HUNGARIAN LABOUR LAW
E - J O U R N A L

# Covid-19 and Hungarian Labour Law: the 'State of Danger'

**Tamás Gyulavári***

The Covid-19 crisis has posed an enormous challenge in labour law for all governments. Although the Hungarian government faced with the same problem, they introduced quite unexpected and radical measures, unlike other European states.[1] In this paper, I will first describe the Hungarian legal framework of the State of Danger, respectively the government restrictions and prohibitions in relation to the pandemic. After this introduction, I will analyze the labour law related new laws on freedom of contract, maximum 24 months long reference period, unilateral wage cut by the employer, and the transitional measures. I will argue, that these laws pushed the consequences of the crisis exclusively to employees by strengthening the unilateral rights of the employer to change basic working conditions, and also by returning to the unrestrained freedom of contract.

## 1. Challenges in labour law during the State of Danger

### *1.1. The 'State of Danger'*

Following the virus outbreak in Hungary, the 'State of Danger'[2] (in Hungarian: 'Veszélyhelyzet') was declared on March 11 by Government Decree 40/2020[3], and thereby a 'special legal order' entered

* Professor of Labour Law, Chair of Labour Law Department, Pázmány Péter Catholic University, Budapest, Hungary. Email: gyulavari.tamas@jak.ppke.hu. This publication has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information, please consult: http://ec.europa.eu/social/easi. More information on the European Union is available on the Internet (http://www.europa.eu).

1 For a comprehensive overview of Covid-19 labour law measures see: *Italian Labour Law e-Journal,* Vol 13., No 1.(2020): Special Issue: Covid-19 and Labour Law. A Global Review, https://illej.unibo.it/ (accessed: 21.5.2020).

2 This is an emergency situation.

3 Government Decree 40/2020. (III. 11.) on the declaration of the State of Danger.

into force in Hungary on that day. This Decree on the declaration of the State of Danger was based on Article 53 of the Fundamental Law[4] (Constitution):

"State of Danger – Article 53

(1) In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.

(2) In a state of danger the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(3) The decrees of the Government referred to in Paragraph (2) shall remain in force for fifteen days, unless the Government, on the basis of authorisation by the National Assembly, extends those decrees.

(4) Upon the termination of the state of danger, such decrees of the Government shall cease to have effect."

The State of Danger is declared by the Government for an undefined period of time, therefore, it is the government, who can declare also the termination of the State of Danger. There is no temporal limit, and the government did not set an end of it. Thus, in the case of the 'State of Danger', the government may issue special 'Government Decrees', which may suspend the application of certain laws, derogate from statutory provisions and take other emergency measures, as defined by the Article 54 'Common rules on special legal system' of the Fundamental Law:

"Common Rules for Special Legal Orders – Article 54

(1) Under a special legal order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII(2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I(3).

(2) Under a special legal order, the application of the Fundamental Law may not be suspended, and the operation of the Constitutional Court may not be restricted.

(3) A special legal order shall be terminated by the organ entitled to introduce the special legal order if the conditions for its declaration no longer exist.

(4) The detailed rules to be applied under a special legal order shall be laid down in a cardinal Act."

[4] English translation: https://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf

According to Article 53(2) of the Fundamental Law, in a State of Danger the Government may adopt Decrees by means of which it may, as provided for by a 'cardinal Act' (means: passed with qualified majority), suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures. This "cardinal Act" is Act 128 of 2011 on disaster management and amending certain related acts.[5] Articles 47–51 of this Act contain the extraordinary rules (Articles 47-48) and measures (Articles 49–51), which may be ordered or introduced by a Government Decree.[6]

Based on these articles, we can conclude, that there is no authorization to pass a Government Decree on labour law issues, or to deviate from EU law during the State of Danger. The authorizations for Government Decrees in articles 47 and 48 contain very different topics (such as court procedures, mayor's powers), but none of these authorizations is related to employment. Thus, Article 6 of Government Decree 47/2020 (III.18) (henceforward: Decree 47/2020) on derogations from the Labour Code[7] was passed without any authorization for the government. Therefore, Article 6 of Decree 47/2020 was in my opinion unconstitutional.

Article 53 (1) and (3) of the Fundamental Law (Constitution) separates the period of the State of Danger and the temporal scope of Government Decrees issued during this period. The temporal scope of these Government Decrees is 15 days, but it may be extended by the Parliament. The final limit is the cessation of the State of Danger. The State of Danger was declared on 11 March by Decree 40/2020 and the Government Decrees issued after 11 March were in force for fifteen days, until 26 March. The Parliament restarted ('confirmed') the temporal scope of these Decrees by Act 12 of 2020[8] from 31 March. From 26 March to 31 March, there was the State of Danger, but the Government Decrees (issued during the State of Danger) were not in force any more. For example, any alteration from the Labour Code in accordance with Article 6(4) of Decree 47/2020 (see later) was null and void during these days, since Decree 47/2020 was not in force during this period. The temporal scope of the Government Decrees continued from 31 March by Act 12 of 2020, so derogating agreements may be made again after this date.

Act 12 of 2020 on the containment of coronavirus, the so-called 'Authorization Act'[9], tried to arrange this unconstitutional matter by Article 3:

> "Article 3
>
> (1) On the basis of Article 53(3) of the Fundamental Law, the National Assembly authorises the Government to extend the applicability of the government decrees under Article 53(1)

5 Hungarian text: https://net.jogtar.hu/jogszabaly?docid=a1100128.tv.

6 Article 47–48: Special measures that can be introduced by Decree during the State of Danger; Article 49–51: Special measures that can be used based on an authorization by Decree during the State of Danger.

7 Act 1 of 2012 on the Labour Code.

8 Act 12 of 2020 was passed on 30 March and came into force on the day after, in accordance with Article 7 of the Act.

9 English text: http://abouthungary.hu/media/DocumentsModell-file/1585661547-act-xii-of-2020-on-the-containment-of-coronavirus.pdf

and (2) of the Fundamental Law adopted in the state of danger until the end of the period of state of danger.

(2) The National Assembly may withdraw the authorisation under paragraph (1) before the end of the period of state of danger.

(3) The National Assembly confirms the government decrees referred to in paragraph (1) that have been adopted after the entry into force of the Decree, but before the entry into force of this Act."

The issued Government Decrees will be in force until the end of the State of Danger, which is an undefined period. The Parliament may withdraw the authorisation for the applicability of the Government Decrees. These Decrees will cease to have effect upon the termination of the State of Danger at the latest. Moreover, Article 2 of Act 12 of 2020 has given a general legislative authorization, which now includes all matters, such as all labour law regulatory topics:

"(1) During the period of the state of danger, in addition to the extraordinary measures and rules laid down in Act 128 of 2011 on disaster management and amending certain related Acts, the Government may, in order to guarantee that life, health, person, property and rights of the citizens are protected, and to guarantee the stability of the national economy, by means of a decree, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(2) The Government may exercise its power under paragraph (1) for the purpose of preventing, controlling and eliminating the human epidemic referred to in the Decree, and preventing and averting its harmful effects, to the extent necessary and proportionate to the objective pursued."

As for EU law, there is no special provision in the Fundamental law, or in other Acts on the application of EU (labour) law in case of the State of Danger. Since there is no special constitutional provision in relation to EU law obligations and their implementation during the State of Danger, therefore, the Hungarian implementing measures of EU primary and secondary law should be applied in this period as well. Evidently, there is no exemption from implementation as a consequence of the State of Danger.

### *1.2. Restrictive measures during the State of Danger*

The following prohibitions and restrictions have been introduced within the period of State of Danger from its declaration on 11 March 2020 (among other measures):

– compulsory quarantine for persons arriving from certain countries;[10]

– closure of higher education institutions;[11]

– closure of nurseries, kindergartens,[12] primary and secondary schools;[13]

– prohibition of events above 100 persons inside, and 500 people outside;[14]

– closure of cinemas, all cultural institutions and general prohibition of events;[15]

– closure of restaurants, bars and shops (except food stores) after 3 pm and before 6 am.[16]

These measures have had a considerable impact in the labour market, and the legislative answers of the government to this challenge will be the focus of the next chapter.

## 2. Decree 47/2020: back to freedom of contract

The Labour Code[17] is the codex of Hungarian labour law. Therefore, most of the EU Directives related to labour law have been implemented by the Labour Code. There are also some other Acts related to labour law harmonization, such as the Equal Treatment Act[18] implementing the Equality Directives, and the Labour Safety Act[19] transposing the Health and Safety Directives. However, the Hungarian transposition of the EU Directives on working conditions can primarily be found in the Labour Code.

According to Article 6 of Decree 47/2020:[20]

> "6(1) Under Government Decree 40/2020 (3/11 of 2020) on the declaration of a State of Danger, in order to comply with the prohibitions and restrictions imposed during the State of Danger ordered by that Decree, Act 1 of 2012 on the Labour Code (hereinafter: Labour Code) shall be applied with the altered rules in Subsections 2 to 4 of this Article.

10 Article 3 of Government Decree 41/2020. (III.11.).

11 Article 4 of Government Decree 41/2020. (III.11.).

12 Article 2 of Government Decree 45/2020. (III.14.).

13 Government Decision 1102/2020. (III.14).

14 Article 4 of Government Decree 41/2020. (III.11.).

15 Article 3-5 of Government Decree 46/2020. (III.16.).

16 Article 1 and 6 of Government Decree 46/2020. (III.16.).

17 Act 1 of 2012 on the Labour Code.

18 Act 125 of 2003 on equal treatment and the promotion of equal opportunities. English translation: https://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex3.pdf

19 Act 93 of 1993 on Labour Safety.

20 English translation: https://njt.hu/translated/doc/J2020R0047K_20200319_FIN.pdf. This is in force from 19 March 2020.

6(2) The Labour Code shall apply for the State of Danger and 30 days following its cessation, with the following alterations:

a) the employer may modify the announced working time schedule differently from the notification rules laid down in Article 97 (5) of the Labour Code;

b) the employer can unilaterally assign the employee to work from home and telework;

c) the employer may take the necessary and justified measures to monitor the health of the employee.

6(3) The provisions of collective agreements contrary to the rules in Subsection 2 shall not be applied during the period of application of this Decree.

6(4) The employer and the employee may derogate from the provisions of the Labour Code by their agreement."

Thus, the hierarchy between the Labour Code, collective agreement and agreement of the employer and the employee have partly been changed by Article 6(4) of the Decree for the period of the State of Danger. The current rules of the Labour Code on the hierarchy of labour law sources shall, therefore, apply during the State of Danger, with the following modifications. It has to be emphasized, that the reason for these changes is the implementation of the prohibitions and restrictions imposed during the State of Danger, so the new rules must and can be applied for these purposes. Thus, the following new rules have a declared purpose and a definite duration.

Article 6(2) of the Decree 47/2020 contains the following rules of the Labour Code, which are changed for the duration of the State of Danger:

a) The employer may modify the announced working time schedule differently from the notification rules laid down in Article 97(5)[21] of the Labour Code: the employer may modify the announced working time schedule any time, even immediately before or even after starting scheduled work.

b) The employer can unilaterally assign the employee to home office and telework: there is no need for a mutual agreement for telework, and home office may be ordered without a time limit (opposed to yearly 44 days in Article 53(1) of the Labour Code).

c) The employer may take the necessary and justified measures to control the health of the employee: its meaning is quite obscure, however, it was probably intended to allow monitoring health condition of employees.[22]

According to Article 6(3) of the Government Decree, these changing rules are ius cogens with regard to collective agreements during the State of Danger, so any derogation from these statutory provisions in a collective agreement is null and void. This means that neither the collective agreement

[21] 97(5) "The employer may alter the work schedule for a given day upon the occurrence of unforeseen circumstances in its business or financial affairs, at least four days in advance."

[22] Kártyás, Gábor: *Veszélyhelyzetre veszélyes munkajogi szabályok.* 2020. március 19., http://www.klaw.hu/2020/03/19/kartyas-gabor-munkajog/?fbclid=IwAR3gU62eIzUwtwC4ByOQC8Cxl5o5kM5UAShbqYp983RtTSdLtBtk7bs4Pz0 (accessed: 21.5.2020).

concluded before the entry into force of the State of Danger, nor the collective agreement concluded thereafter may depart from the above mentioned rules of the Labour Code.

The most important change is, that during the State of Danger, the hierarchy between the Labour Code and the agreement of the parties have been changed by Article 6(4) of the Decree. This temporarily altered[23] rule of the Labour Code on the hierarchy of statutory law and individual agreement shall apply during the State of Danger. We can conclude from this provision, that

- any rule of the Labour Code may be derogated from by the parties' agreement (Article 1-299 of the Labour Code, see exceptions below), and
- any kind of derogation is allowed, to the benefit or the disadvantage of the employee ('in melius' and 'in peius' derogations as well).[24]

'Agreement' is defined by Article 14 of the Labour Code: "agreement regulated by this Act is the outcome of an agreement resting on mutual consent of the parties." However, this general definition includes individual as well as collective agreements. In the case of derogation under 6(4) of the Decree, only the agreement of the employer and the employee (the individual parties of employment relationship) can derogate from the Labour Code under Article 6(4) of Decree 47/2020.

There is no specific provision to prevent detriment, if a worker does not "agree" to a proposal from the employer to reduce his/her rights below the level guaranteed in the Labour Code. However, particularly the termination of employment will be unlawful (with payment of compensation[25]), and the general principles of the Labour Code (articles 6-12) also protect the employee from such retaliation (e.g. prohibition of abuse of rights). Therefore, the general protection applies in case of such agreements. The free will of the parties, and especially of the employee, will largely depend on the bargaining power of the employee in the given employment relationship, depending on the circumstances of the case.

Certainly, EU labour law Directives, as transposed in national law, would be potentially at risk of being violated by an agreement of the parties. Derogation may mean the application of rules different from those in the Labour Code, or even exclusion of the application of certain articles, or even chapters of the Labour Code. For instance, the parties may agree on excluding the application of the Labour Code provisions on collective redundancies. Since, these agreements may derogate from (almost) all provisions of the Labour Code, the agreement may change, or even put aside, for instance, any collective labour law provision as well. The derogation is free from the entire Labour Code, and Part 3 of the Labour Code regulates "Industrial relations".

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23 The Decree uses the term, that the Labour Code must be applied with this „alteration". So this could be perceived as a temporarily „altered" provision.

24 Kártyás op. cit.

25 Article 82(1) The employer shall be liable to provide compensation for damages resulting from the wrongful termination of an employment relationship. (2) Compensation for loss of income from employment payable to the employee may not exceed twelve months' absentee pay.

Thus, derogation is possible from collective labour law rules as well, however, with effect only to the legal relationship of the parties of this agreement, namely the employer and the individual employee. For example, the employer and the employee cannot terminate a collective agreement (Articles 280 and 281), but they can exclude the application of that collective agreement (or certain parts of it) to the employment relationship of the employee, who is the party to this derogating agreement. In my opinion, the individual agreement cannot have effect on other employees.

The form of the agreement of the parties is also a relevant question. Since Article 6(4) of Government Decree No 47/2020 does not require a written form, thus, the parties may orally agree on such a derogation from the Labour Code. For example, the parties may orally agree on excluding the application of the Labour Code rules on collective redundancies. There is no specific requirement on retention of proof of the content of such non-written agreements. In case of a dispute, it is generally for the party, who relies on the agreement in the dispute, to prove its content. However, in certain legal disputes, e.g. on discrimination, the burden of proof is reversed. Moreover, it is rather difficult to prove the content and the facts of such an oral agreement. Therefore, the Labour Code generally requires the important agreements in a written form.[26] In this context, it is quite a surprise that such an important agreement may be made orally, which may be perceived as an exception in the Hungarian labour law framework, as other important agreements (employment contract, amendment, termination etc.) must be made in a written form.[27]

However, the above described legal situation has partly been amended by Government Decree 104/2020 (henceforward: Decree 104/2020).[28] According to Article 1(3) of this Decree: "It is prohibited to derogate from Article 99 and 104–106 of the Labour Code, however, it does not affect derogations under 135(4)[29]." This means, that Articles 99 and 104–106 are ius cogens, therefore, any derogation is null and void in collective agreements and also in agreements of the parties. The following provisions do not allow any derogation:

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26 Article 22(1) Legal acts may be made without particular formal requirements, unless otherwise provided for by employment regulations or by agreement of the parties. Upon the employee's request, legal acts shall be made in writing by the employer where this is not otherwise mandatory.

27 See Article 22 of the Labour Code.

28 104/2020. (IV. 10.) Korm. rendelet a koronavírus világjárvány nemzetgazdaságot érintő hatásának enyhítése érdekében szükséges azonnali intézkedésekről szóló 47/2020. (III. 18.) Korm. rendelet munkajogi szabályainak a Gazdaságvédelmi Akcióterv keretében történő kiegészítéséről. Hungarian text: https://net.jogtar.hu/jogszabaly?docid=A2000104.KOR&searchUrl=/gyorskereso%3Fkeyword%3D104/2020.%2520%28IV.%252010.%29%2520Korm.%2520rendelet%2520#lbj0ideafd. The Decree has been in froce from 11 April 2020.

29 Article 135 (4) The agreements of parties may derogate from the provisions contained in Subsection (2) of Section 99 and collective agreements may derogate from Sections 101-109 with respect to:

*a)* employees working as navigators, flight attendants and aviation engineers or engaged in providing ground handling services to passengers and aircraft, and participating in or providing direct support for navigation services;

*b)* employees working in travel-intensive jobs in the domestic or international carriage of passengers and goods by road;

*c)* carriers and traffic controllers working in a local public transportation system for the carriage of passengers or in a scheduled intercity transportation system inside a fifty-kilometer radius;

*d)* traveling employees and traffic controllers working in the carriage of passengers by rail and in the carriage of goods by rail;

*e)* employees working in harbors.

– Article 99 on scheduled working time, which can be subject to a two-year reference period (see later);[30]
– Article 104 on daily rest period;
– Article 105 on weekly rest day;
– Article 106 on weekly rest period.

The above listed four articles of the Labour Code on working time (99, 104-106) do not allow any derogation for the parties' agreement, and they cover a number of key standards as set by the Working Time Directive (WTD). These four articles implement the following provisions of WTD:

– Article 3 on daily rest;
– Article 5 on weekly rest period;
– Article 6 maximum weekly working time;
– Article 16 reference periods (partly).

So any derogation from the implementing provisions of these WTD articles is prohibited by Government Decree 104/2020 (null and void). However, the implementation of all other articles of WTD is not guaranteed, since they are subject to possible agreements under Art 6(4) of Decree 47/2020. For WTD, the scope for derogations through agreements is eventually limited, while for other EU instruments at stake, derogations are possible for all provisions. However, all other working time implementing provisions may be subject to derogation by an agreement of the employer and the employee: articles 86-98, 100-103, 107-135 of the Labour Code can be freely derogated from.

This new hierarchy overwrites the 'normal' (before the State of Danger) rules of the Labour Code concerning the hierarchy between the Labour Code and the agreement of the parties. According to the 'normal' rules, the parties' agreement can derogate from the Labour Code and collective agreements only to the benefit of employees (in melius derogations). However, the agreement of the parties could derogate only from the second part of the Labour Code (on employment relationship), while the rest of the Labour Code[31] is ius cogens (no derogation is allowed at all). In addition, every chapter within the second part, and also the text of certain provisions may contain exceptions:

– some provisions of the Labour Code may allow free derogations (in peius and in melius at the same time), and
– also derogations to a certain degree (limited in peius derogation, for instance 400 hours of extra working time in a year).

Article 299 of the Labour Code contains the list of sixteen EU Directives transposed by the Labour Code. Some other laws also play some (minor) role in harmonization, however, the Labour Code is the principal law in transposing these Directives. Directive 2001/23 /EC is a good example, where

[30] Despite the fact, that Article 99 of the Labour Code is excluded from the scope of derogations under Article 6(4) of Decree 47/2020, it is still possible in view of Article 1(1) and 1(2) of Decree 104/2020 to have an extension of reference periods unilaterally by the employer, up to 24 months.

[31] Part 1 on General provisions, Part 3 on Industrial relations, Part 4 on Labour disputes, Part 5 on Closing provisions.

some other acts[32] also play a very limited role in harmonization, however, the Labour Code transposes almost all provisions (95%). So, the predominant role of the Labour Code in transposing of these Directives is unquestionable.

It is remarkable, that Article 6 of Decree 47/2020 does not affect the relationship between collective agreements and agreement of the parties. Therefore, the relationship between collective agreements and agreement of the parties remains the same as in the current Labour Code. Consequently, the parties' agreement may derogate from the collective agreement exclusively to the benefit of the employee (in melius derogation is allowed only). There is only one exception from this general rule, namely the 2019 amendment of Article 109(2), which authorizes the agreement of the parties to allow maximum 400 hours of extraordinary working time in a year, while collective agreements can allow only 300 hours. In this exceptional case, the parties' agreement may derogate from the collective agreement to the detriment of employees.

If the agreement of the parties deviates from the Labour Code to the detriment of the employee during the State of Danger, in accordance with Article 6(4) of Decree 47/2020, even in this case the agreement may derogate from the collective agreement only to the employee's benefit. According to the Labour Code, the deviation from the collective agreement to the detriment of the employee is invalid. The parties can only settle this, if they also deviate from Article 43(1) of the Labour Code, which allows only in melius derogation from a collective agreement.[33] This difference between the Labour Code and collective agreements as to the derogations does not influence potential infringements with EU labour law. The following example may illustrate the above described legal problem. For instance, the employer terminates the employment relationship of the employee after 20 years of employment, and the employee is entitled to severance pay:

- Article 77(3) of the Labour Code guarantees 5 months pay as severance pay.
- The collective agreement (covering the employee) requires 6 months pay as severance pay in her case.
- The parties' agreement may freely derogate from the Labour Code, so they agree on 1 month-pay.

However, the agreement may derogate from the collective agreement only to the employee's benefit. The parties can solve this problem by derogating from Article 43(1) of the Labour Code, which allows in melius derogation from a collective agreement. It is an open question, if such a derogation from Article 43(1) of the Labour Code must be expressed in the agreement, or it may be perceived as an implied term. In this context, it must be underlined, that the agreement of the parties may be orally concluded.

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32 Act 33 of 1992 on legal status of public servants, Act 199 of 2011 on legal status of civil servants, Act 96 of 1993 on voluntary mutual insurance funds, Act 49 of 1992 on bankruptcy.

33 Article 43(1) Unless otherwise provided for by law, the employment contract may derogate from the provisions of Part Two and from employment regulations to the benefit of the employee."

If the labour courts want to apply a purposive approach regarding the limitation of such agreements of the parties, they may use the following wording of Article 6(1) of Decree 47/2020: "with a view to ensuring compliance with prohibitions and restrictions ordered within the period of State of Danger". However, it must be emphasized, that this is far from being a direct restriction of the scope of the Decree, but it is rather a vague legal basis for labour courts to restrict later in legal disputes the potential scope of these derogating agreements of the parties. This would not be an acceptable approach to limit the scope of derogations to provisions implementing EU law, as it is not sufficiently clear, and relies on the decisions of individual national courts, so not offering sufficient legal certainty.

I provide below some examples, which contents may respect, in my view, the above described purposive limit:

– According to Article 53, employers shall be entitled to temporarily reassign their employees to jobs and workplaces other than what is contained in the employment contracts, or to another employer. According to the Labour Code, the duration of such employment may not exceed a total of forty-four working days in a year. The parties may now agree on a longer period of such employment.
– According to Article 146(1), in the event of the employer's inability to provide employment as contracted during the scheduled working time (downtime), the employee shall be entitled to his/her base wage, unless it is due to unavoidable external reasons. The parties may now agree on a lower payment.
– According to Article 122(4), employees shall be notified of the scheduled date of their paid leave no later than fifteen days before the first day of vacation. The parties may now agree on a shorter notice time on scheduling paid leave.
– According to Article 236(3), works councils are elected for five years. The parties may now agree, that they postpone the elections until the end of the State of Danger.

Examples of actual provisions in Hungarian labour law, which contents would, in my opinion, not (always) respect this purposive limit:

– Mitigating the statutory payments as a consequence of termination of employment by the employer, such as shorter notice period,[34] lower severance pay,[35] lower payment on termination of fixed- term contract.[36] However, these may also respect the purposive limit, depending on the circumstances, if for instance it serves maintaining employment of other employees, and in certain sectors.
– Pay lower than the minimum wage.[37]

34 Article 69 of the Labour Code.

35 Article 77 of the Labour Code.

36 Article 79(2) of the Labour Code.

37 Article 153 of the Labour Code.

– Lack of paid leave[38] and/or sick leave.[39]
– Excluding the provisions on collective redundancies.[40] However, this may also respect the purposive limit, depending on the circumstances, if, for instance, the employer initiates termination of employment by mutual agreement, at the same time they agree in writing upon the re-establishment of employment after the State of Danger.
– Excluding the provisions on transfer of undertakings.[41]
– The daily working time in full-time jobs is nine hours.[42]

It must be emphasized, that a case by case approach should be followed regarding the above mentioned examples, when deciding, which contents would respect the above described purposive limit. There is no objective test in this case, therefore, all the circumstances of the given case must be taken into account in relation to the applicability of certain agreements of the employer and the employee. In my view, the main issue should be in this decision, what is appropriate and necessary to overcome the economic difficulties deriving from the restrictions and prohibitions during the Pandemic. Applying the proportionality principle may provide the required flexibility for employers and also effective protection for employees at the same time.

## 3. Decree 104/2020: reference period up to 24 months

According Decree 104/2020:

> "Article 1
> (1) Beyond article 6(2) of Government Decree 47/2020, the Labour Code must be applied with the further alteration, that the employer may unilaterally order a reference period of maximum 24 months.
> (2) The employer may prolong the formerly ordered reference period up to the length indicated in paragraph 1.
> (3) It is prohibited to derogate from Article 99 and 104–106 of the Labour Code, however, it does not affect derogations under 135(4).[43]

38 Article 115–116 of the Labour Code.

39 Article 126 of the Labour Code.

40 Article 71–76 of the Labour Code.

41 Article 36–40 of the Labour Code.

42 Article 92(1) of the Labour Code.

43 Article 135 (4) The written agreement of the parties may derogate from Article 99(2) and collective agreements may derogate from Article 101-109 in the following sectors: a) employees working as navigators, flight attendants and aviation engineers or engaged in providing ground handling services to passengers and aircraft, and participating in or providing direct support for navigation services; b) employees working in travel-intensive jobs in the domestic or international carriage of passengers and goods by road; c) carriers and traffic controllers working in a local public transportation system for the carriage of passengers or in a scheduled

(4) Provisions of collective agreements contradicting the provisions in this Decree shall not be applied during the applicability of this Decree.

[…]

Article 4

Article 1(1)–(2) of this Decree and agreements of the parties under Article 6(4) of Decree 47/2020 on working time reference periods will not be affected by the cessation of the State of Danger."[44]

Article 1(1) of Decree 104/2020 refers to Article 6(2) of Decree 47/2020, as the former is a further 'alteration' (amended provision) from the Labour Code, in addition to the latter. Thus, there is no relation between the 'altered' working time provisions in Article 1(1) of Decree 104/2020 and in Article 6(2) of Decree 47/2020. Article 1(1) simply mentions, that there has been other (three) amendments of the Labour Code in Article 6(2) of Decree 47/2020.

Decree 104/2020 allows the employer to unilaterally order a reference period up to 24 months, or prolong an existing reference period up to 24 months. This reference period is implementing Article 6 of WTD. Thus, agreements of the parties under Article 6(4) of Decree 47/2020 on reference periods (up to 2 years or even longer), and unilateral decisions of the employer on reference periods up to 2 years (longer than statutorily allowed) will 'exceptionally' remain in force after the cessation of the State of Danger. We can conclude from this provision, that other agreements of the parties under Article 6(4) of Decree 47/2020 will not remain in force after the cessation of the State of Danger.

It must be examined, whether the new '24 months maximum' for a reference period under Article 1 of Decree 104/2020 complies with Articles 6 and 16, 18 and 19 the Working Time Directive:

– Article 6 of WTD:

According to the work schedule, the weekly working time of employees shall not exceed forty-eight hours.[45] According to Article 99(7) of the Labour Code, in case of an irregular work schedule (reference period), the duration of scheduled weekly working time shall be taken into account on the average

a) within four months[46], or in some work schedules six months[47];

b) where justified by objective or technical reasons or reasons related to work organization, within a twelve-month period according to the collective agreement.[48]

intercity transportation system inside a fifty-kilometer radius; d) traveling workers and traffic controllers working in the carriage of passengers by rail and in the carriage of goods by rail; e) employees working in harbors.

44 Article 2 and 3 of Decree 104/2020 are not relevant.

45 Article 99(2)b) of the Labour Code.

46 Article 94(1) of the Labour Code.

47 According to Article 94(2) of the Labour Code, the maximum duration of working time banking is six months or twenty-six weeks in the case of employees: a) working in continuous shifts; b) working in shifts; and c) employed for seasonal work; d) working in stand-by jobs; and e) in jobs defined in Subsection (4) of Section 135.

48 Article 99(7) of the Labour Code.

Therefore, the 48 hours maximum of weekly working time must be taken into account on an average in a 'reference period'. However, there is no specific provision in Government Decree 104/2020 on the calculation of the weekly 48 hours maximum, thus, the Labour Code provisions shall apply, which also lacks a specific rule on the maximum 24 months reference period.

According to Article 99(7)b), the duration of scheduled weekly working time shall be taken into account on the average within a twelve-month period, where justified by objective reasons related to work organization (see above in point b). According to this interpretation, the 48 hours maximum must be taken into account on an average within a 12 months period, despite the 24 months long reference period. The only problem with this interpretation is, that the maximum 24 months reference period is not based on a collective agreement, but it is the unilateral order of the employer.

The reference in article 99(7)a) to article 94(1) and (2) raises the issue of applying a shorter (maximum 4 or 6 months) reference period for the calculation of the weekly 48 hours maximum. As a whole, the calculation of the 48 hours weekly maximum is not absolutely clear, however, it leads to a calculation of the 48 hours wekly maximum within a 4 or 6 months period.

– Article 16 of WTD:

  According to Article 16(b) of WTD, a reference period may not exceed four months. Therefore, the 24 months, or the 12 months calculation period for the 48 hours weekly maximum is above this limit.

– Article 18 of WTD:

  The maximum 24 months reference period may be applied unilaterally by the employer, therefore, article 18 of WTD cannot be applied.

– Article 19 of WTD:

  "Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months." The maximum 24 months reference period is longer than 12 months, and it may be applied/prolonged unilaterally by the employer, without a collective agreement. Therefore, this derogation shall not apply in this case.

## 4. Football players: wage cut by the employer

Finally, Government Decree 142/2020 (IV.22)[49] allowed the employers (football clubs) to single-handedly reduce the pay of soccer players. During the State of Danger, all football clubs may unilaterally decrease the pay (alternatively the monthly service fee) of professional (first, second and third league) football players up to 70% of the salary, who work under the scope of an employment contract, or a service contract.[50]

This measure is part of the legislative trend during the State of Danger, which is gradually and constantly increasing the unilateral powers of the employer. In this case, the employer can change the obligatory content (pay) of the employment contract. This is contradicting with fundamental labour law principles, such as the need of mutual consent for the amendment of the employment contract. In addition, the Written Statement Directive (91/533/EEC) obliges the employer to notify the employee of the essential aspects of the contract of employment and their changes thereof. Although, the Labour Code contains a general information obligation[51], however, this is hardly complying with the specific EU law information requirements in this regard.

## 5. Transitional measures

The government submitted the Bill to the Parliament[52] on termination of the State of Danger on 26 May 2020. This new law (Act 57 of 2020) will not terminate in itself the State of Danger, but it only calls upon the government to end it by issuing a Decree.[53] However, the Authorization Act and the Government Decrees issued during the State of Danger will lapse with the end of the State of Danger.

At the same time, the Parliament passed Act 58 of 2020 on the transitional rules connected to the cessation of the State of Danger. Amongst the very extensive transitional provisions, Article 56 contains the following rules related to labour law:

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49 Government Decree 142/2020. (IV. 22.) on certain labour law rules during the State of Danger, which comes into effect on 7 May, 2020.

50 Government Decree 142/2020, Article 2(1).

51 Article 6 (4) The parties falling within the scope of this Act shall inform each other concerning all facts, information and circumstances, and any changes therein, which are considered essential from the point of view of employment relationships and exercising rights and discharging obligations as defined in this Act.

52 Bill No. T/10747, https://www.parlament.hu/irom41/10747/10747.pdf (accessed: 2.6.2020).

53 Article 1 of Bill No. T/10747.

"24. Transitional provisions concerning the altered application of Act 1 of 2012 on the labour code

56. § (1) Act 1 of 2012 on the labour code (henceforward: Mt) is applied with the altered rules in this article.

(2) Mt will be applied until 1 July 2020 with the following alterations :

a) the employer may amend the formely declared scheduling of working time differently from article 97(5) of Mt,

b) the employer may unilaterally order home office and telework for the employee,

c) the employer may use the necessary and justifiable measures in order to monitor the health condition of the employee,

d) the employer and the employee may derogate form the provisions of Mt in a separate agreement.

(3) Employment in a reference period, which is ordered unilaterally by the employer or by the agreement of the parties during the state of danger, will not be affected by the cessation of the state of danger.

(4) The Békés County Government Office can authorize, that in the case of a job creation investment, the employer may apply a reference period or a payroll period - taking into account the relevant provisions of Mt - on the basis of maximum 24 months, if the investment is in the interest of the national economy.

(5) The Békés County Government Office makes the decision described in Subsection (4) within 90 days."

As it is clear from Article 56, the transitional measures will keep in force the provisions of Article 6 of Government Decree 47/2020, with the exception of the ban on regulating these issues in a collective agreement. However, the new deadline of 1 July 2020 raises some concern. According to Subsection (2) d) of Article 56, there may be (new) derogating agreements until 1 July 2020. According to Subsection (3), only the derogating agreements on reference periods will not be affected by the cessation of the State of Danger. So we can conclude (only) from this provision, that all other agreements will be affected (terminated) by the end of the state of danger.

If the state of danger is over before 1 July (on 18 June), than new derogating agreements may be made until 1 July, but the derogating agreements concluded before the end of the State of Danger will be affected by the end of it. So the former derogating agreements will not be in force any more (except on reference periods), but new derogating agreements may be concluded. The parties, for instance, may keep in force their former derogating agreement (concluded before 18 June or so), which was terminated by the end of the State of Danger. There is no rule on the future of the new agreements made by before 1 July 2020. Their temporal scope may not be affected by the end of the state of

danger, since they are concluded after that date. We can say (based on general principles of law), that these agreements must comply with the „normal" rules after 1 July 2020, however, there is no explicit provision on that in the Bill. In addition, it is quite obscure, why is it necessary to keep the above mentioned measures in force after the State of Danger, supposedly only for a couple of days.

However, Article 56 also contains a clearly non-transitional measure on the maximum 24 months reference period. So far, the employer and the collective agreement could introduce a reference period. From now on, the Békés County Government Office can allow a maximum 24 months reference period on the request of the employer. This decision must be based on the need of „job creation" and the „interest of the national economy". This new provision is in line with some measures described above on weakening the role of collective bargaining. Moreover, this possibility is clearly in the hand of the administration, who makes this decision on the basis of these exteremely flexible concepts. At the same time, the real value of this possibility is also questionable, since the 48 hours weekly maximum must be calculated on a four months or a six months basis. Overall, Article 56(4)-(5) is an amendment of the Labour Code provisions on reference period, which should have been inserted in the Labour Code. Formally, it is quite problematic, that only one of the provisions on reference period takes place in a separate Act on „transitional rules".

## 6. Conclusions

The Hungarian Labour Code was able to give answers to the upcoming challenges of the new labour market situation during the Pandemic. In spite of this, the government felt urged to change several laws to help employers handling the employment situation. These new measures took the form of Government Decrees, based on the Authorization Act. The government has been quite active in issuing labour law related Decrees, which has been going to two suprising and provoking directions.

The first direction is strengthening the powers of the employer to change the basic working conditions of the employee without the consent of the other party. This unilateral power of the employer covers ordering home office, telework, 24-month reference period and wage cut. The second direction of governmental lawmaking is the way back to the 19th century's absolute freedom of contract, which now allows the parties of the employment relationship to put aside the entire body of statutory law.

These two flawed concepts, strengthening employers' powers and freedom of contract, is topped by the total refusal of the concept of social dialogue and collective bargaining. These measures may be criticised from the theoretical viewpoint, that this legislative policy will inevitably result in burdening the weaker party of the employment relationship. As a whole, this legislative policy seems to go against the whole spirit of what we understand as 'modern labour law', built on statutory minima, international standards and collective agreements as a result of social dialogue at various levels.