

# Illegal contract as a general clause - European trends and new Hungarian judicial practice<sup>1</sup>

Associate professor **Ádám AUER**<sup>2</sup>

## **Abstract**

*The invalidity of a contract is a sanction of civil law. In a dispute, the purpose of the law, its effect and its application must be applied together to the contract in conflict with the law. The means of doing so are judicial interpretation and the application of the general clause. An illegal contract may cover several areas: contracts contrary to public policy, a rule of law, morality or fundamental principles. In such a complex legal environment, an important question is which rule is breached and which results in the invalidity of the contract. The relationship between civil law and other rules is of particular importance in the context of the use of AI, where there are a number of technical obligations for the contracting party or administrative rules governing the use of AI. In the digital environment, many sectoral rules impose prohibitions, many norms define specific requirements as well. The study examines the new paradigm of the Hungarian Civil Code of illegal contracts and focuses the judicial practice of the general clause of illegality.*

**Keywords:** illegal contract, null and void, invalidity, general clause, Hungary.

**JEL Classification:** K12

DOI: 10.24818/TBJ/2023/13/4.06

## **1. Introduction**

In contractual cases, the applicable law is made up of several elements. The applicable law is generally made up of the Civil Code and other legal rules, because the welfare state achieves its objectives through legislation as well.<sup>3</sup> The legal rules may also be binding on contracts. A party may enter into a contract with a license, subject to a regulated procedure prior to the conclusion of the contract. These examples could be extended further.

The relationship between civil law and other rules is of particular importance in the context of the use of AI, where there are a number of technical obligations for the contracting party or administrative rules governing the use of AI. The interconnection of legal disciplines arises in mixed legal relationships where the state and the private party enter into a contract. In the digital environment, many sectoral rules impose prohibitions, many norms define specific requirements.

---

<sup>1</sup> This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

<sup>2</sup> Ádám Auer - University of Public Service, Budapest, Hungary, [auer.adam@uni-nke.hu](mailto:auer.adam@uni-nke.hu).

<sup>3</sup> Hein Kötz, *Europäische Vertragsrecht* Tübingen: Mohr Siebeck, 2015, p. 178.

In such a complex legal environment, an important question is which rule is breached and which results in the invalidity of the contract.<sup>4</sup> Contract invalidity can be summarised in the group of immoral and illegal contracts, the detailed rules of which vary across European legal systems. Thus, the new aspects may provide a valuable contribution to the comparison of laws.<sup>5</sup> Among the grounds for invalidity of a contract, the prohibited (illegal) contract is the connecting rule that includes sectoral rules among the grounds for invalidity. Does any breach of the legal rules governing the contract render the contract invalid? If not, who may consider whether to disapply the invalidity? The *lex specialis* legal regulation or only the court? Can the other legal rule derogate from the application of nullity which based on the general clause of the Civil Code?

The nullity of a contract is a sanction, and civil law achieves its objective by depriving it of legal effect. The complex legal environment challenges the law of contract invalidity. If we accept that a rigid interpretation of the law is ineffective because it leads to an unfair result, we must ask where should we draw the limit?

This study briefly describes the Hungarian legal situation, following some European legal solutions to the issue. I seek to answer the question whether the statutory power generally granted to the judge to determine whether a contract is unlawful is a sufficient step to achieve the above objectives. In 2013, the Hungarian Civil Code (hereinafter: HCC) sought to shift judicial practice away from the previous position by redefining the rules on illegal contracts and to open the door to the use of illegal contracts by introducing a general clause. In this paper, I will present the available case law on this issue, followed by a statement of conclusions.

The presentation of Hungarian practice is interesting because a rule allowing for judicial discretion has been introduced in the HCC. It is worth examining how this rule has been applied in practice. Another important aspect is that the judicial practice of the Curia (Supreme Court) has been binding since 2020. The decisions of the Curia are binding and have introduced a limited system of precedents. This means that a decision of the Curia is in itself binding, so a court decision on the subject can be an important orientation for practice.

## 2. Illegal contract in the field of the European Contract Law

The international literature identifies several causes for illegal contracts It can distinguish: contractual restriction on freedom to conduct business, contracts which involve prohibited conduct.<sup>6</sup> Kötz's classification of illegal contracts is even

---

<sup>4</sup> Rossella, Esther Cerchia, *A Comparative Viewpoint on Illegal Contracts: In Favor of Flexibility and Proportionality*. "Global Jurist", 2021, vol. 21, no. 2, pp. 447-479.

<sup>5</sup> Hugh Beale and Bénédicte Fauvarque-Cosson and Jacobien Rutgers and Denis Tallon and Stefan Vogenauer (eds.): *Cases, Materials and Text on Contract Law*. Oxford: Hart, 2018, p. 663.

<sup>6</sup> Hugh Beale and Bénédicte Fauvarque-Cosson and Jacobien Rutgers and Denis Tallon and Stefan Vogenauer (eds.): *Cases, Materials and Text on Contract Law*. Oxford: Hart, 2018, p. 663.

broader.<sup>7</sup> Several elements can be included in the category of illegal contract, and the solutions adopted by the Member States vary.<sup>8</sup>

The Principle of European Contract Law (PECL) treats contractual provisions, which are contrary to fundamental principles and the rules of conflict of laws as illegal. It is important to note that the PECL also sets out specific criteria relating to the classification of illegal contracts. These may be of assistance to the court in its interpretation of the law. In addition to the PECL, the DCFR also sets out the grounds that may lead to the nullity of a contractual agreement.<sup>9</sup> German law applies the general rule in § 134 BGB, according to which a declaration contrary to the law is null and void (*Verbotsgeschäft*) unless the interpretation of the law indicates otherwise.<sup>10</sup> There is extensive case-law on the interpretation of the law, for example, as to what the statutory prohibition applies to in particular (parties or only one party) and how this relates to the invalidity of the contract.<sup>11</sup> The Anglo-Saxon solution allows the judge even wider discretion to assess the breach of the law in the context of invalidity, including, for example, the relationship to the public policy.<sup>12</sup> In terms of the effect of illegality, a distinction must be made between the stricter, by reason of statute, or the more flexible at common law case.<sup>13</sup> Here again, the principle is a question of settlement arising from the contractual relationship.<sup>14</sup> Since 2016, French law has relied more heavily on case law with the change in the doctrine of cause, but sections 1128 and 1162 of the Code Civil also include the protection of public order, for example, within the scope of illegality.<sup>15</sup>

In summary, the nullity of a contract is not a mechanical sanction. In a dispute, the purpose of the law, its effect and its application must be applied together to the contract in conflict with the law. The means of doing so are judicial

<sup>7</sup> Hein Kötz, *Europäische Vertragsrecht* Tübingen: Mohr Siebeck, 2015, p. 157.

<sup>8</sup> Rossella, Esther Cerchia, *A Comparative Viewpoint on Illegal Contracts: In Favor of Flexibility and Proportionality*. "Global Jurist", 2021, vol. 21, no. 2, pp. 447-479., 447-448.

<sup>9</sup> Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) II.-7:302 and comments (online) Available: [https://www.law.kuleuven.be/personal/mstorme/european-private-law\\_en.pdf](https://www.law.kuleuven.be/personal/mstorme/european-private-law_en.pdf) (15 June 2023).

<sup>10</sup> § 134 BGB.

<sup>11</sup> Hein Kötz, *Europäische Vertragsrecht* Tübingen: Mohr Siebeck, 2015, p. 159., Axel Beater, *Der Gesetzesbegriff von § 134 BGB - zur Anwendbarkeit der Vorschrift auf Verfassungs- und Satzungsnormen, allgemeine Rechtsgrundsätze und Gesetzesumgehungen*. "Archiv für die civilistische Praxis" 1997, Vol. 197, 5, pp. 505-528.

<sup>12</sup> Prentice, D.D.: Illegality and Public Policy. in: Hugh Beale (ed.) *Chitty on Contracts*. Volume I. London: Sweet & Maxwell, 2021, pp. 1324-1325.

<sup>13</sup> Beatson, Burrows, Cartwright, *Anson's Law of Contract*. Oxford: Oxford University Press, 31<sup>st</sup> edition, 2020. 410, 413-420; Prentice, D.D.: Illegality and Public Policy. in: Hugh Beale *Chitty on Contracts*. Volume I. London: Sweet & Maxwell, 2021, p. 1327.

<sup>14</sup> Beatson, Burrows, Cartwright. *Anson's Law of Contract*. Oxford: Oxford University Press, 31<sup>st</sup> edition, 2020. 410.

<sup>15</sup> Hugh Beale and Bénédicte Fauvarque-Cosson and Jacobien Rutgers and Denis Tallon and Stefan Vogenauer (eds.): *Cases, Materials and Text on Contract Law*. Oxford: Hart, 2018, 666-667.

interpretation and the application of the general clause.<sup>16</sup> An illegal contract may cover several areas: contracts contrary to public policy, a rule of law, morality or fundamental principles.

### 3. Illegal contract (prohibited contract) in the Hungarian Private Law

The validity of a contract in Hungarian legal dogmatic means that there is no deficiency with respect to three conjunctive conditions: the will, the declaration and the intended legal effect.<sup>17</sup> A contract is invalid if it is not capable of producing the intended legal effect for one of the reasons specified by law, thereby denying the contract the recognition of legal effects. An invalid contract cannot be enforced by operation of law and performance cannot be claimed.<sup>18</sup> The HCC distinguishes two categories of invalidity: nullity and contestability.<sup>19</sup> Among the characteristics of nullity, the following should be highlighted: nullity exists from the moment of conclusion of the contract<sup>20</sup>, any person without a time limit and without any special procedure can invoke nullity, nullity is discovered by the court of its own motion, and nullity is objective in nature.<sup>21</sup> The parties entitled to declare a contract null and void are only those who have a legal interest in it or who are authorised by law to do so.<sup>22</sup> The objectivity of nullity means that the good faith or bad faith of the parties to the transaction is irrelevant to the legal consequences.<sup>23</sup> The Civil Code has grouped them into three main categories: the defect of contractual intention<sup>24</sup>, the defect of contractual declaration<sup>25</sup> and the defect of intended legal effect<sup>26</sup>. It is important that Hungarian practice separates the categories of conflict of laws treated as a group in the international literature: thus, contracts contrary to morality and the question of a striking disproportion of value are treated as separate grounds for invalidity in Hungarian civil law.

According to § 6:95 of the HCC, a contract which is in conflict with a statute, or which has been concluded in circumvention of a statute is void, unless the statute provides for other legal consequences. Even if there is another legal consequence, the contract is null and void if the law specifically states this or if the

---

<sup>16</sup> Rossella, Esther Cerchia. *A Comparative Viewpoint on Illegal Contracts: In Favor of Flexibility and Proportionality*. "Global Jurist", 2021, vol. 21, no. 2, 478-479.

<sup>17</sup> Kiss Gábor, Sándor István: *A szerződés érvénytelensége*. Budapest: Hvg-orac, 2014, p. 15, Vékás Lajos: *Szerződési jog – Általános rész*. Budapest: ELTE Eötvös Kiadó, 2016, 110.

<sup>18</sup> Sec 6:108. § HCC The official english version is available: [https://njt.hu/translation/J2013T0005P\\_20210701\\_FIN.PDF](https://njt.hu/translation/J2013T0005P_20210701_FIN.PDF) (15 June 2023).

<sup>19</sup> Other terminology is used in the legal literature: absolute or relative grounds for invalidity.

<sup>20</sup> Vékás Lajos, Gárdos Péter (eds.): *A Polgári Törvénykönyv Kommentárja*. Budapest: Complex, 2014. Commentary on Sec 6:88.

<sup>21</sup> Sec. 6:88-89 HCC.

<sup>22</sup> Sec. 6:88. (3) HCC which is a default rule.

<sup>23</sup> Kemenes István: *A szerződés érvénytelenségének egyes kérdései a gazdasági szerződéses gyakorlatban*. „Polgári Jogi Kodifikáció” 2002, Vol. 1., 4. pp. 7-27. p. 8.

<sup>24</sup> Sec. 6:90-93. HCC.

<sup>25</sup> Sec. 6:94. HCC.

<sup>26</sup> Sec. 6:95-107. HCC.

law is intended to prohibit the legal effect intended to be achieved by the contract. The interpretation of this rule of the Civil Code as to what happens when a contract conflicts with a rule of civil law is clear. However, the situation is not so simple when the contract conflicts with provisions of another law. Although the Civil Code declares that where other legislation governs a civil law relationship, it must be applied in accordance with the Civil Code, the relationship of other legislation to civil law invalidity is not without controversy.<sup>27</sup>

#### 4. New provisions of the Civil Code on the prohibited contract

In process of codification of the HCC applicable to prohibited contracts, the legislator drew on judicial case-law before World War II.<sup>28</sup> Under the Civil Code, a contractual provision which is contrary to another law must be assessed on the basis of whether the rule is contrary to a dispositive or a mandatory rule, in which case only the mandatory rule is obviously invalid. Several acts and legal provisions provide that a breach of a legal rule is null and void: for example, a breach of the Public Procurement Act<sup>29</sup>, or of the rules of the capital market governing the placing of shares<sup>30</sup>, or of the rules governing the transfer of ownership in the case of the sale of national property.<sup>31</sup> The fact that it is the specific legal provision (*lex specialis*) that declares nullity and only this that gives rise to civil law nullity is interpreted in the literature as a *contra legem* interpretation.<sup>32</sup> It should be noted, however, that in practice this is still an argument and is used in several laws.<sup>33</sup> The situation is different if the rule does not contain the former clause and provides for a different legal consequence for the infringement. According to the Civil Code, in such cases the contract is void even if, in addition to the application of the other legal consequence, the purpose of the law is expressly to prohibit the legal effect intended to be produced by the contract. According to the reasoning of the HCC, these cases can be resolved by interpreting the rule in accordance with its purpose. It is necessary to examine the purpose of the rule, i.e. whether, in the event of a breach of the prohibition in question, the

---

<sup>27</sup> Ptk. 1:2. § (2) bek.

<sup>28</sup> Curia No. 53. uniformity decision and BH 1994. 186. (Collection of the Decisions of Curia).

<sup>29</sup> See: Auer Ádám: *Is the Authorisation of the Conclusion of a Contract an Interim or a Permanent Measure?* "European Procurement and Public Private Partnership Law Review" 2021, Vol. 16, 4, pp. 295-304.

<sup>30</sup> Sec. 17 (3) Act CXX of 2001 on the Capital Market.

<sup>31</sup> Sec 13-15 Act CXCVI of 2011 on the National Assets.

<sup>32</sup> Darázs Lénárd: *A jogszabályba ütköző (tilos) szerződések semmissége.* „Polgári Jogi Kodifikáció” 2008, Vol. 10, 5-6, pp. 14-26.

<sup>33</sup> Most recently, see Sec. 1 (4) of Government Decree 330/2022 (IX. 5.) on the ministerial approval of certain contracts of government administrative bodies and certain business companies, which introduces ministerial approval for contracts above a certain value threshold for public administration bodies, the lack of which results in the nullity of the contract.

legislator intended to deprive the contract of its intended legal effect.<sup>34</sup> A prohibition which does not have this purpose cannot result in the nullity of the contract. Examples of the latter are provisions which impose an administrative condition on only one of the contracting parties (e.g. a special license for a business activity).<sup>35</sup>

It is worth pointing out that civil law provides the court with an important right in relation to prohibited contracts. Before the HCC, the practice solved problems of this kind in a partly mechanical way: if the specific law did not provide for the nullity of the contract, the court did not examine it.<sup>36</sup> The HCC sought to break with this practice and, in the case of prohibited contracts, extended the examination to the whole of the statute: if the legislator intended to deprive the contract of its intended legal effect, the court could declare it null and void. It is for the court to decide which breach of the law gives rise to nullity.

The situation seems clear, the nullity of the contract results from the breach of law. If the specific rule (e.g. an administrative rule) provides for nullity, the situation is much simpler, but if the rule is not present in the law, the civil court may declare the contract null and void even if the rule is intended to deprive the contract of its legal effect. It may also apply this sanction if the infringement has already been subject to another sanction (for example, an administrative sanction).

### 5. Source of the new general clause of the Civil Code

The Hungarian commentary literature usually refers back to the new general form of Section 6:95 HCC to the fact that it was intended to reintroduce the practice of former Curia (a decision from 1932) into the HCC.<sup>37</sup> However, the reference back to the 1932 court decision cannot be mechanical. The specific context should also be examined.<sup>38</sup> This is less emphasized in the commentary literature, so it is worth addressing the arguments on which the interpretation of the law at the time was based.

It is emphasized that this curia decision was made with the aim of unifying the jurisprudence, case-law, i.e. there were conflicting decisions in judicial practice. The facts of the cases usually concerned a contractual relationship in which one of the contracting parties would have had to have a public authority's authorization in order to conclude the contract. The absence of a public authority was regarded as a decisive factor in the case. The question was not clearly defined

---

<sup>34</sup> Wellmann György: A 6:95. § kommentárja. in: Petrik Ferenc (ed). *Az új Ptk. magyarázata V/VI. Kötelmi jog*, Budapest: HVG-orac, 2014. pp. 172-185.

<sup>35</sup> Vékás Lajos, Gárdos Péter (eds.) *A Polgári Törvénykönyv kommentárja*. Budapest: Complex, 2014. Sec 6:95. HCC commentary.

<sup>36</sup> For a summary critique see: Darázs Lénárd: *A jogszabályba ütköző (tilos) szerződések semmissége*. "Polgári Jogi Kodifikáció". 2008, Vol. 10, 5-6, pp. 14-26.

<sup>37</sup> Vékás Lajos (ed). *A Polgári Törvénykönyv magyarázatokkal*. Budapest: Complex, 2013, 571.

<sup>38</sup> I will raise the question of the extent to which the Great Depression in 1932 may have had an indirect impact. The reasons for the decision do not address this issue.

in the case-law. In essence, the main issue is the extent to which conduct contrary to an administrative rule governing a party (e.g. an administrative authorization) or the absence of an administrative authorization affects the contract. The solutions adopted in the case law of the time were as follows: (1) the contract is void because it was concluded for the purpose of a prohibited activity contrary to the law.<sup>39</sup> Either the contract is void because it is based on a criminal offence, because it contains a personal prohibition, and therefore a declaration of nullity is justified.<sup>40</sup> (2) the contract does not create a contract (*naturalis obligatio*), since the conclusion of the contract is a breach of the law because of the administrative authorization and no contract can be concluded as a result of a prohibited act.<sup>41</sup> (3) The contract is invalid because it constitutes a circumvention of the law.<sup>42</sup> (4) Unauthorized money-lending intermediary activity which constitutes a breach does not render the contract null and void because a condition for the conclusion of the contract by one of the parties has been breached and the contract as a whole will not be invalid.<sup>43</sup> The Curia's decision No. 53 from 1932 decided the above situation in such a way that, according to position (3), the validity of the contract is not affected unless the law expressly declares the transaction null and void, or unless the content of the transaction is contrary to other law or to morality, or unless it is open to challenge under the rules of private law.

According to the Curia, the invalidity of a contract is not automatically a legal consequence, even if the contract was concluded in violation of the law. In the context of the unification of the practice of keeping secrets, the Curia started from the fact that the conclusion of certain private law transactions on an industrial (regular) basis required some kind of official authorisation, without which the conclusion of the transactions constituted a criminal offence or a misdemeanour.<sup>44</sup> The Curia has listed several such activities, which it summarises as official authorisations, i.e. the reasoning does not differentiate in any way as to the exact type of authorisation: if any condition is required for the (regular) conclusion of the contract, the case-law applies. In accordance with the commercial law - private law dichotomy of the time, the Curia noted that the cases were predominantly commercial cases, but reflected newer legislation, which was no longer necessarily related to commercial transactions, so that the case-law generally examined the question of the contract of sale. The general rule of private law, according to the Curia, is that a contract which contravenes a statutory prohibition is void unless the law provides otherwise. This rule, however, applies to the specific contract, i.e. the content of the transaction concluded must be prohibited or illegal: the prohibition

---

<sup>39</sup> Curia P. IV. 2348/41/1927 Decision.

<sup>40</sup> Curia P. VII. 1951/23/1931 Decision.

<sup>41</sup> Debrecen Court of Appeal P. 1. 355/15/1930. decision, the Curia later reversed this decision and declared the contract null and void.

<sup>42</sup> Curia P. VII. 7920/17/1929. and Curia P. VII. 3897/10/1925 Decisions.

<sup>43</sup> Curia P. IV. 8599/37/1928 Decision.

<sup>44</sup> Curia No. 53. uniformity decision p. 142.

may relate to the fact that the law expressly excludes the conclusion of the contract or that the contract is for a service which is prohibited by law. Nullity only arises if the law does not provide otherwise: thus, for each prohibition imposed by a statute, it must be determined by reference to the interpretation of the relevant source of law whether the law intended to deprive the contract which is contrary to the prohibition of its transactional effect.<sup>45</sup>

The part of the argumentation of the Curia, which in our opinion provides the doctrinal justification for the answer to the legal question and examines the private law and administrative law justifications in relation to each other is noteworthy and should be highlighted for our topic. The Curia, in the case of contracts prohibited by their content, the legal system seeks directly to protect the goods themselves, the protection of which is in the interest of the public order<sup>46</sup>, and the private prohibition or penalty is a counteraction to the infringement of that interest, for example in the case of usurious transactions.<sup>47</sup> Such a rule "protects direct damage to property", whereas a trade licence is intended to "prevent the endangering of public or private interests".<sup>48</sup> The logic of the Curia's argument is that rules such as those in the case of a contract of sale are not intended to prohibit the transaction but to protect the security of market transactions.<sup>49</sup>

Nor, according to the Curia, can such a rule affect the legitimate interests of a third party acting in good faith who, when concluding a transaction, cannot exhaustively verify whether the contracting party has the necessary authorizations. According to the reasoning of the decision of Curia, this is also true in reverse, if the lack of authorization in itself would affect the validity of the transaction, the contractor without authorization would not be able to claim his rights under the contract concluded against the contracting party, which would be unfair to him.<sup>50</sup>

On the basis of the above, the Curia concluded that the court must examine whether, in the case of prohibitions on the use of industrial property, the prohibiting legislation also declared the contract concluded invalid. If not, then the transaction concluded is not in substance contrary to another law or to morality, or is voidable.<sup>51</sup> According to the Curia, this examination provides sufficient protection under private law.

## 6. The new general clause - judicial practice

Until the entry into force of the HCC (2014), judicial practice could not be considered uniform and, according to the literature, a kind of simplification was

---

<sup>45</sup> Curia No. 53. uniformity decision p. 143.

<sup>46</sup> Curia No. 53. uniformity decision p. 143.

<sup>47</sup> Curia No. 53. uniformity decision p. 143.

<sup>48</sup> Curia No. 53. uniformity decision p. 143.

<sup>49</sup> Curia No. 53. uniformity decision p. 144.

<sup>50</sup> Curia No. 53. uniformity decision p. 145.

<sup>51</sup> Curia No. 53. uniformity decision p. 145.



adopted. For example, in several cases, the case-law required that the sectoral legislation in question should establish the nullity of the contract, failing which civil law nullity could not be established on the grounds of conflict of laws.

The Civil Code sought to change this and to restore the previous practice of the courts. In the course of the research, I examined in which cases since the entry into force of the Civil Code the provisions of the Civil Code have been applied. 6:95 of the Civil Code has been applied and in which cases the court has applied the rule that allows it discretion in determining nullity.

It should be stressed that a dispute concerning the invalidity of a contract does not identify only one ground for invalidity, but several. Thus, each ground of invalidity competes with the others in the course of litigation. The Civil Code. 6:95 in the sample of cases I have examined and in cases that have been finally settled, there were about 300 court cases on the merits.<sup>52</sup> Of these, the number of cases in which discretion as a legal interpretation tool is used is below 10. I consider two of these to be important because they may be of an orienting nature for the jurisprudence.

### **6.1 The contract limits the application of the provision of the act**

The main issue in the dispute was whether a contract can validly limit a statutory right, i.e. whether a contractual provision that prevents the enforcement of a provision of the act can be validly excluded.

The case was a dispute between a political party and the body responsible for public service news.<sup>53</sup> A contract was concluded between the two parties under which the party's announcements would be published by the news agency. According to the legal rules<sup>54</sup> governing the dispute, the body performing the functions of a news agency is required by the relevant law to contribute to the transmission of its public interest announcements to the print and electronic press, to provide regular and factual information on the activities of political parties and to publish official announcements in this context. The specific legal relationship is a contract between the party and the news agency, which is renewed annually. The contract included a clause that the communications would be published in full without alteration or editing, but that the communications must not infringe the

---

<sup>52</sup> Hungarian court judgments are freely searchable at <https://eakta.birosag.hu/anonimizalt-hatarozatok>. Here I searched for a legal section reference.

<sup>53</sup> Curia Pfv.VI.20.454/2019/4., in second instance Budapest Court of Appeal Gf.40.217/2018/6/II., in first instance Budapest Regional Court G.42.345/2017/18.

<sup>54</sup> Act CLXXXV of 2010 on Media Services and Mass Media Sec. 101. (1) The public media service provider shall be subject to the provisions of Act Sec 83. (...) c) contribute to the transmission of public interest announcements of state bodies, other organizations and natural persons to the printed and electronic press, d) provide regular and factual information on the activities of parties represented in Parliament, other parties, significant civil society organizations, and on the activities of the Government, public administration bodies, local authorities, courts, prosecution offices, and publish official announcements in this context.

privacy rights of others. The dispute concerned the fact that the news agency had on several occasions refused to publish the party's statement because it was likely to infringe personal rights.<sup>55</sup> According to the applicant, this provision of the contract was unlawful because the law governing the legal relationship required that the communications must be published without alteration or editing. According to the defendant, as a news agency providing a public service media service, it must pay particular attention to the rights of personality in accordance with the law, the contractual and general conditions of contract and the Public Service Code applicable to it. The dispute was whether the contractual provision in the law concerning publication without alteration or editing, which allows the possibility of refusing to publish a communication on the grounds of infringement of personality rights, was unlawful in breach of the law.

The reasoning of the courts was unanimous on this point, and the Curia, both at first instance and on appeal, and in the review, came to the same conclusion. The judgments are based on the Section 6:95 of HCC, the resolutions held that a contractual relationship had been established between the statutory news agency and the applicant for the purpose of ensuring publication. The contract was also governed by the mandatory legal provisions, although the statutory provisions did not impose a contractual obligation, but set out the duties of the news agency. According to the HCC, a contract is void if it is contrary to legal provision and, even if the contract is void *expressis verbis*, the contract will be void if the purpose of the legal provision is to have no legal effect of the contract. Based on the fact that, in the exercise of the function of news agency, it is a factual requirement to publish a communication, the courts have held that this activity includes the right to edit. The contract gives the news agency an editorial right, but the Media Act, the Public Service Code, aims at factual information and the protection of individual rights, and therefore does not preclude a contractual provision which regulates a specific right to do so. In the light of the above, the Court finds that the applicant's argument is not well founded.<sup>56</sup>

## 6.2 Contracting in the absence of an official authorization

In the context of the invalidity of loan agreements, the Curia has applied the HCC.<sup>57</sup> The defendants in the case were engaged in the business of granting loans and lent large sums of cash to persons in financial distress who had difficulty in obtaining credit. The loans were subject to interest at a rate substantially in excess of that charged by financial institutions engaged in this type of short-term personal lending activity, but which is normal in the relationship between individuals. The applicants seek a declaration that the contract is void on the

---

<sup>55</sup> Decision of Budapest Regional Court p. 3.

<sup>56</sup> Decision of Budapest Regional Court pp. 7-10., Decision of Budapest Court of Appeal pp. 4-5.

<sup>57</sup> Curia decision Pfv.VI.22.123/2015/12., in second instance Gyula Regional Court Pf.25644/2014/23 decision, in first instance Orosháza District Court P.20023/2013/65.

ground that the defendants have engaged in unauthorised financial activities because they are not duly authorised to carry out such activities and that the contracts are therefore prohibited contracts (illegal) and therefore null and void. According to the reasoning of the judgment of the court of first instance, a contract which infringes mandatory rules of other branches of law is only invalid in civil law if the law of the other branch expressly states that the infringement of the legal rule in question also renders the contract invalid.<sup>58</sup> In the absence of such an express legal provision, it is only by interpreting the purpose of the law in question that it can be established that it did not intend to permit the validity of the contract in addition to the sanction of the other legal branch, i.e. that the purpose was to prohibit the legal effect which the contract was intended to achieve. According to Article 3 of Act CXII of 1996 on credit institutions and financial undertakings, the activities listed in the scope of financial services, such as the commercial granting of a loan, may be carried out only with a licence. However, what is material with regards to the invalidity of the contracts is that the authorisation is not necessary for the conclusion of the contracts but for the commercial pursuit of the activity, and the law does not provide for a specific sanction for the nullity of agreements concluded without authorisation. The court of first instance therefore held that the contracts could not be found to be illegal.

The Curia's position differed. The Curia has already stated its position that it is not correct to hold that, where a civil law contract entails a breach of another rule of law, the contract is void only if the law expressly makes the breach subject to that sanction. This type of interpretation of the law does not follow from the old Civil Code and would result in a breach of the law being without civil law consequences. Accordingly, if the contract infringes a mandatory provision of the law governing civil law relationships which substantially regulates the procedure for the formation of the legal relationship, the right of representation, the content, the subject matter of the contract or other essential circumstances, the contract may be declared null and void, even if the law itself did not expressly attach this sanction to the infringement.<sup>59</sup>

The Curia emphasised that the HCC specifically states that a contract is null and void even if it is subject to other legal consequences, if the legal regulation specifically states this or if the purpose of the act is to prohibit the legal effect intended by the contract. In order for the court to decide on this, the relevant provision of the law must be examined. A mandatory provision governing the legal relationship between the parties does not generally prohibit a person from making a loan to another person or persons without the authorisation of the authorities, nor does it preclude the conclusion of several such loan agreements, even with several persons. According to the Curia, the activity is prohibited only if it is carried out in a commercial manner because, in the Curia's view, it is conduct which is contrary to public policy which the law seeks to protect and which may lead to serious harm

---

<sup>58</sup> This is considered in the literature as a *contra legem* interpretation, for example.

<sup>59</sup> Decision of Curia Pfv.VI.22.123/2015/12. p. 13.

to the public, social and private interests of the public authorities. The Curia emphasised that such activity is also a criminal offence. According to the Curia, such contracts are therefore prohibited. The legislation would not achieve its purpose, and would even be meaningless, if, in the case of such activity by anyone, the overall legal effect were to be that the perpetrator would be penalised, but the contracts would continue to be valid and could be enforceable even in court, because civil law would attach to them a binding legal effect. The Curia took into account the fact that financial activities have significant economic and social consequences and pointed out that recent events relating to lending and financial investments clearly show that even a seemingly detailed and elaborate legal regulation and control system is not always sufficient to ensure proper management and control of such activities and to avoid serious social and economic consequences (the judgment was delivered in November 2016). The Curia also took into account that both parties were aware that they were not licensed to carry out the activity and therefore could not be considered to be acting in good faith, which supports the application of invalidity.

The Curia therefore applied a reverse logic than the judicial reasoning of the former resolution 1932. The exceptional nature of the prohibited contract is reversed here. If we were to apply the case of the Curia in 1932, the opposite would apply here and the nullity of the contract would not be established. On the other hand, the Curia considered that the economic importance of the contract and the protection of financial relations in general justified a declaration of nullity.

### **6.3 Private sanction instead of public sanction<sup>60</sup>**

The judgment states that the defendant's dead mother was admitted to a nursing home. The nursing home was operating without an official licence. In the nursing home, the defendant's mother concluded a maintenance contract with the plaintiff. The plaintiff is the child of the person running the nursing home. Under the maintenance contract, the plaintiff was entitled to use another person to fulfill his contractual obligations. The claimant did not care for the maintenance creditor in his own home and not himself. The actual care was provided by the nursing home and its manager.

In consideration of the obligation under the maintenance contract, the defendant's mother transferred to the plaintiff the exclusive ownership of her property. Following the conclusion of the maintenance contract, the defendant's late mother's health deteriorated and, despite appropriate medical treatment, did not improve and she died.

Her estate was transferred by the notary to the defendant as a legal succession. The plaintiff brought an action for registration of the property, which he claimed under the maintenance contract.

The main issue in the dispute is that the plaintiff's mother operated a social

---

<sup>60</sup> Decision of Debrecen Regional Court 5.Pf.20.464/2022/13, Decision of Debrecen District Court P.20371/2020/63.

care institution without a licence, whereas the establishment and operation of such institutions is an activity requiring a licence from the public authorities (Decree No. 1/2000 of 19 December 2000 on the professional duties and operating conditions of social institutions providing personal care). Pursuant to Article 6(10) of the regulation, a person employed in an institution providing such services (and his close relative and partner) may not conclude a maintenance, annuity or inheritance contract with the person receiving care during the period of care. Nor may they conclude such a contract within one year after the termination of the period of benefit. According to the court of second instance, it is established that the institution where the defendant's mother was placed was in fact a home for the elderly.

In the court's view, the question of law is whether the prohibition on contract applies where not all the conditions for running a social institution are met. The court therefore held that the dispute "must be approached not from the point of view of the public law (social administration) status of the institution, but from the point of view of the personal circumstances of the person receiving the care." The court also interpreted the grounds for the prohibition and found that the prohibition under the Decree exists because the interests of the persons cared for must be protected against the persons at their mercy. The court held that all the conditions for the prohibition were met and that the contract was therefore in accordance with the Civil Code. 6:95 of the contract is void. The court also pointed out that "the breach of the implied provision in Article 6(10) of the R. invalidates the contract, despite the fact that the law does not expressly sanction the breach. It is a provision the content of which necessarily implies that failure to comply with it constitutes a manifest obstacle to the valid conclusion of the contract."

## 7. Conclusions

We agree with the following statement in the international literature: „*Current trends in European systems are moving in the direction of using general clauses as a means of achieving solutions characterized by a fair balance between the interests at stake and the proportionality between circumstances and remedies. The general clause on illegality should follow this course as to find the straightforward pathway that had been lost.*”<sup>61</sup>

European contract law handles the invalidity of illegal contracts as a group, and different legal systems differ in how they regulate the grounds for invalidity. The Hungarian legislation opens the way for the interpretation of the law by the courts to render a contractual provision invalid even in the absence of an express prohibition. The number of decisions reaching such a result is currently not very high. The conclusion of the study is that judicial jurisprudence is capable of sanctioning prohibited conduct. The general clause provides an appropriate tool for this purpose. In further decisions, the court may reach similar results as in the

---

<sup>61</sup> Rossella, Esther Cerchia. *A Comparative Viewpoint on Illegal Contracts: In Favor of Flexibility and Proportionality*. "Global Jurist", 2021, vol. 21, no. 2, pp. 447-479, p. 479.

above cases in several cases. In this way, a judgment can provide quick and effective protection against an unfavourable contractual situation.

### Bibliography

1. Auer Ádám, *Is the Authorisation of the Conclusion of a Contract an Interim or a Permanent Measure?* “European Procurement and Public Private Partnership Law Review” 2021, Vol. 16, 4 pp. 295-304.
2. Beale, Fauvarque-Cosson, Rutgers, Tallon, Vogenauer (eds.): *Cases, Materials and Text on Contract Law*. Oxford: Hart, 2018, p. 663.
3. Beater, Axel: *Der Gesetzesbegriff von § 134 BGB - zur Anwendbarkeit der Vorschrift auf Verfassungs- und Satzungsnormen, allgemeine Rechtsgrundsätze und Gesetzesumgehungen*. “Archiv für die civilistische Praxis” 1997, Vol. 197, 5, pp. 505-528
4. Beatson, Burrows, Cartwright: *Anson’s Law of Contract*. Oxford: Oxford University Press, 31<sup>st</sup> edition, 2020. 410., 413-420.
5. Cerchia, Rossella, Esther: *A Comparative Viewpoint on Illegal Contracts: In Favor of Flexibility and Proportionality*. “Global Jurist”, 2021, vol. 21, no. 2, pp. 447–479.
6. Darázs, Lénárd: *A jogszabályba ütköző (tilos) szerződések semmissége*. „Polgári Jogi Kodifikáció” 2008, Vol. 10, 5-6, pp. 14-26.
7. Kemenes István: *A szerződés érvénytelenségének egyes kérdései a gazdasági szerződéses gyakorlatban*. „Polgári Jogi Kodifikáció” 2002, Vol. 1., 4. pp. 7-27.
8. Kiss Gábor, Sándor, István: *A szerződés érvénytelensége*. Budapest: Hvg-orac, 2014.
9. Kötz, Hein. *Europäische Vertragsrecht* Tübingen: Mohr Siebeck, 2015, p. 178.
10. Prentice, D.D.: *Illegality and Public Policy*. in: Beale, H. *Chitty on Contracts*. Volume I. London: Sweet & Maxwell, 2021, pp. 1324-1325.
11. *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) II.-7:302 and comments* (online). Available: [https://www.law.kuleuven.be/personal/mstorme/european-private-law\\_en.pdf](https://www.law.kuleuven.be/personal/mstorme/european-private-law_en.pdf) (15 June 2023).
12. Vékás Lajos (ed.). *A Polgári Törvénykönyv magyarázatokkal*. Budapest: Complex, 2013
13. Vékás, Lajos. *Szerződési jog – Általános rész*. Budapest: Elte Eötvös Kiadó, 2016
14. Vékás, Lajos & Gárdos, Péter: *A Polgári Törvénykönyv Kommentárja*. Budapest: Complex, 2014. Commentary on Sec 6:88.
15. Wellmann, György. 6:95. § kommentárja. in: Petrik (ed). *Az új Ptk. magyarázata V/VI. Kötelmi jog*, Budapest: HVG-orac, 2014. pp. 172-185.