

## The Principle of ‘Equitable Assessment’ in Hungarian Labour Law – How to Make it Work?

ATTILA KUN\*

**Abstract.** Labour standards are more and more framed as open norms at a higher level of abstraction. A considerable share of these open norms set standards of conduct for employers in order to inspire socially responsible corporate behaviour. Nonetheless, concerns are often raised about the uncertain, un-measurable, possibly insufficient implementation of these open standards.

The present paper examines one illustrative Hungarian regulatory case-study in order to be able to reflect on the chance of implementation of open norms in a more general context. This regulatory case study is the principle of ‘equitable assessment’ from the new Hungarian Labour Code. According to this ‘employers shall take into account the interests of workers under the principle of equitable assessment; where the mode of performance is defined by unilateral act, it shall be done so as not to cause unreasonable disadvantage to the worker affected’ (Section 6, Subs. 3 of Act 1 of 2012 on the Labour Code). The principle of ‘equitable assessment’ institutionalizes one form of the proportionality-test, as a limitation on employers, into the architecture of Hungarian labour law as a general standard.

One of the main assumptions of the paper is that ‘essence’ i.e. the goal, aim, relevance, ‘marketing’, uptake, infrastructure etc. of a given open norm is the truly important factor for its total effect and success, not solely its judicial practice.

In summary, the principle of ‘equitable assessment’ does not fulfil its intended most important functions and, for the time being, it cannot unfold its inherent multifaceted potential. In this context, the study examines the reasons why this standard is struggling with a form of functional deficiency and aims to demonstrate how this particularly important provision could be more effectively operationalized, dynamized, and ‘breathed into life’.

**Keywords:** open norms, labour law, general clauses, enforcement, proportionality, equitable assessment, reasonability

### 1. INTRODUCTION

Labour standards and obligations under labour laws are often and increasingly framed at a higher level of abstraction as open norms. A large share of these open norms set standards of conduct for employers in order to stimulate a more socially responsible corporate behaviour. Nonetheless, concerns are often raised about the uncertain, un-measurable, possibly insufficient implementation of these standards.

This paper examines the new principle of ‘equitable assessment’ from the new Hungarian Labour Code<sup>1</sup> (hereinafter referred to as HLC) in this wider context.

Open-textured normative ‘benchmarks’ in labour law often try to influence employers’ decision making processes by mandating the injection of some ‘social’ concerns into the contractual relationships. They habitually strive to effectuate a behavioural change on the

\* Associate Professor, Head of Department (Department of Labour Law and Social Security), Károli Gáspár University, (KRE) Faculty of Law, Budapest, Hungary; Associate Professor, National University of Public Service (NKE), Faculty of Political Sciences and Public Administration, Institute of Human Resources, Budapest, Hungary. E-mail: [kun.attila@kre.hu](mailto:kun.attila@kre.hu). The research was conducted within the framework of the MTA (Hungarian Academy of Sciences) – PTE Research Group of Comparative and European Employment Policy and Labour Law. Some (mostly introductory, contextual) parts of the text draw heavily on the author’s other paper: Kun (2018). However, the present paper offers a much deeper, more targeted analysis of the principle of ‘equitable assessment’.

<sup>1</sup> Act 1 of 2012.

side of employers by gently altering the managerial prerogative. 'Equitable assessment' is clearly intended to be a leading general principle of the new architecture of Hungarian labour law, as it has been often mentioned as the most important new, general principle of labour law in Hungary, especially from the perspective of workers' protection.<sup>2</sup> The principle of 'equitable assessment' is a virtuously moral-based principle with clear limitative ambition with regard to the managerial prerogative, placing a significant additional burden on employers. Nevertheless, this standard is rather abstractedly and vaguely textured; its precise scope varies from one context to another and is rather difficult to be channelled into practice. In general, the operationalization<sup>3</sup> of the principle of 'equitable assessment' seems to be rather under-developed.

One of the main assumptions of the paper is that 'essence' i.e. the goal, aim, relevance, 'marketing', uptake, infrastructure etc, of a given open norm is the truly important factor for its total effect and success, not solely its judicial practice.

## **2. GENERAL CONTEXT – THE IMPORTANCE OF OPEN NORMS IN LABOUR LAW**

The apparently growing importance of open-textured standards and standard-like language<sup>4</sup> in labour law<sup>5</sup> can be basically explained by the main features of modern labour markets, such as the changing nature of the economy and production methods, growing individualization, flexibilization, deregulation, diversification etc. In the increasingly complex, multi-faced world of work, it is more and more difficult to design clear-cut, casuistic, uniformly applicable, exhaustive, openly protectionist, rigid rules. The long-term, complex, relational, dynamically changing nature of the employment relationship simply could not only exist with rules – there is a clear need for open-ended standards. The growing use of open norms in labour law might be described as a general common trend, however its degree varies across countries,<sup>6</sup> influenced by legal origin, legal culture, regulatory style etc.<sup>7</sup> Davidov notes, that 'open-ended standards are a legal technique that can be used to address the crisis and advance the goals of labour law (although, obviously, they are no panacea...)'<sup>8</sup> Cabrelli states that open norms are 'expectations about the exercise of the managerial prerogative which the law transmits through such standards.'<sup>9</sup> Likewise, Román describes these behavioural norms as 'control-definitions' which serve as compass for

<sup>2</sup> Kun (2016) 214–24.

<sup>3</sup> In our understanding, operationalization refers to a complex process of defining a vague concept so as to make it clearly understandable and effectively applicable in practice (with relevance for the reality of the employment relationship).

<sup>4</sup> For example: reasonability, proportionality, equitability etc.

<sup>5</sup> Cf. Davidov (2016) 158; Bever (2011) 225; Bever (2012); Cabrelli (2011a) 21–41; Alon-Shenker and Davidov, (2013) 375.

<sup>6</sup> For example: the Dutch example of 'good employership' and 'good employeeship'; the 'implied terms' in English case law; the French general principle of 'proportionality' in the Code du Travail etc.

<sup>7</sup> According to Deakin (citing Legrand) the idea of legal culture refers to ingrained practices operating to a certain extent beyond the scope of formal norms, which inform approaches to the making, interpretation and application of rules. Deakin (2008) 9.

<sup>8</sup> Davidov (2016) 158.

<sup>9</sup> Cabrelli (2011b) 146–80.

‘a priori’ unspecified or indefinable behaviour and for the posterior adjudication of human actions.<sup>10</sup>

Open norms seem to be increasingly popular in labour laws nowadays but they are not at all new. ‘Open norms’ have been used throughout the history of law, going back to ‘bonafide’ in the antique Rome. Deakin notes that ‘the private law codes of the civilian world, far from being rigid and monolithic statutes, are (at least in their nineteenth century core) restatements of principles, which have been open to reinterpretation by the courts, with the result that their meaning has been substantially reshaped over time.’<sup>11</sup>

Unsurprisingly, the amplified use of open-norms has both advantages and disadvantages. Hart summarized these advantages and disadvantages perfectly by stating that ‘uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication...’<sup>12</sup> Resorting to open norms can help to overcome difficulties arising from increasingly excessive complexity of individual terms and conditions of work. Furthermore, open norms can flexibly fill the gap when (more detailed, more targeted) mandatory legislation is missing. Unforeseen situations can also be captured by open norms and can be a source of further legal development. Open norms are also opening the gates for human rights-based reasoning.<sup>13</sup> Open norms, in general, might also serve as principled counterbalancing tools between employers and employees e.g. they might serve as a protective tool to answer to the employer’s demands for substantial variation of working conditions. Open norms might also fulfil a wider, educative role in society as authoritative points of orientation by communicating certain values.<sup>14</sup> At the end of the day, open norms usually aim to change the behaviour of affected actors.<sup>15</sup> Consequently, the real merit of an open norm should be ultimately measured by its behaviour-changing capacity, not by its formal setting.

On the other hand, the abstract nature of open norms makes it difficult to effectively and consistently apply them in concrete cases. The growing use of open norms – especially when coupled with a missing or unclear related judicial practice – might create unpredictability, which, in effect, might undermine the rule of law. The presupposed counterbalancing power of open norms might also be overblown, as not only employees, but also employers may refer to some open norms e.g. the employee’s legitimate interest might always be limited by the employers’ legitimate economic interests.<sup>16</sup> The very nature of the employment contract is a balancing task between some open norms, including the basic idea of the employer’s duty of care (*Fürsorgepflicht*) and its counterpart, the duty of loyalty (*Treuepflicht*) owed by the worker.

Therefore, even if open norms might provide a useful tool to protect workers, their limitations should not be forgotten. First and foremost, the effective operationalization of open norms is largely context-dependent and it presupposes a complex web of legal

<sup>10</sup> Román (1977) 136.

<sup>11</sup> Deakin (2008) 9.

<sup>12</sup> Cited by: Twining, Miers, (2010) 149.

<sup>13</sup> Kübra (2009).

<sup>14</sup> See: rules as techniques of social management. Twining, Miers (2010) 110.

<sup>15</sup> Bever (2011) 226.

<sup>16</sup> Cf. Kübra (2009).

infrastructure<sup>17</sup> which can support the understanding and application of these abstract standards. It is the Author's view, without such a supportive legal infrastructure, open norms might easily stay trapped as 'laws in books', without meaningful effect on the everyday life of workers. Furthermore, as Bever notes, even 'the judge needs some practical guidelines to deal with the vagueness of open norms.'<sup>18</sup>

In theory, the main possible elements, *pillars of the above-mentioned legal infrastructure* can be the following. The detailed statutory, legislative 'explanation' of the norm; governmental policy-guidelines, codes, information notes, campaigns, trainings (for the affected parties, but also for judges etc.) etc., further explaining the norm and guiding its practical implementation. By far the most important, traditional tool of operationalization for open norms is case-law and above all judicial case-law, but also case-law of administrative bodies – including labour inspection –, ADR<sup>19</sup> – bodies and mechanisms etc. The uptake of open norms by collective bargaining, social dialogue can also be important. 'Soft governance', the uptake of the open norm by various non-state regulatory initiatives, such as codes of conduct, CSR-policies, self-regulation by companies, or custom etc., might also be of relevance. The embeddedness of the given norm in legal theory, media and public opinion might also play a role.

All in all, the paper assumes that the effective operationalization of open norms is dependent on a complex web of various factors, among which the clarity, strength and relevance of the moral message ('signal'<sup>20</sup>) of the open norm is probably the most important. However, there is also a need for an effective legal infrastructure of the norm, as described above. If the various factors of the complex web of a legal infrastructure come together in a mutually supportive manner, this can create a dynamic 'snowball effect' which might effectively help to operationalize the given open norm. Furthermore, open norms should have some degree of functionality i.e. responsiveness, reflexivity, for their application.

### 3. THE MEANING OF 'EQUITABLE ASSESSMENT'

The principle of 'equitable assessment' can be found among the 'general requirements of conduct' or common rules of conduct, i.e. basic principles in the HLC. The HLC (Section 6, Subsection 3) lays down that 'employers shall take into account the interests of workers under the principle of equitable assessment where the mode of performance is defined by unilateral act, it should be done so as not to cause unreasonable disadvantage to the worker affected.' The employer shall take the employee's interests into consideration on the basis of due and fair deliberation and the unilateral determination of the method of performance may not result in a disproportionate harm for the employee. This standard seeks to facilitate a compromise between managerial autonomy and the protection of employees.

<sup>17</sup> Legal infrastructure refers to the totality of processes, tools, documents, and other information systems that form the basis or facilitates the daily functioning of a particular legal norm. According to Deakin, legal infrastructure includes, among others, the procedures for adopting, interpreting and applying legal rules, the way that disputes are resolved, the relationship between the courts and the legislature, and the capacity of legal rules for adaptation. Deakin (2008).

<sup>18</sup> Bever (2011) 231.

<sup>19</sup> ADR: Alternative Dispute Resolution.

<sup>20</sup> About legal signals, see: Doorey (2012) 47.

The principle of ‘equitable assessment’ is novel in Hungarian labour law as no such provision – not even as a reference – existed in the Hungarian labour law system before the 1st of July, 2012. It is fundamentally based on the unilateral determination of performance widely known in German law (*einseitige Leistungsbestimmung* BGB 315. §<sup>21</sup> and *Gewerbeordnung*, § 106 *Weisungsrecht des Arbeitgebers*<sup>22</sup>). One of the manifestations of subordination and superordination in employment is the unilateral determination of performance by one of the parties. The employer has the right to determine the specifics of the performance of the employee’s duties stated in the employment contract, the method and intensity of performance, term, etc. unilaterally. Instead of the ‘average’ behavioural standard of the Code, which tries to objectively test what a reasonable person in general would have done in the factual circumstances,<sup>23</sup> for unilateral exercises of the managerial prerogative, the Code sets a more stringent requirement in respect of the employer’s conduct inasmuch as the employer must take the employee’s interests into consideration based on fair deliberation.

There are further important differences between the general behavioural standard of the Code and ‘equitable assessment’.<sup>24</sup> The average behavioural standard of the Code is kind of an objective reasonableness-test which tries to objectively test what a reasonable person in general would have done in the factual circumstances,<sup>25</sup> while ‘equitable assessment’ is a form of the proportionality-test, and it is much more subjective as it involves the application of a variable intensity of scrutiny depending on the nature of the relevant interest of the employee. The reasonableness-test also requires comparisons to be made with other similar reasonable actors (‘as it might normally be expected in the given circumstances’), while ‘equitable assessment’ is targeted to each individual employer (and proportionality must be weighed under the concrete factual circumstances of the given employer and the employee in question). In this sense, reasonableness-test is one-dimensional, while proportionality is two-dimensional, focusing on the actions and needs of the employer and the harm caused to the employee.<sup>26</sup> In the case of ‘equitable assessment’,

<sup>21</sup> Bürgerliches Gesetzbuch (BGB), § 315 *Bestimmung der Leistung durch eine Partei*. Section 315 *Specification of performance by one party*:

(1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it. (2) The specification is made by declaration to the other party. (3) Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is binding on the other party only if it is equitable. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.

<sup>22</sup> Der Arbeitgeber kann Inhalt, Ort und Zeit der Arbeitsleistung nach billigem Ermessen näher bestimmen, soweit diese Arbeitsbedingungen nicht durch den Arbeitsvertrag, Bestimmungen einer Betriebsvereinbarung, eines anwendbaren Tarifvertrages oder gesetzliche Vorschriften festgelegt sind. Dies gilt auch hinsichtlich der Ordnung und des Verhaltens der Arbeitnehmer im Betrieb. Bei der Ausübung des Ermessens hat der Arbeitgeber auch auf Behinderungen des Arbeitnehmers Rücksicht zu nehmen.

<sup>23</sup> Section 6, Subsection 1, HLC: Employment contracts shall be executed as it might normally be expected in the given circumstances, unless any legal provision exists to the contrary.

<sup>24</sup> For a comparison between reasonability and proportionality, see: Cabrelli (2011b) 169.

<sup>25</sup> Section 6, Subsection 1, HLC: Employment contracts shall be executed as it might normally be expected in the given circumstances, unless any legal provision exists to the contrary.

<sup>26</sup> Cabrelli (2011b) 170.

the employer is the primary decision-maker and the courts cannot really substitute their own judgement on the merits of a case for that of the employer. In contrast, the reasonableness-test gives much wider latitude for judges. In terms of 'equitable assessment', the courts always have a secondary role by assessing the equitability of the employers' behaviour (or the lack of it), while in case of the reasonableness-test, courts often need to act first by deciding upon the degree of reasonability. In terms of 'equitable assessment', the 'norm' (proportionality) must be set in each individual case (set by the employer and judged by the court). In terms of reasonability, the 'norm' (reasonability) should rather be reflected in each individual case, the standard of review shall be more or less stable. 'Equitable assessment' is a more intrusive, more demanding standard towards employers than a purely objective standard and 'equitable assessment' is targeted exclusively to employers (while the general standard is applicable to all parties under the scope of the Labour Code).

The employer's decisions, in particular, in the cases of employment in departure from the employment contract e.g. over-time, assignments not falling within the job responsibilities, cannot cause the employee a disproportional harm while it is obviously accepted, that such measures e.g. over-time, may cause certain harm to the employee but it cannot be disproportional. This also means that if the employer were compelled to cancel its decision, it would cause the employer disproportionately larger losses or costs and harm in general, than the disadvantage that the implementation of the decision would cause the employee.<sup>27</sup> There are many measures of the employer, which cause unfairness to the employee by nature but the Labour Code only prohibits the unreasonable ones. Employers may not cause relatively great harms to employees to achieve relatively small gains and as such, the principle of 'equitable assessment' seeks to minimize the interference with the employer's managerial autonomy, with only the unreasonably harmful instructions are prohibited whilst also aiming to minimize the harm to the employee, by offering protection against the unreasonably harmful instructions of the employer. In summary, the principle of 'equitable assessment' institutionalizes one form of the proportionality-test as a limitation on employers into the architecture of Hungarian labour law as a general standard.

The employee can refer to their reasonable interests (social, personal, professional etc.) when weighing proportionality. However, the employer, as an act of protection against the limitative function of the principle of 'equitable assessment', can also refer to many things. The apparent rightful economic interests of the employer and the general obligations of the employee are at stake here. For instance, in the name of expected loyalty, the employer can refer to such contrasting open norms as 'trust'. Namely, the HLC puts forward that the employee must 'perform work in such a way that demonstrates the trust vested in them for the job in question.'<sup>28</sup> Among others,<sup>29</sup> this can be a significant frontier in terms of the worker-friendly potential of the principle of 'equitable assessment'

The starting point of the provision is that during the performance of employment the employer, because of the strict hierarchy of the parties, has such additional rights that enable it to determine the performance unilaterally. The wide managerial prerogative may define the expected behaviour of the employee in practically all aspects of the employment in details. It is important to note that the principle of equitable assessment clearly has a

<sup>27</sup> Labour Code, Proposal, General Reasoning, July 2011.

<sup>28</sup> Section 52, Subsection 1 d) HLC.

<sup>29</sup> See also the other general principles of the Labour Code, such as good faith, obligation for cooperation, prohibition of the abuse of rights etc. Section 6–7 HLC.

safeguarding role to support employees, with which the legislator purposefully interferes in defining the performance. This provision aims to moderate the dominant position of the employer on the level of general behavioural principles.

The principle of ‘equitable assessment’ is designed to be a powerful, protective general standard for the benefit of employees. First and foremost, according to Section 54, Subsection 2, employees may refuse to carry out an instruction if it violates the provisions of employment regulations.<sup>30</sup> This means that if the employer fails to apply, or fails to apply properly, the principle of ‘equitable assessment’, employees may refuse to carry out the given instruction. If such conduct is sanctioned by the employer, then they may go to court. According to one of the most prestigious commentary of the HLC,<sup>31</sup> the principle of ‘equitable assessment’ is escalating the chances of employees to take legal action for redress against measures taken by their employers. It must be noted that according to Section 522 of Act CXXX of 2016 on the Code of Civil Procedure, in labour disputes it is incumbent on the employer to show the contents of internal policies, instructions.

The limitations and main cornerstones of equitable assessment are still questionable for the practice, however, answers to some questions can be found by interpreting this standard alongside with the other requirements of behaviour – mostly with the general standard of care, as the new general requirement on behaviour, as mentioned before, the Labour Code sets out that the employment contracts shall be performed by the parties in accordance with the usual expectations in the given circumstances.<sup>32</sup> ‘Equitable assessment’ is an alteration to the standard conditions of assessment, designed for specific situations where unilateral power of the employer is exhibited.

The Labour Code offers only a very sketchy, open formulation of this principle, leaving many ambiguities up to the practice. Most importantly, the Code does not define the following issues in details:

### **3.1. Which interests of the workers are to be taken into account under the principle of equitable assessment?**

The Code does not set concrete criteria, but according to legal practice it could be, among others, the personal – even social – circumstances, health status, and family relationships, age of the employee.

In the course of application of the principle of ‘equitable assessment’ it can also be an issue, how and when the employer shall be informed by the employee about these particular personal and often sensitive circumstances. Naturally, employers can only exercise ‘equitable assessment’ when they are in the possession of information to be assessed. As such, the principle of ‘equitable assessment’ underlines the parties’ general obligation of information-giving.<sup>33</sup> Data-protection and privacy concerns might also occur in this context.

<sup>30</sup> However, Román notes that the denial of the employers’ instruction is ‘not a reality’ in the ambit of the modern (as he calls: ‘bourgeois’) employment relationship. Román (1977) 184.

<sup>31</sup> Kozma, Lőrincz, Pál and Pethó (2016) 36.

<sup>32</sup> Section 6, Subsection 1, HLC.

<sup>33</sup> Section 6, Subsection 4, HLC: The parties falling within the scope of this Act shall inform each other concerning all facts, information and circumstances, and any changes therein, which are considered essential from the point of view of employment relationships and exercising rights and discharging obligations as defined in this Act. Furthermore (Section 18, Subsection 1, HLC): Unless otherwise provided for by employment regulations, information shall be provided at a time and in a manner to permit the exercise of rights and the fulfilment of obligations.

Furthermore, Cabrelli notes, in line with Law and Economics theory, that 'information cost' of determining each employer's intelligence and ability to make judgements of this kind can be too great to sincerely trust in consistent self-compliance with such ambitious behavioural standards, like the principle of 'equitable assessment'.<sup>34</sup>

Open norms often serve as 'entry points' for human rights-related reasoning. When employers take into account the interests of workers under the principle of equitable assessment, human rights-related interests might also come into the picture e.g. in relation to the right to dignity at work,<sup>35</sup> right to private and family life, freedom of religion and other fundamental rights. In such situations connected to human rights, the intensity of assessment (the 'test') should be certainly more stringent than in cases where only simple interests of employees are at stake e.g., personal preferences, a hobby.

It is also important to note that the equitable assessment of the workers' specific circumstances cannot turn into discrimination – equal treatment is an inherent barrier to any kind of assessment.

The Labour Code puts specific emphasis on the employees' health-status by obliging the employer to unilaterally modify the working conditions and the working time schedule in a manner that corresponds to the employee's health.<sup>36</sup> The principle of 'equitable assessment' must be taken into account when carrying out this obligatory modification.

### **3.2. What are the most important situations, in which the mode of performance is defined by unilateral act of the employer and, as a consequence, the principle of equitable assessment is to be applied?**

The previous Labour Code of Hungary (Act XXII of 1992), as previously mentioned, did not contain the principle of 'equitable assessment' as such and it was introduced by the new Labour Code, Act I of 2012. However, the previous Labour Code contained particular clauses (rules) of employee-protection in relation to the most important unilateral measures of the employer, where the mode of performance is defined by unilateral act., The previous Code offered a more detailed 'case by case' rule-based protection for employees with regard to important unilateral measures of the employer instead of applying a general, self-standing behavioural standard (as as enshrined in the new Code). The standard of 'equitable assessment' now also serves as a replacement for protections previously provided for by more detailed rules. This legal development, as mentioned in section 2, also underlines the general tendency in labour, according to which the resort to standards in labour law (instead of rules) has increased in recent years in many countries.<sup>37</sup>

For instance, in relation to reassignment,<sup>38</sup> the previous Labour Code laid down that 'the reassignment of an employee must not result in disproportionate harm in view of the employee's position, qualification, age, health condition or his/her other circumstances.'

<sup>34</sup> Cabrelli (2011b) 166.

<sup>35</sup> The Fundamental Law of Hungary (25 April 2011) lays down that 'every employee shall have the right to working conditions which respect his or her health, safety and *dignity*' (Article XVII, Subsection 3).

<sup>36</sup> Section 51, Subsection 3 HLC.

<sup>37</sup> Cf. Davidov (2016) 158.

<sup>38</sup> Reassignment: when the employee – for reasons in connection with the employer's operations – is ordered by the employer to temporarily work in another position in lieu of or in addition to his/her original position. Reassignment shall not be deemed an amendment of the employment contract (Section 83/A, Subsection 1 of Act XXII of 1992).



Similarly, in relation to over-time, the previous Code explicitly laid down (as opposed to the new Code) that ‘special work duty may not be required if it imposes any danger to the physical integrity or health of the employee, or if it constitutes any unreasonable hardship to the employee in respect to their personal, family or other circumstances.’<sup>39</sup>

It must be noted that the new principle of ‘equitable assessment’ was introduced in parallel with the abolition of the former obligation of the employer to give the reasons of instructions going beyond the contractual framework of the employment.<sup>40</sup> This former obligation of reasoning, albeit very vague, was decisive in determining whether the harm for the employee was proportionate or disproportionate. The new Code grants wider margin to the right to order of the employer and limits it only by the principle of ‘equitable assessment’. For example, before 2012, reassignment could only be exercised ‘for reasons in connection with the employer’s operations’,<sup>41</sup> whereas the new Labour Code does not contain similar purposive restriction. Correspondingly, according to the previous Labour Code, over-time could be required only under ‘justified and extraordinary circumstances’,<sup>42</sup> while the new Labour Code does not prescribe such formal limitation. Consequently, the unveiling of any ‘disproportionate harm’ might be even more cumbersome under the new Labour Code as the employer is not formally obliged to give the reasons of such instructions.

All in all, the new principle of ‘equitable assessment’ raises the protection to the level of general behavioural standards (instead of offering concrete rules for concrete situations). Consequently, the principle of ‘equitable assessment’ can be used in relation to all unilateral measures of the employer, where the mode of performance is defined by unilateral act. There is no list for such situations in the Code, not even an exemplificative one, which is not necessarily a good, clear enough signal for the potential ‘users’, employers and employees, of the standard. As in the past, the most typical fields of application of the standard continue to be the ‘specific instructions’, namely cases of employment in departure from the employment contract e.g. over-time, assignments not falling within the job responsibilities, unilateral variation of employment conditions etc – the ‘*ius variandi*’. However, the principle can also be used in relation to more general unilateral measures of the employer, such as work schedules (working time arrangements) laid down by the employer, instructions for training, commands in relation to the method of performance etc.

In this context, the legal literature has different views on the potential scope and possible interpretation of the principle. On one hand, some authors argue in favour of a broad, universal, rather ambitious applicability of the standard, based on the first part of the rule that ‘employers shall take into account the interests of workers under the principle of equitable assessment’.<sup>43</sup> On the other hand, if one reads the text of the law in full,<sup>44</sup> it becomes rather obvious that the relevance of the standard shall be limited to those acts of the employer where the mode of performance is defined by unilateral act. In this regard, it has also been debated whether the principle of ‘equitable assessment’ may or may not be applied by the employee in assessing the legality of the termination of their employment

<sup>39</sup> Section 127, Subsection 2 of Act XXII of 1992.

<sup>40</sup> Lehoczkyné Kollonay (2013) 46.

<sup>41</sup> Section 83/A, Subsection 1 of Act XXII of 1992.

<sup>42</sup> Section 127, Subsection 1 of Act XXII of 1992.

<sup>43</sup> Halmos (2014) link 1, 12.

<sup>44</sup> ‘Employers shall take into account the interests of workers under the principle of equitable assessment; where the mode of performance is defined by unilateral act, it shall be done so as not to cause unreasonable disadvantage to the worker affected.’ Section 6, Subs. 3 HLC.

by the employer. According to the Curia of Hungary, the principle does not apply in case of redundancy/collective redundancy, because even if redundancy is a unilateral measure by the employer, in this context, the employer's action is clearly not aimed at fulfilling, performing the employment relationship. This reasoning is underlined by the fact that Hungarian labour law does not know the concept of 'social validity' of dismissal, unlike the German concept of 'Sozial ungerechtfertigte Kündigungen', according to which a dismissal should be socially justified.<sup>45</sup>

The obligation of 'equitable assessment' shows great similarity with the principle formerly known as 'improper practice of rights', recently renamed as 'prohibition of the abuse of rights'.<sup>46</sup> However, while 'equitable assessment' deliberately sets additional obligations for the employer, the 'prohibition of the abuse of rights' is an obligation for both parties, and for all the parties under the scope of the Labour Code. For instance, even before the entry into force of the principle of 'equitable assessment' (2012), the judicial practice used the principle formerly known as 'improper practice of rights' (now 'prohibition of the abuse of rights') to annul specific instructions of employers which ignored some specific circumstances of employees. Considering some personal circumstances of the employee, the court concluded from the principle known as 'improper practice of rights' that if the employer ignores the circumstances of the employee (health status, obligation to care for an elderly parent) in course of an instruction for secondment, it is against the principles and is unlawful.<sup>47</sup> Consequently, much of the thinking in line with the idea of 'equitable assessment' has been present for decades in judicial practice and legal theory but it has only been expressly formulated in the Labour Code since 2012. Similar decision could be based now more specifically on the principle of 'equitable assessment'.

### **3.3. What are the benchmarks, standards of equitability in the course of assessment? Which degree of proportionality is to be applied?**

The Code does not lay down the parameters of equitability in the course of assessment. What is clear though that the legislator does not require philanthropy and leniency from employers in the framework of 'equitable assessment.' Fair treatment does not require the employer to make unreasonable sacrifices or leniency, but, in order not to compromise the requirement of 'equitable assessment', it requires reasonable assessment, attention and, above all, change of attitude, behaviour.<sup>48</sup> 'Equitable assessment' seeks to provide proportionality, not advantage.

The parameters of weighing between costs (for the employee) and benefits (for the employer) are not laid down by the Code and should be construed by judicial practice. However, in principle, there could be three main levels of proportionality. Firstly, according to the less rigorous scenario, 'equitable assessment' could only block the employer's unilateral act when the given unilateral act would render the situation of the employee completely impossible. Secondly, according to a 'relaxed version' of the proportionality-

<sup>45</sup> Curia of Hungary (2015) link 2, 20.

<sup>46</sup> Section 7, Subsection 1 HLC: Abuse of rights is prohibited. For the purposes of this Act 'abuse of rights' means, in particular, any act that is intended for or leads to the injury of the legitimate interests of others, restrictions on the enforcement of their interests, harassment, or the suppression of their opinion.

<sup>47</sup> EBH2009.1979.

<sup>48</sup> See as analogy one decision of the Equal Treatment Authority (ETA) of Hungary, which circumscribed the notion of equitability in a different, but still similar context. EBH/95/2011.

test (according to Davidov), ‘equitable assessment’ could only block the employer’s unilateral act when there would be a gross disproportion between costs and benefits.<sup>49</sup> Thirdly, according to the most stringent interpretation, the general, common understanding of proportionality shall be used. In this sense, employers would not be allowed to cause almost any harm to employees. For instance, Kollonay, in the name of more mutuality and reciprocity between the parties, argues for the concept of a ‘decent’ (bona fide) assessment instead of ‘equitable’ assessment.<sup>50</sup> However, this would be definitely unrealistic as there are many acts of the employer which can cause certain harm to the employee by nature e.g. over-time, and the Labour Code prohibits only the overtly unreasonable ones. Accordingly, the wording of the HLC and the essence of the principle of ‘equitable assessment’ imply that the second version of the proportionality-test shall be the decisive one.

As it has already been mentioned, much of the thinking in line with the idea of ‘equitable assessment’ has been known for decades in legal theory. For example, Román (back in 1977) deduced the principle of proportionality of interests from the general standard of labour law –the duty of cooperation. In his view, the extent and the utilization of the right to order of the employer are shaped and limited by the duty of cooperation. He perceived the proportionality of interests as a reflection of the general duty of cooperation which shall be applied for all unilateral orders of the employer. The ‘unreasonable disadvantage’ would go against the idea (the shadow) of the contract. He also pointed out – quite similarly to the essence of the modern ‘equitable assessment’ principle – that the proportionality of interests affects the possible denial of certain instructions. However, Román called attention to the all-time ‘abstract’ and ‘troublesome’ nature of any proportioning and reminded to the fact that proportioning is always influenced by subjective circumstantialities.<sup>51</sup>

In principle, employment of persons with some equitably assessable particular characteristics e.g. being a single parent, taking care for seriously ill or disabled relatives, should not be an embarrassing duty for employers, but also an opportunity to enhance the organizational culture (for instance, in the name of ideas like diversity, employer-branding and CSR: Corporate Social Responsibility). In this context, the obligation of ‘equitable assessment’ might have a wider, dynamic educative mission. However, the potential of open flow of information within the firm concerning the background of equitable assessment is limited by nature, as, according to the HLC, employers shall be permitted to disclose facts, data and opinions concerning a worker to third persons only upon the worker’s consent (or in the cases specified by law).<sup>52</sup> Accordingly, the possibility of intra-firm sharing of sensitive (‘equitably assessed’) data of employees (and the circumstances of the assessment) with co-workers is rather narrow.

### **3.4. Who is the ultimate addressee of the standard: the employer, the court or both?**

Open norms, in general, can be standards of conduct and/or standards of review.<sup>53</sup> They can serve as benchmarks of conduct directly for the parties of the contract and as guidelines for the judge (or both).<sup>54</sup> ‘Equitable assessment’ is first and foremost intended to generate

<sup>49</sup> Davidov (2016) 182.

<sup>50</sup> Lehoczkyné Kollonay (2013) 47–48.

<sup>51</sup> Román (1977) 141–60.

<sup>52</sup> Section 10, Subsection 2 HLC.

<sup>53</sup> Cabrelli (2011b).

<sup>54</sup> Bever (2011) 230.

consequences at the operational level by providing rules of conduct for the employer. It is situated under the title 'common rules of conduct' in the HLC; the standard tries to induce self-compliance by employers.<sup>55</sup> It tries to 'educate' in a sense so that employers can internally test their conduct against the standard. However, judges will also need to scrutinise employers' conduct on the basis of the same principle. The German BGB lays down that if the employer's assessment is not equitable, the specification is made by judicial decision. The same applies if the specification is delayed. The HLC does not provide for a similar rule, but it is evident that courts can judge the employers' assessment in a similar vein, per se, courts shall decide about the merit of equitability, but the factual bases of the assessment must be ventilated by the parties before the court.

The aforementioned double function of 'equitable assessment' is evident but it is somewhat confusing, basically for two reasons. Firstly, the interpretation of the same test by employers and the courts might diverge, especially in the lack of consistent case-law. Secondly, the information available for the sake of assessment can be different for employers and for the courts. After all, when applying the principle of 'equitable assessment', both employers and judges need to deal, in a responsive way, with complex patterns of human interactions. This is not an easy task especially for judges as it is very difficult to reconstruct the complexity of the contractual relationship, even in social and psychological terms – Cabrelli names this phenomenon as the 'knowledge deficit' on the part of the adjudicator.<sup>56</sup> Proper application of 'equitable assessment' presupposes a full insight into the essence of the contractual relationship. This approach would require a paradigm-shift on the side of employers and, even greater shift on the side of judges.

#### 4. THE OPERATIONALIZATION OF 'EQUITABLE ASSESSMENT'

Judicial practice has not developed substantial case-law since the entry into force of the new Labour Code with the new requirement of 'equitable assessment' in it (July, 2012). However, without doubt, case-law would and should be the principal mechanism of concretization for such open norms. Davidov formulates that open norms can only 'help those who can overcome the barriers to reaching the courts.'<sup>57</sup> Clearly enough, for several reasons, Hungarian employees in general cannot overcome the barriers to reaching the courts with regard to the novel principle of 'equitable assessment' which principle, as previously mentioned, paradoxically, was clearly designed with a view to boost the chances of employees to take legal action against their employers.

The reasons for such a situation i.e. low frequency of recourse to this right are only partly of a legal nature such as the laconic, unclear wording of the Code on this matter. Everyday practice shows that only a small, rather negligible, fraction of real-life, workplace-level conflicts manifests itself as a legal dispute and employees are often reluctant to enforce their claims due to structural, financial, psychological barriers, lack of information etc. This is especially the case with conflicts connected to the principle of 'equitable assessment' in Hungary. Court decisions directly based on the new requirement of 'equitable

<sup>55</sup> Cf. Lewinsohn-Zamir (2014).

<sup>56</sup> Cabrelli (2011a).

<sup>57</sup> Davidov (2016) 158.

assessment' are so far non-existent.<sup>58</sup> Such conflicts typically occur during the day-to-day course, performance of the employment relationship when employees are usually less motivated to file a claim due to psychological concerns, inasmuch as not to endanger the existence and/or the 'peace' of the employment relationship. Furthermore, enforcement of the principle of 'equitable assessment' does not really promise financial gains, therefore employees often rather 'swallow' such conflicts. Conflicts related to 'equitable assessment' are often minor, trivial ones in scale e.g. a dispute about one single over-time instruction, where it is not necessarily realistic for employees to initiate lengthy court-proceedings. Moreover, according to everyday experience, average employees do not have sufficient information about such labour rights as the principle of 'equitable assessment'.

Even if claims based on 'equitable assessment' would be much more frequent, judicial practice would never be able to offer absolute, stable guidance on the application of this standard, since countless various unique scenarios can occur in practice where the principle of 'equitable assessment' is relevant (and judicial practice, by nature, will always be patchy and shallow). Furthermore, in relation to 'equitable assessment', to a great extent, judges are bound to make value judgements. All things considered, mere court-based, litigation-based enforcement of the principle of 'equitable assessment' does not promise structural compliance with this principle and it does not even offer stable guidance about the expected interpretation of this standard.

Several mosaics of a complex legal infrastructure besides consistent case-law might, in theory, help the operationalization of open norms. In Hungary, not only case-law is severely under-developed (almost non-existent) in relation to the new requirement of 'equitable assessment' but also other, alternative mechanisms. At the end of the day, open norms, including 'equitable assessment' aim to facilitate behavioural change on the side of employers. This behavioural change should be first and foremost guided by judicial practice, but other mechanisms can also play a role in such a complex process of operationalization. 'Equitable assessment' is not only virtually absent from case-law, but other aforementioned possible supportive mechanisms of operationalization are also lacking.

First, there is no detailed, transparent statutory, legislative 'explanation' of the norm in the Hungarian Labour Code. In fact, the wording of the Code is rather sketchy and ambiguous, which is highly problematic when considering that these managerial measures are usually not applied by lawyers, but by HR personnel and employers themselves.

Second, related explanatory governmental guidelines, codes, information tools, or trainings are non-existent.

Third, the uptake of the standard by collective bargaining, social dialogue, is not really happening. However, collective bargaining agreements could be a highly relevant tool to specify the circumstances, measures, procedures etc. of 'equitable assessment'.

Fourth, soft governance does not really play a role in the implementation of the standard – the uptake of the open norm by internal company codes of conduct, CSR-policies, self-regulation by companies is not typical etc.

<sup>58</sup> In general (even for the future), it is much more probable for 'equitable assessment' to pop up in court proceedings indirectly than directly. For example, it is much more realistic for the employee to file a claim in a situation when the employee is dismissed for refusing an instruction of the employer in connection with the presumed violation (or ignorance) of the obligation of 'equitable assessment'. In such a situation (principally disputing the legality of the dismissal) it is much more realistic to initiate a court procedure than simply because of the incidental breach of the obligation of 'equitable assessment' by the employer.

Fifth, the embeddedness of the norm in media and public opinion is far from satisfactory. Everyday experience suggests that average workers do not typically know about this important individual right.

Taking into account the above-discussed difficulties and weaknesses of the traditional, court-based, litigation-based enforcement of the principle of 'equitable assessment', some supplementary ideas might be put forward about how to give effect to this highly important legal standard in practice. Unfortunately, none of the following possible options is really considered nowadays in Hungarian professional discourse, but all of them might serve as a basis for discussion and, in theory, can help the operationalization of 'equitable assessment' in a wider context of a complex legal infrastructure. However, all of them would require in-depth legal reform. Accordingly, besides litigation (and case-law), the following techniques might help to vitalize and institutionalize the principle of 'equitable assessment'.

First, instead of traditional litigation, a *quick, free of charge and compact, specific nonlitigious procedure* might be created for the sake of the effective enforcement of the principle of 'equitable assessment'.<sup>59</sup> This could be especially helpful for employees in situations when the employer refrains from the application or the proper application of 'equitable assessment.' One of the possible outcomes of such a non-litigious procedure could be that the court obliges the employer to carry out meaningful 'equitable assessment'. If enforcement is for the performance of a specific act or a specific conduct (here: 'equitable assessment'), the court shall issue an *enforcement order* to order the 'obligor' (here: the employer) to voluntarily comply within the deadline specified. The rules of judicial enforcement contain special enforcement procedures, including implementation of a specific act.<sup>60</sup> These procedures might be tailored and specified for the advancement of the principle of 'equitable assessment.'

Second, another theoretical option for the worker-friendly advancement of 'equitable assessment' could be to grant *right of consultation (or even co-determination) to employees' representatives at the workplace* (works council and/or trade unions) on the currently fully unilateral managerial exercise of 'equitable assessment' or at least on disputes arising from the implementation of the principle of 'equitable assessment'.

Third, employees' representatives (especially trade unions) could also be specifically entitled by law to initiate '*class action*' claims (*actio popularis*) on behalf of employees, in case of mass managerial breach of the obligation of 'equitable assessment'.<sup>61</sup>

<sup>59</sup> For instance, the employee (or employees' representatives) might bring an action within five days in the event of any violation of the provisions on equitable assessment. The court could be obliged to hear such cases within fifteen days in non-contentious proceedings. The decision of the court might be appealed within five days from the date of delivery of the decision. The court of the second instance could be obliged to deliver its decision within fifteen days. Similar enforcement procedures are existent in labour law already (see for analogy Article 289, HLC which provides for a comparable procedure for any violation of the provisions on information or consultation (I & C) rights of workers' representatives).

<sup>60</sup> See for further details: Act LIII of 1994 on Judicial Enforcement, Part III Special Enforcement Procedures, Chapter 9. Implementation of a specific act.

<sup>61</sup> See as analogy: Section 20 (Assertion of claims of public interest) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities. Similarly, a public interest lawsuit could be initiated by social and interest representation organisations if the violation of the principle is based on a characteristic that is an essential feature of the individual, and the violation of law affects a larger group of persons that cannot be determined accurately.

Fourth, institutionalized, targeted, easily accessible, *workplace-level ADR (alternative dispute resolution) mechanisms* (such as conciliation, mediation etc.) could also bolster the effective application of the principle of ‘equitable assessment’. The spectrum of assessment is typically a dispute of interest, where ADR mechanisms are usually highly relevant.

Fifth, as previously mentioned, employees are often not even aware of their rights, including the right to ‘equitable assessment’. *Targeted information or even training* from the side of the employer on this matter might be mandated by labour law. For instance, there is a general obligation on the employer to provide certain information in writing for the employee within fifteen days from the date of commencement of the employment relationship concerning the basic terms and condition of employment.<sup>62</sup> Such written statement might be supplemented by versatile information on the principle of ‘equitable assessment’. Conversely, employers (managers etc.) would also require training on the principle of ‘equitable assessment’.

Sixth, extremely harsh infringements of the principle of ‘equitable assessment’ (when the breach of the principle results in moral damage in relation to personality rights) shall automatically qualify for the civil law based *exemplary compensation* for wrongdoing (*‘sérelemdíj’*, similar to ‘Schmerzensgeld’ in German law).<sup>63</sup>

Seventh, another alternative avenue of the enforcement of the principle of ‘equitable assessment’ could be the possibility to resort to an *‘independent labour inspection’ (the ‘audit’)*. The ‘independent labour inspection’ (‘audit’) appeared in the original Proposal of the new Labour Code (2011) as a new institution to be introduced under labour law. Finally, the new Code has not introduced such a system. However, it could have been an alternative, additional, private way of rights-enforcement. The objective of the institution would have been to promote the observance of labour legislation but not by imposing binding

<sup>62</sup> See Section 46 HLC. Furthermore: Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship – the ‘Written Statement Directive’.

<sup>63</sup> It is important to note as a new possible ‘channel’ of personality rights’ enforcement that a new feature of the new Civil Code (Act V of 2013) is the introduction of the so-called exemplary compensation for wrongdoing (*‘sérelemdíj’*, similar to ‘Schmerzensgeld’ in German law). The exemplary compensation for wrongdoing replaces the former ‘non-pecuniary damages’ that could be awarded based on the former Civil Code and the Labour Code, but only for the case of infringing a person’s moral rights, deduced from human dignity. Consequently ‘non-pecuniary damages’ have ceased to exist with the entry into force of the new Civil Code and this rule is applicable also in labour law, because the entry into force of the new Civil Code on 15 March 2014 led to the necessity of harmonising certain provisions of the Labour Code with the new Civil Code. As a new sanction of moral damages, the exemplary compensation is due merely because of causing grievance; the aggrieved party does not have to verify if he suffered any pecuniary or other loss/injury due to the grievance. Exemplary damages (*‘sérelemdíj’*) can be granted as ‘lump sum’ damages to compensate the infringement of personal rights. As opposed to the claim for damages, with exemplary damages the injured party does not have to evidence the prejudice beyond the violation of law. Under the new law, the court will only investigate whether personal rights have been infringed and whether the defendant’s conduct and failure is attributable to the defendant. The right to *‘sérelemdíj’* for infringement of personal rights will be established without the obligation to prove any other losses than the infringement of rights. Damages for infringement of personal rights may apply to all personal rights, such as non-discrimination, protection of personal data, performance etc. As such, this new institution might open up new horizons also in the enforcement of workers’ personal rights related to the employment relationship.

regulations and using instruments of the authority. The legal consequence of the procedure would have been the exemption from fines or other legal disadvantages imposed on the employer on account of a breach, in case the employer remedied in response to the advisor's notification. The Code would have defined the legal form in the framework of which the labour advisor can be contracted (as a 'private service supplier'), the information obligation of the employer, the areas of labour inspection, issues of confidentiality and business secrets etc. Moreover, and what is most important in this context, the Code would have introduced a new instrument, the *employee complaint to the auditor*. The idea of such 'independent labour inspection' has remained only a concept and it has not been incorporated by the new Code.

After more than five years since its enactment, the principle of 'equitable assessment' is still far from being an integral, embedded, overarching protective tool of labour law in Hungary. Despite its intended strong moral message and its hard law nature, in the lack of related case-law and in the lack of a complex web of supportive legal infrastructure, its operationalization is rather immature and hazy. The lack of related judicial practices risks the consistent interpretation of the standard and gives nearly 'free hands' for employers (and their Human Resource managers) to interpret this standard, if they care about it at all, arbitrarily in course of the exercise of the managerial prerogative. Consequently, there can be a harmful gap between the 'daily' interpretation of the standard and the 'ideal', expected (legally mandated) purpose of the standard. However, it is a general maxim of legal thinking that 'careful examination of the purpose(s) of a rule is a vital aid to resolving doubts in interpretation.'<sup>64</sup> All in all, so far, the principle of 'equitable assessment' has not been able to live up to its potential. At best, its sporadic, case by case utilisation can be projected. Nonetheless, it would be important to motivate employers to adopt fair and consistent 'equitable assessment' practices and to encourage employees (and their representatives) to speak out when experiencing the breach of this standard.

## 6. CONCLUSIONS

Open norms usually aim to change the behaviour of actors regulated. Consequently, the real merit of an open norm should be ultimately measured by its behaviour-changing capacity, not by its formal setting. The question how far various open norms can substantially influence the reality of the employment relationship should be investigated by identifying the total effect of the complex web of a possible legal infrastructure. Formalism seems to be a dead-end for the operationalization of open norms, and the growing recognition of the plural and multi layered nature of a possible legal infrastructure is needed. Davidov has rightly stated that the success of open norms 'depends to a large extent on the actual ability and willingness of courts to use standards in a way that materializes the potential',<sup>65</sup> but, in our view, the courts and a much wider, much more complex legal infrastructure can and should further the operationalization of open norms. If the various mechanisms of the complex web of a legal infrastructure intermingle in a mutually supportive manner, this process can create a dynamic 'snowball or spill-over effect' which might effectively help to operationalize the given open norm.

<sup>64</sup> Twining and Miers (2010) 158.

<sup>65</sup> Davidov (2016) 163.



The novel principle of ‘equitable assessment’ in the Hungarian Labour Code is struggling with a serious ‘moment of inertia’. It seems that not only the associated judicial practice, but also the potentially related, supporting legal/regulatory environment (or infrastructure) is still severely deficient (virtually non-existent). All in all, the institutionalization of the standard is weak and the related legal conscience is modest. Thus, the standard does not fulfil the most important functions it is intended for, and for the time being, it cannot unfold the multifaceted potential inherent in it. In this context, the study examined the reasons why this standard is struggling with a kind of functional deficiency and it aimed to show how this extremely important provision could be more effectively operationalized, dynamized, and ‘breathed into life’.

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