

ARTICOLE

THE STATUS AND LIABILITY OF EXECUTIVE
OFFICERS IN THE HUNGARIAN JUDICIAL
PRACTICE - WITH PARTICULAR REFERENCE TO
THE NEW LEGISLATION

DOI: 10.24193/SUBBiur.67(2022).4.8
Data publicării online: 31.05.2023

László SCHMIDT*

Abstract: Under the former Hungarian Labour Code, the employer's manager and his deputy were liable for damages caused by the violation of the rules prescribed in the context of his managerial activity according to the rules of civil law. Under the previously applicable Act on Companies either the labour law rules or the rules of the Civil Code applied to the executive officer.

According to the new Civil Code, the executive officer is liable to the legal person for damages caused to the legal person during his management activities according to the rules of liability for damages caused by breach of contract.

The management of the company may be carried out by the executive officer on the basis of an agency contract or an employment contract, according to the agreement concluded with the company.

The new legislation raises the question of whether the executive officer is liable for damage caused to the company under the rules of employment law or under the civil law rules on breach of contract.

* PhD-Student, University of Pécs, Faculty of Law, e-mail: schmidt.laszlo@ajk.pte.hu.

Keywords: civil law, labour law, liability, executive officers, foreseeability

Cuprins

I.	Status and liability of the executive officers in the old Labour Code and in the Act on Companies	234
A.	Status and liability of senior officials in the old Labour Code and in the Act on Companies	234
II.	The status and liability of the manager in the new Labour Code and the new Civil Code	237
A.	The relevant rules of the new Labour Code and the new Civil Code ...	237
B.	Issues raised by the new legislation	239
III.	Summary and <i>de lege ferenda</i> proposals.....	246
A.	De lege ferenda Proposal I.	247
B.	De lege ferenda proposal II.	247
C.	Reasoning.....	247
IV.	Bibliography	249

I. Status and liability of the executive officers in the old Labour Code and in the Act on Companies ¹

A. Status and liability of senior officials in the old Labour Code and in the Act on Companies

Pursuant to Article 188 of Act XXII of 1992 (old Labour Code), “for the purposes of this Act, an employee in a managerial position is the head of the employer and his/her deputy (hereinafter referred to as "manager" or “senior official” or “executive officer”). “The provisions of this Act shall apply to employees in a managerial position with the exceptions set out in this Chapter.”² The old Labour Code further provided that “a manager shall be liable for damages caused by a breach of the rules prescribed within the scope of his/her managerial activity according to the rules of civil law,³ while in other cases the liability of the manager shall be governed by the general - labour law - rules on liability for damages, with the exception that in the case of negligent damage the liability may be limited to the average monthly salary of the manager up to twelve months”.⁴ According to the commentary on the old Labour Code, "the liability of a manager for damages depends on whether the damage is caused in the course of his managerial activity or for a cause outside it. If a manager causes damage in the course of his management activities (e.g. due to management or organisational errors or lack of orders),

¹ This paper is based on the previous paper from the Author which has already been published in Hungarian. <https://pea.lib.pte.hu/bitstream/handle/pea/34308/PTE-%c3%81JK-20220614-1.pdf?sequence=1&isAllowed=y>.

² Act XXII of 1992 on the Labour Code 188.§ (1)-(2) paragraphs <https://njt.hu/jogszabaly/1992-22-00-00.80#6302> 2023.03.09.

³ Old Labour Code. 192/A.§ (1) paragraph

⁴ Old Labour Code 192/A.§ (3) paragraph

he is liable under civil law, not the Labour Code. If the damage was not caused in connection with the breach of the managerial function, the general rules of the Labour Code governing the compensation of employees shall apply.”⁵

Pursuant to Article 21 (1) paragraph of Act IV of 2006 on Companies (Act on Companies) “the management of a company shall be carried out by the company's senior officers or by a body of senior officers, in accordance with the provisions on certain forms of companies. For the purposes of this Act, management shall mean the taking of all decisions necessary in connection with the management of the company which are not the responsibility of the company's supreme body or of another company organ by law or by the company statutes.”⁶

Pursuant to paragraph (2) of Article 22, “the rights and obligations of the executive officer in this capacity shall be governed by the rules of the Civil Code on the assignment of persons (company law relationship) or the rules governing employment relationships, subject to the exceptions provided for by law.”⁷

Act LXI of 2007 amended the Act on Companies, according to which a “member of a one-person company or a member of a general partnership or a limited partnership with sole management rights may not hold a management position in an employment relationship, unless otherwise provided for in the

⁵ LŐRINCZ György: A vezető állású munkavállalókra vonatkozó eltérő rendelkezések, In: A Munka Törvénykönyve Magyarázata (Commentary to Act XXII of 1992 on the Labour Code), Complex Kiadó, Budapest, 2008, p. 846.

⁶ Paragraph (1) of Article 21 of Act IV of 2006 on Companies (Act on Companies) <https://njt.hu/jogszabaly/2006-4-00-00.37>, 2023.03.09.

⁷ Paragraph (2) of Article 22 of the Act on Companies.

partnership agreement.”⁸ It is important to note, however, that the above amendment has not been explained or reasoned.

In a case published under BH2011. 288. the Supreme Court of Hungary held that the executive officer had not acted with due diligence when he granted a loan on behalf of the company to a person whose personal data were unknown, and therefore the claim could not be recovered from him. The Supreme Court shared the view of the courts of first and second instance that the executive officer did not act with the requisite care when granting the loan. He entered into the loan agreement without knowing the details necessary to identify the debtor, depriving the company of a realistic possibility of asserting a claim based on the loan agreement and thereby causing damage to the company, for which he was liable to compensate the company.⁹

In its decision published under EBH2011. 2417., the Supreme Court of Hungary explained that "the liability of a manager may be established if the manager, having made a foreseeable and manifestly unreasonable risk taking, wrongly assessed the situation of the company and the market environment as a whole. A manager may act in a negligent manner if he concludes a contract in a foreign language with which he is not familiar without being satisfied as to its true legal content, or transfers a significant amount of money to a foreign offshore company as a contracting party, he does not provide any security in the event of performance or impossibility of performance, the company's balance sheet shows that there is little possibility of recovering his

⁸ Art. 22 (3) of the Civil Code (in force from 1 September 2007).

⁹ BH2011. 288. In: *Bírósági Határozatok* 2011/10, pp. 768-769.

debts and he does not take the necessary measures to enforce his claim arising from the breach of contract." ¹⁰

With regard to the due diligence generally expected of a manager, the Kúria (Supreme Court of Hungary) stated in principle in its case decision EBH2012. M. 11. that "a manager employed by a company demonstrates the due diligence expected of a person holding such an office if he or she seeks to know and disclose all the material terms and conditions of the contract to be concluded by the company from a management point of view. Due diligence also includes providing the employer with information, usually in advance, to facilitate a reasonable and informed decision, particularly where the contract involves substantial assets." ¹¹

II. The status and liability of the manager in the new Labour Code and the new Civil Code

A. The relevant rules of the new Labour Code and the new Civil Code

Pursuant to Article 208 (1) paragraph of Act I of 2012 on the Labour Code (Labour Code), "an employee in a managerial position is the head of the employer and other employees under his/her direct control and entitled to replace him/her, in whole or in part, (hereinafter together referred to as

¹⁰ EBH2011. 2417. (for the details of the case see dr. Hanyu Henrietta: Munkajogi kárfelelősség a gyakorlatban, Wolters Kluwer, 2019, Budapest) https://mersz.hu/hivatkozas/YOV1550_67 2023.03.09.

¹¹ EBH2012. M.11. for the details of the case see dr. Hanyu Henrietta: Munkajogi kárfelelősség a gyakorlatban, Wolters Kluwer, 2019, Budapest) https://mersz.hu/hivatkozas/YOV1550_66 2023.03.09.

"manager")".¹² Pursuant to Article 209 (5) paragraph, "the manager is liable for the entire damage in the event of negligent damage."¹³

In the new Civil Code, the rules on the liability of executive officers, in addition to those on the liability of members and founders of legal persons, have also responded to the economic and market changes.¹⁴

According to Articles 3:21.§ and 3:24.§ of Act V of 2013 on the New Civil Code (Civil Code), "decisions related to the management of a legal person that fall outside the powers of the members or founders shall be adopted by an executive officer or executive officers or by a body of executive officers. Executive officers shall perform their management duties in the interests of the legal person. The first executive officers of a legal person shall be designated in the instrument of incorporation of the legal person. After the creation of a legal person, executive officers shall be elected, appointed and dismissed by the members of the legal person or, in legal persons having no members, by the founders. The mandate of an executive officer shall come into effect when accepted by the person designated, elected, or appointed."¹⁵

„The executive officer shall be liable to the legal person for the damage caused to it during his management activities according to the rules on liability for damage caused by breach of contract. The legal person shall be liable for any damage caused to a third party by the executive officer acting in

¹² Act I of 2012 (Labour Code) 208.§ (1) paragraph <https://njt.hu/jogszabaly/2012-1-00-00.31> 2023.03.09.

¹³ Labour Code 209.§ (5) paragraph.

¹⁴ NOCHTA Tibor: A vezető tisztségviselők magánjogi felelősségének mércéjéről és irányairól az új Ptk. alapján Gazdaság és Jog 2013/6, pp. 3-8. <https://ptk2013.hu/szakcikkek/nochta-tibor-a-vezeto-tisztsegviselok-maganjogi-felelossegenek-mercejerol-es-iranyairol-az-uj-ptk-alapjan-gj-20136-3-8-o/2388>, 2023.03.09.

¹⁵ Act V of 2013 (Civil Code) 3:21.§ <https://njt.hu/jogszabaly/en/2013-5-00-00> 2023.03.09.

his competence. The executive officer and the legal person shall be jointly and severally liable if the executive officer caused the damage intentionally.”¹⁶

The Article 3:112.§ (1) - (2) paragraphs of the Civil Code states that “ the executive officer shall manage the operations of the company under an agency contract or an employment contract, according to his agreement with the company. The executive officer shall manage the operations of the company autonomously, complying with the overruling priority of the interests of the company. In this capacity, the executive officer shall be bound by law, by the instrument of incorporation and the resolution of the supreme body of the company. The executive officer shall not be instructed by the members of the company and the supreme body shall not deprive him of his powers.”¹⁷

B. Issues raised by the new legislation

There has been a lively debate on the legal status and liability of executive officers both in the legal literature and in case law, based mainly on the fact that:

1) the new Civil Code has substantially changed the scope of liability for damages caused by breach of contract and introduced a new, much stricter system, (almost strict liability)

2) the Civil Code states, in the above-quoted 3:24.§ (1), on the one hand that executive officers are liable to legal persons according to the rules of contractual liability, but

¹⁶ Civil Code. 3:24. §.

¹⁷ Civil Code 3:112 § (1)-(2) paragraphs.

3) the Civil Code allows the possibility for business entities (companies) to base the position of their executive officers on a agency contract or employment relationship,

4) the new Labour Code basically retained the liability regime based on fault, and

5) the new Labour Code - in contrast to the old Labour Code –which provides for a system of liability for damages based on fault, does not state that the executive officer is liable for damages caused in the course of his managerial activities under the rules of civil law.¹⁸

According to Jácint Ferencz and Máté Trenyisán (among others), the problem is that “based on the above-mentioned rules of the Civil Code and the Labour Code, it is not clear whether the liability of the company's executive officers for damages caused by them is based on the rules of the Civil Code on the basis of the contractual liability or on the rules of the Labour Code on the basis of fault. Because the Article 3:112.§ of the Civil Code expressly refers to the possibility of both employment and agency relationships in relation to the executive officers of companies.”¹⁹ The Civil Code has introduced a very strict, objective standard of liability for damages caused by breach of contract, whereby the tortfeasor must prove that the circumstances were not foreseeable to him at the time the contract was concluded. ²⁰ However, the

¹⁸ TERCSÁK Tamás: Vezető tisztségviselő jogállása és felelőssége, In: Pál Lajos (szerk.): A vezető tisztségviselő jogállása és felelőssége. Budapest, Hvg-Orac, 2017, pp. 94–95.

¹⁹ FERENCZ Jácint – TRENYSÁN Máté: Jogértelmezési kérdések a vezető tisztségviselő társasággal szembeni kártérítési felelősségének köréből In: Pál Lajos (szerk.): A vezető tisztségviselő jogállása és felelőssége, Budapest, Hvg-Orac, 2017, p. 114.

²⁰ Civil Code. 6:142.§: „ A person causing damage to the other party by breaching the contract shall be required to compensate for it. He shall be exempted from liability if he proves that the breach of contract was caused by a circumstance that was outside of his control and was not

general employee liability rule of the Labour Code is still based on fault.²¹ According to Ferencz and Trenyisán, the Civil Code. 3:24.§ (1) and 3:112.§ (1) would lead to the result that “a manager in a relationship of agency contract would be liable under the stricter liability rules of the Civil Code, while a manager in a relationship of employment would be liable under the lighter liability rules of the Labour Code, which is clearly not permissible.”²² In the context of the nature of the different legal relationships, Tercsák also points out that the legal relationship of an executive officer is characterised by autonomy and initiative. Autonomy is expressly laid down in the law and is also a consequence of the prohibition on giving instructions. Initiative is necessary because the (ongoing) protection of the interests of an operating company is hardly conceivable without initiative behaviour. In contrast, in the employment relationship, subordination is the dominant principle, and the employer may instruct the employee, who is obliged to comply. In his view, it is therefore difficult to reconcile the status of the executive officer with that of employee, since the two legal relationships require and allow for completely different attitudes. In its nature, the management relationship is the closest to a relationship of agency, but the liability of the agent and the legal provisions of the Civil Code 3:24 (1) are incompatible.²³

foreseeable at the time of concluding the contract, and he could not be expected to have avoided that circumstance or averted the damage.”

²¹ Labour Code Article 179.§ (1) paragraph: „An employee shall compensate for any damage caused by a breach of his/her obligations arising from the employment relationship if he/she has not acted in a manner that could normally be expected in the given situation.”

²² FERENCZ Jácint – TRENYSÁN Máté: Jogértelmezési kérdések a vezető tisztségviselő társasággal szembeni kártérítési felelősségének köréből, 2017, p. 117.

²³ TERCSÁK Tamás: Vezető tisztségviselő jogállása, felelőssége <https://ptk2013.hu/szakcikkek/tercsak-tamas-vezeto-tisztsegviselo-jogallasa-felelossege/6424> 2022. 02. 27.

The Great Commentary on the Civil Code states that "Since the Civil Code regulates liability for damages caused by breach of contract and damages caused by non-contractual acts differently, it was necessary to determine which rule applies to the liability of executive officers towards legal persons. The legislator has chosen the rules on liability for breach of contract because all the legal policy objectives which justify the tightening of contractual liability also apply to the relationship between the executive officer and the legal person. The executive officer is never placed in this position by accident, not against his will, but consciously assumes management duties vis-à-vis the legal person in the interests of the legal person. If the chief executive breaches this previously considered, consciously assumed obligation, he or she is justified in taking a more stringent action than liability for non-contractual damages. A consensus is reached between the chief executive and the legal person as to the creation of the office and the two parties' wills creates a contractual relationship in substance between the two parties."²⁴

Tercsák also points out that the changes in the new Civil Code in contractual liability also have a significant impact on this topic. The foreseeability principle has a dual role, in the basis of liability and the limit of damages to be recovered. It is very likely that the legislator's primary objective was to ensure that the contracting parties entered into the contract in the knowledge of the risks associated with the specific contract. A party in breach of contract can only be held liable for damages arising out of a circumstance which he could foresee at the time of the conclusion of the contract and, except for damages for loss of adhesion, only for damages which were foreseeable at

²⁴ Vékás Lajos, GÁRDOS Péter (szerk.): *Kommentár a Polgári Törvénykönyvhöz*, Wolters Kluwer, Budapest, 2018, p. 251.

the time of the conclusion of the contract. The rules on damages based on the foreseeability principle can achieve their primarily objective where the risks associated with the contract are known at all, at least to one of the parties at the time of the conclusion of the contract. At the time of the conclusion of the contract to which they are subject, executive officers are not in a position to foresee in detail the risks associated with their activities, to consider them before accepting the position. To do this, the economic environment of the company (often the state of the economy as a whole) would need to be anticipated, possibly years in advance. This is obviously impossible. The company is also not in a position to provide information on the risks arising from the specific position, in addition to the general risks associated with the executive's activities, thereby making them foreseeable for the executive.²⁵

With regard to the so-called reference date, the Great Commentary on the Civil Code recognises that it poses a significant problem in relation to the liability of executive officer. "In the vast majority of cases, the mandate may be for a long period, years or even indefinitely. In this way, the date of the contract and the date of the actual damage would be so far removed from each other that proving unforeseeability would become too easy. It is questionable whether this problem is addressed by judicial practice by taking the date of the conclusion of the contract as the date of the commission of the damaging conduct of the executive officer rather than the date of the creation of the legal relationship of the executive officer. This may also arise because, in a significant number of cases, the tortious conduct is also linked to a contract, the tortious conduct of the manager consisting in the conclusion of a contract on behalf of the company without due care. Nevertheless, it is clear from the structure of the liability rule that the foreseeable circumstance at the time of

²⁵ TERCSÁK Tamás: *Vezető tisztségviselő jogállása és felelőssége*, 2017, pp. 104-106.

the conclusion of the contract must relate to the conclusion of the contract on the breach of which the claim for damages is based. The legal person may, under the rule under consideration, sue its own directors and officers, and the date of the conclusion of the contract between them must therefore be the relevant date."²⁶

Tercsák does not see the function of the Article 3:112 (1) paragraph of the Civil Code as "to refer to the possibility or necessity of duplication of legal relationships, but to refer to the possibility of employment relationships, while leaving the unity of the legal relationship intact, and in particular to state the rules of liability applicable in the context of a single managerial relationship. Accordingly, if the parties do not expressly agree on an employment relationship, their relationship is to be considered as an agency relationship. In the case of an employment agreement, the situation differs only in that, in addition to the rules of the Civil Code, the corresponding provisions of the Labour Code apply - emphatically only in a complementary manner - to the manager's relationship with the company".²⁷

In accordance with Labour Code, however, the Commentary states that, "a manager and a managerial employee are two different legal statuses, i.e. they are not interchangeable categories. In our view, in this context, the main legal status of the person concerned is that of executive officer, which is framed by the status of a person in a relationship of agency or employment. The managerial employee, in this context, is therefore an employee, in other words, a subject of the employment relationship. In this capacity, his partner in the legal relationship is not usually the legal person or the company as such,

²⁶ VÉKÁS Lajos, GÁRDOS Péter (szerk.): *Kommentár a Polgári Törvénykönyvhöz*, Wolters Kluwer, Budapest, 2018, pp. 252-253.

²⁷ TERCSÁK Tamás: *Vezető tisztségviselő jogállása és felelőssége*, 2017, pp. 109-110.

but the employer as the other party to the employment relationship."²⁸ According to the ministerial reasoning of the Civil Code, "management decisions are taken by the managing directors of the legal person. Since they are not necessarily involved or interested in the operation of the legal person, it is necessary to state that in their management activities, the managing directors are obliged to act in the interests of the legal person. Breach of this duty entails liability for damages against the legal person and, since the relationship between the managing director and the legal person is based on the will of the parties, even if the legal relationship is not necessarily established according to the classical rules of contract formation, the rules of liability for breach of contract should apply. The liability rule here applies only to the internal relationship between the legal person and its manager."²⁹

With regard to the management of companies, the ministerial reasoning states that "the law describes the management of companies as an autonomous activity of the executive officers, for which the executive officer is liable to the company. The autonomy of the chief executive officer is not affected by the fact that he performs his duties on a contract basis or as an employee. While employment law generally implies a relationship of subordination and superiority between the employer and the employee, the application of employment law rules does not preclude a manager from exercising a high degree of autonomy and full responsibility for the tasks falling within his or her job. Of course, the autonomy of the chief executive does not mean that he or she can be entirely independent of the will of the company as expressed by its members: the chief executive is subject not only

²⁸ BANKÓ Zoltán, BERKE Gyula, KISS György: *Kommentár a munka törvénykönyvéhez*, Wolters Kluwer, Budapest, 2017, p. 605.

²⁹ Ministerial reasoning for the New Civil Code <https://jogkodex.hu/doc/3587649> 2023.03.09.

to the law but also to the company's articles of association and the decisions of its main organs." ³⁰

In my view legislative correction would be necessary to fully and satisfactorily eliminate the anomalies arising from the new rules, while in the meantime the resolution of the inconsistencies is left to judicial practice.

Regarding the liability of the executive officer, even under the new regulation, the previous judicial practice that the liability of the executive officer can be established if the executive officer has assumed a foreseeable and manifestly unreasonable risk, having completely misjudged the situation of the company and the market environment, seems to be maintained.³¹

With regard to the liability of the executive officer under the Labour Code, the Supreme Court of Hungary explained that the new Labour Code in force at the time of the damage does not refer to the application of the Civil Code rules in the area of the liability of the executive officer, but only contains a stricter rule in the case of negligent damage, when it provides that the executive officer is liable for the entire damage even in the case of negligence.³²

III. Summary and *de lege ferenda* proposals

As can be seen from the above, the provisions of the Labour Code and the Civil Code are far from being uniform and clear with regard to executive

³⁰ Minsiterial reasoning for the New Civil Code <https://jogkodex.hu/doc/3587649> 2023.03.09.

³¹ See footnote 10.

³² Supreme Court of Hungary EBH2018. M. 19. <https://kuria-birosag.hu/hu/sajto/tajekoztato-kuria-mfvi100592017-szamu-ugyrol-vezeto-allasu-munkavallalo-karteritesi> 2023. 03.10.

officers. In fact, by removing the reference to general civil liability from the Labour Code, but by providing in the Civil Code for the possibility of both employment law and agency law for the management of companies (and only of such entities), the legislator has, in my view, created uncertainty which, in my opinion, should be resolved by legislative correction.

A. De lege ferenda Proposal I.

The following paragraph (7) shall be added to Article 209 of the Labour Code: the manager shall be liable to the employer for damages caused in the course of his/her managerial activity in accordance with the rules of liability for breach of contract.

B. De lege ferenda proposal II.

The Civil Code Article 3:24 (1) paragraph is added as follows: (the executive officer) shall be exempted from liability if he proves that the breach of his management duty was caused by a circumstance beyond his control, unforeseeable at the time when he entered into the contract or failed to make the contract or other legal commitment giving rise to the dispute, and which he could not reasonably have been expected to avoid or to prevent.

C. Reasoning

In my view, the above additions and amendments can address the problems raised earlier. On the one hand, the amendment of Article 209 of the Labour Code brings the managerial employee under the contractual liability regime of the Civil Code, and on the other hand, the liability rule for managerial employees is clarified and limited. In my opinion, the 'extension' of the so-called reference date creates a healthy balance. The executive officer

will not be expected to 'look ahead' for many years at the time of his appointment but will retain his increased responsibility towards the legal person.

IV. Bibliography

- BANKÓ Zoltán, BERKE Gyula, KISS György: Kommentár a munka törvénykönyvéhez, Wolters Kluwer, Budapest, 2017;
- FERENCZ Jácint – TRENYSÁN Máté: Jogértelmezési kérdések a vezető tisztségviselő társasággal szembeni kártérítési felelősségének köréből
In: PÁL Lajos (szerk.): A vezető tisztségviselő jogállása és felelőssége, Budapest, Hvg-Orac, 2017;
- LŐRINCZ György: A vezető állású munkavállalókra vonatkozó eltérő rendelkezések, In: A Munka Törvénykönyve Magyarázata (Commentary to Act XXII of 1992 on the Labour Code), Complex Kiadó, Budapest, 2008;
- NOCHTA Tibor: A vezető tisztségviselők magánjogi felelősségének mércéjéről és irányairól az új Ptk. alapján, *Gazdaság és Jog* 2013/6.;
- TERCSÁK Tamás: Vezető tisztségviselő jogállása és felelőssége, In: Pál Lajos (szerk.): A vezető tisztségviselő jogállása és felelőssége. Budapest, Hvg-Orac, 2017;
- TERCSÁK Tamás: Vezető tisztségviselő jogállása, felelőssége.
<https://ptk2013.hu/szakcikkek/tercsak-tamas-vezeto-tisztsegviselo-jogallasa-felelossege/6424>;
- VÉKÁS Lajos, GÁRDOS Péter (szerk.): Kommentár a Polgári Törvénykönyvhöz, Wolters Kluwer, Budapest, 2018.