declaration of Human Rights[10], the International Covenant on Civil and Political Rights[11], the Charter of Fundamental Rights of the European Union[12] and the European Convention on Human Rights[13] into one group, since all four of them regulate it with the same content, differing only minimally: no one may be subjected to torture, inhuman or degrading treatment or punishment. If we look at the wording of the provisions, we can see that all four contain the same prohibition of torture, with only one or two word differences (e.g. the inclusion of the word "cruel" in the Universal Declaration of Human Rights). The greatest difference in content is to be found in the International Covenant on Civil and Political Rights, which specifically states that the prohibition of torture includes the prohibition of subjecting another person to medical or scientific experimentation without his or her consent. In my view, the most relevant international treaty in terms of the prohibition of torture is the one that deals exclusively with it. This treaty is the 1987 "International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", which Hungary ratified in 1988. As can be seen from the title, it follows the terminology of the international treaties illustrated above, but unlike them, this treaty has the possibility to explain the prohibition in detail, and I would like to focus only on this in my presentation. The treaty also defines the

[8] KOVÁCS – SÁNTA, op. cit.
[9] KOVÁCS – SÁNTA, op. cit
[10] Universal Declaration of Human Rights, United Nations General Assembly, 1948, Article 5: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[11] International Covenant on Civil and Political Rights, United Nations General Assembly, 1966, Article 7 on the : „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".
[12]Charter of Fundamental Rights of the European Union, Official Journal of the European Union, 2010, Article 4 on the Prohibition of torture and inhuman or degrading treatment or punishment: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".
[13]European Convention on Human Rights, Council of Europe, 1960, Article 3 on the Prohibition of torture: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

concept of torture in Article 1, which consists of three sub-elements. Firstly, torture is an act used intentionally to inflict severe pain or suffering, whether physical or mental, on a person in order to extract information or a confession from him or a third person or to punish him for an act which he or a third person has committed or is suspected of having committed. Secondly, it is done to intimidate or pressure the victim or a third person to do the same or for any other reason based on any form of discrimination (e.g. race). Thirdly, the treaty also defines the perpetrators: a person in a public office or any other person acting in an official capacity or, at the instigation or with the consent of such a person, any other person. The treaty also contains guarantees for its enforcement in States Parties, but as they are not closely related to the subject of my presentation, I will not describe them.

### *2.3. The prohibition of torture in the Hungarian legislation*

#### *2.3.1. Torture in the Hungarian Fundamental Law*

The prohibition of torture is also regulated in Article III of the Hungarian Constitution (which is called Hungarian Fundamental Law). In this article, the regulatory methods that we have seen in international documents are reflected. It states that no one may be subjected to torture, inhuman or degrading treatment or punishment, and includes a provision from the International Covenant on Civil and Political Rights prohibiting medical or scientific experiments on human beings without their consent and without their knowledge. It is important to note that, the Fundamental Law also contains some novelties compared to the foregoing. These include the prohibition of slavery, human trafficking, the practice of racial breeding, the practice of human reproduction and the prohibited use of the human body. In addition, I would also like to note that the Constitution lists the torture and inhumane treatment of people as a crime of the Communist regime, which, judging from the context, is linked to the illegal imprisonment of people and their confinement in forced labour camps.

#### *2.3.2. Torture in the Criminal Code of Hungary*

In the Criminal Code[14] of Hungary, there are various provisions referring to torture. The most obvious of these is a qualified case of homicide[15] and battery[16], which provides for a more severe punishment when the offence is committed with particular cruelty, but the execution of the violation of personal liberty by torturing the victim is closer to the content of torture as described above. The new Criminal

[14] Criminal Code of Hungary, 2012, https://njt.hu/jogszabaly/en/2012-100-00-00 (accessed: 01.12.2022.)
[15] Act C of 2012 on the Criminal Code, Section 160 b
[16] Act C of 2012 on the Criminal Code, Section 164 e

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Code also criminalises torture directly through the offence of third degree[17]: an official who uses force, threats or other similar methods to make or withhold a statement or confession is punishable by a term of imprisonment of one to five years, but unlawful detention[18] also includes torture. It is important to underline that both are included in the list of offences of official misconduct in the Criminal Code, which also defines the possible perpetrators.

## 3. Analysis of the case Balázs v. Hungary

### *3.1. Brief description of the basic case*

On 21 January 2011, at dawn, the applicant and his girlfriend were assaulted by 3 men. The insults focused on the Roma origin of the applicant and the appearance of his girlfriend. The three men were later joined by a fourth one, E.D. When the applicant questioned E.D. about the language he had used against him, E.D. attacked him and a fight broke out between the two. The fight was broken up by three of the applicant's acquaintances, and the police officers – called by E.D. – who arrived escorted the applicant, his girlfriend and E.D. to the local police station. At the police station, only E.D. was examined medically, however the applicant was not. Two days later, he went to his GP, who found bruises on the applicant's chest, back, neck and head. On 1 February, the applicant lodged a criminal complaint against E.D. at the Szeged Public Prosecutor's Office, where he also reported the racist language used by the offenders. The applicant alleged, inter alia, that the offenders threw money and cigarettes at them while asking them: „Dirty gypsy, do you need cigarette? Here is money". E.D. joined the group by asking if they did not know „could not handle a dirty little gypsy", clearly referring to the applicant. In addition, the applicant found E.D. on a well-known social network site and shared the text of his posts with the authorities. In this post, E.D. claimed that he had "kicked a gypsy in the head who was lying on the ground when three of his friends pushed him down". This post had also comments from other users of the social network site, who expressed messages of support for E.D., to which E.D. copied a clip from a feature film with a specifically racist message, in which the character listed the types of people he hated. E.D. also added to the clip that this list could be supplemented by „some other types of rubbish living among us". In my view, this circumstance clearly shows what E.D.'s motivation was when he provoked the applicant and also paints a general and clear picture of E.D.'s attitude towards Roma people and the racist nature of his attack. Two parallel proceedings were opened against E.D. In one of them, the Public Prosecutor's Office initiated proceedings

[17] Act C of 2012 on the Criminal Code, Section 303
[18] Act C of 2012 on the Criminal Code, Section 304

for the crime of "violence against a member of the community", and in the other, the Szeged Public Prosecutor's Office initiated ex officio proceedings for „disorderly misconduct". The applicant, his girlfriend and the police officers who arrived were questioned in the former procedure, but the police officers had no relevant information on the case as they arrived after the fight between teh applicant and E.D. had ended. The police also wanted to interview the three men who had helped to separate the applicant and E.D., but the applicant did not know their full names, only their nicknames, and so they could not be heared. E.D. was only questioned in the „disorderly misconduct" proceeding. Here he claimed that the applicant provoked him and that the only physical contact between the two of them was that he pushed the applicant away and insisted that he had not hit or assaulted the applicant. He also indicated that the main reason for the disagreement between the two was that the applicant provoked him, E.D. did not, according to his own statement, make any comment on the applicant's Roma origin and the reason for the conflict was not because of the applicant's Roma origin. He admitted that his post on the social network site was exaggerated because if he had actually kicked him in the head, the applicant would have „suffered more serious injuries."

### *3.2. The issues underlying the questions in the case*

The two parallel proceedings ended differently. E.D. was convicted in the „disorderly misconduct" proceedings, but the „violence against a member of the community" proceedings were suspended. The Prosecution argued that there was no evidence that E.D. had attacked the applicant out of racial hatred, nor was it possible to establish from the existing evidence who had started the fight and whether it had been provoked by insults directed at the applicant. The applicant complained about the termination of the procedure and at the same time the applicant's lawyer requested to interview and confront E.D. The lawyer's request was rejected, as E.D. had already been questioned in the „disordely misoconduct" proceedings. The applicant contested the decision, requesting further investigative measures. The Csongrád County Regional Public Prosecutor's Office upheld the contested decision, since, although E.D.'s racist motives were likely, they could not be proven to the extent necessary to establish criminal liability, i.e. clearly and beyond reasonable doubt. The racist motive is difficult to establish because, according to his own statements, Mr E.D. wanted to leave the scene before the fight and only thought about the applicant's words of reproach. Nor did the authorities have sufficient information about the fight itself through the contradictory testimonies of the applicant and E.D., nor did anyone provide enough evidence to establish who started the fight, whether racist remarks were made during the fight, or whether E.D. really wanted to leave but was turned back by the applicant. According to the authorities, E.D.'s post on a social networking site does not allow

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to determine whether the subject of the post was the applicant or whether the fight was due to his Roma origin. The detailed account given by E.D. during the "assault" proceedings makes further questioning of him unjustified, and the fact that there are such discrepancies between E.D.'s testimony and that of the applicant makes it impossible to confront the two persons. The applicant turned to the European Court of Human Rights ("the Court") because he considered that the authorities had violated Article 14 (prohibition of discrimination) of the European Convention on Human Rights read in conjunction with Article 3 (prohibition of torture). As my paper focuses mainly on the latter, I will therefore - without neglecting the former - concentrate on the issues involved in the legal argumentation.

### *3.3. The law applied in the case*

As far as Hungarian law is concerned, the most significant source of law was the Criminal Code in force at the time. The two relevant offences which were decisive in the proceedings were „violence against a member of a national, ethnic, racial or religious group" and „disorderly misconduct" and reference was also made to a passage in the Criminal Code which stated that „Criminal proceedings may only be initiated upon the suspicion of a criminal offence and only against a person reasonably suspected of having committed a criminal offence". International documents were also used in the proceedings, the most influential of which was the 2009 Organisation for Security and Cooperation in Europe (OSCE) guide "Preventing and Responding to Hate Crimes". The aim of this document is to make it easier to identify hate crimes, and the guide provides a number of tools to help do this. It includes sections to help identify victims and witnesses, to interpret the behaviour of the perpetrator, to identify victim and perpetrator characteristics, and to define, among other things, what constitutes a racist and homophobic attack. The other relevant international document was the European Convention on Human Rights, Articles 3[19] and 14[20] of which were used in the proceedings.

### *3.4. Legal reasoning used in the procedure*

The Government of Hungary contested the applicant's claims and asked the Court to declare the application inadmissible, as the available remedies had not yet been exhausted in the main proceedings. The Government referred to the case of

[19] Prohibition of torture: „No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[20] Prohibition of discrimination: „The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Horváth and Vadász v. Hungary, in which the applicant should have brought an substitute private prosecution. The applicant's defence was that in Kiss Borbála v Hungary the Government's objection had been rejected by the Court. The applicant added that he had not brought a substitute private prosecution because it was costly and because it was not successful either in his case or in general, given the difficulties involved in taking additional investigative measures, and he noted that the Court had not addressed the effectiveness of the substitute private prosecution in Horváth and Vadászi v Hungary. In relation to this argument, the European Roma Rights Centre was of the opinion that Roma citizens cannot be expected to make a substitute private prosecution in cases of hate crime, as this would give the impression that the authorities are less obliged to investigate such crimes and that it would be unfair to expect investigative activity from a member of a disadvantaged group. The Centre also argued that if institutional racism could prevent effective investigation, then requiring a substitute prosecution would put Roma people at risk, as they would be burdened with the consequences of revealing hidden anti-gypsyism. The Court has ruled on the necessity of an substitute private prosecution. It states that the article providing for the exhaustion of remedies obliges applicants to first seek the ordinary and sufficient remedies available under domestic law which provide an opportunity to redress their grievances. Where the applicant has several remedies to choose from, the above-mentioned Article must be interpreted in such a way that its application reflects the practical reality of the applicant's situation[21], but where the comparative effectiveness of the several remedies available is not clear, the Court will generally interpret this requirement in favour of the applicant[22]. The Court finally stressed that the applicant cannot be expected to avail himself of further possible remedies which are considered unsuccessful if they have been previously exhausted and are presumed to be effective and sufficient. In the present case, the applicant had filed a complaint against E.D. for committing „violence against a member of a group" and the subsequent proceedings had been appropriate to identify and, where appropriate, punish the perpetrators. The State was thus given the opportunity to remedy the infringement and the applicant could not be expected to pursue the case by means of a supplementary private prosecution with the same purpose as the half-penalty, since the filing of the complaint was sufficient to remedy the prejudice suffered by him. Moreover, the applicant's problem was more with the effectiveness of the criminal proceedings than with the lack thereof. The Court further responded that the case cited by the Government was not applicable in this case because it did not involve racial discrimination on the part of the applicants as an alleged grievance. In view of the above, the Court concluded that the Government's preliminary objection should be dismissed. The Government

[21] Hilal v. United Kingdom, 45276/13, 2018
[22] Budayeva and Others v. Russia, 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 2008

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then argued that the applicant had lost his victim status after E.D. was convicted of assault. The applicant contested the Government's position, arguing that the proceedings for „disorderly misconduct" had nothing to do with the proceedings for "violence against a member of the community", in which E.D.'s potential racist motives were not examined. The Court further observed that the proceedings on the ground of „disorderly misconduct" did not at any stage address the applicant's claim that he had been racially assaulted, and therefore were not capable of exhausting the provisions of Article 3 of the Convention, thereby not depriving the applicant of his victim status, and the application could not be rejected on the ground that it was incompatible ratione perosnae with the provisions of the Convention. In its observation, the Court also pointed out that the offence of aggravated assault does not even address the possibility that the conduct may have implications which would cover a complaint of racially motivated assault. The Government's final argument was that the application was incompatible ratione materiae with the content of the Convention, the treatment complained of not having gone beyond what was necessary to invoke Article 3 of the Convention. The Government based this finding on the fact that the applicant had not brought a private prosecution for assault and defamation. The applicant disagreed with this view of the Government, as the reason for his failure to bring a private prosecution was not that the degree of assault was insignificant, but that he had lost all confidence in the Hungarian judicial system. The Court held that this argument of the Government was closely connected with the complaint under Article 3 of the Convention and must therefore be joined with the merits of the Government's objection.

### *3.5. Questions examined by the Court*

The Court sought answers to two questions. The first was whether the attack on the applicant had reached the degree of seriousness which would make Article 3 of the Convention applicable. This degree may depend to a considerable extent on the unique circumstances of the case (e.g. length of the attack, sex, age of the victim, etc.) and the Court therefore examined a number of previous judgments which might have provided it with guidance in deciding this question. One such judgment was El Masri v. „the former Yugoslav Republic of Macedonia", in which the concepts of „inhuman' and „degrading" were defined. According to the Court, „inhuman" is defined as any act in which the victim is deliberately physically and mentally abused for hours, while „degrading" is defined as any abuse which is intended to humiliate, degrade and ultimately to instil fear in the victim. In Tyrer v. United Kingdom, the Court held that punishment of an adolescent without serious physical injury is „degrading" if it is directed against the dignity of the person, and in Đorđević v. Croatia, the fact that the victim felt fear and helplessness as a result

of the abuse was sufficient for Article 3 to apply. In the judgment, the Court also mentions other cases where, despite the absence of physical injury, the question of whether the act constituted „degrading treatment" under Article 3 was examined. The main proposition in relation to the adjudication of the case was that the presence of racial discrimination in relation to acts carried out by officials should be interpreted as „degrading treatment" and that if discriminatory remarks and racist insults are made, this should be considered an aggravating factor[23]. The Court also considered whether Article 3, read in conjunction with Article 1, imposes an obligation on the Parties to take all steps - establishing the facts, identifying the perpetrator - to ensure that persons within their jurisdiction are not harmed by private individuals. This means that, in the case of an act of ill-treatment committed by a non-authoritative body, as interpreted under Article 3 of the Convention, it is also a violation of the Article if the State fails to fulfil its duty to investigate the matter. The State is not a party to the abuse, but its failure to investigate the case properly may reinforce the negative effects of the abuse on the victim. However, in order to determine this, it is necessary to clarify what constitutes an effective procedure. It is important to underline that the Court of Justice has taken the view that this is not an obligation on the part of the State to achieve a result, but an obligation to use its means, so that a procedure is not effective because it ends with a result favourable to the victim, but because the State uses all the means at its disposal to achieve the fairest possible outcome at the end of the procedure.[24] The Court found that in all the circumstances the claim was satisfied, as the applicant had been violently attacked with racist motives and had been the target of racist abuse by E.D. and the three others prior to the confrontation. The other issue examined by the Court was whether the Hungarian authorities had investigated the motives behind the incident. In this respect, the Court is of the opinion that the applicant provided sufficient information about the case in his complaint to enable the authorities to identify its racist motives. However, the Court points out that the ineffectiveness of the investigation does not mean that it was ineffective. The conduct of E.D. was prohibited under the cited part of the Criminal Code (§ 174/B), and the authorities also acknowledged that the applicant had been subjected to racist abuse and violence on account of his Roma origin, and for that very reason they took the necessary steps to establish E.D.'s motives. The Court further pointed out that Article 1 of the Convention - that Contracting Parties shall ensure to all persons within their jurisdiction the rights and obligations set out in the Convention - read in conjunction with Article 3 thereof, shows that they must do their utmost to protect persons within their jurisdiction from ill-treatment. If a person proves that he or she has suffered an injury within the meaning of Article 3, this Article thereby

[23] B.S. v. Spain, 47159/08, 2012
[24] Milanovic v. Serbia, 44614/07, 2011

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also requires the State to conduct an effective procedure for the proper investigation of the case, effectiveness being determined by the capacity of the procedure to establish the facts, to detect the perpetrator or perpetrators and to punish them. Here the Court emphasises that this is not an obligation to produce results, but an obligation of means, i.e. the State must provide every opportunity to conduct such an effective procedure, the result of which is independent of this obligation. In the case of violent crime, the identification of a possible racist motive is also part of the State's obligation, but the Court recognises that this is difficult in practice. The Court also points out that the social condemnation of racism must be repeatedly expressed and that, therefore, attacks of this kind must be investigated vigorously and impartially. Moreover, the Roma are in a particular situation in this respect, being particularly vulnerable because of their persistent rootlessness[25].

The Court's position is clear according to the above. A reading of Articles 1 and 3 of the Convention together imposes several obligations on the State Party, the most important of which is that, where the victim has been subjected to an attack of a racist nature, the State must investigate it in the most appropriate manner. This obligation can also be inferred from the negative impact of racism on society, since if a racist attack remains uninvestigated, the victim's trust in society as a whole will be damaged. The Government's argument to shift this responsibility to the applicant is not valid, as the applicant starts from a position of victim, whose rehabilitation must be guaranteed by the State. Despite the fact that the Public Prosecutor's Office accepted the applicant's and L.D.'s claims that they had been discriminated against, they could not decide whether the applicant's Roma origin was relevant in the case. E.D.'s Facebook post could not establish whether it was about the applicant or not, but it mentioned the Roma origin of the three of the applicant's acquaintances who later intervened in the fight, which made it possible to link the post and the incident. The prosecution did not explain why this could not be considered as evidence of a racially prejudicial motive. The Court therefore upheld the applicant's application on the basis of the above.

## 4. Summary

My study shows that, even though torture is clearly defined in several international documents, in certain circumstances the prohibition of torture can be applied to cases that one might at first think impossible. The diversity in the colloquial use of torture also suggests that. The international instruments clearly define the prohibition of torture and, by extension, torture itself. There is also a consensus on this point in the main international documents. The national legal regulations also apply these solutions, as we have seen in the Hungarian Fundamental Law and the

[25] D.H. and Others v. Czech Republic, 57325/00, 2007.

Hungarian Criminal Code, where the terms and concepts used in the international documents are also used. However, we have also seen in the case at hand that the interpretation of these provisions also leaves a relatively large margin of manoeuvre to the legislator in the application of these rules. The case of Balázs v. Hungary is a typical hate crime case: we are talking about racially motivated violence against a member of a minority, which the Hungarian state did not investigate thoroughly enough. The Hungarian government has invoked in the case the applicant's procedural failings (substitute private prosecution), the loss of his victim status and, finally, the incompatibility of the application of Article 3 of the Convention with the basic case. The Court in the case, however, held that the State has a responsibility under the Convention to investigate properly the grievances of its nationals who approach it. This applies in particular to hate crimes against members of minorities, as they are considered to be particularly vulnerable within society. In this respect, although none of the elements of torture were present in the case at hand, Article 3 of the Convention became applicable, since the State's failure to act effectively to eliminate the racist motives behind the harm suffered by the applicant amounted to deprivation of the applicant's liberty. The case is also, in my view, precedent-setting, as it provides an example of the forms of institutional racism that may exist in States.

Hate speech is one of the biggest problems of our time, and minorities are most at risk. The aim of my study is to illustrate the difficulties that the state faces in detecting such incidents, but also to point out that states have a responsibility to act effectively in such matters. If they do not act effectively, it will create mistrust of the state among members of the minority, which may even create new tensions within society, and therefore the state must do everything it can to act effectively in cases of hate crime against members of the minority. If it fails to act effectively, it cannot shift responsibility to the victim (as was the case in the present case), as the victim cannot act for the state in such cases. It will be seen from the outcome of the case that if the state fails to act appropriately, it may even stop the state from violating the prohibition of torture. For this reason, the State must, in all circumstances, take care to deal with the matter effectively.

## Bibliography

KISS, B.: A kínzás és más kegyetlen, embertelen, megalázó büntetés vagy bánásmód tilalma az emberi jogok rendszerében (Prohibition of torture and other cruel, inhuman, degrading punishment or treatment in the system of human rights) http://acta.bibl.u-szeged.hu/61950/1/juridpol_forum_008_002_197-212.pdf (accessed: 01.12.2022.)

KOVÁCS L. – SÁNTA F.: A kínzás bűntette a nemzetközi büntetőjogban (The crime of torture in international criminal law), *Miskolci Jogi Szemle*, 2010., pp. 12-30

https://doi.org/10.46942/SIDM.2023.1.49-62

http://lexikon.katolikus.hu/I/inkviz%C3%ADci%C3%B3.html (accessed: 01.12.2022.)
Universal Declaration of Human Rights, United Nations General Assembly, 1948, Article 5: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
International Covenant on Civil and Political Rights, United Nations General Assembly, 1966, Article 7 on the : „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".
Charter of Fundamental Rights of the European Union, Official Journal of the European Union, 2010, Article 4 on the Prohibition of torture and inhuman or degrading treatment or punishment: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".
European Convention on Human Rights, Council of Europe, 1960, Article 3 on the Prohibition of torture: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
Criminal Code of Hungary, 2012, https://njt.hu/jogszabaly/en/2012-100-00-00 (accessed: 01.12.2022.)
Hilal v. United Kingdom, 45276/13, 2018
Budayeva and Others v. Russia, 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 2008
B.S. v. Spain, 47159/08, 2012
Milanovic v. Serbia, 44614/07, 2011
D.H. and Others v. Czech Republic, 57325/00, 2007.

**IREM NUR ÜSTÜNTAY***

# Introduction to Legislation on Transnational Acquisition of Real Estate with a Special Focus on Agricultural Lands in Turkish Law

**Abstract**
Transnational acquisition of real estate is regulated in Land Registry Law Nr. 2644 within the frame of Article 35 amended with Law Nr. 6302. It is stated that foreign natural persons are eligible to acquire real estate within the frame of limitations mainly on nationality, size, and location. However, regulations were different in the previous versions of the article where the reciprocity condition was considered when it comes to the transnational acquisition of real estate. The legislator regulates the transnational acquisition of agricultural lands briefly in Article 35 of the Land Registry Law and appoints the authorized ministry to regulate the details of the implementation of the legislation.
This article unfolded the development of the regulations on the transnational acquisition of real estate as well as agricultural lands in 4 different sections which are (1) the pre-republic period, (2) the early period of the Republic of Turkey, (3) regulations of last 30 years, and (4) current regulations.

**Key words**
cross-border acquisition, transnational acquisition, real estate, agricultural land, the law of property, Turkish law

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## 1. Introduction

The acquisition of the real estate by foreigners in Turkey has been subject to various legal regulations in the historical process. The process, which started with the regulations brought especially in the last years of the Ottoman Empire, ended with the changes brought with Law No. 6302 made in the Land Registry Law No. 2644.

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Although the expression *"every Turk"* was included in some articles in the Constitution of 1982[1] to ensure fundamental rights and freedoms, the phrase *"everyone"* was included in most articles; the term *"foreigners"* is used, albeit very rarely. The main purpose of using these expressions is to say that in the articles regulating the fundamental rights and obligations of individuals, the expression *"every Turk"* should mean people who are bound to the Republic of Turkey by citizenship, the phrase *"foreigners"* should mean only foreigners, and the phrase *"everyone"* should mean everyone without discriminating between citizens and foreigners.

Article 35 of the 1982 Constitution states that *"Everyone has the right to property and inheritance"*. These rights can only be limited by law for the public interest. The use of the right to property can not be contrary to the public interest." It has been regulated that everyone will have the right to property without making any distinction between foreign and Turkish citizens. In addition, it has been regulated that limitation of this right can be made for "public interest" as a special reason.

For this article, the doctrinal legal research method was used to explore the subsurface of the transnational acquisition of the real estate by using primary and secondary sources. This method is favored by taking into account the examination process of the evaluation of the regulations. Within the frame of this article, the legal framework of the transnational acquisition of real estate unfolded taking into account the legal history of Turkish legislation. The evaluation of the transnational acquisition of real estate was examined with a special focus on the special regulations on the transnational acquisition of agricultural lands. Therefore, after an explanation of the development of regulations on the transnational acquisition of real estate in the Land Registry Law, the conclusion of the legislation is stated. In the meantime, immovable property and real estate terms are used interchangeably.

## 2. Pre-Republic Period

Except for the rights conferred by a few specific edicts (*ferman*),[2] it is evident that foreigners did not have a right to possess real estate in the Ottoman Empire until 1868. With the publication of the Reform Edict (*Islahat Fermanı*) in 1856, the prohibitive attitude regarding the acquisition of the real estate by foreigners on the territory of the Ottoman Empire changed to a great extent. One of the prominent points in the Reform Edict is the use of an expression that can be accepted as a promise regarding the acquisition of the real estate by foreigners, through the effort

[1] Constitution of the Republic of Turkey, Law Nr. 2709, Date: 18/10/1982, Official Gazette Date: 9/11/1982, Issue: 17863 https://www.mevzuat.gov.tr/mevzuatmetin/1.5.2709.pdf (Date of Access: 09/12/2022)

[2] LEVİ, S.: Yabancıların Taşınmaz Mal Edinmeleri, *Legal Yayınları*, İstanbul, 2006. ISBN: 9944-941-12-3, 55.

to ensure equality between Muslim and Christian subjects.[3] As it is introduced in the edict of 1856, foreigners would be able to acquire real estate in the Ottoman lands, provided that they accepted the condition of complying with the Ottoman laws and regulations in advance and paid the taxes paid by the Ottoman citizens with the enactment of the specific law. Therefore, with the adoption of the Law on the Being of Real Estate Owners of Foreign Citizens (*Tebaa-i Ecnebiyenin Emlâke Mutasarrıf Olmaları Hakkında Kanun - Safer Kanunu*), which is the first law in Turkish law that paved the way for foreigners to acquire real estate, foreigners who met the aforementioned requirements were permitted to purchase immovable property.[4] The Safer Law remained in force until World War I and was repealed by the Law on the Abolition of Capitulations (*Kapitülasyonların Kaldırılmasına İlişkin Kanun*) enacted in 1914.[5]

The Lausanne Peace Treaty, which shaped the first years of the Turkish Republic, was signed on July 27, 1923, and entered into force on August 23, 1923, has a cornerstone principle that is phrased as "reciprocity" in the acquisition of immovable property by foreigners in Turkey.[6]

## 3. Early Period of the Republic of Turkey

The Lausanne Residence and Authority Judiciary Agreement *(Lozan İkamet ve Selâhiyeti Adliye Mukavelesi)* in addition to the Treaty of Lausanne, which was signed on July 24, 1923, was a turning point in the acquisition of the real estate by foreigners in Turkey. With the Treaty, the contractual reciprocity system was accepted and the *Safer* Law of 1868's system of equality (representation to the subject) was abandoned. Additionally, the legal framework regulating the acquisition of the real estate by foreigners was associated with the work that provided insight into the Republican era.[7]

The Land Registry Law, dated 22.12.1934 and numbered 2644, is the most significant element of Turkish law regulating the acquisition of the real estate by foreigners in the years after the formation of the Republic. In the first version of

[3] SARGIN, F.: Yabancı Gerçek Kişilerin Türkiye'de Taşınmaz Mal Edinmeleri ve Sınırlı Ayni Haklardan Yararlanmaları, *Yetkin Yayınları*, Ankara, 1997, 62.

[4] GENÇ, Ş.: Geçmişten Günümüze Türkiye'de Yabancı Gerçek Kişilerin Taşınmaz Edinimi, *Sayıştay Dergisi*, Sayı: 95, 2014, s. 79.

[5] CANDAN, H. - OKTAY, E.: Yabancıların Türkiye'de Taşınmaz Edininiminin Turizm Sektörü Üzerine Etkisi, *MANAS Sosyal Araştırmalar Dergisi*, Cilt: 6, Sayı: 4, 2017, s. 642.

[6] ÜSTÜNDAĞ, B:. Türk Hukukunda Yabancıların Taşınmaz Mal Edinmeleri, Unpublished Master Thesis, Ankara, 2010, s. 78.

[7] As the in the Article 1 of the Lausanne Residence and Authority Judiciary Agreement stated that, full reciprocity will be sought in the application of each of the provisions in the other contracting states to the subjects and companies.

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the provision of Article 35 of the Land Registry Law, *"Foreign natural persons can appropriate and inherit immovable properties in Turkey, provided that the legal provisions of the limitation remain in place and are mutual."* The acquisition of real estate by foreign natural persons is subject to certain conditions. The conditions stipulated in the article were expressed as *"to comply with legal restrictions"* and *"reciprocity"*.

The condition of reciprocity was preserved in the first important legal regulation of the Republican period. On the other hand, in Article 36 of the first version of the Land Registry Law No. 2644, a restriction was imposed on the acquisition of real estate by a foreign natural person in terms of quantity and location. According to the Village Law, the acquisition of real estate in villages by foreign natural persons was prohibited, and the size of real estate they could acquire in areas outside the village was limited to 30 ha. It was decreed that foreign natural persons could only own individual farms not affiliated with a village. For a foreign person to acquire more than 30 ha of land outside the village boundaries depends on the government's permission. The Law, which sought the same conditions in terms of death-related dispositions, excluded real estates acquired through legal inheritance from the scope of the provision.[8]

## 4. Regulations of the Last 30 Years

An important clause was added to the 35th Article of the Land Registry Law No. 2644 with Law No. 3029 dated 21.06.1984. With this paragraph, the Council of Ministers was vested with the authority to determine which countries the reciprocity condition would not be applied to. However, the aforementioned regulation was annulled by the decision[9] of the Constitutional Court on 13.06.1985.[10] As a result

[8] GENÇ, Ş.:Geçmişten Günümüze Türkiye'de Yabancı Gerçek Kişilerin Taşınmaz Edinimi, *Sayıştay Dergisi*, Sayı: 95, 2014, p. 81.

[9] Constitutional Court Decision dated 13.06.1985 and E. 1984/14, K. 1985/7

[10] The Constitutional Court underlined in its decision that with the Lausanne Peace Treaty, the principle of reciprocity was stipulated as a condition for foreigners to acquire an immovable property within the borders of the Republic of Turkey. In the same decision, the court pointed out that the reciprocity condition was recognized in the legislation and in many agreements regarding the acquisition of immovable property by foreigners. In this way, the Constitutional Court has determined that the principle of reciprocity has become one of the general principles of Turkish foreigners' law, both in terms of treaties law and domestic law. In the decision, it was stated that the acquisition of immovable properties by foreigners could not be considered only as a property issue, taking into consideration that land is an indispensable element of the state, a symbol of sovereignty and independence. Emphasizing that the principle of reciprocity is a balancing instrument that ensures equality in international relations, the Court concluded that the regulation that allowed the territory of the country to be seized by foreign elements in order to create an insignificant economic resource was unconstitutional. In its decision, the Constitutional Court also emphasized that the amendment made with Law No. 3029 gave the Council of Ministers an unspecified authority and that this issue constitutes a violation of the Constitution,

of the annulment decision of the Constitutional Court dated 13.06.1985, a new legal regulation was made by the legislator and two paragraphs were added to Article 35 of the Land Registry Law with Law No. 3278 dated 22.04.1986.

With the new regulation, it was stated that in cases where it is deemed beneficial for the national economy, it can decide which countries and/or natural persons from which countries will be exempted from the reciprocity condition. As can be seen, there is a very slight difference between the amendments made to Article 35 of the Land Registry Law. This difference focuses exclusively on the fact that the authority to exempt the Council of Ministers from the reciprocity requirement is limited to situations deemed beneficial to national interests or the national economy. Since there is no doubt that this benefit analysis will be made by the Council of Ministers itself, it is possible to state that the difference between the two regulations remains at an indeterminate level. Likewise, the amendment made to the Land Registry Law with Law No. 3278 was annulled by the decision of the Constitutional Court on 09.10.1986.[11]

Within the frame of Law Nr. 4916 dated 03.07.2003, several revisions are made to the Land Registry Law. After the revisions, foreign natural persons, as well as commercial companies with legal personality established in foreign countries according to the laws of those countries, have been granted the right to acquire immovable property limited to 30 hectares, provided that it is reciprocal and legal restrictions are observed. The condition of reciprocity has been abolished in the acquisition of real estate by foreign natural persons through inheritance.

Article 87 of the Village Law No. 442 was repealed and it became possible to acquire real estate within the village borders. In the establishment of limited rights (right of use, right of residence, right of construction, mortgage, etc.), the condition of reciprocity has been abolished for foreign natural persons and commercial companies with legal personalities established in foreign countries according to the laws of these countries. Restrictions in military zones, security zones, and strategic zones have been preserved, in addition to the existing restrictions, the Council of Ministers has been authorized to determine the places where this article will not be applied in terms of public interest and national security. The amendments made to Article 35 of the Land Registry Law with Law No. 4916 were also annulled by the Constitutional Court on 14.03.2005. The annulment decision of the court was based

considering that, it means the transfer of legislative power. At the same time, the Constitutional Court noted that laws should also specify the criteria for determining the use, quantity, and location of immovables that foreign natural persons may purchase.

[11] YILMAZ, A.: 6302 Sayılı Kanun Hükümleri Uyarınca Yabancı Gerçek Kişilerin Türkiye'de Taşınmaz Edinimi, *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Cilt: 17, Sayı: 1-2, 2013.

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because, in parallel with the previous decisions, the principle of reciprocity was violated in the legal regulation and the principle was handled in an emptied way.[12]

Article 35 of the Land Registry Law, with the amendment made in 2005 with Law No. 5444, a structural change was made in terms of commercial companies with legal personality established in foreign countries according to the laws of their own countries, and it was stipulated that these companies could acquire real estate and limited real rights only within the framework of the provisions of the special law. In the amendment, some restrictive regulations are included in terms of the purpose of acquiring the immovable, the size of the immovable to be acquired, limited real rights and the authority of the Council of Ministers.

Other amendments made with Law No. 5444 were made for the purpose, location, and size of the real estate. According to the amendment, in terms of purpose, foreign natural persons can acquire immovables in Turkey to be used only as workplaces or residences. Likewise, the immovables must be among the immovables that have been separated and registered for these purposes within the implementation zoning plan or local zoning plan. Within the framework of this regulation, foreign natural persons were prevented from acquiring real estate, for example, on agricultural lands. The legislator has introduced different criteria for real estate that foreign natural persons can acquire, valid throughout the country and on a provincial basis considering the size. Accordingly, it was regulated that the immovable to be acquired would not exceed 2.5 ha in total within the borders of the country, but the Council of Ministers was authorized to increase this amount up to 30 ha. Similarly, the Council of Ministers is authorized to determine the rate of real estate that foreign natural persons can acquire on a provincial basis, not exceeding 5 ‰, according to the provincial area. In addition, the Council of Ministers is authorized to determine the areas where foreign natural persons cannot acquire real estate and limited real rights in terms of public interest and national security.

With Law No. 5444 and Article 35 of the Land Registry Law, a distinction was made in terms of immovables acquired through legal inheritance. According to this, it has been decreed that the limitations specified in terms of purpose, location, and size shall not be applied to the immovables acquired by the citizens of the state that have reciprocity with Turkey through legal inheritance, whereas the immovables acquired by the citizens of the state that do not have reciprocity through legal inheritance will be liquidated by transfer. On the other hand, in Law No. 5444, it was stated that conditions of reciprocity and compliance with legal restrictions regarding testamentary dispositions would be sought, as in the period of Law No. 4916. An annulment lawsuit was filed in the Constitutional Court regarding the

[12] GENÇ, Ş.: "Geçmişten Günümüze Türkiye'de Yabancı Gerçek Kişilerin Taşınmaz Edinimi", *Sayıştay Dergisi*, Sayı: 95, 2014, p. 82.

regulation introduced in Article 35 of the Land Registry Law with Law No. 5444. In its decision dated 11.04.2007, the court stated that the authority to increase the limit of 2.5 ha of real estate vested to the Council of Ministers within the framework of this regulation up to 12 times resulted in the transfer of legislative power to the executive body, and decided that this sentence was unconstitutional. The Court has also concluded that the provision in the article in the case that the rate of real estate that foreign natural persons can acquire on a provincial basis shall be determined by the Council of Ministers, not exceeding 5‰, according to provinces and provincial area, is also unconstitutional.

Upon this point, with Law No. 5782 adopted by the legislator on 03.07.2008, the 35th Article of the Land Registry Law was amended once again, and transnational acquisition of real estate and limited real rights allowed up to 10%, based on the central district and districts, within the boundaries of the implementation zoning plan and the local zoning plan. Up to 10% of the total area of the land has been allowed to acquire immovable properties and limited real rights. On the other hand, in Law No. 5782, no new regulation was made regarding the authority of the Council of Ministers to increase the amount of immovable property up to 30 ha. , which was canceled by the Constitutional Court.

## 5. Current Regulations on Transnational Acquisition of Real Estate with Special Regulations for Transnational Acquisition of Agricultural Lands

Legislations on the transnational acquisition of agricultural lands are regulated within the frame of Land Registry Law Nr. 2466. Moreover, current legislation is shaped by the Law Regarding the Amendments to the Land Registry Law and the Cadastre Law Nr. 6302 Date: 3/5/2012[13]. In this context, a broad regulation made on the transnational acquisition of real estate also includes the general points of transnational acquisition of agricultural lands. However, due to the fact that agricultural lands have their specific requirements taking into account the protection of land, state sovereignty, land and water grabbing, etc. specific regulations are a must. The state is responsible to ensure the rule of law, international bilateral relationships, and the benefit of the state. Therefore, it was a starting point for the transnational acquisition of real estate as well as agricultural lands. Article 35 of the Land Registry Law Nr. 2466 it is stated foreign national natural persons who are citizens of the countries that are determined by the President can acquire real estate and limited real rights in rem as long as it complies with the legal limitations when

[13] Official Gazette Date: 18 May 2012 Friday, Issue: 28296 Law Regarding the Amendments to the Land Registry Law and the Cadastre Law Nr. 6302 Date: 3/5/2012 https://www.resmigazete.gov.tr/eskiler/2012/05/20120518-1..htm (Date of Access: 09/12/2022)

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it required for the bilateral international relations and benefit of the state.[14] In the same paragraph, it is highlighted that the total area of real estate acquired by natural persons of foreign nationality and limited independent and permanent rights in rem cannot exceed 10% of the district area subject to private property and 30 ha per person throughout the country and the President is authorized to double the amount that can be obtained throughout the country per capita. Apart from that, it is regulated that President[15] is vested with the power to limit; partially or completely suspend, or prohibit the acquisition of real estate and limited rights in rem considering the country of the foreigner, foreign natural person, geographical region, duration, number, rate, type, quality, area, and size when it is necessary for the interests of the Republic of Turkey.

The first specific regulation concerning the transnational acquisition of agricultural lands is introduced 3rd paragraph of Article 35 of the Land Registry Law Nr. 2644. According to this paragraph, foreign natural persons are obliged to submit the project to be developed on the unstructured real estate they purchased within two years to the approval of the relevant Ministry. The project, which is approved by the relevant Ministry by determining the start and completion time, is sent to the land registry office where the unstructured real estate is located to be recorded in the declarations section of the land registry. The Ministry monitors whether the approved project is carried out within the prescribed period. Within the frame of this paragraph, the term "unstructured real estate" is used frequently. In the Circular Letter Nr. 1752 2013/15 dated 27/11/2013 issued by the Ministry of Agriculture and Forestry the concept of *"unstructured real estate"* is described as real estate that has no construction or structure on the land. Examples are given in the same text to create a mutual understanding by mentioning the terms "land, field, vineyard, garden". In the same Circular Letter, it is also described the framework of "structure" which is all kinds of structures and facilities built to stay more or less permanently on or under a land and combined with it by technical means. However, as it is stated in the Circular Letter, "unstructured real estates" are not limited with agricultural lands. In terms of difference, in case of a foreign natural person willing to acquire agricultural land, a letter of undertaking that reflects the intention of the foreigner shall be submitted to the Ministry of Food, Agriculture and Livestock[16].

[14] Here in this part, "state" refers to the Republic of Turkey.
[15] The last amendment made in the Land Registry Law regarding the acquisition of property by foreigners is the Law No. 6302 dated 03.05.2012. This change is due to the abolition of the Council of Ministers and the transfer of these duties to the President, depending on the constitutional amendment made in 2017. From this point of view, it is understood that the President will use the powers of the Council of Ministers in the Land Registry Law.
[16] With the Presidential Decree Nr.1 dated 10 July 2018, name of the Ministry is changed to the Ministry of Agriculture and Forestry. https://www.resmigazete.gov.tr/eskiler/2018/07/20180710-1.pdf (Date of Access: 09/12/2022)

Upon the receipt of the letter of undertaking, a notification shall send to the district office of the Ministry of Food, Agriculture, and Livestock.[17] In case the purchase inquiry is accepted, the district office of the Ministry of Food, Agriculture, and Livestock[18] informs the foreigner and a statement is going to be in the script to the Land Registry system which indicated that the foreigner must submit the project for the approval of the Ministry of Food, Agriculture, and Livestock[19] within 2 years. The Circular Letter addressed the legal framework of the liquidation process in case the project registered to the Land Registry system would not be approved by the Ministry of Food, Agriculture, and Livestock[20]. Ministry of Finance is addressed as the authority in the liquidation process and liquidation reasons are listed in 3 points: (1) At the end of the period of 2 years starting from the date of acquisition, neither foreigner nor the Ministry of Food, Agriculture and Livestock can not provide an official statement indicates that either the project is approved by the Ministry[21] or the project is submitted for the approval of the Ministry[22] and a notification is received on the Information System of Land Registry and Cadastre *(TAKBİS)*. (2) In case of a notification addressed by the Ministry[23] stating that the project which is submitted within 2 years of the acquisition date is not approved within the given period. (3) In case of a notification addressed by the Ministry[24] stating that the intended project is not completed within the given period.

As it is mentioned, the transnational acquisition of agricultural land within the frame of a project is planned to be realized on the purchased land. Details of the requirement considering the project are explained with ministerial guidance titled *"Instructions Regarding the Permission for the Acquisition of Agricultural Land and Approval of Developed Agricultural Projects"*. Therefore, this ministerial guidance intended to determine and monitor the principles regarding the agricultural project

[17] With the Presidential Decree Nr.1 dated 10 July 2018, name of the Ministry is changed to the Ministry of Agriculture and Forestry. https://www.resmigazete.gov.tr/eskiler/2018/07/20180710-1.pdf (Date of Access: 09/12/2022)
[18] With the Presidential Decree Nr.1 dated 10 July 2018, name of the Ministry is changed to the Ministry of Agriculture and Forestry. https://www.resmigazete.gov.tr/eskiler/2018/07/20180710-1.pdf (Date of Access: 09/12/2022)
[19] With the Presidential Decree Nr.1 dated 10 July 2018, name of the Ministry is changed to the Ministry of Agriculture and Forestry. https://www.resmigazete.gov.tr/eskiler/2018/07/20180710-1.pdf (Date of Access: 09/12/2022)
[20] With the Presidential Decree Nr.1 dated 10 July 2018, name of the Ministry is changed to the Ministry of Agriculture and Forestry. https://www.resmigazete.gov.tr/eskiler/2018/07/20180710-1.pdf (Date of Access: 09/12/2022)
[21] Here, the term Ministry refers to the Ministry of Agriculture and Forestry.
[22] Here, the term Ministry refers to the Ministry of Agriculture and Forestry.
[23] Here, the term Ministry refers to the Ministry of Agriculture and Forestry.
[24] Here, the term Ministry refers to the Ministry of Agriculture and Forestry.

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development, approval, and control process[25] as it is stipulated in Article 35 of the Land Registry Law. In Section II, it is stipulated how the inquiry of the foreigner shall be proceeded with in the case of agricultural land acquisition. Shortly, it is regulated that foreigners are bound to the same legislations as Turkish citizens in terms of Soil Conservation and Land Use Law No. 5403 and Agricultural Reform Law No. 3083 on Land Arrangement in Irrigation Areas. It is stipulated that joint ownership is not allowed when it comes to the transnational acquisition of agricultural lands as it is stated that it is not possible to develop the project under joint ownership. Moreover, a significant regulation was made in case the agricultural land has an olive garden status. In this case, ministry guidance implements broader protection on the land, and purchase requests shall be considered within the frame of Law Nr. 5403 on Soil Conservation and Land Use[26] and Law Nr. 3573 on Breeding of Olive Creation and Its Wild Law on Vaccination.[27]

There are several points that foreigners must consider during the implementation phase of the project. The most comprehensive regulation in this context is Article 6 of the ministry guidance on Instructions Regarding the Permission for the Acquisition of Agricultural Land and Approval of Developed Agricultural Projects. As it is stipulated, the foreign natural person must contribute to production by keeping the land in agricultural process and production at every stage, from the time that will pass until the process of submitting the agricultural project to be developed on the unstructured real estate that foreigner has purchased, and starting the implementation of the project. Another condition for the project is to not aim to cultivate and produce animal species that may harm the natural environment, human health, and the environment. Foreigners are obliged to maintain sustainable land use by protecting the soil and water resources, preventing soil and water pollution, and protecting the land against erosion. Apart from the obligations related to the protection of the land and environment, there are another regulation bound foreigners in human resourcing for the agricultural activity that will be carried out within the frame of the project. It is stated that foreigners shall source the manpower that is needed for the implementation from Turkey. In this way, administrative power aim to create employment opportunities for inhabitants. Within the frame of a grammatical interpretation, it can be said that administrative power leaves the door open for other foreigners who are residing in Turkey to be employed as seasonal or full-time workers during the implementation phase of the

[25] Article 1, Instructions Regarding the Permission for the Acquisition of Agricultural Land and Approval of Developed Agricultural Projects
[26] Law Nr. 5403 on Soil Conservation and Land Use Dated: 3/7/2005, Date of Issue: 19/7/2005 Issue: 25880 https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5403.pdf (Date of Access: 09/12/2022)
[27] Law Nr. 3573 on Breeding of Olive Creation and Its Wild Law on Vaccination Dated: 26/1/1939 Date of Issue: 7/2/1939 Issue: 4126 https://www.mevzuat.gov.tr/mevzuatmetin/1.3.3573.pdf (Date of Access: 09/12/2022)

project. Overall, in case the project finds meeting the criteria of the legislator and administrator, it will be approved. However, the implementation of the project is closely observed by the authorized institution. In case of a delay or act of God, details of the project can be revised. Administrative power listed possible agricultural projects in general terms but not exclusively which are classified under 3 subtitles: (1) Crop production: greenhouse agriculture, soilless agriculture, grain cultivation, seedling cultivation, growing saplings, horticultural cultivation, fruit-vineyard cultivation, tea farming, vegetable farming, organic plant production, banana cultivation, medicinal and aromatic plant cultivation, seed cultivation, meadow, pasture, and fodder crops, industrial plants, ornamental plants, edible grain legumes, mushroom cultivation, tropical-exotic fruits, and plants. (2) Animal production: poultry domestication, small cattle breeding, cattle breeding, beekeeping. (3) Aquaculture. The cultivation of olives must be regulated in Law Nr. 3573 on Breeding of Olive Creation and Its Wild Law on Vaccination which is *lex specialis* to this ministry guidance.

Another general restriction that applies to agricultural land acquisition and limited rights *in rem* in the security zones by foreigners is specified in paragraph 5 of Article 35. Hence, foreigners' acquisition of immovable properties and limited real rights in military forbidden zones, military security zones, and strategic areas is restricted. Within the frame of this paragraph, the Ministry of National Defense is assigned to inform the General Directorate of Land Registry and Cadastre of the locations of the military forbidden zones, military security zones, and strategic areas. Therefore, in case of an acquisition request on mentioned zones, the General Directorate of Land Registry and Cadastre can reject the application.

## 6. Conclusion

Until the 19th century, under the rule of the Ottoman Empire, foreigners do not have the right to acquire real estate in the territory of the state. Within the frame of the reformation process, in 1856, foreigners are given the right to acquire real estate as long as they carry out the obligations that comes with the right.

The exception to the Treaty of Laussane, a cornerstone principle that will stay in effect for a long period, the principle of reciprocity is introduced to the legislation on the transnational acquisition of real estate. Land Registry Law Nr. 2644 regulated that foreign natural persons can acquire real estate within the frame of legal provisions on limitations and as long as it is mutual. In this way, foreigners may acquire real estate which is an individual farm out of the Village zones that are introduced in Village Law. Moreover, the size of the real estate can not be more than 30 hectares. Within the frame of the amendment made in 1984 on the Land Registry Law, the Council of Ministers was vested with the authority to determine the list of countries that shall be exempt from the rule of reciprocity. However, this

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amendment was annulled by the Constitutional Court decision in 1985, and regulations is replaced by a new amendment. In the new amendment, the legislator added that benefit of the national economy must be considered to decide whom to be exempt from the reciprocity condition which is a limitation on the authority of the Council of Ministers. Nonetheless, in 1986, Land Registry Law was annulled once again by the decision of the Constitutional Court.

In 2003, Land Registry Law Nr. 4916 was revised. Within the frame of the revisions, the reciprocity condition was abolished in the transnational acquisition of real estate by the natural person by inheritance. Later on, Village Law was repealed and it became possible for foreigners to acquire real estate within the borders of village zones. However, the amendments made to Article 35 of the Land Registry Law with Law No. 4916 were also annulled by the Constitutional Court on 14.03.2005. The annulment decision of the court was based because, in parallel with the previous decisions, the principle of reciprocity was violated. Article 35 of the Land Registry Law was amended with Law Nr. 5444 revised the restrictions on the purpose, location, and size of the real estate that a foreigner is willing to acquire. Although the reciprocity principle had been omitted in the transnational acquisition of real estate, in the case of acquisition by legal inheritance, the principle is still in charge.

In 2012, Land Registry Law Nr. 2466 got its final version within the frame of the amendments Law Regarding the Amendments to the Land Registry Law and the Cadastre Law Nr. 6302. Article 35 of the Land Registry Law provides the legal framework of the regulations concerning the transnational acquisition of real estate as well as agricultural lands. As it is described in detail above, foreign natural persons can acquire the ownership of real estate as long as (1) the purchase is beneficial concerning the bilateral international relationship of the Republic of Turkey, (2) the foreigner is holding citizenship of a country which is listed in the Presidential decrees on the eligible states to purchase real estate in Turkey (3) the area of the intended real estate does not exceed the 10% of the district area subject to private property and 30 ha throughout the country[28] (4) the intended real estate is not located in a military security zone, military forbidden zone, and strategic areas. Article 35 also stipulates specific legislation concerning the acquisition of agricultural land. By stating that foreign natural persons are required to submit a business plan addressed as a *project* to keep the ownership of the agricultural land. However, in the text, the legislator decided to use the term unstructured real estate rather than directly referring to agricultural land to provide flexibility for administrative power in regulating the details. In this way, Ministry has described

[28] As it is mentioned above, President vested with the right to double the amount that can be purchased all around the country. Moreover, President has the power to limit, suspend (partially or completely) or prohibit the acquisition transaction.

the term unstructured real estate in Circular Letter Nr. 1752 2013/15 within the frame of terms "structure" and "structured real estate". The key concept for the project is to be submitted to the Ministry of Agriculture and Forestry and be accepted within 2 years of the acquisition. Otherwise, for those agricultural lands for which acceptance of the Ministry is not provided, the liquidation process shall be started by the Ministry of Finance. Moreover, at this point, a detailed examination of the legal status of the submission, acceptance, and absence of the project must be evaluated to discover if it is a condition of validity for the transnational acquisition of real estate due to the fact that the legislator did not appoint it directly.

It is worth mentioning that in the 1980s, the discretion power of the council of ministers is intended to reinforce. However, each attempt of the legislator via amendments was reciprocated by the Constitutional Court with an annulment. The main argument behind the Constitutional Court annulments is breaching the core of the Turkish Constitution by nearly vesting the executive power with legislative power. Starting from the amendment made in 2003, reciprocity conditions began to be taken out of the picture starting with the transnational acquisition of real estate of the foreign natural person within the frame of inheritance. Therefore eventually the reciprocity condition became fully out of the picture and replaced with the concept of the eligibility list declared by Presidential Decrees.

Implementation of the special legislation for the transnational acquisition of agricultural lands mainly with circular letters and ministerial guidance issued often by the Ministry of Agriculture and Forestry. Therefore, a detailed examination shall be made within the frame of the documents issued by the Ministry of Agriculture and Forestry to reveal the core concept of the transnational acquisition of agricultural lands.

## Bibliography

AKYOL, F. (2012). " Yabancı Gerçek ve Tüzel Kişilerin Taşınmaz Ediniminde Karşılaşılan Sorunlar ve Çözüm Önerileri", Ministry of Environment and Urbanization, Land Registry and Cadastre, Specilization Thesis.

CANDAN, H. - OKTAY, E. (2017). "Yabancıların Türkiye'de Taşınmaz Ediniminin Turizm Sektörü Üzerine Etkisi", *MANAS Sosyal Araştırmalar Dergisi*, Cilt: 6, Sayı: 4.

EKŞİ, N. (2012). "Yabancıların Türkiye'de Taşınmaz İktisabı", *Beta Yayınevi*, İstanbul.

GENÇ, Ş. (2014). "Geçmişten Günümüze Türkiye'de Yabancı Gerçek Kişilerin Taşınmaz Edinimi", *Sayıştay Dergisi*, Sayı: 95.

https://doi.org/10.46942/SIDM.2023.1.63-76

Instructions Regarding the Permission for the Acquisition of Agricultural Land and Approval of Developed Agricultural Projects, Nr: B.12.0.TRG.0.09.230.04-08/4084 Dated: 02.11.2012

Land Registry Law Nr. 2644, Dated: 22/12/1934 Official Gazzette Publication Date: 29/12/1934, Issue: 2892 https://www.mevzuat.gov.tr/MevzuatMetin/1.3.2644.pdf

Law of Protecting the Soil and Manual of the Land Use Nr. 5403, Dated: 3/7/2005 Official Gazette Publication Date: 19/7/2005, Issue: 25880 https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5403.pdf

LEVİ, S. (2006). "Yabancıların Taşınmaz Mal Edinmeleri," *Legal Yayınları*, İstanbul, ISBN: 9944-941-12-3.

SARGIN, F. (1997). "Yabancı Gerçek Kişilerin Türkiye'de Taşınmaz Mal Edinmeleri ve Sınırlı Ayni Haklardan Yararlanmaları", *Yetkin Yayınları*, Ankara.

ÜSTÜNDAĞ, B. (2010). "Türk Hukukunda Yabancıların Taşınmaz Mal Edinmeleri," Unpublished Master Thesis, Ankara.

YARAR, G. (2018). "Yabancıların Türkiye'de Taşınmaz Mal Edinmeleri", Published Master Thesis, İstanbul.

YILMAZ, A. (2013), "6302 Sayılı Kanun Hükümleri Uyarınca Yabancı Gerçek Kişilerin Türkiye'de Taşınmaz Edinimi", *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Cilt: 17, Sayı: 1-2.

**JANA VÁBEK MARKOVÁ** *

# The legal position and rights of the consumer in the case of non-conformity of goods with the purchase contract

**Abstract**[1]
The present article deals with the legal position and rights of the consumer in the case of non-conformity of goods with the purchase contract, which is examined from the perspective of Czech law, both before and after the amendment to the Consumer Act. The text first defines the basic concepts as they are understood by Czech law or the Civil Code. It then deals with rights arising from defective performance. Finally, it takes into account the major amendment to consumer law that will affect the Czech legal system in January 2023. The core of the text is an analysis of the provisions of Section 2169 of the Civil Code. This article is a follow-up to a paper presented at the ASCEA conference held in Budapest in October 2022.

**Keywords:** *consumer protection, sale of goods, right to repair, consumer information, Czech Republic*

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## 1. Consumer

European legislation defines a consumer in Article 2(1) of Directive 2011/83/EU as a natural person who, in contracts covered by this Directive, acts for a purpose which is not part of his trade, business, craft or profession. Similar definitions can be found in Directives 2019/770 of 20 May 2019 on certain aspects of contracts for the provision of digital content and services and 2019/771 of 20 May 2019 on certain aspects of contracts for the sale of goods, amending Regulation (EU)

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[1] Some chapters of the text (in particular the definition of terms, and the development of rights from defective performance) are based on the qualification work of the author of this text: MARKOVÁ, J.: Withdrawal from the contract in consumer relations [online]. Brno, 2020 [cit. 2023-03-05]. Available at: https://is.muni.cz/th/z3pu3/. Master thesis. Masaryk University, Faculty of Law. Thesis supervisor Lukáš HADAMČÍK.

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2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC. It is always a natural person who is acting for a purpose which cannot be regarded as his trade, business, craft or profession. Article 419 of the Civil Code defines a consumer as any natural person who, outside the scope of his or her business activity or the independent exercise of his or her profession, concludes a contract or otherwise deals with an entrepreneur. Other definitions of consumer in the Czech Republic are contained in various sectoral laws, for example in the Electronic Communications Act and the Energy Act.

The term consumer is also a central concept of Act No. 634/1992 Coll. on Consumer Protection (hereinafter referred to as the "Consumer Protection Act"). A consumer does not use products or services in the course of his business activity (or in the course of the independent exercise of his profession) and is therefore worthy of protection as a 'weaker party'. This is in particular because the consumer does not have the same knowledge and experience as the entrepreneur, who enters into a number of different contracts on a daily basis (often with the help of lawyers) after having prepared them in advance, has detailed knowledge of the product offered, is better able to negotiate the terms of the contract, etc. One of the characteristics of a consumer could therefore be that he is not a professional but enters into a contractual relationship with a professional." However, this definition is only relevant for the AoCP. However, the definition contained in the Civil Code is general. Any other definition in the various provisions referred to above is a special definition and, in the event of a conflict, the rule *lex specialis derogat legi generali* must be applied.

A consumer may therefore be defined as a natural person who acts outside the scope of his business or outside the scope of his independent exercise of his profession and who deals with an entrepreneur. Similar definitions of consumer can then be found across all European countries, with minor variations. Within the Community, the basic approach is based on the wording of the EU rules.

A consumer contract is therefore concluded for a private purpose.

## 2. Entrepreneur

The definition of an entrepreneur can also be found in the Civil Code. Section 420(1) states that an entrepreneur is "a person who, on his own account and responsibility, independently carries out gainful activity in the form of a trade or in a similar manner with the intention to do so consistently for profit." There is an addition in Section 421 of the Civil Code, which sets out the legal fiction that a person registered in the Commercial Register is regarded as an entrepreneur.[2] The

[2] Such entrepreneurs are also called formal entrepreneurs (entrepreneurs for form).

second paragraph of Section 421 also contains a rebuttable legal presumption according to which a person that has trade licences or other authorisations under the law—for example an attorney—is regarded as being an entrepreneur. If we return to the statutory definition contained in Section 420, all the characteristics have to be met at the same time. The Civil Code also contains a definition of an entrepreneur that serves for consumer protection purposes. Here "any person who enters into contracts related to his own commercial, production or similar activities, or within his profession, or a person acting in the name or on the account of an entrepreneur is considered to be an entrepreneur." This definition expands the group of entities that fall under Section 420(1). This typically concerns persons/entities that do not primarily make a profit (e.g., contributory organisations, municipalities). As the topic of this work is a consumer's rights in the case of defects in goods, it is clear that one contracting party will be a consumer and the other an entrepreneur. The entrepreneurs will be legal entities (business corporations) or natural persons doing business. In the case of these persons, it can be assumed that they are experts in their field. They will be subject to Section 5 of the Civil Code, which deals with the professionalism of entrepreneurs. Entrepreneurs should therefore act with the necessary knowledge and care. If they do not do so, this is to their detriment. There is sometimes talk of *lege artis* care of an entrepreneur.[3] The judgement of the Constitutional Court of 1 March 2011, file ref. IV. ÚS 3271/10, indicates that the mere statement of a business ID number (*identifikační číslo osoby* or *IČO*) does not exclude consumer status. It is important to assess the purpose of the conclusion of a contract. If a contract is concluded for private purposes and the entrepreneur (seller) is objectively aware of this information, then the provisions on consumer protection apply to such persons.[4] Very often there are cases where certain websites offer entrepreneurs automatic pre-completion of forms. Sometimes a business ID number that defines an entrepreneur (or through which the majority of the lay public recognises a person/entity is an entrepreneur) finds itself in a contract, without the contract being a B2B relationship (for example, a hairdresser orders toys for her children for Christmas—the business ID number is stated in the contract, but this is no reason to take away consumer protection).[5] Pelikán s Pelikánovou[6] speak in this context of "two faces" of an entrepreneurial natural person (one entrepreneurial and the other private, non-business). Legal persons engaged in business will not in principle have this "non-business" nature.

[3] Regarding the term *lege artis* care see: SOKOL, T.: Lege artis, známý pojem neznámého obsahu. *Právní rádce*, 2010. Pravniradce.ihned.cz [online] (date of download: 13. 1. 2023).
[4] Cf. Magyar Köztársaság Legfelsőbb Bíróság (Hungary) Legf. Bír. Kfv. III. 37.675/2003. sz.
[5] Similarly: ZAPLETAL, J., Definice podnikatele. In: PETROV, J. - VÝTISK, M. - BERAN, V.: A kol. Občanský zákoník. 2nd edition. Prague: *C. H. Beck*, 2022, 8.
[6] ŠVESTKA, J. - DVOŘÁK, J. – FIALA, J., *et. al.*, Občanský zákoník, Svazek I, *Wolters Kluwer*, 2020, 869.

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It is also important to note that, according to Section 420(2), the following applies for the purposes of consumer protection and for the purposes of section 1963, any person who concludes contracts in connection with his own business, manufacturing or similar activity or in the independent exercise of his profession, or who acts in the name or on behalf of an entrepreneur, shall also be deemed to be an entrepreneur. Lasák states that in this case it is about[7] *„A person who concludes contracts related to his own business, production or similar activities may also be a natural person, a municipality, a county or a public corporation in general or another non-business legal entity. It is sufficient if the conclusion of the contract in question, to which section 1963 or, as the case may be, the provisions on consumer protection should apply, is connected with its trade, manufacture or other similar activity. It need not be a direct manifestation of that trade, manufacture or other similar activity. The commercial activity may be, for example, the sale of goods or the provision of certain services of a private law nature, even though the profit criterion is not relevant for the entity concerned, as is the case, for example, in the provision of public services (e.g. the operation of a hospital, public transport, public institutions).“* Personally, I believe that this definition protects consumers who enter into contracts with individuals through, for example, social networks. More and more individuals are, for example, selling their creations (especially handmade products - e.g. knitted toys for children) via Instagram or Facebook. Most of these individuals do so for profit and do not have the necessary authorisation. However, if they are not doing so at random and, for example, their profile on one of the platforms focuses on selling these products, their customers need to be protected.

## 3. Contract Concluded with a Consumer

I regard it as necessary, in order to understand the general requisites, to define the term contract concluded with a consumer, or rather how such a contract is understood by Czech law. Some authors[8] also work with the term consumer contract.[9] This term was defined in previous legislation in Section 52(1) of Act No. 40/1964 Coll., the Civil Code, as amended until 31 December 2013, (hereinafter the "Civil Code of 1964") as a purchase contract, performance contract or other contract if the contracting parties are, on one side, a consumer and, on the other side, an entrepreneur. The institution of consumer contracts was included in the

[7] LASÁK, J., Pojem podnikatele, *in:* LAVICKÝ, P.: Občanský zákoník I. Obecná část. 2. vydání. Prague: *C. H. Beck*, 2022, 1320.
[8] For example: ONDŘEJ, J.: Spotřebitelské smlouvy a ochrana spotřebitele: ekonomické, právní a sociální aspekty. Prague: *C.H. Beck*, 2013.; See also: VÍTOVÁ, B.: Ochrana spotřebitele při uzavírání smluv na slevových portálech. Brno: *Iuridicum Olomoucense*, 2017, 234.
[9] VONDRÁČEK, O. also works with this concept. § In: PETROV, J. - VÝTISK, M. - BERAN, V., 2022, *op. cit.*, 6.

Civil Code of 1964 with effect from 1 January 2001 as a response to requirements resulting from European Communities directives.[10]

The currently effective Civil Code did not accept this formulation in its new text. In its obligations part, the Civil Code contains a division entitled Provisions on Obligations Arising from Contracts Concluded with Consumers. The definition contained in Section 1810, however, introduces the legislative abbreviation consumer contract. We can find the following in the relevant provision: *"The provisions of this division apply to contracts concluded between an entrepreneur and a consumer (hereinafter 'consumer contracts') and to obligations arising therefrom."* A contract can be defined as a consumer contract if on one side of the contractual relationship there is an entrepreneur, as a person/entity acting when concluding the contract and performing the contract as a part of his/her/its business or other commercial activities, and on the other side of the relationship there is a consumer. It is, however, necessary to mention the fact that this is not a special contractual type. It is also not an innominate contract. The text will use the term purchase contract, but it could be a contract on accommodation, escrow, a holiday or insurance. Contracts on performance and other contracts are frequent, if they are concluded in compliance with the requisites stated above.[11] In the EU, Directive 2011/83/EU was adopted on 25 October 2011 and replaces and unifies the previous provisions[12]. The directive is aimed at setting uniform rules that are applicable in all member states, in particular for the sale of goods or services through contracts concluded remotely or outside commercial premises.[13] Various language versions of the directive use minor deviations. Some versions use the term "contracts agreed with consumers", whereas others use the translation "consumer contract"[14]. It is quite possible to entirely identify with Ondřej's opinion, as expressed in the book *Spotřebitelské smlouvy a ochrana spotřebitele* (*Consumer Contracts and Consumer Protection*) that: "It would be possible to hold a discussion about the suitability of the term

[10] For more not only on consumer contracts in the Civil Code of 1964 see: SELUCKÁ, M.: Ochrana spotřebitele: nenápadná změna se zásadními dopady. *Právní rozhledy.* 2010/18, n. 14, 513–517.

[11] DVOŘÁK, J. - ŠVESTKA, J. - ZUKLÍNOVÁ, M. *et al.*: Občanské právo hmotné, 2nd edition. Prague: *Wolters Kluwer*, 2016, 394.

[12] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services; and, for example, Art. 2(2) of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, have a relatively new impact on the relevant area.

[13] For more details, see the reasoning for: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament.

[14] For example, in the Czech or German versions (from the German *Verbraucherverträgen*).

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consumer contract."[15] I am of the opinion that a more appropriate and precise term is a "contract agreed with a consumer", as it is a contract agreed with a specific party that is granted special rights and duties. Consumers often think that a contract must always be in writing. The form is defined in Section 1756 of the Civil Code. There is no specific rule for contracts agreed with a consumer. In general, the written form is not mandatory. A consumer can conclude a contract over the telephone, by e-mail or only orally. Based on experience, I know that this causes consumers major problems. They often do not realise that a simple "yes" stated over the telephone is enough. They regard a contract as a "paper document" that has to contain their signature and other requisites. A contract can be concluded in a quite informal manner—i.e., upon the acceptance of an offer—at the moment acceptance of the offer is received by the seller. Consumers are, however, protected to a certain extent. If they conclude contracts over the telephone or remotely, they can withdraw from the contract within 14 days. The European Union tries to protect consumers even more, if they conclude a contract in a specific way. Czech law is responding to current trends and requirements, as well as to modern technology that is changing contractual law as such. There will be a discussion of the major amendment to the Act on Consumer Protection and the Civil Code below. Regarding contracts concluded remotely, there will, for example, be new provisions on order buttons in e-shops.

## 4. Rights Due to Defective Performance

Rights due to defective performance are set out for a consumer in Section 2169 of the Civil Code; this provision is also sometimes referred to as the hierarchy of claims. A consumer's claims are limited by this provision and it is necessary to comply with certain requirements, if the consumer wants to withdraw from a contract (or the claims are conditional). Withdrawal from a contract is not the right of first choice in the event of the delivery of defective goods. Based on the provision's nature, it is a unilaterally mandatory legal standard. It is therefore possible to deviate from this provision in favour of a consumer. This means that individual rights can be claimed under more advantageous conditions than those stipulated by the law.[16] The essence and the actual sense of the provisions is basically the same as it is in Sections 2106 and 2107 of the Civil Code. The regime for claiming rights and the content of rights is, however, different.[17] The hierarchy of claims is also dealt with in Directive No. 2019/771. The directive has been in force

[15] ONDŘEJ, 2013, *op. cit.*, 12.
[16] ŠVESTKA, J. *et al.:* Občanský zákoník. Komentář. Svazek. Prague: *Wolters Kluwer*, 2014, 979.
[17] One material difference is a certain interdependence of individual rights. The seller's degree of options/capability is also stated as a difference.

since 11 June 2019, the directive came into partial effect on 1 January 2022, with the remainder coming into effect on 1 July 2022. The directive deals with the repair and exchange of an item, as well as a reduction in price (discount) and termination of a contract (withdrawal).[18] The directive's aim is to increase consumer protection in the EU. In its Article 4, the directive introduces the full harmonisation principle: "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive." The Czech Republic will see the largest changes in connection with the requirements of EU Law from the start of the new year.

In accordance with Section 2169 of the Civil Code, a consumer is entitled to the delivery of a new item, which includes the free correction of a defect.[19] If it is not possible, he/she can withdraw from the contract. He/she can also always request a reasonable discount. Šilhán[20] also speaks of the complexity of this legal regulation, stating that this rather complicated regulation of § 2169 (as amended until 6 January 2023) contained the criterion of "proportionality" or "reasonableness" of the chosen claim in relation to the nature of the defect. He also says: v *„As the regulation favours the non-business purchaser, it can be agreed that it merely extends the general regime. The rights here do not take the place of §§ 2106 and 2107, but are supplemented in favour of the buyer. Indeed, even the text of § 2169 says that the buyer may claim 'even' the rights listed below. The two regimes must therefore be considered cumulatively. In accordance with Section 2161 of the Civil Code, the seller is liable for an item not having defects upon acceptance. If a defect occurs within six months of acceptance (from the 6 of January 2023 there is a change), an item will be regarded as having been defective upon acceptance. This means that if a complaint is to be rejected, the seller has to prove, best of all using an expert report, that an item was not defective upon acceptance. The mere statement of this is not sufficient."* Personally, I consider that the interpretation given by Šilhán to the provision in question may not have been entirely obvious. For this reason, too, it is appropriate that the new legislation expressly excludes the applicability of the provisions of section 2106 and 2107 CC.

A consumer's primary claim until the end of 2022 was therefore a free repair, followed by an exchange of the item, the delivery of a new item and, if certain specifics were met, withdrawal from the contract (this will be analysed below). A

[18] For more details see: MIŠÚR, P.: Evropský parlament schválil směrnici posilující ochranu spotřebitelů. *Obchodněprávní revue*, 2019/11, n. 6, 163.

[19] I would only add that the seller has, in accordance with Section 19(3) of Act No. 634/1992 Coll., on Consumer Protection, the duty to deal with a complaint without undue delay, no later than within 30 days. If it does not deal with a complaint properly within a 30-day period, this establishes a material breach of the contract and in such a case the consumer is entitled to withdraw from the contract pursuant to Section 2002 of the Civil Code.

[20] ŠILHÁN, J.: Prodej zboží v obchodě, *in:* Právní následky porušení smlouvy v novém občanském zákoníku. Prague: *C. H. Beck*, 2015, 486.

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consumer is always entitled to a free discount, the calculation of which can be markedly complicated.

Withdrawal is a unilateral expression of will addressed to the seller. When this expression is received by the addressee's (seller's) sphere of influence, the contract is—or rather the obligations resulting from the contract are—terminated from the very beginning. A buyer can withdraw from a contract in several cases. One of them is when a buyer's claim cannot otherwise be satisfied. In practice this means that the seller cannot deliver a new item, if the buyer is entitled to it, or the item cannot be repaired. In this case, the buyer can withdraw from the contract. The impossibility of repairing goods should be objectively assessed with regard to a specific case. The actual Section 2169(2) states, "Even where a defect is removable, the buyer is entitled to have a new item supplied or a component part replaced if he cannot use the item properly due to the repeated occurrence of the defect after a repair or due to a larger number of defects. In this case, the buyer shall also have the right to withdraw from the contract." This means that even if there are defects that can be corrected on an item and the seller has already corrected the defects, the buyer can, upon the occurrence of an additional defect, withdraw from the contract due to the repeated occurrence of defects. If there are multiple defects in an item at the moment a complaint is made, the buyer can withdraw, regardless of whether in a previous complaint he/she claimed the correction of defects.[21] The legislators, however, do not define in more detail the terms "repeated occurrence of the defect after a repair" or "larger number of defects". An answer to this question has to be sought in established case law. The starting point is a decision of the Supreme Court published in the Collection of Court Judgements and Opinions under no. Rc 22/83, which stipulates that the re-occurrence of defects can be regarded as meaning the occurrence of the same defect after at least two previous repairs (i.e., at the moment the defect occurs for the third time). And a number of defects is larger if three various defects in an item occur at the same time. A larger number of defects therefore means at least three defects at the same time, but it is necessary for each of the defects to prevent the ordinary use of the item. A defect can be regarded as having occurred repeatedly in cases where the goods are affected by the same defect, after being repaired twice following a legitimate complaint. In the case of a third complaint about the same defect, a consumer can ask to withdraw from the contract. Whether a defect is the same or not can again be deduced from case law. According to the judgement of the Supreme Court of 29 August 2013, file ref. 33 Cdo 2979/2012, a defect is the same in a situation where the defect has the same effect on an item's properties. It is therefore not necessary to examine the cause of a defect, only the result. An example is a situation where a consumer repeatedly complains about a laptop. The defect is visible in that the laptop cannot be switched

[21] ŠVESTKA, 2014, *op. cit.*, 982.

on. The consumer therefore requests withdrawal due to the repeated occurrence of a defect. It is not possible for an entrepreneur to not accept a withdrawal because a defect was due to a different cause. An entrepreneur cannot argue that the first defect was caused by a defective base board, the second a defective processor and the third defective RAM. What is decisive is only that the defect in the product appears the same to the consumer. There is now, however, the question as to whether this court interpretation is sufficient. Legislators are examining the matter; the amendment includes the issue of defects in goods.

The amendment[22] was supposed to introduce a Section 2169a, stating in which cases a buyer would be entitled to withdraw from a contract. This would concern cases where the seller did not correct a defect or did not correct it in accordance with Section 2169(2) of the Civil Code. It was also to cover situations where a defect occurs repeatedly, the defect is a material breach of the contract or it is clear from the seller's declarations or the circumstances that the defect will not be corrected within a reasonable period or without marked problems for the buyer.[23] I would be critical, however, of the fact that it is again not clearly defined what repeated occurrence of a defect means. The amendment was not accepted in this form in the end.

However, this provision has changed significantly since 6.1.2023, thereby overcoming some significant application problems. The new provision reads as follows:

„*§ 2169 CC*

*(1)If a thing is defective, the buyer may demand its removal. He may, at his option, demand the delivery of a new thing without defect or the repair of the thing, unless the chosen method of removing the defect is impossible or disproportionately costly compared with the other; this shall be judged in particular with regard to the significance of the defect, the value which the thing would have had without the defect and whether the defect can be removed by the other method without considerable difficulty for the buyer.*

*(2) The seller may refuse to remedy the defect if it is impossible or unreasonably costly to do so, having regard in particular to the significance of the defect and the value which the thing would have had without the defect.*

*(3) The provisions of Sections 1923, 2106 and 2107 on rights arising from defective performance do not apply.*"

The amendment of this provision has improved the definition of consumer rights and also eliminated shortcomings that caused problems in practice. Paragraph 3

[22] Amendment planned for 2020.

[23] See Section 2169a of the Civil Code. For more details, see here: https://apps.odok.cz/veklep-detail?pid=KORNBFQGCDCT 113 See Section 346(1) to (3) BGB (date of download: 27. 11. 2022).

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excludes the application of certain provisions of the Civil Code, which previously raised problems as to whether or not these provisions could also be applied.

As it follows from the Explanatory Report[24] to Act No.374/2022 Coll., amending Act No.634/1992 Coll., on Consumer Protection, as amended, and Act No.89/2012 Coll., Civil Code, as amended, the Buyer has, in principle, a free choice between repair and replacement after the amendment. I believe that previously he was limited by the hierarchy of claims and the primary claim was only the repair.

However, it should be noted that even after the amendment, the choice is limited, in that if the chosen method of remedy is legally or factually impossible, or would involve disproportionate costs for the seller compared to the other available method, the seller is not obliged to respect the claim (For example, a button falls off on a coat, which can be sewn on quite easily, but the consumer demands delivery of a new piece - this limitation could, however, be deduced from the previous regulation).

That proportionality is to be assessed in relation to the other remedy, not in absolute terms (cf. judgment of the Court of Justice of the European Union in Joined Cases Weber/Putz, C-65/09 and C-87/09). The rejection of the remedy sought is justified by costs which are substantially higher than the costs which would have been incurred by the other available remedy. The explanatory memorandum itself then gives as an example of inadequacy the case of a malfunctioning air conditioning system in a car, where the purchaser requests the replacement of the whole vehicle, but the defect is confined to a component or part, which could be remedied by replacing the component or part without replacing the whole thing. Paragraph 1 of Section 2169 CC is a projection of Article 13(2) and (3) of Directive 2019/771.[25]

## 4. Enforcement of Rights

The enforcement of consumers' rights is a major problem in the Czech Republic. I believe that the issue of the enforcement of substantive rights could be helped by a better setup of the extrajudicial resolution of consumer disputes. In the case of an extrajudicial resolution of consumer disputes, the power is most frequently held by the Czech Trade Inspection Authority or, if there is a cross-border element, then the European consumer centre affiliated to the Czech Trade Inspection Authority (hereinafter the "CTIA"). The main problem is that a CTIA decision is not

[24] Government of Czechia: Explanatory Report to Act No. 374/2022 Coll., amending Act No. 634/1992 Coll., on Consumer Protection, as amended, and Act No. 89/2012 Coll., Civil Code, as amended, No. 374/2022 Dz.
[25] See Explanatory Report.

enforceable and binding. It can only by a signal as to how a court should decide a dispute (if it is escalated to the court stage). Nevertheless, consumers could be discouraged from using this alternative path by the non-enforceability and non-binding nature of decisions. A consumer spends several weeks on the resolution in this method. Even if the CTIA decides in favour of a consumer, it could happen that the entrepreneur does not respect the decision. Subsequently, the consumer has to apply to a court. I am therefore of the opinion that it would be better to have provisions similar to those for finance, where there is a special consumer arbitration body.[26] It would be appropriate if decisions by the consumer arbitrator were binding and had the effects of an executable court decision. The reviewability of decisions by a court, however, should be a matter of course. I believe that the establishment of such an institution would lead to the better enforcement of consumer rights. In the event that the CTIA remains the authorised body—or the CTIA's extrajudicial resolution of consumer disputes department (also known as the ADR CTIA) does—I regard it as necessary to change whether decisions are binding. Consumers could better claim their rights without the need for a court to intervene.

Class actions are a separate chapter. Unlike many other European countries, the Czech Republic does not yet have a law allowing collective enforcement of consumer rights. Smaller lawsuits totalling hundreds or thousands of crowns are therefore usually not filed by Czech consumers, as court proceedings are time-consuming and costly. However, the outlook for class actions is not as black as it might seem. The draft law on class actions was supposed to be adopted by 25 December 2022 (but probably still will not be adopted in the first half of 2023), as this obligation was imposed on us by the EU. The legislators should have prepared and approved the draft law by this time, otherwise they put the Czech Republic at risk of sanctions. The draft law prepared by the Czech Republic is only a minimalist version and does not provide sufficient protection for consumers. However, even this minimalist version has not yet been adopted. Class actions are a shaky topic that brings a large number of questions to our legal environment that (it seems) are not yet answered. How to deal with class action funding? How to deal with a potentially negative pre-litigation campaign? Are the Czech courts ready for class actions? What will be the process of accessing the case file and how will groups exercise their rights? Personally, I think that the Czech legal environment and especially Czech consumers need the institution of class actions in the Czech Republic. However, it

[26] This idea was also voiced at the Law Days 2019 conference that was held at the Masaryk University Law Faculty on 22 November 2019. The idea was expressed by Markéta Selucká in the civil law section.

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is necessary to design and adopt legislation that is workable and brings about a satisfactory resolution of consumer disputes for all stakeholders.[27]

## 5. Amendment to Consumer Law in the Czech Republic

In November 2022, the President of the Czech Republic signed an amendment to the Consumer Protection Act and the Civil Code. The amendment has a major impact on the relations between consumers and businesses and concerns consumer contracts concluded both online - typically through e-shops - and in brick-and-mortar stores. The amendment also takes into account the aforementioned Directives 2019/770 and 2019/771

The amendment, in addition to the above-mentioned impact on the legal position and rights of the consumer in the case of non-conformity of goods with the purchase contract provided for in § 2169 CC, also affects a large number of other areas.

Among other things, the amendment expands the information obligation, sets out unfair practices and introduces higher sanctions in case of violations. The Consumer Protection Act redefines the concept of an online marketplace, for the operators of which an extended information obligation is established. Consumers must therefore be clear who they are dealing with and what rights they have (including those arising from European regulations).

Strict conditions for the publication of consumer reviews are newly introduced; e-shops, for example, must prove that a review is genuine and how they verified such a fact. However, the rules on reviews are not as strict as they might seem; if the business does not verify the review, it should prominently state this, and if it does, it should be clear to the consumer how (or where) it has done so.

There will also be a "button amendment", which will clarify in law the moment as of which a consumer undertakes to pay the purchase price. The Czech Trade Inspection Authority, as a supervisory authority, states that: the seller may use the wording specified in the Civil Code, i.e. "Order binding payment", or another wording of the same meaning. Failure to comply with this obligation renders the contract null and void.[28]

Other regulations will affect discounts—this could mean that artificial discounts will disappear from the Czech Republic. The calculation of a discount will be based on the lowest price for which goods were sold in the last 30 days. The rule, however,

[27] A closer look at class actions and current developments in the Czech Republic: MIŠÚR, P.: The draft law on class actions after the comment procedure. *Ius Focus*, 2023.
[28]Czech trade Inspection Authority. *Novela zákona o ochraně spotřebitele.* https://www.coi.cz/novela-zakona-o-ochrane-spotrebitele/. [online] (date of download: 22/02/2023).

contains some exceptions, which could, at the end of the day, lead to some entrepreneurs abusing these exceptions. At the moment, I personally see the biggest problem with this regulation, where some online stores still publish discount offers in violation of the law.

The above-mentioned presumption of the defectiveness of the goods has changed or the time limit has been extended. Now, the seller in the Czech Republic must prove for 12 months that the product complained of was not defective at the time of sale (the provisions of Section 2161 as amended until 6 January 2023 modified the presumption of defectiveness by referring to the manifestation of the defect within the first 6 months of receipt). The new wording then states that: *if a defect manifests itself within one year of receipt, the item is presumed to have been defective upon receipt, unless the nature of the item or the defect precludes it. This period does not run for the time during which the buyer cannot use the thing, if he has rightly pointed out the defect.*[29]

Until the amendment, the consumer was to some extent limited by the above hierarchy of claims if the goods were defective (this has been discussed in more detail above). Nowadays, the consumer has a choice - that is, he can choose between remedying the defect by repair or replacement. Again, there are exceptions, e.g. if the choice is impossible or prohibitively expensive. In the wording of § 2169 until the amendment, the consumer was always entitled to a reasonable discount. The right of withdrawal was conditional. The new legislation has made both of the above claims conditional, so that they will be triggered if the trader fails or refuses to remedy the defect, or if the defect is in material breach of contract or is repeated (as discussed above). There is also the possibility of triggering the above claims if it is clear from the trader's statement or the circumstances that the defect will not be remedied within a reasonable time or without significant inconvenience to the buyer.[30]

Until the January 2023 amendment came into force, some opinions in the Czech Republic held that the statutory warranty period was effective. However, this issue has not been fully clarified and it was possible to encounter opinions that the so-called new Civil Code never included a statutory guarantee.[31] According to the amendment, there is no statutory guarantee as of 2023, which removes any doubt as to whether or not we have a statutory guarantee in the Czech Republic. Therefore, from 2023, it is up to the entrepreneur whether or not to provide the consumer with

[29] § 2161 odst. 2 CC.
[30] Cf. VEVERKOVÁ, S. - ODSTRČILOVÁ, M.: *Na co byste měli připravit svůj byznys po novele spotřebitelského práva?* (*What should you prepare your business for after the amendment to consumer law?*). https://kroupahelan.cz/blog/na-co-byste-meli-pripravit-svuj-byznys-po-novele-spotrebitelskeho-prava/162. [online] (date of download: 23/02/2023).
[31] For example: VEVERKOVÁ, S.: Ustanovení § 2165 odst. 1 ObčZ: Záruční doba, či reklamační lhůta?, *in:* NOVOTNÁ, M.: Zásady európskeho súkromného práva v aplikačnej praxi. Spotrebiteľský kódex: áno či nie?. Prague: *Leges*, 2018, 197–214.

a guarantee. A consumer will only be able to complain about a defect or defects occurring within two years of acceptance—i.e. only a defect that an item had upon acceptance, although it was not visible to the eye. The amendment contains a key difference in the field of complaints—or rather rejected complaints. Consumers will have to have an expert report prepared if a complaint is rejected. On the other hand, there is a benefit to consumers in the form of an extension of the period for which there is a presumption goods are defective. It will automatically be thought that if a defect comes to light within a year, the goods must have had it upon acceptance.[32]

## 5. Conclusion

The thesis dealt with the issue of consumer protection in the Czech Republic. First, the basic concepts were defined. Subsequently, the genesis of consumer contracts in the Czech Republic was examined. Not only Czech legislation but also EU legislation was taken into account. The core of the thesis, like the paper presented at the ASCEA (Annual Scientific Conference Of The Central European Academy) Legal Position and Rights of the Consumer in the Event of a Lack of Conformity of the Goods with the Contract. In the event of defective goods, the consumer has several options how he could react to the defect and what he can demand. The basic claims are then defined as free repair, replacement of the goods, a reasonable discount and, in extreme cases, withdrawal from the contract. In view of the major amendment to consumer law that came into force in January 2023, consumer law and consumer protection in the Czech Republic have been further strengthened. The amendment has also been reflected in the text.

## Bibliography

### *Books and articles:*

DVOŘÁK, J. - ŠVESTKA, J. - ZUKLÍNOVÁ, M. *et al.*: Občanské právo hmotné, 2nd edition. Prague: *Wolters Kluwer*, 2016, 394.

LASÁK, J.: Pojem podnikatele. *in:* LAVICKÝ, P.: Občanský zákoník I. Obecná část, 2nd edition. Prague: *C. H. Beck*, 2022, 1320.

[32] Cf. also MIŠÚR, P.: Novela zákona o ochraně spotřebitele nabyla účinnosti. *Ius Focus*, n. 35, 2023. https://www.beck-online.cz/bo/document-view.seam?documentId=nrptembsgnpwszs7gm2q&tocid=nrptembsgnpwszs7gm2q [online] (date of download: 23/02/2023).

ŠVESTKA, J. - DVOŘÁK, J. – FIALA, J., *et. al.*, Občanský zákoník, Svazek I, *Wolters Kluwer*, 2020, 869.

MIŠÚR, P.: Evropský parlament schválil směrnici posilující ochranu spotřebitelů. *Obchodněprávní revue*, 2019/11, n. 6, 163.

MIŠÚR, P.: The draft law on class actions after the comment procedure. *Ius Focus*, 2023.

ONDŘEJ, J.: Spotřebitelské smlouvy a ochrana spotřebitele: ekonomické, právní a sociální aspekty. Prague: *C.H. Beck*, 2013, 12-234.

SELUCKÁ, M.: Ochrana spotřebitele: nenápadná změna se zásadními dopady. *Právní rozhledy*. 2010/18, n. 14, 513-537.

ŠILHÁN, J.: Prodej zboží v obchodě, *in:* Právní následky porušení smlouvy v novém občanském zákoníku. Prague: *C. H. Beck*, 2015, 486.

ŠVESTKA, J. *et al.:* Občanský zákoník. Komentář. Svazek. Prague: *Wolters Kluwer*, 2014, 979.

VEVERKOVÁ, S.: Ustanovení § 2165 odst. 1 ObčZ: Záruční doba, či reklamační lhůta?, *in:* NOVOTNÁ, M.: Zásady európskeho súkromného práva v aplikačnej praxi. Spotrebiteľský kódex: áno či nie?. Prague: *Leges*, 2018, 197–214.

VÍTOVÁ, B.: Ochrana spotřebitele při uzavírání smluv na slevových portálech. Brno: *Iuridicum Olomoucense*, 2017, 234.

ZAPLETAL, J., Definice podnikatele. In: PETROV, J. - VÝTISK, M. - BERAN, V.: A kol. Občanský zákoník. 2nd edition. Prague: *C. H. Beck*, 2022, 8.

***Legislation and case law:***

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament Directive 2019/770

Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC

Government of Czechia: Explanatory Report to Act No. 374/2022 Coll., amending Act No. 634/1992 Coll., on Consumer Protection, as amended, and Act No. 89/2012 Coll., Civil Code, as amended, No. 374/2022 Dz).

Magyar Köztársaság Legfelsőbb Bíróság (Hungary) Legf. Bír. Kfv. III. 37.675/2003. sz.

Zákon č. 40/1964 Sb., občanský zákoník, ve znění do 31. 12. 2013. In: CODEXIS [právní informační systém]. Atlas consulting [cit. 11. 1. 2023].

Zákon č. 458/2000 Sb., o podmínkách podnikání a o výkonu státní správy v energetických odvětvích a o změně některých zákonů (energetický zákon). In: ASPI [právní informační systém]. Wolters Kluwer ČR. [cit. 2. 1. 2023].

Zákon č. 634/1992 Sb., o ochraně spotřebitele, ve znění do 31. 12. 2013. In: ASPI [právní informační systém]. Wolters Kluwer ČR. [cit. 7. 1. 2023]. 56. Zákon č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů. In: ASPI [právní informační systém]. Wolters Kluwer ČR. [cit. 2. 1. 2023].

Zákon č. 634/1992 Sb., o ochraně spotřebitele, ve znění pozdějších předpisů. In: ASPI [právní informační systém]. Wolters Kluwer ČR. [cit. 7. 1. 2023].

***Electronic sources:***

Czech trade Inspection Authority. *Novela zákona o ochraně spotřebitele.* https://www.coi.cz/novela-zakona-o-ochrane-spotrebitele/. [online] (date of download: 22/02/2023).

MARKOVÁ, J.: Withdrawal from the contract in consumer relations. Master thesis. Masaryk University, Faculty of Law Brno, 2020. https://is.muni.cz/th/z3pu3/. [online] (date of download: 05/03/2023).

MIŠÚR, P.: Novela zákona o ochraně spotřebitele nabyla účinnosti. *Ius Focus*, n. 35, 2023. https://www.beck-online.cz/bo/document-view.seam?documentId=nrptembsgnpwszs7gm2q&tocid=nrptembsgnpwszs7gm2q [online] (date of download: 23/02/2023).

SOKOL, T.: Lege artis, známý pojem neznámého obsahu. *Právní rádce*, 2010. Pravniradce.ihned.cz [online]. (date of download: 13. 1. 2023).

VEVERKOVÁ, S. - ODSTRČILOVÁ, M.: *Na co byste měli připravit svůj byznys po novele spotřebitelského práva?* (*What should you prepare your business for after the amendment to consumer law?*). https://kroupahelan.cz/blog/na-co-byste-meli-pripravit-svuj-byznys-po-novele-spotrebitelskeho-prava/162. [online] (date of download: 23/02/2023).

**MÁTÉ DÁVID ADRIÁN***

# Munkavállalói „szabad" akarat egyes kérdései**

**Absztrakt**
Sok esetben gondoljuk azt, hogy szabad akaratelhatározás alapján cselekszünk, azonban döntéseink mögött megannyi kényszer és késztetés húzódik meg. A jog bizonyos kényszerhelyzetekhez meghatározott jogkövetkezményeket rendel, amely a magánjog területén elsősorban az érvénytelenség rendszerén keresztül nyilvánul meg. A kényszernek különös jelentősége van a munkajogban, hiszen a munkavállaló alárendelt szerepben tűnik fel jogviszony keretében.
**Kulcsszavak:** érvénytelenség, semmisség, megtámadhatóság, kényszer, szabad akarat

**Abstract**
In many cases, we think that we act on the basis of free will, but behind our decisions there are so many constraints and urge The law assigns specific legal consequences to certain forced situations, which in the field of private law is primarily manifested through the system of invalidity. Coercion is of particular importance in labor law, as the employee appears in a subordinate role within the framework of the legal relationship.
**Keywords:** invalidity, nullity, challengeability, compulsion, free will

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## 1. Bevezetés

A mindennapi életünk tele van döntések sorozatával, amelyeket valamilyen szempontrendszer mentén napról-napra meghozunk. Döntéseinket mindig egy adott viszonyrendszer kereti között hozzuk meg. Választási lehetőségeink nem korlátlanok, döntési szabadságunk is véges. A választás és döntés az esetek nagy

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részében kényszer, ami abból következik, hogy a szűkösség viszonyai vesznek körül minket.[1] A jog alapvetően meghatároz egy általános keretrendszert, amelyen belül értelmezve és mérlegelve a döntési lehetőségeinket meghozzuk a végső döntést. A döntéseinket gyakran valamely külső hatás, valamilyen fokú kényszer befolyásolja. A jogon belül különös jelentőséggel bír a kényszer hatására tett (jog)cselekmény értékelése. A kényszer azonban sokféle lehet, úgy mint, gazdasági, társadalmi, morális, de megkülönböztethetünk külső és belső kényszert is. Fontos a kényszer mértéke, hiszen a jog szempontjából figyelembe vehető kényszer valamennyi szempont együttes értékelése és mérlegelése révén nyerhet jogi relevanciát.

A döntési lehetőségek vizsgálata során a munkajog még inkább speciális karakterjegyekkel rendelkezik. Következik ez abból, hogy a munkajogi viszonyt eredendően egyensúlyhiányos, aszimmetrikus jogviszonyként kategorizálja a jogtudomány.[2] A munkajogi jogviszonyok kiinduló pontja tehát eredendően az, hogy a munkavállaló egy - elsősorban gazdasági szempontú – kiszolgáltatott helyzetben van, ami alapján szükséges olyan védő mechanizmusokat beépíteni, amellyel elkerülhető a munkavállaló kiszolgáltatott helyzetének növelése, végső soron a kizsákmányolás.

Jelen tanulmány keretében a munkajogon belül megvalósuló döntési szabadságot és annak korlátait kívánom megvizsgálni. Ennek keretében megvizsgálom, hogy hogyan szabályozza a törvény a kényszer által hozott jogcselekmények kérdését, milyen mértéknél avatkozik be a jogalkotó, milyen következményeket alkalmaz és hogyan csapódik le mindez a joggyakorlatban. Mindezen túl áttekintem, hogy a polgári jogi szabályokhoz képest rendelkezik-e specialitásokkal a munkajog területe a vizsgált tárgykörben.

## 2. A munkavállalói szabad akarat

A szabad akaratról általánosan azt a megállapítást tehetjük, hogy a szabad akarat szabad döntési képességet jelent, azaz lehetőség másként cselekedni. A szabad akarat filozófiai alapjait az indeterminizmus és a determinizmus irányzatai jelentik. Az első irányzat követői azt vallják, hogy az ember teljesen szabadon hozza meg döntéseit, minden befolyástól függetlenül cselekszik és választ lehetőségei közül. Az utóbbi irányzat követői szerint a világon minden jelenség, így az emberi cselekedetek és gondolatok is elkerülhetetlenek és előre meghatározottak. A jelen egy oksági folyamat szükségszerű eredménye, a szabad akarat pedig nem más, mint egy illúzió.[3] A jogrendszer megad a társadalom számára egy általános keretrendszert, amelyen

[1] Farkasné Fekete M., Molnár J.: *Közgazdaságtan I. Mikroökonómia*, Debreceni Egyetem Agrár- és Műszaki Tudományok Centruma, Agrárgazdasági és Vidékfejlesztési Kar, Debrecen, 2007., 7. o.
[2] Kiss Gy.: *Munkajog,* Dialóg Campus, Budapest, 2020., 48. o
[3] Kókai G.: A jog és az akaratszabadság jogelméleti kérdései, *Comparative Law Working Papers* – Volume 5. No. 2. 2021. 1-7. o.

belül lehetőség nyílik arra, hogy jogi szempontból értékelésre kerüljön a jogalkotó által jogszerűnek és jogellenesnek titulált magatartás közötti különbségtétel.

Bizonyos nézőpontból megközelítve egy jogügylet létrejövetelének előfeltétele a felek akaratát befolyásoló alapvető tényező, a gazdasági kényszer, vagyis minden árucserén alapuló érdekmotiváció, amely őket a szerződés megkötésére indítja. Ennek megfelelően akaratukat a saját érdekeiknek megfelelően hangolják össze úgy, hogy megfeleljenek a tőlük elvárható kölcsönös együttműködés és a jóhiszeműség elvének.[4] A piaci viszonyok alakulása is kényszerítőleg hathat a fél szerződéskötési szándékára, ez azonban még nem jogellenes, hiszen a gazdálkodó szervezetek közötti kapcsolatok során általában elfogadott a gazdasági kényszer. Ezt erősíti meg a vonatkozó bírósági ítélkezési gyakorlat is, mely szerint a kölcsön felvétele során a „gazdasági kényszer" önmagában még nem minősíthető érvénytelenségi oknak, hanem az legfeljebb az uzsora tényállásának felelhet meg (Szegedi Ítélőtábla, Gf.III.30.288/2017.). Szükséges továbbá rögzíteni, hogy a kényszer csak közvetett lehet. Abban az esetben ugyanis, ha a másik fél közvetlen kényszert alkalmaz (pl. a másik fél kezét vezeti a szerződés aláírása során), az nem a szerződés érvénytelenségét eredményezi, hanem kizárja a szerződéses akarat létét és ekképpen a szerződés nem létezését vonja maga után.[5]

Mindezek alapján megállapítható, hogy a gazdasági kényszer bizonyos szempontból a mozgatórugója a szerződések létrejöttének. Mindemellett a fő kérdés az, hogy milyen jellegű és milyen mértékű kényszer esetén lehet beszélni egy szerződés érvénytelenségéről. A munkajog ebből a szempontból egy különleges terület, hiszen az említett gazdasági kényszer és az egyik szerződő oldalán felmerülő gazdasági kiszolgáltatottság eredendően a jogviszony karakterét képezi.

A jog több területe is egyértelmű szabályozást ad arra az esetre, ha a jogalany úgy tesz (jog)cselekményt, hogy az nem tükrözi a szabad akaratelhatározást. A magánjog területén kiemelt jelentősége van a szabad akaratnak, hiszen a felek megállapodásaik révén rendezik kapcsolataikat. Ennek legfőbb alapját jelenti a szerződési szabadság, amely alapján a felek szabadon dönthetnek arról, hogy szerződnek-e, kivel és milyen tartalommal.[6] A szerződés, mint kötelemkeletkeztető tény pedig a felek

[4] GELLÉN K.: Az akarat szerepe a szerződéskötés során, különös tekintettel a színlelésre, *Acta Universitatis Szegediensis Acta Juridica Et Politica* Tomus LXII. Fasc. 4. 1-44. o.

[5] KRISTON E., SÁPI E.: *Érvénytelenség és hatálytalanság a polgári jogban*, Novotni Alapítvány a Magánjog Fejlesztésért Miskolc 2019.

[6] Polgári törvénykönyvről szóló 2013. évi V. törvény 6:58. § [A szerződés]
A szerződés a felek kölcsönös és egybehangzó jognyilatkozata, amelyből kötelezettség keletkezik a szolgáltatás teljesítésére és jogosultság a szolgáltatás követelésére.
6:59. § [Szerződési szabadság]
(1) A felek szabadon köthetnek szerződést, és szabadon választhatják meg a másik szerződő felet.
(2) A felek szabadon állapíthatják meg a szerződés tartalmát. A szerződéseknek a felek jogaira és kötelezettségeire vonatkozó szabályaitól egyező akarattal eltérhetnek, ha e törvény az eltérést nem tiltja.

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konszenzusán alapul. Konszenzusról pedig csak abban az esetben beszélhetünk, ha mindkét fél akarata – kényszertől mentesen – a szerződés felek által meghatározott – jogszabályba nem ütköző - létrehozására irányul.

A magánjog a szabad akaratot torzító körülményekből származó igazságtalanságot eredményező helyzetet az érvénytelenség szabályaival oldja fel. Az érvénytelenségen belül megkülönböztetünk feltétlen, vagy abszolút érvénytelenséget, amely semmiségként kerül meghatározásra. Az érvénytelenség másik formája a megtámadhatóság, amely feltételes, vagy relatív érvénytelenséget jelent. A semmisség súlyos hibát jelent, amely esetén jogszabály kizárja a célzott joghatás bekövetkezését. Semmisség esetén nincs szükség külön eljárás lefolytatására. Ezzel szemben a megtámadhatóság kisebb jellegű hibát feltételez. A megtámadás olyan egyoldalú, a másik félhez címzett jognyilatkozat, amelynek az a célja, hogy a megállapodás érvénytelenné váljék.[7] Ha megtámadásról van szó, akkor mindaddig érvényes az akarati hibás szerződés, illetve jogügylet, amíg azt a jogosult, vagy a jogosultak köre meg nem támadja. Sikeres megtámadás esetén a jogügylet „ex tunc", vagyis visszaható hatállyal érvénytelenné válik, kivéve a munkaszerződés, ahol az érvénytelenség jogkövetkezménye „ex nunc", vagyis a megtámadás jogalapjának elismerésével, vagy bírósági kimondásával válik érvénytelenné.[8]

Érdemes megjegyezni továbbá, hogy a megtámadással ellentétben semmisségre határidő nélkül lehet hivatkozni. A semmisség miatti érvénytelenségi okra bármely érdekelt hivatkozhat, a megállapodás megtámadására csak a sérelmet szenvedett félnek biztosít lehetőséget a törvény.[9] Fontos, kiemelni, hogy a bírói gyakorlat alapján az olyan jognyilatkozatok esetében, ahol nyilvánvaló elírás történt megtámadásra nincs szükség, ebben az esetben a jognyilatkozat értelmezésének van helye.[10]

Az érvénytelenség rendszere a polgári jogban és a munkajogban nagyon hasonló, azonban vannak eltérések. A polgári jogban az érvénytelenség rendszerében az akarathibából adódó érvénytelenségi ok lehet a színlelt szerződés a tévedés a megtévesztés és a jogellenes fenyegetés. Az első esetkör semmisséget eredményez, míg az utóbbi három eset megtámadásra alapot adó ok és sikeres megtámadás esetén vált ki érvénytelenséget. A munkajog is ezt a rendszert veszi át, azonban a részletszabályokban bizonyos eltérések mutatkoznak.

A megtámadásra nyitva álló határidő vonatkozásában a hatályos polgári törvénykönyv[11] kihagyja az elévülés szabályai megfelelő alkalmazásának a

[7] Érvénytelenség a munkajogban, Összefoglaló vélemény, Szakcikk Adatbázis, Kúriai Döntések (BH) Fórum rovata, 2021., 2021/2. szám, 283-306. o.
[8] PRUGBERGER T., NÁDAS Gy., JAKAB N.: Az érvénytelenség szabályozásának és gyakorlati megállapításának munkajogi problémái. In: *Miskolci Jogi Szemle*, 2022/2. 7-21.
[9] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.
[10] BH 1999.531
[11] A polgári törvénykönyvről szóló 2013. évi V. törvény (továbbiakban: Ptk.)

lehetőségét, valamint tévedés és különösen a megtévesztés, valamint a jogellenes fenyegetés esetében azt a német jogból, de a frankofon latin jogrendszerek esetében is alkalmazott méltányos szabályt, hogy a megtámadásra az általában alkalmazott és a magyar Ptk.-ban is alkalmazott egy éves megtámadási határidő kezdete minden esetben a szerződés megkötésének napjával kezdődik akkor is, ha kényszer vagy fenyegetés esete áll fenn, nem pedig a korábbi joghoz hasonlóan akkor, amikor az megszűnik.[12] Ezzel ellentétben a munka törvénykönyve megállapít egy szubjektív 30 napos megtámadási határidőt, amely a tévedés felismerésétől vagy a jogellenes fenyegetés megszűnésétől kezdődik. Mindemellett a törvény rendelkezik egy objektív határidőről is, amely kimondja, hogy megtámadási határidőre az elévülés szabályai megfelelően irányadók azzal, hogy hat hónap elteltével a megtámadás joga nem gyakorolható. A vonatkozó bírói gyakorlat alapján az utóbbi hat hónapos határidő a megállapodás megkötésétől számítandó jogvesztő határidő, tehát amennyiben az érintett a tévedést később ismerte fel, ha ezen felismerés eredményeként 30 napon belül ugyan, de hat hónap elteltével támadta meg a megállapodást, abban az esetben erre jogszerűen már nem volt lehetősége.[13]

Kérdésként merül fel ilyenkor, hogy a „kirúglak, ha nem módosítjuk a szerződést" kijelentéssel kezdődik e a megtámadásra nyitva álló határidő, vagy az fennáll a jogviszony megszűnésének időpontjáig? Ebben a körben bizonyos ellentmondás érzékelhető, amelyet a hasonló polgári jogi szabályok generálnak. Ugyan a hatályos munka törvénykönyve konkrétan meghatározza, hogy mely szabályok alkalmazandóak a polgári törvénykönyvből, így az nem képezi háttérszabályát a munka törvénykönyvének. A polgári törvénykönyv alapján a jogosultság gyakorlására és követelés érvényesítésére jogszabályban előírt határidő eltelte jogvesztéssel akkor jár, ha ezt jogszabály kifejezetten így rendeli. Ha a határidő nem jogvesztő, arra az elévülés szabályait kell alkalmazni. Ennek alapján egy határidő vagy jogvesztő, vagy az elévülés szabályai irányadóak. Ezzel szemben a fent ismertetett munkajogi megtámadásra nyitva álló határidő egyszerre rendeli az elévülési szabályok alkalmazását és határoz meg jogvesztő határidőt. Mindez azért is lehet problémás a megtámadás esetében, mert a megtévesztés, jogellenes fenyegetés esetén fennállhat olyan menthető ok, amely miatt nem tudja megtámadási jogát határidőn belül gyakorolni a jogosult. Maga a megtámadási ok is alapot adhat a menthető okra, hiszen fennállhat huzamosabb ideig a jogellenes fenyegetés vagy a megtévesztésről hat hónap után is tudomást szerezhet a jogosult.

Ahogy arra Prugberger Tamás, Nádas György, Jakab Nóra is rámutat az érvénytelenség a jogügylet a szerződés szereplőinek egyik, vagy több, esetleg valamennyi szereplőjének akarathiánya (kényszer) vagy hibája (fenyegetés, megtévesztés, tévedés, tévedésben tartás) miatt válik érvénytelenné, az

[12] Prugberger T., Nádas Gy., Jakab N.: i.m. 2022/2. 7-21.
[13] EBH 2011.2335.

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érvénytelenség oka ilyenkor csak a felek akaratában, ismeretében erőszakos vagy megtévesztő befolyásolásával a másik, vagy külső jogalany részéről előidézett akarathiány vagy hiba miatt válik érvénytelenné. Ebben az esetben, ha fizikai, vagy pszichikai kényszer, vagy pedig olyan bódító hatású kábítószer kényszerbevétele hatására veszíti el a nyilatkozó az akaratát, ez esetben a nyilatkozó részéről sem akarat, sem akaratnyilatkozat nem létezik. Ez esetben a nyilatkozat csak látszat, vagyis semmis.[14]

## 3. Megtévesztés

A következőkben az egyes érvénytelenségi okok vizsgálatára kerül sor. A sort a megtévesztéssel nyitom. A megtévesztés egy célzatos és szándékos magatartást feltételez, amely elem megkülönbözteti a tévedéstől. A másik fél tévedését ilyen esetben a fél tudatosan fejti ki a megtévesztésével, ami lehet aktív magatartás (dolus malus), vagy akár valamilyen lényeges körülmény elhallgatása is (reticentia).[15] A megtévesztés és jogellenes fenyegetés esetén a jogellenesség súlyosabb, az csalárd szándékot, fenyegetést, esetlegesen erőszakot is tartalmazhat.[16] A gyakorlatban felmerülő eset, hogy a munkáltató közös megegyezéssel történő megszüntetés lehetősége elé állítja a munkavállalót, akit váratlanul ér a kezdeményezés. Általában mindez nem előzmény nélküli és a megromlott munkahelyi légkör megoldására alkalmazott szokásnak is nevezhető. Ilyen esetben a munkáltató gyakran nem, vagy nem megfelelő módon tájékoztatja a munkavállalót a lehetőségekről, sok esetben tudatosan törekszik arra, hogy tévedésbe ejtse a munkavállalót és azt a látszatot kelti, hogy az egyetlen ésszerű döntés a – munkáltató által előre megfogalmazott és kialakított – közös megegyezés aláírása.

Ebben körben fontos kiemelni, hogy a munka törvénykönyvének miniszteri indokolása szerint a megállapodás tanulmányozására, illetve aláírására a munkáltatónak kellő időt kell biztosítani, és nem tanúsíthat olyan magatartást sem, amely a munkavállalóra kényszerítőleg hat vagy őt megtéveszti.[17] A joggyakorlat-elemző csoport összefoglaló véleménye pedig kiemeli a tévedés kockázatának vállalásával összefüggésben azon Kúriai döntést, amely hangsúlyozza, hogy a bírói gyakorlat szerint az úgynevezett szerencseelemet tartalmazó, üzleti vagy egyéb jellegű kockázatvállalással járó szerződések körében alkalmazandó.[18] Egy perbeli esetben a rendvédelmi feladatokat ellátó szervek hivatásos állományának szolgálati viszonyáról szóló 2015. évi XLII. törvény 2019. február 1-jei módosítása alapján a

[14] PRUGBERGER T., NÁDAS Gy., JAKAB N.: Az érvénytelenség szabályozásának és gyakorlati megállapításának munkajogi problémái. In: *Miskolci Jogi Szemle*, 2022/2. 7-21.
[15] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.
[16] Fővárosi Ítélőtábla, 1.Mf.31.324/2020/18.
[17] T/4786. számú törvényjavaslat a Munka Törvénykönyvéről, 64-67. §-hoz fűzött indokolás
[18] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.

hivatásos katasztrófavédelmi szervnél foglalkoztatott közalkalmazottak jogállása megváltozott: az érintetteket – írásbeli hozzájárulásukkal – 2019. február 1. napjától kizárólag az új rendvédelmi igazgatási szolgálati jogviszonyban lehet foglalkoztatni, mint rendvédelmi alkalmazottat. A munkáltató a határozott idő fenntartása mellett vállalt kötelezettséget a tovább foglalkoztatásra, valamint arról tájékoztatta a foglalkoztatottat, hogy amennyiben nem járul hozzá a jogviszony váltáshoz úgy a törvény erejénél fogja megszűnik a jogviszonya. A foglalkoztatott elfogadó nyilatkozatot tett, amelyet követően értesült, hogy hozzájárulás hiányában a jogviszony megszűnése esetén 12 havi illetményre válik jogosulttá. A foglalkoztatott utóbb vissza kívánta vonni nyilatkozatát, de a munkáltató azt nem fogadta el. A peres eljárás során a foglalkoztatott hozzájáruló nyilatkozatát, mint egyoldalú jognyilatkozatot támadta meg, amely során hivatkozott arra, hogy tévedésben volt és kényszerhelyzetben küldte vissza a nyilatkozatát, továbbá ígéretet kapott arra, hogy a munkáltató elindítja a jogviszonya határozatlan idejűvé alakítását, azonban ez nem történt meg. A Bíróság a keresetet elutasította. Kifejtette, hogy a foglalkoztatott a tévedése kockázatát vállalta, mert annak ellenére, hogy bizonytalan volt, hogy milyen járandóságra jogosult a jogviszony megszűnésekor, az alperes felhívása ellenére nem tájékozódott az alperes Humánszolgálati Osztályánál, és a jogviszony határozatlan idejűvé válásában bízva tette meg a hozzájáruló nyilatkozatát. A Kúria a döntést megváltoztatta, döntésében pedig kifejeztette, hogy a közalkalmazotti jogviszony megszűnésekor a közalkalmazottat megillető járandóságokat a törvény kimerítően szabályozza, szerencseelem, kockázatvállalás nem merül fel. Az alperes felelős az akarathibáért, mert a közalkalmazotti jogviszony megszűnése és az azzal járó járandóságok tekintetében megtévesztő tájékoztatást közölt. A munkáltató a jogviszonyváltás során hiányos és megtévesztő tájékoztatást közölt, melyre tekintettel a felperes sikeresen támadta meg egyoldalú nyilatkozatát.[19]

A közölt bírósági döntés alapján felmerül annak lehetősége, hogy a munkavállaló megtévesztése – amely alapot ad a megtámadásra – megvalósulhat gondatlanság esetén, hiszen perbeli esetben a munkáltató szándéka nem terjedt ki arra, hogy tudatosan téves információt közöljön a munkavállalóval.[20]

[19] Kf.VII.39.051/2020/4

[20] Szándékosság esetén két estkört különböztethetünk meg:
Egyenes szándék (dolus directus), amelyet a magatartás következményeinek kívánása jellemez.
Eshetőleges szándék (dolus eventualis), amelyet a magatartás következményeibe való belenyugvás jellemez.
A gondatlanság két alakzata:
Tudatos gondatlanság (luxuria): Az elkövető előre látja magatartása következményeinek a lehetőségét, de könnyelműen bízik azok elmaradásában.
Hanyag gondatlanság (negligentia): Az elkövető nem látja előre magatartása lehetséges következményeit, mert elmulasztotta a „tőle elvárható" figyelmet vagy körültekintést.

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## 4. Fenyegetés

A következő akarathiba a megtámadás esetkörein belül a fenyegetés (vis compulsiva). Ez valójában a lelki kényszernek felel meg, mivel ekkor korlátozzák a személyt az elhatározás, döntés szabadságában. A szerződő féllel vagy vele kapcsolatban álló személlyel szemben helyeznek kilátásba olyan személyi, illetve vagyoni hátrányt, amely alkalmas arra, hogy a fél akaratát meghajlítsa, befolyásolja. A fenyegetésnek jogellenesnek kell lennie, akkor adhat okot a megtámadásra. Ekkor az adott személy félelmében tesz akaratától eltérő szerződéses nyilatkozatot.[21]

Az előzőekben már említett, ahhoz hasonlóan tipikus eset, amikor a munkáltató bármilyen okból szabadulni akar a munkavállalójától, de tisztában van azzal, hogy az Mt. 65. §-ába foglalt munkavállaló-védelmi előírások miatt jogszabályszerűen semmilyen felmondással élni nem tud és ezért vagy a munkavállalót kényszeríti felmondásra, vagy pedig – és ez a gyakoribb – közös megegyezéses munkaviszony megszüntetésre szorítja rá.[22]

A bírói gyakorlat iránymutatást ad számunka további tipikus esetekre. A bírói gyakorlat egységes abban a tekintetben, hogyha a munkaviszony megszüntetésére irányuló megállapodás megkötését megelőzően a munkáltató a munkavállaló által elkövetett kötelezettségszegés, vagy egyéb magatartás miatt jogszerű eljárás lefolytatását, vagy a 78. § szerinti azonnali hatályú felmondás közlését helyezi kilátásba, az nem tekinthető jogellenes fenyegetésnek.[23]

Legfelsőbb Bíróság[24] kifejtette, hogy fenyegetésnek az olyan magatartás minősíthető, amely a másik félnek jelentős és utóbb maradéktalanul nem orvosolható joghátrányt, vagy egyéb következményeket helyez kilátásba, azonban az ilyen jogkövetkezmények kilátásba helyezése is csak akkor alapozhatja meg az annak hatására tett jognyilatkozat megtámadását, ha a magatartás, a fenyegetés egyszersmind jogellenes volt. Nem minősül ezért jogellenesnek olyan jogkövetkezmények kilátásba helyezése, amelyek alkalmazására a félnek munkaviszonyra vonatkozó szabály alapján lehetősége van és amely ellen a felperes jogorvoslatot vehet igénybe. Ha a munkáltató a munkaviszony megszüntetésének módja tekintetében az azonnali döntésre való felszólítással olyan helyzetet teremt, amely alkalmas arra, hogy a munkaviszony megszüntetésének jogi feltételeiben járatlan munkavállalóra kényszerítőleg hasson, őt megfélemlítse, vagy megtévessze

[21] GELLÉN K.: Az akarat szerepe a szerződéskötés során, különös tekintettel a színlelésre, Acta Universitatis Szegediensis Acta Juridica Et Politica Tomus LXII. Fasc. 4. 1-44. o.
[22] GELLÉN K.: i.m. 1-44. o.
[23] 1630.EH., BH 1998.50., BH 2002.74.
[24] A legmagasabb szintű bíróság Magyarországon 2012. január 1-jétől a Kúria, azt megelőzően Legfelsőbb Bíróság.

(jogban járatlannak a vezető jelenlétében azonnali döntésre való felszólítása), a magatartása folytán létrejött megállapodás érvénytelen.[25]
Kényszer alkalmazását nem lehet megállapítani, ha a fél nem vitatja a közös megegyezésre irányuló tárgyalás nyugodt légkörét, továbbá azt, hogy kérése esetén részére a munkáltató gondolkodási időt biztosított volna.[26]

Az azonnali döntésre való felszólítás önmagában nem minősülhet jogellenes fenyegetésnek. Az említett jogesetben is utalt arra a Legfelsőbb Bíróság, hogy az egyéb körülmények (pl. alacsony iskolai végzettség, több vezető fenyegető fellépése) fennálltának vizsgálata nem mellőzhető a pszichikai kényszer megállapításánál.[27]
A Ptk. hatálybalépésével a megállapodás (és az egyoldalú jognyilatkozat) megtámadására vonatkozó korábbi szabályok annyiban változtak, hogy a 2014. március 14. után tett jognyilatkozat jogi kérdésben való tévedés címén nem támadható meg. A jogellenes kényszerítés korábbi tényállásának elhagyása ugyanakkor tartalmi változást nem jelent, ugyanis a jogellenes fenyegetés kifejezés alatt nyilvánvalóan a kényszerítés esetét is érteni kell.[28]

A bírói gyakorlat alapján tehát körvonalazódik, hogy alapvetően az, hogy az adott esetben mi hatott „kényszerítőleg" a munkavállalóra, mi az, ami megfélemlítette az adott tényállástól nagyban függ, de mégis kiolvashatók tipikus esetek, amelyek nem tartozhatnak ebbe a körbe.

## 5. Jóerkölcsbe ütköző megállapodás

A munkajogi jogvitákban felmerülő esetkörként emelhető ki, azon eset is, amely során a munkavállaló arra hivatkozással támadja meg a jognyilatkozatot, hogy az jóerkölcsbe ütközik. Ugyan nem az akarathiba, hanem a célzott joghatás körébe felmerülő érvénytelenségi ok a jóerkölcsbe ütköző jognyilatkozat, azonban munkajogi relevanciája viszonylag nagy.

A törvény nem tartalmaz definíciót arra vonatkozóan, hogy mi az, ami sérti a jóerkölcs kategóriáját. Mindez következik abból is, hogy a jóerkölcs generálklauzulaként tudja betölteni funkcióját, mivel bizonyos szempontból a tartalma folyamatos mozgásban van. A jóerkölcs fogalmának tartalma igazodik a mindenkori társadalmi viszonyokhoz, amelyet rendszerint a bírói gyakorlat tölt meg tartalommal. Erre utal a Kúra azon álláspontja is, amely szerint a jóerkölcs olyan általános társadalmi kategória, amely általános értékítéletet fejez ki, a bíróság absztrakció útján, a társadalomban általánosan elfogadott erkölcsi normák alapján

[25] BH 2001.340.
[26] EBH 2007.1630.
[27] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.
[28] KOZMA A., LŐRINCZ Gy., PÁL L.: A Munka Törvénykönyvének magyarázata, HVG-ORAC, Budapest, 2022.

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minősíti a szerződéseket. Következésképpen ezen nem a szerződéskötő felek érdeksérelmét, az egyes szerződő felek konkrét joghátrányát kell érteni, hanem a jogügylet egészének társadalmi megítélését.[29] A szerződés jóerkölcsbe ütközésének a szerződéskötéskor kell fennállnia, továbbá a jogügylet nemcsak tartalmánál, hanem joghatásánál fogva is minősülhet jóerkölcsbe ütközőnek.[30]

Egy perbeli esetben a munkavállaló tettlegességig fajuló vitába keveredett munkatársával. A munkáltató a jogviszony közös megegyezéssel történő megszüntetését kezdeményezte, illetve tájékoztatta a munkavállalót, hogy a megállapodás létrejöttének elmaradása esetén jogviszonyát azonnali hatállyal kezdeményezi megszüntetni. A munkavállaló aláírta a közös megállapodást, majd később megtámadta arra hivatkozással, hogy munkaviszonya közös megegyezéssel történő megszüntetése jóerkölcsbe ütközött, mert jelentős súlyú kötelezettségszegés esetén azonnali hatályú felmondásnak lett volna helye. A bíróság nem találta megállapíthatónak a jóerkölcsbe ütköző jellegét a megállapodásnak.[31]

A joggyakorlat-elemző csoport álláspontja szerint amennyiben a felperes több okból is panaszolja az adott intézkedés jogellenességét, a bíróságnak vizsgálati sorrendet kell tartania: először a konkrét jogszabályba ütközést, utána az általános magatartási követelmények megsértését, végül a jóerkölcsbe ütközést kell vizsgálnia. Ezt támasztja alá az a jogirodalmi álláspont is, mely szerint a megtévesztés, jogellenes fenyegetés, tévedés a jóerkölcsbe ütközéshez képest lex specialis, magában a megtévesztés, jogellenes fenyegetés, tévedés nem teszi a szerződést nyilvánvalóan jóerkölcsbe ütközővé, s ez okból semmissé. Ehhez további tényállási elem szükséges, melynek hiánya esetén a szerződés csak megtámadható, semmisségre nem lehet eredményesen hivatkozni.[32]

Végül érdemes a jóerkölcsbe ütköző szerződés és a joggal való visszaélés közötti különbségtételt megvizsgálnunk. Joggal való visszaélés a jog gyakorlása különösen akkor, ha az mások jogos érdekeinek csorbítására, érdekérvényesítési lehetőségeinek korlátozására, zaklatására, véleménynyilvánításának elfojtására irányul vagy ehhez vezet. Ebben az esetben formálisan nem állapítható meg jogsértés, azonban a joggyakorlás nem annak rendeltetése szerint történik, ami miatt a másik felet hátrány éri.[33] A joggal való visszaélés tilalmának megsértése akkor állapítható meg, ha valamely alanyi jog gyakorlása formálisan jogszerűen történt. Ezért valamely joggyakorlás nem lehet tételes jogszabályba ütközés miatt jogellenes és egyben a joggal való visszaélés tilalmába ütköző.[34] A jogirodalomban ismert álláspont szerint a legfőbb különbség a joggal való visszaélés tilalma és a jóerkölcsbe ütköző

[29] Kúria Pfv.I.20.063/2019/3.
[30] EBH.2019.M.17.
[31] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.
[32] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.
[33] Kozma A., Lőrincz Gy., Pál L.: i.m. 2022.
[34] 5/2017. (XI. 28.) KMK számú vélemény 1. pont

szerződések semmissége között abban rejlik, hogy a joggal való visszaélés tilalma nem közvetlenül a szerződés tartalmi kontrolljára irányul, hanem arra, hogy egy jogalany az adott esetben az őt megillető joggal élhetett-e.[35]

A bíróság semmisnek ítélte meg azon rendelkezését a munkaszerződésnek, mely szerint a munkavállalókat a munkaviszony rendkívüli felmondással történő megszüntetése esetére is kártalanítás illeti meg, a jóerkölcsbe ütközik, ezért ez a rendelkezés semmis. Indokolásában kifejtette, hogy a munkajogban alkalmazott rendkívüli felmondás - azonnali hatályú felmondás – olyan szankciós megszüntetési ok, amely olyan súlyosan jogsértő magatartást feltételez, amely alapján nem képzelhető el többletjuttatásra való igény a jóerkölcs sérelme nélkül.[36]

## 6. Feltűnő értékaránytalanság

A következőkben a szolgáltatás- ellenszolgáltatás feltűnően nagy értékaránytalansága (laesio enormis) miatti megtámadási okról kívánok néhány szót ejteni. A kérdéskört különösképpen fontosnak tartom a munkajog területén, hiszen a ez szorosan kapcsolódik az egyenlő munkáért egyenlő bér elvéhez, valamint fontos lehet(ne) a munkavállalók kizsákmányolása elleni fellépés során. A megfogalmazás nem véletlen, ugyanis a munka törvénykönyve – a polgári törvénykönyvvel ellentétben – nem tartalmazza a feltűnő értékaránytalanság intézményént, vagy legalábbis nem a Ptk. szerinti módon. A polgári törvénykönyv szabályai szerint, ha a szolgáltatás és az ellenszolgáltatás értéke között anélkül, hogy az egyik felet az ingyenes juttatás szándéka vezetné, a szerződés megkötésének időpontjában feltűnően nagy az aránytalanság, a sérelmet szenvedett fél a szerződést megtámadhatja. Nem támadhatja meg a szerződést az, aki a feltűnő értékaránytalanságot felismerhette vagy annak kockázatát vállalta. A felek ezen megtámadási jogot - fogyasztó és vállalkozás közötti szerződés kivételével - a szerződésben kizárhatják.[37]

A munkajogi viszonyok természetére tekintettel jelen van egy közjogi jellegű, állami beavatkozás a bérek tekintetében, amely minimálbér és a garantált bérminimum intézményében ölt testet. Ennek kapcsán felmerül, hogy amennyiben a felek a szerződési szabadság elvéből következően ettől eltérő – magasabb – bérezésben állapodnak meg, akkor okszerűen vizsgálandó, hogy mennyiben felel meg a szolgáltatás és ellenszolgáltatás egyenértékűségével szemben támasztott követelménynek ez a díjazás.[38] Tehát önmagában a minimálbér, vagy a garantált

[35] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.
[36] EH 2017.03.M3
[37] A polgári törvénykönyvről szóló 2013. évi V. törvény 6:98. § (1), (2) bekezdése
[38] NÁDAS Gy.: Jogkövetkezmények a változó munkajogi szabályozás rendszerében, *Miskolci Jogi Szemle* 12. évfolyam (2017) 2. különszám, 401-408. o.

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bérminimum alkalmazása nem jelenti azt, hogy a szolgáltatás és az ellenszolgáltatás arányban áll egymással.

A Kúria egy ügyben megállapította, hogy a visszterhesség vélelme kapcsán érvényesített polgári jogi elv a munkaviszonyban nem érvényesül. Az Mt. 31. §-a nem sorolja fel a munkaviszonyban is alkalmazandó szabályok között a Ptk. 6:98. §-át, ezért a feltűnő értékaránytalanság érvénytelenségi okként alkalmazása a munkajogi érvénytelenség körében közvetlenül nem lehetséges, a megállapodás feltűnő értékaránytalanság címén nem támadható meg. Az Mt. a munkaviszonyhoz kapcsolódó egyes megállapodásokkal kapcsolatos értékarányossági problémákat nem a polgári jogi nevesített érvénytelenségi okkal, hanem az aránytalanság kiküszöbölésével, részleges érvénytelenséggel kívánja megoldani. Ez a megoldás a munkaviszony alanyaira vonatkozóan kedvezőbb, mint a polgári jogi szabályozás, mert nem csupán a feltűnő értékaránytalanság, hanem a csekélyebb mértékű aránytalanság, illetve nem csak az érték aránytalanságának orvosolására alkalmas. [39]

Érdekes megállapítást teszt továbbá a joggyakorlat elemző csoport, a jóerkölcsbe ütköző szerződés és a feltűnő értékaránytalanság kapcsolata tekintetében. A jóerkölcsbe ütközés miatti semmisség egyik eleme lehet olyan szerződési kitétel, amely értékaránytalanságot foglal magában. Az értékaránytalanság azonban önmagában még nem eredményezi a megállapodás jó erkölcsbe ütközését, egy olyan többletényállási elem megléte is szükséges, amely a szerződést nyilvánvalóan jóerkölcsbe ütközővé teszi, vagyis ami megfelel annak a kitételnek, miszerint az az általánosan elfogadott erkölcsi normákat, szokásokat nyilvánvalóan sérti és ezért az általános társadalmi megítélés is egyértelműen tisztességtelennek minősíti.[40]

## 7. Színlelt szerződés

Fontos kiemelni, hogy az akaratot befolyásoló körülmények más relevanciával bírhatnak a jogviszony létesítése előtt és a jogviszony fennállása alatt. A munkaviszony tartós jellegéből adódóan a függelmi helyzet sokkal inkább elmélyülhet a jogviszony fennállása alatt. Míg a jogviszony létesítése előtt elsősorban a munkavállaló oldalán felmerülő gazdasági kényszert lehet inkább detektálni, addig a jogviszony létesítését követően már sokkal inkább érvényesül a munkáltató uralmi jellegű pozíciója. Az érvénytelenségi okot előidéző magatartás tanúsítása előfordulhat a munkaviszony létesítését megelőzően, de akár a szerződés fennállása alatt, annak módosítása során is. Az első esetkör egy újabb akarathibához vezet minket, mégpedig a színlelt szerződés kérdéséhez, amely semmisségi ok.

[39] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.
[40] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.

A munka törvénykönyve alapján a színlelt megállapodás semmis, ha pedig más megállapodást leplez, azt a leplezett megállapodás alapján kell megítélni.[41] A munkavégzésre irányuló jogviszonyokhoz, pontosabban az ennek keretében kifizetett juttatásokhoz eltérő adó- és társadalombiztosítási elvonások tapadnak. Részben ezért tapasztalható, hogy a felek valós szándékuktól eltérő, a számukra kedvezőbb következményekkel járó szerződéses formát választják. A munkaviszony leplezésének a másik oka az, hogy a foglalkoztató szabadulni kíván azon munkajogi szabályok teljesítése alól, amelyek a polgári jogi jogviszonyokban nem érvényesülnek, így különösen a felmondási védettséget biztosító rendelkezések alól, illetve a munka- és pihenőidőre vonatkozó rendelkezések alkalmazásától. Ezért közismerten meglehetősen gyakori jelenség, hogy a ténylegesen munkaviszonyban történő foglalkoztatás leplezésére a felek megbízási vagy vállalkozási szerződést kötnek. Mindezen cselekvésekre ad magyarázatot a racionális választások elmélete, illetve a cselekvőről adott közgazdasági modell, amely a közgazdaságtan és a racionális választások emberképe nyomán abból indul ki, hogy a cselekvők a saját hasznosságuk növelésére, maximalizálására törekednek, és az előttük álló cselekvési alternatívákat ebből a szempontból értékelik. Azt az alternatívát választják, amely – a költségeket is figyelembe véve – a legnagyobb hasznossággal, vagy a legkisebb kárral jár számukra.[42]

Amennyiben a munkavégzésre irányuló jogviszony minősítése vitatott, az egyes szerződéses elemeket összességükben kell vizsgálni.[43] A munkaviszonynak a munkavégzésre irányuló egyéb jogviszonyoktól való elhatárolása szempontjából a legfontosabb vizsgálandó körülmény a jogviszony önálló vagy önállótlan jellege. Az elhatárolást elősegítő jellegadó tulajdonságai az egyes jogviszonyoknak azonban napjainkban egyre inkább összemosódnak, egyre nehezebben határolhatóak el egymástól a jogviszonyok. A rugalmas foglalkoztatási lehetőségek motorja a digitalizáció, amely még inkább megnehezíti az elhatárolást, hiszen ezen foglalkoztatások során még inkább keverednek az egyes jogviszonyok jellegadó tulajdonságai. A bírói gyakorlat abból indul ki, hogy ha a tevékenység jellege megengedi, a felek szerződéses szabadsága érvényesül a típusválasztást illetően is.[44] A feleket megillető szerződéses szabadság azonban a szerződés tartalmának és nem elnevezésének meghatározására (minősítésére) terjed ki. A korábbi időszakhoz képest a vizsgált ügyek körében jóval kevesebb esetben fordult elő, hogy a munkavállalók a színlelt szerződés miatti érvénytelenségre hivatkoztak.[45]

[41] A munka törvénykönyvéről szóló 2012. évi I. törvény 27. § (2) bekezdése
[42] BODA Zs.: Bizalom, legitimitás és jogkövetés,837-855. o., http://jog.tk.mta.hu/ uploads/files/32_Boda_Zsolt.pdf (a letöltés ideje: 2023. március14.)
[43] KOZMA A., LŐRINCZ Gy., PÁL L.: i.m. 2022.
[44] KOZMA A., LŐRINCZ Gy., PÁL L.: i.m. 2022.
[45] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.

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A leírtak alapján a munkajog jövőjét illető legnagyobb fenyegetésnek azt látom, hogy a munkaviszony keretében történő foglalkoztatás veszít népszerűségéből, ami ahhoz vezet, hogy a foglalkoztatottak egy védtelenebb jogviszonyban végzik munkájukat. Jogosan merül fel bennünk az a megoldás, hogy jogi kényszer útján érjük el, hogy a szerződő felek kizárólag csak munkaviszony keretében végezhessen munkát. Mindazon túl, hogy a szerződéses szabadság jelentős korlátozásával járna az intézkedés, valószínűleg további káros hatásai is lennének úgy, mint a fekete foglalkoztatás növekedése. Mindezek ellenére azt gondolom, hogy a munkajognak mindenképpen növelni kell a versenyképességét így, ha szükséges bizonyos fokú állami beavatkozás útján is elő kell segíteni, ösztönözni kell a munkaviszony keretében történő foglalkoztatást. Ennek egyik legmegfelelőbb színtere az adópolitika. A pozitív ösztönzés olyan adóigazgatási módszert jelent, amelyben a jogkövetési hajlandóság javítását, az adófizetési képességet speciális adózási előnyök, kedvezmények rendszerével kívánják pozitív irányba megváltoztatni.[46]

## 8. Összegzés

Összességében megállapítható, hogy a munkajog erős magánjogi kötődése miatt nem, vagy csak nehezen adhatók válaszok az egyes felmerült kérdésekre, nem minden esetben lehetséges az egyértelmű elhatárolási pontokat megtalálása. A munkajog és a polgári jog viszonya olykor sok kérdést vet fel a jogalkalmazók számára, azonban tény, hogy a munkajog dogmatikai alapjait a magánjogból ered ezért a szabályozás alapját is áthatja. A jogalkalmazásban korábban érvényesült az az elv, hogy amennyiben valamely polgári jogi norma, vagy elv nem ellentétes a munkajog elveivel, úgy az a munkaviszonyokban is alkalmazható.[47]
A munkajog területét erősen átható gazdasági erőfölényből származó gazdasági kiszolgáltatottság, gazdasági kényszer más magánjogi jogügylet mozgatórugóját képezi. Önmagában a gazdasági kényszer azonban nem alapozza meg a szerződés érvénytelenségének megállapíthatóságát.
Fontos kiemelni továbbá, hogy az akaratot befolyásoló körülmények más relevanciával bírhatnak a jogviszony létesítése előtt és a jogviszonyban. A munkaviszony tartós jellegéből adódóan a munkáltatótól függő helyzet sokkal inkább elmélyülhet a jogviszony fennállása alatt. Éppen ezért a jogviszony létesítése előtt elsősorban a munkavállaló oldalán felmerülő gazdasági kényszert lehet detektálni, a jogviszony létesítését követően már sokkal inkább érvényesül a munkáltató erőfölénye. Az érvénytelenség kérdéskörét tovább nehezíti a

[46] SZILOVICS Cs.: A jogkövetés megvalósulásának vizsgálata az adójogban, Ph.D. értekezés, Pécs, 2001.164. o
[47] Érvénytelenség a munkajogban, i. m. 2021., 283-306. o.

munkajogban a munkaszerződés irreverzibilis jellege, amelyből következően az eredeti állapot helyreállítására a klasszikus értelemben nincs lehetőség.

**Felhasznált források**

1630.EH.
5/2017. (XI. 28.) KMK számú vélemény 1. pont
BH 1998.50.
BH 2002.74.
BH 1999.531
BH 2001.340.
EBH 2011.2335.
EBH 2007.1630.
EBH.2019.M.17.
EH 2017.03.M3
Fővárosi Ítélőtábla, 1.Mf.31.324/2020/18.
Kf.VII.39.051/2020/4
Kúria Pfv.I.20.063/2019/3.
T/4786. számú törvényjavaslat a Munka Törvénykönyvéről
A munka törvénykönyvéről szóló 2012. évi I. törvény
A polgári törvénykönyvről szóló 2013. évi V. törvény
Boda Zsolt: Bizalom, legitimitás és jogkövetés,837-855. o. ., http://jog.tk.mta.hu/uploads/fi les/32_Boda_Zsolt.pdf

Érvénytelenség a munkajogban, Összefoglaló vélemény, Szakcikk Adatbázis, Kúriai Döntések (BH) Fórum rovata, 2021., 2021/2. szám, 283-306. o.

Farkasné Fekete Mária, Molnár József: Közgazdaságtan I. Mikroökonómia, Debreceni Egyetem Agrár- és Műszaki Tudományok Centruma, Agrárgazdasági és Vidékfejlesztési Kar, Debrecen, 2007.
Gellén Klára: Az akarat szerepe a szerződéskötés során, különös tekintettel a színlelésre, Acta Universitatis Szegediensis Acta Juridica Et Politica Tomus LXII. Fasc. 4.
Kiss György, Munkajog, Dialóg Campus, Budapest, 2020.
Kozma Anna – Lőrincz György – Pál Lajos: A Munka Törvénykönyvének magyarázata, HVG-ORAC, Budapest, 2022
Kókai Gábor: A jog és az akaratszabadság jogelméleti kérdései, Comparative Law Working Papers – Volume 5. No. 2. 2021.
Kriston Edit – Sápi Edit: Érvénytelenség és hatálytalanság a polgári jogban, Novotni Alapítvány a Magánjog Fejlesztésért Miskolc 2019.

https://doi.org/10.46942/SIDM.2023.1.93-108

Nádas György: Jogkövetkezmények a változó munkajogi szabályozás rendszerében, Miskolci Jogi Szemle 12. évfolyam (2017) 2. különszám,
Prugberger Tamás - Nádas György - Jakab Nóra: Az érvénytelenség szabályozásának és gyakorlati megállapításának munkajogi problémái. In: Miskolci Jogi Szemle, 2022/2.
Szilovics Csaba: A jogkövetés megvalósulásának vizsgálata az adójogban, Ph.D. értekezés, Pécs, 2001.

**MENYHÉRT ENIKŐ***

# A büntetés-végrehajtási jog kialakulása és fejlődéstörténete Magyarországon

***Absztrakt:*** Jelen tanulmány a modern büntetés-végrehajtási jog kialakulását és fejlődéstörténetét mutatja be Magyarországon. Sokáig uralkodó szemlélet volt, hogy a büntetés-végrehajtásnak a megtorlást, valamint az elrettentést kell szolgálnia. Ezt támasztja alá az is, hogy semmilyen jogszabály nem határozta meg a büntetés-végrehajtás célját, feladatát. A szerző górcső alá veszi, hogy az egyes történeti időszakokban hogyan is változott a szankciórendszer, illetve a büntetés-végrehajtás helyzete.
***Kulcsszavak:*** büntetés-végrehajtás, jogtörténet, szankciórendszer, büntetés

***Abstract:*** The subject of this article is the formation and development of modern criminal enforcement law in Hungary. For a long time, it was a prevailing view that the execution of penalty should serve the purpose of retribution as well as deterrence. This is also supported by the fact that no law has defined the purpose and task of the criminal enforcement. The author examines how the sanctions system and the criminal enforcement have changed in each historical period.
***Keywords:*** criminal enforcement, legal history, sanction system, penalty

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## 1. Bevezetés

A büntetések és intézkedések végrehajtása a büntetőjogi felelősségre vonás legutolsó, befejező szakasza, amely egyrészt feltételezi a jogszabályban arra feljogosított állami szervek tevékenységét, másrészt pedig az elítéltek ennek megfelelő magatartását. Ezáltal a végrehajtásra feljogosított állami szervek, illetve az elítéltek között meghatározott társadalmi viszonyok keletkeznek, melyek igénylik a jogi szabályozást mind a büntetések és intézkedések eredményessége, mind pedig az állampolgári jogok védelme szempontjából.[1]

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[1] *Tansegédlet a büntetés-végrehajtási jog tanulmányozásához*, ELTE Büntető Eljárásjogi és Büntetésvégrehajtási Jogi Tanszéke, Budapest, 2014. 4. http://www.ajk.elte.hu/file/TSZ_BEBVJ_tansegedlet_2014.doc (letöltés dátuma: 2015.10.31.)

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Csakúgy, ahogy a többi jogág vonatkozásában, a büntetőjog, és így a büntetés-végrehajtás területén is a jogalkotás hiánya figyelhető meg. Sokáig uralkodó szemlélet volt, hogy a büntetés-végrehajtásnak a megtorlást, valamint az elrettentést kell szolgálnia, ezt szemléletesen támasztja alá, hogy semmilyen jogszabály nem határozta meg a büntetés-végrehajtás célját, feladatát.[2] Elmondható továbbá, hogy hazánkban a modem büntetés-végrehajtás csupán a XVIII. század utolsó évtizedeiben kezdett kialakulni, míg a polgári börtönügy kibontakozásának befejező aktusait a XIX. és XX. század fordulóját követő időpontra tehetjük.[3]

Tanulmányomban a magyar büntetés-végrehajtási jog kialakulását és fejlődését mutatom be egészen az ún. vérségi igazságszolgáltatás korszakától a rendszerváltásig. Ebből adódóan bár a büntetés-végrehajtási jog aktuális megítélése nem tárgya jelen tanulmánynak, mégis fontosnak tartom megjegyezni, hogy a büntető-jogtudományban tulajdonképpen az elmúlt évek jogalkotásának köszönhetően tekinthetünk immáron teljes értékű, önálló jogágként a büntetés-végrehajtásra. Ennek indoka az Országgyűlés által 2013. december 17-én elfogadott Büntetés-végrehajtási Kódex, vagyis a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról szóló 2013. évi CCXL. törvény. E törvény megalkotása ugyanis mérföldkő a büntetés-végrehajtás területén, tekintve, hogy első alkalommal jelenik meg a legmagasabb szintű jogszabály, azaz törvény formájában a személyi szabadság elvonásával járó jogkövetkezmények végrehajtása.[4]

Lássuk azonban az idáig vezető rögös utat…

## 2. A büntetés-végrehajtás történeti fejlődése

Az ősi jogról nagyon hézagos ismereteink vannak, jobban mondva csupán töredékek. A szórványos információk csupán a jog létét bizonyítják. A szegényes ismeretanyagot a jogtörténet az őstörténet-kutatásban is használatos analógiai módszerrel teljesíti ki. Az ősi jog fejlődésének első szakaszát tekintve a norma kialakulása és követése automatizmusként jelent meg, s hosszú időnek kellett eltelnie a tudatos megfogalmazásáig. Úgy is mondhatnánk, hogy a jog ebben a korban még csak „öntudatlan gyakorlat" volt. Később A természeti kiszolgáltatottság enyhülése és a magasabb politikai szerveződés szükségszerűen maga után vonta, hogy a nem-tudatos jogkövetést fölváltotta az egyre erősödő egyéni érdekeltség konfliktusteremtő hatása. A kívülről jövő kényszert belülről szervezettel váltották

[2] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 13. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)

[3] MEZEY Barna: *A magyar börtönügy „hosszú" 19. százada - A modem büntetés-végrehajtás feltételeinek megteremtése Magyarországon.* In: Börtönügyi Szemle 2005/4. szám 1. o.

[4] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 8. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)

fel, az öntudatlan jogkövetést a jog tudatos kikényszerítésével. A politikai hatalom megszervezte a maga apparátusát e célra. Ennek ellenére azonban a jogalkotás még hosszú ideig nem volt realitás. A jog változatlanul képződött, a jogot „megállapították", s annak legfőbb forrása a szokás, a kiérlelődött gyakorlat.[5]

Érzékelhető, hogy magának a jognak, a jogrendszernek a kialakulása is egy hosszabb periódust ölel fel, a jogrendszernek jogágakra tagolódása pedig egy újabb hosszú, több évszázados történelmi folyamat eredménye, ami a büntető jogágak esetében is lényegében ugyanúgy zajlott és alakult ki, mint bármely más jogterületnél.[6]

A büntetés-végrehajtási jog ugyan ma már külön jogágat képez, ez azonban nem jelenti azt, hogy önálló vizsgálata teljes mértékben lehetséges lenne. Ezt az elgondolást alátámasztja a feladata is, amely lényegében a büntetőjog által meghatározott célok realizálása, a gyakorlatban a bíróság által meghatározott szankciók végrehajtásában nyilvánul meg.[7] A büntető anyagi, eljárási, valamint a végrehajtási jogi szabályozás tehát – ahogyan napjainkban is – korábban még inkább összefonódott. Megemlítendő továbbá, hogy a három részterület közül ez utóbbi minősül a legfiatalabbnak, mivel pusztán a XX. századtól képez új jogterületet a büntetőjog jogágán belül.[8]

A következőkben bemutatott korszakok vonatkozásában nem csupán a végrehajtási, hanem az elmondottakra való tekintettel az anyagi jog ismertetésére is sor kerül, lévén, hogy a két jogterület nem választható el egészen egymástól.

## 3. Büntetés-végrehajtás a vérségi igazságszolgáltatás

Egyetlen emberi közösség sem közömbös tagjainak kohézióját erősítő hasznos vagy közösséget bomlasztó, káros cselekedeteivel szemben, ez alól a vérségi alapokon szerveződött nemzetségi társadalom egyes csoportjai vagy a felbomlott ősi közösség maradványain kibontakozó politikai szervezetek, a vagyoni alapokon szerveződő társadalom sem képez kivételt. A közösségellenes megnyilvánulásokat, a többség (vagy legalábbis a hatalmat gyakorlók) érdekeivel szemben állókat a társadalom felelősségre vonja, negatív szankciókat helyez kilátásba, és szükség esetén foganatosítja is azokat.[9]

[5] MEZEY Barna (szerk.): *Magyar jogtörténet*, Osiris Kiadó Kft., Budapest, 2004. 1-2.
[6] DOBOS József: *A büntetőeljárás történeti fejlődésének vázlata az 1896-os első kódexig.* In: Jogelméleti Szemle 2003/3. szám http://jesz.ajk.elte.hu/dobos15.html#_ftn17 (letöltés dátuma: 2018.02.01.)
[7] BUCHINGER Ágnes: *A büntetés-végrehajtási jog kialakulása.* In: Doktori Műhelytanulmányok 2015., Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola, Győr, 2015. 40.
[8] Uo. 40.
[9] MEZEY (szerk.): i.m. 138.

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A vérségi igazságszolgáltatás – vagy helyesebben jogszolgáltatás - jellemzője kezdetben egyfajta sajátosan kettéváló igazságosztás volt. Különbséget tettek a belső és a külső reakciók köre között.

A belső igazságszolgáltatásban olyan sérelmek rendezése volt a cél, amelyeket a nemzetségek tagjai követtek el egymás és a közösségi normák ellen. Az idevágó esetek száma és jelentősége is csekély, tekintettel a családok és nemzetségek igen nagyfokú egymásra utaltságára s ennek folytán erős belső kohéziójára. Szankcióként az erkölcsi megvetés, a megszégyenítő büntetések, a közös rituálékból történő kizárás említhetőek, legvégső eszközként pedig a kiközösítést alkalmazták.

A külső igazságszolgáltatás bírt nagyobb relevanciával, tekintettel arra, hogy a magyar társadalomfejlődés törzsi-törzsszövetségi korszakát megelőzően olyan felettes hatalom, mely a nemzetségek felett állt volna, amely a más csoportok felől jelentkező sértéseket megtorolhatta volna, nem volt. A csoportnak magának kellett önmaga fennmaradása érdekében kollektív és feltétlen választ adnia a támadásra, ez jelentette ugyanis az egyedüli garanciát a közösség védelmére. A feltétlen megtorló fegyveres visszacsapás tudata óvhatta meg a csoport tagjait újabb atrocitásoktól, külsők erők zaklatásaitól, vagyoni vagy személyes sérelmektől. A viszontválasz sem maradt el, ennek eszköze a bosszú és a háború, tehát a fegyveres elégtétel vétele volt.[10] A törzsszövetséget létrehozó szerződések, illetve a vérszerződések elsősorban az ősi katonai büntetőjog szabályaira vonatkoztak.[11]

A vérségi igazságszolgáltatásnak fontos eleme a kollektív felelősség. Ennek lényege, hogy a (jog)sértő csoportjának egészével szemben ragadott fegyvert a sértett rokonsága.

## 4. Büntetés-végrehajtás a törzsi társadalomban

A törzsi társadalomban a szankciórendszer jelentős változáson ment keresztül. Az új termelési eljárások, a természet fokozottabb ellenőrzése, a kisebb fokú egymásrautaltság, a vagyonosodás fellazította az összetartó erőt, meggyengítette a csoporttudatot. Egyéb társadalmi következmények mellett a büntetések minősége és összetétele is átalakult. A kiközösítés elveszítette szigorú szankció jellegét, mivel a gazdálkodás fejlődése immáron lehetővé tette az életben maradást a csoporton kívül is. Változást hozott a tulajdon kialakulása is, hiszen ezáltal egyrészt növekedett a vagyon elleni bűncselekmények száma, továbbá az anyagi különbségek létrejöttével a közösség iránt érzett elkötelezettség tudata csökkent.

E kor „termése" a halálbüntetés, illetve a vagyoni kárpótlás gondolata is.

[10] Uo. 141.

[11] KARDOS Sándor: *A magyar katonai büntetőjog múltja és jelene*, Doktori Értekezés, Miskolci Egyetem Állam- és Jogtudományi Kar, Deák Ferenc Állam és Jogtudományi Doktori Iskola, Miskolc, 2002. 15.

A halálbüntetés egyes népeknél a papok által teljesített szakrális áldozat formájában, másutt a kivégzés közösségi foganatosításában volt jelen.[12]

## 5. Büntetés-végrehajtás a középkorban

A középkori büntetőjog partikuláris, rendi állásra épülő, nyíltan (jog)egyenlőtlen, önkényt és erőszakot befogadó, rendszertelen és tagolatlan, a perjoggal összefüggő, szokásjogokban és a hétköznapi törvénykezésben élő és alakuló joganyag.[13]

A középkor büntetőjogát alapjaiban határozta meg és befolyásolta a vallás, a kánonjog. A katolicizmus átütő jelentőségét számtalan rendelkezésen lemérhetjük. Kifejezetten a keresztény vallás körében megfogalmazott erkölcsi bűnöket bűncselekményi formába öntöttek (káromkodás, varázslás, magzatelhajtás, nőrablás, bűbájosság, paráznaság stb.); a gyakorlatban számos, ennél enyhébb, törvénybe nem is foglalt erkölcsi vétket büntettek. A katolikus vallás szokásainak, egyházi liturgiájának betartatását és kikényszerítését is büntetőjogi eszközökre bízták (vasárnap dolgozók büntetése, böjt betartatása, mise alatti helytelen viselkedés szankcionálása, gyónási előírások követése stb.). A keresztény felfogásnak megfelelően (melynek értelmében a bűncselekmények elkövetése nem más, mint az Isten által szabályozott rend megsértése, s mely egyben az Úr megsértése is, amivel aligha érhetnek fel a szerény földi büntetőeszközök) a büntetések igen súlyosak.[14]

A büntetési nemek kapcsán alapvetően a halálbüntetés (mely a mai szabadságvesztés büntetéshez hasonlóságokat mutat a differenciáltsága tekintetében, hiszen több fokozatát ismerték: egyszerű halálbüntetés, illetőleg minősített halálbüntetés kiszabására is lehetőség volt), a különböző testi büntetések, testcsonkítások, a vagyoni büntetések (teljes vagy részleges vagyonvesztés, pénzbüntetés), a megszégyenítés és a tömlöcözés (szabadságvesztés) emelhetőek ki.[15] Utóbbi kapcsán utalnék arra, hogy bár a hatályos büntetőjogunkat szabadságvesztés-centrikusság jellemzi, illetőleg a büntetési hierarchia csúcsán is a szabadságvesztés büntetés helyezkedik el, a középkor embere számára mégis teljesen más megítélése volt a személyi szabadságnak – gondoljunk csak arra, mennyire váltotta volna ki a szabadságelvonással járó büntetés a célját - egy relatíve egyébként sem szabad – jobbágy esetében.

A középkori büntetések kapcsán két elv említhető: a tálió elv, illetőleg a tükröző elv.

[12] MEZEY (szerk.): i.m. 164.
[13] Uo. 149.
[14] Uo. 142.
[15] Uo. 165-166.

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A tálió, vagyis a szemet szemért elvben a bosszúigény érhető nyomon, hiszen lényege abban fogható meg, hogy az elkövető azonos hátrányt szenvedjen, mint a cselekmény sértettje.

Tükröző volt maga a büntetés, s tükröző annak végrehajtása is, mely tulajdonképpen azt jelentett, hogy a szankció valamelyest az elkövetett cselekményhez kapcsolódott. Így például a pokol tüzét tápláló sátánnal cimboráló boszorkányt természetesen megégették, ahogyan a gyújtogatót is. A pénzhamisító büntetése Európa-szerte a megfőzés volt, ami tevékenységét tükrözte, az olvasztással történő pénzhamisítást. Az árulót azon a szekéren égették el, amelyen becsempészte az ellenséget; az éjszakai fa- és fűtolvajt kötél helyett fűzfaággal akasztották; a szodomitát az állattal összekötve égették meg; a házasságtörőket egymásra fektetve, karóval átdöfve pusztították el. A kivégzés helye gyakorta maga a tetthely volt, ezzel is a cselekmény és a büntetés közötti szoros kapcsolatot hangsúlyozva.

A tálió elv és a tükröző elv alkalmazása a feudalizmus legvégéig szokásban volt, habár a felvilágosodás előretörése tompított az abszolutizmus időszakára kialakult gyakorlaton, korlátozta a kegyetlenséget, s kismértékben humanizálta a büntetéseket. A középkor végén terjedő büntetési nem, a szabadságvesztés mind a tükrözést, mind a táliót kizárta, hiszen az egyenlőségi igazságosság tézise helyébe az arányos igazság tételét állította.[16]

A nyilvánosság is kiemelendő a kor büntetés-végrehajtásával kapcsolatosan. A közönség részvételével zajlott az egész eljárás, kezdve attól, hogy a bíró és a perlekedő felek az érdeklődő lakosság jelenlétében vívták jogi csatájukat. Az eljárásban elrendelt bizonyítási aktusokat megint csak ország-világ előtt teljesítették. A büntetés-végrehajtás pedig egyenesen vonzotta a tömegeket. A nyilvánosság korlátozása csak akkor kezdődött meg, amikor az állam kinevelte saját jogtudó értelmiségét, amikor a laikus elem jelenléte kezdett visszaszorulni. Megjegyezendő azonban, hogy a büntetés végrehajtása volt az a szakasz, ami a legtovább „nyitva maradt" a nyilvánosság számára, hiszen ez szükséges volt ahhoz, hogy a büntetés valóban elérje célját, az elrettentést.[17]

A büntetés-végrehajtás nem kizárólagosan az eljárás befejező szakaszaként jelent meg, hanem annak csúcspontjává nőtte ki magát: a zárt eljárás során meghozott büntetés végrehajtása jelentette ettől kezdve az igazságszolgáltatás hatalmának mérőjét. Ennek nyomán a hóhér szerepe is felértékelődött, majd a folyamat előrehaladtával, a büntetések brutalizálódásával - és ennek nyomán azon jelenség felbukkanásával, hogy az eljárás nem hivatalos résztvevői nem kívántak többé

[16] MEZEY (szerk.): i. m. 167-168.
[17] Uo. 166.

szerepet vállalni a végrehajtásban - a büntetések végrehajtásához szükséges professzionalitás igényének fellépésével, önálló foglalkozássá vált.[18]

A kor jellegzetessége volt a nemek közötti különbségtétel, mely a büntetés-végrehajtás terén is tetten érhető volt. Emellett természetesen a nő társadalmi osztályhoz tartozása is alapvetően befolyásolta a szankció kiszabását. Egyes esetekben az ugyanolyan társadalmi helyzetű nők között előnyt élvezett a férjes asszony a hajadonnal és az özveggyel szemben. Szent István király egyik rendelkezését emelném ki, mely szerint a férj két alkalommal megválthatta feleségét, ha az lopott, majd az asszony harmadik lopásakor szolgának kellett őt eladni.[19] A szabad ember tolvajlását ellenben jóval szigorúbban rendelte büntetni: *„Szabad embernek, ha lopásban vétkezik, ily törvényt szerzettünk bünhödésére: hogy egyszer váltsa meg magát, ha tudja; ha pedig nem, adják el szolgaságra. Ha eladatván lopand, a szolgák törvénye alá vettessék. Ha másodszor is, ugyanazon törvény teljék be rajta. Ha pedig harmadszor, élete vesszen."*[20]

Ugyancsak megfigyelhető Szent László királyunk törvényeiben is az elkövetők közötti különbségtétel, mind jogállás, mind nemek, mind pedig családi állapot vonatkozásában. Főszabály szerint halállal rendelte büntetni szabad ember és a szolga tolvajlását, kivételt képzett ez alól a 10 dénárnál kisebb értékre elkövetett, illetve a lúd- vagy tyúklopás. Harmadik törvénykönyvének 6. és 7. fejezete sem „enyhekezűségről" tanúskodik, mindazonáltal kevésbé szigorúan bánik a lopásban bűnösnek talált nőkkel: a férjes asszonyt orrvesztéssel és szolgasorba taszítással, valamint a férje halála esetén örökölhető vagyonának elvesztésével, az özvegyeket fél szemüknek kiszúrásával és – fiai örökségén kívül – teljes vagyonvesztéssel, a hajadonokat pedig örökös szolgasággal szankcionálta.[21]

Végül a bosszúigényből eredeztethető „önbíráskodás" kapcsán is érdemes szólni. A korábbi időszakokhoz képest a középkorban már megfigyelhető, hogy a magánszemélyeknek egyre kevesebb teret engednek a jogos, vagy jogosnak vélt igényeik érvényesítésére, a bosszúigényük kielégítésére, a büntetőhatalom sokkal inkább a bírói igazságszolgáltató tevékenység része. Ennek ellenére, szűk körben ugyan, de a sértetti végrehajtás is részét képezte a középkori Magyarország büntetés-végrehajtásának.[22]

## 6. Büntetés-végrehajtás a polgári átalakulást követően

[18] MEZEY Barna: *Becstelen emberek, becstelen foglalkozások*. In: Belügyi szemle 2013/1. szám 52-54.
[19] Szent István Király Dekrétomainak Második Könyve, 29. fejezet
[20] Szent István Király Dekrétomainak Második Könyve, 41. fejezet
[21] VINCZE Eszter: *A nőkkel szemben alkalmazott büntetések a középkorban és az újkorban*. In: Börtönügyi Szemle 2012/1. szám 101.
[22] MEZEY (szerk.): i. m. 168.

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A polgári átalakulás szerte a világon a büntetőjog forradalmát hozta magával. A társadalom-átalakító küzdelmek egyik legjelentősebb csomópontja lett a büntetőjog, a büntető perjog és ezekkel összefüggésben a büntetés-végrehajtás átalakítása. A büntetés-végrehajtás forradalmához a büntetőjog és a büntetések megközelítésének teljesen új koncepciója vezetett el. A XVIII-XIX. század fordulóján fölbukkanó, filozófiai indíttatású büntetési elméletek egyenes következményei a felvilágosodás társadalomkritikájában megfogalmazódó büntetőjogi programnak. Az önkényes büntetések elleni fellépés, a megfelelő büntetés kiszabására, a büntetőjog és büntetés-végrehajtás humanizálására való törekvés a gondolkodókat a büntetés lényege és célja fölötti elmélkedésre sarkallta.[23]

Erre az időszakra tehető a szabadságvesztés büntetés intézményesülése, illetőleg térnyerése.[24] E büntetési nem elfogadtatásában nagymértékben közrehatott a felvilágosult abszolutizmus büntetőpolitikája.

Vitathatatlan, hogy városainkban és váraink már a XV. századtól kezdve szokásos volt a bűnelkövetéssel gyanúsítottaknak a városháza, a megyeháza, illetve a vár félreeső, földalatti helyiségeiben való elzárása, de szabadságvesztés büntetésről még Werbőczi Hármaskönyvében sem esett szó.[25]

A börtönügy kialakulása tekintetében a fejlődés első jelentős állomása III. Károly nevéhez köthető, aki 1723. évi XII. törvénycikkben (Corpus Juris Hungarici) a szabadságvesztést mint határozott ideig tartó büntetést jelenítette meg.[26] A Corpus Juris Hungarici is csupán a vérfertőzés bűntettét fenyegette szabadságvesztéssel.[27] A végrehajtásra vonatkozó szabályok azonban hiányoztak, ezeket az ítélkező bíróság belátásra bízták.[28]

A börtönbüntetés végrehajtására egészen a XIX. század közepéig a vármegyék, a törvényhatósági joggal felruházott városok és a pallosjoggal bíró uradalmak tömlöcei szolgáltak. Ezenkívül a katonaság váraiba, erődítményeibe adtak át hajóvontatásra és sáncmunkára ítélt rabokat, valamint politikai foglyokat. Országos jellegű fenyítőház létesítésének gondolata a Helytartó Tanácsban 1763-ban merült fel először, főként a németalföldi, ott már jól bevált intézmény hatására. A fenyítőházak létesítésére felszólító körrendeletet a törvényhatóságok tartózkodással fogadták, és pénzügyi nehézségeikre hivatkozással mindenütt elutasították. Az első országos fenyítőház 1772-ben mégis megkezdhette működését. Mária Terézia

[23] Uo. 196.
[24] MEZEY: *A magyar börtönügy*… 1.
[25] LŐRINCZ József – NAGY Ferenc: *Börtönügy Magyarországon*, Büntetés-végrehajtás Országos Parancsnokság, Budapest, 1997. 33.
[26] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 11. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)
[27] LŐRINCZ – NAGY: i. m. 33. o.
[28] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 11. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)

környezetéből gróf Esterházy Ferenc gáláns felajánlásából Szempcen átadott épületébe *„köztörvényhatóságok és magánosok a javíthatatlanokat és kihágókat és más vétkeikért halálos büntetésre kevésbé érdemeseket, vagy attól kegyelemből felmentetteket"* küldhettek, azzal a feltétellel, hogy magánosok 3, a többiek napi 4 krajcárt előre kötelesek letenni az ellátásért és az őrzésért.[29]

A szabadságvesztés-büntetés általános alkalmazása beépítette a büntetés-végrehajtásba mindazokat a szempontokat, melyek eredetileg győzelméhez is elvezettek. Az új, polgári szabadságfelfogás a büntetés alapjelentésén módosított. A középkor bűnöse az isteni és világi szabályok megsértésével magát mintegy a törvényen, erkölcsön és szolidaritáson kívülre helyezte. Becstelen és méltányos bánásmódot nem érdemlő személy lett. Ez visszatükröződött a büntetések végrehajtásának minőségében, de a társadalomba visszavezető utak elzáródásában is. Ezzel szemben a polgári teória a szabadság puszta elvételét tekintette a büntetésnek, s hangsúlyozta az egyéb súlyosítások, a sanyargatások, a lealázás és a testi fenyítés tarthatatlanságát. Ebbe a koncepcióba beleillett a bűnös visszavezetése a társadalomba, a büntetés-végrehajtás kiegészítése olyan megoldásokkal és technikákkal, melyek a reszocializációt elősegítik. A büntetés-végrehajtás alapelveivé lettek tehát a jobbítás (nevelés), vagyis az elítélt alkalmassá tétele a visszatérésre, valamint az ezt a célt szolgáló lelki gondozás, oktatás és a munkáltatás. A humánus kezeléssel és a sanyargatás elutasításával kapcsolatos az emberies bánásmód és a kötelező egészségügyi gondoskodás (tisztaság, megfelelő élelmezés, orvosi ellenőrzés) meghonosítása a börtönügyben. A siker érdekében a már korábban is követelményként megfogalmazódó elkülönítés, illetőleg az elítéltek differenciált osztályozása általánossá lett.[30]

A büntetőjogi kodifikáció kérdése a reformországgyűlések időszakában 1832 és 1836 közötti időszakban ismét megjelent, melynek élén államférfiak álltak. Mozgatórugója e törekvéseknek az volt, hogy a jobbágyok személyes szabadságának biztosítására egyre nagyobb igény keletkezett, melyek magukkal hozták a büntetési nemek modernizációjának igényét. 1840-ben megalakították a kodifikációval foglalkozó nagy országos bizottságot, melynek munkája eredményeként 1843-ban megszületett egy átfogó büntetőtörvény-javaslat. A javaslat büntetés-végrehajtást érintő kérdéseiben kiemelendő, hogy általánossá tette a szabadságvesztés alkalmazását, melyet fogházban vagy börtönben rendelt foganatosítani. Differenciáltan jelenítette meg a börtönstruktúrát, amikor kerületi és törvényhatósági börtönöket kívánt létrehozni, külön szabályozva ezek építésének módját, helyét és a kerületek kiterjedését. E javaslat a maga idejében előremutató volt, azonban még mindig a feudális börtönrendszer lényegét tükrözte, ugyanis a magánelzárás rendszerét kívánta megvalósítani. A tervezet azonban soha nem vált

[29] LŐRINCZ – NAGY: i. m. 33.
[30] MEZEY: *A magyar börtönügy*... 197.

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törvénycikké, mert a főrendi tábla a halálbüntetés mellőzése miatt megtagadta a hozzájárulást.

Az 1848/49-es szabadságharc bukását követően Magyarország elveszítette függetlenségét, és mint osztrák tartomány tagolódott be a Habsburg-birodalomba. Ennek hatásaként 1852-ben hatályba léptették az osztrák büntetőtörvénykönyvet (Strafgeshetzbuch), amelynek központi büntetési neme a szabadságvesztés volt. Honi szempontból kodifikáció tehát nem történt, mert automatikusan e jogszabályt kellett alkalmazni a korabeli Magyarországon. A szabályozás hazai vonatkozású jelentősége abban áll, hogy – csatlakozva a már több éve folyamatban lévő osztrák börtönépítési programhoz – új fegyintézetek építése kezdődött meg hazánkban is. A jogszabály végrehajtási alapgondolata a magánzárka alkalmazása és a megtorlás érvényesítése volt.[31]

Az 1867. évi kiegyezést követően ismételten előtérbe került a büntetőjog - s így a büntetés-végrehajtási jog - megreformálásának gondolata. A Szemere – Deák - Eötvös által képviselt európai szellemiségű börtönügyi gondolkodás méltó folytatója volt Horvát Boldizsár, a kiegyezés korának igazságügy-minisztere. A magyar börtönügy igazságügyi irányítás alá került, és a kodifikációs munkálatok is megkezdődtek az átfogó szabályozás érdekében. Ennek eredményeképp 1878-ban megszületett az első magyar büntetőtörvénykönyv, a Csemegi-kódex.[32] A Kódex a szabadságvesztés-büntetés öt különálló nemét határozta meg: a fegyházat, az államfogházat, a börtönt, a fogházat és az elzárást.[33] A törvénycikk nem csak megállapította a büntetési nemeket, illetve az ezek végrehajtására vonatkozó legfontosabb irányelveket és szabályokat, hanem részben meghonosította hazánkban a progresszív börtönrendszert is. Csemegi Károly, valamint a börtönügyi vonatkozásokat fogalmazó Tauffer Emil a kodifikációs részmegoldással lezárták a börtönügyi törvény körüli vitákat. A büntetés-végrehajtás főbb téziseinek az anyagi kódexben történő szabályozása eleget tett a garanciákkal szemben támasztott minimális követeléseknek, a részletes rendezést pedig rendeleti szintre utalta.[34]

A büntetés-végrehajtás területén jelentős változás volt tapasztalható a századforduló idején. Ekkor az új építkezések nyomán egy igazán európai büntetés-végrehajtás alapjait vetették meg. A függetlenné vált bírói szervezet elhelyezésére tett erőfeszítések eredményeképpen országszerte sorra épültek a megyei törvényszéki és a járásbírósági igazságügyi paloták, melyek a kor felfogásának megfelelően épületegyüttesükbe foglalták a törvényszéki és járásbírósági fogházakat is.[35]

[31] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 11-12. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)
[32] A magyar büntetőtörvénykönyv a bűntettekről és vétségekről 1878. évi V. törvénycikk
[33] LŐRINCZ – NAGY: i. m. 34.
[34] MEZEY (szerk.): i. m. 202.
[35] Uo. 205.

Újabb mérföldkőnek tekintendő az első Büntetőnovella, mely időben 1908-ra tehető. Ennek köszönhetően a fiatalkorúakra vonatkozó szabályok jelentek meg. A novellában az életkori kategória 12 és 18 év között került kijelölésre, valamint új intézkedések jelentek meg a fiatalkorúakkal szemben, így a bírói dorgálás, a próbára bocsátás és a javító nevelés volt alkalmazható. Ezeket a liberalizálódó szabályokat azután az 1913-as dologházi törvény drákói szigorral szorította vasabroncsok közé.[36]

A trianoni békeszerződést követően büntetés-végrehajtásunk nehéz helyzetbe került. Az ország jelentős területeinek átcsatolásával elveszítette a lipótvári, illavai és nagyenyedi fegyintézeteket; továbbá 42 törvényszéki és 200 járásbírósági fogházat. Még ha tekintjük is a területelvételekkel megcsappanó lakossághányadot, a változások alapjaiban érintették a büntetés-végrehajtási struktúrát, melynek helyreállítása évtizedekre lekötötte a szakemberek figyelmét és energiáit.[37]

A második Büntetőnovella 1928-ban látott napvilágot, és bevezette a szigorított dologház intézményét, továbbá egy meglehetősen tisztázatlan fogalmat is alkotott a megrögzött bűntettes definiálásával. Előremutató volt ugyanakkor, hogy lehetőség nyílt a büntetés felfüggesztésre a pénzbüntetés és az egy hónapnál rövidebb tartamú fogházbüntetés esetén. A dologház és a szigorított dologház valójában szabadságvesztésnek minősült, amelyeket a valódi szabadságvesztés rezsimfeltételeinek megfelelően hajtottak végre. Mindez azt jelentette, hogy a dologházat a fogház, a szigorított dologházat a fegyháznak megfelelő szabályok szerint kellett működtetni.

Itt említeném meg továbbá az 1948-ra datálódó harmadik Büntetőnovellát (1948. évi XLVIII. törvény), amely új elemmel gazdagította a büntetőjogi szankciórendszert, mert bevezette a beszámíthatatlan elmebeteg elkövetők biztonsági őrizetét.[38]

A korszak kapcsán kitérnék továbbá az ún. rabsegélyezésre, mely alapvetően két részből tevődik össze: a fogházmisszióból, illetve az utógondozásból.

A fogházmisszió a büntetés időtartama alatt bír relevanciával, lényegét tekintve a mai vallásgyakorláshoz hasonlítható. Eredete a keresztények tömeges bebörtönzésének idejére tehető. Az egyház mindig feladatának érezte az elítéltek lelki kínjainak enyhítését, így a börtönlátogatás, a vigasznyújtás évszázadokon át gyakorolt tevékenységgé lett. Ami a polgári börtön megjelenésekor megváltozott a misszióval kapcsolatosan: az egyházi gondozó tevékenység beépült a büntetés-végrehajtás folyamatába. Minthogy a büntetés célja a nevelés, a modern polgári börtönügy számára kézenfekvő lett a nevelőmunkában oroszlánrészt vállaló karitatív

[36] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 13. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)
[37] MEZEY (szerk.): i. m. 206.
[38] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 13. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)

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munkálkodás intézményesítése. Emellett a lelkészek és papok elvállalták a pszichikai kezelést is: lelki vigaszt, nyugalmat, vallásos és erkölcsi támogatást nyújtottak az elítélteknek. A dualizmus korában a lelkész már éppen olyan szerves része a börtönorganizációnak, mint a tanár vagy az orvos. A századfordulón már tevékeny részt vállaltak a fogházlátogatásban a rabsegélyező egyletek is, ezzel némileg csökkentve az egyház terheit.

Az utógondozás két részből tevődik össze. Az egyik a hivatalos állami gondoskodása, mely leginkább csak a hazajutásig szóló támogatásra terjedt ki. A szabaduló rab a legolcsóbb közlekedési útijegyet, a legnélkülözhetetlenebb ruhákat és három forintnál nem több készpénzt kaphatott útravalóul, de ez sem illette meg, ha visszaesőként ítélték el, ha külföldi volt, ha a letartóztatás alatt fegyelmi megrovás alá esett, s csak abban az esetben juthatott hozzá, ha állandóan jó magaviseletet tanúsított, s szegény sorsú volt. Másik részét az utógondozásnak társadalmi részvétellel, magánosok szervezésében kívánták megoldani. Minthogy Magyarországon a rabsegélyezés állami formái csak lassan bontakoztak ki, az első lépéseket magánosok tették meg. Az érdemi gondoskodás (tanácsadás, munkahelyszerzés, segélyezés, pártfogó kijelölése) a rabsegélyező egyletekre maradt. Az ún. rabsegélyező egyesületek a szabaduló elítéltek foglalkoztatásáról, elhelyezéséről kíséreltek meg gondoskodni. Átmeneti otthonokat szerveztek, adományokat gyűjtöttek, segélyalapokat létesítettek.[39]

A középkori „bűnös-felfogás" az elítéltet mindenféle jogától, becsületétől, tisztességétől megfosztotta. Az isteni és emberi szabályok megsértése számára a társadalomból való kivetést, a törvényenkívüliséget eredményezték. Hosszú é rögös utat kellett bejárni, mire e megrögzült kép megváltozott. A polgári börtön megszületésére volt szükség ahhoz, hogy előbb „fogsági jog", majd „rabjogok" néven önállósuljon az a felfogás, mely a rabot bizonyos jogokkal bíró lényként tételezte. Ezek a jogok kezdetben csak néhány, a modern börtönfogalom körébe illő dologra terjedtek ki: például a humánus bánásmódra, a megfelelő egészségügyi ellátásra, az élelmezésre, a tanulásra, a lelki vigaszra. Később a minimális levegőzés, látogató fogadása, levélírás is felzárkózott, sőt megjelent a panasz és kérelem joga is. A nagy áttörés a rabbiztosítás elismerése volt (1913), mely kötelezővé tette a munkát végző letartóztatottak balesetbiztosítását, a biztosítás díját az államra terhelve. A rabok a munkavégzés körében történt baleset kapcsán baleseti segélyt, munkaképesség megszűnése esetén járulékot kaptak, a rab elhalálozása esetén a belföldi hozzátartozók járulékra voltak jogosultak.[40]

## 7. Büntetés-végrehajtás a szocialista rendszerben

[39] MEZEY (szerk.): i.m. 207.
[40] Uo. 208.

A II. világháborút követően Magyarországon a politikai helyzet bizonytalanságához hasonlóan zavaros volt a jogalkotás, a jogalkalmazás és a jogértelmezés állapota is. Az új hatalom képviselői kötelességüknek érezték a fellépést a háborús bűnösökkel szemben, amely egyben a volt politikai elit eliminálását is lehetővé tette. A büntetőjog elsődleges feladata a politikai rendszer védelme, a büntető-jogalkotásban pedig a generális prevenció szempontjai voltak dominánsak. A büntetőjog hatásköre kiszélesedett, és a büntetendő cselekményekre előírt szankciók szigora nagymértékben fokozódott. A szocialista időszak büntetőjogára, és így különösen funkciójára az elnyomó és kényszerítő jelleg volt jellemző, mely háttérbe szorította a nevelő-szervező funkciót.[41]

A Csemegi-kódex egész büntetési rendszerét eltörölte az 1951. január 1-jén hatályba lépő 1950. évi II. törvény. Az új szabályozás csupán egyféle szabadságvesztést ismert és ezt „börtönnek" nevezte el. A miniszteri indokolás szerint e módosítást a Csemegi-kódex büntetési nemeinek sokasága szükségtelen, azonban e mögött az egyre növekvő elítélt-tömeg akadálytalan munkára irányításának szándéka húzódott meg. 1949-ben kezdődött el a szovjet modell alapján a „nyitott végrehajtási helyeknek", gyáraknak, üzemeknek, bányáknak stb. átadása a büntetés-végrehajtás számára, és 1952 végére már szinte az egész országot behálózták az ún. őrparancsnokságok, illetve munkahely-parancsnokságok.[42] A munkaszolgálat mellett speciális retorziónak számított a pszichiátriai kezelés is, abból az elvből kiindulva, hogy aki szembe mer fordulni a szocialista rendszerrel, az csak elmebeteg lehet.[43]

A szovjet típusú diktatúra büntetési rendszerének jogi szabályozása és tényleges gyakorlata kapcsán megfigyelhető, hogy azok jelentős mértékben eltért egymástól. Olyan büntetéseket és intézkedéseket is alkalmaztak, amelyeket a hivatalosan kiadott büntetés-végrehajtási jogszabályok nem szabályoztak, s amelyekről kortársi tankönyvek és monográfiák sem szóltak. A szankciók egy jelentős részét nem is a bírósági ítéletek révén alkalmazták, hanem teljesen önkényesen a rendészeti szervek szabták.[44]

Mivel a büntetés nem állt arányban a társadalom értékítéletével, a diktatúra büntetései nagyobb rémületet váltottak ki a lakosság körében, mint amit az esetleges bűncselekmény előidézett. Az ilyesfajta büntetési gyakorlat nem a gonosztevőket

[41] Uo. 208.
[42] LŐRINCZ József: *Büntetőpolitika és büntetés-végrehajtás 1970 és 2002 között* http://jesz.ajk.elte.hu/lorincz16.html (letöltés dátuma: 2018.02.02)
[43] HORVÁTH Attila: *A szovjet típusú diktatúra büntetési rendszere.* 151. http://real.mtak.hu/34848/7/1_pdfsam_150_pdfsam_Mezey_60_READER.pdf (letöltés dátuma: 2018.02.02.)
[44] Uo. 151.

rettentette el, hanem a becsületes embereket térítette el a törvények tiszteletétől, amely inkább az erőszakot, mint a jogot tükrözte.[45]

A büntetési rendszer tekintetében a halálbüntetést, a koncentrációs táborokat, a kitelepítést és a szabadságvesztés büntetést emelhetjük ki.

A jogalkotás szempontjából újabb állomásnak 1955 tekinthető, amikor megjelent az első büntetés-végrehajtási szabályzat, amely átfogóan szabályozta a börtönbüntetés (szabadságvesztés) végrehajtásának főbb irányait. A szabályozás lényege az volt, hogy a börtönbüntetést mindenkivel szemben azonos regulák szerint kell végrehajtani, azaz mindenfajta fokozatosság megszűnt. Fontosabb rendelkezései voltak, hogy kétfajta végrehajtási módot állapított meg: a börtönt és a büntetés-végrehajtási munkahelyet, melyek között gyakorlatilag alig volt különbség; első ízben jelentek meg alapelvek a végrehajtás tekintetében; megtiltotta a testkínzó és fizikai fájdalmakat okozó fegyelmi büntetéseket, valamint rögzítette az elítélt kötelezettségeit is, azonban jogairól nem rendelkezett.

Mérföldkő a 8/1959. BM utasítás is, ami már három fő feladatot határozott meg a büntetés-végrehajtás számára: az elítéltek őrzését, munkáltatását és nevelését.

Az 1950-es évek közepétől komoly elméleti előkészítő munka folyt a büntetőjog egészének újraszabályozása miatt. A kodifikációs törekvések az 1960.évi V. törvényben valósultak meg, amely 1962. július 1-jén lépett hatályba. A jogszabály bevezette a börtönbüntetés fogalma helyett a szabadságvesztés definícióját, melynek két végrehajtási fokozatát különböztette meg: a börtönt és a büntetés-végrehajtási munkahelyet. Pontosan meghatározta a büntetési célok között az elítéltek nevelését, melynek eszközeként a szabadságvesztést jelölte meg. A törvény hatálybalépése ellenére a korabeli államvezetés is szembesült azzal, hogy a jogi struktúra nem szolgálja hatékonyan a bűnmegelőzést és a végrehajtás tárgyi feltételei is kevésbé alkalmasak a célok megvalósítására.

Az 1966. évi 21. sz. törvényerejű rendelet szintén kiemelendő a jogalkotás vonatkozásában, ugyanis ez a jogszabály volt az, amely első ízben határozta meg az egyik legmagasabb jogszabályi szinten a szabadságvesztés és az előzetes letartóztatás végrehajtásának részletszabályait.[46]

Az 1971. évi 28. sz. törvényerejű rendelet visszaállította az életfogytiglanig tartó szabadságvesztést, és szigorúbb rendelkezéseket állapított meg a visszaesőkkel szemben is. A novella átkeresztelte a négy fokozatot: fegyház, szigorított börtön, börtön, fogház. Az előbbiekben említett folyamatok miatt az 1974. évi 9. sz. törvényerejű rendelet a visszaeső bűnözők megregulázására bevezette a szigorított őrizetet. Csak azt lehetett „szigorított őrizetbe" helyezni, akit a közrend és a

[45] BARNA Attila – HORVÁTH Attila – MÁTHÉ Gábor – TÓTH Zoltán József: *Magyar állam- és jogtörténet*, Nemzeti Közszolgálati Egyetem Közigazgatás-tudományi Kar, Budapest, 2014. 610.

[46] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 15. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)

közbiztonság ellen három ízben, együttesen legalább 3 évi szabadságvesztésre ítéltek, és a negyedik elítélés során legalább egy évre ítéltek.

A kor büntetőpolitikájára jellemző módon, még az alkoholizmus ellen is a szabadságvesztés-büntetés eszközével léptek fel. Az 1974. évi 10. sz. törvényerejű rendelet az alkoholisták kötelező munkaterápiás intézeti kezelését vezette be.[47]

A szocializmus korszakának legjelentősebb büntetés-végrehajtási jogszabálya az 1979. évi 11. sz. törvényerejű rendelet. volt. E jogszabály már az európai börtönhumanizációs mozgalomhoz közelítő elveket is figyelembe vett, különösen a szabadságvesztés végrehajtásának alapelveit illetően. A végrehajtás feladata is finomodott, mert célként már csak a társadalomba való beilleszkedést és az újabb bűncselekmény elkövetésétől való tartózkodást tűzte ki. A szabályozás során első alkalommal jelent meg kódex-szerű jogszabály, amely elveiben igazodott az emberi jogok védelmét biztosító nemzetközi előírásokhoz. Az elítéltek jogi helyzete részletesebb szabályozást kapott.[48] A jogszabály kapcsán megjegyezném, hogy egészen a jelenleg hatályos Büntetés-végrehajtási Kódex[49] hatálybalépéséig, tehát egészen 2015. január 1-jéig alapozta meg a hazai büntetés-végrehajtás szabályozását.

## 8. Összegzés

Dolgozatomban igyekeztem képet adni arról, hogyan is változott meg a szankciórendszer, illetőleg a büntetés-végrehajtás az egészen kezdeti időszaktól a szocialista időszakkal bezárólag. Látható, hogy minden kornak megvoltak a maga eszközei a bűnösök – olykor pedig az ártatlanok – megtorlására. Sokáig tartott, amíg elterjedt az az eszme, miszerint a büntetésnek nem elsődlegesen a megtorlást, elrettentést kell céloznia, s a nevelés mint büntetési cél megjelenését követően is inkább egy elméleti felvetés volt, mintsem gyakorlatban érvényesülő elv.

Hosszú és rögös út vezetett tehát ahhoz, hogy - a napjainkban már egyre inkább természetesnek vélt - humánus bánásmód jelen legyen mind a szankciók, mind pedig azok végrehajtása során.

A szocializmus lezárultával új időszámítás kezdődött a büntetés-végrehajtás területén is. Ennek első lépése 1990-ben a halálbüntetés abolíciója.[50]

Tanulva a múlt hibáiból, a büntetés célja – alapvetően a szabadságvesztés büntetés esetében - elsődlegesen a reintegráció, vagyis annak elősegítése, hogy az elítélt visszailleszkedjen a társadalomba, és annak jogkövető tagjává váljon. Kétség

[47] BARNA – HORVÁTH – MÁTHÉ – TÓTH: i.m. 615-616.

[48] *Korszakváltás a büntetés-végrehajtásban*, Budapest, 2015. 16. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)

[49] 2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról

[50] Lásd: 23/1990. (X. 31.) AB határozat a halálbüntetés alkotmányellenességéről

sem fér ahhoz, hogy jelenleg is számos probléma vár megoldásra, azonban úgy gondolom, az utóbbi évek jogalkotása, illetőleg a gyakorlati tapasztalatok azt mutatják, hogy a magyar büntetés-végrehajtás jó irányba tart.

## Irodalomjegyzék

BARNA Attila – HORVÁTH Attila – MÁTHÉ Gábor – TÓTH Zoltán József: *Magyar állam- és jogtörténet*, Nemzeti Közszolgálati Egyetem Közigazgatás-tudományi Kar, Budapest, 2014.
BUCHINGER Ágnes: *A büntetés-végrehajtási jog kialakulása*. In: Doktori Műhelytanulmányok 2015., Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola, Győr, 2015.
KARDOS Sándor: *A magyar katonai büntetőjog múltja és jelene*, Doktori Értekezés, Miskolci Egyetem Állam- és Jogtudományi Kar, Deák Ferenc Állam és Jogtudományi Doktori Iskola, Miskolc, 2002.
LŐRINCZ József – NAGY Ferenc: *Börtönügy Magyarországon*, Büntetés-végrehajtás Országos Parancsnokság, Budapest, 1997.
MEZEY Barna (szerk.): *Magyar jogtörténet*, Osiris Kiadó Kft., Budapest, 2004.
MEZEY Barna: *A magyar börtönügy „hosszú" 19. százada - A modern büntetés-végrehajtás feltételeinek megteremtése Magyarországon*. In: Börtönügyi Szemle 2005/4. szám 1-10.
MEZEY Barna: *Becstelen emberek, becstelen foglalkozások*. In: Belügyi szemle 2013/1. szám 46-63.
VINCZE Eszter: *A nőkkel szemben alkalmazott büntetések a középkorban és az újkorban*. In: Börtönügyi Szemle 2012/1. szám 99-110.

## Internetes hivatkozások

DOBOS József: *A büntetőeljárás történeti fejlődésének vázlata az 1896-os első kódexig*. In: Jogelméleti Szemle 2003/3. szám http://jesz.ajk.elte.hu/dobos15.html#_ftn17 (letöltés dátuma: 2018.02.01.)
HORVÁTH Attila: *A szovjet típusú diktatúra büntetési rendszere* http://real.mtak.hu/34848/7/1_pdfsam_150_pdfsam_Mezey_60_READER.pdf (letöltés dátuma: 2018.02.02.)
Korszakváltás a büntetés-végrehajtásban, Budapest, 2015. http://www.ajk.elte.hu/file/TSZ_BEBVJ_korszakvaltas.pdf (letöltés dátuma: 2015.10.31.)
LŐRINCZ József: *Büntetőpolitika és büntetés-végrehajtás 1970 és 2002 között* http://jesz.ajk.elte.hu/lorincz16.html (letöltés dátuma: 2018.02.02)

Tansegédlet a büntetés-végrehajtási jog tanulmányozásához, ELTE Büntető Eljárásjogi és Büntetésvégrehajtási Jogi Tanszéke, Budapest, 2014. http://www.ajk.elte.hu/file/TSZ_BEBVJ_tansegedlet_2014.doc (letöltés dátuma: 2015.10.31.)

**Jogszabályok jegyzéke**

1948. évi XLVIII. törvény
1950. évi II. törvény
1960.évi V. törvény
1966. évi 21. sz. törvényerejű rendelet
1971. évi 28. sz. törvényerejű rendelet
1974. évi 10. sz. törvényerejű rendelet
1974. évi 9. sz. törvényerejű rendelet
1979. évi 11. sz. törvényerejű rendelet
2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról
8/1959. BM utasítás
A magyar büntetőtörvénykönyv a bűntettekről és vétségekről 1878. évi V. törvénycikk
Szent István Király Dekrétomainak Második Könyve

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# A megelőző távoltartás jogalkalmazási nehézségei

**Absztrakt**
A megelőző távoltartás hazánk első olyan jogintézménye, mely közvetlenül lép fel a családon belüli erőszak megelőzése érdekében. Tekintettel újszerűségére, alkalmazása során számos olyan eljárásjogi kérdés merül fel, melynek kiküszöbölése a jogalkalmazásra hárul. Tanulmányomban olyan problémásnak vélt területek kutatását és vizsgálatát végeztem el, melyben egységes jogalkalmazási gyakorlat még nem alakult ki. Így az eljárásjogi kérdéskörök feltárásán túl olyan megoldási javaslatok megfogalmazása törekedtem, melyek elősegíthetik a távoltartás intézményének hatékony alkalmazását.

**Kulcsszavak**: megelőző távoltartás, családon belüli erőszak, bántalmazás, bántalmazó

**Abstract**
Preventive distance is the first legal instrument in Hungary that directly intervenes to prevent domestic violence. In view of its novelty, its application raises a number of procedural issues, the elimination of which is left to the enforcement of the law. In my study, I have researched and examined areas which are considered problematic but where there is no uniform practice in the application of the law. Thus, in addition to exploring procedural issues, I have sought to propose solutions that could facilitate the effective application of the institution of distance.

**Keywords**: domestic violence, abuse, victim, preventive distance

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## 1. Bevezető gondolatok

A megelőző távoltartás jogintézményének a célja a hozzátartozók közötti erőszakos cselekmény, a családon belüli erőszak megelőzése. A családon belüli erőszak komoly társadalmi probléma. Ezen súlyos probléma megelőzése érdekében hozta létre a jogalkotó a hozzátartozók közötti erőszak miatt alkalmazható távoltartásról szóló 2009. évi LXXII. törvényt. A törvényben szabályozott megelőző távoltartás

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lehetőséget biztosít a feleknek, hogy mielőtt egy elmérgesedett helyzet alakulna ki közöttük, a hatóságok fellépjenek és megoldást találjanak a felek közötti vitás helyzet kezelésére. A törvény rövid terjedelme, valamint a gyors megalkotása miatt számos eljárásjogi kérdésről nem rendelkezik megfelelően, melyet a hatóságok a gyakorlatban próbálnak meg kiküszöbölni. A jogintézmény bemutatásán keresztül ezen jogalkalmazási nehézségeket helyezem előtérbe. Szem előtt tartva mindazt, hogy egy olyan családi jogviszonnyal foglalkozó jogintézmény, mely a felek családi viszonyaiba beleszólva próbál a felmerült konfliktusokra megoldást találni.

## 2. A megelőző távoltartás a jogalkalmás tükrében

Ahhoz, hogy jobban megértsük a jogintézmény célját, fontosnak tartom ismertetni az erőszakos cselekmény fogalmát. Hozzátartozók közötti erőszakos cselekménynek minősül egyrészt a bántalmazó által a bántalmazott sérelmére megvalósított, a méltóságot, az életet, a szexuális önrendelkezéshez való jogot, a testi és a lelki egészséget súlyosan és közvetlenül veszélyeztető tevékenység, valamint a méltóságot, az életet, a testi és lelki egészséget súlyosan és közvetlenül veszélyeztető mulasztás.[1] Ranschburg Jenő meghatározása szerint a családon belüli erőszak körébe tartozik a kényszer, a fizikai bántalmazás, a szándékosan előidézett, rendszeresen ismétlődő, tartós lelki gyötrelem.[2]

A megelőző távoltartás indulhat kérelemre, valamint hivatalból.[3] A hivatalból indult eljárást megelőzi egy rendőrségi hatáskörbe tartozó közigazgatási eljárás, az ideiglenes megelőző távoltartás.[4] A rendőrség 72 órára rendeli el a bántalmazóval szemben a távoltartást.[5] Ezen időtartam alatt a hatóság a szükséges iratokat – az ideiglenes megelőző távoltartó határozatot és a védelmi tanúsítványt – megküldi az illetékességgel rendelkező járásbíróságnak, akinek ezen 72 óra áll rendelkezésére, hogy döntsön a megelőző távoltartás elrendeléséről. [6] Kérelemre indult eljárás esetében a kérelmet a bántalmazott, valamint a bántalmazottnak a Ptk-ban meghatározott közeli hozzátartozója és hozzátartozója, illetve a bejegyzett élettársa is előterjesztheti. [7]

Az eljárás résztvevői a bántalmazott (kérelemre indult eljárás esetében a kérelmező), valamint a bántalmazó (kérelmezett). A törvény értelmében bántalmazottnak minősül az a hozzátartozó, akivel szemben megvalósítják a

[1] A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról szóló 2009. évi LXXII. törvény (a továbbiakban: Hketv.) 1. § (1) a-b)
[2] VISONTAI-SZABÓ K.: *A családon belüli erőszak pszichológiai és jogi kérdései.* Családi Jog, 2013., 240.
[3] Hketv. 14. § (1)
[4] Hketv. 6. § (1)
[5] Hketv. 6. § (4)
[6] Hketv. 7. § (2)
[7] Hketv. 14. § (1)

hozzátartozók közötti erőszakos cselekményt, míg bántalmazó lehet azon cselekvőképes hozzátartozó, aki a hozzátartozók közötti erőszakos cselekményt megvalósítja, vagy akire tekintettel megvalósítják az erőszakot, feltéve, ha ezzel a bántalmazó egyetért.[8] A törvény a megalkotásakor a hozzátartozók fogalmát a Ptk. értelmező rendelkezések körében szabályozott hozzátartozók és közeli hozzátartozók fogalmának alapul vételével határozta meg. Azonban ezen megközelítést számos kritika érte, hiszen egy bántalmazás nem csak a házastársak között, hanem a volt házastársak és volt élettársak között is megvalósulhat. Ennek következményeképpen az OBH elnökének javaslatára az eljárás résztvevőinek a körét kiterjesztették a volt házastárs, volt élettárs, bejegyzett élettárs, volt bejegyzett élettárs, gyám, gyámolt, gondnok és gondnokolt körére is. Úgy gondolom, hogy a módosítás megoldást talált a kritikákra, azonban további problémák megoldásra várnak.

A törvény értelmében bántalmazó csak olyan személy lehet, aki cselekvőképes. Számos ügy azonban szülő-gyermek viszonylatában fog előfordulni. Gondolni lehet arra, hogy a kamaszok körében milyen elterjedt az alkohol és a kábítószer alkalmazása, mely negatívan képes befolyásolni a személyiséget, agresszív viselkedést kiváltva. Kérdésként merülhet fel az is, hogy egy hivatalból indult eljárás esetében, amikor a rendőrség a helyszínen veszi fel a felek adatait, akkor hogyan fog értesülni arról, hogy a bántalmazó gondnokság alatt áll, ha mindezt a felek sem tudják előadni a bántalmazást követő zaklatott lelkiállapotukban. A bíróságnak lehetősége van hozzáférni a gondnokoltak országos nyilvántartásához, azonban az eljárás gyorsított jellegére tekintettel ezt nem fogják vizsgálni, hacsak az eljárás során ebben a tekintetben nem merül fel releváns adat.[9] A civilisztikai kollégiumvezetők 2010-ben megtartott országos tanácskozásán egyetértés alakult ki abban a tekintetben, hogy ha a rendőrségnek az eljárása során nem merül fel adat a bántalmazó cselekvőképességének korlátozott voltára vagy hiányára, akkor ezen körülményt nem kell vizsgálni. Kétség esetén a bíróságnak ezen körülményt már hivatalból kell vizsgálnia. [10]

Az eljárásra a bántalmazott életvitelszerű tartózkodási helye szerinti járásbíróság illetékes.[11] Egy joghoz nem értő bántalmazott esetében gyakran előfordul, hogy nem az illetékességgel rendelkező bíróságon terjeszti elő a kérelmét. Ha a bíróság az eljárási törvénynek megfelelően szeretne eljárni, akkor az eljárást a Pp.174. § alapján

[8] Hketv. 1. § (2)-(3)
[9] TISZAVÖLGYI Gy.: *Megelőző Távoltartás a Budapest Környéki Törvényszék gyakorlatában I. rész.* Családi jog. 2018/3., 36-40.
[10] Legfelsőbb Bíróság Civilisztikai Kollégiumának emlékeztetője a civilisztikai kollégiumvezetők 2010. február 17-19. napján megtartott országos tanácskozásán megvitatott kérdésekrekről. (https://uj.jogtar.hu/#doc/db/1/id/A10V0601.LFB/ts/10000101/)(Utolsó megtekintés: 2022. december 08.)
[11] Hketv. 13. § (3)

átteszi az illetékességgel rendelkező járásbíróságra. Ezen rendelkezés azonban merően szembe megy a megelőző távoltartás egyik fő céljával, a gyorsasággal. Ha az eljárási törvénynek megfelelően járnak el a bíróságok, akkor akár több hónap is eltelhet, mire a kérelem az illetékes bírósághoz kerül. Ebben az esetben hiába fog előírni a törvény rövid határidőket, annyi idő telik el a bántalmazástól, hogy teljes mértékben meghiúsul a jogszabály által kitűzött cél, hogy a jogalkalmazó minél gyorsabban reagáljon a bántalmazásra. Ezen eljárásjogi kérdés megoldása érdekében célszerűnek tartanék egy olyan szabályozást bevezetni, ami lehetővé teszi, hogy a rossz helyen előterjesztett kérelmet a bíróság közvetlenül tudja megküldeni az illetékes bíróságnak.

A törvény rendelkezése alapján a megelőző távoltartás elbírálása során nem járhat el bírósági titkár.[12] Ezen törvényi rendelkezést nem tartom megfelelő szabályozásnak. Különösen érdekes az is, hogy van olyan nemperes eljárás, a pszichiátriai betegek intézeti gyógykezelésének elrendelése, ami súlyosabban fogja korlátozni a személyes szabadságot, ennek ellenére mégis eljárhat bírósági titkár.[13] Mindezek alapján célszerűnek tartanám a bírósági titkárok eljárását is megengedni, tekintettel arra, hogy a megelőző távoltartás rövid határideje következtében az illetékes bíróságon eljáró bíráktól folyamatos készenlétet fog követelni, amivel a bírósági titkárok eljárásba történő bevonása jelentős munkatehertől mentesítené az eljáró bírókat.

A törvény különbséget tesz a határidők számítása során abban, hogy az eljárás kérelemre vagy pedig hivatalból indult. Kérelemre indult eljárás esetében a kérelem beérkezésétől számított három munkanapon belül kell lefolytatni az eljárást. Hivatalból indult eljárás esetében pedig a rendőrség által elrendelt ideiglenes megelőző távoltartás kezdő időpontjától számított három napon belül.[14] A civilisztikai kollégiumvezetők 2010-ben megtartott országos tanácskozásán egyetértés alakult ki abban a tekintetben, hogy ezen időtartamba a kezdő nap is beleszámít. További érdekesség, hogy a határidő az ideiglenes megelőző távoltartásról rendelkező határozat szerinti távoltartási kötelezettség kezdő időpontjától indul és nem a naptári nap 0 órájától.[15] A határidők megállapításával a jogintézmény ellentétes lesz a bíróság polgári peres ügyekben előforduló tárgyalás-előkészítés logikájával. Ez alapján a bíróságnak kellő idő állna rendelkezésére az ügyben történő felkészülésre. A megelőző távoltartás azonnali intézkedést fog igényelni, mely ellentétes lesz a bíróság bizonyítási eljárás lefolytatására épülő, több

[12] Hketv. 13. § (6)
[13] Az egészségügyről szóló 1997. évi CLIV. törvény (Eütv.) 196-201/A. §
[14] Hketv. 15. § (6)
[15] Legfelsőbb Bíróság Civilisztikai Kollégiumának emlékeztetője a civilisztikai kollégiumvezetők 2010. február 17-19. napján megtartott országos tanácskozásán megvitatott kérdésekről. (https://uj.jogtar.hu/#doc/db/1/id/A10V0601.LFB/ts/10000101/)(Utolsó megtekintés: 2022. december 08.)

tárgyalási határnapot is felölelő munkamenetével. Ebből arra lehet következtetni, hogy a távoltartás gyorsított jellege elsőbbséget fog élvezni.[16]

A bíróság akkor rendeli el a megelőző távoltartást, ha az eset összes körülményéből, így különösen a bántalmazó és a bántalmazott által előadott tényekből, a hozzátartozók közötti erőszakra utaló jelekből, a bántalmazó és a bántalmazott magatartásából és viszonyából a hozzátartozók közötti erőszak elkövetésére megalapozottan lehet következtetni. A bíróság, amennyiben elrendeli a távoltartást, akkor legfeljebb hatvan napra teheti mindezt.[17] A Kúria Pfv.II.21.305/2014. számú határozatában kimondta, hogy a távoltartás elrendeléséhez nem elegendő a bántalmazás valószínűsítése, hanem szükséges, hogy az eset összes körülményéből az erőszak elkövetésére megalapozottan következtetni lehessen.[18] Véleményem szerint a szabályozás megfelelően szemlélteti mindazt, hogy a hatóság egy családi viszonyban, magánéleti kérdésben kíván döntést hozni, ahol nincs lehetősége a bíróságnak hivatalbóli bizonyítást lefolytatni, mely nagyban megnehezíti a bíróság döntését.

Egy távoltartási ügyben nehéznek bizonyul a bizonyítás, tekintettel arra, hogy a bíróság nem végezhet bizonyítási cselekményeket, ezáltal a bíró belátására van bízva, hogy elrendeli-e a távoltartást a felek nyilatkozatai és az általuk csatolt bizonyítékok alapján. Azonban sokszor ellentmondásba keverednek a felek, hiszen az érintetteken kívül más nem volt jelen a cselekménynél és egymásnak ellentmondásosan is előadhatják a tényállást. A bántalmazott általában látlelet csatolásával kívánja bizonyítani a bántalmazás megtörténtét. Egységes gyakorlat alakult ki azzal kapcsolatban, hogy látlelet csatolása nem elégséges a távoltartás elrendeléséhez, hiszen bár bizonyítani tudja a sérülésnek a megtörténtét, azonban a keletkezésének a módját nem. Egy hasonló esetben a kérelmező látlelettel és hangfelvétellel tudta bizonyítani a bántalmazásnak a tényét. A másodfokú bíróság ezzel kapcsolatban is fenntartotta azon véleményét, hogy a fizikai bántalmazás megtörténtét még ebből sem tudja kétséget kizáróan megállapítani. [19]

A törvény a bíróságot kötelezi a feleknek legalább egyszer történő személyes meghallgatására.[20] A családi életben fellépő problémák az esetek többségében nem eredményeznek azonnali nyílt konfliktust. A megelőző távoltartás elrendelése iránti személyes meghallgatás során krízishelyzetben lévő személyek várnak külső segítséget. Ezért sem eredményes a meghallgatás során a konkrét bántalmazásra rákérdezni, hanem fontosabb megismerni a feleknek a kapcsolatát, a bántalmazás

[16] LUGOSI J.: *A megelőző távoltartás intézményének jogalkalmazási nehézségei*. Magyar Jog. 2013/11. 690-698.
[17] Hketv. 16. § (1)-(2)
[18] Kúria Pfv.II.21.305/2014.
[19] TISZAVÖLGYI Gy.: *Megelőző Távoltartás a Budapest Környéki Bíróság gyakorlatában II.rész*. Családi Jog. 2018/4. 29-33.
[20] Hketv. 15. § (1)

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körülményét, súlyosságát. [21] A bíróságnak lehetősége van részben vagy teljes egészében mellőzni a bántalmazott és a bántalmazó egymás jelenlétében való meghallgatását, különösen, ha mindez a rendőrségi iratban, valamint a kérelemben foglaltak alapján indokolt. Figyelembe veendő a hozzátartozók közötti erőszak módja, rendszeressége, valamint a bántalmazottnak a kiszolgáltatott helyzete is. Indokolt esetben lehetősége van a bíróságnak megakadályozni, hogy a bántalmazó és a bántalmazott a bíróság épületében találkozzon. [22] Eljárásjogilag kérdésként merül fel, hogy a feleknek a külön-külön, egymás távollétében való meghallgatásával mennyire fog sérülni a közvetlenség alapelve. Véleményem szerint a jogintézménynek a gyorsított jellege fogja indokolni az alapelv megkerülését, amennyiben a bántalmazott meghallgatásakor a bántalmazó is jelen lenne, akkor helyzeti előnyt jelentene számára, hogy a meghallgatás során a bántalmazott előadását már hallotta, vagy jelenlétével félelemben tudná tartani az áldozatot.[23]

A válófélben lévő házastársak közötti konfliktushelyzetben alkalmazandó távoltartás elrendelése a leginkább kérdéses esetkör. A Kúria határozatában kimondta, hogy a válófélben lévő házastársak közötti konfliktushelyzetben, melynek kialakulásában mindkét fél magatartása közrehatott, egyszeri kifogásolható magatartás nem ad alapot a személyi szabadságot súlyosan korlátozó, azzal adott esetben arányban nem álló távoltartás elrendelésére. [24] Eddigi kutatásaim során ezen problémakört két különböző irányból közelítettem meg. Válófélben lévő házastársak közötti konfliktushelyzetben, mely mögött nyilvánvalóan mindkét fél közrehatása közrehat, engedhető-e akár egyszeri bántalmazás a felek viszonyában? Amennyiben a jogalkalmazó engedékenyebb a szankcionálás során, mennyire fog mindez visszaélésre lehetőséget adni a válófélben lévő felek között? Hozzájárul-e az a bírói engedékenység ahhoz, hogy ezen jogalkalmazási gyakorlatra hivatkozva kölcsönösen bántalmazzák egymást a felek következmények nélkül? Azonban ha a jogalkalmazó szigorúan közelíti meg a szabályozást és elrendeli a megelőző távoltartást, akkor egy már feszült helyzetben lévő felek között nem rosszabbítja-e a helyzetet azzal, hogy további indulatokat vált ki ahelyett, hogy egy nyugodt légkör megteremtésére törekedne? Véleményem szerint ezen kérdéses esetkör is nagyon jól szemlélteti a jogintézmény szabályozásának a nehézségét. Meddig mehet el egy jogalkalmazó, hol húzza meg a határokat egy családon belüli viszonyban, mennyire lehet tágan értelmezni egy konfliktushelyzetet?

A bíróság a határozatot előzetesen végrehajthatja, valamint kötelessége figyelmeztetni a bántalmazót, hogy a határozat szabályainak a megszegése elzárással

[21] SZOLYÁK E. - PÁL Sz.: „*Ne a tükröt törd szét, ha bánt az önarckép*". Magyar Jog. 2012/4. 237-244.
[22] Hketv. 15.§ (7)
[23] LUGOSI: *i.m.* 690-698.
[24] Kúria Pfv. II.21.305/2014.

is büntethető szabálysértést valósít meg. [25] A törvény a módosítását megelőzően nem tette lehetővé az előzetes végrehajthatóságot, mely számos jogalkalmazói aggályt felvetett, hiszen a közlést követő 15. napon következett be a határozat jogerőre emelkedése. Úgy gondolom, kellően fel lehet mérni, hogy milyen következményekkel járhat a felek viszonyában mindaz, hogy a fél 72 órára kénytelen volt magát távol tartani az otthonától, majd pedig ezt követően még agresszív lelkiállapotban visszatérhetett a bántalmazotthoz, aztán 15 napra újra eltiltották az életvitelszerű tartózkodási helyétől.[26]

A törvény lehetőséget ad a határozat elleni fellebbezésre, melyre a közléstől számított 3 munkanapon belül van lehetőség.[27] A rövid határidő biztosítása az eljárás minél gyorsabb lefolytatását hivatott garantálni.

## 3. Záró gondolatok

Egy viszonylag új jogintézményről van szó, mely a hazai joggyakorlat által még nem ismert polgári eljárások körébe sorolja olyan családon belüli viszonynak a megoldását, mely még nem került szabályozásra. Sokáig maguk a törvények sem rendelkeztek a családon belüli erőszakról, valamint ehhez kapcsolódóan nem is találkozhattunk a megelőző távoltartáshoz hasonló jogintézménnyel. Azonban fontos hangsúlyozni, hogy a megelőző távoltartás nagy előrelépésként szolgál a családon belüli erőszak megelőzésében, valamint hogy kevésbé maradjanak látenciában a családon belül elkövetett erőszakos cselekmények.

## Felhasznált források

A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról szóló 2009. évi LXXII. törvény (a továbbiakban: Hketv.)

Legfelsőbb Bíróság Civilisztikai Kollégiumának emlékeztetője a civilisztikai kollégiumvezetők 2010. február 17-19. napján megtartott országos tanácskozásán megvitatott kérdésekrekről.

Az egészségügyről szóló 1997. évi CLIV. törvény (Eütv.)

Legfelsőbb Bíróság Civilisztikai Kollégiumának emlékeztetője a civilisztikai kollégiumvezetők 2010. február 17-19. napján megtartott országos tanácskozásán megvitatott kérdésekről.

[25] Hketv. 16. § (2a)
[26] VISONTAI-SZABÓ: *i.m.* 436-438.
[27] Hketv. 16. § (7)

Kúria Pfv.II.21.305/2014.

Kúria Pfv. II.21.305/2014.

LUGOSI József: A megelőző távoltartás intézményének jogalkalmazási nehézségei. Magyar Jog. 2013/11. 690-698.

SZOLYÁK Elvira - PÁL Szilvia: „Ne a tükröt törd szét, ha bánt az önarckép". Magyar Jog. 2012/4. 237-244.

TISZAVÖLGYI Gyöngyvér: Megelőző Távoltartás a Budapest Környéki Törvényszék gyakorlatában I. rész. Családi jog. 2018/3., 36-40.

TISZAVÖLGYI Gyöngyvér: Megelőző Távoltartás a Budapest Környéki Bíróság gyakorlatában II.rész. Családi Jog. 2018/4. 29-33.

VISONTAI-SZABÓ Katalin: A családon belüli erőszak pszichológiai és jogi kérdései. Családi Jog, 2013., 240.

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# The Examination of Artificial Intelligence Systems in light of the Concept of Product and Service[*]

**Abstract**
Despite the advanced technologies of the 21st century, developers still struggle to fully comprehend the operation of AI systems, which is essential for the legislation. This study aims to classify AI systems as either services or products, which is important for answering liability questions. Moreover, it analyses the relevant provisions of the revised EU Product Liability Directive, particularly the changing definition of product concerning software and AI systems.
**Keywords**: artificial intelligence, product, service, civil law

**Absztrakt**
21. századi fejlett technológiák ellenére a fejlesztők számára még mindig kihívás a mesterséges intelligencia rendszerek működésének megértése, ami azonban a jogi szabályozás megalkotása miatt elengedhetetlen. Jelen tanulmány célja a mesterséges intelligencia rendszerek szolgáltatásként vagy termékként történő kategorizálásának vizsgálata, ami a felelősségi kérdések megválaszolása miatt is fontos. Ezen túlmenően tanulmányozza a felülvizsgált uniós termékfelelősségi irányelv vonatkozó rendelkezéseiket, különös tekintettel a termék fogalmának változásra a szoftverek, MI-rendszerek tükrében.
**Kulcsszavak**: mesterséges intelligencia, termék, szolgáltatás, polgári jog

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## 1. Introduction

Artificial Intelligence systems (hereinafter referred to as 'AI' or 'AI systems') are becoming increasingly widespread in our daily lives, for example, through their use in messaging systems[1] or smart devices[2]. Technology has also appeared in many fields, including education[3], healthcare[4], finance[5], transport and logistics[6]. At the same time, the unfamiliarity of the technology raises many questions for those using, legislating, and enforcing it. It is not an overstatement to say that even with the advanced technologies of the 21st century, it is a challenge for developers to understand the mechanisms of AI systems in detail. It is almost impossible to understand AI from the user's point of view. Several international organisations have recognised the importance of proper regulation and have established working groups to study the technology and produce policies.[7] Due to the cross-border nature of the technology, the European Union has produced several studies, guidelines, and proposals over the last decade to create a common regulatory framework. In the 2020s, the legislative process for the regulation of AI has accelerated considerably.[8]

The study addresses the issue of categorising AI systems in legal literature. Specifically, it examines whether these systems can be classified as services or

[1] AMOS, Zac: AI and Spam: *How Artificial Intelligence Protects Your Inbox*. https://www.unite.ai/ai-and-spam/ (Date of download: 18.06.2023.).

[2] STEFÁN Ibolya: Az okoseszközökkel kapcsolatos adatvédelmi kérdések, különös tekintettel a biometrikus adatokra. *Studia Iurisprudentiae Doctorandorum Miskolciensium, 2021/2,* 222–223.

[3] Cf. CHEN, L. – CHEN, P. – LIN, Z.: Artificial Intelligence in Education: A Review. *IEEE Access, 2020/8,* 75264–75278. https://ieeexplore.ieee.org/document/9069875 (Date of download: 18.06.2023.).

[4] See DAVENPORT, T. – KALAKOTA, R.: The potential for artificial intelligence in healthcare. *Future Healthcare Journal, 2019/2,* 94–98.

[5] Cf. OECD: *Artificial Intelligence, Machine Learning and Big Data in Finance: Opportunities, Challenges, and Implications for Policy Makers.* https://www.oecd.org/finance/financial-markets/Artificial-intelligence-machine-learning-big-data-in-finance.pdf (Date of download: 18.06.2023.).

[6] See IYER, Lakshmi Shankar: AI enabled applications towards intelligent transportation. *Transportation Engineering, 2021/5,* 1–11.

[7] For more, see the documents of the ad hoc Committee on Artificial Intelligence (CAHAI); Committee on Artificial Intelligence (CAI) of the Council of Europe and the Working Group on Artificial Intelligence of OECD.

[8] *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Act.* Brussels, 21.4.2021. COM(2021) 206 final. (hereinafter referred to as 'AI Act'). https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF (Date of download: 18.06.2023.).
*Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive).* Brussels, 28.9.2022. COM(2022) 496 final. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0496 (Date of download: 18.06.2023.).

products, which is crucial in determining liability. Furthermore, it analyses the relevant provisions of the revised EU Product Liability Directive, which results from the accelerated legislative process and focuses on the changing definition of 'product' concerning software and AI systems.[9]

## 2. The concept and characteristics of artificial intelligence systems

Depending on which characteristics of the technology are emphasised, there are several definitions of artificial intelligence in the literature. For the purpose of our study, we use the concept of the AI Act, as it is crucial to have a consistent definition that describes the technology in general but includes its essential elements. According to the AI Act, *"artificial intelligence system (AI system) means a machine-based system that is designed to operate with varying levels of autonomy and that can, for explicit or implicit objectives, generate outputs such as predictions, recommendations, or decisions that influence physical or virtual environments".*[10] It should be noted that AI systems can be used as stand-alone software systems, embedded in a physical product, serving the functions of a physical product without integration, or as a component of a more extensive system.[11] Machine learning, which is the dominant form of AI systems, involves programming algorithms using a variety of techniques of which, three broad categories can be distinguished:

a) Regarding *supervised learning*, algorithms are trained using labelled datasets, learning the relationship between input and output pairs and later using this 'knowledge' to associate appropriate output data with unknown input data.

b) In *unsupervised learning*, the algorithm learns on unlabelled datasets without instructions by identifying different patterns and recognising correlations.

[9] *Proposal for a Directive of the European Parliament and of the Council on liability for defective products.* Brussels, 28.9.2022. COM(2022) 495 final. https://eur-lex.europa.eu/resource.html?uri=cellar:b9a6a6fe-3ff4-11ed-92ed-01aa75ed71a1.0001.02/DOC_1&format=PDF (hereinafter referred to as 'Proposal for the Directive on liability for defective products') (Date of download: 18.06.2023.).

[10] *Draft Compromise Amendments on the Draft Report Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts.* COM(2021)0206 – C9 0146/2021 – 2021/0106(COD), Committee on the Internal Market and Consumer Protection Committee on Civil Liberties, Justice and Home Affairs, Brussels, 9.5.2023., Article 3(1). https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/CJ40/DV/2023/05-11/ConsolidatedCA_IMCOLIBE_AI_ACT_EN.pdf (hereinafter referred to as 'Draft Compromise Amendments of AI Act, 2023') (Date of download: 18.06.2023.).

[11] Draft Compromise Amendments of AI Act, 2023, Recital, 6b.

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c) *Reinforcement learning* is a powerful behavioural model that empowers algorithms to learn from and adapt their interactions and actions with the environment instead of being limited by pre-existing datasets.[12]
Another important element and method of machine learning is deep learning, which is performed on neural networks to replicate the functioning of the human brain.[13] Machine learning can serve as the foundation for each technique mentioned above.[14]

It is necessary to describe some of the factors that are relevant and have an impact on liability regulation in the context of technology:

a) Concerning *complexity*, two forms should be mentioned. On the one hand, algorithms and technology have inherent complexity resulting from machine learning and deep learning processes. On the other hand, even multi-component hardware devices are complex, and combining them with AI systems complicates the situation even more.

b) *Opacity* is due to complexity and autonomy, in which the so-called 'black box' effect plays an important role. The 'black box effect' reflects on the self-learning mechanism of the algorithms when the developers do not understand some of the decisions of the technology.

c) *Openness* is inherent in all emerging technologies, as they may be considered unfinished because of their nature. For example, smart products, software, and AI systems are the subject of continuous improvements and updates as these technologies must be developed to keep them up to date. On the other hand, its interaction with other systems and data sources (e.g. during data transfer) is often necessary for proper functioning.

d) *Autonomy* is inherent in the self-learning mechanism, as AI systems are able to make decisions on their own over time based on previously learned patterns and contexts. Typically, their tasks are executed in accordance with pre-established instructions.

e) Regarding *predictability*, it should be emphasised that it is becoming more challenging to predict the impact of technology because of its complexity, autonomy, black box effect, as well as constant interaction with the environment.

f) *Data-drivenness* is a feature of all emerging technologies, as they require large amounts of data to be processed, analysed and stored in order to function correctly, make the most accurate decisions and execute the self-learning mechanism.

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[12] *Artificial Intelligence (AI) Techniques: A Comprehensive Guide.* https://databasetown.com/artificial-intelligence-ai-techniques/ (Date of download: 18.06.2023.); HURWITZ, J. – KIRSCH, D.: *Machine Learning for Dummies.* Hoboken: John Wiley & Sons, Inc., 2018, 14–17. https://www.ibm.com/downloads/cas/GB8ZMQZ3 (Date of download: 18.06.2023.).
[13] HURWITZ, J. – KIRSCH, D.: ibid., 17–18.
[14] *Is deep learning supervised or unsupervised?* https://www.aiplusinfo.com/blog/is-deep-learning-supervised-or-unsupervised/ (Date of download: 18.06.2023.).

g) *Vulnerability* is in the nature of AI systems, as continuous developments, updates, and interactions with other systems are essential for their proper functioning. However, they also pose several cybersecurity risks, such as hacking or using incorrect or inappropriate data. Therefore, it is necessary to minimise the potential risks.[15]
Proper regulation must be established to ensure that users can overcome information asymmetry, exercise their various rights[16].

## 3. Civil law aspects of artificial intelligence systems

### 3.1. Artificial intelligence as a service

Machine learning and deep learning technologies, also known as AIaaS (Artificial Intelligence as a Service/Service Stack), are now being offered as a service by cloud providers. AIaaS combines artificial intelligence (software that performs cognitive functions associated with the human mind[17]) with the cloud computing model (*"on-demand network access to a shared pool of configurable computing resources"*[18]). *"AIaaS as cloud-based systems providing on-demand services to organizations and individuals to deploy, develop, train, and manage AI models."*[19]

Regarding the structure of AIaaS, three categories can be distinguished:

1. *Artificial Intelligence Software Services* are 'ready-to-use' applications linked to traditional SaaS cloud models. SaaS stands for 'Software as a Service', which means that the software is not installed on the user's computer; it is accessed through a web browser on the internet. This technology has several advantages, such as the software and data being accessible from anywhere and any device, regardless of the operating system used, and the user not having to worry about updating the software. Additionally, paid services are cost-effective as users only pay for the features they actually use.[20] AI-based services are based on machine learning or deep learning, which are two types of AI software services that can be distinguished.

[15] Expert Group on Liability and New Technologies: *Liability for Artificial Intelligence and other emerging digital technologies*. Brussels, 2019, 33–34. https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en (Date of download: 19.06.2023.).
[16] For example, the right to the protection of personal data.
[17] Lins, S. – Pandl, K. D. – Teigeler, H. – Thiebes, S. – Bayer, C. – Sunyaev, A.: Artificial Intelligence as a Service. *Business & Information Systems Engineering, 2021/4*, 441–442.
[18] Mell, P. – Grance, T.: *The NIST Definition of Cloud Computing. Recommendations of the National Institute of Standards and Technology.* https://nvlpubs.nist.gov/nistpubs/legacy/sp/nistspecialpublication800-145.pdf (Date of download: 21.06.2023.).
[19] Lins, S. – Pandl, K. D. – Teigeler, H. – Thiebes, S. – Bayer, C. – Sunyaev, A.: ibid., 442.
[20] Lexiq: *SaaS*. https://lexiq.hu/saas (Date of download: 23.06.2023.).

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Regarding *inference service*, users have access to pre-trained machine learning models, while with the *machine learning service,* users can create and adapt machine learning models. These services have several types: linguistic services for text analysis and translation, analytical services for product analysis, speech services for text-to-speech and speech-to-text conversion, and computer vision services for image analysis.[21]

2. *Artificial Intelligence Development Services* are linked to PaaS cloud models, also known as 'Platform as a Service'. PaaS provides the complete development and deployment environment in the cloud, providing all the resources the users might need to build simple or complex enterprise cloud applications. Similar to IaaS, PaaS also includes infrastructure – namely network, hosting, and servers – as well as development tools and other services. PaaS supports the entire web application development lifecycle, including development, testing, deployment, monitoring and upgrades.[22] These services allow developers to maximise the capabilities of AI systems. The service explicitly supports AI development, often providing tools that enable faster coding and easier integration[23] of APIs[24].

3. *Artificial Intelligence Infrastructure Services* consist of computing resources needed to efficiently deploy and use AI development tools and services with the traditional IaaS cloud model. IaaS, meaning 'Infrastructure as a Service' *"is a type of cloud computing service that offers essential compute, storage, and networking resources on demand, on a pay-as-you-go basis. IaaS is one of the four types of cloud services, along with software as a service (SaaS), platform as a service (PaaS), and serverless. Migrating your organization's infrastructure to an IaaS solution helps you reduce maintenance of on-premises data centers, save money on hardware costs, and gain real-time business insights. IaaS solutions give you the flexibility to scale your IT resources up and down with demand. They also help you quickly provision new applications and increase the reliability of your underlying infrastructure."*[25] Moreover, artificial intelligence software service also store data to train AI infrastructures and various AI models, while providing proper data storage and sharing technologies.[26]

[21] Lins, S. – Pandl, K. D. – Teigeler, H – Thiebes, S. – Bayer, C. – Sunyaev, A.: ibid.,. 443–445.
[22] Microsoft: *Mi az a PaaS? Szolgáltatásként nyújtott platform.* https://azure.microsoft.com/hu-hu/resources/cloud-computing-dictionary/what-is-paas (Date of download: 24.06.2023.).
[23] Lins, S. – Pandl, K. D. – Teigeler, H. – Thiebes, S. – Bayer, C. – Sunyaev, A.: ibid., 445.
[24] *"An API, or application programming interface, is a set of defined rules that enable different applications to communicate with each other. It acts as an intermediary layer that processes data transfers between systems, letting companies open their application data and functionality to external third-party developers, business partners, and internal departments within their companies." IBM: What is an Application Programming Interface (API)?* https://www.ibm.com/topics/api (Date of download: 24.06.2023.).
[25] Microsoft: *What is IaaS? Infrastructure as a service.* https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-is-iaas (Date of download: 24.06.2023.).
[26] Lins, S. – Pandl, K. D. – Teigeler, H. – Thiebes, S. – Bayer, C. – Sunyaev, A.: ibid., 445–446.

Considering AI as a service, the Digital Services Act[27] should be mentioned regarding technology regulation. The DSA defines cloud services as intermediary services, including hosting services.[28] The clarification is necessary as the regulation provides liability exemptions for intermediary services – such as hosting services –, under specific circumstances.[29] However, if online platforms perform as manufacturers, importers, or distributors of defective products, they should be held liable on the same terms as these economic operators.[30]

### 3.2. Categorising artificial intelligence system as a product

According to the current EU legislation – 85/374/EEC Directive [31] – *"product means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable."*[32] The directive also categorises electricity as a product.[33] In accordance with the legislation, a product must be a movable thing, i.e. have a physical extension, a requirement that is only waived for electricity. However, technological developments and the increasing application of digital components are extending the limits of classical legal concepts, which are becoming outdated and need to be revised. AI systems' appearance has raised several questions about the legal assessment of the technology and liability issues. In this section, we focus on the perception of technology, particularly whether software, AI systems and information may be considered a product in light of the legal literature.

There is a debate in the legal literature about whether software should be classified as a product or a service. Some legal experts argue that software should

[27] *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)* (hereinafter referred to as 'DSA'). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065 (Date of download: 24.06.2023.).

[28] DSA, Recital (29). According to the DSA intermediary service, particularly hosting service *"consisting of the storage of information provided by, and at the request of, a recipient of the service"*. DSA, Article 3, g, iii.

[29] DSA Recital (28) and Article 6. Cf. Proposal for the Directive on liability for defective products, Recital (28).

[30] Proposal for the Directive on liability for defective products, Recital (28).

[31] *Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).* (hereinafter referred to as '85/374/EEC Directive') https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0374 (Date of download: 27.06.2023.).

[32] 85/374/EEC Directive, Article 2.

[33] 85/374/EEC Directive, Article 2.

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be considered a service[34] or an intangible good[35] rather than a product. However, if the software is stored on a physical medium, like a CD, DVD, or USB stick, it should be classified as a product,[36] which aligns with the Commission's position.[37] If the software is not presented physically, for example, accessed online, it is considered intangible property and not covered by the 85/374/EEC Directive.[38] If the software is incorporated into a movable object and is necessary for its operation, it becomes an integral part of the object and falls within the 85/374/EEC Directive's scope.[39] However, some literature suggests that software is simply information and is not subject to the Directive.[40]

There are several forms of information; one of them is the so-called 'pure' information, for example, the paper of a prescription or a cookbook. This type of information is separate from the specific product, unlike products that are accompanied by information; in the latter case, the product and the information are considered as a whole; therefore, it falls within the scope of the 85/374/EEC Directive. Regarding 'pure' information, there is also a view in the legal literature that rejects the application of the Directive referencing to movable goods. According to this view, the legislation does not apply to intangible property if the information is defective, *"in the absence of any defect on the part of the carrier of the information, the Directive does not apply to intangible goods."*[41] In this respect, it could also be argued that the 'materialised' form of information – for example, when presented on a tangible medium – becomes movable, which form of information is also covered by the 85/374/EEC Directive.[42] This broad interpretation of the Directive is in line with the principle of interpretation developed by the court, which considers

[34] SLAGTER, Wicher Jan: Produktenaansprakelijkheid in Nederland. *Tijdschrift voor Privaatrecht, 1988/25,* 740–741.
[35] FAGNART, J.-L. – BOULARBAH, H.: La garantie et la responsabilité en matière de dommages causés par les produits. In: *Le droit des affaires en évolution*. Bruylant, 2000, 132–133.
[36] DOMMERING-VAN RONGEN, Louise: Produktenaansprakelijkheid en software. *Computerrecht, 1988/5, 227–228*.
[37] Written Question No. 706/88 by Mr. Gijs de Vries (LDR-NL) to the Commission of the European Communities (5 July 1988) (89/C 114/76). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1989:114:FULL (Date of download: 27.06.2023.).
[38] WUYTS, Daily: The Product Liability Directive – More than Two Decades of Defective Products in Europe. *Journal of European Tort Law, 2014/5*, 1–34.
[39] FAIRGRIEVE, D. – HOWELLS, G. – MØGELVANG-HANSEN, P. – STRAETMANS, G. – VERHOEVEN, D. – MACHNIKOWSKI, P. – JANSSEN, A. – SCHULZE, R.: Product Liability Directive. In: MACHNIKOWSKI, Piotr (ed.): *European Product Liability. An Analysis of the State of the Art in the Era of New Technologies*. Cambridge: Intersentia, 2016, 47.
[40] STUURMAN, K. – VANDENBERGHE, G. P. V.: Softwarefouten: een 'zaak' van leven of dood? *Nederlands Juristenblad, 1988/24,* 1667–1672.
[41] FAIRGRIEVE, D. – HOWELLS, G. – MØGELVANG-HANSEN, P. – STRAETMANS, G. – VERHOEVEN, D. – MACHNIKOWSKI, P. – JANSSEN, A. – SCHULZE, R.: ibid., 48.
[42] FAIRGRIEVE, D. – HOWELLS, G. – MØGELVANG-HANSEN, P. – STRAETMANS, G. – VERHOEVEN, D. – MACHNIKOWSKI, P. – JANSSEN, A. – SCHULZE, R.: ibid., 48.

that in the absence of an explicit definition, concepts must be interpreted following the purpose and objective pursued by the Directive.[43]

Considering the interpretation of information, the KRONE case is worth mentioning. The case was the subject of a preliminary ruling by the Court of Justice of the European Union. In the KRONE case, the injured party read an article in a newspaper – called Kronen-Zeitung – about the beneficial effects of grated horseradish. The article was written by an expert in herbal medicine, which 'promised' relief for rheumatism. According to this, freshly grated horseradish can effectively reduce rheumatic pain. According to the article, the affected area should be rubbed with lard or vegetable oil, and the grated horseradish should be pressed onto the area, which can be left on for two to five hours. The injured party followed the instructions, but the article was inaccurate on the length of the time – the article used the term 'hours' instead of 'minutes' – and removed the substance after approximately three hours, having suffered severe pain from a toxic contact reaction.[44] *"The applicant in the main proceedings claimed that KRONE – Verlag should be ordered to pay her compensation of EUR 4400 for the physical harm suffered and that that publisher should be held liable for any current and future harmful consequences of the incident of 31 December 2016."*[45] Regarding the preliminary ruling, the assessment of information is relevant to our study. According to the opinion of Advocate General Gerard Hogan, *"In my view, however, it is nonetheless perfectly clear from the language, context and objectives of the Products Liability Directive that the reference to a 'product' in that directive is confined to a tangible object. That, in essence, is why the present claim cannot succeed, at least so far as the Product Liability Directive is concerned, precisely because it does not concern an injury resulting from a physical defect contained in a product. This is also borne out by a consideration of the objectives and context of the Product Liability Directive. The very first recital of that directive makes it clear that this was a harmonisation measure »concerning the liability of the producer for damage caused by the defectiveness of his products«…".*[46]

It can be argued that software always takes physical form, as it has to run on a server to function; therefore, a physical extension is necessary to fulfil its purpose, similar to electricity. *Gerhard Wagner* points out that in the 85/374/EEC Directive, the classification of electricity as a product refers to the legislators' concern about movables, which are not tangible assets and can cause damage to consumers in the

[43] *Case C-203/99. Henning Veedfald v Århus Amtskommune.* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0203 (Date of download: 27.06.2023.).
[44] *Case C-65/20, VI v KRONE – Verlag Gesellschaft mbH & Co KG.* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0065 (Date of download: 27.06.2023.).
[45] Case C-65/20, VI v KRONE – Verlag Gesellschaft mbH & Co KG, (18).
[46] *Case C-65/20, VI v KRONE – Verlag Gesellschaft mbH & Co KG, Opinion of Advocate General G. Hogan.* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CC0065 (Date of download: 27.06.2023.).

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same way as defective physical objects. The fact that software was not included in the Directive is understandable, as technological developments were still in their infancy when it was drafted. Businesses typically used computers and software, which were less accessible to consumers. All in all, software should fall under the scope of the Directive either by analogy or by the broader interpretation of the notion of product.

This problem seems to be solved by the proposal for the Directive on liability for defective products, which extends the concept of the product to digital manufacturing files and software[47]; therefore, the revised Directive will cover AI systems and partially solve liability issues. As the proposal for the Directive on liability for defective products states, *"where software is supplied in exchange for a price or personal data is used other than exclusively for improving the security, compatibility or interoperability of the software, and is therefore supplied in the course of a commercial activity, the Directive should apply."*[48] The proposal clarifies that software is considered a product, whether stored in the cloud or on a physical device. In contrast, software's source code is classified as information and, therefore, not included in the Directive.[49] Additionally, the proposal includes the revised Product Liability Directive being applied to related services[50] as they are often integrated into products in a way that is essential to their function and should be considered a fundamental part – component[51] – of the product.

The revision of the 85/374/EEC Directive was necessary as its deficiencies were highlighted in several working documents made by expert bodies and working groups preparing to regulate AI. The *2018 evaluation of the 85/374/EEC Directive* concluded that the Directive is still an effective instrument for addressing liability issues, but it needs to be revised as technological developments are stretching the classical conceptual framework of the decades-old legislation. It was not entirely clear how the concepts of the Directive – e.g. product – should be applied to software, digital services, smart devices, or how to distinguish between products and services often intertwined in emerging technologies. Concerning the latter, the

[47] *"product means all movables, even if integrated into another movable or into an immovable. 'Product' includes electricity, digital manufacturing files and software"* Proposal for the Directive on liability for defective products, Article 4, (1).
*"digital manufacturing file means a digital version or a digital template of a movable"* Proposal for the Directive on liability for defective products, Article 4, (2).
[48] Proposal for the Directive on liability for defective products, Recital (13).
[49] Proposal for the Directive on liability for defective products, Recital (12).
[50] *"related service means a digital service that is integrated into, or inter-connected with, a product in such a way that its absence would prevent the product from performing one or more of its functions"* Proposal for the Directive on liability for defective products, Article 4, (4).
[51] *"component means any item, whether tangible or intangible, or any related service, that is integrated into, or inter-connected with, a product by the manufacturer of that product or within that manufacturer's control"* Proposal for the Directive on liability for defective products, Article 4, (3).

evaluation also highlighted, among many other things, that the increasingly common integration of services into products is blurring the line between the two. Although product liability issues are well established in the Member States, the issue of liability for damage caused by defects in intangible goods (e.g. software) or services is unclear in 18 Member States, including Hungary.[52] The 2019 report of the independent expert group, called *'Liability for Artificial Intelligence and other emerging digital technologies'* also briefly summarised the deficiencies of the Product Liability Directive in relation to AI systems, while seeking to address the problem in a complex way by analysing other liability regimes, identifying their strengths and weaknesses.[53] The *White Paper* in 2020 identified risks in several AI-related areas, including product liability. The document addressed the necessity of providing equivalent protection for AI victims compared to other technologies and the possibility of amending the Product Liability Directive and harmonising the national rules. All these factors have been taken into account in the proposal for a directive on liability for defective products.[54]

## 4. Summary

The 21st century has witnessed unprecedented transformations in technology, revolutionizing daily activities with the emergence of new software and programs. As a result, legal systems have been challenged to keep up with the swift pace of technological growth, as these systems contain many new and unknown features constantly changing due to multiple updates. The European Union has recognized these challenges presented by emerging technologies and is actively seeking immediate and efficient solutions to address their regulatory concerns. As a result, several proposals have been published in the previous years, the *'Artificial Intelligence*

[52] *Commission Staff Working Document Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).* SWD(2018) 157 final, Brussels, 7.5.2018., 50–51. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0157 (Date of download: 27.06.2023.).

[53] European Commission, Directorate-General for Justice and Consumers: *Liability for artificial intelligence and other emerging digital technologies.* Brussels: Publications Office, 2019, https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en (Date of download: 27.06.2023.).

[54] *White Paper On Artificial Intelligence – A European approach to excellence and trust.* Brussels. 19.2.2020. COM(2020) 65 final. https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:52020DC0065 (Date of download: 27.06.2023.).

*Act'* in 2021, the *'Artificial Intelligence Liability Directive'* and the *'Proposal for the Directive on liability for defective products'* in 2022.

The Directive effectively expands its scope to AI systems by defining commercially available and non-open source software, whether it is embedded or cloud-based as a product. *"The PLD proposal will ensure that when AI systems are defective and cause physical harm, property damage or data loss it is possible to seek compensation from the AI-system provider or from any manufacturer that integrates an AI system into another product."*[55] The '*Proposal for the Directive on liability for defective products'* has resolved a long-standing debate in legal literature about whether software should be classified as a product or a service. This decision instils confidence and trust in users regarding new technologies while also allowing ongoing technological development. Additionally, it also provides predictability for law enforcers, users, and economic operators.

## Bibliography

1. Chen, L. – Chen, P. – Lin, Z.: Artificial Intelligence in Education: A Review. *IEEE Access, 2020/8,* 75264–75278. https://ieeexplore.ieee.org/document/9069875 (Date of download: 18.06.2023.). https://doi.org/10.1109/ACCESS.2020.2988510
2. Davenport, T. – Kalakota, R.: The potential for artificial intelligence in healthcare. *Future Healthcare Journal, 2019/2,* 94–98. https://doi.org/10.7861/futurehosp.6-2-94
3. Dommering-van Rongen, Louise: Produktenaansprakelijkheid en software. *Computerrecht, 1988/5.*
4. European Commission, Directorate-General for Justice and Consumers: *Liability for artificial intelligence and other emerging digital technologies.* Brussels: Publications Office, 2019. https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en (Date of download: 27.06.2023.).
5. Expert Group on Liability and New Technologies: *Liability for Artificial Intelligence and other emerging digital technologies*. Brussels, 2019. https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en (Date of download: 19.06.2023.).
6. Fagnart, J.-L. – Boularbah, H.: La garantie et la responsabilité en matière de dommages causés par les produits. In: *Le droit des affaires en évolution*. Bruxelles: Bruylant, 2000, 93–152.
7. Fairgrieve, D. – Howells, G. – Møgelvang-Hansen, P. – Straetmans, G. – Verhoeven, D. – Machnikowski, P. – Janssen, A. – Schulze, R.:

[55] Proposal for the Directive on liability for defective products, Explanatory Memorandum.

Product Liability Directive. In: MACHNIKOWSKI, Piotr (ed.): *European Product Liability. An Analysis of the State of the Art in the Era of New Technologies.* Cambridge: Intersentia, 2016, 17–110. https://doi.org/10.1017/9781780685243.002
8. HURWITZ, J. – KIRSCH, D.: *Machine Learning for Dummies.* Hoboken: John Wiley & Sons, Inc., 2018. https://www.ibm.com/downloads/cas/GB8ZMQZ3 (Date of download: 18.06.2023.).
9. IYER, Lakshmi Shankar: AI enabled applications towards intelligent transportation. *Transportation Engineering, 2021/5,* 1–11. https://doi.org/10.1016/j.treng.2021.100083
10. LINS, S. – PANDL, K. D. – TEIGELER, H. – THIEBES, S. – BAYER, C. – SUNYAEV, A.: Artificial Intelligence as a Service. *Business & Information Systems Engineering, 2021/4*, 441–456. https://doi.org/10.1007/s12599-021-00708-w
11. MELL, P. – GRANCE, T.: *The NIST Definition of Cloud Computing. Recommendations of the National Institute of Standards and Technology.* https://nvlpubs.nist.gov/nistpubs/legacy/sp/nistspecialpublication800-145.pdf (Date of download: 21.06.2023.).
12. OECD: *Artificial Intelligence, Machine Learning and Big Data in Finance: Opportunities, Challenges, and Implications for Policy Makers.* https://www.oecd.org/finance/financial-markets/Artificial-intelligence-machine-learning-big-data-in-finance.pdf (Date of download: 18.06.2023.).
13. SLAGTER, Wicher Jan: Produktenaansprakelijkheid in Nederland. *Tijdschrift voor Privaatrecht, 1988/25,* 731–762.
14. STEFAN Ibolya: Az okoseszközökkel kapcsolatos adatvédelmi kérdések, különös tekintettel a biometrikus adatokra. *Studia Iurisprudentiae Doctorandorum Miskolciensium, 2021/2,* 217–232.
15. STUURMAN, K. – VANDENBERGHE, G. P. V.: Softwarefouten: een 'zaak' van leven of dood? *Nederlands Juristenblad, 1988/24,* 1667–1672.
16. WUYTS, Daily: The Product Liability Directive – More than Two Decades of Defective Products in Europe. *Journal of European Tort Law, 2014/5*, 1–34. https://doi.org/10.1515/jetl-2014-0001

## Legal Sources

### *Directives & Regulations*

*Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).* https://eur-lex.europa.eu/legal-

content/EN/TXT/PDF/?uri=CELEX:31985L0374 (Date of download: 27.06.2023.).
*Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065 (Date of download: 24.06.2023.).

***Cases & Questions***

*Case C-203/99. Henning Veedfald v Århus Amtskommune.* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0203 (Date of download: 27.06.2023.).
*Case C-65/20. VI v KRONE – Verlag Gesellschaft mbH & Co KG, Opinion of Advocate General G. Hogan.* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CC0065 (Date of download: 27.06.2023.).
*Case C-65/20. VI v KRONE – Verlag Gesellschaft mbH & Co KG.* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0065 (Date of download: 27.06.2023.).
Written Question No. 706/88 by Mr. Gijs de Vries (LDR-NL) to the Commission of the European Communities (5 July 1988) (89/C 114/76). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1989:114:FULL (Date of download: 27.06.2023.).

**Proposals and Working Documents of the European Union**

*Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive).* Brussels, 28.9.2022. COM(2022) 496 final. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0496 (Date of download: 18.06.2023.).
*Proposal for a Directive of the European Parliament and of the Council on liability for defective products.* Brussels, 28.9.2022. COM(2022) 495 final. https://eur-lex.europa.eu/resource.html?uri=cellar:b9a6a6fe-3ff4-11ed-92ed-01aa75ed71a1.0001.02/DOC_1&format=PDF (Date of download: 18.06.2023.).
*Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Act.* Brussels, 21.4.2021. COM(2021) 206 final. https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF (Date of download: 18.06.2023.).
*Draft Compromise Amendments on the Draft Report Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence*

*Act) and amending certain Union Legislative Acts*. COM(2021)0206 – C9 0146/2021 – 2021/0106(COD), Committee on the Internal Market and Consumer Protection Committee on Civil Liberties, Justice and Home Affairs, Brussels, 9.5.2023., Article 3(1).
https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/CJ40/DV/2023/05-11/ConsolidatedCA_IMCOLIBE_AI_ACT_EN.pdf (Date of download: 18.06.2023.).
*White Paper On Artificial Intelligence – A European approach to excellence and trust.* Brussels. 19.2.2020. COM(2020) 65 final. https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:52020DC0065 (Date of download: 27.06.2023.).
*Commission Staff Working Document Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).* SWD(2018) 157 final, Brussels, 7.5.2018., 50–51. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0157 (Date of download: 27.06.2023.).

**Online Sources**

*Amos, Zac: AI and Spam: How Artificial Intelligence Protects Your Inbox*. https://www.unite.ai/ai-and-spam/ (Date of download: 18.06.2023.).
*Artificial Intelligence (AI) Techniques: A Comprehensive Guide.* https://databasetown.com/artificial-intelligence-ai-techniques/ (Date of download: 18.06.2023.)
*IBM: What is an Application Programming Interface (API)?* https://www.ibm.com/topics/api **(**Date of download: 24.06.2023.).
*Is deep learning supervised or unsupervised?* https://www.aiplusinfo.com/blog/is-deep-learning-supervised-or-unsupervised/ (Date of download: 18.06.2023.).
*Lexiq: SaasS*. https://lexiq.hu/saas (Date of download: 23.06.2023.).
*Microsoft: Mi az a PaaS? Szolgáltatásként nyújtott platform.* https://azure.microsoft.com/hu-hu/resources/cloud-computing-dictionary/what-is-paas **(**Date of download: 24.06.2023.).
*Microsoft: What is IaaS? Infrastructure as a service*. https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-is-iaas (Date of download: 24.06.2023.).

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**MOHAMMAD ELAYAN AL ANIMAT***

# *Legal Framework and Mechanisms to Protect the Digital Economy*

**Abstract**

This article aims to protect the electronic financial system of Electronic banks and electronic operations are among the risks facing electronic payment operations, follow up on the latest technical protection systems and protection against online fraud and money theft attacks, and review regulatory legislation from regulatory authorities through the Central Bank of Jordan and the European and international model in this field.

**Keywords:** Electronic Fraud, Digital Economy, Electronic Payment, Internet Crimes, Electronic Banking.

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## 1. Introduction

Electronic payment operations have become in the minds of banks until they occupy a good position in the competition among them, and despite the fact that they are surrounded by many risks, this is called the risks of electronic payment operations, and this is what will be addressed.

Electronic banking means virtual access to bank account information. One of its main problems is the huge difference between a non-digital human connection, which uses different identification mechanisms (name, password, handwritten contract, etc.), and an electronic/digital connection that uses the authentication methods mentioned in this paper[1].Integration of risk management processes The electronic payment aims to ensure and define an understanding of the nature of the interrelationships between the various risks in the bank, as it is not possible to evaluate the impact of certain risks in isolation from the rest of the other risks related to the bank's work, and the risk management process is comprehensive at the level of the institution as a whole, which leads to the application of Integrated risk management, in addition to the ability to understand the interrelationships between

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[2] Petr Hanaek, KAMIL Malinka, JIRI Schafer, E-banking security - comparative study, In 42nd Annual IEEE International Conference on Security Technology, Prague, Czech Republic, 2008., pp.326–330.

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different risks. Electronic payment operations and their attendant effects in a way that negatively affects the operations of the bank. For example, in Sri Lanka, the results of the completed study revealed that financial and security risks are taken into greater consideration by e-commerce users than other risks such as perceived, operational and financial risks[2].

The Basel Committee on Banking Supervision indicated that banks should put in place policies and procedures that allow them to manage these risks through their assessment, monitoring and follow-up[3].The risk assessment should be carried out by an independent body with sufficient authority and experience to assess risks, test the effectiveness of risk management activities, and make the necessary recommendations to ensure the effectiveness of the risk management framework[4]. There must be plans reinforced with preventive measures against crises, to be approved by the concerned officials, to ensure the bank's ability to withstand any crisis or failure in the systems or communication devices, provided that these plans are subject to periodic testing.

## 2. Data and Methodology of study used

The research depends on the descriptive analytical approach to verify the most important risks facing electronic payment operations. These risks are analyzed and taken advantage of to keep pace with modern protection methods related to the topic of research, discuss the most important forms of financial fraud, and develop the best recommendations for the use of protection methods and keeping pace with high technological development.

And review the laws issued by the Central Bank of Jordan and the instructions for cyber risks according to the Central Bank of Jordan and what is related to the licensing of electronic banks and the regulations issued by The Basel Committee on Banking Supervision (BCBS) in addition to the laws issued by the United Nations[5] to protect against risks that threaten consumers in the field of cyber security and electronic commerce.

[2] Arthika Rajaratnam, "The Factors Influencing on Internet Banking Adoption in Trincomalee District, SRI Lanka," International Research Journal of Advanced Engineering and Science, Volume 4, Issue 1, pp. 160-164, 2019.

[3] The Basel Committee on Banking Supervision is the committee that was established and consisted of the ten industrialized countries: Canada, Britain, France, Italy, the Netherlands, Sweden, the United States of America, Switzerland, Japan, Luxembourg, at the end of 1974, under the supervision of the Bank for International Settlements in the Swiss city of Basel, and from The most important goals of the stability of the international banking system, especially after the exacerbation of the debt crisis for the poor countries of the world.

[4] Instructions for adapting to cyber risks issued by the Central Bank of Jordan on 6/2/2018.

[5] UNCITRAL Model Law on Electronic Commerce NEW YORK.1996.11.

## 3. The policy of the Jordanian government measures

Remittances outside the country are considered one of the most important risks facing electronic banks, which may cause great harm to the economy inside the country. Which he enjoys, but at the same time, he may be exposed to great risks, whether at the level of maintaining that good money from the banks or the economy of countries as a whole. Threats should not affect or limit the spread of electronic payment operations. Rather, governments and legislative councils that are concerned with protecting the interests of customers and citizens, which may be represented by the Ministry of Investment and the Central Bank, should take into account these risks, and develop the necessary technology to prevent their occurrence on an ongoing basis and binding on electronic financial companies. , by reducing its incidence to the lowest possible degree. Jordan's policy was to protect customers from the risks of electronic fraud through the application of general rules to protect customers and citizens through the role of the Central Bank of Jordan in regulating electronic payment methods for banks, the Jordanian government encouraged citizens to go to electronic transactions and provided them with all means of protection from electronic risks. It has worked to promote the e-government program and electronic payment through the application (E-Fawateercom[6]).

In fact, the Central Bank of Jordan has developed a legal regulation regulating the work of electronic companies, electronic banks, traditional banks, electronic payment companies, and electronic transfer companies. Electronic payment is up and running. This definition legally applies to electronic banks, because it deals with the same systems and manages them electronically, and these electronic companies are not entitled to a license except after obtaining the approval of the Central Bank and submitting an application for a license through which the Central Bank requires its supervision and follow-up on the operations of the electronic bank[7]. The researcher believes that subjecting traditional or electronic banks to the control of the Central Bank secures the necessary protection for customers and cultivates a kind of confidence towards modern electronic payment processes that are dealt with behind screens. The Central Bank has taken over the protection of customers by enacting instructions and regulations to compel electronic financial companies to protect customers. The legislative framework of the Central Bank appears by issuing the appropriate regulations, instructions, and circulars for the activities of payment services and electronic money transfer in Jordan, defining the terms of dealing with them, settling disputes that arise between its parties, in addition to the technical and

6 See: https://bankofjordan.com/ar/digital-banking/e-fawateercom.
7 View the application form for licensing payment companies and electronic money transfer in the Hashemite Kingdom of Jordan, issued by the Central Bank of Jordan.Ammam.2015.17.

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technical procedures and requirements for electronic money. Payment tools and directing those who engage in such activities to comply with them. Regulatory framework: The regulatory framework in the Central Bank is to supervise all electronic payment systems and monitor all activities of managers and operators of electronic payment systems, participants in them and providers of electronic payment services.

It is possible to count as an example one of the largest electronic banks in the world in terms of definition and electronic payment methods provided through it to most countries of the world and the legislative texts to protect the electronic financial system and the licenses that had to be obtained from the Central Bank of Lithuania to license a Revolut banks a financial technology company that provides banking services in Europe and the world.

## 4. License conditions for providing banking operations in digital banks

The Jordanian legislator determined the licensing of digital banks in accordance with article (31) of the Constitution and based on what was decided by the Council of Ministers on 10/18/2017 the Central Bank of Jordan issued the electronic payment and transfer system Law No. (111) of 2017 in accordance with Articles (21) and (22) From the Electronic Transactions Law No. (15) of 2015 which deals with all matters related to licensing electronic banks in Jordan, electronic banks are considered in Jordan. The same material value that traditional banks pay in terms of fees upon licensing and in accordance with the regulations issued by the Central Bank of Jordan[8]. In order for a bank to obtain a license to provide electronic banking services, it must first create a website for itself, after obtaining a set of licenses through the following; Granting licenses is limited to banks registered with the Central Bank alone, that the bank fulfill the regulatory controls related to the extent of its commitment to the following: capital adequacy, principles of loan classification, credit concentration and others.

The bank follows the principles of risk management when providing its services via the electronic network, and the licensed bank disclosed on its own page that it obtained a license by number and date, in addition to linking the bank's website to the central bank page. Businesses should have mechanisms in place to handle complaints that provide consumers with a prompt, fair, transparent, inexpensive, accessible, rapid and effective resolution of disputes without undue cost or burden. Companies should consider subscribing to local and international standards related to internal complaints handling, alternative dispute resolution services, customer

[8] Article (31) of the Constitution and based on what was decided by the Council of Ministers on 10/18/2017 the Central Bank of Jordan issued the electronic payment and transfer system Law No. (111) of 2017.

satisfaction rules and providing all means of protection against cyber risks to these processes[9].

## 5. The Necessity of Creating a Regulatory Legal Legislation

When we research the extent to which the legal legislation covers the issues of the risks of electronic payment methods. In fact, in Jordan there is the Cybercrime Law of 2015 and it is the authorized legislation that addresses the risks that arise from electronic operations in general, The electronic services provided by banks are characterized by speed, flexibility and simplicity, and therefore this matter required the existence of legal legislation that protects and cultivates confidence by customers in these banks and solve any dilemma he needs, hence the need for the intervention of central banks in the countries, in order to establish a legislative legal organization that cultivates confidence in the customer and forces electronic banks to apply the legal foundations regulated by the Central Bank to protect the interests of all parties[10], and from For that, some international models of the extent of central bank control over the legal regulation of banks will be studied:

The Jordanian Electronic Transactions Law requires these companies to obtain a license From the Central Bank of Jordan, where Article (22) of it stipulates the following[11]; A- Without prejudice to any law, every payment and electronic money transfer company must obtain License from the Central Bank of Jordan. B - Payment and electronic funds transfer companies, in carrying out their activities, are subject to the supervision of the Central Bank, the Jordanian and his knowledge. C- For the purposes of this article, a payment and electronic transfer of funds company means the company that practices Payment services, transfer, financial settlement, electronic clearing, or issuance of payment tools and systems and its management in accordance with the provisions of this law and the regulations and instructions issued pursuant to it or the legislation other related matters.

In fact, we need an in-depth study, taking into account the Jordanian Transactions Law of 2015 and UNCITRAL International Trade Law, and the United Nations Guidelines for Consumer Protection, which are international comparative laws, and I will mention some of them here:[12] Consumer privacy and data security. And the terms of the contract are clear, concise, easy to understand, and unfair. Finally, clear and timely information enables consumers to easily contact businesses.

[9] United nations Consumer Protection Guidelines United Nations, New York and Geneva, 2016, P 10.
10 Electronic Payment System No. (111) of 2017, issued by the Central Bank of Jordan.
11 Article No. 22 of the Jordanian Electronic Transactions Law No. 15 of 2015 issued in the official newspaper
[12] United nations Consumer Protection Guidelines United Nations, New York and Geneva, 2016.11.

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## 6. Legal Principles

At the legislative level, the legislator must realize the nature and requirements of the information age, and that there is an urgent need for an integrated package of laws that must be enacted to address all the effects of the difference in the electronic environment in which it is located. Banks operate from their traditional environment, where many existing laws appear to be invalid. Facing the various and growing problems related to the use of computers in the banking field, through the formation of a legal committee under the supervision of the Central Bank and members of banks who provide electronic services in order to disclose their need for some important matters. The legal foundations that serve the banking financial work and work on its development in order to make amendments to the electronic financial legislation that has become obsolete in proportion to the need of the current time. General legal principles must be observed in protecting customers from electronic risks. The responsibility for risks lies primarily with the board of directors of each bank, which is responsible to the shareholders about the bank's business, which requires an understanding of the risks faced by the bank and ensuring that it operates in an effective manner. Accordingly, the risk Policies are set by the bank's senior management, and the board of directors must review them. The risk management policies must include defining or defining risks and methods or managing and controlling the risks facing electronic payment operations because the most important characteristics that encourage the adoption of electronic banking services are convenience and ease of use[13], the general legal principles in protecting customers from electronic risks issued by the Basel Committee must take into account many tasks and duties. And the fraud cases decided by the European Court of Justice on November 11, 2020, the Court of Justice of the European Union (CJEU) held that the near-field communication (NFC) functionality of a bank card, also known as contactless payment, in itself is a "payment instrument" as defined in the EU Payment Services Directive 2015/2366 (PSD 2). The CJEU also clarified the meaning of "anonymous use" under PSD 2 with regard to NFC functionality. The court stated that a bank may not exclude its liability for unauthorized low-value transactions in its general terms and conditions by simply claiming that blocking the NFC functionality would be technically impossible, but must prove impossibility in light of the objective state of available technical knowledge when a customer reports a lost or stolen bank card. Furthermore, the court ruled that if the user is a consumer, general terms and conditions that provide for tacit consent to possible future amendments to such terms and conditions must comply with the standard of

[13] JIAQIN Yang and LI Cheng and XIA Luo. A comparative study on e-banking services between China and USA. International Journal of Electronic Finance.2009.3(3), 235–252.

review set out in Directive 93/13 on consumer rights protection, not with (PSD 2)[14].

## 7. Conclusion

Through this study, the researcher can extract and suggest a set of relevant findings and recommendations to generalize and consolidate the interest as follows; In fact, according to my opinion, banks should prepare qualified banking human cadres to work in the face of risks that threaten electronic payment operations, taking into account accuracy and security to ensure proper use of the network to complete electronic payment operations. Or tampering with accounts and balances in banks that require updating information systems to keep pace with all technical developments and continuously absorb them and keep pace with the technological development to combat hackers in addition to combating computer viruses, which is one of the most threats facing electronic dealing. Perhaps the most important security tools in use today are firewalls and encryption

Its technological infrastructure is well-developed in order to be able to provide electronic banking services events to its customers. Must banks to state in the contracts they conclude with customers over the network that the geographical scope is specified within the countries that are signatories to international electronic trade agreements, in order to avoid conflict with countries that do not recognize these agreements since the scope of the service listed on the network is all over the world. Choosing a technical supplier, p provided has the technical expertise and honorable career history.

Electronic banks must follow advanced and continuous methods of technological prevention and protection to face expected natural disasters such as humidity, heat, unexpected fires, floods, fluctuations and power outages, wars, earthquakes, etc., in order to prevent computers from being exposed to them. Damage and damage and to prevent the immediate impact of electronic banking operations.At the legislative level, the legislator must realize the nature and requirements of the information age, and that there is an urgent need for an integrated package of laws that must be enacted to address all the effects of the difference, as many of the current laws seem to be invalid, to face the various and growing problems related to the banking field, by forming a legal committee under the supervision of the Central Bank and members of banks who provide the electronic service to disclose their need for some legal foundations that serve the banking financial work and work on its development in order to make amendments to the electronic financial legislation that has become obsolete, including It fits the

[14] Article European Union: European Court of Justice Rules on Liability of Banks for Unauthorized Low-Value Transactions Using Contactless Payment, Library of Congress, Vienna ,Austria,2020.11.

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needs of the time. Rather, electronic banks should play a role in preparing these laws to reach sound legal results, given their important practical experience in this regard. Finally, I hope that I have presented even a small part through this article in the field of electronic payment risks, which will benefit researchers and specialists in the field of electronic banking.

**Bibliography**

Petr HANAEK, Kamil MALINKA, Jiri SCHAFER, E-banking security - comparative study, In 42nd Annual IEEE International Conference on Security Technology, Prague, Czech Republic, 2008., pp.326–330.

Arthika RAJARATNAM, "The Factors Influencing on Internet Banking Adoption in Trincomalee District, SRI Lanka," International Research Journal of Advanced Engineering and Science, Volume 4, Issue 1, pp. 160-164, 2019.

Instructions for adapting to cyber risks issued by the Central Bank of Jordan on 6/2/2018.

UNCITRAL Model Law on Electronic Commerce NEW YORK.1996

United nations Consumer Protection Guidelines United Nations, New York and Geneva, 2016

Electronic Payment System No. (111) of 2017, issued by the Central Bank of Jordan.

United nations Consumer Protection Guidelines United Nations, New York and Geneva, 2016

JIAQIN Yang and LI Cheng and XIA Luo. A comparative study on e-banking services between China and USA. International Journal of Electronic Finance.2009.3(3), 235–252.

**URŠKA KUKOVEC** *

# Best interests of the child in adoption proceedings

**Abstract:** There is universal agreement that the child's best interests should be a primary consideration in any decisions made about a child's future. Especially in the case of adoption, which represents one of the most far-reaching and definitive decisions that could be made about the family life of any child– the selection of their parents. The text deals with requirements for the child's protection in adoption based on the Constitution of the Republic of Slovenia and the Slovenian Family Code, with references to international law standards.

**Keywords**: best interests of the child, adoption, Slovenian Family Law, proportionality, adoptive family

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Adoption represents a special form of child care, which creates the same relationship between the adoptive parent and the child as between parents and their children[1], also stipulated in the Article 9 of the Slovenian Family Code[2]. Adoption represents the best alternative form of child care, as the child is fully integrated, de facto and legally, into the adoptive family. According to the UN Convention on the Rights of the Child[3], a child must grow up in a family environment, in an atmosphere of happiness, love, and understanding, for full and harmonious personality development. However, this statement cannot in any way be interpreted in the direction of a "right" or a requirement that every child should be guaranteed adoption if their parents cannot care for them.

In accordance with the principle of gradualism, adoption should be the last measure to be taken, initially using milder measures that do not separate the child

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[1] KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. - DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 501.

[2] Družinski zakonik, Uradni list RS, št. 15/17, 21/18 - ZNOrg, 16/19 - ZNP-1, 22/19, 67/19 - ZMatR-C, 200/20 - ZOOMTVI, 94/22 - odl. US, 94/22 - odl. US.

[3] Convention on the rights of the Child, adopted by the General Assembly resolution 44/25 of the United Nations on 20th November 1989.

from the parents. Both UN Convention on the Rights of the Child and the Constitution of the Republic of Slovenia[4] dictate that children who are not cared for by their parents, who have no parents, or who are without adequate family care enjoy special protection from the state.[5]

In accordance with the regulations in the international convention and the Slovenian legislation, adoption is only carried out if the parents, despite all the help and support to preserve the child's family environment, are unable to do so or are no longer allowed to take care of their child. Only in the event that all milder measures do not lead to the desired circumstances that would allow the child to remain in the family environment of the mother's family should adoption take place as a measure of ultima ratio (principle of subsidiarity). Mere poverty, poor financial condition, or illness of the parents should not form a bare basis for adopting a child.[6] In any case, the fundamental principle also in adoption is the principle of protecting the child's interests. There is universal agreement that the child's best interests should be a primary consideration in any decisions made about a child's future. In the case of adoption, which represents one of the most far-reaching and definitive decisions that could be made about the future of any child – the selection of their parents – international law qualifies the best interests of the child as the paramount consideration.

As according to the Constitution of the Republic of Slovenia children enjoy special care and attention. Children enjoy human rights and fundamental freedoms according to their age and maturity. Children shall be provided with special protection against economic, social, physical, mental, or other exploitation and abuse. Such protection is regulated by law. Children and minors who are not cared for by their parents, who do not have parents, or who do not have adequate family care enjoy special protection from the state. Their position is governed by law.

Adoption must be for the child's benefit, which cannot prevail over the interests of the parents or adoptive parents. In adoption, a family must be found for the child, not the child's family.[7]

[4]Ustava RS, Uradni list RS, št. 33/91I, 42/97 - UZS68, 66/00 - UZ80, 24/03 - UZ3a, 47, 68, 69/04 - UZ50, 69/04 - UZ43, 69/04 - UZ14, 68/06 - UZ121,140,143, 47/13 - UZ90,97,99, 47/13 - UZ148, 75/16 - UZ70a, 92/21 - UZ62a.
[5]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 501-502.
[6]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 502.
[7]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 502.

As according to the Article 8 of the European Convention on Human Rights[8]everyone has the right to respect for his private and family life, his home and his correspondence. The second paragraph of this Article explicitly stipulates that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Today, the principle of the best interests of the child is a fundamental principle of children's law - an area where law is intertwined with the child's life. It is covered in Article 3 of the 1989 UN Convention on the Rights of the Child:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Concerning the stipulated article above we must take into consideration this fundamental principle of the best interests of the child when deciding on the adoption of children and this principle should be a primary consideration.

The concept of 'the best interests of the child' was already contained in the Geneva Declaration of the Rights of the Child of 1959[9] where Principle 2 stipulated that in the laws adopted for the protection of the child, the best interests of the child should be a primary consideration.

[8]The European Convention on Human Rights (ECHR; formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

[9] The Declaration of the Rights of the Child, sometimes known as the Geneva Declaration of the Rights of the Child, is an international document promoting child rights, drafted by Eglantyne Jebb and adopted by the League of Nations in 1924, and adopted in an extended form by the United Nations in 1959.

The UN Convention on the Rights of the Child was also followed by the Charter of Fundamental Rights of the European Union (hereinafter: LEUTP), which addresses the rights of children in Article 24.

It stipulates that children have the right to the necessary protection and care to ensure their well-being and that all measures of public bodies or private institutions concerning children must take into account the best interests of the child (paragraphs 1 and 2 of Article 24 of the LEUTP).

Mention should also be made of the European Convention on the Exercise of Children's Rights (hereinafter "ECHR"), which aims to promote their rights for the benefit of children, to recognize their procedural rights and to enable them to exercise those rights by themselves or through others. Authorities are informed and allowed to take part in proceedings before the judicial authorities concerned (Article 2 (2) of the ECHR). A special reference to the best interests of the child is contained in Article 6 of the ECHR: In proceedings affecting a child, the judicial authority, before taking a decision, shall: a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; b) in a case where the child is considered by internal law as having sufficient understanding: – ensure that the child has received all relevant information; – consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child; – allow the child to express his or her views; c) give due weight to the views expressed by the child.

*Article 7 of Slovenian Family Code (FC) 2017 states:*
*(1) Parents shall take care of the best interests of the child in all activities related to the child. Children are brought up with respect for their person, individuality and dignity.*
*(2) Parents have priority over all others in the care and responsibility for the benefit of the child.*
*(3) Parents work for the benefit of the child if, in particular, taking into account the child's personality, age and developmental level and desires, they adequately meet his material, emotional and psychosocial needs by acting to indicate their care and responsibility towards the child. appropriate educational leadership and encourage it in its development.*
*(4) State bodies, public service providers, holders of public authority, local community bodies and other natural and legal persons must take care of the best interests of the child in all activities and procedures related to the child.*
*(5) The state shall provide conditions for the operation of non-governmental organizations and professional institutions for the development of positive parenting. "*

The principle of the best interests of the child thus represents a fundamental starting point in all vertical relations or activities related to the child carried out by state bodies (eg court, social work center, police,…). However, the best interests of the child must also be a fundamental guide in horizontal relations, ie in the relations between parents and children.

The notion of "child benefit", which must be the basic guideline in all matters concerning the child (i.e. general authority), is not defined in our positive legislation. It is a legal standard, the content of which must be sought in each case separately (eg judiciary, education, health care, ...). The only starting point is that parents are considered to be working for the benefit of the child if, in particular, taking into account the child's personality, age and developmental level and desires, they adequately meet his or her material, emotional and psychosocial needs. responsibility to the child, and provide him with appropriate educational guidance and encourage him in his development.

The performance of parental duties must therefore be in the best interests of the child.However, parents work for the benefit of the child if they meet his material, emotional and psychosocial needs by appropriate behavior.

The legal standard is individually adaptable and traceable to the needs of each child. In order to be able to give the most optimal content to this legal standard in any case, it is necessary to take into account all the circumstances of the individual case, as it is a value concept that is subjective in nature and is adapted to each user. As a rule, the Slovenian court has a wide discretion in defining the content of this legal standard, as in practice it can use a number of subjective and objective reasons that have developed over the years in case law. However, it should not be overlooked that the court must also follow the principle of proportionality, as the exercise of parental care and the obligations and rights arising from it primarily belong to the parents, who exercise them in accordance with the principle of autonomy. Parents therefore have priority over all others in the exercise of parental care. The basic premise is that parents act in the best interests of the child.

Anyone who disagrees (either a natural person (eg a second parent) or a legal person (eg a public authority)) must challenge this legal presumption and prove it to the contrary with an appropriate standard of proof.

Interventions in parental care (eg restriction or deprivation) must be proportionate and in accordance with the principle of the most lenient measure. There are two limitations to consider when choosing a measure to protect the best interests of the child:

a) a measure should be issuedthat will limit the parents as little as possible in the exercise of parental care, provided that it provides sufficient protection for the best interests of the child;
b) above all, a measure should be imposed by which the child is not taken away from the parents, if this measure can sufficiently protect the interests of the child (Article 156 of the Family Code).

As we have assessed the international and Slovenian regulations for protecting the best interests of the child, we can follow with the assessment of the regulations assuring the best interest of the child is also a primarily consideration in adoption proceedings.

The Convention on Protection Of Children And Co-Operation In Respect Of Intercountry Adoption (Concluded 29 May 1993)[10] determines in Article 4 the requirements for intercountry adoptionwhich shall take place only if the competent authorities of the State of origin – a) have established that the child is adoptable; b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests; c) have ensured that (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin, (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing, (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and (4) the consent of the mother, where required, has been given only after the birth of the child; and d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required, (2) consideration has been given to the child's wishes and opinions, (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal

[10] The Adoption Convention was developed to respond to the serious and complex human and legal problems in intercountry adoption. It gives effect to Article 21 of the United Nations Convention on the Rights of the Child (UNCRC) by adding substantive safeguards and procedures to the broad principles and norms laid down in the UNCRC. These substantive safeguards are aimed at ensuring that intercountry adoptions take place in the best interests of the child and with respect for the child's fundamental rights. The safeguards established by the Convention are only minimum standards, and Contracting Parties are therefore encouraged to improve these standards (The Hague Convention).

form, and expressed or evidenced in writing, and (4) such consent has not been induced by payment or compensation of any kind.

From the determination of the intercountry adoption as according to this article of the Hague Convention we can view the importance of the child`s wishes and opinions that has to be considered when deciding on the adoption of the child and the importance of the previously mentioned rule, that in the adoption proceedings a family must be found for the child, not the child's family.

The best possibility to overview whether in the specific case the child`s best interests according to the regulations on the international level were considered is to put into consideration the decisions of the European Court of Human Rights.

In the Case of Pini and others v. Romania[11] the European Court on Human Rights was dealing with the question whether the Article 8 of The European Convention of Human Rights was infringed and dealing with the question whether the adoption of two girls Florentina and Mariana was in the best interests of the two children, who were adopted at a late stage (perhaps too late), and have never met their adoptive parents (have consequently barely formed any ties with their adoptive parents), whether it is in the best interests of the children to remain in the educational centre where they have lived for many years rather than to undergo a complete change of lifestyle, environment, language and culture.[12] It was founded that in this case the authorities´ lack of cooperation in allowing the applicants to develop ties with the children, two young girls were required to move to a foreign country to join adoptive families whom they barely knew. Consequently, there were indeed exceptional measures justifying the non-enforcement of the adoption orders in respect of Florentina and Mariana. It was considered that no family life within the meaning of Article 8 of the Convention ever existed between the applicants and their adopted children.[13]

In the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, such protection is afforded, for example, by the obligation on States to give due consideration to the possibilities for placing the child within the State of origin (Article 4 (b)) and to ensure, having regard to the age and degree of maturity of the child, that he or she has been counselled and duly informed of the effects of the adoption and that consideration has been given to the child's wishes and opinions (Article 4 (d)).

[11]Applications nos. 78028/01 and 78030/01, dated on 22nd June 2004.
[12]As according to the Concurring opinion of Judge Costa, p. 44 of the Judgement in the Case Pini and others v. Romania.
[13]Dissenting Opinion of Judge Thomassen Joined by Judge Jungwiert, p. 50 of the Judgement in the Case Pini and others v. Romania.

Article 6 of the European Convention on human rights cannot justify the execution of a judicial decision whose application infringes the fundamental rights of others. In the present case the execution of the decisions in question would have forced the children to leave their country against their will to live with parents whom they had never met.[14] In this dissenting opinion thejudgesdo not believe that the Romanian authorities should have enforced such decisions. In their view if they did so, they would have constituted an act of State raising serious problems as to the respect due for the children's rights under Article 8. For that reason, they consider that there was no violation of Article 6.

In the Slovenian legislation, the competence in the adoption procedure was transferred from the Social Work Centers to the courts with the Slovenian Family Code of 2017. Despite this, the Social Work Centers still play a key role in the field of adoptions, as they check the conditions on the part of the child who is to be adopted (passive adoptive capacity), as well as the conditions that must be met by a person who wants to become an adopter (active adoptive capacity).[15] The role of Social Work Centers is thus focused on checking the conditions and also the child's benefits. Social Work Centers no longer have decision-making powers, as adoption is now decided by the court in an informal procedure according to the Non – procedure Act[16].

The conditions for adopting a child are defined in Article 218 of the Slovenian Family Code. Only a child may be put up for adoption;

If the parents consented to the adoption before the social work center or the court after the child's birth. For a child who has not yet reached 8 weeks of age, consent must be confirmed after eight weeks of age. Otherwise, the consent has no legal effect. However, the consent of the parent who has been deprived of parental care or is permanently incapable of expressing his will is not required. (Paragraph 1 of Article 218 of the FC).

A parent divested of parental rights is not afforded a role of any kind in the adoption proceedings. The UN Convention on the Rights of the Child of 20 November 1989, in so far as relevant, reads as follows in the Article 9: States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in

[14]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 52.
[15]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 502.
[16]Zakon o nepravdnem postopku – ZNP-1, Uradni list RS, št. 16/19.

accordance with applicable law and procedures, *that such separation is necessary for the best interests of the child.* Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence.In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

In Article 21 of the UN Convention States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

The question in the Case of A.K. and L. v. Croatia of The European Court of Human Rights was, whether the applicants and her son's right to respect for family life had been infringed in that she could not effectively participate in the proceedings concerning her parental rights, and that her son was put up for adoption without her knowledge, consent, or participation in the adoption proceedings. She relied on Article 8 of the UN Convention.[17]

The question in the present case was whether Article 8 of the UN Convention was applicable to the present case, arguing that the relationship between the first applicant and her son had deteriorated to such an extent that it no longer represented a family life and that their blood relation alone was not enough to maintain it.[18] They stressed that the child had been placed in a foster family from its birth, that the first applicant had ceased to care for the child, and that the child had been adopted by third persons.[19]

[17]Application no. 37956/11, dated on 8th January 2013.
[18] Judgement in the Case of A.K. and L. v. Croatia, p. 12.
[19]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 12.

The first applicant replied that even though she had been divested of her parental rights, she nevertheless had the right to bring complaints on behalf of her biological child in order to protect his interests.[20]

As regards the compliance with the six-month rule to file an application, the first applicant replied that she could not understand the meaning of the proceedings for divesting her of her parental rights and the effect of that decision and that only by chance had she been made aware of the true meaning of the decisions adopted. She had then applied for legal aid and used all the legal paths that had still been at her disposal, such as a request that her parental rights in respect of her son be restored. Although the child was placed in a foster family soon after his birth, it would appear that the first applicant continued to visit her son.[21] The Court has already held that family ties exist between a child and its biological parent with whom the child has never lived. In the Court's view there existed a bond between the first applicant and her son from the moment of the child's birth which bond amounted to a "family life". Therefore, Article 8 is applicable in the present case.

The relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents.

In the procedures applicable to the determination of issues relating to family life parents normally have a right to be heard and to be fully informed, although restrictions on these rights could, in certain circumstances, find justification under Article 8 paragraph 2 of the European Convention on Human Rights.

As in the present Case of A.K. and L. v. Croatia the European Court of Human Rights established that the child of a mother diagnosed with a mild mental disability was given up for adoption without her knowledge, consent, and participation in the adoption process and that there was a violation of Article 8 of the European Convention on Human Rights.

In the Article 218 of the Slovenian Family Code there are stated conditions according to which a child can be put up for adoption:

- A child may only be put up for adoption if the parents have consented to the adoption before the Social Work Center or the court after the child's

[20] KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 12.
[21] KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 14.

birth. For a child who has not yet reached the age of eight weeks, the consent must be confirmed after the child is eight weeks old, otherwise the consent has no legal effect. The consent of the parent who has been deprived of parental care or who is permanently incapable of expressing his will is not required;

- The consent is not required for those children whose parents are unknown;
- Further on if the residence of the parents has not been known for a year(Paragraph 2 of Article 218 of the FC);
- And for the child who has no living parents (Paragraph 4 of Article 218 of the FC).

Before the court decides on the adoption of a child in an informal procedure, it can decide that the child spends a certain time in the family of the prospective adopter. (Paragraph 1 of Article 227 of the FC). This is to ensure that the best adopter will be found for each child. At the same time, it is possible for both the child and the prospective adopter to get used to each other or for the child and the prospective adopter to get used to the new situation. It is a kind of transitional period because during this time, the parents no longer exercise parental care, and on the other hand, even the future adoptive parent does not exercise it yet. However, the court will not decide on such placement if it is a unilateral adoption by the spouse or common-law partner of the child's parent since in this case, there is already a community of life between the child and the adoptive parent, and they have already gotten used to each other.

If the court finds that the conditions for adoption prescribed in the FC are met, and in particular, that the adoption is in the best interest of the child, it issues a decision on adoption. If the court finds in an informal procedure that the conditions for adoption are not met or that the adoption would not be in the child's interest, it will reject the adoption proposal (paragraph 2 of Article 229 of the FC).[22]

The Slovenian Parliament has severely limited the acquisition of data that would enable a child to realize his right to know his origin or to know his biological parents. With this arrangement, Slovenia is even among the strictest countries, as it conditions this child's right on the consent of the biological parents.[23] If the biological parents refuse this right, the data about the biological parents will not be disclosed. This prevents the child, above all, from his psychological interest in

[22]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 504.
[23] KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 506.

finding out who his parents are. An individual has a need for an identity, which he can realize if he knows his origins. Apart from the psychological interest, it can also have a medical interest, which is realized through paragraph 3 of Article 222 of the FC and a material interest (for example, inheritance), which must in no way play a primary role in establishing the identity of the biological parents. An exception to the regulation according to paragraph 2 of Article 222 of the FC is the acquisition of data on health status.[24] The adopted person or his legal representative can request from the center for social work information about the health status of the biological parents to the extent and under the conditions stipulated by law.

In the following Case of Godelli v. Italy[25] the applicant complained of her inability to obtain non-identifying information about her birth family. She maintained that she had suffered severe damage as a result of not knowing her personal history.[26] She stated that she had been denied access to non-identifying information about her birth mother and family that would have enabled her to trace some of her roots while ensuring the protection of third-party interests. She also complained that, in weighing the two competing interests, the legislature had given preference to the mother's interests alone without there being any possibility for the applicant to request, as in French law, a waiver of confidentiality of the mother's identity subject to the latter's agreement. She also submitted that she had been the subject of a simple adoption order, which had not created an effective family relationship[27]. She relied on Article 8 of the European Convention on Human Rights, which provides:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

The Court must examine whether a fair balance has been struck in the present case between the competing interests: on the one hand, the applicant's right to have access to information about her origins and, on the other, the mother's right to

[24]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 506-507.
[25]Application no. 33783/09, dated on 25th September 2012.
[26] Judgement in the Case of Godelli v. Italy, p. 6.
[27]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 6.

remain anonymous.[28] In the present case the Court observes that, unlike the situation in the case of Odièvre mentioned further on, the applicant did not have access to any information about her mother and birth family that would allow her to trace some of her roots, while ensuring the protection of third-party interests. The applicant's request for information about her origins was totally and definitively refused, without any balancing of the competing interests or prospect of a remedy. In the present case the Court notes that where the birth mother has decided to remain anonymous, Italian law does not allow a child who was not formally recognised at birth and was subsequently adopted to request either access to non-identifying information concerning his or her origins or the disclosure of the mother's identity. Accordingly, the Court considers that the Italian authorities failed to strike a balance and achieve proportionality between the interests at stake and thus overstepped the margin of appreciation which it must be afforded.[29]

There has therefore been a violation of Article 8 of the European Convention on Human Rights.

In order for the child's right to be informed or to know the origin, three prerequisites must be fulfilled cumulatively: the child must be at least 15 years old (objective prerequisite), and the child must be able to understand the meaning and consequences of the given consent (subjective prerequisite), and the consent of the biological parents. A complete denial of the possibility of access to biological parents would be contrary to Articles 7 and 8 of the UN Convention on the Rights of the Child. Pursuant to paragraph 1 of Article 7 of the UN Convention on the Rights of the Child, it is determined that the child "has the right to know his parents as much as possible."[30] Problems can arise if the biological parents are unable to give consent (lack of ability to express their will - business incapacity) and in case of disagreement regarding providing consent between the biological parents.

In the Republic of Slovenia, we could follow the example of other countries and perhaps shift the balance in the legislation to the side of the child, thereby ensuring respect for the child's right to know his biological parents, which is in the sense of protecting the child's best interests, especially for reasons of health and circumstances related to regarding him.

[28]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 11.
[29]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 11-12.
[30]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 508.

In ZNP-1, Article 5 stipulates that the court must give the opportunity to make a statement about the statements of other participants in the procedure, which means that the participants in the adoption procedure must also be given the right to make a statement. The court may also decide, without giving the participant the opportunity to make a statement, if the law so stipulates or if it judges that this would endanger other constitutional rights of a person whose rights and legal interests the court is obliged to protect ex officio. Since adoption is a special form of child protection, the court must protect the rights and legal interests of the child. Concealing personal information about the prospective adoptive parent in the adoption proposal is pointless or redundant, as the biological parents already get to know them beforehand. In accordance with the provisions of the FC, only after the decision on adoption becomes final the adopted person does not have the right to learn about the personal data of his biological parents, which are kept in the birth register and other records of personal data. Even the biological parents who put the child up for adoption do not have the right to access the child's personal data after the decision on adoption has become final.[31]

The European Convention on the Adoption of Children[32] in Article 22 mentions the access and disclosure of information, as the state countries accept the provisions that may be made to enable an adoption to be completed without disclosing the identity of the adopter to the child's family of origin.

The adopted child shall have access to information held by the competent authorities concerning his or her origins. Where his or her parents of origin have a legal right not to disclose their identity, it shall remain open to the competent authority, to the extent permitted by law, to determine whether to override that right and disclose identifying information, having regard to the circumstances and to the respective rights of the child and his or her parents of origin. Appropriate guidance may be given to an adopted child not having reached the age of majority.

The adopter and the adopted child shall be able to obtain a document which contains extracts from the public records attesting the date and place of birth of the adopted child, but not expressly revealing the fact of adoption or the identity of his or her parents of origin. States Parties may choose not to apply this provision to the other forms of adoption mentioned in Article 11, paragraph 4, of this Convention. Having regard to a person's right to know about his or her identity and origin, relevant information regarding an adoption shall be collected and retained for at least 50 years after the adoption becomes final.

[31]KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 510.
[32] Revised, Strasbourg, 27th November 2008.

Public records shall be kept and, in any event, their contents reproduced in such a way as to prevent persons who do not have a legitimate interest from learning whether a person was adopted or not, and if this information is disclosed, the identity of his or her parents of origin.

The right of an adopted child to know his origin is not an absolute right according to the European Convention on the adoption of children, as a balance must be struck between the right of the child to know his origin and the right of the child's biological parents to remain anonymous.

In the Case of the European Court of Human Rights Case of Odièvre V. France[33] the applicant said that she defended the rights of the child. In France it was possible to act as if the mother did not exist, whereas in most countries in the world birth automatically created parental ties between the mother and the child she had brought into the world. By a legal fiction and because she had expressly sought confidentiality, the applicant's mother was deemed never to have given birth. The applicant described how difficult it was for her to live without knowing her original identity and complained not only of the arbitrary interference in her life as an ordinary citizen caused by the system used to preserve confidentiality, but also of culpable failure on the part of the domestic authorities through their refusal to disclose the requested information even though it was available in the file.[34]

While recognising the child's fundamental right to receive information about its biological origins and ascendants under Article 8 of the UN Convention, the State authorities may, in accordance with Article 8 paragraph 2, nevertheless implement measures that are designed to protect the rights of others and the general interest. It is clearly in the general interest for appropriate measures to be taken to improve the situation of mothers in distress and to protect children's lives by reducing so far as possible the number of abortions, whether legal or illegal. That, to my mind, is an overriding consideration that may prevail over a child's right to know its origins.[35] Persons who seek disclosure at any price, even against the express will of their natural mother, must ask themselves whether they would have been born had it not been for the right to give birth anonymously. That concern serves and may legitimately serve as the basis for the State's decision to introduce and uphold such a system.

Here, the Court distinguishes between two relevant stages: the first stage is represented by the prenatal period, delivery and the time immediately after the child is born; the second stage is the time after the child has been born safely. At the second stage the interests of both the child and its mother fall under Article 8 of the

[33]Application no. 42326/98, dated on 13th February 2003.
[34] Judgement in the Case of Odièvre V. France, p. 19.
[35] As stated in this case p. 33.

UN Convention. At the prenatal stage, at the time of delivery and immediately afterwards both the mother and the child/the unborn child have rights under Articles 2 and 3 of the UN Convention also. With reference to the latter there is no need in this context to decide whether a child in utero is separately protected under Article 2 of the Convention or through its mother, the old maxim "infans conceptus pro nato habetur quoties de commodis ejus agitur" is respected either way.

The Court moreover, recognises that the right to life is superior to any other right – all other rights are about giving quality to that very life. The question in the certain case is whether to protect life and give birth anonymously or to protect a child`s right to know the identity of her mother, when at the time of the procedure, the child was already an adult.

The ideal situation is and will remain that even a woman who is pregnant under difficult circumstances – which characterises the situation at issue in the present and similar cases where women today have opted for anonymity when giving birth – should be able to give birth under circumstances that ensure her and her baby's safety and make it possible for the child to know the mother's identity, even if it is immediately adopted by a new family. When, however, a woman for whatever reason finds that this is not an option in her case – which it may be difficult for anyone else fully to appreciate – human rights should nonetheless militate in favour of her being able to give birth under circumstances that ensure her and her baby's safety, even if she insists on remaining anonymous vis-à-vis the child. It would be plainly inhumane to invoke human rights to force a woman in this situation to choose between abortion or a clandestine birth; the latter always holds a potential of jeopardising the mother's and/or the child's health and, if worst comes to worst, could be life threatening and/or result in the child being stillborn.[36]

The right of an adopted child to know his origin is not an absolute right according to the European Convention on the Adoption of Children, as a balance must be struck between the right of the child to know his origin and the right of the child's biological parents to remain anonymous, as in the above case.

The right of a child to know his own origin is regulated differently in the legislation of European countries; some legislation, e.g., Bosnia and Herzegovina and Croatia, even order adoptive parents to inform the child that they are adopted. In the procedure for the adoption of a child, the court must check whether the conditions are met by the person or persons who wish to adopt the child, i.e., the prospective adopter and also the future adoptee, i.e., the child who is to be adopted.

[36]Concurring Opinion of Judge Greve in the Case of Odièvre V. France, p. 39.

In particular, the court must check whether the adoption is in the best interest of the child (paragraph 1 of Article 229 of the FC).[37]

The principle of the best interests of the child is not designed as a kind of super-right and cannot be used to override other rights – for example, when deciding whether a child should be considered adoptable or not. While decisions to withdraw parental care, which could open the door to adoptive parents, must be clearly based on the best interests of the child, the adoptability decision-making process itself depends on a number of specific and clear rights-based criteria that cannot be altered by other considerations. The criterion of the greatest benefit is the basis for defining the most appropriate outcome for an individual child who is actually "adoptable," and its interpretation must be in accordance with all other rights from the UN Convention and other relevant instruments. This determination process involves the assessment of a number of factors that have nothing to do with the alleged "better position of the child elsewhere."[38]

**Bibliography**

Convention on the rights of the Child, adopted by the General Assembly resolution 44/25 of the United Nations on 20th November 1989.
Družinski zakonik, Uradni list RS, št. 15/17, 21/18 - ZNOrg, 16/19 - ZNP-1, 22/19, 67/19 - ZMatR-C, 200/20 - ZOOMTVI, 94/22 - odl. US, 94/22 - odl. US.
ECHR judgement from 08.01.2013, A.K. and L. v. Croatia.
ECHR judgement from 13.02.2003, Odièvre v. France.
ECHR judgement from 22.06.2004, Pini and Bertani & Manera and Atripaldi v. Romania.
ECHR judgement from 25.09.2012, Godelli v. Italy.
European Convention on the Adoption of Children, 27.11.2008.
KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. - DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD*.
The Declaration of the Rights of the Child, 20.11.1959.
The European Convention on Human Rights, 04.11.1950.

[37] KRALJIĆ, S. - KEŽMAH, U. - ČUJOVIČ, M. -DAJČMAN, A.: Zakon o nepravdnem postopku – ZNP-1 s komentarjem, *Založba WD, 2022*, 512.
[38] Commissioner for Human Rights, Adoption and Children: Human Rights Perspective,CommDH/IssuePaper(2011)2, Strasbourg, 28th April 2011, p. 14.

Ustava RS, Uradni list RS, št. 33/91I, 42/97 - UZS68, 66/00 - UZ80, 24/03 - UZ3a, 47, 68, 69/04 - UZ50, 69/04 - UZ43, 69/04 - UZ14, 68/06 - UZ121,140,143, 47/13 - UZ90,97,99, 47/13 - UZ148, 75/16 - UZ70a, 92/21 - UZ62a.
Zakon o nepravdnem postopku – ZNP-1, Uradni list RS, št. 16/19.

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**VÁMOSI VIVIEN CINTIA** *

# *A pénzmosás bűncselekmény szabályozásának fejlődése*

**Absztrakt**
A pénzmosás az egyike a tíz legveszélyesebb vagyon ellen elkövethető bűncselekménynek, melynek fontosságát jelzi, hogy Büntető Törvénykönyvünk önálló fejezetben szabályoz. A legtöbb bűnöző e bűncselekménnyel próbálja elfedni az alapbűncselekményt, illetve az abból származó hasznot.E bűncselekményt későn kezdték el szabályozni, az első vonatkozó jogszabály Amerikában született meg 1986-ban. Hamarosan Európa is felismerte a bűncselekmény elleni fellépés fontosságát. Eleinte különböző egyezményekben határozták meg a cselekmény jellemzőit és szankcióit, később pedig az Európai Unió irányelvi szinten kezdte el szabályozni a bűncselekményt. E szabályozási folyamat mind a mai napig tart, hogy minél hatékonyabban vehessék fel a küzdelmet a pénzmosás bűncselekménnyel szemben.

**Kulcsszavak**: bűntetőjog, pénzmosás, Európai Unió, irányelvek, orgazdaság

**Abstract**:
Money laundering is one of the ten most dangerous crimes against property, the importance of which is reflected in the fact that our Criminal Code has a separate chapter on the subject. Most criminals use this offence to cover up the underlying offence and the profits derived from it. This crime has been a latecomer to regulation, with the first legislation in this area being passed in America in 1986. Europe soon recognised the importance of this phenomenon and started to regulate it. At first, the characteristics and penalties were defined in various individual acts, and later the European Union began to regulate the offence at directive level. This regulatory process continues to this day in order to combat the crime of money laundering as effectively as possible.

**Keywords**: criminal law, money laundering, European Union, directives, dealing in stolen good

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## 1. Introductory thoughts

The crime of money laundering has grown in importance over the last decades. A large number of criminals use this act to try to hide from the authorities the assets they have obtained from other criminal activities. There are an increasing number

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of ways to do this, although concealment through banking systems is still the most common method. However, the offenders are increasingly turning their attention to cryptocurrencies because of their untraceability. The money laundered through the banking system is usually used to fund future crimes, further aiding the criminals. Another major problem is that the origin of the laundered money is almost impossible to trace, making it more difficult to detect the underlying crimes.

Under international rules, each state must designate a central body to receive and investigate suspicious activity reports according to a strict protocol. The results of the operational analysis are forwarded to the competent authorities. These competent bodies are the Financial Intelligence Units (FIUs). In Hungary, this task is carried out by the Anti-Money Laundering and Counter-Terrorist Financing Bureau (FIU), which is part of the Central Administration of the National Tax and Customs Administration. [1]

The Hungarian Anti-Money Laundering Bureau conducts analytical and evaluative activities to combat, prevent, detect and investigate criminal offences. This activity includes operational and strategic analysis. Operational analysis is triggered when the service provider makes a notification under its obligation or when the supervisory body becomes aware of the data, facts or circumstances on which the notification is based. Strategic analysis means the examination of the processes related to money laundering and terrorist financing.[2]

## 2. The evolution of regulation

### *2.1. The period 1986-2005*

The regulation of the fight against the crime of money laundering now plays an important role in almost all countries, appearing in their criminal codes. It is a relatively new crime, the criminalisation of which has evolved in line with the fight against organised crime.[3] The first regulations appeared in the United States of America, where the first Anti-Money Laundering Act was adopted in 1986. By enacting federal legislation to criminalise the laundering of illicit proceeds, Congress was responding to the growth and prevalence of money laundering.[4] Soon the danger of the crime was recognised worldwide, and the fight soon spread to Europe.

[1] SIMONKA G.: A pénzmosás elleni intézményrendszer a Pénzmosás Elleni Információs Iroda szemszögéből. Kriminológiai Közlemények 72 69-82.

[2] https://pei.nav.gov.hu/elemzo-ertekelo-tevekenyseg/elemzo-ertekelo-tevekenyseg (download time 2023.02.05.)

[3] JACSÓ J.- UDVARHELYI B.: A pénzmosás elleni fellépés aktuális tendenciái az Európai Unióban. Ügyészségi Szemle 2017=01. II. évfolyam 1. szám 6-31. o

[4] GURULE, J. The Money Laundering Control Act of 1986: Creating a new federal offense or Merely affordingfederal prosecutors an alternative means of punishing specified unlawful activity? 32 Am. Crim. L. Rev. 823 (1994-1995)

Initially, the main aim of criminalising money laundering was to drain the financial base of drug trafficking and organised crime. The crime soon became a focus of attention for the European Communities and then the European Union. At that time, it was a general defence against organised crime and was considered a serious cross-border crime. The result of the European Union's policy, the four freedoms, threatened to make it easier for criminals to legalise their income. To be effective in combating the crime, the European Union had to set up an anti-money laundering policy. This policy was based on two main pillars: criminal and non-criminal law instruments. The criminal law instruments were the EU's Pillar III instruments, while the non-criminal law instruments were the anti-money laundering directives. These directives were (and still are) used to prevent the use of the financial sector for money laundering.[5]

In Europe, the Vienna Convention of 1988 was the first international document to mention money laundering as a criminal offence in the context of drug trafficking. Hungary joined the convention ten years later, and promulgated it with Act L of 1998. Another important international document is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on 8 November 1990. It was also promulgated in Hungary ten years later, with Act CI of 2000. Another important convention is the Convention against Transnational Organised Crime (Palermo Convention, 14 December 2000). Hungary ratified this convention by Act CI of 2006. The last major milestone was the 2005 Warsaw Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. It was promulgated in Hungary in 2008.[6]

International organisations that operate on the principle of mutual evaluation between Member States are an effective tool in the fight against money laundering. The most important of these is undoubtedly the FATF, the International Financial Action Task Force. This organisation was set up in July 1989 in Paris, where the seven leading economic powers of the world decided to create an international organisation specialised in the fight against money laundering. Its task is to coordinate the national programmes developed in the countries, to establish links between the authorities and to put into practice the principles of the Basel Declaration and the Vienna Convention.[7] The FATF's mission is to combat money

[5] JACSÓ J.: A pénzmosás compliance hazai és európai dimenzióban a társadalmi innováció tükrében. Miskolci Jogi Szemle 14. évfolyam (2019) 2. különszám 1. kötet 394-412. o.
JACSÓ J.- UDVARHELYI B.: A pénzmosás elleni fellépés aktuális tendenciái az Európai Unióban. ÜgyészségiSzemle 2017=01. II. évfolyam 1. szám 6-31. o

[6] GÖRGÉNYI I.- GULA J.- HORVÁTH T.- JACSÓ J.- LÉVAY M.- SÁNTHA F.- VÁRADI E.: Magyar büntetőjog különös rész. Wolters Kluwer Hungary. Budapest. 2020. 781-798.

[7] https://www.fatf-gafi.org/about/historyofthefatf/ (download time 2023.02.05.)
https://www.fatf-gafi.org/about/whatwedo/ (download time 2023. 02.05.)

laundering, and to this end it drew up a 40-point recommendation in 1990, which lays down the basic principles of the fight against money laundering, although it has been amended several times since then.[8] Another very important organisation is Moneyval, which was set up in 1997 in cooperation with the FATF and the European Council. [9] The members of this organisation include not only the Member States of the European Union but also overseas territories and various international organisations. It was set up to assess the compliance of each Member State with the FATF Recommendations and the effectiveness of their national rules in the fight against money laundering.[10] In carrying out this assessment, an evaluation team analyses the Member State's legislation, adds it to the FIU's recommendations and writes its report. This report is discussed and adopted in plenary sessions.[11]

## 3. Evolution of EU legislation

As regards the development of the criminal law on money laundering, we cannot ignore the European Union's legislation.

The Council decided to issue a directive to ensure that the rules were adequate, since all the participating States had to transpose the directive into their national legislation as a binding secondary source of law.

### *3.1. Anti-Money Laundering Directives I and II*

The first Directive on the fight against money laundering was issued by the Council of the European Communities in 1991. The Directive served three main purposes. Its primary objective was to prevent criminals from using the benefits of the single market to launder money. This was important not only to legalise the criminal profits but also to protect the stability of the financial system. Secondly, it was intended to prevent Member States from taking measures contrary to the functioning of the single market in the fight against money laundering offences. The third objective was to organise effective action against organised crime and drug trafficking.[12] This Directive was amended by Directive 2001/97/EC of the European Parliament and of the Council. A significant part of the Directive involves

[8] PAZ, V: Mercosur: Bill on Money Laundering: FATF requirements, International Trade Law & Regulation2010, 12
[9] https://www.coe.int/en/web/moneyval/home ( download time 2023. 02.05.)
[10] https://www.coe.int/en/web/moneyval/moneyval-brief ( download time 2023. 02.05.)
[11] https://www.coe.int/en/web/moneyval/moneyval-brief/structure ( download time 2023.02.05.)
[12] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering

clarification of definitions. The definition of money laundering has also been broadened compared to the previous regulation.[13]

### *3.2. Anti-Money Laundering Directive III*

In 2005, Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing was adopted as the European Union's Third Anti-Money Laundering Directive. The Directive aims to prevent the use of financial sectors and certain non-financial sectors for the purpose of money laundering and terrorist financing in accordance with the Financial Action Task Force (FATF) standards. The creation of this legal source also gives priority to the identification of the true identity of customers, the obligation to report suspicious transactions and the establishment of prevention systems within organisations. The Directive extends the scope of the sectors covered by the Directive, including the obligation for lawyers, notaries and all distributors to report sales involving cash payments of €15 000 or more. They are also obliged to carry out customer due diligence, to report suspicions of money laundering and terrorist financing and to provide appropriate training for their staff.[14]

### *3.3. Anti-Money Laundering Directive IV*

A major change following the Third Anti-Money Laundering Directive was the adoption of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing ten years later. This Directive saw the prevention of abuse in the financial markets as the main line of defence. One of its main objectives is to ensure that the provisions of the Third Money Laundering Directive are applied more widely and thus to replace it. The legislators sought to remove any ambiguities at both the Directive's and statutory level that could have caused problems and to ensure consistency in the way Member States drafted and applied the legislation. From 2015, the Directive now covers not only former financial and non-financial businesses but also traders in goods, if the amount of cash payments was at least €10 000. The rules on customer due diligence have been tightened, in particular with regard to beneficial owners, and a central database has been required to record information on them. The Directive draws attention to the shortcomings in the fight against crime and the possibilities for protection. It establishes a coherent European policy for the protection of the

[13] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on the use of the financial system for the purpose of money laundering

[14] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

financial system against third countries which do not have an effective system of protection against money laundering. Last but not least, it improves cooperation between the Member States' financial information systems, with FIU.net as the designated platform for the exchange of information.[15]

### *3.4. Anti-Money Laundering Directive V*

The next major EU milestone was the Fifth Anti-Money Laundering Directive, Directive 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU. This Directive entered into force in summer 2018. Several objectives have been set. It sought to make the ownership of companies and trust services more transparent. Controls have been tightened for high-risk third countries. Another objective is to address the risks associated with prepaid cards and virtual currencies. Achieving even better cooperation between national financial information units will also be envisaged. Finally, the aim is to improve cooperation and information exchange between the anti-money laundering supervisory authorities and the European Central Bank (ECB).[16]

### *3.5. Directive 2018/1673 on combating money laundering by criminal law*

Closely linked to the aforementioned Directive is Directive 2018/1673 on the fight against money laundering by criminal law. This Directive also recognises that money laundering is an EU-wide problem that seriously affects confidence in the financial sector and the internal market and security of the European Union. The aim of this Directive is to build up the possibilities for combating money laundering by means of criminal law instruments and to improve the effective flow of information between authorities and cross-border cooperation.[17]

The Directive first defines and clarifies the definition of the offence of money laundering and the basic offences, which have been significantly extended. Compared to Directives 2015/849 and 2018/843, the Criminal Law Directive lists more than twenty offences as possible predicate offences for money laundering. These include, but are not limited to, terrorism, sexual exploitation, corruption,

[15] Directive 2015/849/EC of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

[16] Directive 2018/843/EC of the European Parliament and of the Council of 30 May 2018 amending Directive 2015/849/EC on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU

[17] Directive 2018/1673/EC (recital 1)

fraud, counterfeiting, direct and indirect tax offences as defined by international law, etc.[18]

For the other offences, Member States are free to decide which they consider to be possible predicate offences, this list being a general rule. It is also stipulated that any offence punishable by a maximum term of imprisonment of more than one year or a measure involving deprivation of liberty may constitute a predicate offence.[19]

The Directive sets out the four intentional conducts of the offence. It requires that the offence is committed intentionally and with knowledge that the property is derived from the offence. These can be inferred from objective factual circumstances. At the same time, the Directive allows Member States to apply a sanction even if the offender should have known that the property was derived from a criminal offence.[20] The Directive also leaves the door open to making negligent money laundering a criminal offence.[21]

It is also a new regulation that it was not necessary to obtain a conviction for the predicate offence or to establish all the elements of the predicate offence. Furthermore, money laundering was criminalised even when the predicate offence was committed in the territory of another Member State or a third country. With exceptions, however, double incrimination is possible in this case, so that the predicate offence can be criminalised both in the place where the money laundering was committed and in the country where it was committed. It has also become compulsory to sanction the laundering of own money.[22] The Directive also makes specific provision for participatory behaviour and experimentation.[23] The legislation sets out in detail the range of sanctions that can be applied, which have also been extended compared to the previous legislation. The penalties must be effective, proportionate and dissuasive, and the maximum term of imprisonment is set at a minimum of four years. Additional penalties and measures have been added where necessary.[24] The Directive also contains a partial provision with regard to aggravating circumstances, in particular where the offender is a service provider covered by the 4th Anti-Money Laundering Directive. Legal persons may also be

[18] Directive 2018/1673/EC Article 2(1)
[19] JACSÓ J.-UDVARHELYI B.: A pénzmosás elleni küzdelem Magyarországon. Az európai Unió pénzügyi érdekei védelmének büntetőjogi aspektusai. Szerk.: FARKAS-DANNECKER-JACSÓ Wolters Kluwer Hungary 2019.295-309.
[20] Directive 2018/1673/EC Article 3(2)
[21] Directive 2018/1673/EC Recital 13
[22] JACSÓ J.- UDVARHELYI B.: A pénzmosás elleni küzdelem Magyarországon. Az európai Unió pénzügyi érdekei védelmének büntetőjogi aspektusai. Szerk.: FARKAS-DANNECKER-JACSÓ Wolters Kluwer Hungary 2019.295-309.
[23] Directive 2018/1673 Article 4
[24] Directive 2018/1673 Article 5

held liable under the Directive and may be subject to financial penalties, exclusion from public aid, disqualification from engaging in business activities, etc.[25]

### *3.6. Package of proposals to revise the rules on money laundering and terrorist financing*

The most recent developments in the fight against money laundering occurred in the summer of 2021, when the European Commission presented a new package of proposals to strengthen EU rules. A proposal was made to set up a new single EU authority to combat money laundering, with the aim of improving the detection of suspicious transactions and activities and reducing the opportunities for criminals to launder illegally obtained assets. The new strategy aims to improve existing EU legislation to take account of the new challenges of digitalisation. These challenges include the emergence of virtual currencies, the complexity of financial transactions, the emergence of cryptocurrencies, etc. This package of proposals contains four main pieces of legislation. First and foremost, a Regulation establishing a new EU authority. This Authority (AML Authority - AMLA) will be responsible, inter alia, for establishing a single supervisory regime in the participating States and for placing the riskiest financial institutions under its direct supervision. The authors of the proposal aim to have an active, operational and effective authority by 2024. Another important part of the package is the creation of a new regulation to further strengthen the rules on customer due diligence and beneficial ownership. For large cash payments

A ceiling of €10,000 has been set for the whole of the EU. No higher due diligence thresholds can be set by the participating states (below €10,000 can of course still be set). The final piece of the package is the drafting of the Sixth Anti-Money Laundering Directive, which will replace Directive 2015/849. Directive (EU) 2015/847 of 2015 has been revised to facilitate the monitoring of crypto-asset transfers. Currently, only certain crypto-asset providers are regulated by the European Union, which is what the Commission wanted to change. The new legislation aims to make Bitcoin transactions traceable and to detect and prevent the use of crypto assets for money laundering.[26]

As money laundering is a global phenomenon, it can only be effectively tackled through strong international cooperation. The Commission will seek to work with international partners in a concerted effort to prevent the movement of money

[25] JACSÓ J.- UDVARHELYI B.: A pénzmosás elleni küzdelem Magyarországon. Az európai Unió pénzügyi érdekei védelmének büntetőjogi aspektusai. Szerk.: FARKAS-DANNECKER-JACSÓ Wolters Kluwer Hungary 2019.295-309.

[26] JACSÓ J.- UDVARHELYI B. A pénzmosás elleni küzdelem Magyarországon. Az európai Unió pénzügyi érdekei védelmének büntetőjogi aspektusai. Szerk.: FARKAS-DANNECKER-JACSÓ Wolters Kluwer Hungary 2019.295-309.

laundering assets. The Financial Action Task Force continues to make recommendations to countries to combat money laundering and terrorist financing. It is planned that in the future, countries listed by the FATF will be listed by the European Union itself. Two lists are planned, a black list and a grey list, in line with the FATF lists. This list will facilitate the application of risk proportionate measures. The EU may also list countries outside the FATF list, but the threat to the financial system must be taken into account in this case.[27]

## 4. The Hungarian legislation

In terms of the development of Hungarian legislation, we can say that we are talking about a relatively late criminalisation of the offence. It gained prominence in the context of the wider spread of drug-related offences, as the proceeds of the underlying offence had to be made legal in some way.[28] Hungary fulfilled its international commitment by criminalising money laundering in 1994 with Act IX of 1994. This made money laundering an economic crime. In the same year, Parliament adopted Act XXIV of 1994 on the Prevention and Suppression of Money Laundering, known as the Pmt of 1994.. At that time, money laundering was only punishable in connection with serious criminal offences. The Hungarian legislators thus fulfilled a condition for accession to the European Union, as the 1st Anti-Money Laundering Directive was transposed into Hungarian law.[29]

In 1999 a change took place, Act CXX of 1999 criminalised all money laundering activities related to an offence punishable by imprisonment. As a way of combating terrorism, the law was amended in 2001 to include money laundering. It also made it a criminal offence to provide false information to the customs authorities when crossing the state border. The law changed on two important points until 2007. The first was introduced by Act CXXI of 2001. Thanks to this law, the perpetrator of a previous offence became punishable for the offence of money laundering. Conceptually, this can be called laundering one's own money. An important amendment is that the reckless commission of money laundering has also been made punishable, and failure to report money laundering has also been made punishable.[30]

[27] European Commission press release. Fight against financial crime: Commission reviews rules on money laundering and terrorist financing. Brussels, July 2021

[28] PINTÉR B.: A pénzmosás elleni küzdelem az új magyar büntetőjogban PhD értekezés Pécsi Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskola 2012. 81.o.

[29] JACSÓ J.- UDVARHELYI B. A pénzmosás elleni küzdelem Magyarországon. Az európai Unió pénzügyi érdekei védelmének büntetőjogi aspektusai. Szerk.: FARKAS-DANNECKER-JACSÓ Wolters Kluwer Hungary 2019.295-309.

[30] GÖRGÉNYI I.- GULA J.- HORVÁTH T.- JACSÓ J.- LÉVAY M.- SÁNTHA F.- VÁRADI E: Magyar büntetőjog különös rész. Wolters Kluwer Hungary. Budapest. 2020. 781-798

The other major amendment was introduced by Act XXVII of 2007. The Act was adopted as a result of a provision of Directive 2005/60/EC of the European Parliament and of the Council of the European Union of 26 October 2005. This Directive aims to prevent the use of the financial and certain non-financial sectors for money laundering and terrorist financing in accordance with the FATF recommendations. The Directive introduced customer identification and enhanced customer due diligence, reporting suspicions of money laundering or terrorist financing to the authorities. The Directive has provided precise definitions to assist law enforcers, including the definition of terrorist financing, the scope and definition of the institutions applicable and the definition of assets.[31]

The next step in the domestic regulation of the crime of money laundering is the Criminal Code currently in force, Act C of 2012. In this Act, the legislator has already dedicated a separate chapter to the offence, thus emphasising the importance of the offence and the importance of defending against it.[32] The Penal Code, in force since 1 July 2013, deals with two offences, separating the offence of intentionally and recklessly committed money laundering from the offence of failing to report money laundering.[33] The protected legal interest is twofold, covering the fight against organised crime and the financing of terrorism, as well as the protection of confidence in the functioning of the legal economy, financial institutions and economic life.[34]

Since the Member States had to comply with the above-mentioned Anti-Money Laundering Directive VI by 3 December 2020, the amendments that entered into force with Law XLIII of 2020 brought about a significant change in the regulation of the offence.[35]

## 5. The crime of Dealing in Stolen Goods

When we talk about the development of the crime of money laundering, we cannot ignore the crime of dealing in stolen goods, as this crime is also part of money laundering since the entry into force of Act XLIII of 2020. Until then, however, this offence was also regulated separately under the offences against property.

[31] Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

[32] GÖRGÉNYI I.- GULA J.- HORVÁTH T.- JACSÓ J.- LÉVAY M.- SÁNTHA F.- VÁRADI E Magyar büntetőjog különös rész. Wolters Kluwer Hungary. Budapest. 2020. 781-798.

[33] 2012. évi C. törvény 399-401 §

[34] JACSÓ J.: A pénzmosás, in: HORVÁTH T. – LÉVAY M. (ed.): Magyar Büntetőjog. Különös Rész, Wolters KluwerKft., Budapest, 2013, 617 et seq

[35] JACSÓ J.: A pénzmosás hatályos magyar büntetőjogi szabályozása az európai uniós elvárások tükrében.Miskolci Jogi Szemle 16:5. 207-220

## 6. Changes to the offence of money laundering in the current Criminal Code

The Hungarian criminal legislation provides for three stages in relation to the offence of money laundering. The first two define the intentional and reckless forms of the offence (Articles 399-400 of the Criminal Code), while the third deals with the failure to report money laundering (Article 401 of the Criminal Code). Section 402 of the Criminal Code contains an interpretative provision.

The legal interest of the offence is the public interest in the suppression of organised crime and the social need to ensure that the offender does not retain the proceeds of crime. Three types of money laundering can be distinguished under the previous law. These are money laundering for the purpose of tracing the proceeds of another's crime, money laundering for the purpose of tracing the proceeds of another's crime without the purpose of tracing the proceeds of the crime and money laundering for the purpose of laundering the proceeds of one's own crime.[36] While the previous legislation provided for three criminal conducts, the Criminal Code in force from 1 January 2021 will provide for four type of punishable conducts.

The object of the offence has also changed. Whereas previously the object was the thing, now it has been replaced by the property. Directive 2018/1673 of the European Parliament and of the Council of the European Union defines property. According to this, property is "any asset, including tangible or intangible, movable or immovable, tangible or intangible, and any legal document or instrument, including electronic or digital, in any form, evidencing title to or interest in such assets."[37]

There has been a change in the outcome of the crime. While in the legislation in force until 31 December 2020 there was no result for the offence, under the new legislation there is a result for the first criminal conduct of money laundering. This result is the concealment of the origin of the property.

Previously, the offence of being committed by a lawyer was included in the legislation as a qualifying circumstance, but under the new legislation, a lawyer cannot commit the offence sui generis, but the law still provides for a more severe punishment, as the personal scope of the Anti-Money Laundering Act (AML[38]) also extends to lawyers in certain cases, which is included in the qualifying circumstances in the current legislation.

There has also been a change in the criminalisation of preparation. Under the rule in force until 31.12.2020, only the agreement to commit jointly was punishable; now all forms of preparation are punishable.

[36] European Parliament and Council of the European Union Directive 2018/1673
[37] European Parliament and Council of the European Union Directive 2018/1673
[38] 2017. évi LIII. törvény a pénzmosás és terrorizmus finanszírozásának megelőzéséről.

The amended legislation now also includes the offence of dealing in stolen goods, whereas under the old rules there were separate offences.

The offence of money laundering was previously not known as an offence, but the new legislation now includes it. The same applies to alternative penalties.

The money laundering offence used to be tried in the first instance by a court of law, but now it is tried in the first instance by the district and/or district court, and in rare cases by a court of law.

However, there are not only changes between the old and the new legislation, but also many similarities. An important feature is that reckless money laundering is still punishable.

## 7. The evolution of the regulation of dealing in stolen good and the current legislation

The regulation of the crime of dealing in stolen good dates back almost 145 years. As early as Article V of the Law of 1878, the Csemegi Code, contained provisions on the subject. According to this:

*"Article 370 Whoever, for pecuniary gain, obtains, conceals or procures the alienation of any thing known to have come into the possession of its owner or his accomplice as a result of the crime of theft, embezzlement, robbery or extortion, commits the crime of stealing and is punishable with imprisonment for up to five years.*

*And if the property comes into the possession of the owner or his agent through the offence of theft, extortion or embezzlement, or misappropriation, it is a misdemeanour to commit theft, and is punishable with imprisonment for up to two years.*

*Section 371: Stealing is a crime if committed by a person who has been convicted of robbery, extortion, theft, embezzlement or stealing twice. However, this rule shall not apply if ten years have elapsed since the last conviction.*

*Article 372 If the law imposes a penalty of more than ten years' imprisonment on the perpetrator of the offence committed and the fence was aware of the circumstances which entail the penalty indicated at the time of committing the offence, or if the fence is engaged in the business of fence-keeping, he shall be liable to imprisonment for a term of up to five years.*

*§ 373 In addition to imprisonment, the penalty for fence-sitting shall be deprivation of office and suspension of the exercise of political rights."*[39]

After the Second World War, the legislator differentiated between crimes against social property and crimes against personal property, so that crimes committed against the former were punished more severely. The crime of dealing in stolen goods was already a threat to property and property relations and the functioning of the judiciary under the Csemegi Code. It was considered a secondary offence, as it required the commission of a previous offence against property. It is an offence

[39] 1878. évi V. tc. 370-373.§

that can be classified as a criminal relationship, but can also be committed independently if the perpetrator of the underlying offence is not punishable or remains unknown during the proceedings.[40]

However, the much-mentioned Act XLIII of 2020 has introduced significant changes to the existing Criminal Code. The legislator has merged dealing in stolen good into money laundering, which was previously a separate offence. As a result, it is no longer included in the Criminal Code as a crime against property.[41] What has changed is that previously the offence could only be committed in respect of the things deriving from criminal offences listed in the Act, but now the basic act can be any criminal offence. The scope of the offence has also been extended. Previously, the typical conduct was acquisition, concealment and assisting in disposal, but now there are new elements (such as use). The offence has not changed, and the offender can be anyone except the person who committed the predicate offence or the person who is not the owner of the object of the offence. The predicate offence is usually theft, robbery, plunder, embezzlement, etc., which are associated with this type of conduct.[42]

As a result of the amendment, the sanctions for money laundering will also apply to the offence of dealing in stolen goods, unlike the previous system of sanctions. It is considered to be a basic offence if money laundering (and therefore also money stealing) is committed for a maximum amount of HUF 50,000,000. Previously, the penalty for money laundering varied from two years to ten years, depending on the value of the offence. Nowadays, the basic offence is an offence punishable by up to five years' imprisonment (so the general minimum is three months). Furthermore, the court may decide to impose alternative penalties and sanctions in this case, so that imprisonment is not even certain. With regard to qualified cases, it can be further stated that the value of the offence determines the size of the penalty imposed, which in the most serious cases can range from five to ten years (for offences of particularly high value, or for offences of particularly high value, the latter requiring also the offence to be committed in the course of a business, in the capacity of an official and as a specific service provider).[43]

## 8. Concluding thoughts

In summary, the prevention of money laundering and terrorist financing has historically played an increasing role in government policy and the functioning of

[40] GÖRGÉNYI I.- GULA J.- HORVÁTH T.- JACSÓ J.- LÉVAY M.- SÁNTHA F.- VÁRADI E: Magyar büntetőjog különös rész. Wolters Kluwer Hungary. Budapest. 2020. 718-721.
[41] ANGYAL P.: Sikkasztás, jogtalan elsajátítás, orgazdaság és bűnpártolás. A magyar büntetőjog kézikönyve 13. Attila-nyomda, Budapest, 1936. 168–204. o.
[42] 2012. évi C. törvény 399§ (4)
[43] AMBRUS I.: Digitalizáció és büntetőjog. Wolters Kluwer 2021. 148-156. o.

economies, yet it was relatively late in the development of regulation, starting in 1986. The United States of America was the first to take steps to regulate and prevent the crime, but Europe has not been idle. More and more organisations have been set up, such as the FATF and Moneyval. These were responsible for setting the rules and supervising the service providers covered. The European Union has also been actively involved in the development of the rules, and is still actively involved. These have helped to bring Member States' regulations into line with each other. The directives are constantly evolving to keep pace with the development of the offence, so that the latest offences can be tackled more effectively.

Hungary has also joined the measures adopted, transposing the directives into its national legal system in the form of laws. This led to the Act of 1994 on the Prevention of Money Laundering, which was updated in 2007 and again in 2017. Furthermore, money laundering itself became a criminal offence in our country as well, when it was introduced into our Criminal Code in 1994. Act C of 2012 now regulates the offence in a separate chapter. The most recent significant changes came into force on 01.01.2021 as a result of the latest European Union Directive.

The important changes not only affected the offence of money laundering per se, but also abolished the previously separate offence of dealing in stolen good. As a result of the amendment, this offence is now the fourth punishable conduct for money laundering. As a result, there have been significant changes to the offence of money laundering, including changes to the scope of the predicate offences, the offence and the system of penalties.

## Bibliography

AMBRUS I.: Digitalizáció és büntetőjog. Wolters Kluwer 2021. 148-156. o.

ANGYAL P.: Sikkasztás, jogtalan elsajátítás, orgazdaság és bűnpártolás. A magyar büntetőjog kézikönyve 13. Attila-nyomda, Budapest, 1936. 168–204. o.

Európai Bizottság sajtóközleménye. A pénzügyi bűncselekmények elleni küzdelem: a Bizottság felülvizsgálja a pénzmosás és a terrorizmusfinanszírozás elleni szabályokat. Brüsszel, 2021.július

GÖRGÉNYI I.- GULA J.- HORVÁTH T.- JACSÓ J.- LÉVAY M.- SÁNTHA F.- VÁRADI E: Magyar büntetőjog különös rész. Wolters Kluwer Hungary. Budapest. 2020. 781-798.

GÖRGÉNYI I.- GULA J.- HORVÁTH T.- JACSÓ J.- LÉVAY M.- SÁNTHA F.- VÁRADI E: Magyar büntetőjog különös rész. Wolters Kluwer Hungary. Budapest. 2020. 717-729.

JACSÓ J..: A pénzmosás, in: HORVÁTH T. – LÉVAY M. (ed.): Magyar Büntetőjog.

Különös Rész, Wolters Kluwer Kft., Budapest, 2013, 617 et seq.

JACSÓ J. A pénzmosás compliance hazai és európai dimenzióban a társadalmi innováció tükrében. Miskolci Jogi Szemle 14. évfolyam (2019) 2. különszám 1. kötet 394-412. o.

JACSÓ J.: A pénzmosás hatályos magyar büntetőjogi szabályozása az európaiuniós elvárások tükrében. Miskolci Jogi Szemle 16:5. 207-220

JACSÓ J.: Gondolatok az Európai Unió pénzmosás elleni büntetőpolitikájáról a hatodik Pénzmosás elleni uniós irányelv tükrében. Kriminológia és kriminálpolitika a jogállam szolgálatában. Szerk: BÁRD P.-BORBÍRÓ A.-GÖNCZÖL K. 2019. 401-410. o.

JACSÓ J.- UDVARHELYI B.: A pénzmosás elleni fellépés aktuális tendenciáiaz Európai Unióban. Ügyészségi Szemle 2017=01. II. évfolyam 1. szám 6-31.o

JACSÓ J.- UDVARHELYI B.: A pénzmosás elleni küzdelem Magyarországon. Az Európai Unió pénzügyi érdekei védelmének büntetőjogi aspektusai. Szerk.: FARKAS-DANNECKER-JACSÓ Wolters Kluwer Hungary 2019. 295-309.

GURULE, J. The Money Laundering Control Act of 1986: Creating a new federal offense or Merely affording federal prosecutors an alternative means ofpunishing specified unlawful activity? 32 Am. Crim. L. Rev. 823 (1994-1995)

PINTÉR B. A pénzmosás elleni küzdelem az új magyar büntetőjogban PhDértekezés Pécsi Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskola 2012. 81.o.

SIMONKA G: A pénzmosás elleni intézményrendszer a Pénzmosás Elleni Információs Iroda szemszögéből. Kriminológiai Közlemények 72

PAZ, V.: Mercosur: Bill on Money Laundering: FATF requirements,International Trade Law & Regulation 2010, 12

2017. évi LIII. törvény a pénzmosás és terrorizmus finanszírozásának megelőzéséről.

2012. évi C. törvény a Büntető Törvénykönyvről

1878. évi V. tc. a magyar büntetőtörvénykönyv a büntettekről és vétségekről

Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering Official Journal L 166 , 28/06/1991 P. 0077 - 0083

Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering Official Journal L 344 , 28/12/2001 P. 0076 - 0082

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose

of money laundering and terrorist financing Official Journal L 309, 25/11/2005 15-36

Directive 2015/849/EC of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC Official Journal L 141, 5.6.2015, p. 73–117

Directive (EU) 2018/843/EC of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849/EC on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU Official Journal L 156, 19.6.2018, p. 43–74

Directive of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law means Official Journal L 284, 12.11.2018, p. 22–30

https://pei.nav.gov.hu/elemzo-ertekelo-tevekenyseg/elemzo-ertekelo-tevekenyseg (download time: 2023.02.05.)

https://www.fatf-gafi.org/about/historyofthefatf/ (download time: 2023.02.05)

https://www.fatf-gafi.org/about/whatwedo/ (download time: 2023.02.05)

https://www.coe.int/en/web/moneyval/home (download time: 2023.02.05 )

https://www.coe.int/en/web/moneyval/moneyval-brief (download time: 2023.02.05 )

https://www.coe.int/en/web/moneyval/moneyval-brief/structure (download time: 2023.02.05)

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# *Az adóelkerülés nemzetközi trendjei és az arra adott válaszok*

**Absztrakt**

Már a mindennapokban is érezzük, egy új világ kezdődött, a digitalizáció újrarendezi a gazdasági viszonyokat. A hagyományos termékek és szolgáltatások köre kibővült a digitális termékek és szolgáltatások körével. A digitális gazdaság határon átnyúló online szolgáltatást foglal magában, mely tevékenység megadóztatása számos eltérést mutat az egyes országok különböző adóztatási rendszerei miatt. Ennek pedig az a következménye, hogy az Európai Unió legtöbb tagállama sokkal kevesebb adóbevételhez jut a digitális szolgáltatást nyújtó vállalatok tevékenysége után, mint amennyi méltányos lenne.

**Kulcsszavak**: adójog, reklámadó, digitális szolgáltatások adóztatása, digitális gazdaság

**Abstract:**
We can already feel that a new world has begun, digitalization is rearranging economic conditions. The range of traditional products and services has expanded with the range of digital products and services. The digital economy includes cross-border online services, the taxation of which activity shows many differences due to the different taxation systems of individual countries. The consequence of this is that most member states of the European Union receive much less tax revenue from the activities of companies providing digital services than would be fair.

**Keywords:** tax law, advertising tax, taxation of digital services, digital economy

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## 1. Bevezetés

Már a mindennapokban is érezzük, egy új világ kezdődött, a digitalizáció újrarendezi a gazdasági, politikai, társadalmi viszonyokat, illetve az egyes ágazatok súlyát, szerepét. A hagyományos termékek és szolgáltatások köre kibővült a digitális termékek és szolgáltatások körével. A digitális gazdaság határon átnyúló online szolgáltatást foglal magában, mely tevékenység megadóztatása számos eltérést mutat

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az egyes országok különböző adóztatási rendszerei miatt.[1] A legnagyobb nehézség ezen a téren az, hogy a nemzetközi adóztatás hagyományos szabályai szerint az adóztatás abban az országban történik, ahol a vállalkozás tényleges fizikai jelenléttel rendelkezik, a digitális szolgáltatások nyújtásához azonban nincs szükség fizikai jelenlétre a szolgáltatásnyújtás országában.[2] Ennek köszönhetően a digitális nagyvállalatok jelentős profitot termelnek, viszont adózniuk rendszerint ott kell, ahol a székhelyük található.[3] Ez a nemzetközi adóztatás szabályai szerint adóelkerülésre ad lehetőséget. Emellett agresszív adótervezési technikákat alkalmaznak, ezzel használják ki az egyes országok adórendszerében lévő különbségeket. Ennek pedig az a következménye, hogy az Európai Unió legtöbb tagállama, sokkal kevesebb adóbevételhez jut a digitális szolgáltatást nyújtó vállalatok tevékenysége után, mint amennyi méltányos lenne.[4] A gyors változások pedig még nehezebbé teszik egy olyan adórendszer kialakítását, amely a fent említett problémákat megfelelően tudná kezelni.[5]

Az egyes országok különböző, már meglévő (jövedelemadók és forgalmi típusú adók), illetve újonnan megalkotott adótípusokkal kívánják kezelni ezen nehézségeket. A tanulmány további részében megkísérlem bemutatni azt, hogy a gyakorlatban miért is annyira komplikált a vállalkozások digitális tevékenysége után beszedendő adók valós mértékének megállapítása. Tekintettel arra, hogy a különböző államok által a reklámok, digitális szolgáltatások megadóztatására megalkotott egyes adótípusok részletes elemzését a tanulmány terjedelmi korlátai nem teszik lehetővé, így a Magyarországon is alkalmazandó reklámadón keresztül ismertetem, pontosan miért okoz problémát, illetve milyen hatással bír az adott ország adórendszerére egy nemrégiben megalkotott különadó.

[1] RÁCZ Dániel: A nemzetközi adózás új kihívásai: a digitális gazdaság p. 314. https://edit.elte.hu/xmlui/bitstream/handle/10831/35726/Jogi_tan_2014_Racz_Daniel_312-322.pdf?sequence=1&isAllowed=y
(Utolsó letöltés ideje: 2022. április 8.)
[2] VARGA Erzsébet: A nemzetközi adójog kihívásai a globalizáció és a digitális gazdaságtükrében p. 107. http://ias.jak.ppke.hu/hir/ias/20193sz/10_VargaE_%20IAS_2019_3.pdf
(Utolsó letöltés ideje: 2022. április 8.)
[3] KPMG: Observations on OECD Interim Paper and EU Commission Digital Tax Proposals https://assets.kpmg/content/dam/kpmg/be/pdf/2018/08/GM-FTS-0440-Digital-Tax-report_V5.pdf
(Utolsó letöltés ideje: 2022. április 8.)
[4] PULAY – TESKI (2020): i.m.
[5] THORNE (2013): i.m. p. 5.

## 2. A digitális szolgáltatások jövedelemadózással kapcsolatos nehézségei[6]

Az OECD Modellegyezmény 7. cikke és az erre épülő kettős adóztatás elkerüléséről szóló egyezmények rendelkezései alapján jelenleg a forrásország a külföldi illetőségű vállalkozásnak csak azt a nyereségét adóztathatja, amely a forrásországban létesült telephelyének tudható be.[7] A jövedelemadózásban a telephely fogalmának meghatározásánál meg kell vizsgálni, hogy a nem belföldi székhelyű vállalkozás rendelkezik-e telephellyel az adott állam területén, azaz, hogy telephelye okán belföldi illetőségűnek minősül-e a vállalkozásból. Ebből következően felmerül az a kérdés is, hogy mi minősül telephelynek a vállalkozás külföldi jelenléte okán. Az OECD Modellegyezmény egy fizikailag is meghatározható üzleti helyet követel meg, amely akár gép vagy berendezés is lehet, nem szükséges irodának lennie. A telephelynek hozzá kellene járulnia a vállalkozás bevételeihez is, ez adja a produktív jellegét. Fontos elem továbbá az állandóság is, azaz a tevékenységet folyamatosan és nem ideiglenes jelleggel kell folytatnia.[8] Az egyes forrásországok adóztatási jogát a fix hely által meghatározott telephely mint kapcsolószabály hozza létre. Ha a forrásországban a nyereséget szerző vállalkozás nem rendelkezik telephellyel, egyéb kapcsolószabály hiányában a forrásország nem tudja adóztatni azt a nyereséget, amelyet az ottani vásárlóknak történő értékesítés útján a külföldi illetőségű vállalkozás elér. A koncepció lényege tehát a külföldi illetőségű vállalkozás és a forrásország adóztatási joga közötti „kapcsolat" megteremtése. A telephely mint kapcsolószabály alapvető funkciója tehát, hogy meghatározza, mely esetekben minősül egy külföldi illetőségű vállalkozás forrásországbeli tevékenysége elég „jelentősnek" ahhoz, hogy a forrásország az ott keletkezett nyereséget adóztathassa.[9]

## 3. A digitális szolgáltatások forgalmi adózással kapcsolatos nehézségei

A forgalmi adózás rendszerében kiemelkedő jelentősége van a letelepedésnek a teljesítés helyének maghatározása szempontjából, különösen a szolgáltatások körében. A Közösségen belüli szolgáltatások teljesítési helye nagyban függ attól, hogy annak nyújtója és igénybe vevője hol telepedett le. Egy vállalkozásnak, ahol a székhelye vagy telephelye van, ott minősül letelepedettnek. A 282/2011/EU végrehajtási rendelete szerint a gazdasági tevékenység székhelye a vállalkozás

[6] U.o. p. 7.
[7] RÁCZ (2014): i.m. p. 314.
[8] SZLIFKA Gábor: A hozzáadottérték-adó jelene és jövője Európában p. 133. (https://jak.ppke.hu/uploads/articles/12332/file/Szlifka_Gabor_dolgozatk.pdf) (2020. október 21.)
[9] RÁCZ (2019): p. 315.

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központi ügyvezetésének helye. Megadja továbbá az ún. passzív és aktív telephely fogalmat. A passzív telephely a szolgáltatások fogadására alkalmas jelenlét, amely a szolgáltatások teljesítési helyének megállapítása szempontjából lényeges. Passzív telephelynek minősül, amely a személyi és tárgyi feltételek tekintetében kellően állandó jelleggel és megfelelő szervezettel rendelkezik a szükségleteinek kielégítésére igénybe vett szolgáltatások fogadásához és használatához. Aktív telephely esetén az adóalanynak azt a telephelyét kell figyelembe venni, amely a személyi és tárgyi feltételek tekintetében kellően állandó jelleggel és megfelelő szervezettel rendelkezik azon termékértékesítés vagy szolgáltatásnyújtás teljesítéséhez, amelyben részt vesz. Nehézséget jelenthetnek a határokon átnyúló szolgáltatások, hiszen előfordulhat, hogy egyik vagy mindkét félnek több letelepedése is érintett.[10]

A digitális szolgáltatások esetében felmerül még egy kérdés azzal kapcsolatban, ha személyzetet is fenntart egy fizikailag jól körülhatárolható területen, hiszen ez a letelepedés kérdéskörét is érinti. Ha a létesítmény a héa értelmezésében letelepedettséget generál, akkor ebben az esetben a kedvezőbb adóteherrel járó tagállamban fogja ezt megtenni, ahonnan a szolgáltatásait nyújtani tudja a virtuális téren keresztül gyakorlatilag bárkinek. Arra is lehetősége van, hogy kapacitását is bővíteni tudja a virtuális térben úgy, hogy az már lényegében nem is kapcsolódik a telephely fizikai helyéhez.[11]

## 4. A digitális szolgáltatások reklámadózással kapcsolatos nehézségei

Tanulmányok[12] kimutatták, hogy a reklámadónak torzító hatása van a piacra, hiszen a reklámok megadóztatása csökkenti a piaci versenyt. Gazdasági szempontból a reklámdíjnak hasonló hatása van, mint annak az adónak, amely megemeli határköltségét. A díj kivetése befolyásolja a hirdetési kiadásokat, ami visszahat a reklámra mint üzleti bevételre, illetve reklámra mint üzleti tevékenységre. A reklám árának emelkedése megváltoztatja az üzleti döntést, amely hatással lehet a végső árakra is. A reklámköltségek növelése szinte biztosan kevesebb reklámkiadást eredményez, ezáltal a reklámadó holtteher-veszteséget okoz a társadalom egésze számára az eladások csökkenése miatt. Ráadásul, a vállalkozási ráfordítások adója adócsökkenéshez vagy kettős adóztatáshoz vezet, ami a közgazdasági elmélet szerint a gazdasági tevékenységek megadóztatásának nem hatékony módja.

A reklámköltségek emelése alkalmas arra, hogy megkülönböztesse a kisvállalkozásokat (vagy az esetleges belépőket) hiszen az egyes vállalkozások dönthetnek úgy, hogy teljesen abbahagyják a reklámozást. Megkülönbözteti azokat a cégeket, amelyek magas reklám-értékesítés arányú iparágakban működnek, hiszen

[10] SZLIFKA (2019): i.m. p. 133.
[11] SZLIFKA (2019): i.m. p. 151.
[12] OECD Competition Assessment Reviews (2014): Greece p. 216.

nekik mesterségesen magasabb költségeket kell fizetniük befektetéseikért. A reklámköltségek növelése árt a reklámozásnak is mint üzleti tevékenységnek, ezzel szemben az alacsonyabb hirdetési kiadások csökkentett bevételeket és kevesebb munkahelyet jelentenek a reklámszakma cégeinek. Ha az adó beszedésének költségei a reklámügynökségekre hárulnak, mint ahogy Görögországban is, akkor az erre a tevékenységre fordított jelentős források magasabb működési költségekhez vezetnek, ami magasabb koncentrációhoz vezethet ezen a piacon. Ennek oka abban rejlik, hogy a kis reklámügynökségek nem tudnak profitot termelni, csak „túlélnek". Ugyanakkor a hagyományos médiát egyre inkább kezdi felváltani az „új" média, a digitális reklámok, amelyekre egyelőre a reklámadó nem vonatkozik vagy a rendelkezései nem egyértelműek, így a megadóztatásuk sem egységesen történik. Ez pedig egyértelműen a piac torzításához vezet, hiszen van, aki egyáltalán nem fizeti meg az adót, van, aki jóval kevesebbet, mint ami a tevékenységéből indokolt lenne.[13]

## 5. Megoldási lehetőségek az adóelkerülés megszüntetésére

A tisztességes gazdasági verseny fenntartása miatt az OECD és az Európai Bizottság is fogalmazott meg javaslatokat a digitális szektor megadóztatása vonatkozásában (a tanulmányban a probléma nemzetközi jellegére koncentráltam, így a nemzetközi szervezetek általi javaslatokra, szabálytervezetekre, illetve szabályokra kívánok elsősorban kitérni).

Az OECD meghatározó szerepet tölt be a nemzetközi adópolitikában, annak ellenére is, hogy a szervezetnek nincs kötelező erejű jogi aktusa. Kihat az államok belső jogának formálására, az egyes államok közötti adóegyezmények alakítására, illetve az adóhatóságok közötti fokozottabb együttműködésre. Nemcsak az OECD tagállamokkal képes egyeztetni, ezáltal az Európai Unió adópolitikát is befolyásoló szervezetnek tekinthetjük.[14] Az OECD digitális témakörben első jelentős intézkedését 2013. szeptember 5-én hozta meg Szentpéterváron. Ennek keretében a G20 -szal együtt elfogadta az ún. BEPS Akciótervet, melynek keretében a nemzetközi szintű adóelkerülés megakadályozását tűzte ki célul. Olyan szabályok megalkotását fogalmazták meg, amelyek biztosítják, hogy minden adóalany, így a digitális nagyvállalatok is méltányos adórészesedésüket az azt megillető országba fizessék be.[15] Az OECD már ebben az I. Akciótervében is lehetséges megoldásokat vázolt fel, amelyek alapján a nemzetközi adójog választ tud adni a digitális gazdaság által támasztott kihívásokra.[16]

[13] OECD Competition Assessment Reviews (2014): Greece p. 220.
[14] PAJOR (2019): i.m. p. 185.
[15] U.o. p. 174.
[16] U.o. p. 175.

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Az OECD 2020. januári ülésén ismertette legfrissebb, két pillérre épülő tervezetét, amely új lendületet adott az adókijátszás elleni küzdelemnek. Az első pillér az adóztatási jogok felosztását változtatná meg, részben a piac országához rendelve a profitokat, eszerint az adóztatás jogát három szempont szerint osztanák fel. Ezek a szempontok a tevékenység tényleges végzésének a helye, a marketing és technikai működtetés operatív lebonyolításának helye, valamint az a hely, ahol a fogyasztók ténylegesen találhatók. Részletezésre került továbbá a fix bérezés az alaptevékenységért.[17]

A második pillér egy globális minimumadó bevezetését javasolta, amely koncepció sok vitát váltott ki, de 2021 októberére sikerült egy kiterjedt, nemzetközi politikai konszenzust elérni. A 2021. december 20-án publikált végleges modellszabályok pontosították és kiegészítették az eddig ismert szabálytervezetet. Ennek alapján a minimum adóterhelés mértékét 15%-ban[18] határozták meg- Az egyik legnagyobb figyelmet kapó rendelkezés a valós gazdasági tevékenységekhez kapcsolódó mentesség, azaz az úgynevezett 'substance carve-out' számítására és alkalmazására vonatkozik, mely szerint egy kereskedelmi, gyártó vagy bármely más tényleges üzleti tevékenységet tárgyi eszközökkel és munkavállalókkal folytató cégcsoportnak ne kelljen ezen tevékenységéből származó jövedelme után a minimum 15%-os adóterhelést teljesíteni pusztán azért, mert az állam, ahol működik ennél kisebb mértékű adót szed be.[19] A szabályok az OECD országokban lévő leányvállalatok esetében 2023. január 1-jén, harmadik országok esetében 2024-től lépnének hatályba.[20] Nagyon összetett és bonyolult szabályrendszerről beszélhetünk, amely nagy valószínűséggel kihívást fog jelenteni mind az adóhatóságoknak, illetve az adózóknak egyaránt.

Magyarország élt a vétójogával a globális minimumadó kapcsán azzal a hivatkozással, hogy Magyarország versenyhátrányba kerülne a magasabb adómérték miatt. Tekintettel arra, hogy az adójogi kérdésekkel kapcsolatos szavazás esetében egyhangúság szükséges, korábbi kutatásaim konklúziója is a minősített többségi

[17] BDI: Pillar One: reallocation of taxing rights
https://english.bdi.eu/article/news/pillar-one-reallocation-of-taxing-rights-unified-approach/
(Utolsó letöltés ideje: 2022. április 10.)
[18] OECD releases Pillar Two model rules for domestic implementation of 15% global minimum tax
https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm
(Utolsó letöltés ideje: 2022. április 14.)
[19] DELOITTE: Megjelentek az új globális társasági minimumadó szabályai
https://www2.deloitte.com/hu/hu/pages/ado/cikkek/globalis-tarsasagi-minimumado.html
(Utolsó letöltés ideje: 2022. április 14.)
[20] ANDERSEN: Új fázisba lépett a globális minimumadó bevezetése
https://hu.andersen.com/hu/hirek/uj-fazisba-lepett-a-globalis-minimumado-bevezetese/
(Utolsó letöltés ideje: 2022. április 14.)

szavazás bevezetése volt. Sajnos a vétó bejelentésével ismét ezt látom az egyedüli megoldásnak akkor is, ha a többi érintett állam továbbra is be kívánja vezetni a globális minimumadót. Bruno Le Maire francia pénzügyminiszter is a magyarországi döntés bejelentésekor a minősített többségi szavazás bevezetése mellett érvelt, szerinte tarthatatlan az egyhangú szavazás.

## 6. Összegzés

Nyilvánvaló, hogy a globalizáció, az üzleti modellek és a technológia fejlődése nyomást gyakorol a múlt század elején kidolgozott nemzetközi adórendszerekre és elméletre. A digitalizáció ezt tovább súlyosította, ami még nyilvánvalóbbá tette, hogy a jelenlegi adózási szabályok nem alkalmasak arra, hogy a digitális cégek is arányosan kivegyék a részüket a közteherviselésből.[21]

A digitális vállalkozások sajátos jellemzője az, hogy versenyelőnybe kerülnek a hagyományos gazdaságban működő vállalkozásokkal szemben, effektív adóterhelésük jóval kisebb, mint a hagyományos gazdasági szereplőké. A digitális vállalkozások kiemelkedő versenyelőnyben vannak más vállalkozásokkal szemben, a kieső bevételeket pedig a gazdaság más szereplőitől, illetve a fogyasztóktól kell beszedni. Ez azonban nem egy hosszútávon tartható koncepció. Fontos kritérium az adózási alapelvek, szabályok átgondolása, azoknak a megváltozott gazdasági környezetnek az igazítása.[22] A digitális szektor adóztatása kapcsán nem csak az a kérdés, hogy az államháztartási bevételek fenntarthatósága szempontjából melyik adózási rendszer a hatékonyabb, hanem az is, hogy a választott adórendszer átláthatósága, célszerűsége, eredményessége ellenőrizhető-e. Nem utolsó sorban pedig az adóhatóságnak megfelelő módszertannal és infrastruktúrával kellene rendelkezniük a digitális szektor tevékenységeiből származó adóbevételek és naprakész nyilvántartásának fenntartására, ezzel is biztosítva a digitális szektor megadóztatásának ellenőrizhetőségét.[23]

[21] WÁGNER Tamás Zoltán: A digitális adók kérdése, különös tekintettel a cseh szabályozásra p. 110. http://real.mtak.hu/108886/1/08_KulugyiMuhely_WagnerTamasZoltan_DOI.pdf
(Utolsó letöltés ideje: 2022. április 8.)
[22] ADÓ ONLINE (2018): i.m.
[23] PULAY – TESKI (2020): i.m.

https://doi.org/10.46942/SIDM.2023.1.193-204

## Irodalomjegyzék

### Könyvek, tanulmányok, folyóiratok

Alapjogokért Központ: Technológiai óriások: Apple, Microsoft, Amazon. Az ún. GAFA-cégekről általában és a techcégek adózásának problémája http://alapjogokert.hu/wp-content/uploads/2020/03/tech_oriasok_adozasanak_prob_.pdf (Utolsó letöltés ideje: 2020. augusztus 17.)

Commission Staff Working Document, Impact Assessment, SWD(2018) https://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-81-F1-EN-MAIN-PART-1.PDF
(Utolsó letöltés ideje: 2020. augusztus 11.)

Csabai Róbert - Czoboly Gergely: A digitális cégek adóztatásának kihívásai - nemzetközi válaszkísérletek
(Adó szaklap, 2016/12-13.)

Danielle Thorne: The Double Irish and Dutch Sandwich tax strategies: could a genereal anti-avoidance rule counteract the problems caused by utilisation of these structures?
https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/3252/thesis.pdf?sequence=2
(Utolsó letöltés ideje: 2020. október 13.)

Erdős Éva: A digitális gazdaság és kereskedelem árnyoldala: a digitális adóelkerülés nemzetközi tendenciái
https://www.mjsz.uni-miskolc.hu/files/6555/25_erdoseva_tördelt.pdf
(Utolsó letöltés ideje: 2020. április 12.)

Erdős Éva: A káros adóverseny kezelése az európai adójogban
https://www.uni-miskolc.hu/~wwwdeak/Collegium%20Doctorum%20Publikaciok/Erd%F5s%20%C9va.pdf
(Utolsó letöltés ideje: 2020. november 20.)

KPMG: Observations on OECD Interim Paper and EU Commission Digital Tax Proposals

https://assets.kpmg/content/dam/kpmg/be/pdf/2018/08/GM-FTS-0440-Digital-Tax-report_V5.pdf
(Utolsó letöltés ideje: 2020. augusztus 14.)

OECD Adóügyi Bizottsága: Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on the Model Convention on Article 5 (2000)

OECD, Are the Current Treaty Rules for Taxing Busienss Profits Appropriate for Taxing E-Commerce? Final Report (2005)

OECD Competition Assessment Reviews: Greece (2014)

OECD Modellegyezmény Kommentárja

Pajor Andrea: A digitalizáció által okozott kihívások a közvetlen adóztatásban
http://real.mtak.hu/105887/1/11_Pajor_Andrea_A_digitalizacio_altal_okozott_kihivasok.pdfsequence32
(Utolsó letöltés ideje: 2020. június 13.)

Pulay Gyula – Teski Norbert: A digitális gazdaság méltányos megadóztatásának kihívásai
https://www.penzugyiszemle.hu/tanulmanyok-eloadasok/a-digitalis-gazdasag-meltanyos-megadoztatasanak-kihivasai
(Utolsó letöltés ideje: 2020. augusztus 4.)

Rácz Dániel: A nemzetközi adózás új kihívásai: a digitális gazdaság
https://core.ac.uk/download/pdf/159317861.pdf
(Utolsó letöltés ideje: 2020. április 13.)
RSM Hungary Adótanácsadó és Pénzügyi Szolgáltató Zrt.: A reklámadó hatása az online tartalomszolgáltatásra

Szlifka Gábor: A hozzáadottérték-adó jelene és jövője Európában
https://jak.ppke.hu/uploads/articles/12332/file/Szlifka_Gabor_dolgozatk.pdf
(Utolsó letöltés ideje: 2020. október 21.)

Varga Erzsébet: A nemzetközi adójog kihívásai a globalizáció és a digitális gazdaságtükrében
http://ias.jak.ppke.hu/hir/ias/20193sz/10_VargaE_%20IAS_2019_3.pdf
(Utolsó letöltés ideje: 2020. április 13.)

Varga Erzsébet: A digitális vállalkozások adóztatásának kihívásai
http://real.mtak.hu/110151/1/14_Varga_Erzsebet_A_digitalis_vallalkozasok_adoztatasanak_kihivasai.pdf
(Utolsó letöltés ideje: 2020. augusztus 11.)

Wágner Tamás Zoltán: A digitális adók kérdése, különös tekintettel a cseh szabályozásra
http://real.mtak.hu/108886/1/08_KulugyiMuhely_WagnerTamasZoltan_DOI.pdf
(Utolsó letöltés ideje: 2020. augusztus 13.)

Zsignár Bernadette: Az elektronikusan nyújtott szolgáltatások bemutatása, adójogi meghatározása IV.
https://5percado.hu/az-elektronikusan-nyujtott-szolgaltatasok-iv/
(Utolsó letöltés ideje: 2020. október 18.)

**Internetes források**

Az Európai Unió Bírósága 21/20. sz. sajtóközlemény
https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200021hu.pdf
(Utolsó letöltés ideje: 2020. augusztus 17.)

Az Európai Unió Bírósága 132/20. sz. sajtóközlemény
https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-10/cp200132hu.pdf
(Utolsó letöltés ideje: 2020. november 20.)

A digitális adózás néhány aktuális kérdése az EU-ban
https://ado.hu/ado/a-digitalis-adozas-nehany-aktualis-kerdese-az-eu-ban/
(Utolsó letöltés ideje: 2020. június 13.)

A digitális szolgáltatásokra felszámított áfa (szűkített egyablakos ügyintézés)
(https://europa.eu/youreurope/business/taxation/vat/vat-digital-services-moss-scheme/index_hu.htm)
(Utolsó letöltés ideje: 2020. október 17.)

Harriet Taylor: How Apple managed to pay a 0.005 percent tax rate in 2014.

https://www.cnbc.com/2016/08/30/how-apples-irish-subsidiaries-paid-a-0005-percent-tax-rate-in-2014.html
(Utolsó letöltés ideje: 2020. augusztus 18.)

Jelentős változások jönnek az ÁFA-rendszerben
(https://www2.deloitte.com/hu/hu/pages/ado/articles/jelentos-valtozasok-az-afa-rendszerben.html)
(Utolsó letöltés ideje: 2020. október 18.)

Megjelentek az új globális társasági minimumadó szabályai
https://www2.deloitte.com/hu/hu/pages/ado/cikkek/globalis-tarsasagi-minimumado.html
(Utolsó letöltés ideje: 2022. április 8.)

Multilateral Instrument (MLI) Ratification, Impact on Indian tax treaties
https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/IE_Tax_Multilateral%20Instrument%20(MLI)%20Ratification.pdf?fbclid=IwAR3WgiIAZ_xi6YC-MIk3IYEmRUlVvGB46xHeBSJSVjYMGDkEJYgOpHidsHw
(Utolsó letöltés ideje: 2020. november 22.)

Multilaterális Egyezmény az adótervezés ellen
https://www2.deloitte.com/hu/hu/pages/ado/articles/ado-hirlevelek/MLI-az-adotervezes-ellen.html
(Utolsó letöltés ideje: 2020. november 22.)

Új fázisba lépett a globális minimumadó bevezetése
https://hu.andersen.com/hu/hirek/uj-fazisba-lepett-a-globalis-minimumado-bevezetese/
(Utolsó letöltés ideje: 2022. április 8.)

**Jogszabályok**

Tanács 2003/49/EK irányelve

Tanács 2006/112/EK irányelve

2007. évi CXXVII. törvény az általános forgalmi adóról

Tanács 2008/8/EK irányelve

https://doi.org/10.46942/SIDM.2023.1.193-204

Tanács 904/2010/EU rendelete

Tanács 282/2011/EU végrehajtási rendelete

Tanács 1042/2013/EU végrehajtási rendelete

2014. évi XXII. törvény a reklámadóról