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

A foreign body in employment law? – The impact of EU accession on Hungarian anti-discrimination law in employment – Part III

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The purpose of this series of articles is to give an overview of the impact of the EU law on equal treatment on relevant Hungarian labour law. In the previous part (Part I),[1] a short description was given on the status of national provisions as existed before the implementation of the relevant EU directives, highlighting the most important regulation needs and challenges identified by the then relevant academic literature. Part II[2] described the main features of EU and Hungarian law concerning equal treatment in employment; further it was evaluated, how far Hungarian labour law has reached in the implementation since the accession in terms of determining the protected characteristics and the definition of discriminatory conducts. This, final part provides further analyse on the achievements of the implementation process (rules on burden of proof, the structure of exemptions and justifications, sanctions and remedies), and, as a conclusion, the main challenges of the future are addressed in this field. The development of the case law of Hungarian courts is followed up, which was recently summarised and evaluated by the Case Law Analysing Group of the Kúria[3] appointed to scrutinise the judicial practice of equal treatment regulation in the field of labour law.

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2 Szilvia Halmos: A foreign body in employment law? – The impact of EU accession on Hungarian anti-discrimination law in employment – Part II. *Hungarian Labour Law Journal,* 1/2020. 23–48.

3 Before 31 December 2011, the supreme judicial forum of Hungary was denominated as „Supreme Court", subsequently: „Kúria".

1. Specific key achievements in the field of Hungarian equality law since the accession to the EU

1.1. Burden of proof

In Part II of this series of articles it was already discussed which doctrinal reasons support the higher standards of excuse on the side of the employer is an inherent part of the structure of anti-discrimination law (Section 2.1).[4] The procedural aspect of this higher standard is represented by the rules on shared or reversed burden of proof.

Rules on reversed burden of proof cannot only be justified on the grounds outlined in Section 2.1. of Part II, but by merely practical reasons as well. Since the biasing patterns motivating an employer to decide to underscore any person with a specific protected characteristic[5] often remain undisclosed by the employer, in many cases the victim of discrimination could hardly be able to deliver any evidence to duly support his/her claim.[6] The general rule about the burden of proof for civil proceedings within the EU (and its Member States) is that a claimant must prove his or her case. However, proving discrimination in this way can be very difficult in comparison to other civil claims. This is because establishing discrimination requires the claimant to show why a particular (disadvantageous) thing happened to them. This is usually something that will only be known to the perpetrator(s), and in some cases may not consciously be known even by them.[7]

Under EU law, rules on shared burden of proof emerged first in the jurisprudence of the CJEU. The subject matter of the first landmark case *(Danfoss)*[8] related to the question of reversed burden of proof were wage (indirect) discrimination. In this case female workers received a lower pay on average than male colleagues, and the system of pay that led to this result was completely lacking in transparency.[9] In the judgement the CJEU indeed placed the burden of proof to the employer, arguing that otherwise female workers "would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory". Apparently, the core of the argumentation of the CJEU was that the use of ordinary scheme of burden of proof would considerably hurdle the victim's effective assertion of his/her claim, in failure of sufficient information and evidences on the background of the employer's (allegedly discriminatory)

4 Halmos (2020) op. cit. 32–33.

5 See in more detail: Section 1.2. of Part II (Halmos (2020) op. cit. 25–26.)

6 See: Kiss, György: *Alapjogok kollíziója a munkajogban*. Pécs, Justis Tanácsadó Bt., 2010. 22.

7 Anna Beale: *Proving discrimination: the shift of burden of proof and access to evidence.* Cloisters, 2018.; (http://www.era-comm.eu/oldoku/Adiskri/03_Burden_of_proof/118DV18_Beale_Paper_EN.pdf), 2.

8 C-109/88. Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss, ECLI:EU:C:1989:383

9 Summarized by: Beale (2018) op. cit. 4.

provision.[10] This formula obviously leaved unanswered the question, to what extent it is expected from the victim of discrimination to support his/her claim to reverse the burden of proof to the employer. The CJEU proceeded to a more general statement of principle in the *Enderby*-case.[11] The CJEU stated that the existence of a *"prima facie"* case of discrimination casts the burden of proving objective justification onto the employer.[12] This line of case law was later on further proceeded and refined.[13] The essence of the relevant judgements were ultimately consolidated and included in the Burden of Proof Directive (covering only sex discrimination cases).[14] Today, the rules on shared burden of proof is included in all the three anti-discrimination Directives.[15] According to the current fordulation of the main rule of the burden of proof in the Directives, "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."[16]

In practice it means that a two-stage scheme of scrutiny should be applied in terms of a discrimination claim. (1) The claimant has to demonstrate facts that *prima facie* ("at the first sight") support that he/she become the victim of a discriminatory act of the employer. According to a simple formulation: the claimant is not supposed to prove that he/she actually suffered a detriment and the precise reason for this *was* his/her protected characteristic, but he/she is only supposed to demonstrate that his/her protected characteristic *could be* the reason for the suffered detriment. Once the claimant succesfully

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10 As the subsequently developed case law clarified, no intention or subjective motivation of the employer is required to establish the discriminatory nature of a specific provision of the employer (See: C.127/92. Dr. Pamela Mary Enderby kontra Frenchay Health Authority és Secretary of State for Health, ECLI:EU:C:1993:859 ("*Enderby*-judgement") and the attached Advocate General's opinion; C-177/88. Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, ECLI:EU:C:1990:383 ("*Dekker*-judgement"); C-96/80. J.P. Jenkins v Kingsgate (Clothing Productions) Ltd., ECLI:EU:C:1981:80 ("*Jenkins*-judgement"); Evelyn Ellis – Philippa Watson: *EU Anti-Discrimination Law.* Oxford, Oxford EU Law Library, [2]2013. 163–169.

11 See above.

12 See also: C-381/99. Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG, ECLI:EU:C:2001:358 ("*Brunnhofer*-judgement").

13 C-400/93. Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S., ECLI:EU:C:1995:155 ("*Royal Copenhagen*-judgement"); C-297/93. Rita Grau-Hupka v Stadtgemeinde Bremen, ECLI:EU:C:1994:406; C-399/92., C-409/92., C-425/92., C-34/93, C-50/93 and C-78/93. Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg, ECLI:EU:C:1994:415.

14 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ L 14, 20.1.1998, 6–8.) (hereinafter: Burden of Proof Directive).

15 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, 23–36. („Gender Directive"); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; OJ L 180, 19.7.2000, 22–26. („Race Directive"); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22. („Framework Directive"; hereinafter together: "Directives").

16 Gender Directive, article 19(2); Race Directive, article 8; Framework Directive, article 10.

complete this requirement, (2) the employer has to prove that the provision in question was not discriminatory.[17]

Member States are not prevented from introducing rules of evidence which are more favourable to plaintiffs. Preferential rules on burden of proof does not apply to criminal procedures and need not be applied to inquisitorial proceedings.[18]

Under Hungarian law, the reversed burden of proof related to discrimination cases was statutorily defined since the entry into force of the Act XXII of 1992 on the Labour Code; hereinafter: LC 1992), so already at a time when formulation the relevant case law of the CJEU was in a quite early stage. The section 5, paragraph 2 of the LC 1992 laid down that in the event of a dispute arising in relation to a violation of the prohibition against detrimental discrimination, the employer shall prove that its procedure did not violate those provisions on discrimination. Although the very existence of this rule at this time should be appreciated, already the contemporary literature expressed weighty criticisms on it. A study assessed that the burden of proof is placed onto the employer once the employee simply alleges a discriminatory harm, which may give rise to concerns as it might be unfair for the employer's side and may open the way for the successful assertion of completely unsupported claims. Further, it was not clear, whether and how an employer may justify a differential treatment.[19]

Upon the entry into force of the Act CXXV of 2003 on equal treatment and on the enhancement of equal chances (hereinafter: ETA Act), the regulation on burden of proof was deleted from the LC 1992, and since then the relevant norms can be found in the ETA Act. The current text of section 19 of this act lays down that

„(1) [i]n procedures initiated because of a violation of the principle of equal treatment, the injured party […] must make is presumable that a) the injured person or group has suffered a disadvantage […], and b) the injured party or group possessed (or at least as supposed by the other party possessed) a protected characteristics defined in Article 8 at the time of the injury. (2) If the case described in paragraph (1) has been made presumable, the other party shall prove that a) the facts made presumable by the injured party did not exist, or b) it has observed or in respect of the relevant relationship was not obliged to observe, the principle of equal treatment. (3) The provisions set out in paragraphs (1)–(2) shall not apply to criminal procedures and to procedures of minor offences." The original text of this section used the phrase „must prove" instead of the current phrase of „must make it presumable". The provision was amended by the Act CVI of 2006, decreasing the standard of proof required from the claimant, in order to approximate the content of the provision to the requirements of the Directives.

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17 See: Ambrus, Mónika: Vizsgálati modell az egyenlő bánásmód megsértésével kapcsolatos ügyekben. In: Majtényi, Balázs (ed.): *Lejtős pálya. Antidiszkrimináció és esélyegyenlőség.* Budapest, L'Harmattan Kiadó, 2009. 135–164.; Beale (2018) op. cit. 4–6.

18 Gender Directive, article 19(3)(5); Race Directive, article 8; Framework Directive, article 10. About the development of regulation on burden of proof in the EU, see in detail: Ellis–Watson (2013) op. cit. 157–163.; Ambrus op. cit. 79.; Kádár, András Kristóf: A bizonyítási teher megosztásának kérdései. *Fundamentum,* vol. 10., 4/2006. 115–124.

19 See: Kardos, Gábor – Nacsa, Beáta – Gyulavári, Tamás: A nemek közötti diszkrimináció értelmezése az Európai Bíróság esetjogában és a magyar bírósági gyakorlatban. In: Kardos, *Gábor (ed.): Törvénykezés és jogérvényesítés a nők elleni diszkrimináció leküzdésére*. Budapest, Szociális és Családügyi Minisztérium Nőképviseleti Titkárság, 2000. 16.

This provision clearly prescribes a different scheme of scrutiny from the general rule of burden of proof as stipulated in the Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP 2016).[20] The section 265, paragraph 1 of the CCP 2016 sets out that "[u]nless otherwise provided for by an act, facts which are considered material for the case shall be evidenced by the party who harbors an interest that such facts are recognized by the court as true (hereinafter referred to as 'burden of proof'), moreover, the consequences of failure to provide such evidence or to corroborate said facts shall also fall upon that party."[21] According to a special rule applicable in labour cases, where the burden of proof is defined by substantive labor law in derogation from the provisions of the act, it is to be interpreted in accordance with substantive law.[22] As the section 19 of the ETA Act is such a derogating rule, it must be obviously applied instead of the general rule of burden of proof in occupational discrimination cases.

Comparing the national scheme of scrutiny with the one enshrined in the Directives, we can conclude that the Hungarian system is on the one hand more precise, on the other hand more favorable for the claimant. The higher degree of precisity follows from the fact that the Hungarian provision clearly defines which facts should be established by the claimant: exclusively the existence (or the supposed existence by the employer) of a protected characteristic and the occurrence of the detriment. Notably, the claimant is not required at all to support the causation between these two facts. This latter circumstance results that the Hungarian regulation can be assessed as more preferential on the side of the employee than it is prescribed by the Directives, because under the Directives it is not excluded that the national law requires the claimant to support (however, complying with the *'prima facie'* standard) the causation between the protected characteristic and the detriment. "Making any fact presumable" means in the Hungarian practice a sort of proving, which is not supposed to reach the standard of complete certainity, instead it is sufficient if the claimant delivers some evidences that makes his/her allegations credible.[23] Briefly formulated: making an allegation presumable is somewhat more than a mere allegation of a fact, but is less than proving it by certain.

Once this first stage is succesfull, the burden of proof is placed to the employer, which may use three options to excuse itself. (1) It may prove that the facts made presumable by the claimant indeed are indeed false (e.g. the claimant did not possess the protected characteristic he/she states). It should be stressed that, in relation to the same facts alleged by the claimant, the law requires different standards of proof by the employee (for *prima facie* support) and the employer (for the excusation). As far as the employer is not able to prove this, (2) it may prove that the duty of equal treatment had been observed. This means that the employer may prove that there was no causation between the protected

20 The same general rule was applicable under the previous Code of Civil Procedure as well (Act III of 1952 on the Code of Civil Procedure [hereinafter: CCP 1952], sec. 164(1)). The new Code of Civil Prodecure (CCP 2016) took effect in 1 January 2018.

21 This general rule corresponds with the general rules of burden of proof prevailing in other Member States as well [Beale (2018) op. cit. 2.].

22 CCP 2016, sec. 522(2).

23 The Executive Report of the previously referred Case Law Analysing Group of the Kúria (hereinafter: Executive Report), 34–35.

characteristic and the disadvantage suffered by the claimant. As far as the employer is still not able to excuse itself by this, (3) it can prove that in respect of the relevant relationship the employer was not obliged to observe the principle of equal treatment. This latter term means that even if there was a causation between the protected characteristic and the detriment (or the employer could not succesfully rebut it), the employer may refer to an exception or to a justification ground as stipulated in the ETA Act (about these grounds see in more detail in Section 1.2).

Although this scheme of scrutiny appears to be precise and clear enough at the first sight, a huge uncertainity prevailed concerning the application in the judicial practice for many years. The source of controversities was that the courts interpreted the relation of the general rule of burden of proof in the Act III of 1952 on the Code of Civil Procedure (hereinafter: CCP 1952) and the special rule enshrined in the ETA Act in different ways, particularly in terms of the burden of proof related to the causation between the protected characteristics. There were cases[24] in which even the Supreme Court/Kúria held that the mere allegation by the claimant of the causation between the protected characteristic and the detriment is not sufficient, he/she should at least make is presumable.[25] This approach clearly reflects that the courts attempted to apply the general rule of burden of proof (CCP 1952) in parallel with the special rules (ETA Act), instead of using the *lex specialis derogat legi generali* principle. Later on, the development of case law took a different position and cristallyzed that in terms of the causation the burden of proof lies on the employer, i.e. it should be interpreted against the employer if it cannot rebut the causation.[26] The Case Law Analysing Group of the Kúria gave a detailed analysis of the development of relevant the Hungarian case law in the light of the Directives' standards, and concluding that in terms of the causation the employee is only required to make allegations, and the burden of proof is completely placed to the employer.[27] This position was transposed to the Resolution of the Labour and Administrative Department of the Kúria No. 4/2017. (XI.28.) KMK on specific issues of the labour law disputes related to equal treatment (hereinafter: KMK Resolution) as well, enhancing the uniform interpretation of the rules on burden of proof for courts for the future.[28]

A study annexed to the Executive Report (hereinafter: Executive Report)[29] of the previously referred Case Law Analysing Group of the Kúria suggest that the very frequently used defence by the employer stating that it was not aware of the existence of the protected characteristic of the claimant (e.g. in case of sexual orientation, adherence to a specific nationality or ethnicity) should also be proved by the employer (in the framework of rebutting the causation in failure of knowledge about

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24 E.g. judgement of the Supreme Court No. EBH2010. 2272.

25 A summary of this practice: Kulisity, Mária: A bizonyítási eljárás szabályai az egyenlő bánásmód sérelmére hivatkozás esetén. In: *Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat.* [Annex of the Executive Report] Kúria, 2017. 164–165.

26 Decisions of the Kúria No. EBH 2015. M.24.; Mfv.I.10.630/2014.

27 Executive Report, 56.

28 KMK Resolution, sec. 1.

29 *Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat – Összefoglaló vélemény.* Kúria, 2016. (https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_-_egyenlo_banasmod.pdf)

the protected characteristic), and the claimant may not be required to prove (or to make presumable) the awareness of the employer.[30] This approach appears to be correct, without prejudice that the mere existence of the protected characteristic is required to be made presumable by the employee, even if it concerns sensitive personal data (e.g. similarly the gender identity or sexual orientation, race, ethnicity, criminal or medical records).[31]

1.2. The structure of exemptions and justification

As referred above,[32] the substantive aspect of higher standard of excuse in the field of employment discrimination imply that, if the employer cause a disadvantage directly or indirectly on the grounds of a protected characteristic, in a narrow range of cases it can justify its act, further the law recognises certain exceptions to the main rule of prohibition of discrimination.

According to the traditional approach prevailing in the anti-discrimination laws of the Member States, direct discrimination is subject to no justification or just limited ones which are expressly written into statute in order to provide certainity and clarity. On the other hand, indirect discrimination is open to objective justification.[33] (The "privileged" position of indirect discrimination is only ostensible, and does not mean that there would be a hierarchy in the gravity of the two main forms of discrimination. Indeed, the discriminatory effect of the apparently neutral provision of the employer only establishes the presumption of discrimination that may be rebutted by the objective justification test.[34]) Nevertheless, this is not the only approach, and we can observe a high variety of systems of justification and exceptions among the Member States. However, the Directives, primarily based on the preliminary practice of the CJEU in terms of justification and exceptions, define the fundamental standards for national laws.[35]

To comprehend these systems, a reference should be made to the dichotomy of "exceptions" and "justification" as well, even though the difference between the two categories is less than clear-cut. "Justification" can be defined as the open-ended possibility for a perpetrator of discrimination to propose a good reason why their actions should not be treated as unlawful. The perpetrator will normally be required to identify the legitimate aim pursued and the necessary nexus between that aim

30 Kulisity (2017) op. cit. 129.

31 About the burden of proof in more detail: Halmos, Szilvia: Bizonyítás az egyenlő bánásmóddal kapcsolatos munkaügyi perekben az új Pp. alapján. In: Pál, Lajos – Petrovics, Zoltán (eds.): *Visegrád 15.0 : A XV. Magyar Munkajogi Konferencia szerkesztett előadásai.* Budapest, Wolters Kluwer, 2018. 21–71.

32 Section 1.1; Section 2.1 of the Part II [Halmos (2020) op. cit. 32–33.]

33 Dagmar Schiek – Lisa Waddington – Mark Bell (eds.): *Cases, materials and text on national, supranational and international non-discrimination law.* Oxford–Portland, Oregon, Hart Publishing, 2007. 269.

34 S. Fredman: *Discrimination law.* OUP Oxford, 2011. (2nd ed.; reprint 2012) 353.

35 Schiek et al. op. cit. 269.

and the measures actually adopted. While "exceptions" are specific circumstances identified in law where acts that would otherwise be unlawful discrimination will not be so treated. The perpetrator is not free to propose any legitimate aim for their actions; the law has already identified the conditions within which exceptions can be permitted. In addition, legislation may also include "exclusions". These can be viewed as questions concerning the personal and the material scope of the law rather than exceptions.[36]

The possibility of justification of direct discrimination is hotly contested in the academic literature. Namely, direct discrimination is concerned with the unequal treatment of a personal characteristic, which is a central affront to individual dignity.[37] The Directives do not apply any reference to justification of direct discrimination (unlike indirect discrimination, where objective justification is specifically mentioned).[38] However this position is also not represented consistently throughout the Directives: the Framework Directive allows the justification of age discrimination (applicable for indirect discrimination as well).[39] It has been argued that it does not mean that age is at the bottom of the hierarchy of protected grounds, but istead: the recognition of the fact that age discrimination is different and its scope needs more careful demarcation.[40] On the contrary, the Directives recognise a few exceptions connected with direct discrimination, the implementation of which shows a great diversity in national laws. These exceptions may be related to „geniune occupational requirements ('GOR')", „respect for human rights and freedoms", „public security", „health and safety", „provision of financial services" and „positive actions".[41] The most frequently used excepcion, the GOR is defined with respect to the fact that protected characteristics are normally irrelevant to a person's ability to perform a job, however, there are narrow circumstances where the suspect characterisc can be still relevant.[42] A reference to such a „GOR" as the basis of distinction between persons with and without a specific protected characteristic may eliminate the discriminatory feature of the employer's measure. This sort of exception appears in a number of national laws.

As referred above, these exceptions and the justification related to age discrimination is applicable also for indirect discrimination as well under the Directives. Further, a general ground of justification is linked to indirect discrimination: apparently indirect discriminatory provisions can be objectively

36 Ibid. 270–271.

37 Fredman (2011) op. cit. 196.; Tess Gill – Karon Monagham: Justification in Direct Sex Discrimination Law: Taboo Upheld. *Industrial Law Journal,* vol. 32., Iss. 2. (2003) 115.

38 Gender Directive, article 2(1)(b); Framework Directive, article 2(2)(b)(i); Race Directive, article 2(2)(b)(i).

39 Framework Directive, article 6(1).

40 Case C-388/07. The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, ECLI:EU:C:2009:128 („Heyday-case") per advocate general Mazák, para 76.; Fredman (2011) op. cit. 198. About the special nature of age discrimination: Lehoczkyné Kollonay, Csilla: Aktívan, hasznosan... és egyenlő méltósággal? Az életkori diszkrimináció tilalma mint „hátrányos helyzetű diszkriminációs tilalom". In: Horváth, István (ed): *Tisztelgés: ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára*. Budapest, ELTE Eötvös Kiadó, 2015. 281–292.

41 In detail: Schiek et al. op.cit. 275–322.; EU Fundamental Rights Agency (2018) op. cit. 96–108.

42 Schiek et al. op. cit. 275–276.

justified by a legitimate aim provided that the means of achieving that aim are appropriate and necessary.[43]

As for specific protected characteristics, the Directives contain specifically formulated exceptions and justifications, such as the exception above described related to age discrimination, a specialised form of GOR for discrimination on the grounds of religion and belief; reference to reasonable accommodation as a justification of indirect discrimination against persons with disabilities.[44]

As can be seen, the structure of justification and exceptions under the Directives are rather complex, which makes the examination of the compliance of national law with the requirements of EU law rather difficult. In terms of compliance, attention should be taken to the minimum requirements nature of the Directives, from which it follows that national law implementing the regulation on justification and exceptions can only be more preferential to the victim of discrimination than the Directives' standard. This means that, as the case law of the CJEU consequently shows, exceptions to the principle of the prohibition of discrimination must be interpreted strictly.[45]

In Hungary, as it was outlined in Part I,[46] before the entry into force of the ETA Act, one of the most serious shortage of the discrimination-related regulation of the LC 1992 was that the act provided on the justification of disrcimination in a very vague and uncertain manner (see at Section 2.2.3 of Part I). The ETA Act brought sweeping changes in this question: the act introduced a very complex and not fully coherent system of exclusions and justifications. This system was a few times amended as well on some essential points as well. It would exceed far beyond the frames of this study to analyse in depth the structure and the compliance of national provisions with the Directives' benchmark. In the past years a few study attempted to examine this question in detail.[47] Since an in-depth analysis of the compliance of Hungarian law in this aspect would go far beyond the frames of this article, only a few key findings of the relevant studies are asserted here. The most important difficulties of the interpretation and the application of the national structure of justification grounds can be identified as follows.

1) The ETA Act's system is fundamentally based on the two-tier test of justification grounds elaborated by the Hungarian Constitutional Court in the '90s, which follow a completely different approach of classification of discriminatory harms (distinguishing between discriminatory injuries concerning fundamental rights and other rights)[48] than it is included in the Directives

43 Gender Directive, article 2(1)(b); Framework Directive, article 2(2)(b)(i); Race Directive, article 2(2)(b)(i).

44 Gender Directive, article 14(2); Framework Directive, article 2(2)(b)(ii), 4, 6(1); Race Directive, article 4.

45 European Union Agency of Fundamental Rights: *Handbook on European Non-Discrimination Law*. Luxembourg, Publications Office of the European Union, 2018. (https://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination), 97.; *Johnston*-case.

46 Section 2.2.3. of Part I [Halmos (2019) op. cit. 42–44.]

47 Kádár, András Kristóf: *Az egyenlő bánásmódról szóló törvény kimentési rendszere a közösségi jog elveinek tükrében*. Manuscript, s.a.; Halmos (2018) op. cit. 38–55.; Kulisity (2017) op. cit. 133–136.

48 See at Section 2.1. of Part I [Halmos (2019) op. cit. 33–34.]

(distinguishing between direct and indirect discrimination). Unfortunately the Directives's system is not at all mirrored in the Hungarian structure.[49] The ETA Act do not use any distinction between the justification of direct and indirect discrimination, further do not use the dichotomy of exceptions and justifications.

2) The ETA Act stipulates generic and specialised justification grounds. Special justification grounds relate on the one hand to specific protected characteristics (however, precisely not age and disability, where it would be permitted by the Framework Directive), on the other hand to specific areas of life (e.g. for employment). A study analysing the references of justification grounds in the national case law establishes that courts are not consequent in opting for one or another justification ground, and do not clarify the relation between generic and specific grounds.[50] Even the Executive Report only outlines more alternative approaches of interpretation of the justification grounds, and fails to priorise them.[51] The KMK Resolution do not prejudice this issue at all.
3) In spite of the above sketched interpretation difficulties, as a recent, comprehensive analysis on the compliance of national law with EU law in this topic asserts, in most cases it is possible to find an interpretation of national law that meets the Directives' requirements. However, this latter study refers to a recent amendment of the ETA Act, where the incompliance is obvious, and cannot be dissolved by an adequate interpretation of national law, but it can be necessary to disregard the national law that is in breach of EU law, or at least refer a preliminary question to the CJEU.[52]

1.3. Sanctions and remedies

Sanctions and remedies attached to discriminatory injuries have double functions: to dissuade the discriminator (and other potential discriminators) from future discrimination, and to redress the wrong done to the victim(s).[53]

The rules on the enforcement of the non-discrimination principle have been developed by the CJEU in the context of sex discrimination cases.[54] The importance of adequate sanctioning was first

49 Halmos (2018) op. cit. 44.

50 Kulisity (2017) op. cit. 135.

51 Executive report, 57–62.

52 See in detail: Halmos (2018) op. cit. 47–52.

53 Kádár, András Kristóf: *Seeking effectiveness: remedies and sanctions in discrimination cases.* Speakers' contribution [.ppt] on European Academy of Law, Seminar on Anti-discrimination EU Law, Hungarian Academy of Justice, Budapest, 5 September 2018. (http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/118DV21_KADAR_EN.pdf) [hereinafter: Kádár (2018a)]

54 Ellis–Watson (2013) op. cit. 301.

formulated by the CJEU in the *Von Colson*-case[55] related to a predecessor directive[56] of the Gender Directive. The CJEU laid down as a matter of principle that „it is impossible to establish real equality of opportunity without an appropriate system of sanctions". It referred that „the Directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective" however the Directive „does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must […] be adequate in relation to the damage sustained".[57] Subsequently, case law further refined the principles of application of sanctions.[58] Significant guidelines were outlined in the *Marshall (No. 2)* judgement, where the CJEU, in connection with a Gender Employment Equality Directive as well, established that "the fixing of an upper limit of the kind at issue in the main proceedings cannot […] constitute proper implementation of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation". In the *Accept*-judgement, the CJEU warned that "a purely symbolic sanction cannot be regarded as compatible with the correct and effective implementation of Directive 2000/78". Rules on sanctions are not dissuasive enough if "those with legal standing to bring proceedings [are] reluctant to assert their rights" and „any repeat offences of the defendant concerned" might raise doubts about dissuasiveness.[59]

Today, principles of sanctioning in discrimination cases developed by the CJEU are largely consolidated in the three Directives.[60] According to the relevant articles, the system of adequate sanctions and remedies have three main features. Sanctions and remedies should be (1) effective (i.e. capable of achieving the desired goals of sanctioning via deterrence and redressing); (2) proportionate (i.e. adequately reflecting the severity of the violation and the harm caused) and (3) dissuasive (i.e. capable of deterring the discriminator from continuing and/ or repeating the violation and also of deterring other (potential) discriminators).[61]

It is obvious that establishment of a system of sanctions and remedies is primarily a matter of domestic legislature. However, the CJEU identified a few important obligations of national courts

55 Case 14/83. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, ECLI:EU:C:1984:153.

56 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; OJ L 39, 14.2.1976, 40–42. ("Gender Employment Equality Directive").

57 As cited by Kádár (2018a) op. cit.

58 Leading cases e.g.: *Dekker*-case.; *Johnston*-case; M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority, ECLI:EU:C:1993:335 ("*Marshall No. 2*"-case); C-54/07. Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, ECLI:EU:C:2008:397.

59 C-81/12. Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării, ECLI:EU:C:2013:275; Kádár (2018a) op. cit.

60 Ellis–Watson (2013) op. cit. 301.

61 Kádár (2018a) op. cit.

in terms of applying sanctions and remedies in discrimination cases. In the *Dansk Industri*-case, the CJEU ruled that „a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required […] to interpret […] provisions [of national law] in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply […] any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age."[62] This obligation of national courts should be interpreted so far reaching that „[n]either the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation." Nevertheless, the limits of the courts' activity were also laid down in another judgement, where the CJEU stressed that courts are not required to apply the national law *contra legem*. This means, the national court can only disregard the national statutory or case law that breaches the EU law, but cannot create law (e.g. invent a new type of sanction).[63]

As described above (at Section 2.2.5 of Part I),[64] one of the most important weaknesses of Hungarian anti-discrimination law before the accession was the lack of adequate system of sanctions and remedies. Regrettably, The ETA Act brought only half measure in this field. The act defines only the sanctions that are applicable by the Commissioner of Fundamental Rights acting as an administrative authority in cases related to equal treatment.[65] These can be the followings: a) ordering that the situation constituting a violation of law be terminated; b) prohibiting the future continuation of the conduct constituting a violation of law, c) ordering that its decision establishing the violation of law be published, d) imposing a fine (ranging from HUF 50 000 (approximately EUR 167) to HUF 6 million (approximately EUR 20 000)), e) applying a legal consequence determined in a special act. These sanctions can be applied jointly.[66] This set of sanctions are often criticised for prescribing predominantly redressing sanctions, and offering no opportunity for the victims to claim compensation for the injuries.[67]

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62 C-441/14. Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen, ECLI:EU:C:2016:278; as cited by Kádár (2018a) op. cit.

63 C-407/14. María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA, ECLI:EU:C:2015:831. See. in detail: Kádár (2018a) op. cit.

64 Halmos (2019) op. cit. 44–45.

65 From entry into force of the ETA Act until 31 December 2020, a separate administrative authority, the Equal Treatment Authority (ETA) performed the functions of an equality body (as envisaged by the Race Directive) by controlling the enforcement of rights and duties arising from the ETA Act via exercising of a wide range of public powers. The powers of the ETA were taken over by the Commissioner of Fundamental Rights (general ombudsman) on 1 January 2021.

66 ETA Act, sec. 17/A(1), see: Kádár, András Kristóf: *Country report – Non discrimination, Hungarry 2017. European Commission, Directorate-General for Justice and Consumers.* Luxembourg, Publications Office of the European Union, 2018 [hereinafter: Kádár (2018b)]

67 Halmos, Szilvia – Gazsi, Adrienn: *Esetjogi tanulmányfüzet – Az értelmi fogyatékos, halmozottan fogyatékos és autista emberek számára működtetett antidiszkriminációs jelzőrendszer tapasztalatai*. Budapest, Kézenfogva Alapítvány, 2008. 68–69.

However, if the claimant asserts his/her rights on a judicial way,[68] the list of available sanctions is not clearly catalogued by the ETA Act. There are no specific catalogue of sanctions applicable in cases where equal treatment was not observed. The sanctions are in general adjusted to the nature of unlawful act of the employer. If the discrimination is manifested in the unlawful termination of the employment, the employer shall compensate the employee for the damages suffered. Full compensation is restricted by the provision, according to which under the heading of lost income a maximum of 12-months' salary may be claimed by the employee.[69] If the termination of the employment constitutes the violation of the requirement of equal treatment, the employee may request the court to order his/her reinstatement (in other cases of the unlawful termination of employment, this option is not available with some exceptions, such as when the dismissed employee was a trade union representative).[70]

In other cases of discrimination (i.e. when it is not a dismissal that constitutes the subject matter of the case), it is can be very difficult to find the adequate sanction of a discriminatory provision. If the employee suffers a certain damage in consequence of discrimination, he/she can require the employer to pay full damages.[71] Besides, the violation of right not to be discriminated against is an inherent right under the Act 2013 of V on the Civil Code (hereinafter: CC 2013).[72] The Act I of 2012 on the Labour Code (hereinafter: LC 2012), with reference to the provisions of the CC 2013 on the legal consequences of violations of inherent rights, apparently opens the way to all remedies available under civil law for cases of employment discrimination.[73] One of the most commolny claimed and applied sanction of violation of an individual's right to non-discrimination is the so called pain award, which is a general sanction of violation of inherent rights. In the determination of the amount of pain award, the court has a large margin of discretion, the law defines only some special (but not exclusive) criteria of decision-making (the severity and regularity of the violation, the degree of liability, and the violation's impact on the claimant and his/her environment).[74] Pain award is subject to no statutory upper limit.

Besides, the CC 2013 provides on further legal consequences of violation of inherent rights (sanctions independent of attributability to the perpatrator).[75] The practical manner of application of these rules

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68 In Hungary, currently "general courts" hear labour cases at first instance. General courts, located in every county (19) and in the capital constitute the second level of the four-level judiciary.

69 LC 2012, sec. 82(1)(2).

70 LC 2012, sec. 82(1)(2).

71 LC 2012, sec. 167.

72 CC 2013, sec. 2:43(c).

73 LC, sec. 9; CC, sec. 2:42–43, 2:51, 2:53.

74 CC 2013, sec. 2:52(3).

75 Accorting to the sec. 2:51(1) of the CC 2013, in such cases the claimant may requeast
a) the court's declaration of the occurrence of the infringement,
b) to have the infringement discontinued and the perpetrator banned from further infringement;
c) that the perpetrator provides adequate redress, and, make this fact public at his/her own expense;
d) the termination of the injurious situation and the restoration of the previous state, and the elimination of the object that came into existence as a result of the violation, or to have such an object deprived of its injurious nature;
e) that the perpetrator or its successor hand over the financial asset acquired through the violation.

in an employment context is not always clear (case law is not available either). For example it could be recommended that to construe the sanction formulated under section 2:51(1)d) of the CC 2013 „the termination of the injurious situation" that it implies that the court may order the employer to make an offer of appropriate amendment of the employment contract in cases of wage discrimination for the injured party. Namely, in failure of expressed authorisation by statutory law, the courts are not entitled to amend the employment contracts if the terms and conditions violate the duty of wage equality (or the duty of equal treatment in any aspect). Similarly, it is very difficult to use an effective, dissuasive and proportionate remedy in cases of discrimination where actual material damage is not derived from a discriminatory provision of the employer (e.g. application of a work schedule discriminating against persons with family duties).

The rule on the upper limit of damages in cases of discriminatory dismissals can be deemed highly disputable. As outlined at citing the relevant case law, the CJEU expressed in *Marshall (No.2)* case that such an upper limit is contrary to the relevant directive. Comparing the relevant articles of the Directives, we can establish that only the Gender Directive is, which expressly outrules the statutory fixing of an upper limit for damages derived from discriminatory harms, the other two directives not. However, it should be considered as well that the *Marshall (No. 2)* case was adjudicated in the context of a previous directive, where fixing of upper limit had not been prohibited yet. Thus, if a claimant claimed more than his/her 12 months' salary as damages with respect to discriminatory dismissal, it could be considered to disregard the mentioned rule of national law in the specific case, or at least refer a preliminary question to the CJEU on the correct interpretation of relevant EU law and the obligations of the national judge.[76]

As previously referred among the shortages of early national anti-discrimination law, academic literature expressed their concerns in terms of missing collective forms of assertion of rights.[77] In the meanwhile, the ETA Act introduced the opportunity of *actio popularis,* allowing public prosecutors, associations/organisations/trade unions (and even the ETA in judicial lawsuits) to act in the public interest on their own behalf, without a specific victim to support or represent before the courts of the Commission of the Fundamental Rights. Before the courts, they may – out of the list of sanctions applicable in lawsuits launched for the violation of inherent personal rights – seek all the sanctions with the exception of damages. This form of assertion of rights is obviously very benefitial for victims as protecting them from retrenchments of the perpatrator, as well as mitigating their burdens arising from litigation. However, *actio popularis* is a very rarely used procedural tool in the practice, especially in cases of employment discrimination.[78]

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76 András Kádár's ideas and comments to this argumentation.

77 Section 2.2.4 of Part I [Halmos (2019) op. cit. 44.].

78 Kádár (2018b) op. cit. 110–111. A recent research reports on only three such case heard by administrative and labour courts. (Gelencsér, Dániel: Közérdekű igényérvényesítés Magyarországon I. *Eljárásjogi Szemle,* 3/2016. 31–45.)

The CCP 2016 newly introduced two types of collective assertion of rights: actions brought in the public interest and class astions.[79] The former is precisely designed for cases where an action is brought by the claimant in the public interest on behalf of the so called „beneficiaries" whose rights were violated, and where the assertion of right concerns the public interest. Although, assertion of rights in discrimination cases by e.g. associations, trade unions could precisely fit into this conceptual framework, the CCP 2016 excludes such proceedings from the scope of actions brought in the public interest.[80] On the contrary, the latter new type (class action) are applicable for employment discrimination cases as well.[81] Class action may be initiated to enforce one or several rights of the same cause for at least 10 claimants ("representative right") in the form of class action if the facts underlying the representative right are the same as to substance with respect to all claimants ("representative facts"), and the court approved the class action. The claimants appoint a „representative claimant", who enforce the rights of the others by his/her own acts in the course of the proceedings. In failure of relevant judicial practice, we cannot report on the effectiveness of the new rules in discrimination cases.

2. Conclusions and agenda for the next decade and a half

This study attempted to give a comprehensive overview on the development of Hungarian anti-discrimination law,[82] demonstrating the impacts of implementation of EU law respectively.

Before the accession of our country to the EU, national anti-discrimination law could be found in a rather embryonic status. Although the statutory law (and among the other fields of law, most notably the labour law) already stipulated the basic concepts and instruments of equal treatment as already existed in many legal cultures, a lot of serious shortages prevented victims of employment discrimination from effective assertion of their rights. As demonstrated by numerous studies and papers from that time, for academics and human rights' activitst, relevant EU law and the case law of the CJEU was one of the primary references as a possible benchmark for national regulation.

Implementation of the EU law on the ban on discrimination in employment took place in two major steps: first through the 2001 amendment of the LC 1992, second through the introduction of the ETA Act. Since then, the ETA Act was subject to some significant amendments, however, the fundamental concepts and regulation structure of the act remained unaffected since 2003. Nevertheless, implementation of the requirements of relevant EU primary, secondary and case law played an eminently decisive role in the establishment of Hungarian anti-discrimination law, fundamentally reshaping and determing the design of current concept and instruments.

79 CCP 2016, sec. 571–591.

80 CCP 2016, sec. 571.

81 CCP 2016, sec. 583.

82 However, by reasons of space, we could not provide an in-depth analysis in all aspects of the topic.

Over the last decade and a half, the number of domestic discrimination cases sharply increased both before the equal treatment authority and in terms of labour law disputes as well. The most important developments and shortages of judicial case law were analysed on a comprehensive basis by the Kúria in 2016, and the guiding conclusions were summarized in the Executive Report and in the KMK Resolution. The analysis of case law elucidated the strengths as well as the weaknesses of statutory law. In parallel, an increasing number of academic writings also address the assessment of the effective regulation. This study attempted to summarize all these findings in order to describe the arc of development of the national anti-discrimination law applicable to employment cases.

Accordingly, comparing the pre-accession and the current status of the relevant national law in the light of EU law, the following conclusions about the achievements, as well as the most important needs for further development, constituting an kind of agenda for the next fifteen years can be established.

1) In terms of the position of Hungarian equality law in the framework of the typology of different approaches of equality, the national body of law reaches farther than the formal approach, and contains elements reflecting the ideas of „equality of results", „equality of opportunities" and „equality as an element of dignity". Even though the Constitution[83] and the principles elabourated by the Constitutional Court related to the constitutional understanding of equality clause gave indications for the legislature and the jurisdiction to exceed the formal approach of equality already in the '90s, a set of new instruments reflecting the substantial and the dignity-based approach of equality became part of national law in consequence of implementation of EU law (e.g. indirect discrimination, harassment, victimisation, positive actions etc.)
2) The structural position of equal treatment duty as a „real" fundamental principle of labour law was in the '90es not at all obvious: courts often took the position that if the employer exercising its prerogatives correctly in a formal sense, the discriminatory nature of this provision cannot be the subject matter of a lawsuit. By now, the trend of judicial practice took a preferential direction: prohibition of discrimination is regarded as a fundamental principle of labour law, and by this, constitutes a genuine limitation of the margin of discretion of employers in exercising their employers' rights. As a result, any discretional decision of an employer (i.e. dismissal during the trial period, premising the workers, executing a redundancy) can be contested if it does not meet the requirements of equal treatment.
3) In terms of protected characteristics, prior to the implementation of EU law, the national regulation was considerably vague. The codificators of the ETA Act envisaged to define a very broad scope of protection against discrimination by setting up an extremely long and open-ended list of protected characteristics. This gave rise to a line of cases (particularly handled by the previous Equal Treatment Authority), in which the interpretation strongly deteriorated from the doctrinal purpose of anti-discrimination law, and lead to the application of rules on burden

[83] Act XX of 1949 on the Constitution of the Republic of Hungary (in effect from 20 August 1949 to 31 December 2011.

of proof in an unfair way. On the contrary, EU law neither used such a wide range of protected characteristics nor an „other status" category. This pattern was also helpful for the academy and the law enforcement bodies to recognise the incorrectness of interpretation of protected characteristics. By means of the guidelines appearing in this subject matter in the Executive Report and the KMK Resolution, the law enforcement has become more and more consolidated by taking a right direction in terms of doctrinal correctness and EU compliance as well. As another positive development, it shall be noted that, in line with spirit of the EU Directives, the Kúria, in the mentioned documents put an end to the disputes about the connection of protected characteristics and the duty of equal pay. Here should be mentioned that, in terms of rules on equal pay, the term „wage" was also reconcepualised to comply with the EU standards.

4) The definition of the conducts amounting to discrimination are predominantly the word-by-word transposition of the Directives' text. It is to appreciate that other categories than the two classic forms of the discrimination (direct and indirect discrimination) were also codified in the Hungarian code, extending the scope of protection to these specific forms of discrimination, in addition, listing an extra type of discriminatory conducts as well (unlawful segregation). However, it has to be established that the verbatim transposition of the Directives cannot be deemed as the most effective way of implementation. In particular, it has lead to a too complex and confusing definition of indirect discrimination, constituting a hurdle in effective assertion of rights. The refinement of the definition of indirect discrimination is highly recommended in the future. The improvement of the definition of victimisation could be also considered in order to better reflect the nature of sexual harassment.
5) The rules on shared or reversed burden of proof lie in the heart of anti-discrimination law. Although the pre-accession national law referred to the reversed burden of proof in discrimination cases, the ETA Act, in correspondence with the Directives, significantly refined and clarified the obligations of the parties. National rules now comply with the EU standards, however, may be a slightly too generous in favour of the claimants. The KMK Resolution, in line with the CJEU's case law and the Directives, made a full clarity in application of rules on burden of proof, dissolving the previous controversies of the case law.
6) The basic concepts of Hungarian anti-discrimination law were established in the framework of the practice of the Constitutional Court. The principles elaborated by the Constitutional Court were the initial guidelines for normal courts hearing discrimination cases of private entities. This was the reason why the ETA Act codified a number of patterns (in particular: the justification tests) in line with the case law of the Constitutional Court and the normal courts (e.g. Supreme Court's resolution No. MK 97 dating back to the 1970's, the wording of which is still, though amended, reflected in the section 22 of the ETA Act). The incompliance of these rules with

the requirements of the EU is more and more tangible, and calls for a systematic review of the system of justifications and exemptions in the light of the Directives.

7) The system of sanctions and remedies also need to be reviewed in the oncoming years. It was highlighted that there is no uniform and transparent set of sanctions and remedies for discriminatory injuries applicable by the courts hearing labour law cases. Further, concerns can be identified about the incompatibility of a certain rule of the statutory law with the Directives. The procedural instruments of effective assertion of rules have also been extended, however, the *actio popularis* that had been strongly advocated by the promoters of equal treatment before the accession, has been very rarely used in labour judiciary.

Looking back to the development of national anti-discrimination law in employment since the EU accession, the high value added by relevant EU law to the domestic achievements cannot be disregarded. The body of anti-discrimination law indeed was, and perhaps also continues to be a „foreign body" in the eye of Hungarian law practicioners and judges for a long time more. Even though the comparative analysis of the two statuses of this field of national statutory and case law may confirm that it has been and still is worth the effort to gain a deeper and deeper understanding of the instrument of EU anti-discrimination Directives and case law, which has given so far many valuable indications for improvement of national law, and hopefully will do so for the development of domestic law in the future as well.