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Developments in Hungarian Labour and Public Service Legislation during the 2011–2012 Codification and the Subsequent Comprehensive Amendments

Summary

The study deals with the second codification wave similar to and following the first codification period of labor and public service law after the change of regime in 1992-1993, which took place because contrary to the previous left-liberal government policy, a very different, right-wing civilian government came to power in the parliamentary elections of 2010. The article in the previous English volume showed in detail only the employment and public service legislation of 1992-1993, while the second codification of 2011-2012 relating to these two fields of law was only outlined. In this writing we give a more profound critical analysis of the re-codification of employment and public service law in 2012 and the subsequent amendments. Our study covers both individual labor and public service law, as well as employment and public service law relations in both the fields of labor law and public service law.

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Transfer from the previous study

The Development of the Hungarian Labor and Public Service Law After the Regime Change', which was published in the special English issue of the Civic Review of 2018, we described the essential features of the 'real socialist' labor law of the period before the regime change in 1990, which included public service law, too. Subsequently, we addressed in great detail the first codification of employment and public service law after the regime change as a result of which three laws, a labor code, a public servant and a civil servant law were drawn up, where workers for non-official public institutions were uniformly listed as public servants, while workers of institutions operating as an authority were classified as civil servants and the legal relations of case managers and physical workers were registered as employment relationships. This classification did not change in the second codification period of 2011-2012, however, the content of the civil servant's legal relationship was changed several times, most recently in December 2018, when the new Hungarian Labor Code was also significantly modified. The legal institutions of working time and rest time were significantly modified in both the new Hungarian Labor Code and the new Act on Public Servants (Act CXCIX of 2011) and in the latter the rules of leave were also changed to a large extent, which mean both sociological-ergonomic and social law problems. These problems of modifications are discussed in this article and besides we are analyzing the Hungarian Labor Code of 2012 in detail, which – due to reasons of extent – was left out of our previous study.

The second labour law codification in 2012 and its further amendments

In 2008–2009, the world saw the worst financial and economic crisis in eighty years, and it resulted in a rise in unemployment. Already before the crisis, the so-called flexicurity programme appeared in the literature of the employment policy of the EU,[1] which includes the need for flexible and reliable contractual arrangements, lifelong learning, active labour market policies, and the need to create more flexible social security systems both in international and national rules (Tóth, 2017; Jakab, 2017).

This programme launched a debate on the development of labour law, and gave rise to the Green Book (European Commission, 2006). This public debate concerned the achievement of sustainable growth while ensuring more and better jobs in the EU through the development of labour law. The study was published in 2006, and it already covered the challenges of the 21st century, too.

One of the key objectives in developing the concept of the new Hungarian Labour Code was to incorporate the recommendations of the Green Paper into the internal legal order by creating the conditions for flexible employment while preserving the social security of workers. The new Labour Code, according to the official justification, took account of the international social and economic changes, and moved the labour law legislation mainly toward dispositivity. This gives more scope for agreements between the employer and the employee, on the one hand, and the trade union and the employer, on the other, when formulating the content of the employment relationship and thus, the intervening role of the state is pushed into the background. In general, it can be stated that the legislator's intention was appropriate for managing the consequences of the emerging economic crisis. However, the social partners perceive greater dispositivity as a violation of employees' and collective labour rights.

One of the significant changes to the new Labour Code is that the provisions of the Civil Code (hereinafter: 'Ptk.'), which took effect in 2013, clearly appear in the labour law regulations, and this is particularly apparent in the general provisions (e.g. the novel judgment of the ability to act) and the rules relating to labour law liability.

At first, this solution seems quite correct. However, looking into it more profoundly, this solution in the new Labour Code is problematic, because the employer is the stronger party and the employee is existentially defenceless against him. Therefore, in all such agreements, the will of the employer prevails, and if the employee is unwilling to accept the employer's offer, the employer may take reprisals against him. It is no coincidence that the labour laws of the Francophone and Latin-American states are still full of regulations protecting the social and existential situation of workers, which are governed by separate laws due to the absence of codified labour law similar to the German legal system (Prugberger and Nádas, 2014, pp. 48–50).

For this reason, within the framework of labour law, the legal personality of employees is a focal issue. Indeed, the legislator does not extend the scope of the social and existential protection of labour law, and thus the scope of the labour protection system, to all the activities of workers. A long-term business and agency contract is in many respects similar to an employment or a service relationship, but it does not expand the social and existential protection of labour law to cover the latter, as the stand-alone business position protects long-term entrepreneurs and those engaged in outsourcing. Nowadays, however, new forms of employment have emerged as sources of income, and therefore it is basically a matter of legal policy to decide who the personal scope of labour law covers. At the same time, this legal policy decision results from the pressure of economic and social changes and expectations, which will also become a burning issue in Hungary in the near future with the appearance of numerous atypical services, such as Uber. The question is which of them should be given employee rights to provide them a social and existential safety net.

Employee rights include general and specific employee abilities. A general employee ability is the ability to comply with legal requirements and a specific ability is the ability to fill a particular job. General and specific employee abilites are of particular importance for people with intellectual and psychosocial disabilities and for

people whose work capacity has changed. That is why there is a broader concept of employee rights, which applies to the employment of people with disabilities. This concept is a combination of environmental and personal factors, as not only does the individual's state of health and ability determine the success of employment, but also the social acceptance of disability, economic and labour market conditions, adult protection regulations, the development and capacity of the educational and training system. If the goal is to integrate more people into the labour market, including people with disabilities, the legislator should adopt a holistic approach and understand that integration is not just a matter of labour law, but of broader employment, rehabilitation, education and adult protection regulation.

In addition, employee rights rapidly change. Developments can be defined in the context of historical, economic and social events. Development include the expansion of labour law to various persons, essentially, rating a relationship as atypical employment, or the denial of such a qualification, i.e. the exclusion of certain workers from the scope of labour law.

The employment conditions prevailing in the economic environment of the 21st century have an impact on the personal scope of labour law, on the legal status of an employee, i.e. who can be regarded as an employee and where the boundaries of dependent work are. Judicial enforcement, legal theoreticians, legislation and collective bargaining have all played a role in expansion in Europe. The boundaries of contingent work can be determined in the following ways in European labour law: 1) by the expansion of the concept of the employee, 2) by the creation of a third type (tertium genus) of people who perform work, 3) by the creation of a kind of common right for workers and by the expansion of the different levels of rights to broad categories, and 4) by exclusion. Clearly, workers cannot be treated as a uniform mass. Legal policy responded to this problem by pointing out the necessity of creating an intermediate concept between the employee and the entrepreneur, and to associate it with adequate labour and social protection.

"In labour law, individual self-determination is manifest in the wills of the two subjects of the employment contract or employment relationship, and therefore the determination of the subjects of the obligation is of fundamental importance, i.e. it has become one of the cardinal problems in labour law. The concepts of the employer and the employee correlate with each other'" (Kiss, 2005, p. 104). There is a perception in the legal literature that the distinctive features of labour law are defined through the concept of the employee (labour law is the Sonderrecht of employees) (Kiss, 2005, p. 116). With a view to all this, an employee is a person who carries out work for others. This allows us to distinguish between the employee and the self-employed.[2] This concept focuses on the work, i.e. the ability to work. The capacity to exercise rights has no role in this statement.

According to Article 72 of the former Hungarian Labour Code, a minor of 16 years of age or more and a person with limited legal capacity were allowed to establish employment without the consent of their legal representatives. Based on this, the conditions to becoming an employee included having at least a limited capacity to exercise

rights and the age, which was in line with the provisions of Act IV of 1959 on the Civil Code. At the same time, there was a conflict between Article 72 of the former Labour Code and Act XXVI of 1998 on the Rights and Equal Opportunities for Persons with Disabilities (hereinafter referred to as 'Fot.'). According to Article 15 and Article 16 of Fot., disabled persons were entitled to integrated employment, so far as possible, and, in the absence thereof, to protected employment.

In the case of integrated employment, the employer is obliged to ensure that the work environment, in particular, the tools and other equipment, must be appropriately modified to the extent necessary for the work, and support can be requested from the central budget for this purpose. In addition, during the recruitment process, the employer is obliged to provide an environment that is equally accessible in all respects, in order to facilitate access to employment for the disabled person. These obligations are imposed on the employer if the vacancy has been announced publicly and the person with a disability has applied for the position by indicating his or her special needs for the job interview and the burden on the employer to provide them is not disproportionate. A burden is disproportionate if the fulfilment of the obligation renders the operation of the employer impossible. If the employment of a disabled person cannot be implemented in this way in the context of integrated employment, his or her right to work must be ensured as much as possible. Employers accredited for the employment of disabled employees and employers engaged in social employment are supported by the central budget as defined by law.

It is clear from the above that the former Labour Code made only allowed for persons with limited capacity to undertake employment. The right to work for people with disabilities was not discussed in the former Labour Code. Only the Fot. regulations included the rules of establishing the general framework for equal treatment in employment and work, while Article 5 of the former Labour Code included the general obligation of equal treatment along with the legal remedies of its violation. This obligation was also transposed to Article 12 of the new Labour Code. Therefore, the employer continues to be obliged to provide an accessible employment environment for disabled persons. The purpose of the amendment was to maintain this obligation during the pre-employment recruitment procedure as well. The specific provisions on equal treatment for persons with disabilities are set out in Act CXXV of 2003 on the Promotion of Equal Opportunities (hereinafter: 'Ebt.'). Before the codification of the new Labour Code, the Fot. and the Ebt. counterbalanced the condition that the employee's right was subject to his or her legal capacity, which was contradictory because, in other cases, driven by needs, it regulated the employment of incapacitated people in a way that their employment contracts should be signed by their legal representatives. However, if the incapacitated person did not have a legal representative, he could not become an employee. This conflict was resolved by the new Labour Code through terminating the conditionality of the employee's right to employment on his or her capacity to exercise rights, and only stipulating in Article 34 that the employee was a natural person who performs work under a contract of employment. By doing so, the new Labour Code classified incapacitated persons as potential employees.

Besides, with a view to the new Civil Code, the new Labour Code has also included the category of the relative legal capacity with the condition that if a person under guardianship does not have absolutely diminished capacity, he or she can conduct an employment contract without the consent of his or her legal representative within the scope his or her discretionary ability is full and not limited.

Based on all these, work involving personal and economic dependence is one that remains within the scope of labor law. Taking this into account, the new Labor Code included as atypical employment relationships only those from the activities that represent a source of income where there is some form of personal dependence on the employer or the agent, such as in the case of teleworking.

While in the case of the right of employees, the new Labour Code took workers' interests into account to a relatively large extent, this is not the case regarding the settlement of issues concerning the content of the employment relationship. As concerns the two most important areas in the content of the employment relationship, namely, working time, rest periods, leave, on the one hand, and wages and benefits, on the other, within the latter, the new Labour Code has significantly diminished employees' rights. As far as working time is concerned, normal working hours may not exceed 48 hours according to the relevant Directive. The new Labour Code allows the employee to agree with the employer in a separate agreement to undertake overwork, however working time may not exceed 60 hours a week. This commitment may, however, last up to 6 months, but it can be extended. Nevertheless, in Western European labour law, the employee can terminate this commitment at any time. The Hungarian Labour Code does not include such an option. Pursuant to the former Hungarian Labour Code, as a rule of thumb and in accordance with Western European practice, the employee was entitled to additional payment for overwork, and he or she was entitled to leisure time only upon request. In the new Labour Code, however, overwork is compensated by either additional payment or leisure time, depending on the agreement between the employer and the employee. Nevertheless, such an agreement is already governed by the employer's will, as discussed above.

In principle, accounts must be settled with overwork by the end of the following month, although it is possible to compensate it over a longer period of time, called reference period by averaging. This period can be 6 months for ordinary work according to both the Directive on working time, rest time and leave, and the Hungarian Labour Code, and 12 months in the case of seasonal and stand-by work. During this period, flexible working hours must be cancelled out, and if they exceed 40 hours per week on average, on subsequent settlement they must be compensated by payment or leisure time. With authorisation by a sectoral collective agreement, in some Western European states, the reference period can be extended up to 12 months or even more. In Hungary, however, in the framework of a unique comprehensive amendment to the Labour Code performed at the end of December 2018, this period was extended up to 3 years. Although this extension is only allowed on the basis of an agreement between the employer and the employee, the provision on a sectoral collective agreement to mitigate pressure from the employer's side is missing (Prugberger and

Tóth, 2019). The latter is imperative because the option to extend the working time frame, or in other words, the reference period, to 3 years also includes the possibility that the employer only pays for overtime once in 3 years.

During such a long period of time, there is the employer may even go bankrupt or be liquidated, including the risk of simplified liquidation in the absence of possessions, in which case the employees are not paid for their overwork, and the wage guarantee fund only settles the wages and salaries due to employees from their employers to a limited extent. In addition, although in Hungary the general practice is to use a 4-month working frame as a main rule, several companies have extended it to 6 months by a collective agreement, while the reference period in the EU member states is usually no more than 2-4 weeks (Prugberger and Tóth, 2019).

The term 'shift' means night shift in the EU Directive, applicable to people who regularly work at night and therefore their biorhythm is accustomed accordingly. They receive a lower shift bonus than determined in international labour law and practice. Their shift bonus is usually 15%. This is also used in the Hungarian practice. In the case of work in shifts, 30% is due for night work, similarly to other legislations, due to the greater organisational burden arising from work in weekly changing schedules. Hungary's former labour law also took this into account in the case of afternoon shifts and raised the base salary by 20%. The new Labour Code, however, eliminated the afternoon shift bonus, and introduced a 15% bonus for work between 6 p.m. and 6 a.m., and consequently, those who work during this period are entitled to 15% bonus.[3]

There have also been changes concerning wages and salaries. As a positive change, the minimum wage or salary has been supplemented by the guaranteed minimum wage or salary, which is higher than the minimum wage and applies to those with secondary or higher qualifications. The adverse change, however, is that both the basic wage or salary and the guaranteed wage or salary minimum are determined by the government on its sole discretion, without the involvement and interest reconciliation of social (coalition) partners, and the single parameter taken into account is inflation, and not the consumer basket. As far as the most recent practice is concerned, there seems to be a positive change at first sight: it is provided that in the event of downtime, employers pay must the average wage or salary instead of the statutory basic wage or salary, but with the condition that the lost working time must be worked off subsequently. However, nothing is paid for the subsequent work. And if the employee who was paid an average wage or salary for the downtime wants to terminate his or her employment relationship or if he or she was given a notice by the employer prior to having the possibility to work off his or her downtime, the employer will reclaim the average wage or salary paid to him or her for the downtime.

In both cases, the employer saves payment of the base wage or salary. It is also an unwelcome change that the new Labour Code does not contain any remuneration in-kind, only allows cafeteria, which the government is about to abolish.

Two more labour law institutions need to be mentioned here: the modification of employment relations and the employer's legal succession. Similarly to the German legal system, under the Hungarian Labour Code, employment contracts can be modi-

fied by mutual agreement as a main rule. However, on a temporary basis, the employer may modify the employment contract by redirecting the employee to another job or workplace within the company, or by secondment to another employer, by posting, and by lending. This is regulated by Article 53 of the Labour Code as "employment by derogation from contractual employment", which also stipulates that all these forms of temporary employment can be applied by the employer only once in a business year for each employee. This regulation is basically more favourable for employees than the corresponding provision in the former Labour Code, which allowed the employer to use each form of temporary employment up to 44 days a year, on condition that total application does not exceed 110 working days per year. However, similarly to the former Labour Code, the current one does not adopt any rule from the Posting Directive, which allows the redirection, secondment or lending of an employee for maximum one year, extendable for maximum another year. It would be a good idea to supplement the Labour Code with such a provision in order to avoid the termination of employment during periods of business slump. This amendment could be linked to the lending of employees abroad, deficiently regulated in the new Labour Code, as the one-year limit to extension is not included.[4] The rules regulating modification in the employment contract in the case of the employer's succession have not changed in comparison to the former Labour Code and are in compliance with the regulations of Directive 2001/23 (EC) on Succession and the Reasonable Interests of Employees.

The new Labour Code has amended the rules on the employer's liability for compensation to the employee and partly placed them on new footing. Exemption has been adopted in labour law from civil liability, with focus on the foreseeability clause, which may result in the employer's partial exemption from compensation for damage if it was unforeseeable at the time of the injury. Another rule also allows the limitation of the employer's liability by introducing the "control circle" instead of the "operating circle". The former is a much broader and an objective category, and according to the essence of the regulation, the employer is exempt from the liability if the damage was caused by circumstances beyond its control. In contrast, the Labour Code of 1992 regulated the employer's liability for damages – especially in the case of a work injury – on the basis of the analogy of dangerous operational liability, where considerably less room was given for exemption than in the new Labour Code, where being out of control and the absence of foreseeability make it easier for the employer to be exempted from the liability. Stricter liability based the analogy of dangerous operational liability and the possibility of exemption would be more appropriate, since the operation of a plant is the employer's risk. This is also based on the fact that the profits made from the operating activities also belong to the employer. Therefore, any effort on the part of the employer to share the risk of operating the plant with employees is unfounded. Besides, this new rule is also discriminatory to employees. Indeed, if e.g. an explosion occurs due to operation and people other than employees are injured, the employer is liable towards them under more stringent rules of hazardous operational liability, whereas in the case of employees – as we have already stated – the employer may be exempted more easily

(Prugberger, 2014, pp. 145–150). It is no coincidence that, in order to overcome this inconsistency, the judicial practice applies the regulations of the new Labour Code recalibrated for the former rules pursuant to the instructions of the Curia (Sipka, 2015, Chapter V).

Regulations on the employee's liability to the employer have been changed to a lesser extent, and these changes have been implemented at the employee's expense (Prugberger, 2014, pp. 150–157). The introduction of the concept of civil liability in labour law is appropriate and it is also correct that within the concept, the various forms of fault affecting the reduction of the amount of compensation are distinguished. However, the rule is unreasonably burdensome for the employee according to which if the employee causes damage to the employer with more than average gross negligence, he/she may theocratic ally be held liable for the whole damage. In such cases Western European legislations also reduce the amount of compensation. When reducing compensation, it would be necessary to take into account not only increase in the risk due to the employees' several hours of monotonous repetitive workflow (Eörsi, 1961, p. 16; Nagy, 1964, pp. 15–16), but also the fact that in the case of in-plant work, the employer may prevent or mitigate the adverse effects of the damage by work supervision (Deli, 2013).

The system of legal consequences of the unlawful termination of employment has also undergone a major transformation. One of the changes is that the employee can only demand the restitution of employment if the termination was grossly unlawful, i.e. in five cases (Gyulavári, 2015, p. 227). In the case of unlawful termination, the employee, in contrast to the regulations of most of the old EU Member States, may only claim compensation but not restitution, representing considerably less compensation than before (Prugberger, 2012).

The employee may claim income missed in the case of damages, but the amount of compensation is limited: it should not exceed the amount of payment for a 12-month period of absence. The new rules have taken over the provision of the Civil Code relating to mitigation of damages, according to which the employee is obliged to look in a new job after the termination of employment and he or she must also prove it at court. In the old Member States, on the other hand, the employer is obliged to pay full compensation of the employee in addition to restitution. Moreover, in the case of the unlawful termination of employment by an employer in several Northern European states, adopted from the law of the United Kingdom, the employee is entitled to a base flat-rate compensation (basic anwart) ex-lege, and if the employee's damage is larger than that amount, he or she can also claim compensation (compensationsanwart) in excess of the amount of the base compensation. In this case, however, the burden of proof is on the employee (Prugberger, 2012).

As a new chapter, data management was added to the most recent amendment to the Labour Code. This amendment is justified in 2016 by the Council and the European Parliament on the adoption of Regulation 2016/679 (EC) of the European Parliament and of the Council on the protection of individuals with regard to the

processing of personal data and on the free movement of such data (hereinafter: 'GDPR'). The Regulation seeks to achieve full legal alignment, so that the rules applicable horizontally (in general, for all data management legal relationships) in the areas of its scope are applicable directly and in Hungarian law.

As a general rule in the context of data management, the purpose and legal basis of data management should be indicated. According to the Labour Code the purpose of data management is the processing of personal data that is essential for the establishment, fulfilment, termination or enforcement of an employment relationship. Although the Labour Code does not specify the legal basis, there are three possible legal bases for data management at the workplace. The consent of the data subject, legal authorisation and data management based on the legitimate interest of the employer. The opinion of the Data Protection Working Team[5] is that the voluntary nature of contribution is uninterpretable in employment relations, and therefore in labour law this legal basis can only be invoked exceptionally.

A new provision seeks to promote privacy. If the employer provides the employee with a computer to work, only the data related to the employment relationship are allowed to be inspected. However, in general, the Labour Code stipulates that the employee may only use such devices for work.

An important change concerning collective agreements in the field of labour relations is that the law restricts the parties' collective bargaining to the slightest extent. The new act has significantly changed the rules for the conclusion of a collective agreement, so the collective agreement can already be concluded by the trade union with membership amounting to 10% of the people employed by the employer. This rule is absolutely antidemocratic, because if there is no other trade union at the company, the minority can force its own will on the majority of the employees, to whose detriment the employer may collaborate with the trade union signing the collective agreement. Previously, winning the works councils' elections was the benchmark for the contracting ability of a trade union.

It is legally unfounded that works councils precede trade unions in the new Labour Code. In this respect, the Labour Code follows the US solution, where employers prefer to negotiate directly with employees and enter into "win-win" agreements than with trade unions that are considerably stronger in advocacy.

Recently, works council formations have appeared in some states in the USA, but they only have the right to express opinions and consult, and they do not have the same co-decision right as in most Western European states (Hennsler and Roman, 2003, pp. 557–558). Probably this model has contributed to the reduction of works councils' co-decision rights in the new Hungarian Labour Code and has made it formal.

As concerns the right of interest reconciliation and the ability of the social partners to enter into a tripartite collective agreement with the state have been altered completely. Act XCIII of 2011 completely modified the National Labour Council and the National Interest Reconciliation Council. The National Labour Council has been extended to a National Economic and Social Council and has been fully transformed into a consultative institution with no authority to conclude national

general collective agreements. Therefore, only sectoral and territorial reconciliation exist with the participation of the sectoral dialogue committees and as a result, there is a sectoral collective agreement. Unacceptably, as stated above, corporate collective bargaining has been altered in such a way that a trade union with only 10% representation can conclude a collective agreement on its own with the corporate management with an effect on employees who did not join the trade union.[6] According to the minister's argumentation, the legislator hopes that these changes will significantly increase activity by interest representations in shaping employment, while at the same time limit unjustified state interference and restrict it to the use of market-conform solutions. In the meantime, however, the legislator exposes employees to employers.

Amendments affecting government officials following the enactment of the Act on Public Service and the Act on Civil Service

The re-classification of government officials by Act LII of 2016 only due to a different wage or salary chart was abolished by Act CXXV of 2018 and the uniform status of government official was restored. It was also discussed that Chapter XVIII of the same Act, through the adoption of a general 4-month working timeframe – allowed an increase in the daily working hours to 12 hours for several weeks and to 60 hours per week for several weeks, which are already 9 hours per day and 45 hours per week as against the regulation in effect in 2015. In addition, government officials' basic leave was reduced from the earlier 25 days to 20 days per annum. In addition to what has already been emphasised in our previous essay, these violate the provisions of Act XXV of 2003 on Equal Treatment. In spite of the fact that officials under the new Act – by positive discrimination – were entitled to higher pays than other employees in administrative positions, a kind of runaway is experienced partly to retirement, and partly to the business sectors.

The reason for this is that the national guaranteed minimum wage has increased the salaries paid by the government and private officials subject to other public service law and public servants, thus the difference is no longer significant. This is the reason for civil servants' attempts at setting their foot on such more lax areas and leaving government service (Mélypataki, 2017, p. 370).

Notes

[1] See Commission Communication on developing Common Principles of Flexicurity: COM (2007) 359. The aim of flexicurity is to ensure that all EU citizens enjoy a high level of employment security, i.e. they have the opportunity to find employment in every phase of their life until retirement and have favourable employment prospects in a rapidly changing economy. Flexicurity also aims to help both employers and employees to benefit from globalisation.

[2] About the freedom of self-employment as a fundamental right see Kiss, 2006, pp. 285–290. In this study the text of the doctoral dissertation was taken as a basis. See also: Kiss, 2005, p. 116.

[3] Article 141 of Act I of 2012 (Labour Code). Note that the concept of this shift bonus and the exact period when it is due should have been regulated under Article 89 2) 46 (Concepts) in Chapter XI of the Labour Code.

[4] For a more critical analysis of this area of law, see Prugberger, 2018, p. 25–27.

[5] An independent European advisory body on data protection and privacy issues.

[6] For more criticism of this see Prugberger and Rácz, 2017, pp. 191–192, 195.

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