www.cielolaboral.com

HUNGARY — The impact of the labour law measures taken by the authorities: reflections one year after the official recognition of Covid-19 as a pandemic

Attila Kun

1. Introduction, background

This contribution aims to summarize, identify and evaluate the most important trends of labour law (and labour market) measures taken by the authorities in Hungary to mitigate the effects of the Covid-19 pandemic. Partly because of space-limitations, partly because of a targeted, specific — more reflective and analytical — methodological consideration, this paper doesn't aim to take a full inventory and describe all related measures in details (this has also been done before, elsewhere[1]), but it strives to point out some tendencies (if any), debates and long lasting implications.

Domestic labour market indicators in recent years have shown an improving trend, the economic activity and employment level have increased since 2011. For example, in the last quarter of 2019 there were 4 million 520 thousand people in employment, thus the employment rate of the population aged 15-64 reached 70 percent. Along with improving employment rates, the number of unemployed continuously decreased (in 2019 to 160 thousand people), so the unemployment rate decreased to 3.4 percent. However, *the corona-virus outbreak has broken these improving tendencies*. Compared to 2019, the average number of employees in the first half of 2020 decreased by 75 thousand (1.66 percent). The number of people affected by collective redundancies peaked in June. From April 2020 to the end of July in total, almost a hundred employers announced collective redundancies, of which more than 7,000 employees were involved. The preceding trend-like decline in the number of unemployed was broken. In July 2020, the number of unemployed was 218 thousand. The unemployment rate rose to 5.1 percent by June, then declined a bit to 4.7 percent for July. By the middle of 2020, about 90 thousand more people entered the jobseeker-status than normally expected (based on data from the last five years). The economy seemed to gradually restart by July 2020, but the second wave of the pandemic started as of autumn, and the third has§ continued closely, starting from the end of February 2021. According to analysts of the State Audit

[1] *Cf.* Horváth, I. — Petrovics, Z.: COVID '19 – Hungary. Measures concerning employment, collective labour law and social security; Horváth, I. — Petrovics, Z.: COVID-19 – Hungary (Part 2): Measures concerning employment, collective labour law and social security, CIELO www.cielolaboral.com, accessed 25 February 2021.

Office of Hungary, *encouraging may be an expected relatively rapid recovery in the economy*, since, before the crisis, mounting labour shortages had been the main labour market concerns.[2]

2. The main features of related labour law and labour market measures: three phases of action

If one looks back to the one year of crisis-management from a labour law perspective, three phases of governmental action might be identified. Firstly, the Government started off with rather radical, hectic measures aimed at altering the basic regulatory structure of labour law — for the sake of "flexibility" — by way of strengthening the unilateral power of employers and intensifying the freedom of contract. Secondly, the Government introduced general (non-sector specific) financial support schemes to protect jobs and preserve economic capacities. Thirdly, more recently, a shift can be detected to more targeted, sector-specific financial support schemes. Furthermore, the re-launching of the economy and creating jobs are becoming top priorities.

2.1. The first phase: radical measures in employment contracts law

After the declaration of the state of emergency [40/2020. (III. 11.) Govt Decree], the most important labour law measures were promulgated in two subsequent Decrees.

Govt Decree 47/2020. (III.18.) on immediate measures to mitigate the effects of the coronavirus pandemic on the national economy[3] expanded the managerial prerogatives of employers by permitting them to unilaterally derogate from certain standard rules of the Labour Code (Act I of 2012, hereinafter LC), for example in the field of working time scheduling, or by authorizing employers to unilaterally oblige the employee to telework or work in home office etc. Moreover, Art. 6(4) of this Decree also stated that "*the employer and the employee may derogate from the provisions of the LC by their agreement*." This general authorization was without doubt the most controversial element of the pandemic-related labour legislation, because, as many experts noted, it represents a return to the absolute freedom of contract[4], practically puts labour law as such (and its protective functions) "in brackets" and does away with the overriding "non-waivability" (and "in favorem") principle of labour law.[5] It does not require further explanation that this legislative solution could have far-reaching consequences, as the unbalanced contractual power of the employer and the employee could (and certainly did) result in precarious agreements[6] (by its nature, no exact data is available on this matter). In principle, the above-mentioned derogations could only be applied for the sake of a purpose: "in order to comply with the prohibitions and restrictions imposed during the state of emergency."[7] However, the monitoring of this precondition was impossible in practice. It is worth noting that the Constitutional Court rejected to establish the unconstitutionality of the aforementioned Art. 6(4) on the basis that the given legal provision was

---

[2] Állami Számvevőszék: Járványhelyzet és munkaerőpiac. 2020. 09. EL-2824-002/2020. <https://www.asz.hu/storage/files/files/elemzesek/2020/jarvanyhelyzet_munkaeropiac_2020_09_30.pdf?download=true> accessed 21 February 2021.

[3] According to some experts, this Decree was even unconstitutional, because it was passed without any constitutional authorization for the Government. Gyulavári, T.: Covid-19 and Hungarian Labour Law: the 'State of Danger', *Hungarian Labour Law E-Journal* 2020/1, 111. This has never been officially confirmed.

[4] Ibid 113.

[5] *Cf.* Davidov, G.: Nonwaivability in Labour Law. *Oxford Journal of Legal Studies*, 2020, Forthcoming, 2. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559244> accessed 15 January 2021; Kun, A.: Munkajogi elvi kérdések: a felek (munkáltató és munkavállaló) egyéni megállapodásainak mozgásteréről: A járványhelyzet egyes munka- és szociális jogi dilemmái I., *Glossa Iuridica*, VII: Különszám. 145-156 (2020). <https://ajk.kre.hu/images/doc6/PR/Glossa_Iuridica_Kulonszam.pdf> accessed 23 February 2021.

[6] Berke, Gy.: Munkajog veszélyhelyzetben, in: Pál, L. – Petrovics, Z. (eds.): *Visegrád 17.0.* Wolters Kluwer, Bp. 2020, 33.

[7] The rules entered into force on March 19, 2020 and could be applied during the state of emergency or for the next 30 days thereafter. Finally these rules were in force till the 1st of July, 2020 (based on Act LVIII of 2020).

no longer in force. Accordingly, the Constitutional Court avoided (i.e. did not have the choice) to examine the issue in merit.

Govt Decree 104/2020 (IV.10) — apart from slightly mitigating the extreme flexibility offered by Art. 6(4) of Decree 47/2020 by designating some "cogent" rules — introduced another highly contentious rule. The Decree allowed employers to unilaterally order a working time banking (reference period according to the EU-law terminology) of maximum 24 months (or to prolong the formerly ordered working time banking up to the same length). This option enables flexible employment solutions for employers. This rule raised several concerns, among which the most important ones are the following. First, the 24 months is much longer than what is normally, statutorily allowed in the LC. Pursuant to the general rule of LC, the maximum duration of working time banking unilaterally applicable by the employer is 4 months (or 16 weeks). By way of derogation from the general rule, the maximum is 6 months (or 26 weeks) in some specific cases. In addition, where justified by objective or technical reasons or reasons related to work organisation, the maximum duration of working time banking fixed in the collective agreement can be 36 months [LC Art. 94 (1)-(3)]. Second, such long (up to 24 months) reference periods — according to the Decree — would not be affected by the cessation of the state of emergency (i.e. they could remain in force, continue after the cessation of the state of emergency). Third, it is doubtful if this rule is (or is not)[8] in compliance with the Working Time Directive (WTD) of the EU[9] (according to which, in short, the reference period in no event can exceed 12 months[10]). Fourth, since the employer has the right to introduce 24-months long working time banking even if there is a trade union represented at the employer, the above-mentioned default rule on the collective agreement's option to introduce working time banking up to 36 months becomes marginalized. Therefore, this might mean a restriction on collective bargaining.

Both above-mentioned Decrees stated that any clauses of collective agreements limiting the employers' aforementioned unilateral measures shall not apply.[11] Accordingly, this rule sets aside existing collective agreements in relation to these matters and thus represents an excessive marginalization of collective bargaining.

As a bypass, even though it is a very specific measure, it is useful to mention that, authorized by a Govt Decree [142/2020. (IV. 22.)], football clubs were authorized to unilaterally implement wage-cuts for their employed players. This — only one of its kind, but emblematic — option represented a highly unusual intrusion into the contractual nature of the employment relationship.

In sum, the main intention and effect of the above-mentioned measures were to push the burden of crisis-management to the parties of the employment contract (and more specifically, indirectly to the employee). As practice showed, this approach in itself could not suffice in the long run; more active (financial) forms of state support were needed.

[8] The debate is also about the diverging understanding of terminology: "reference period" (applied by EU-law) *versus* "working time banking" / "working time frame" (used by the LC). Szabó, I. Sz.: Munkajogi elvi kérdések: a szociális párbeszéd és a kollektív szerződések mozgásteréről: A járványhelyzet egyes munka- és szociális jogi dilemmái II., *Glossa Iuridica* VII: Különszám. 157-169 (2020).
[9] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. See especially Art. 19.
[10] *Cf.* CJEU of 3 October 2000, Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*. [ECLI:EU:C:2000:528], Para 69-70.
[11] Art. 6(3) of 47/2020. (III. 18.) Govt Decree and Art. 1(4) of 104/2020 (IV. 10.) Govt Decree.

2.2. The second phase: financial support schemes

During the first wave of the pandemic, under the emergency rule, a general wage support (for part-time employment) and employment retention scheme ("Munkahelyvédelmi Bértámogatás") was introduced: 105/2020 (IV.10.) Govt Decree on support for reduced working time in the event of an emergency under the Economic Protection Action Plan, amended by Govt Decree 141/2020. (IV.21.). The scheme was set up to run from 17 April 2020 until 31 July 2020, but it was extended for another month (until 31 August). The aim of the measure was to prevent Covid-related layoffs. The scheme resembled the German-type Kurzarbeit, but it was less generous. The wage subsidy was transferred directly from the state to the employee while the reduced wage was paid by the employer. Over the course of the existence of the scheme, its eligibility criteria were progressively eased (e.g. the ban on layoffs was relaxed to apply only to the covered employees, but not to the whole headcount; 'national interest' of the activity was no longer required as precondition etc.), so that the number of beneficiaries increased significantly.[12] The most often raised critics with the scheme were the following: the too bureaucratic, too general (not targeted) nature and that it came rather late, 5 weeks after the announcement of a 'state of emergency'. Already in these periods, some more targeted, sector-specific schemes were introduced: for instance, a specific wage subsidy scheme for workers employed in research & development (applied between 15.04 – 15.07.2020. on the basis of Govt Decree 13/2020). In sum, these wage subsidy schemes were able to contribute to the retention of almost 230 000 workers by July 2020.[13]

2.3. The third phase: sector-specific support schemes

During the second wave of the pandemic, in the framework of the emergency rule (introduced on 04.11.2020), more targeted support-schemes has come into the forefront in Covid-hit sectors (HORECA, culture, sport, leisure): Govt Decree 485/2020 on sector specific protection measures during the emergency period — employers in the sectors concerned for the months of November, December 2020 and January 2021 received wage subsidies. Since the start of the program, more than 16,000 employers have applied for support for the wages of some 115,000 employees (by March 2021).[14] With respect to the third wave of the pandemic (starting as of February 2021), the Government has decided about the continuation (and broadening) of these measures.

It is a separate, but very significant new sectoral measure that in October 2020 the Parliament adopted Act C of 2020 on Healthcare Service Relationship which fundamentally transforms the employment relationships at state-owned healthcare service providers. The Act envisages substantial increase in the statutory base-wages of physicians depending on seniority in three steps, reaching its maximum in January 2023. The new public medical service contract and status involves some rigorous new obligations as well (including stricter rules on "second jobs" / incompatibility rules, absolute ban on "gratuity payments" etc.). As of March 2021, more than 95 percent of health care workers have signed the new contract under the new status law.[15] Preceding this, Govt Decree 275/2020. (VI.12.) awarded health-care workers a one-off bonus acknowledging their hard work during the first wave.

---

[12] For further details, see: Eurofound (2020), Covid-19 EU Policy Watch, Database of national-level responses, Hungary by Nóra Krokovay (KOPINT-Tárki) and Eurofound. <https://static.eurofound.europa.eu/covid19db/countries/HU.html> accessed 25 February 2021.

[13] Állami Számvevőszék, *Op. cit.*

[14] <https://www.magyarhirlap.hu/gazdasag/20210227-a-marciusi-berekre-is-igenyelheto-a-bertamogatas> accessed 28 February 2021.

[15] <https://www.napi.hu/magyar_gazdasag/egeszsegugyi-reform-a-dolgozok-tobb-mint-95-szazaleka-alairta-az-uj-szerzodeset.724383.html > accessed 02 March 2021.

3. The main characteristics and long lasting impacts of measures taken

Hungary has experienced a legislative "tsunami" during the pandemic (especially during its first wave) and it hasn't always been easy to navigate within the "jungle" of legislative acts. Hence, it is almost impossible to point out stable tendencies, consequent policies. Still, as far as labour law is concerned, some underlying common regulatory considerations and trends can be identified. The most notable ones are the following: the maximization of flexibility, the marginalization of social dialogue and collective bargaining, the inattentiveness towards some international law and EU-law based principles and rules.

First, as far as maximization of flexibility is concerned, as it has already been pointed out, several measures aimed at broadening the managerial prerogatives of employers and the freedom of contract of the parties to the employment contract in order to help the labour market to organize work during the state of emergency more flexibly. These measures seemed to undermine the inherent purposive, protective functions of labour law. Taking into account that Hungarian labour law is considered to be extremely flexible by default[16], these trends did not come as a surprise, but were still worrisome.

Second, social partners' role in designing the measures mentioned above was marginal. At best, some ad hoc consultation through national tripartite social dialogue bodies happened (the tripartite VKF — "Consultation Forum of the Private Sector" — meets more often since the start of the crisis). However, meaningful social dialogue is missing. The Government often provided information to social partners already published in the media. Social partners' role in the implementation, monitoring and assessment phase of the above-mentioned measures is also non-existent. The same attitude prevailed in relation to existing collective agreements, as described above (under 2.1.). International experiences show that the importance of collective bargaining is paramount and ever-increasing in crisis situations. The attitude of the Hungarian legislator does not seem to reflect these considerations.

Third, the inattentiveness of law-making in the field of labour law towards some international law and EU-law based principles and rules is apparent. However, it must be noted that it would be extremely difficult to prove overt breaches of international and EU-law norms. Nevertheless, the legislator seemed to "dance on the edges of compliance" with some temporary solutions. This can be exemplified by, among others, three concerns. First, promotion of collective bargaining has never been a "success story"[17] in Hungary, but the above-described measures of Govt Decrees 47/2020 and 104/2020 call into question Hungary's compliance with this obligation of the state.[18] Second, "EU labour law Directives, as transposed in national law" could have been potentially at risk of being violated by agreement of the parties[19] (based on the above-described Art. 6(4) of Decree 47/2020). Third, it is debatable whether the above-analyzed "24 months-long working time banking" was in line with the rules (and the spirit, aim) of the WTD.

[16] *Cf.* Gyulavári, T. – Kártyás, G.: *The Hungarian Flexicurity Pathway?* Pázmány Press, Bp. 2015. Kun, A. : Country Report: Hungary: Newefin Project, University of Amsterdam 2020. <https://aias-hsi.uva.nl/en/projects-a-z/newefin/drafts-country-reports/newefin-drafts-country-reports.html> accessed 21 February 2021.

[17] In the recent past, both the ECSR (European Committee of Social Rights) and the ILO has criticised Hungary for insufficient promotion of collective bargaining. See: ECSR, Conclusions 2014 (HUNGARY) Articles 2, 5, 6, 21 and 22 of the Revised Charter, Jan. 2015, 18; ILO, Memorandum of Technical Comments on Hungary's draft Labour Code, 8 Nov.2011.

[18] For instance, as mandated by Art. 4 of ILO Convention No 98 (also ratified by Hungary).

[19] Gyulavári, T.: Covid-19 and Hungarian Labour Law, *Op. cit.* 115.

4. Some issues of professional debate

The pandemic-context has brought to the surface some professional issues which demonstrate longer-lasting, structural regulatory dilemmas within Hungarian labour law. As an illustration, this paper briefly sketches three such debates.

First, the unstable interpretation of "vis maior" has been a "hot topic" during the pandemic. For instance, according to Art. 146(1) of the LC, 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. In this regard, citing the Covid-19 situation as a "vis maior" to pay no wages for down-time has been a frequent attempt by employers. However, it can only be decided on the basis of an examination of all the circumstances of the case if it is correct or not. A broad reference to the Covid-19 situation as a "vis maior" usually can't suffice, but, for instance, the restriction of the employer's operation by law may be considered an unavoidable external reason, i. e. the employee's claim for remuneration may be excluded. In the same logic, Art. 68(8) (c) of the LC states that the employer shall be permitted to terminate a fixed-term employment relationship by notice if maintaining the employment relationship is no longer possible due to unavoidable external reasons. The pandemic in itself cannot justify this way of terminating employment. More precisely, the decrease in income directly causally related to the pandemic or the rationalization of funds necessary to maintain functionality due to the pandemic cannot qualify as legitimate reasons for termination of fixed-term employment by employers under Art. 66(8) (c) of the LC.[20] Again, all the circumstances of the given case must be taken into account in relation to the applicability of the "vis maior" rule.

Second, there seems to be a conceptual confusion in Hungarian labour law as regards telework and / or "home office". This might be partly explained by the former imprecise, short-sighted, rather mechanical implementation of the European Framework Agreement on Telework (2002) into the LC, which requires a sui generis — "atypical" — employment contract for telework. According to the LC [Art. 196(1)], telework shall mean activities performed on a regular basis at a place other than the employer's facilities, using computing equipment, where the end product is delivered by way of electronic means. In the employment contract the parties shall agree on the employee's employment by means of telework [LC, Art. 196(2)]. On the other hand, so-called "home office" (or "work at home") — which has obviously become very widespread during the pandemic[21] — is not governed by law in the private sector.[22] According to the legal practice, "home office" can be based on an agreement between the parties or on a unilateral authorization or order of the employer. As for the latter, according to Art. 53 of the LC, employers shall be indeed entitled to temporarily reassign their employees to workplaces other than what is contained in the employment contracts, but the duration of this may not exceed a total of 44 working days or 352 scheduled hours during a calendar year. In sum, the pandemic-related legislation aimed at easing the conditions of both telework and "home office" (e.g. by authorizing employers to unilaterally oblige the employee to telework or work in "home office"; by options for derogation from the LC[23], by simplified temporary health and safety provisions; by financial support of working from home etc.). During summer 2020, it was also on the political agenda to draft a comprehensive, clarifying new law on

[20] Ferencz, J. — Wellmann, B. B.: Adalékok az Mt. 66. § (8) bekezdésének c) pontja szerinti munkaviszony-megszüntetéshez, a koronavírus-járvánnyal összefüggésben, *Munkajog*, 2020/4, 14-19.

[21] Based on data from the Central Statistical Office, 3.7% of the employees were employed as teleworkers in the first quarter of 2018, while the number of 'teleworkers' – either occasional or regular – exceeded 750,000 persons (17.3%) in the spring/summer of 2020. <https://www.ksh.hu/docs/hun/xstadat/xstadat_evkozi/e_tavmunk9_17_03.html#> accessed 21 February 2021.

[22] For the public service, Act CXXV of 2018 on Governmental Administration contains some basic rules on "home office" (Art. 126.).

[23] Govt Decree 487/2020 (11 November) on "applicable regulations relating to telework during the emergency".

the topic, but finally, this has not happened so far. Nonetheless, there are two different views in the scholarship with regards to whether telework and "home office" are different[24] or more equivalent[25] legal categories. This debate is certainly not pointless, but seems to be slightly exaggerated, as the current — undeniably imperfect — rules still seem to function satisfactorily in practice (mainly based on the parties' possibility for all kinds of "home office" / telework agreements). The most recent Govt Decree [104/2021. (III.5.)] on temporary tightening of safeguard measures to deal with the third wave of the pandemic still doesn't clarify the situation, but contains a programmatic norm (Art. 12): "the Government invites the actors of the economy to strive to apply the legal institution of home office while operating the economy."

Third, the inherently temporary logic of the crisis-related law-making seems to be partially altered, at least as regards one unique measure. The above discussed — greatly controversial — "24 months working time banking" seems to partially live on. Art. 56(4) of Act LVIII of 2020 on the transitional rules connected to the cessation of the state of emergency contains the following rules related to labour law: The Békés County Government Office (i.e. a designated local branch of the public employment service) 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 the LC — on the basis of maximum 24 months, if the investment is in the interest of the national economy. In this vein, crisis-related legislation seems to have some — not very positive — long-lasting "after effect." The cited rule is unusual for several reasons. First, it prolongs (without time limit) the potential applicability of an otherwise greatly debated transitional measure. Second, it represents a genuine labour law rule outside the body of the LC (in another Act). Third, it makes the applicability of a genuine labour law rule dependent on an administrative decision. Fourth, the required administrative decision is tied to rather vague, undefined criteria ("interest of the national economy", "job creation investment"). Fifth, it has the potential to undermine collective bargaining.

Attila Kun
Professor of Labour Law, Hungary, Budapest, KRE ÁJK & NKE ÁNTK.
Supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences
and the ÚNKP-20-5-KRE-2 New National Excellence Program of the Ministry for Innovation and Technology
from the source of the National Research, Development and Innovation Fund.
The manuscript was closed on the 1st of March 2021

[24] Pál, L.: Munkajogi elvi kérdések: a foglalkoztatási és rendelkezésre állási kötelesség teljesítése a veszélyhelyzet tartama alatt: A járványhelyzet egyes munka- és szociális jogi dilemmái III., *Glossa Iuridica* VII: Különszám. 169-184; 4.2. (2020).

[25] Fodor, T. G.: Tényleg létezik home office? Hrportal, 2020 < https://www.hrportal.hu/hr/tenyleg-letezik-home-office---egy-munkajogasz-ketsegei-a-home-office-szal--mint-jogintezmennyel-kapcsolatban-20201117.html > accessed 21 February 2021.