HUNGARIAN LABOUR LAW - E-JOURNAL

Requirement of reasonable accommodation under Hungarian employment law

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Introduction

An old debt of the Hungarian legislator was met, when the Article 75, paragraph (3) of Act CXCIX of 2011 on Civil Servants of Public Services (hereinafter: CSPS Act) on 1 March 2012, as well as the Article 51, paragraph 5 of the Act I of 2012 on the Labour Code (hereinafter: LC) on 1 July 2012 entered into force. These provisions set forth that the requirement of the reasonable accommodation shall be applied in the course of the employment of persons with disabilities.[2] The respective legal rule of the LC applies also under the scope of Act XXXIII of 1992 on the Legal Status of the Public Employees (hereinafter: LSPE Act) (see Article 2, paragraph 3 of the LSPE Act). However there is no guidance either in the cited, or in any other legal norm, how the requirement should be constructed.

From this article one can learn about the origin of the legal requirement of the reasonable accommodation in Hungarian labour law, the exact meaning of this concept, the position of this requirement within the structure of Hungarian employment law, and the legal sanctions of the non-compliance with the requirement.

The meaning and the historical origin of the concept of the obligation of reasonable accommodation in other legal systems

The meaning of reasonable accommodation

A large number of national legal systems as well as various important documents of the international law and European Law prescribe the requirement of reasonable accommodation. The concept is a fairly recent development of law: the first appearance is dated to 1968

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[2] The Article 75, paragraph (3) of the CSPS Act prescribes this obligation in regard not only of the persons with disabilities but also those with altered working ability.

(United States). The reason for the respectable „career" of the concept is the fact that it may function as a significant and effective legal instrument serving the social inclusion of persons with disabilities.

People with disabilities face real and hard obstacles of participation in the different fields of social activities (education, employment, contacting the authorities, public transport, availing products and services, housing etc.). Buildings, services and information are often physically inaccessible for them. Persons concerned by intellectual, mental or social impairments may not at all or may only participate in these activities with the help of others. *Provisions on accessibility* in the field of buildings, infrastructure, public transportation, public communication are deemed to be a large step in the direction of equality of chances.[3] However, these provisions solve the problems solely of people with *the most typical impairments,* furthermore they are *introducted slowly, gradually.* Due to the wide range of impairments causing disability it is impossible to reflect the special needs of everyone in terms of creating and implementing accessibility provisions. The special needs of persons with disabilities whose impairments remain unreflected within the scope of the accessibility norms *shall be accommodated to a reasonable extent by the other members of the society.* This is the very essence of the requirement of reasonable accommodation. The actual form of accommodation shall be determined case by case, taking into account the special needs of the person with disability and the capacity of the obligated one. The term "reasonable" means that the accommodation arrangements shall not cause an unjust burden, which means the detriments of the obliged person shall be not disproportionally more severe than the expectable advantage of the disabled one.

Historical origin of reasonable accommodation

Some part-aspects of the concept of reasonable accommodation originate from the 1960s' United States. The Titel I. (Employment) of *Americans with Disabilities Act 1990* (hereinafter: ADA) stipulated for the first time the requirement of reasonable accommodation. The act obliges the employer to make reasonable accommodation *to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose*

[3] One of the most important legal norm on accessibility under Hungarian law is the Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (hereinafter: RPD Act). (Particularly: the Article 4., point g) and h), the Articles 5., 6., 7/A., 7/B. and 8. of the RPD Act)

an undue hardship on the operation of the business of such covered entity. Omission of this obligation amounts to a discriminatory treatment, which indicates severe sanctions.[4]

The requirement of reasonable accommodation emerges in other national legal systems as well, primarily but not exclusively in the Anglo-Saxon countries (e.g. Great-Britain, Australia, Canada, New-Zealand, Ireland, Israeli, Philippines, South-Africa, Germany etc.). The obligated entities are typically the employers, but in some legal systems the accommodation is provided also in the fields of education, contacting the authorities, housing, availing products and services etc.

Reasonable accommodation under the law of the European Union

The concept has been transposed into the law of the European Union[5]. The purpose of the Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, (in short: Framework Directive, hereinafter: FD) is to lay down a general framework for combating discrimination on the grounds of certain protected characteristics (sex, race, age, disability, political or religious views, sexual orientation) as regards employment and occupation. The text of the FD reflects the spirit of the ADA.[6] The directive sets forth provisions on reasonable accommodation in the framework of combating the discrimination on the grounds of disability. The title of Article 5. is "Reasonable accommodation for disabled persons", and it runs as follows:

„In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a

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[4] ADA, sec. 101-102
Considerable literature is available on the meaning and the practice of reasonable accommodation by authors from the United States, which may be useful at exploring the substance of the concept. A few important studies:
Wendt, A. C.,Slonaker, W. M., Sr. (2007): ADA's reasonable accommodation: myth or reality, SAM Advanced Management Journal, Autumn; 21-31
Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, October 2002;
ADA Technical Assistance Manual: Addendum, October, 2002;
Small Employers and Reasonable Accommodation, March, 1999 (www.eeoc.gov)
Hafen, J., (2006): Making Reasonable Accommodations for Employees with Mental Illness Under the ADA; Employee Benefit Plan Review; September, 10-13
Hoffmann, S. 2005: Settling The Matter: Does Title I of the ADA Work?; Alabama Law Review, Vol. 59;
This latter article summarizes the results of a few other empirical researches, such as:
Bruyfere, S. M. et al., 2003.: Identity and Disability in the Workplace, William & Mary Law Review, Vol. 44, 1173;
Schartz, H. A. et al. 2006.: Workplace Accommodations: Empirical Study of Current Employees, Missisipi Law Journal, Vol. 75, 917.

[5] At the current date: „European Community".

[6] About the relationship of the FD and the American legislation:
Waddington, L., 1995, Disability, Employment and the European Community, London, Blackstone, 195-197

person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

Relating to this Article, the Paragraph (20) of the Preamble to the FD lists examples of the possible accommodation arrangements, as follows:[7]

"(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources."

The *material scope* of the FD encompasses the employment both in the private and in the public sphere, as well as the self-employment activities. The rules on the prohibition of discrimination apply to access to employment, vocational guidance, vocational training, advanced vocational training, employment and working conditions, including dismissals and pay, membership of, and involvement in an organization of workers (Article 3, Paragraph 1 of the FD). So reasonable accommodation shall be provided for in the course of all these phases of employment.

Some interpretation difficulties arise from the structure of provisions on discriminatory conducts. The reasonable accommodation, as stipulated in the Article 5, is located separately from the provisions on discriminatory conducts (direct and indirect discrimination, harassment, instruction to discrimination) (Article 2). Differently from the ADA, *the norm does not make it apparent that omission of the obligations laid down in the Article 5 fits within any of the discriminatory conducts.*

While the framework of non-discrimination law in the legislation of other countries may serve only as an attractive model for our national law, *the implementation of the FD is compulsory for the Hungarian legislator.*[8] Though the deadline for the implementation expired on 2 December 2003, Hungary was supposed to comply with the requirements of the FD not earlier than the date of the accession to the European Union, 1 May 2004. Nevertheless the Hungarian national law had provided no reference on reasonable accommodation until the CSPS Act on 1 March 2012 and the LC on 1 July 2012 entered into

[7] The text of the preamble of a directive is not binding, however it provides assistance for the interpretation of the relating Article.
[8] Treaty ont he Functioning of the European Union, Article 288

force. (It is worth to note that some legal rules had existed also earlier, which partially concerned the accommodation duties of the employers, but these norms had not met the criteria of reasonable accommodation as stipulated in the FD. About these norms more can be read hereafter.)

Reasonable accommodation under international law

Hungary is recently also obliged under international law to transform the requirement of reasonable accommodation into national law. The *Convention on the Rights of Persons with Disabilities of the United Nations and the Optional Protocol* (hereinafter: UN CRPD) was ratified by the Hungarian legislator by the Act XCII of 2007. Taking into account the provisions of the convention on entry into force, Hungarian law should have complied with the requirements prescribed in the UN CRPD no later than 3 May 2008.

The concept of reasonable accommodation is outlined among the interpretative provisions (Article 2) of the UN CRPD:

„Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

The same article of the UN CRPD states that *the denial of the obligation of reasonable accommodation shall be taken into account as discrimination of disabled persons*. So far the convention prohibits discrimination on the grounds of disability in several fields of social life, concerning rules imply the prescription of reasonable accommodation in all these fields as well. So the convention provides the requirement of reasonable accommodation for example *on the following domains of life*: rights of women with disabilities (Article 6), respect for home and family (Article 23), education (Article 24), health (Article 25), work and occupation (Article 27), adequate standard of living and social protection (Article 28), participation in political and public life (Article 29). In addition the convention lists the clause of non-discrimination and the obligation of the State Parties to take appropriate measures to combat discrimination of persons with disabilities among general principles and general obligations. Therefore, as an important element of the prohibition of discrimination, *the principle of reasonable accommodation should penetrate all state activities in the States Parties.*

It is obvious that Hungarian legislation and government are expected to carry out considerable activity in the field of introduction and enforcement of the requirement of reasonable accommodation.

The reasonable accommodation under Hungarian employment law

The cited rules from national laws, European and international law design the contours of the substance of reasonable accommodation. As mentioned above, the requirement of reasonable accommodation exists at present exclusively in the CSPS Act and the LC – referred by the LSPE Act too – in Hungarian law, in addition, without clarification of the meaning of the concept. In regard of the appropriateness of the implementation of concerning rules of international and European law, it shall be noted that although not under the denomination of "reasonable accommodation", the Hungarian employment law had already contained partially complying institutions of law for longer. First, these latter concepts shall be detailed. Second, I shall analyse, how the rules of reasonable accommodation under European and international law apply at the interpretation of concerning Hungarian law.

The appropriateness of the implementation of the concerning provisions of the FD

Among the concepts related to the accommodation in Hungarian law, primarily is to mention the concerning norms of the *Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities* (hereinafter: RPD Act). Under Article 15 Paragraph (2) of the RPD Act the employer employing a person with disability is under the obligation to provide to an extent necessary for the performance of the work, accommodation at the work place, i.e. in particular the appropriate refurbishment of tools and machines. Support from the central budget can be requested to cover the expenses incurred by refurbishment. Under the same Article, Paragraph (3) and (4), in order to enhance the access to employment of persons with disabilities, the employer shall be obliged to provide an accessible environment in the course of the recruitment procedure. This obligation shall be imposed on the employer if

a) he/she publicly advertised the vacancy;

b) when applying for the job, the person with disability states his/her special needs related to the job interview; and

c) the accommodation to those needs does not impose a disproportionate burden on the employer. The burden shall be regarded as disproportionate if compliance with this obligation would make the continued operation of the employer impossible.*

As a merit of the PRD Act shall be mentioned that *the law makes no difference among employers according to adherence to the scope of any employment act,* So all the employers are involved by these provisions. Further merits lie in the rules which concern the accommodation in the course of *recruitment process,* and which formulates the concept of *disproportionate (unjust) burden*. Nonetheless, the cited rules of the RPD Act still do not fulfil the compliance criteria of the FD. The material scope of accommodation only encompasses the adjustment of the *material-physical environment* (so the necessary modification of the patterns of working time, manners of communication at the workplace, disciplinary issues are nor required), and the requirements connected to the recruitment process shall also apply with the restrictions under points a)-c). In my opinion, the definition of disproportionate burden is also unreasonable, exaggerating, because the concept of disproportionateness equals the impossibility in the wording of the rule. The examination of proportionateness should instead involve the comparison of the difficulties of the employer with the expectable advantage of the employee. The regulation can be also criticized because *no support from the central budget is available under currently effective Hungarian law.*

Under Article 19 Paragraph (4) of *Act XCIII of 1993 on Work Safety* (hereinafter: WS Act), in relation to the creation of work places where employees with physical disabilities are employed, the physical environment (accommodation) has to suit the changes in the character of the human body. This provision designs the requirement of reasonable accommodation on a very restricted basis: exclusively in regard of the physically disabled, already employed workers, and of the adjustment of the physical environment.

Under Article 66, Paragraph (7) of the LC, the employment relationship of persons with altered working ability eligible for rehabilitation allowance, so the ones whose employability via rehabilitation is restorable or requires a permanent rehabilitation[9], shall enjoy *special protection against termination by notice*. The employer may terminate by notice the employment relationship of a such worker due to the worker's capacity related to medical reasons if the worker can no longer be employed in his/her original position and no other job is available that is considered appropriate for his/her medical condition, or if the employee

* Translation of the text of the legal norm:
Kádár, A., *Report on Measures to Combat Dscrimination, Directives 2000/43/EC and 2000/78/EC Contry Report 2011 Hungary*;
http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination

[9] Act CXCI of 2011 on allowances of persons with altered working ability and amendment of certain laws, Article 3, Paragraph (2), point a)

refuses to accept a job offered by the employer without good reason.[10] This provision imply the requirement of reasonable accommodation, so far the further employability of the employee in his/her own or in another position shall be considered before the termination of the employment relationship. The act does not expressly refer to examination of the possibility of the appropriate adjustments of the original position, but the existence of this obligation is still obvious, because the sustainability of the inappropriate original provision is only possible through accommodation. Nevertheless, this provision designs reasonable accommodation also fragmentarily, regarding the triggers and the beneficiaries of the adjustment arrangements. However in a certain aspect this norm goes beyond the requirements of the FD, which does not formulate the obligation of offering another position for the disabled employee.

To sum up the legal situation in connection with the appropriateness of the implementation of reasonable accommodation, it shall be stated that the rules of the FD has not been properly implemented regarding either the material, or the personal scope, although the regulation lacks remained after the explicit introduction of reasonable accommodation in the employment acts are partially covered by some other rules in the RPD Act, the WS Act and the LC.

The relevance of the concerning rules of the UN CRPD under national law

Implementation of reasonable accommodation into Hungarian law is *an obligation of the Hungarian state under international law according to the UN CRPD*. The opportunity of direct reference on international legal texts in the context of Hungarian law cases would be fairly convenient for the citizens. Nonetheless it arises from the legal nature of international agreements that they stipulate only the obligations of the states parties, which these latter shall meet via legislation and appropriate governmental measures.[11] It means that the Hungarian state, which ratified the UN CRPD, *is supposed to introduce the requirement of reasonable accommodation into national law*. This has not been fully completed yet. The Hungarian state incurs liability under international law due to her omission. However private parties have still no right to refer directly on the rules of the convention.

[10] The same protection is available for persons who are entitled to rehabilitation benefit according to rules earlier in force.
[11] See: Kovács Péter (2006): *Nemzetközi közjog*, Budapest, Osiris Kiadó, p. 119.

The Optional Protocol annexed to the UN CRPD provides a *unique remedy* for disabled persons in case their rights anchored in the convention are violated. In states parties to the Optional Protocol, such as in Hungary, persons with disabilities have the right to lay an individual or group claim against their state before the Committee on the Rights of Persons with Disabilities established by the UN CRPD, stating to be victims of a violation by the current state party of the provisions on the convention. In possession of information on particularly severe violations of rights of disabled persons, the committee has the authority to proceed *ex officio.* The committee examines the submitted case, and if necessary, shall invite the state party to submit more information or take appropriate measures.[12] Stronger sanctions are not available, unlike at the European Court of Human Rights in Strasbourg, which may order the states to pay damages for the victim of violation of any human right.

The UN CRPD provides a few other implementation mechanisms, such as the conference of the states parties, reporting obligations, monitoring opportunities, etc. (see Article 32-40).

Even if the introduction of the provisions of the UN CRPD has not yet been completely occurred, *sooner or later the requirement of reasonable accommodation according to the convention shall apply under the Hungarian law as well.*

In the followings I will present, that *though the lacks of implementation of the FD and the UN CRPD, the requirement of reasonable accommodation is under Hungarian labour law also a binding rule with as broad personal and material scope as determined by the FD and the UN CRPD.*

The relevance of the concerning rules of the FD under national law

The FD, as a piece of European legislation, has a determining relevance in regard of interpretation of the Hungarian concept of reasonable accommodation. In the mentioned pieces of Hungarian employment law, the concept of reasonable accommodation has already been introduced,[13] therefore the implementation can be deemed to be completed to a certain extent. In this case, *the national jurisdiction shall construct the norms of the implementing*

[12] Articles 1-8. of the Optional Protocol

[13] The text of the concerning norms of employment law can be read in the first paragraph of the „Introduction" of this study.

laws in compliance with the parallel directive rule.[14] *It means that the Article 5 of FD has a direct relevance by interpretation of reasonable accommodation in Hungarian law cases.*

Deeper examination of the implementing rules in the LC (LSPE Act) and the CSPS Act gives way to the conclusion *that implementation has still not been succeeded completely*. The requirement of reasonable accommodation does not exist in several laws in the field of employment (employment law of judges, prosecutors, employees of judicial organs, of the army and the police etc.). A further lack of implementation is revealed by the fact that the respective rule in the LC (CSPS Act) focuses on the *obligation of the employer*, so the requirement of reasonable accommodation, controversially to the directive, does not apply in the course of access to employment, vocational training, advanced vocational training, vocational guidance, self-employment. Among lacks of implementation shall be mentioned that the wording of the Hungarian norm tells nothing about the criterion and the meaning of the *unjust burden***.** As it could be seen, some other legal rules partially cover the lacks of transposition.

Problems of implementation do not result that the requirements of the FD remain unenforceable. It counts as a severe breach of European law, if a member state fails to implement a directive into national law by the respective deadline. In failure of proper implementation, a member state and her citizens have to face different *legal consequences* under European law. The European Commission submitted to Hungary a reasoned opinion in advance of a potential infringement proceeding[15], stating that the requirement of reasonable accommodation had not been properly implemented into Hungarian law, 2008.[16] However the infringement proceeding was finally not initiated against the Hungarian state before the Court of Justice of the European Union (hereinafter: ECJ).[17] Nevertheless, the ECJ held in the *Mangold*-judgment[18], that the FD has *horizontal direct effect*, which means that private actors may directly refer on the rules of the directive against their employers before the national courts.[19] Besides, a *private party may claim damages* from her member state before the ECJ,

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[14] *C-14/83. Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen [1984] ECR 01891; C-80/86 Officier van Justitie v Kolpinghuis Nijmegen [1987] ECR 3969; C-106/89. Marleasing SA v. La Comercial Internacional de Alimentacion SA. [1990] ECR I-04135*

[15] Article 258 of the TFEU (ex Article 226 of the former Treaty establishing the European Community)

[16] Press release of the European Commission, MEMO 08/86

[17] See the document of the Ministry of Public Administration and Justice „Hungarian participation in the legal cases of the Court of the European Union"; updated on 31 August, 2011. Downloaded (1 January 2014) http://www.kormany.hu/download/2/43/50000/EUCourt20110831.pdf#%21DocumentBrowse

[18] *C-144-04. Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981

[19] The same consequences is drawn from the statements of the *Mangold*-judgement:
Kádár, A. (2012)*:*, *Report on Measures to Combat Dscrimination, Directives 2000/43/EC and 2000/78/EC Contry Report 2011 Hungary*; p. 62

as far as he/she suffered any damage due the failure of implementation after the respective deadline.[20] A further consequence of failed implementation is, as already mentioned, that the national courts of the current member state are obliged to interpret the national law *in compliance with the not implemented text of the directive.*[21]

The effect of the* Skouboe-Werge*-judgement on the applicability of European and international legal norms under national law

The judgement in a recent case of the ECJ (*Skouboe Werge* and *Ring* joined cases[22]) expressed significant statements on the effect of the European directive and the UN CRPD on national non-discrimination law (hereinafter: *Skouboe*-judgement).

The underlying cases referred by Danish courts to the ECJ for a preliminary ruling are based on very similar facts. In the *Skouboe Werge*-case the applicant suffered permanent injuries in a traffic accident. Her employer sent her first on part-time, then on full-time sick leave. Finally the employer dismissed her. The applicant of the *Ring*-case had been suffering long lasting illness, until the employer dismissed her as a consequence of the much time of absence during the concerned months. The employers argued that such dismissals are provided for under Danish law, if the employee had received her salary during periods of illness for a total period of 120 days during any period of 12 consecutive months.[23] The trade union which brought claims on behalf of the applicants argued that both employees fell within the scope of the Employment Equality Directive as disabled persons, and that the employers should have offered both employees reduced working hours, as a reasonable accommodation under the Danish Anti-Discrimination Law transposing the Directive, rather than dismissing them.

The national courts initiating the preliminary ruling proceeding posed the ECJ a few questions in connection with the concept of disability and the interpretation of reasonable accommodation under the FD.

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http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination

[20] *Joined cases C-6/90. and C-9/90.. Andrea Francovich és Danila Bonifaci and others v Italian Republic. [1991] ECR I-05357*

[21] *C-14/83. Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen [1984] ECR 01891; C-80/86 Officier von Justitie v Kolpinghuis Nijmegen [1987] ECR 3969; C-106/89. Marleasing SA v. La Comercial Internacional de Alimentacion SA. [1990] ECR I-04135*

[22] *Joined cases C-335/11. and C-337/11. Jette Ring v Dansk almennyttigt Boligselskab* and *Lone Skouboe Werge v Dansk Arbejdsgiverforening [2013]* (not yet published)

[23] Act on the relationship of employers and employees (*lov om retsforholdet mellem arbejdsgivere og funktionærer*), Article 2

The ECJ points out that the European Union approved the UN CRPD[24]. *International agreements concluded by the European Union are binding on its institutions and member states, and consequently they prevail over acts of the European Union.*[25] The primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements.[26] These reasoning shall apply to the interpretation of the concept of reasonable accommodation.

As for reasonable accommodation, the ECJ's judgement delivers three important points.

(1) The FD and the transposing national laws prescribe reasonable accommodation only in the field of employment, according to the cited rules on the material scope[27]. Although the UN CRPD extends the requirement on several other fields of social life, the concept in the convention takes effect on the FD's concept exclusively within the material scope of this latter. So far as a national court interprets reasonable accommodation, it should proceed as follows. First, on the grounds of *primacy of European law over national law*, the concerning rule of national law shall be constructed in compliance with the rule of the FD, even in failure of full implementation. Second, on the grounds of *primacy of international law over European law*, the rules of FD shall be interpreted in compliance with the international law.

(2) The ECJ states that though the Article 5 of the FD does not mention explicitly the reduction of working hours, the Paragraph (20) of the preamble lists the patterns of working time as the potential field of accommodating measures. In spite of the arguments of the defendants, the ECJ interprets the concept of patterns of working time broadly, referring that it does not appear from Paragraph (20) in the preamble or from any other provision of the FD that the European Union legislature intended to limit the concept of 'patterns of working time' to such elements and to exclude the adaptation of working hours, in particular the possibility for persons with a disability who are not capable, or no longer capable, of working full-time to work part-time. This way of interpretation is underpinned by the already cited, broadly defined concept of reasonable accommodation in the UN CRPD, which excludes no moment of the employment relationship from the group of potential fields of adaptive measures (Article 2, Paragraph (4) of the UN CRPD). *Accordingly, the employer shall reduce the working hours of the disabled employee, if this measure is necessary to accommodate*

[24] The approval took place by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35)

[25] *C-366/10. Air Transport Association of America and others v Secretary of State for Energy and Climate Change [2011]* (not yet published)

[26] *Joined cases C-320/11., C-330/11., C-382/11. és C-383/11. Digitalnet OOD és társai v. Nachalnik na Mitnicheski punkt - Varna Zapad pri Mitnitsa Varna [2012]* (not yet published)

[27] Article 3, paragraph (1) of the FD

him/her, unless this constitutes the employer undue burden. The national courts shall consider, whether the reduction of working hours, as an accommodation measure, represents a disproportionate burden on the employers. As follows from Paragraph (21) in the preamble to FD, account must be taken in particular of the financial and other costs entailed by such a measure, the scale and financial resources of the undertaking, and the possibility of obtaining public funding or any other assistance.

(3) The ECJ held that the FD must be interpreted as *precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been too much times absent because of illness, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of the FD.* Since the absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation, the employee may not suffer disadvantages for this reason. So the employer shall try to accommodate the disabled employee, and if possible, the dismissal is unjustified, unless the accommodation represents an undue burden.

Next I shall analyse, which consequences can be drawn regarding the Hungarian employment law from the former three points.

Ad (1) As noted above, the direct reference on the rules of the UN CRPD is not permitted in Hungarian legal disputes. Given that Hungary is a member state of the European Union, the principle of the primacy of the European law and the international law shall apply in Hungarian legal cases too. Consequently, *the concept of reasonable accommodation as designed in the UN CRPD has even though direct relevance in purely national legal context,* and through these legal reasoning, the parties to Hungarian legal disputes may directly refer on the text of the convention.

Ad (2) Domestic labour law had imposed so far no obligation on the employer to reduce or rise the working hours of the disabled employee. The LC anchors in the chapter of Amendment of the Employment Contract, that employers shall inform their workers concerning the following opportunities: indicating the jobs in which they are available full or part-time work. Employers shall respond to the proposition of workers for the amendment of their employment contracts within fifteen days in writing. Employers shall amend the employment contract based on the employee's proposition to part-time work covering half of the daily working time until the child reaches the age of three (Article 61 of the LC).

According to these provisons, the employer has only an information obligation, and he/she may assess, whether to accept the amendment offer of the employee. There is only one exception: the employer must accept the offer the employer with a child not older than three, if he/she requests part-time employment.

The *Skouboe*-judgement *formulated a new obligatory case of reduction in working hours.* The employer has to, if necessary, accommodate the disabled worker also through reduction in working hours, unless it constitutes an undue burden. Related to this latter criterion, account must be taken in particular of the financial and other costs entailed by such a measure, the scale and financial resources of the undertaking, and the possibility of obtaining public funding or any other assistance.

Since the determination of working hours under the Hungarian labour law is, within the framework of the law, an issue of the agreement of the subjects of the employment relationship, the employer is not entitled to reduce the working hours unilaterally. The transaction of reduction of working hours begins with the concerning offer of the employee, which shall be considered by the employer, and if it makes no disproportionate burden, it must be accepted. Introduction of part-time employment or further reduction in working hours within a part-time employment relationship takes place by written amendment of the employment contract, according to the rules of the Article 58 of the LC (the amendment is valid by the consent of the parties, and in compliance with the rules of conclusion of the employment contract).

The new obligation of amendment apply also in employment relationships regulated by other employment acts than the LC.

Ad (3) The Hungarian law has always *defended the position of the disabled or the ill employee's employment relationship. An unfixed-term relationship* may be dismissed by an employee only for reasons in connection with his/her behaviour in relation to the employment relationship, with his/her ability or in connection with the employer's operations (Article 66, Paragraph (2) of the LC). The case law accepts the health-related cause as a justifying reasoning on the grounds of *the employee's ability*, if the illness or the impairment results in medical ineptitude. This corresponds also with the responsibility of the employer for the implementation of occupational safety and occupational health requirements. The employee's fitness for the job for which he is being considered shall be examined free of charge before taking up work and on a regular basis during the life of the employment relationship (Article 51, Paragraph (4) of the LC). According to the case law, absences related to medical causes

cannot be taken into account as such *behavioural problems* that would justify a dismissal. The requirement of reasonability of dismissal is infringed, if the reasoning of the measure refers to the fact that the employer was many times ill in the previous period; this gives no way to the conclusion that the already healthy employee with full working capacity is redundant at the firm.[28] However, under certain circumstances, the illness-related absences may be deemed to be a justifying reason for the dismissal *in connection with the employer's operation.* In this latter event the direct effect of the absences on the productivity of the employer shall be thoroughly examined. The examination should concern the circumstances whether the employee had special knowledge, whether his/her work may have been substituted by colleagues, and to what extent the productivity of the employer fell by the actual number of employees.[29]

The termination of a *fixed-term employment relationship* may be grounded on three types of reasons: undergoing liquidation or bankruptcy proceedings; for reasons related to the worker's ability; if maintaining the employment relationship is no longer possible due to unavoidable external reasons (Article 66, Paragraph (8) of the LC). Concerning the lack of the required working ability, the same is the legal situation as written above. Illness may not be deemed as an unavoidable external reason, because this cause inheres in the person of the employee, which is a factor adhering to the employer's operation.

Since the entry into force of the new LC, the incapacity of work related to the illness of the employee shall not be taken into account as a period of prohibition of dismissal. The employer is permitted to terminate the employment relationship by notice also during this period, however the *notice period* shall begin at the earliest on the day after the duration of incapacity to work due to illness, not to exceed one year following expiration of the sick leave period (Article 68, Paragraph (2) of the LC).

To the rules safeguarding the employment relationship of the impaired, disabled workers belongs the above mentioned *restriction of the dismissals of employees receiving rehabilitation allowance.*

To sum up the prior collected rules, the Hungarian labour law defends multi-facetedly the employment relationship of the employees, whose work performance is for a health-related reason lower than they could present in a healthy, able condition. In case of unfitness for the job, and in the event if the absences result in incorrigible detriment in the operation of the employer, they may be dismissed. Exclusively one smaller group of impaired persons, the

[28] Statement of the Supreme Court, Nr. MK 95
[29] See: ruling of the Supreme Court, Nr. EBH2007.1715

beneficiaries of rehabilitation allowance and rehabilitation benefit, is targeted by a kind of accommodation requirement. However this latter rule is far not so detailed, sophisticated regarding the balance of interests of the partied, than it is required under European non-discrimination law. Furthermore, *the act reveals the exact structural relationship between the requirement of reasonable accommodation and the rules on dismissals of the concerned employees.* The exact determination of the correspondence of these two groups of norms is difficult, because while the subjects of the rules on protection against dismissals are the ill, impaired people, the reasonable accommodation concerns disabled persons (under CSPS Act the persons with altered working capacity as well). The definitional overlap between the two groups of persons is not easy to determine.

The *Skouboe*-judgement presents a guidance is presented in these questions as follows.

The ECJ states, so far as the long absences relate to the disability of the individual, it may be taken account as an *indirect discrimination* under the FD, if he/she has to face more detrimental conditions of dismissal. As the ECJ already pointed out in an earlier judgement, the concepts of illness and disability are not equal,[30] so the dismissal detriment due to an illness may not be held automatically as unequal treatment on the grounds of disability. Nevertheless, the persons with disabilities are rather exposed to the danger of illnesses related to their disability. So the indirect detriment actually exists due to the mentioned national rule.[31] It is, however, stressed in the judgement, that the Paragraph (17) of the Preamble to the FD does not require the recruitment, promotion or maintenance in employment of a person who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities. For the Hungarian labour law permits the dismissal of employees for health-related reasons only as far as the medical problem amounts to the unfitness for the job, this *cannot be deemed as either direct or indirect discrimination in relation to healthy, able workers.* From *Skouboe*-judgement also arises that *also in the event of health-related unfitness, the consideration of possibility of reasonable accommodation of the worker is required,* if through appropriate measures the sustaining of the employment in the original job is feasible. Offering another, appropriate job is, however, not demanded under Paragraph (17) of the Preamble.

Besides the restriction of dismissal of the beneficiaries of rehabilitation allowance, the Hungarian employment law does not regulate the employer's obligations prior to the

[30] *C-13/05. Sonia Chacón Navas vs.Eurest Colectividades SA [2006] ECR I-6467*
[31] The third prong of the Article 66, paragraph (2) of the LC

dismissal of persons with disabilities in correspondence with reasonable accommodation duty. The *Skouboe*-judgement reveals that *the accommodation, as a kind of restriction of dismissal, not only shall be ensured for persons receiving rehabilitation allowance, but for all persons with disability.* Concerning persons receiving rehabilitation allowance, the Hungarian national law provides a higher standard of protection than the minimum requirement under the FD[32]: for them, the offer of a different, appropriate job is also demanded, if it makes the further employment possible, regardless if it means disproportionate burden on the side of the employer.

As far as the health-related absences are held by the employer as a factor, which causes considerable or unavoidable difficulties in its operation, the justifiability of a so reasoned dismissal requires a more thorough examination. The *Skouboe*-judgement makes it clear *that the employer shall accommodate the disabled persons, if it represents no disproportionate burden, so far it creates the conditions of the further employment.* This duty is imposed on the employer exclusively in connection with an employee with a disability, so not with all types of illnesses.[33] Offering of another job in this case is not obligatory as well. The judgement focuses, according to the underlying questions, only on the reduction in working hours, but the statements are applicable to any types of adjustment arrangements. The Paragraph (2) of the Preamble to the FD presents an exemplificative list of the possible forms of the appropriate measures: adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources. Beyond these, any kind of arrangement is possible, depending to the actual necessaries of the disabled person, the requirements of the job and the chargeability of the employer. The above cited ruling of the Hungarian Supreme Court[34] presented anyway a right guidance through requiring the thorough examination of the justification of reasoning by the employer's operation. The actual points of examination can be clarified on the basis of the *Skouboe*-judgement: *the dismissal is justified only if the reasonable accommodation is not feasible, and therefore the employment relationship cannot be upheld.*

Position of reasonable accommodation within the structure of Hungarian labour law

[32] See Article 8 of the FD
[33] The *Skouboe*-judgement analyses also the difference between the definition of illness and disability.
[34] Nr. EBH2007.1715

The LC (LSPE Act) and the CSPS Act locates the provision on reasonable accommodation among the rules on fundamental duties of the employer. How does this provision connect to other norms of employment law?

(1) The *Skouboe*-judgement provides important guidelines to identify the structural position of reasonable accommodation within Hungarian employment law. As the *Skouboe*-judgement deducted, reasonable accommodation gives rise to a *new instance of compulsory amendment of employment contract.*

(2) It is also the *Skouboe*-judgement which developed *a new instance of restrictions of dismissal.*

(3) The LC does not regulate the practical steps of enforcement of reasonable accommodation (option of the appropriate form of the measures, carrying out this measure). This lack may be covered by referring to the fundamental norms of conduct stipulated among the Introductory Provisions of the LC. In my opinion *the requirement of reasonable accommodation shall be interpreted in compliance with the general behavioural requirement of duty of cooperation* (Article 6, Paragraph (2) of the LC). The employee is entitled to be accommodated, and the employer shall ensure that he/she can exercise this right. The cooperation of the parties is essential for the elaboration of the details of the accommodation process. Among the fundamental norms of conduct, account shall be taken to the *prohibition of wrongful exercise of rights* (Article 7 of the LC). It means that the rights anchored in the LC shall be exercised in compliance with their social function. In the context of accommodation, this requirement imposes duty primarily on the employee: he/she may not reject wrongfully, without a lawful interest the offer of the employer on the form of adjustment, in order only to cause difficulties for the employer.

(4) In relation to the breach of reasonable accommodation duty as a fundamental employer's duty, the different *sanctions of breach of employment law obligations.* About these sanctions more can be learned from the next chapter.

Sanctions for breaching of the requirement of reasonable accommodation

Sanctions for discriminatory conduct

Breach of the requirement of reasonable accommodation in its original, historical form and in most of the legal systems shall be taken into account as *a discriminative conduct. However, under Hungarian law, this correspondence is not so clear.* Neither employment law

acts, nor the RPD Act provide any respective reference. Not even the text of the FD affirms it directly. In addition, the Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (hereinafter: ET Act), which formulates the most typical discriminatory conducts in the field of employment and in other fields of life (such as direct and indirect discrimination, harrassment, victimisation, unlawful segregation) does not mention concept of reasonable accommodation, and so the omission of that in the list of the discriminatory conducts.

Nevertheless, it shall be concluded that the omission of reasonable accommodation duty as designed by the Article 12 of the LC and the Article 13 of the CSPS *shall be taken into account as a discriminatory act,* which makes the sanctions provided by the ET Act applicable.

The Equal Treatment Authority (hereinafter: ETA) is an administrative organ, established by the ET Act, with the main function of enforcing of the provisions of the ET Act. The scientific advisory body earlier operated besides the ETA (hereinafter: ET AB) released several *position papers*, which were binding for the operation of the ETA. A few of these position papers addresses the issue of accessibility (the latest one: Nr. 309/1/2011(II.11).TT.), which is, as earlier mentioned, a concept of the same roots as reasonable accommodation. The ET AB reveals that „the failure to guarantee accessibility of buildings and equal access to public services amounts to a breach of the requirement of equal treatment, so the scope of the ET Act covers this omission. Beyond the breach of other legal rules, the failure to guarantee accessibility shall be regarded as direct discrimination under Article 8 of the ET Act, because as a result of this failure, persons with disabilities are treated less favourably than people without disabilities in their movement, and access to services. Non-discrimination regulation stipulated in other laws, such as the RPD Act, shall be interpreted in compliance with the ET Act. Accordingly, in case of breach of accessibility duty, as normed under the RPD Act, the sanctions of the ET Act shall apply, within its material and personal scope."

Using the same logic, where there is a statutory obligation of reasonal accommodation, the failure to meet this duty shall be regarded as discrimination,[35] *as far as the case falls under the personal and the material scope of the ET Act,* namely the omission of reasonable accommodation results in the detrimental treatment of persons with disability in relation to able ones. Furthermore, the Article 2 of the ET Act, which states that non-discrimination regulation stipulated in other laws, refers not only to the RPD Act, but to the LC (LSPE Act)

[35] Kádár (2012), *supra,* p. 64

and the CSPS Act too, because these latter acts similarly prescribe the requirement of equal treatment. Therefore the reasonable accommodation duty shall be interpreted in correspondence with the requirement of equal treatment, and the omission of the former one shall be regarded as discriminatory conduct.

Among the sanctions applicable by the ETA in case of breach of equal treatment, primarily is to recall that the authority may order the state of infringement to be terminated, which means that it may order the actor to meet the duty of reasonable accommodation. Further, possibly effective, repressive sanctions are the publication of the decision on the infringement and the imposing of financial penalty (50.000 – 6.000.000 HUF) (Article 17/A, Paragraph (1), point a), d) of the ET Act). The ETA has in its practice several times ordered the establishment of the conditions of accessibility,[36] and there is no obstacle to deliver similar rulings in connection with reasonable accommodation.

Besides the ETA, there are *a few other judicial and administrative organs, which has authority to enforce the requirement of equal treatment.* In the course of these proceedings, these organs may take *special sanctions*, according to the applicable law. In the cases of employment discrimination, claims can be launched to the *labour authorities* and *administrative and labour courts.* About these legal proceedings, more can be read in the point on legal consequences under labour law.

Financial sanctions

Breach of requirement of equal treatment indicates not only the abovementioned sanctions. As far as the ETA imposes financial penalty on the employer, this latter is deemed *not to comply with the principle of orderly employment relations* for two years from the date the decision becomes final and enforceable. As a consequence, the employer will be *excluded from any financial support from budgetary funds.* (See detailed: Article 3-6 of the Decree NGM 1 of 26 January 2012 on criteria and manner of attesting of orderly employment relations).

Sanctions for violation of inherent personal rights

Under the Article 76 of the *Act IV of 1959 on the Civil Code* (hereinafter: Civil Code), any breach of the principle of the equal treatment counts as violation of inherent personal rights. Furthermore, under the Article 27 of the RPD Act the person who suffered unlawful

[36] E.g. Cases Nr. 13/2006., 596/2006

detrimental treatment due to her/his disability, *shall have the demands related to violation of inherent personal rights under civil law*. It means that this person may launch a claim to the court, and may demand the *remedies established under the Article 84 of Civil Code.* Among these remedies, the followings are especially relevant: the persons whose inherent personal rights have been violated may demand to have the infringement discounted and the perpetrator restrained from further infringement, such as termination of the injurious situation. Within the framework of these remedies, the meeting of the requirement of reasonable accommodation can also be ordered. According to the case law, discrimination cause inevitably non-pecuniary damages for the injured person, therefore he/she can claim also the payment of non-pecuniary damages.[37] The new Civil Code, entering into force on 15 March 2014 establishes in essence the same regulation on the possible sanctions (Articles 2:43, 2:51-2:52). The only important difference is the introduction of the remedy of pain award as a pecuniary compensation of violation of inherent rights without the precondition of proving any certain damage. However, as the cited ruling stated, the courts have already so far accepted the existence of damage based on the mere fact of discrimination, so without demonstration of any damage.

The most important lawsuits on inherent personal rights related to disability have targeted *accessibility*.[38] Judicial procedures in civil courts could be an effective way to enforce the requirement of reasonable accommodation as well.

Legal consequences under labour law

The requirement of reasonable accommodation is located both in the LC (LSPE Act) and the CSPS Act in the chapter on *fundamental obligations in the employment relationship.* In case of the breach of these rules, all the general sanctions for the employer's breach of duty are available.

The employee has obviously less legal instruments to reprise the unlawful acts of the employer, than in the reverse case. The employee is in general not entitled to refuse the fulfilment of his/her employment obligations (primarily: work duty, requirement of availability, carrying out the instructions) if the employer omits its duties. The refusal is only permitted on the basis of authorization of the law. This is the case if carrying out an instruction resulted in direct and grave risk to the life, physical integrity or health of the

[37] Ruling of the Metropolitan Regional Appeals Court, Nr. 2.Pf.21.104/2010/5.
[38] E.g. Rulings of the Metropolitan Regional Appeals Court, Nr. 2.Pf.20.531/2007. and 2.Pf.21.073/2007. (these judgements reveal very different guidelines of application of concerned law)

employee (Article 54, Paragraph (2) of the LC, Article 78, Paragraph (3) of the CSPS Act). Consequently, if the employer neglects the reasonable accommodation to such an excessive extent, that so the work environment endangers directly and gravely the life, the health or the physical integrity of the disabled employee, this latter lawfully refuses to work and to remain available under these circumstances. However, the employer is still obliged to carry out the instructions and to be available for work, so far as the working environment does not bring so high standard of danger. Nonetheless, it is clear that the failure of accommodation results not always in such an extreme situation. What can the employee then do?

Failure of accommodation, as a breach of the employer's obligation, *may create the opportunity of termination of the employment relationship for the employee in such manners that would not be not open for him/her else.* For instance, workers are required to give reasons for terminating their *fixed-term employment relationship*. The reason given for termination may only be of such a nature as would render the maintaining of the employment relationship impossible or that would cause unreasonable hardship in light of his/her circumstances (Article 67, Paragraph (2) of the LC). Should the working circumstances be not adequate for the worker's special needs, this can serve as an appropriate reason for terminating the fixed-term legal relationship. Further, the employee may terminate an employment relationship without notice if the employer *willfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship,* or otherwise engages in conduct that would render the employment relationship impossible. (Article 78, Paragraph (1) of the LC). Failure of reasonable accommodation can be in certain cases held as such a „qualified" breach of obligation, by which the termination without notice is justified.

The possible sanctions include also the judicial obligation of the employer *to pay damages*. The employer shall be liable to provide compensation for damages caused in connection with an employment relationship. The employee shall only be relieved of liability if able to prove: a) that the damage occurred in consequence of unforeseen circumstances beyond his control, and there had been no reasonable cause to take action for preventing or mitigating the damage; or b) that the damage was caused solely by the unavoidable conduct of the aggrieved party (Article 166 of the LC). *Three criteria shall be proved* so that the administrative and labour court may impose payment of damages on the employer: (1) the employer has failed to meet the requirement of reasonable accommodation; (2) and as a consequence of that (3) the employee suffered material or non-pecuniary damages. The sanction of damages is not available on the basis of a mere omission of obligation; it is additionally required that the employee had suffered actual damages in consequence of the

unlawful conduct of the employer. For example if an employee with a vision impairment is forced to buy a software which assist him/her by working on the computer in the office on his/her own cost, this material detriment counts as damage. The claim for damages may be justified also if this employee terminates the employment relationship without notice for the reason that the employer did not accommodate him/her, and due to the sudden loss of his/her job, he/she suffers further damages (e.g. in failure of ability to pay the credit on his/her car). Referring to the aforementioned rules of inherent personal rights, it shall be noted, that the obligation of the employer to pay non-pecuniary damages (from 15 March 2014: pain award) can be demanded for the mere fact of discriminatory conduct. As a general rule, all the losses of the employee shall be compensated, however, under certain circumstances, the LC limits the sum of the payable damages by the employer (Article 167 of the LC).

It is not only the employee him-/herself who may enforce the reasonable accommodation: the *labour authorities* have also authorization to do so. It means that the accommodation is not only a private affair of the parties, but an administratively enforceable requirement adhering to the lawfulness of employment. The Article 3, Paragraph (1), point e) of the Act LXXV of 1996 on Control of Labour (hereinafter: CL Act) stipulates that *the labour control encompasses the meeting of the requirements of employment of workers with altered working capacity.* Abandoning the detailed analysis of conceptual differences, it can be stated that persons with disabilities belong to the group of persons with altered working capacity. Requirement of reasonable accommodation shall be therefore the subject matter of the labour control.

The inspector of the labour authority takes, among others, the following arrangements in relation to unlawful employment (Article 6, Paragraph 1, CL Act):

a) The further employment shall be forbidden, if, due to the severity of the unlawfulness, the employment is not sustainable, and the infringement is not to be remedied in a short time.

b) The employer shall be obliged to terminate the infringement in a certain time.

j) To prevent the further infringement, in failure of applicability of point b), the existence of the infringement shall be declared.

e) Imposition of labour penalty may be proposed under Article 7, Paragraph (1).

Labour penalty may be imposed, if the employer infringes the requirement of reasonable accommodation in relation to more employees. The sum of the penalty may be between 30.000 HUF to 10.000.000 HUF (the act regulates detailed the criteria and the frames of the

assessment of the imposition) (Article 7, Paragraph (1), point b), Paragraphs (3)-(7) of the CL Act).

Summary

The purpose of this article was to prove that the recently introduced regulation on reasonable accommodation in certain Hungarian labour laws is in spite of appearance not an empty, undefined and unsanctioned norm. Studying corresponding legal historical, international legal and European legal norms, the substance of the rule can be appropriately unfolded. In addition, a recent ruling of the Court of the European Union delivers such, for our domestic jurisdiction binding statements that further assist the deeper interpretation of the concerning norms.

Applying the method of systematic interpretation of law, the relationship of the duty of reasonable accommodation with other regulations of employment law could also be explored. The overview of the numerous opportunities of sanctioning highlighted that the obligation may be enforced in various, effective ways.