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Access to Information and Evidence on the Basis of the Draft Bill on the New Code of Civil Procedure

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Abstract. The present study analyses the rules of the new Code of Civil Procedure (hereinafter referred to as CCP) on access to information and evidence on the basis of the provisions of the draft bill submitted to the Parliament (draft bill no. T/11900).

The new CCP reiterates that the main objective is the impartial adjudication of cases, which is to be achieved by ensuring the effectiveness of proceedings, strengthening the parties' obligation to tell the truth within a fair trial, introducing a split system of proceedings and the court's contributive actions, obliging both parties, as a general rule, to be represented by a legal representative (the high courts' model), regulating the means of electronic communication and strengthening the parties' right to dispose of the taking of evidence.

During the examination of the topic of the taking of evidence, I had been concerned about the issue of what are the parties' true expectations from the judicial system and to what extent the legislator is able to live up to them. The parties expect from the courts to reveal the truth in order to provide compensation for the damage suffered by them, and the new CCP seeks to meet this social expectation within the framework of the parties' factual allegations. The issue of whether the parties' allegations are true is of essential nature in the proceedings, and based on their assessment the court should deliver a just (true to the facts) judgement. Following the court's judgement, the case adjudged – on the basis of the legal premise of Ulpian: 'Res iudicata pro veritate accipitur' – must be taken for truth. The new regulation aims to ensure the implementation and enforceability of those procedural requirements that are related to the objective of evidence taking (the court has to become convinced of the veracity of the parties' allegations) and the parties' interests in the taking of evidence (the parties seek to convince the court).

Keywords: Hungarian Code of Civil Procedure, codification, concentration of proceedings, split structure of proceedings, exigency of alleging facts and providing evidence, electronic communication, taking of evidence, methods and means of evidence taking

1. INTRODUCTION

'Act no. III of 1952 on the Code of Civil Procedure (hereinafter referred to as CCP) provides a legal framework for 200 to 230 thousand civil proceedings a year, and it constitutes a legislative background for more than one million non-litigious proceedings a year, thus the CCP represents the leading source of law within the Hungarian legal system. In its Government Decision no. 1267/2013 of 17 May 2013 (hereinafter referred to as the Government Decision), the Government decided to elaborate a new Code of Civil Procedure in order to create a new procedural framework that is better suited to the more complex legal disputes of the 21st century. According to the Government Decision, the codification aims at drafting a modern Code of Civil Procedure aligned with international practices and standards, which ensures the effective implementation of substantive rights and regulates procedural relations in a transparent and coherent manner with regard to the latest results of the legal literature and the courts' jurisprudence as well as to technical progress, thereby facilitating the participation of legal professionals and citizens seeking justice in civil proceedings'.[1]

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[1] Commentary to the general explanatory memorandum of the Draft Bill.

In April 2016, a draft proposal on the new Code of Civil Procedure elaborated by the Ministry of Justice[2] (hereinafter referred to as the MoJ draft proposal on the new CCP) was uploaded to the website 'kormany.hu',[3] the publication of which was preceded by a three-year long codification work. The codification started under the leadership of Professor János Németh,[4] while the second phase of the work[5] was carried out under the guidance of Tamás Éless[6] and István Varga[7]. The two work phases[8] resulted in two voluminous publications and involved one hundred and twenty excellent Hungarian legal experts on procedural law who worked at the request of Professor János Németh.

At the end of the first phase, a collection of studies entitled 'Egy új Polgári Perrendtartás alapjai' (The foundations of a new Code of Civil Procedure)[9] was published, which 'constituted an important cornerstone in the preparation of the codification of the new Code of Civil Procedure: the preparatory phase ordered by the Government Decision and aiming at presenting, with scientific depth, the potential directions and methods of codification has ended.[10] The collection of studies that covers all the central fields of civil procedural law not only documents the large professional debate on the preparations of the codification, but served as one of the bases for the subsequent public debate and the drafting of the new piece of legislation as well'.[11]

At the end of the second phase, a work entitled 'The draft version of the provisions and explanatory memorandum of the new Code of Civil Procedure as elaborated by the experts of the Working Committee on the New Code of Civil Procedure' (hereinafter referred to as the Experts' Draft Proposal on the new CCP)[12] was delivered,[13] which was followed by the draft proposal of the Ministry of Justice, published on the website 'www.kormany.hu'.

[2] Draft proposal on the new Code of Civil Procedure, 11 April 2016.

[3] http://www.kormany.hu/download/c/4c/a0000/20160411%20Pp%20el%C5%91terjesztt%C3%A9s_honlapra.pdf, accessed 11 May 2016.

[4] Professor emeritus, ELTE University, Faculty of Law, Department of Civil Procedural Law, chair of the Principal Committee on the Codification of Civil Procedural Law and of the Drafting Committee on the Codification of Civil Procedural Law, both of these committees have been set up by Government Decision no. 1267/2013 of 17 May 2013 on the Codification of Civil Procedural Law.

[5] On the three-year long codification work, see Varga (2015) 20–32.

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[7] Department head, university professor, ELTE University, Faculty of Law, Department of Civil Procedural Law, scientific secretary of the Principal Committee on the Codification of Civil Procedural Law.

[8] On the preparation and consequences of the codification work, see Cserba (2013) 9–18; the period of the two work phases: the years 2013–2014 and 2014–2015.

[9] Németh and Varga (2014).

[10] The concept of the new Code of Civil Procedure – commissioned on the basis of the Government Decision – was adopted by the Government on 14 January 2015.

[11] http://hvgorac.hu/egy_uj_polgari_perrendtartas_alapjai_kiadvany accessed 6 June 2017.

[12] Éless and Varga (2015), (hereinafter referred to as the Experts' Draft Proposal on the new CCP), 1025 page-long manuscript.

[13] The drafters handed over their proposal to the Minister of Justice on 30 October 2015.

After an extremely short public debate,[14] the MoJ draft proposal was presented to the Government in the second quarter of 2016, and the Parliament started to discuss the draft bill on the new Code of Civil Procedure (draft bill no. T/11900, hereinafter referred to as the Draft Bill on the new CCP) on 3 September 2016.

2. PRINCIPLES RELATED TO THE TAKING OF EVIDENCE

Point 2, entitled 'Basic Premises' of the first part of the draft proposal enumerates the five main principles of civil proceedings, four of them are directly linked to the taking of evidence: the principle of the concentration of proceedings (section 3), the parties' obligation to assist the court in administering justice and to tell the truth (section 4), the principle of good faith (section 5) and the court's contributive actions (section 6).

The concentration of proceedings, the parties' obligation to assist the court in administering justice and the court's contributive actions are the three pillars of the new CCP contributing to the systemic assurance of the effectiveness of proceedings.[15] The new CCP seeks to ensure an optimal co-ordination between the parties' actions and the court's tasks by the structural arrangements of proceedings, in particular by the firm and consistent handling of the plaintiff's statement of claims and by the determination of the legal and material framework of civil proceedings divided to a preparatory phase and a phase dealing with the merits of the case.[16]

In civil proceedings, it is the plaintiff who is entitled to initiate an action (the dispositive principle) and the court is bound by the plaintiff's statement of claims and the substantive rights claimed therein (the principle that the parties delimit the subject matter of the proceedings) and makes use in the taking of evidence only of those pieces of evidence that had been submitted or proposed by the plaintiff or the defendant (the parties' obligation to produce evidence),[17] in addition, the court may freely use the parties' arguments as evidence or any other piece of evidence to establish the case's factual background (the principle of the free establishment of facts).

In civil proceedings, the court's judgement either enables the plaintiff to enforce his well-founded claim or protects the defendant against the plaintiff's ill-founded claim, and the court administers justice within the framework of the rules set forth for the parties to comply with their duty to carry out their procedural acts in a timely manner.[18] The effectiveness of proceedings – viewed in conjunction with the courts' adjudicating process (activities) – means that the courts should take all the necessary measures in due time to

[14] As of April 2016, the MoJ draft proposal had been discussed at national level, mainly due to the co-operation and efforts of the National Office for the Judiciary and the Curia of Hungary, for instance, an international conference entitled 'New Hungarian Civil Procedure Act and the Development of European Rules of Civil Procedure' was held jointly by the Institute for Legal Studies of the Hungarian Academy of Sciences, the National Office for the Judiciary and the European Law Institute (UNIDROIT) at the Hungarian Judicial Academy on 30–31 May 2016 with the support of the Ministry of Justice.

[15] See Szabó (2013) 365–76.

[16] Zvolenszki (2016) 273.

[17] Szalma (2016) 565–66.

[18] Szabó (2013) 368 and 373; see also Magyary and Nizsalovszky (1939) 1–4.

conclude the cases brought before them within a reasonable period of time, while – with a view to the results of proceedings (expediency) – it also means that the courts should seek to obtain the legal policy objectives set out by the legislator.[19]

2.1. The principle of the concentration of proceedings

The legal instrument of the concentration of proceedings is intended to identify the characteristics of the parties' legal dispute as early as possible, to provide the court with all the facts and evidence necessary for the delivery of its judgement at the earliest opportunity, in other words, to determine, as early on as possible, the substantive and procedural legal framework of the legal dispute.[20] The court and the parties should seek to have all the facts and evidence necessary for the delivery of the court's judgement in such a time as to allow the court to dispose of the dispute, if possible, on one single hearing.[21]

'The raison d'être of the substantive measures of organisation of procedure is to avoid the delivery of a decision that does not definitively settle the legal dispute:[22] for this purpose, the court should endeavour to ensure that the parties put forward appropriately the essential facts necessary for the court's decision and to provide the parties with all the information necessary for the establishment of the relevant facts and the proving thereof. The court's contributive actions do not conflict with the dispositive principle and the parties' obligation to produce evidence, since the parties are (may be) free to decide whether they wish to comply with the court's 'call' or not, in the latter case, they have to bear the sanctions of their non-compliance as laid down in the detailed rules'.[23]

The principle of the concentration of proceedings appears to simply emphasise the importance of timeliness, however, it also implies the element of effectiveness, as one of the means of the acceleration of the adjudication of cases is the reduction of inputs (e.g. the court organises the questions to be addressed in a logical order, on the basis of which it does not allow the parties to bring forward such arguments that would be of relevance only as regards the case's details to be examined at the later stages of proceedings).[24]

2.2. The parties' obligation to assist the court in administering justice and to tell the truth

If the party brings an action to the court, he becomes obligated to assist the court in dealing with his action, if he fails to comply with the above obligation, he has to bear the procedural consequences (preclusion, lack of proof etc.) of his non-compliance. This principle applies to all procedural acts, including the submission of statements, motions and pieces of evidence, as well as appearing at the court's hearing.[25]

[19] Szabó (2013) 368 and 370.

[20] Commentary to section 3 of the Draft Bill.

[21] Commentary to section 3 of the Draft Bill.

[22] This requirement stems from the principle of 'definitive dispute settlement', defined in section 2, subsection (1) of Act no. CLXI of 2011 on the Organisation and Administration of the Courts (OAC Act).

[23] The Experts' Draft Proposal (manuscript), 2015.

[24] Commentary to section 3 of the Draft Bill.

[25] We can find this obligation also in the Act III of 1952 on the Code of Civil Procedure (CCP in force) section 141 subsection (2) 'The court – if so required to ascertain the relevant facts of the case – order the parties to make their pleas and shall perform the taking of evidence procedure. The party

The new CCP specifically provides for the *parties'* obligation to tell the truth.[26] 'Section 8 of the CCP in force regulates the obligation of the parties and their representatives to tell the truth as one of the elements of the obligation to pursue litigation in good faith, in addition, it also contains certain elements that fall within the scope of the exercise of rights in good faith, but go beyond the obligation to tell the truth, such as the prohibition of delaying the conclusion of proceedings and the prohibition of causing unnecessary expenses. On the basis of an approach different from the one taken in the CCP in force, the Draft Bill links up the parties' obligation to assist the court in administering justice and their obligation to tell the truth, the latter being part of the former. One of the reasons for the above is that the different provisions of section 8 of the CCP in force have diverging personal fields of application. On one hand, section 8, subsection (1) of the CCP on 'the exercise of rights under the principle of due course of the law' and section 8, subsection (4) of the CCP on the prohibition of delaying the conclusion of proceedings apply to the parties and any other participants in the proceedings, on the other hand, section 8, subsection (3) of the CCP on the parties' obligation to tell the truth (the prohibition of making false statements in court proceedings) is addressed only to the parties and their representatives. By virtue of the obligation to tell the truth, set forth by the Draft Bill, the parties are obligated to the reveal the truth only insofar as they wish to make a statement. The parties' obligation to tell the truth includes active and passive statements of fact alike (allegation-disaffirmation). The obligation to tell the truth also applies to representatives and interveners who make an allegation or a statement. Since the allegations of other participants to proceedings, in particular witnesses and experts (deemed to be means of evidence) are treated differently, in terms of dogmatic positions, from the allegations of the parties, the former are subject to special rules (perjury, delivery of a false expert opinion, etc.) and special legal consequences'.[27]

Hence, there is a separation between the principle of good faith and the obligation to tell the truth in the new CCP: 'the personal and material scope of the principle of good faith are broader than the obligation of the parties (and their representatives) to tell the truth. The requirement of pursuing litigation in good faith – as in the provisions of section 8, subsection (1) of the CCP in force – applies not only to the parties, but to other participants to proceedings as well: representatives, interveners, witnesses, experts, interpreters and, defined in broad terms, any other persons who may be entitled to participate in the court's proceedings. The material scope of the principle of good faith is also wider than that of the obligation to tell the truth, because the former defines the requirement of the exercise of rights in good faith in a general way. The Draft Bill does not precisely identify what kind of acts, carried out by the parties or other participants to proceedings, could qualify as an exercise of rights in bad faith, and it provides a wide margin of discretion for the courts in

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shall present the facts, make his pleas and submit any supporting evidence in due time and in a timely manner as consistent with and pertaining to the status of case, and as the case progresses. If the taking of evidence cannot be performed in spite of this during the first hearing, the court may adjourn the hearing and order more elaborate preparations for the case.'

[26] 'The court impose a financial penalty upon the party, who – whether deliberately or as a result of gross negligence presented any facts to the case that later proved to be false.' In section 4, subsection (4) of the Draft Bill.

[27] Commentary to section 4 of the Draft Bill.

respect of the assessment of such acts and the application of legal consequences attached thereto'.[28]

'The obligation to assist the court in administering justice requires active participation from the parties: they are obligated to make relevant, adequate and concise statements, with also regard to cost-effectiveness. The parties' obligation to assist the court in administering justice extends to the institution of proceedings, therefore the Draft Bill lays down higher criteria to be met by the plaintiff's statement of claims as well'.[29]

'For the purposes of achieving the objectives of civil proceedings, the obligation to pursue litigation in good faith means that the court, the parties and other participants of the proceedings have to co-operate with each other on the basis of the court's duty of care and the various requirements imposed on the parties. This obligation is manifested in the exercise of rights under the principle of due course of the law and in the principle of acting in good faith, which also includes the prohibition of acting in bad faith'.[30]

2.3. The court's contributive actions (substantive measures of organisation of procedure)

One of the greatest challenges for today's civil procedural law all over the world is effectiveness and speediness. In order to achieve this objective, legislators tend to introduce new legal institutions and carry out overall reforms affecting even the structure and role of the judiciary and the course of civil litigation. One of the ways legal disputes can be adjudicated within a reasonable time and soundly is to emphasise the role of the preparatory phase of the proceeding and make the parties more active in solving their dispute.[31]

'The legal literature differentiates between substantive and procedural measures of organisation of procedure: the procedural measures of organisation of procedure include measures for the timing of the different phases of proceedings and for ensuring the continuity of proceedings (e.g. setting the date of a hearing, adjourning a hearing, setting deadlines, determining legal consequences related to procedural impediments, etc.), while the substantive measures of organisation of procedure affect the merits of the legal dispute (e.g. clarifying the case's legal basis and factual background) and the substantive rights claimed by the parties'.[32]

The court's contributive actions should effectively facilitate the exercise of the parties' right to dispose of their legal action.[33] The substantive measures of organisation of procedure are adopted by the court to organise its proceedings on the basis of the assessment of the substantive legal aspects of the parties' statements and procedural acts. Such measures enable the court to detect the incoherence, deficiency or inconsistency of the parties' initiative statements (legal and factual allegations, claims, pieces of evidence and motions) and to clarify them.

'The substantive measures of organisation of procedure aim to ensure the availability of all the relevant facts and statements necessary for the court to decide on the case, primarily through the clarification of the parties' allegations, but not without respect for the

[28] Commentary to section 5 of the Draft Bill.
[29] Commentary to section 5 of the Draft Bill.
[30] Herédi (2013) 92.
[31] Ervo (2016) V.
[32] Pákozdi (2014) 146.
[33] Commentary to section 6 of the Draft Bill.

parties' right to dispose of their legal action, and by way of questioning, provision of information and call for the parties. With regard to the prominent implementation of the parties' right to dispose of their legal action and the pronounced enforcement of their obligation to produce evidence, the Draft Bill completely reinterprets the provisions of section 3, subsection (3) of the CCP in force on the court's tasks related to the taking of evidence and breaks with the approach according to which the court should provide all the parties to proceedings with exhaustive information on the taking of evidence in all cases. The parties' right to dispose of their legal action entails that they are free to decide whether, in their procedural acts and statements, they wish to use and comply with the court's substantive measures of organisation of procedure'.[34]

'The material of the case file necessary for the court to conclude the case can be gathered in two different ways: in the 'inquisitorial system', the court is – at least in part – actively involved in investigating the facts of the case instead of the parties. In the 'adversarial system', the court relies on the parties' obligation to produce evidence on the basis of their right to dispose of their legal action, and the court may be entitled to take evidence *ex officio* only in exceptional cases defined by law.[35] The substantive measures of organisation of procedure extend the scope of the adversarial system, since these measures (the court's obligation to ask certain questions and to call the parties to carry out certain procedural acts, provision of information by the court, the court's obligation to encourage the parties to settle their case by amicable agreement) may help those parties who are not familiar with the applicable legal provisions, are not skilled in handling their affairs or are not represented by an adequate legal representative to properly enforce their claims. By eliminating the risks and deficiencies of an excessive adversarial system, the substantive measures of organisation of procedure intend to safeguard the parties' interests and protect the parties who make incomplete or unclear statements or put forward deficient or ambiguous petitions primarily due to their lack of legal expertise from losing out on the legal protection of which they are the beneficiaries based on the relevant substantive legal norms. The substantive measures of organisation of procedure are limited by the requirement of fair legal process. Such measures may be adopted by the court only insofar as the latter is capable of preserving the appearance of impartiality for the litigants'.[36]

At the end of the preparatory phase, the court provides the parties with general information on the facts that need to be proved and on which party has to bear the burden of proof. Upon the court's call, the parties are obliged to put forward their motions for evidence within a deadline set by the court. The court does not take into account motions submitted out of time due to the parties' fault.[37] Till the end of the preparatory phase, the parties are entitled to modify their initiative statements – within the framework of the present Act – without the consent of their adversaries (modification of the statement of claims – modification of the counter-plea).[38] The end of the preparatory phase, as part of the division of procedural phases, basically entails the prohibition of the modification of the statement of claims. The statement of claims is considered to be modified if the plaintiff changes the rights claimed in his statement of claims, which leads to the modification of the relevant facts, but not necessarily entails the modification of the plaintiff's petition. Following the

[34] Commentary to section 237 of the Draft Bill.
[35] The Experts' Draft Proposal (manuscript), 2015.
[36] The Experts' Draft Proposal (manuscript), 2015.
[37] The Experts' Draft Proposal (manuscript), 2015.
[38] Commentary to section 183 of the Draft Bill.

end of the preparatory phase, such modification of the statement of claims is allowed only if the defendant gives his – explicit or tacit – consent to the modification. An unauthorised modification of the statement of claims qualifies as a withdrawal of the petition.[39]

The court may take evidence during the preparatory phase only in cases defined by law. This provision should be interpreted in compliance with the rules on the parties' posterior motions for evidence, which allows it to be carried out between the delivery of a court order that closes the preparatory phase and the closure of the hearing phase before the delivery of the first instance judgement.[40]

'According to the Draft Bill, initiative statements include pieces of evidence and motions for evidence, hence, the court has limited competence in the taking of evidence, and is obliged to intervene only when necessary, in particular if the parties submit incomplete initiative statements in relation to the relevant facts of the case or if there is a dispute between the parties as to which of them should bear the burden of proof as regards the given facts. The court informs the parties if the submitted evidence or motions for evidence do not cover all the essential facts, if the parties' factual allegations are unclear, too general, inconsistent or incomplete or if there is a need to motion the court to take expert evidence. In the case of a dispute, the court informs the parties about the burden of proof resting on them and about the consequences of the failure to motion for the taking of evidence and an unsuccessful evidence taking.

The court's substantive measures of organisation of procedure are limited by the statement of claims and the counter-plea, as well as by the rights claimed and the legal bases referred to by the parties. The system of substantive measures of organisation of procedure does not require the court to inform the parties if their factual allegations raise the necessity of the application of legal norms that have not been referred to in their claims and counter-pleas, in particular if such allegations would necessitate the modification of the claim, counter-plea or the rights claimed'.[41] The above viewpoint is not shared by the members of the Meeting of the Heads of Councils of the Curia who considered it unfavourable and even unacceptable that 'a statement of claims well-founded on the facts may be rejected on the basis of the sole fact that the plaintiff referred to the wrong legal title, such judicial practice is not compatible with the social mission of proceedings. The principle that the court is bound by the legal titles referred to by the parties is based on the misinterpretation of the principle that the parties delimit the subject matter of the proceedings: in reality, the court is only bound by the parties' claims and factual allegations, but not by the legal titles referred to by them. It is the court that is given the task of qualifying the parties' legal relationship based on their allegations and the pieces of evidence brought forward by them, since the proceedings' principal issue is whether the plaintiff's claims and factual allegations are well-founded, and not whether the legal grounds had been correctly put forward by the plaintiff'.[42]

[39] Commentary to section 183 of the Draft Bill.

[40] Commentary to section 220 of the Draft Bill.

[41] Commentary to section 237 of the Draft Bill.

[42] Letter of the Head of the Civil Department of the Curia, Mr. György Wellmann addressed to the President of the National Office for the Judiciary, 2015.E1.I.G.21/2., Budapest, 30 March 2015.

The system of substantive measures of organisation of procedure does not further require the court to quest for, gather and assess facts and evidence *ex officio* within the framework of the parties' claims, counter-pleas, the rights claimed and pieces of legislation referred to by them.[43]

Albeit with different intensity and content and to a different extent, the substantive measures of organisation of procedure are necessary in the preparatory phase, the phase dealing with the merits of the case and in second instance proceedings as well,[44] because, as part of its contributive actions, the court is obliged to clarify the facts of the case and to determine the factual background of the legal dispute.[45]

2.4. The principle of the free establishment of facts

The principle of the free establishment of facts is regulated under the title 'Basic provisions related to the taking of evidence' in the chapter on the taking of evidence of Part 4 of the new CCP.[46]

'The principle of free evidence taking – in a narrow sense – includes the freedom to choose any method for the taking of evidence and the freedom of the court to use any appropriate means (e.g. witness testimony, expert opinions, inspection and documents) as a piece of evidence. During the proceedings, other types of means of evidence or pieces of evidence that are not expressly defined by law may be freely assessed by the court: the different means of evidence have no predetermined – higher or lower – force of evidence. The system of free evidence taking enables the court to use any data, knowledge or information capable of establishing the facts relevant to the parties' legal dispute as a piece of evidence. The means of evidence are regulated by procedural legal norms, which set certain formal requirements, for instance, private documents with full probative value have specific formal features defined by law, and these documents are given a higher force of evidence, even if the court is free to assess the evidentiary force of documents.[47] In other cases, the use of images, video- and audio-recordings as pieces of evidence without the consent of the persons concerned is, in principle, prohibited due to personality rights issues. However, according to the courts' case-law, an audio-recording may be made and used as a piece of evidence without the consent of the person concerned if the recording was carried out to prove the imminent threat or occurrence of an infringement on public interest or justified private interest grounds, provided that the making or use of the recording does not constitute a disproportionate interference in relation to the infringement to be proved.

The principle of the free establishment of facts – in a broader sense – means that the parties are obliged to prove the veracity of their allegations in court. Their veracity can be proved by other pieces of evidence, if the allegations are proved to be true, the court remains free to use them for the establishment of the relevant facts'.[48]

The negative side of the free establishment of facts is that the proceeding court is not bound by the decision of a State authority or other court and by the facts established therein

[43] Commentary to section 237 of the Draft Bill.
[44] Commentary to section 237 of the Draft Bill.
[45] See Köblös (2016) 185–204.
[46] Section 263, subsections (1)–(2) of the new CCP.
[47] See Constitutional Court decision No. 531/B/1997.
[48] The Experts' Draft Proposal (manuscript), 2015.

in the establishment of the factual background of the case heard by the proceeding court and in the subsequent delivery of its decision, hence, there are no obstacles to a civil court establishing – on the basis of the assessment of all the pieces of evidence in its proceedings – a factual background different from the one found by a criminal court.[49]

3. RULES ON THE TAKING OF EVIDENCE IN FIRST INSTANCE PROCEEDINGS AND THE PRELIMINARY TAKING OF EVIDENCE

3.1. The preparatory phase

The new CCP – on the basis of the split system of procedural phases introduced in first instance proceedings – separately regulates the preparatory phase and the phase dealing with the merits of the case. In the split system of proceedings, the preparatory phase aims at determining and clarifying the content and framework of the legal dispute in order to decisively define its factual and legal basis on the occasion of a single preparatory hearing following a detailed and comprehensive preparatory work in writing.[50]

One of the main legal effects of the end of the preparatory phase is that the pieces of evidence and motions for evidence submitted by the parties during that phase cannot subsequently be modified and no new evidence or motion for evidence put forward posterior can be accepted by the court, however, exceptions to this prohibition should be justified in cases like the ones where the modification of the statement of claims and counter-plea is allowed.[51] As a result of the separation of the preparatory phase and the taking of evidence, in principle, no evidence can be taken during the preparatory phase. Evidence in relation to the merits of the case can be taken during the preparatory phase only in cases defined by the Draft Bill (e.g. gathering documents and data necessary for preparing the adjudication of the case upon the parties' motions). The taking of evidence not in respect of the merits of the case is, nevertheless, not excluded (e.g. requirements of admissibility).[52]

'In an ideal situation, the written preparatory work and the court's contributive actions enable the court to have a fully prepared case file to be dealt with at the very first hearing. The preparatory hearing therefore starts with summarising the relevant initiative statements based on the results of the written preparations, prevents the court from misunderstanding or misinterpreting the parties' statements and enables the court to verify whether it correctly interpreted the parties' statements and intentions. In addition, the parties may present observations'.[53]

'According to the Draft Bill, it is considered strictly necessary in the interest of ensuring the effectiveness of the preparatory hearing that the parties be present at the preparatory hearing and that the persons present be appropriately familiar with the facts of the case and its evidentiary issues. The Draft Bill seeks to guarantee the presence of parties

[49] BH 2003.457.

[50] Trials should be as concentrated as possible to be effective. The Recommendation Rec. 84 (5) advises the establishment of a typical procedure based on "not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment." European Commission for the Efficiency of Justice (CEPEJ), Compendium of "best practices" on time management of judicial proceedings, CEPEJ(2006)13, Strasbourg, 8. December 2006, point 4.3.

[51] Commentary to section 220 of the Draft Bill.

[52] Commentary to section 183 of the Draft Bill.

[53] Commentary to section 183 of the Draft Bill.

or representatives who are completely prepared to engage in the litigation by prohibiting the adjournment of the preparatory hearing on the grounds that the parties or their representatives did not take reasonable care to prepare for it. The writ summons has to contain a warning for the persons summoned of the consequences for failing to appear and be properly prepared'.[54]

'The Draft Bill does in principle not differentiate between the high courts' preparatory phase and the district courts' preparatory phase (uniform rules of procedure). Following the submission of a written counter-plea (or eventually counter-claim or set-off), there are three ways to reach the conclusion of the preparatory phase:

1. the court may order the provision of further written documents,

2. the court may set the date of the preparatory hearing, or

3. the court may close the preparatory phase without ordering the parties to submit further written materials and without holding a preparatory hearing.

Thus, the court is given the competence to decide on the most appropriate method and procedural steps for preparing the case's adjudication (in oral or written form), which should be adapted to the specificities of the particular case at hand'.[55]

'Based on the schedule of procedural phases contained in the Draft Bill, in a significant number of the cases, the court may have to hold only one preparatory hearing to close the preparatory phase, and it may be able to start dealing with the merits of the case and taking substantive evidence either already at the preparatory hearing or at a subsequent hearing at the latest'.[56]

'There may be cases in which there is absolutely no need to hold a preparatory hearing or to order the provision of further written materials, because the legal dispute is not complicated at all (e.g. the defendant recognises the plaintiff's claims). In such cases, the preparation of the case's adjudication can be carried out without holding a hearing,[57] but the court has to issue a prior warning and enable the parties to request the court to hold a hearing. If no preparatory hearing is held by the court, then the latter proceeds to close the preparatory phase by delivering an out-of-hearing order the content and legal effects of which are identical to the one rendered at a preparatory hearing. The date of the court's on-the-merits hearing has to be fixed at the same time as the order to close the preparatory phase is delivered'.[58]

'The preparatory phase is closed by the court's formal order that is not subject to appeal and declares the closure of the preparatory phase. As regards this type of court order, the Draft Bill states that, despite being a procedural order, it binds the court that is not allowed to modify it.[59] Procedural acts to be performed during the preparatory phase can be

[54] Commentary to sections 188 and 189 of the Draft Bill.

[55] Commentary to section 187 of the Draft Bill.

[56] Commentary to section 192 of the Draft Bill.

[57] The rules on "Questioning the parties without holding a hearing" (section 155 of the new CCP) serve the purpose of allowing the proceeding court to gather information, request clarification or call for the delivery of a statement from the parties without holding a hearing, which basically extends the court's scope of action in respect of the written preparation of the case's adjudication to the on-the-merits phase of proceedings. The Draft Bill provides for the use of such action by the court only in case of parties acting without a legal representative, since those who are represented by a legal representative have to submit their statements in writing.

[58] Commentary to sections 197 and 198 of the Draft Bill.

[59] Éless and Ébner (2014) 377–92.

carried out at the subsequent stages of proceedings only in cases and under conditions laid down by the Draft Bill'.[60]

'In the context of the substantive measures of organisation of procedure, the Draft Bill provides additional and different types of assistance to parties acting without a legal representative. Lay persons may need to be heard in person to clarify their initiative statements, be assisted in exploring their opportunities in the area of evidence taking, and be informed, in respect of the facts to be proven, about the possible means of evidence, methods of proof and the conditions of evidence taking in terms of procedural law'.[61]

'Additional preparatory measures may need to be taken in case of the extension of the statement of claims and the submission of a set-off as well. These additional measures extend only to the modified parts of the claims and petitions, which means that the entire preparatory phase does not have to be re-opened. The Draft Bill does not contain specific provisions to regulate the deadlines, methods (in oral or written form) and steps of the taking of additional preparatory measures. The court is free to decide on the most appropriate method of taking additional preparatory measures on the basis of the case's specific circumstances and the nature, extent and importance of the petitions' modification'.[62]

3.2. The on-the-merits phase

'In the split system of procedural phases, the second phase serves the purposes of taking evidence – relevant to the legal dispute identified in the preparatory phase – and delivering a decision on the merits of the case.

In this procedural phase, the parties are given the opportunity to modify or supplement – within the applicable legal framework, in a relatively free manner and without the consent of their adversaries – their initiative statements in compliance with their obligation to assist the court in administering justice and to tell the truth and with the principle of good faith. The party who makes an initiative statement or modifies his earlier statement only in the on-the-merits phase despite having been given the opportunity to do so in the preparatory phase is deemed to fail to engage in a reasonably expected procedural conduct. To prevent the parties from engaging in such misconduct, the Draft Bill provides for the possibility of imposing a fine on them'. As a result of the preparatory phase, the court has to carry out targeted and, in many cases, scheduled measures of evidence taking in the on-the-merits phase, therefore the Draft Bill states that the court is also entitled to fix several on-the-merits hearing dates at the same time, and such hearings can be held on consecutive days as well.[63]

[60] Commentary to section 194 of the Draft Bill.
[61] Commentary to section 253 of the Draft Bill.
[62] Commentary to section 222 of the Draft Bill.
[63] Commentary to section 183 of the Draft Bill.

In the on-the-merits – oral – phase, no further evidence or motion for evidence can be submitted, and the court is given the task of taking evidence and delivering a decision on the merits of the case, preferably at a single on-the-merits hearing.[64]

The Draft Bill restricts, *inter alia*, the submission of evidence and motion for evidence from among the different initiative statements, hence, the closure of the preparatory phase essentially leads to the fixing of the framework of evidence taking. 'No other pieces of evidence than the ones available at the court's hearing and capable of immediately establishing the veracity of contested allegations or immediately disproving the statement of claims can be assessed by the court'.[65]

The presence of the parties at on-the-merits hearings is not indispensable, thus, the Draft Bill – by changing the relevant provisions of the CCP in force, which favour only the plaintiff – makes it possible for any of the parties, including the defendant to request the court to hold an on-the-merits hearing in their absence.[66]

3.3. The preliminary taking of evidence

In civil proceedings, evidence is taken in the light of the plaintiff's statement of claims and the defendant's counter-plea in order to establish the relevant facts and verify the contested allegations. However, there may be cases where a fact or circumstance needs to be proven prior to the beginning of proceedings or prior to the court's first hearing, for instance, if there is a danger that, as time passes, the taking of evidence could not be carried out or could be carried out only with great difficulty. Within the framework of the preliminary taking of evidence, the court can order the preliminary hearing of a witness who, for instance, faces imminent death due to health reasons or wishes to settle down abroad. A preliminary inspection can be held if an important document starts to become illegible or there is a risk that the on-the-spot traces would soon disappear (e.g. winter snow is expected). Expert opinions are the most commonly used means of preliminary evidence in cases where the establishment of the relevant facts of the legal dispute requires special expertise.[67]

The preliminary taking of evidence may significantly simplify and thus shorten the proceedings, or, in the optimistic case, may avoid them if, for instance, the preliminary expert opinion on a disputed issue is accepted by both parties who are then able to conclude an out-of-court settlement. The preliminary taking of evidence may take place – upon request – either prior to the beginning of court proceedings or in the preparatory phase.[68]

[64] Those foreign civil procedural codes that recognise the principle of the concentration of proceedings define its meaning, similarly to the new CCP, by the requirement to adjudicate and conclude a case at a single on-the-merits hearing, see, for instance, section 7 of the Lithuanian Code of Civil Procedure, and section 272, subsection (1) of the German Code of Civil Procedure. This requirement was present in section 224 of the 1911 Code of Civil Procedure drafted by Sándor Plósz and also stems from section 141, subsection (1) of the CCP in force. Commentary to section 3 of the Draft Bill.

[65] Commentary to section 214 of the Draft Bill.

[66] Commentary to section 223 of the Draft Bill.

[67] Király and Füzy (2005) 80–91.

[68] Commentary to section 334 of the Draft Bill.

The findings of the preliminary taking of evidence may be used by any of the parties in the subsequent proceedings. It is therefore not excluded that the party refers to the favourable findings of a preliminary taking of evidence requested by the other party.[69]

4. THE RULES OF THE NEW CCP ON THE TAKING AND ASSESSMENT OF EVIDENCE

4.1. The parties' autonomy to allege facts and the method of the court's monopoly to establish the case's facts: the court's discretionary power

The main element of the court's hearings is the taking of evidence, hence, an efficient evidence taking is vital to the well-functioning adjudication of cases by the court.[70] The court should not seek to reveal the truth,[71] but to ensure the fairness of proceedings: it should endeavour to establish the facts of the case by respecting the parties' right to dispose of their legal action.[72] On the basis of their private autonomy and right to dispose of their own legal action, the parties are also given the right to choose the facts that they wish to share with the court and which they refer to so as to request legal protection from the court.[73] The parties are obliged to allege only those facts that 'based on the law, are capable, if proven to be true, of supporting their claim for the enforcement of their substantive rights'.[74]

Within the framework of the parties' motions for evidence, the court is free to decide on the methods and means of evidence taking, as well as on the scope and chronological order of the individual measures for the taking of evidence.[75] The principle of free evidence taking has three main elements in relation to the court's discretionary power in the establishment of facts:

1. 'The *principle of free assessment of evidence* directly stems from the principle of free evidence taking. The court assesses whether the parties' factual allegations are supported by the pieces of evidence submitted by them or not. The facts established by the court are in conformity with the relevant procedural rules if the former are in line with the documents of the case file and are based on reasonable and correct conclusions. The assessment of evidence is, nevertheless, bound by certain constraints, such as legal presumptions or a legal provision that states that a certain circumstance should be considered true in the absence of proof to the contrary or lays out that where property rights stemming from a criminal proceeding that is considered to have been finally disposed of are to be decided in a civil action, the court may not declare in its decision the sentenced person not guilty of the criminal act as charged'.[76]

[69] Commentary to section 338 of the Draft Bill.

[70] Légrádi (2014) 443–73.

[71] "A distinction should be made between seeking legal truth (formal truth) and seeking substantive truth. The former means that the court examines the veracity of only those factual allegations that are contested by the parties, while it accepts the remainder of their allegations without questioning them. The latter entails that the court seeks to reveal the whole truth in the genuine sense of the word." Farkas (1956) 24–25.

[72] Kengyel (2014) 289.

[73] Éless and Parlagi (2014) 358.

[74] Éless and Parlagi (2014) 358–59.

[75] Commentary to section 278 of the Draft Bill.

[76] Commentary to section 279 of the Draft Bill.

2. 'A distinction has to be made between the free assessment of evidence by the court and the court's *discretionary decision-making*, on the basis of which the court is entitled to determine the amount of damages or any other claim to be awarded at its own discretion, after weighing all circumstances of the case, provided that it cannot be established based on the opinions of experts or other evidence. The court is given the power to do so only if the amount to be awarded cannot be established by way of evidence taking. This discretionary power cannot be exercised if the relevant fact could be proven by the party, but the latter fails to submit a motion for evidence or the evidence taken does not support the party's factual allegation.'[77] The principle of discretionary decision-making does not apply to cases in which the court may take evidence *ex officio*.

3. 'The court's freedom in respect of the assessment of evidence also extends to the parties' factual allegations: the court does not automatically consider the parties' undisputed allegations (concurrent allegations, acknowledgements) true, as it checks them against common knowledge, common experience and its official knowledge, and examines their internal coherence, i.e. it assesses them. There are cases in which the party's factual allegation is an essential element of the taking of evidence, that is why the CCP provides for the compulsory hearing of the party concerned (e.g. in actions for the establishment of origin[78]). In the process of the establishment of the case's facts, the court is entitled to assess not only the parties' allegations, but their procedural conduct as well.'[79]

The court assesses not only the results of the taking of evidence, but the process of evidence taking as well: it decides on whether the means of evidence proposed is capable of proving the veracity of the factual allegation to be proved or whether the piece of evidence can be used in court (e.g. the presence of grounds for prohibiting the taking or assessment of evidence, the pieces of evidence have been obtained or used unlawfully).

'Since a conclusive break with the requirement of ensuring the discovery of substantive truth,[80] courts have been required to satisfy themselves with a degree of certainty that excludes any reasonable doubts, one of the reasons behind the changed requirement is that expert opinions, more and more necessary for deciding on the merits of the legal dispute, are usually delivered with a certain level of certainty or that the court's degree of certainty may vary depending on the type of the legal action, for instance, in actions that affect the legal status of the litigants (civil status actions, actions for the establishment of origin, certain family law and guardianship actions, etc.), a higher degree of certainty is required, while in other types of actions, a lower level of certainty may also be sufficient, however, an objectively set minimum degree of certainty has to be achieved in all types of cases'.[81]

The court's conviction is subjective in the sense that it results from the proceeding court's intellectual activity aimed at getting to know the case's factual background and

[77] Commentary to section 279 of the Draft Bill.

[78] BH 1984.453., BH 1983.196.

[79] We can find this also in the Act III of 1952 on the Code of Civil Procedure (CCP in force) Section 206 subsection (2) "Upon weighing the facts based on the case file, the court shall determine, also according to its conviction, the relevance that the party's failure to appear may have as to the judgment of the case, or the party's or his counsel's non-compliance with any request, or the relevance of their refusal to answer a question, or their pleading to having no knowledge or recollection of certain specific facts."

[80] Act no. CX of 1999 on the modification of Act no. III of 1952 on the Code of Civil Procedure.

[81] The Experts' Draft Proposal (manuscript), 2015.

making conclusions based on it, nonetheless, this conviction should not originate from a 'peculiar' intellectual process or from 'a kind of unclear emotional process or a general assumption.[82]

4.2. Unlawful means of evidence

'One of the characteristics of civil proceedings, as opposed to criminal proceedings, is that the production of evidence is, in principle, the task of the litigants (natural or legal persons etc.) who gather the pieces of information and evidence submitted to the court typically but not exclusively as natural persons and outside the framework of the court's proceedings: the theoretical and jurisdictional problem in that case is that the parties may try to use means of evidence produced out of the court unlawfully in terms of the relevant substantive legal norms'.[83]

Due to the emergence and widespread use of new information, communication and multimedia devices, a growing tendency has been seen in the context of the possibility and actual practice of gathering pieces of information and evidence in an unlawful manner.[84]

In the courts' practice, the question of whether an illicit piece of evidence or a piece of evidence obtained unlawfully can be used by the court is raised more and more frequently. In most of the cases, such evidence includes secret picture and sound recordings.[85]

The legal literature has elaborated three theories in respect of the usability of illicit means of evidence. According to the first theory, it follows from the principle of free evidence taking that a procedural act that is not prohibited by law can be freely carried out, therefore the unlawfully obtained pieces of evidence can be freely used; by virtue of the second theory, there is an absolute prohibition on the use of illicit evidence in civil proceedings. The third and most widespread theory – approved at international level as well – is based on the so-called principle of reciprocity, according to which the different interests – the party's legitimate private interests in evidence taking or the protection of the other party's personality rights – have to be weighed against each other in every case, and the court must when weighing those interests have due regard to the degree of unlawfulness of the obtaining and use of evidence.[86] As the courts' case-law and the legal literature opted for the principle of reciprocity in relation to the usability of illicit means of evidence, the Draft Bill has to find a suitable solution between an absolute legal prohibition on and the complete admissibility of illicit evidence, and has to enable the court to exercise a discretionary power in that regard.[87]

'The exclusion of illicit means of evidence from the taking of evidence may make it extremely difficult, if not impossible, for the parties to submit their pieces of evidence. The principle of good faith and the parties' obligation to assist the court in administering justice require from the parties to act in a lawful manner and support the enforcement of rights. In the event, then, that there is a lawful method to produce evidence (it is objectively not

[82] Németh and Kiss (2010) 778.

[83] Papp (2013) 298–99.

[84] Commentary to section 269 of the Draft Bill, BH 1993.365.

[85] An unlawfully produced audio-recording may be used as a piece of evidence in court only if this recording is the only available means of evidence capable of enabling the court to establish the case's facts and reveal the truth (BH 2015.38.)

[86] Kengyel (1995) 408–10; Nagy (2015).

[87] Papp (2011).

impossible), even if that method is more difficult or more complicated than the unlawful method, the parties have to choose the lawful way of producing evidence.

The main advantage of the application of the rules on the exigency of providing evidence is that the opposing party is given an option: he either approves of the use of illicit means of evidence by subsequently renouncing to object to the unlawfulness of evidence or giving his authorisation or consent to the use thereof, or takes the consequences of the exigency of providing evidence, which ultimately prevents the means of evidence from being used at an open court hearing'.[88]

4.3. The use of the results of an evidence taking carried out in other proceedings

There are many cases in which the very same fact (set of facts) has relevance and needs to be proven in more than one proceeding. The taking of evidence on the same fact in different proceedings would be contrary to the principal requirements of economy of procedure and concluding a case within a reasonable time. The CCP in force also provides for the possibility of using evidence taken in other proceedings,[89] and the courts have so far seized the opportunity to do so, but there is no express and unambiguous legal provision as to the evidentiary force of the proofs gathered in such way.

In practice, the courts sought to circumvent the cumbersome provisions: 'if a person had already been heard as a witness in other proceedings, then the proceeding court did not hear the same witness again in detail, but instead it made him state whether he wished to maintain his earlier witness testimony delivered in other proceedings or not, moreover, the summoning of such witness is compulsory only if the proceeding court detects a discrepancy in the witness' earlier testimony, and the discrepancy needs to be resolved at the proceeding court's hearing'.[90]

Judicial practice has already established that an expert opinion delivered in other proceedings can also be used by the proceeding court, provided that such opinion is appropriately presented at the proceeding court's hearing and the parties are given the opportunity to comment on it.[91]

'However, with a view to the differences of the detailed rules of the various types of procedures, the guarantees of the Code of Civil Procedure aimed at ensuring the appropriateness of evidence taking cannot be disregarded: for instance, all the parties to the proceedings have to be given the possibility of being present at the hearing of a witness and addressing questions to him, the witness should be able exercise his right to be exempted from delivering a testimony, the expert opinion should be prepared by an expert enlisted in the registry of forensic experts, etc. On the other hand, there is no procedural interest that would require the court to comply with all the procedural rules on the taking of evidence, including to take evidence itself. The court incorporates those pieces of evidence that have been gathered in other proceedings into its case file by presenting them at its hearing.'[92]

[88] The Experts' Draft Proposal (manuscript), 2015.

[89] Section 124, subsection (4), point a) of the CCP in force expressively enables the court to request documents from other authorities and bodies in the process of the preparation of the court's hearing.

[90] BH 1993.748.

[91] BH 1984.445., BH 2000.208., BDT 2006.1483.

[92] The Experts' Draft Proposal (manuscript), 2015.

4.4. Rejection of a motion for evidence

The court may reject a motion for evidence on three main grounds defined in the CCP in force: failure to submit a motion for evidence within the specified time limit, submission of a motion for evidence in bad faith and the evidence proposed is unnecessary for passing a decision on the merits of the case.[93] Additional grounds for rejection in relation to supplementary motions for evidence may be the followings: the evidence taking proposed by the party, not necessarily in bad faith, would be capable of unduly delaying the conclusion of proceedings, unnecessarily increasing the costs of proceedings or leading to the excessive and burdensome mobilisation of witnesses.[94]

Factual allegations do not need to be proved if they are allegations left to the discretion of the party concerned, are based on acknowledgement, the parties' concurrent or undisputed statements, common knowledge or the court's official knowledge, or qualify as legal presumptions – including allegations that are based on facts that should be considered true by virtue of the law in the absence of proof to the contrary, i.e. temporarily true allegations – against which, however, counter-evidence may be produced.[95] These types of allegations enable the court to consider certain facts relevant to the legal dispute true and use them as a basis for the delivery of its decision.

According to the Draft Bill, the court may reject a motion for evidence, on one hand, on the grounds defined in the CCP in force (the evidence proposed is unnecessary for passing a decision on the merits of the case, or the party fails to comply with his obligation to advance the costs of an evidence taking proposed by him) and, on the other hand, on a new ground (the motion for evidence does not include all the elements required by law).[96] In addition to these grounds for rejection, the court is bound by the prohibition of using illicit means of evidence.

The Draft Bill introduces, as a new element, the possibility of rejecting a motion for evidence on the grounds of economy of procedure. Thus, a necessary and possible, but uneconomical taking of evidence may be rejected by the court (e.g. legal expenses are many times in excess of the amount of the plaintiff's claim).The above ground for rejection cannot be applied in legal actions where the law allows *ex officio* evidence taking.

4.5. The rules on the exigency of alleging facts and the exigency of providing evidence

The parties are under the exigency of alleging facts in the preparatory phase, while they are under the exigency of providing evidence in the on-the-merits phase.[97]

[93] "Rejection of a motion if, for instance, the evidence proposed is not related to the relevant facts of the case, is related to them, but they can be verified without any taking of evidence, or if the veracity of the facts to be proven has already been justified by the court via other means of evidence, or if it is already unlikely or impossible that the taking of evidence would be successful" in BDT 2002.657.

[94] "European Court of Human Rights considers that the competent national authorities were required by Article 6 § 1 to act with particular diligence in ensuring the progress of the proceedings". see *Bock v. Germany*, judgment of 29 March 1989, Series A no. 150, p. 23, § 49 in case of Mikulić v. Croatia (Application no. 53176/99) judgment, Strasbourg, 7. February 2002.

[95] Commentary to section 266 of the Draft Bill.

[96] Commentary to sections 272–74 of the Draft Bill.

[97] New CCP, section 184, subsections (1)–(2): exigency of alleging facts, section 265: interests in producing evidence and exigency of providing evidence.

'The legislator provides for the rules on the newly introduced exigency of alleging facts within the scope of the preparatory phase. The exigency of alleging facts is based on the understanding that, in certain information-asymmetric situations, the party, without any fault on his part, may not be aware of all the pieces of information necessary for the enforcement of his substantive rights, therefore he is unable to make precise factual allegations, while the opposing party is in the possession of the missing information, but it is not in his interest to reveal them in the proceedings.

The main reason behind the introduction of the exigency of alleging facts is that in such situations the party under the exigency of alleging facts and the court are exempted from the obligation to reveal those circumstances of the case that are affected by the exigency, and the missing elements can be considered as proved facts. The Draft Bill, however, does not oblige the court to abide by the above rule if the court has reasonable doubts as to its application, similarly to the provisions related to the acceptance of the veracity of the parties' concurrent and undisputed statements and their acknowledgements'.[98]

'The exigency of alleging facts has to be applied if only the party having adverse interests is in the possession of the pieces of information necessary for making a factual allegation. It cannot be applied, nonetheless, if a third party having no interests in the proceedings is also familiar with such information.

A mere reference to the existence of the exigency of alleging facts is not enough for the application of the rules related to it, but no taking of evidence is expected in that regard. The Draft Bill obliges the party who seeks to refer to the exigency of alleging facts to partly make its existence probable and partly verify its existence'.[99]

The party is under the exigency of alleging facts if *a)* he makes it probable that the pieces of information necessary for making factual allegations are in the exclusive possession of the opposing party, *b)* he verifies that he has taken the necessary measures to get and retain these pieces of information, *c)* the opposing party does not disclose the information despite having been requested by the court to do so, and *d)* the opposing party does not make it probable that the requirements as provided for under points *a)* and *b)* are not met.[100]

By virtue of the requirement of pursuing litigation in good faith, the parties are expected to give an account to the court of the relevant pieces of information that they are aware of – regardless of the general and special rules on the taking of evidence –, and to provide the court with the pieces of evidence available to them.[101] This is the so-called secondary obligation to allege facts, which is of secondary nature not only because it is incumbent (in a secondary manner) on the adversary of the party interested in alleging certain facts, but also because it is exclusively related to the so-called secondary facts. The parties are obliged to allege all the facts that distinguish the substantive rights claimed by them from other substantive rights, these facts cover a set of 'circumstances relevant for deciding on the merits of the case'.[102] The Draft Bill describes this set of facts as 'pieces of information necessary for revealing the particular circumstances of factual allegations'.

A mere reference to the existence of the exigency of alleging facts is not enough for the application of the rules related to it, but no taking of evidence is expected in that regard.

[98] The Experts' Draft Proposal (manuscript), 2015.

[99] Commentary to section 184 of the Draft Bill.

[100] New CCP, section 184, subsections (1)–(2): exigency of alleging facts.

[101] Légrádi, (2014) 469–70.

[102] Névai and Szilbereki (1974) 297.

The Draft Bill obliges the party who seeks to refer to the exigency of alleging facts to partly make its existence probable and partly verify its existence.

The exigency of alleging facts has been recognised in the courts' case-law as well under the term of the reversal of the burden of proof.[103] 'If the exact cause behind the injured party's health damage cannot be determined, the court has to examine all the possible causes that are related to the hospital's activities, and in the event that the hospital is unable to prove that it has fulfilled its duty of care in respect of the possible causes, then the hospital's liability for damages can be established. If the medical activity related cause of the injurious situation cannot be excluded, then the burden of proof is reversed and the defendant hospital has to prove that it has complied with its duty of care regarding the possible causes or that the injury could not have been avoided even if it had fulfilled its duty of care'.[104]

'In a legal action for damages, it is sufficient for the relatives of a person who died during medical treatment to prove in relation to the cause and effect relationship that the person died during or right after the end of a medical treatment provided by a health-care institution. The latter is exempted from the liability for damages if it proves that it has fulfilled its duty of care, expected of health-care institutions and that the patient's death could not have been avoided. In the event that the health-care institution, by failing to carry out an expected medical examination, deprives itself of the possibility of proving that it could not have avoided the injurious situation even in the possession of a correct diagnosis and even with the use of an appropriate medical therapy, then it cannot be exempted from its liability for damages'[105]. In order to be exempted from liability, the defendant medical service provider bears the burden of proving that, despite the service provider's medical treatment in compliance with professional standards and the principle of due care, the plaintiff's health damage could not have been avoided.[106]

The above case-law indicates that, in abnormally information-asymmetric situations, the courts have exempted the 'weaker' party from alleging and proving those facts that would have been necessary for the 'weaker' party's successful litigation, and they have instead placed the burden of proof on the opposing party.[107]

The exigency of providing evidence occurs when 'it is impossible to provide full evidence […], but the relevant facts are highly likely to be present, and the court's conscience is not in favour of strictly applying the rules on the burden of proof…'[108]

Certain exigencies of providing evidence are properly regulated by substantive legal norms via the reversal of the burden of proof, e.g. by establishing presumptions and temporarily true allegations to be taken into account *ex officio* by the court.

The exigency of providing evidence may be applied if 'the party under the burden of proof reveals that there is an exigency of providing evidence, and there is a certain likelihood (e.g. empirical rule) that his factual allegations are true. In the event that the other party is in the possession of convincing proof to the contrary, he is able to disaffirm, without too much difficulty, the above factual allegations'.[109]

[103] Király and Simon (2005) 143–86.
[104] EBH 2009.1956.
[105] BDT 2008.1801.
[106] BDT 2010.2355., BDT 2010.2319., BDT 2007.1689.
[107] The Experts' Draft Proposal (manuscript), 2015.
[108] Farkas and Kengyel (2005) 62.
[109] Légrádi (2014) 211–26.

The Draft Bill defines four situations in which the exigency of providing evidence may be applied.[110]

1. the data necessary for the evidence-seeking party to submit a motion for evidence is in the exclusive possession of the opposing party (or other person); 2. it is impossible for the party to provide evidence, but it would be expected from the opposing party to give evidence to disprove the party's allegations; 3. it is at least likely that the opposing party has obstructed the taking of evidence, 'in such situation, the opposing party, by way of disposing of the pieces of evidence, intentionally or negligently influences the outcome of evidence taking'[111]; 4. the party would be able to provide evidence only in an unlawful manner, and the opposing party does not give his consent to the use of such evidence, in this case, the opposing party who is not interested in the taking of evidence has a right of disposal over the means of evidence.

The legal consequences of the exigency of providing evidence can be avoided by the opposing party only if he makes it probable that (1) he or any other person not involved in the proceedings but having the same interests has never disposed and has never needed to dispose of the relevant data; (2) there is a third person who does not share the interests of the opposing party and also disposes of the relevant data; (3) the evidence-seeking party failed to make every effort which may reasonably be expected of him to obtain the necessary data or means of evidence (for instance, he could have done something else besides the actions he allegedly taken); (4) it is theoretically possible for the evidence-seeking party to produce evidence beyond the opposing party's exclusive scope of control; (5) it cannot be reasonably expected from the opposing party to give evidence to refute the party's allegations; (6) the taking of evidence has not been obstructed; (7) it was not him or any other person having the same interests who has obstructed the taking of evidence; (8) the evidence-seeking party failed to make every effort which may reasonably be expected of him to prevent, eliminate or mitigate the consequences of the obstruction of the taking of evidence; (9) the harm to be suffered by the opposing party in case of providing information or evidence, or giving his consent to the use of evidence would be disproportionately greater than the evidence-seeking party's interests in the taking of evidence; (10) he has lost his right to dispose of the data and means of evidence required due to reasons beyond his scope of control; (11) the obstruction of the taking of evidence is not attributable to him.

This highly differentiated regulation serves the purposes of preventing the parties from being placed in an unfair procedural situation.

The notion of the scope of control was introduced into the Hungarian legal system by the 2013 Civil Code, the explanatory memorandum of which states the followings: 'Circumstances that cannot be controlled or influenced by the party (e.g. the traditional forms of vis maior) are beyond his scope of control. Such circumstances include natural disasters, certain politico-social events (war, revolution, uprising, sabotage, closure of transport routes or airports), certain State measures (import-export bans, foreign exchange restrictions, embargo, boycotts), serious disruptions of public services and those radical changes in the market conditions that make the performance of contractual obligations impossible (e.g. dramatic price explosion, significant lowering of the exchange rate of the currency used for payment, etc.). On the other hand, organisational and other disturbances at the level of the service provider, the adverse behaviour of employees, market supply

[110] New CCP, section 265, subsections (2)–(3): interests in producing evidence and exigency of providing evidence.

[111] Légrádi (2014) 216.

difficulties and other similar circumstances do not qualify as circumstances beyond the scope of control of the defaulting contractual party. The court has to weigh all the circumstances of the case at hand to decide on the issue whether the performance of services in conformity with the contract has been hindered by a circumstance beyond the party's scope of control'.[112] 'The legal consequences of the exigency of providing evidence cannot be avoided, for instance, if the party alleges that he has lost his right to dispose of an otherwise irreplaceable piece of evidence due to burglary or theft, and he is even willing to prove the commission of such criminal offence by presenting the charges filed and the police report on the crime scene.

In the proceedings, the parties are not obliged to allege facts. The parties are free to allege those facts that, due to lack of common or official knowledge or of examination, the court is unfamiliar with. The Draft Bill defines the parties' interests in alleging certain facts on the basis of which it determines which party is primarily expected to allege the facts necessary for the delivery of the court's decision, more precisely, the interested party is expected, while the other party is allowed to do so.

The interests in alleging facts and the interests in producing evidence are different procedural legal terms, which also entails that if the party interested in alleging certain facts fails to allege them, he may remain interested in the taking of evidence related to them in case another person makes the necessary factual allegations.[113]

4.6. The rules on the methods of evidence taking and the means of evidence

The general rules on the methods of evidence taking and the means of evidence are contained separately in Part 4 of the new CCP. The methods of evidence taking are as follows: the hearing of witnesses, the taking of documentary evidence and inspection, while the means of evidence include the followings: witness, expert, documentary evidence, image and sound recording, material evidence, etc.

It is not clear from the provisions of the CCP in force e.g. whether the party's legal representative is heard as a party or as a witness by the court, whether the party's legal representative is entitled to make factual allegations orally instead of the party, or whether the factual allegation of the legal representative of a party that is not a natural person qualifies as a witness testimony or as the party's factual allegation. The Draft Bill does not consider the statements made by the parties and their representatives as means of evidence, and differentiates between the parties' factual allegations and the pieces of evidence learnt in the proceedings.[114]

The hearing of the legal representative of a party, being either a natural or a non-natural person, does not qualify as the hearing of a witness, but is considered as the hearing of a party in person, and the court may order such hearing *ex officio* as well. As the representative's factual allegations are not deemed to be different from the party's factual allegations, the court treats the diverging allegations of several persons (party and representative) as if the statements of the same person, the party himself had been dissonant or self-contradictory.[115]

[112] Commentary to subsection 6 section 142 of the New Hungarian Civil Code.

[113] The Experts' Draft Proposal (manuscript), 2015.

[114] Commentary to section 279, subsection (1) of the Draft Bill. Regarding the party as a means of evidence and the assessment of his personal statement as a piece of evidence, see more Varga and Légrádi (2014) 491–93.

[115] The Experts' Draft Proposal (manuscript), 2015.

By virtue of the principle of the free establishment of facts, not only those methods of evidence taking can be used that are expressly defined by the law, but other, non-defined (atypical) methods can be utilised as well (e.g. requesting information from the relevant authorities and private organisations, carrying out experiments, replaying past events referred to in the proceedings, commissioning opinion polls, etc.).[116] The Draft Bill introduces, as an innovation, the notion of collaborators who provide assistance in appropriately carrying out the taking of evidence, for instance, the court requests information about certain relevant facts from the authorities or private organisations. Due to the extension of the scope of application of coercive measures to all collaborators, the court is able to enforce compliance with the requests for information.[117]

5. SUMMARY

The Draft Bill does not entail fundamental changes in the system of civil procedural law. It seeks to retain the well-established instruments, but 'the introduction of new rules should be of significant benefit, otherwise the well-established legal provisions are to be maintained instead'.[118] The codification of the new Code of Civil Procedure is in conformity with the legal premise of Ulpian only if it does not fall victim to the compulsion to over-regulate and […] the litigants are able to enforce their claims within a transparent, simple, fast-track and clear procedural framework.[119]

The most important questions are whether the Draft Bill will facilitate the participation of legal professionals and citizens seeking justice in civil proceedings and promote the provider's approach of the courts, whether the litigants will be able to enforce their claims within a transparent, simple, fast-track and clear procedural framework, and whether the new Code of Civil Procedure will be able to ensure the simple and efficient enforcement of claims and to strengthen public confidence, the courts' prestige and the rule of law?

I agree with Tünde Handó, the President of the National Office for the Judiciary, in that the introduction of scientifically over-complicated legal institutions[120] (that are understandable almost exclusively by those who have a bar exam) did not serve the above purposes, and the legislator forgot about the litigants. Another predictable consequence of the over-complex wording of procedural rules is that the non-professional parties will misinterpret them, and they will need to be clarified, counselled and informed about them, which will make the proceedings unnecessarily burdensome.[121]

[116] The Experts' Draft Proposal (manuscript), 2015.

[117] Commentary to section 271 of the Draft Bill.

[118] Digesta, IV. cfm–De constitutionibus principum, 2., Ulpianus. See the observations of the President of the National Office for the Judiciary, Mrs. Tünde Handó in respect of the draft proposal on the new Code of Civil Procedure, April 2016, 2014.OBH.XXII.C.1.1./164., attachment no 1.

[119] Letter of the President of the National Office for the Judiciary, Mrs. Tünde Handó addressed to Minister of Justice Mr. László Trócsányi, President of the National Office for the Judiciary, 2014. OBH.XXII.C.1.1./164., 12 April 2016.

[120] By virtue of Recommendation Rec(81)7 of the Committee of Ministers of the Council of Europe on measures facilitating access to justice, the use of strange terminology, unduly complex and too technical expressions should be avoided and the language used should be comprehensible (principle 5 on the simplification of procedural acts).

[121] The observations of the President of the National Office for the Judiciary (2016) as in note 118.

The codification of the new Code of Civil Procedure primarily results from the adoption of the new Civil Code and from the need to align the procedural rules on non-litigious proceedings, increasing in quantity and importance with the Procedural Code, secondarily, it stems from social pressures, the most overwhelming of which is to prevent the backlog of court cases.[122] To address the issues raised by legal practitioners, the drafters had to take into account the courts' procedural law related case-law and the needs of other legal professions as well.[123]

It can be observed in all the re-codified procedural codes of the continental Europe that they strengthen the role of judicial activism, however, they may regulate its intensity and extent differently.[124] Judicial activism aims to ensure compliance with the international requirement of the concentration of proceedings, which is emphasised by various international documents, including the 2006 recommendation of the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, according to which the court should play an active, case-managerial role in civil proceedings. Judicial 'inactivism' is heavily criticised in the case-law of the European Court of Human Rights.[125] The finding of Géza Magyary made more than one hundred years ago has remained true to date regarding part of the civil proceedings of the last few years. He found that 'as the parties had been given full freedom to determine the procedural steps of the proceedings, the taking of evidence was not carried out in sufficient depth and the conclusion of the case was significantly delayed.'[126]

'In the past 20 years, disputes over the necessity of the substantive measures of organisation of procedure have accompanied the various modifications of the CCP. Until 1995, the principle of officiality, expressed in the requirement of ensuring the discovery of substantive truth, the possibility of taking evidence *ex officio* and the obligation to provide extensive information had been strongly emphasised in civil proceedings. By contrast, the 1995 modification of the CCP accentuated the parties' right of due and unbiased process, as well as their right to dispose of their legal action by declaring the exceptional nature of the *ex officio* evidence taking and by restricting the court's obligation to provide information. Subsequently, the introduction of the provisions of section 3, subsection (3) of the CCP[127] led to the extension of the court's role in the organisation of procedure'.[128] The main sources of tension due to the diverging social, legal policy and dogmatic objectives of civil proceedings originate from the conflict between substantive truth and procedural truth and between judicial activism and the parties' right to dispose of their legal action.[129] The judge do not say at the party, what should be asked for in order to fulfill the court's request, just

[122] Cserba (2013)11.

[123] Varga (2013) 489.

[124] E.g. strengthening the court's role in determining the material framework of the legal dispute, which is summarised in the form of the substantive measures of organisation of procedure. In Commentary to section 6 of the Draft Bill.

[125] Commentary to section 6 of the Draft Bill.

[126] Magyary (1898) 901.

[127] Regarding an approach on the court's obligation to provide prior information on the basis of section 3, subsection (3) of the CCP, see more Döme (2014) 393–416.

[128] Letter of the Head of the Civil Department of the Curia addressed to the President of the National Office for the Judiciary (2015) as in note 42.

[129] Virág (2014) 362.

tells him if the request can not be accepted in the given form, which fits to the support of the early completion of the process.'

The new CCP reiterates that the main objective is the impartial adjudication of cases, which is to be achieved by ensuring the effectiveness of proceedings, strengthening the parties' obligation to tell the truth within a fair trial, introducing a split system of proceedings and the court's contributive actions, obliging both parties, as a general rule, to be represented by a legal representative (the high courts' model), regulating the means of electronic communication and strengthening the parties' right to dispose of the taking of evidence.

The most important innovations of the Draft Bill are the implementation of the principle of the concentration of proceedings and the introduction of the split system of procedural phases. 'In the split system, there is a preparatory phase aiming at determining the framework of the legal dispute and there is an on-the-merits phase with evidence taking. The courts' jurisprudence shows that the protraction of proceedings is often and mainly due to the fact that the CCP in force does not restrict or only partially restricts the modification of the statement of claims, allows the defendant to essentially limitlessly modify his defence in the first instance proceedings and allows the parties to submit their pieces of evidence and motions for evidence at almost any time'.[130] The implementation of the principle of the concentration of proceedings can be ensured only if the taking of evidence is under the court's control and not under the parties' control, as they may be interested in the protraction of proceedings, while the court is obliged to render a lawful and well-founded decision within a reasonable time and with regard to the principle of cost efficiency.

The preparation of the court's hearing is one of the most critical phases of civil proceedings, as only a thorough preparation can guarantee the success of the hearing and the shortening of the duration of proceedings.[131] The preparation of the hearing should have a *threefold function:* the preparation of the taking of evidence related to the facts of the case, the assessment of whether the case can be adjudicated without holding a hearing and the promotion of the conclusion of an out-of-court settlement by the parties.[132] This preparatory phase is based on the taking of evidence, which should not be limited to criminal and civil proceedings, since it is an essential procedural element in any proceedings that aim to establish facts and verify allegations.[133] The establishment of facts has an enormous importance for the well-foundedness of the court's judgement, in addition, a fast/efficient establishment of facts enables the court to deliver its decision within a shorter period of time. The establishment of facts can also promote the conclusion of an out-of-court settlement by the parties, which renders the holding of additional hearings unnecessary.

During the examination of the topic of the taking of evidence, I had been concerned about the issue of what are the parties' true expectations from the judicial system and to what extent the legislator is able to live up to them. The parties expect from the courts to reveal the truth in order to provide compensation for the damage suffered by them, and the new CCP seeks to meet this social expectation within the framework of the parties' factual allegations. The issue of whether the parties' allegations are true is of essential nature in the proceedings, and based on their assessment the court should deliver a just (true to the facts) judgement. Following the court's judgement, the case adjudged – on the basis of the legal

130 Commentary to section 214 of the Draft Bill.

131 Farkas and Kengyel (2005) 112.

132 Czoboly (2013).

133 Kengyel (2014) 282.

premise of Ulpian – must be taken for truth.[134] The new regulation aims to ensure the implementation and enforceability of those procedural requirements that are related to the objective of evidence taking (the court has to become convinced of the veracity of the parties' allegations) and the parties' interests in the taking of evidence (the parties seek to convince the court).

In my opinion, it is regrettable that in the codification process no emphasis has been placed on the role of declarations on oath (or solemn pledge), which could, in today's world drifted into moral crises, provide court hearings with a solemn quality, moral strength and a more formal framework. Oaths or pledges would have a much needed psychological effect on the declarants' conscience, and they should be applied to all the participants to proceedings.

Modern procedural laws have increased the level of requirements applied to plaintiffs based on the assumption that defendants should not be obliged to meet the same formal requirements and be subjected to the same sanctions. With regard to the above, the parties' obligation to assist the court in administering justice as defined in the Draft Bill cannot be understood from a defendant's perspective. Requiring defendants to defend their position in an active manner would lead to the restriction of the parties' right to dispose of their legal action, declared as a basic principle and the misinterpretation of the principle of the equality of the parties. In civil proceedings, the parties and, in particular, defendants cannot be expected to do other than make factual allegations to the best of their knowledge.[135] To address this problem, the Draft Bill introduces a number of new provisions at the level of district courts to facilitate the enforcement of claims by litigants without legal representation, e.g. it introduces the application of forms, lowers requirements on the parties' submissions and provides assistance for the parties by way of the court's broader scope of substantive measures of organisation of procedure.[136]

The rules on the taking of evidence in the new CCP essentially aim to align the legal provisions in force with the newly established split system of procedural phases and to codify the courts' existing case-law, at the same time, they clarify certain notions, for instance, the principle of free evidence taking is replaced by the principle of the free establishment of facts, while the notion of the obligation to provide evidence is substituted by the parties' interests in evidence taking. A substantial change is the regulation of the involvement of private experts, and the questions arises as to how the courts will cope with the problem that the opinion of a private expert commissioned by the party (the details of commissioning not being known to the court) and the opinion of a forensic expert commissioned by the court will have the same evidentiary force.

Finally 'what can be the most primitive and simplest method to accelerate civil proceedings? The increase of the number of judges. Problems should not always be addressed by re-regulation, but sometimes by the appropriate assessment of existing conditions'.[137]

[134] Res iudicata pro veritate accipitur. Ulp. D. 50, 17, 207. See in the Observations of the President of the National Office for the Judiciary (2016) as in note 118.

[135] Observations of the President of the National Office for the Judiciary (2016) note 118.

[136] Observations of the President of the National Office for the Judiciary (2016) note 118.

[137] Ferenczy (2015) 92.

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