



Detailed analysis of the Transitional Act's provisions on special legal order and the state of medical crisis, and on other provisions concerning fundamental rights and the rule of law

30 July 2020

Special legal order was terminated in Hungary **as of 18 June 2020**, and so, formally, the Government's extraordinary powers were withdrawn as well. With the termination of the state of danger, the much-criticized¹ Authorization Act² was repealed, along with the close to 150 government decrees that were adopted under the state of danger. However, **we cannot bid farewell to the notion of the Government ruling by decree** even now, **after the ordinary operation of the legal order have been restored**, since the Government has preserved important elements of its extraordinary powers also for the ordinary legal order, with a reference to the state of "epidemiological preparedness". Furthermore, even though the government decrees that were issued under the state of danger, partly using the powers granted by the Authorization Act, were repealed as well, the Government ensured that many of the provisions originally included in these decrees continue to apply. Thus, the **nature of exercising political power**, namely using, abusing and amending legal rules and various legal institutions with the aim of constantly widening the powers of the executive branch, **will not change in the upcoming months**, but will simply be exercised within a new legal framework, with reference to the "epidemiological preparedness". This **continuity is ensured by the Transitional Act**,³ adopted by the Parliament on 16 June.

There are of course provisions among the more than 400 articles of the Transitional Act that are to be welcomed and seem to be indeed transitional and necessary, with a view to the experiences with containing the virus and restrictions imposed earlier. These include for example that

- political rights suspended by the Authorization Act are restored instantly, or within a short timeframe;
- it remains possible for parties acting without a legal representative to submit their claims or counter-arguments to the court not on the respective standardised forms;⁴
- the various application processes for judicial and prosecutorial positions shall be continued without delay, along with the procedures within the court system and concerning the judges (e.g. disciplinary proceedings);⁵
- courts may grant a stay for a maximum of six month for the execution of punishments with a view to epidemiological measures or other reasons related to the state of medical crisis;⁶

¹ Amnesty International Hungary – Eötvös Károly Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee: *Unlimited power is not the panacea – Assessment of the proposed law to extend the state of emergency and its constitutional preconditions*, 22 March 2020, <https://www.helsinki.hu/en/unlimited-power-is-not-the-panacea/>

² Act XII of 2020 on the Containment of the Coronavirus

³ Act LVIII of 2020 on the Transitional Provisions related to the Termination of the State of Danger and on Epidemiological Preparedness

⁴ Transitional Act, Article 140(1)

⁵ Transitional Act, Articles 99-104

⁶ Transitional Act, Article 236(3)

- it is obligatory to place detainees in a two-week quarantine upon admission to a detention facility.⁷

The Transitional Act contains some rules that, even though they are not transitional in nature and their application is not linked to a special legal order or a state of medical crisis being in place, do not give rise to constitutional concerns. Such rules include for example the provision that

- the plenary sessions and the panel sessions of the Constitutional Court may be held also by using electronic communications means, on the basis of the decision of the President of the Constitutional Court.⁸

At the same time, the Transitional Act introduces amendments and novelties that endanger the exercise of fundamental rights, or give rise to severe constitutional concerns for other reasons. The **most prominent** among these are the **amendments related to the state of danger**, which is a form of special legal order expressly included in the Fundamental Law, and the **wide expansion of the institution of the state of medical crisis**. Furthermore, we deem problematic, among others,

- certain provisions pertaining to the operation of the Constitutional Court;
- the unclear wording in relation to exercising the right to freedom of assembly;
- several provisions affecting data protection and the freedom of information;
- the discriminatory nature of fines imposed for violating the rules of home quarantine;
- the extension of the rights of the Military Forces;
- maintaining state control over a private company;
- certain labour law rules;
- some of the changes pertaining to the criminal procedure and the penitentiary system; and
- the transformation of the asylum system.

Amendments related to the state of danger and the state of medical crisis

The Transitional Act amends crucial provisions of the Health Care Act⁹ and the Disaster Management Act:¹⁰ the provisions affected by the amendments establish the general framework for the Government's possible actions in the case of a human epidemic. The amendments in question result in the strengthening of the Government's powers both under a special legal order (*in a state of danger*) and under the ordinary legal order (*in a state of medical crisis*).

The Transitional Act¹¹ practically copies and inserts the Authorization Act's much-criticized "carte blanche mandate" into the Disaster Management Act, and so widens the Government's possible scope of actions significantly, should a special legal order be introduced again in the future. According to the Fundamental Law,¹² in a state of danger the powers of the executive are constrained by a cardinal act adopted by the Parliament, i.e. by another branch of power. The logic behind this rule was disrupted by the Authorization Act when it authorized the Government¹³ to decide on suspending the application of Acts of Parliament, derogating from the provisions of Acts of Parliament, and on taking other extraordinary measures beyond what is provided for by the Disaster Management Act, i.e. beyond the predetermined statutory constraints in a state of danger (i.e. in a special legal order). Through this provision, the Authorization Act extinguished an important safeguard included in the

⁷ Transitional Act, Article 237(1)

⁸ Transitional Act, Article 355

⁹ Act CLIV of 1997 on Health Care

¹⁰ Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts of Parliament

¹¹ Transitional Act, Article 353

¹² Fundamental Law of Hungary, Article 53(2)

¹³ Authorization Act, Article 2(1)

Fundamental Law. The Transitional Act also does away with this constitutional guarantee when it includes in the Disaster Management Act that the Government may, in addition to the measures explicitly listed in the Disaster Management Act, take further, not specified measures for epidemiological reasons, *"in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy"*. This means that if in the future the Government decides to introduce a special legal order once again due to the epidemic, it will be able to act without clearly defined statutory limits – this time, on the basis of the Disaster Management Act, without any separate authorization by an Act of Parliament. According to the reasoning attached to the Transitional Act, the amendment sets forth as a guarantee that the Government shall exercise these admittedly wide powers in accordance with the requirements of necessity and proportionality. However, the effectiveness of this guarantee is questionable, and not only because of the ever-shrinking independence of constitutional institutions in Hungary, but also because this guarantee is not ensured by the Fundamental Law of Hungary as a higher-level law: the Fundamental Law sets out that under a special legal order fundamental rights (with a few exceptions) may be suspended or restricted beyond what would be normally allowed by the principles of necessity and proportionality.²⁴

	How long are government decrees in force?	What can the Government issue a decree about?
State of danger before the Authorization Act	For 15 days – after that, they remain in force only if the Government receives an authorization from the Parliament to extend their effect.	<ul style="list-style-type: none"> About the issues listed in the Disaster Management Act.
State of danger under the Authorization Act	Until the termination of the state of danger (regarding which the Government has full discretion).	<ul style="list-style-type: none"> About the issues listed in the Disaster Management Act. In addition, it may suspend the application of any Act of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.
State of danger under the Transitional Act	For 15 days – after that, they remain in force only if the Government receives an authorization from the Parliament to extend their effect.	<ul style="list-style-type: none"> About the issues listed in the Disaster Management Act. In addition, it may suspend the application of any Act of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.

²⁴ Fundamental Law of Hungary, Article 54(1)

The Transitional Act widens the Government's powers not only in a future special legal order, but, by amending the Health Care Act, it also widens the scope of measures the Government can take during a state of medical crisis, which can be introduced in an ordinary legal order. The gravest problem with the provisions amending the Health Care Act is that they widen the usual means of exercising power under a special legal order, applied exceptionally and temporarily, and make them part of the operation of the ordinary legal order, while significantly restricting the possibility of parliamentary control. According to the provisions of the Transitional Act, the Government may adopt measures severely restricting individual freedoms without introducing a special legal order and without constitutional authorization, via decrees, without involving the Parliament in any way. While in the case of a state of danger, the Fundamental Law ensures at least the minimal parliamentary control, the Transitional Act does not provide for this formal constitutional guarantee in a state of medical crisis. Government decrees adopted in a state of danger stay in force for only 15 days as a main rule, and may be extended beyond that on the basis of authorization from the Parliament.¹⁵ In contrast to that, governmental measures adopted in connection with the danger of an epidemic in a state of medical crisis (replacing the special legal order) may stay in force for a long time, until the end of the medical crisis, without parliamentary approval.

As we know, after the state of danger, i.e. the special legal order was terminated, the Government introduced a state of medical crisis (and with that, epidemiological preparedness).¹⁶ The state of medical crisis has been included in and has been regulated by the Health Care Act¹⁷ already before the Transitional Act was adopted, but the Transitional Act amended the existing legal framework in a significant way. Although the definition of the state of medical crisis has been changed only slightly, and the Transitional Act upholds the list of circumstances that may serve as a basis for introducing a state of medical crisis, which is wide as it is, at the same time the Transitional Act adds a very vague point to that list when setting out that a state of medical crisis may also be introduced due to "other epidemiological dangers".

The Government may declare a state of medical crisis upon the motion of the responsible Minister, which motion shall be based on the proposal of the Chief Medical Officer,¹⁸ and so, practically, the Government will decide about introducing a state of medical crisis alone, without the involvement of other political actors or potential institutional balances. The Transitional Act sets out that the state of medical crisis may initially last for a period of six months, but may be extended indefinitely after that if necessary.¹⁹ Therefore, the significance of the 6-month time limit is low, and a similar situation may occur as the one created by the repealed Authorization Act, where the Government has discretion for a non-specified period of time to adopt measures via decrees that regulate the fundamental aspects of life of and significantly restrict individual freedoms. Accordingly, the "extraordinary operation" characteristic to the state of medical crisis may become the main rule, and an exceptional situation can become permanent, meaning that in many regulatory areas the traditional way of political decision-making compatible with the rule of law, i.e. legislation by the Parliament, may be replaced by the executive power's rule by decree.

The Transitional Act lists the measures the Government may take via decrees in a state of medical crisis.²⁰ A part of these measures have been included in the Health Care Act already before the Transitional Act, under the title *miscellaneous epidemiological measures*.²¹ If there was a danger of an

¹⁵ Fundamental Law of Hungary, Article 53(3)

¹⁶ Government Decree 283/2020 (VI. 17.) on Introducing Epidemiological Preparedness

¹⁷ Health Care Act, Article 228(2)

¹⁸ Transitional Act, Article 313

¹⁹ Transitional Act, Article 314

²⁰ Transitional Act, Article 318

²¹ Health Care Act, Article 74

epidemic, the rules in force made it possible to restrict passenger and freight traffic and personal contact between people, and to restrict or prohibit visiting certain health care facilities, the operation of institutions, and events. Due to their abstract formulation, these rules allowed for a wide restriction of fundamental rights, potentially effecting citizens' freedom of action and their freedom of movement, and, because of the not adequately clear wording of the law, even their freedom of assembly. Thus, the danger of restricting certain freedoms have been already inherent in the original text of the Health Care Act, but the Transitional Act widens the scope of measures that can be ordered in a state of medical crisis.

Several measures posing a danger to fundamental rights that were adopted in the state of danger and now have been repealed can be maintained due to their inclusion in the Health Care Act as potential measures. Amongst others, the Government can now establish in a state of medical crisis the order of accessing health care services, and by maintaining the hospital commander system,²² it may continue to subordinate hospitals and institutions providing care for the elderly to law enforcement agencies controlled by the Government. Furthermore, the Transitional Act maintains certain provisions introduced during the special legal order that raise data protection concerns: for example, the Operational Group (a body created during the state of danger) continues to have very wide data request powers.

The Transitional Act leaves the scope of the potential measures to be introduced via decrees open when prescribing that in a state of medical crisis the Government may order "*epidemiological measures that are provided for by an Act of Parliament*" and may adopt "*other provisions specified by an Act of Parliament*". Thus, the former blanket authorization, providing extensive powers to the Government, is at the Government's disposal both in the ordinary and in a special legal order. The fundamental difference between the two situations is that the termination of the special legal order and introducing the state of medical crisis instead resulted that under the latter, fundamental rights shall be subject clearly to the standards that provide a higher protection for rights, i.e. standards flowing from the so-called necessity and proportionality test.

	How long does it last?	How long are government decrees in force?	What can the Government issue a decree about?
State of danger according to the Transitional Act <i>(Rules in the Fundamental Law and the Disaster Management Act)</i>	It shall be terminated by the Government if the conditions for its declaration no longer prevail.	For 15 days – after that, they remain in force only if the Government receives an authorization from the Parliament to extend their effect.	<ul style="list-style-type: none"> • About the issues listed in the Disaster Management Act. • In addition, it may suspend the application of any Act of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.

²² The system of hospital commanders was introduced under the state of danger by Government Decree 72/2020. (III. 28.).

<p>State of medical crisis according to the Transitional Act (<i>Rules in the Health Care Act</i>)</p>	<p>Initially for six months, but may be extended indefinitely if the conditions for ordering it still prevail.</p>	<p>Until the end of the state of medical crisis.</p>	<ul style="list-style-type: none"> • About the issues listed in Article 232/D (1) of the Health Care Act (as introduced by Article 318 of the Transitional Act). • In addition, the Government may “order epidemiological measures that are provided for by an Act of Parliament”, and adopt “other provisions specified by an Act of Parliament”.
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The operation of the Constitutional Court

Similarly to the Authorization Act, the Transitional Act also sets out that during a period of special legal order the President and the Secretary General of the Constitutional Court shall provide for the continuous operation of the Constitutional Court, and that the President of the Constitutional Court may permit derogation from the rules of procedure of the Constitutional Court.²³ The Transitional Act fails to set forth any limitation in the latter regard, which gives rise to concerns especially in light of the fact that in an order²⁴ issued on 31 March 2020 on the basis of the Authorization Act, the President of the Constitutional Court derogated from the ordinary rules of procedure in a way that restricted the space for debate among Constitutional Court justices, and made it possible for the Constitutional Court to reject constitutional complaints with even shorter reasoning than before.²⁵ The Transitional Act allows the President of the Constitutional Court to issue such or a similar order again in a future state of danger.

There is also an important shortcoming in the Transitional Act with regard to the operation of the Constitutional Court. In a special legal order, and so in a state of danger, due to the Government’s special mandate, constitutional oversight performed by the Constitutional Court must be strengthened. That is why we proposed earlier in relation to the Authorization Act²⁶ that jurisdictional and procedural preconditions are put in place to ensure that the Constitutional Court is able to swiftly and effectively assess whether special legal order decrees are constitutional. One way for that would have been to set out a deadline for the Constitutional Court to adjudicate related cases, or to extend the scope of persons eligible to initiate the procedure of the Constitutional Court in relation to these government decrees. These considerations apply to the state of medical crisis introduced by the Transitional Act as well. However, the Transitional Act does not include any provisions that would facilitate the swift and effective constitutional review of government decrees adopted in a state of danger or in a state of medical crisis.

²³ Transitional Act, Article 356

²⁴ The order is available here in English: <https://hunconcourt.hu/announcement/the-state-of-danger-affects-the-operation-and-the-responsibility-of-the-constitutional-court-as-well>.

²⁵ See in more detail in Hungarian here:

https://helsinkifigyelo.blog.hu/2020/04/20/vita_es_indokolas_nelkuli_elutasitasokat_tett_lehetove_az_alkotmanybirosag_elnoke.

²⁶ Amnesty International Hungary – Eötvös Károly Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee: *Unlimited power is not the panacea – Assessment of the proposed law to extend the state of emergency and its constitutional preconditions*, 22 March 2020, <https://www.helsinki.hu/en/unlimited-power-is-not-the-panacea/>

Freedom of assembly

The terminology applied by the decrees issued under the state of danger differentiated between “events” and “assemblies”: the former category encompassed events in the area of leisure, entertainment, culture, etc., while the latter covered the expressions of opinion in relation to public affairs, as understood by the law on the freedom of assembly. The Transitional Act allows the Government to introduce, in a decree, special rules for attending events.²⁷ If the legislator maintains the distinction between events and assemblies as described above, this provision of the Transitional Act does not raise concerns in terms of exercising political rights.

In a similar manner, the Transitional Act sets out that in a state of medical crisis the Government may, via decrees, restrict or prohibit the attending or organizing of events, and performing activities that may facilitate the spread of the epidemic.²⁸ This provision creates legal uncertainty, because the wording is not clear enough, which provides ample possibility for the Government to restrict political participation rights, freedom of speech, freedom of expression and freedom of assembly, if it wishes to interpret the above provision broadly.

Problems concerning data protection and freedom of information

The Transitional Act lifts²⁹ the suspension of the data protection rights as provided for by the GDPR³⁰ and the Hungarian law on informational self-determination and freedom of information³¹ (hereafter: Privacy Act), introduced via a decree³² under the state of danger. The Transitional Act reiterates the provision of said decree that set forth that the suspension of the rights affected shall be lifted with the end of the state of danger. It remains a question though why the Transitional Act failed to regulate the issue of deadlines applicable in remedy procedures that were suspended until the end of the state of danger by the government decree. However, it is not likely that this will lead to problems in practice, since the government decree was repealed, and the decree itself contains the respective provision as well.

At the same time, provisions of the Transitional Act on freedom of information requests uphold and establish several rules that affect freedom of information negatively. These include the provisions maintaining the 45-day, or, when extended, 90-day deadlines for responding to freedom of information requests, that were established due to the state of danger in a decree. Therefore, further delays are to be expected in responding to the freedom of information requests submitted during the state of danger. This is detrimental to the freedom of information, even though the Transitional Act sets out that requests shall be complied with within the shortest possible time, and they have to be complied with within 15 days after the termination of the state of danger at the latest.

The problem is exacerbated by the fact that the Transitional Act, without any acceptable or logical explanation, puts in a more disadvantageous situation those in the case of whom the 15-day deadline as originally included in the Privacy Act as a main rule has already expired (and who have been waiting for the release of the data requested for a longer period of time) than those in the case of whom the deadline has not expired yet. In the case of the former category, the Transitional Act maintains the

²⁷ Transitional Act, Article 86

²⁸ Transitional Act, Article 318

²⁹ Transitional Act, Article 265

³⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

³¹ Act CXII of 2011 on Informational Self-Determination and Freedom of Information

³² Government Decree 179/2020. (V. 4.)

deadlines extended due to the state of danger, while in the case of the latter category it provides for complying with the 15-day deadline (as originally included in the Privacy Act as a main rule).³³

By prescribing further (potential and unjustified) waiting periods before freedom of information requests are complied with, the Transitional Act also puts those in a disadvantageous situation in an unjustified manner who were called upon to pay a fee to the data controller for the data to be released and who already paid the fee during the state of danger, and so have already taken all steps necessary to access the public interest data requested.³⁴

Thus, in certain scenarios the Transitional Act upholds the extended deadlines in a way affecting the time period after the state of danger, even though these extended deadlines were established exactly because of the state of danger.

Data protection concerns in connection with the powers of the Operational Group

The Transitional Act sets forth that the Operational Group has the right to request data from other actors, and establishes the scope of stakeholders who have to comply with these requests and the data that can be requested in a wide manner that is unacceptable in a state governed by the rule of law. According to the Transitional Act, the Operational Group may request data from any organ, legal entity or organisation without a legal entity in connection with preventing, getting acquainted with, exploring, or preventing the further spread of a circumstance substantiating a state of medical crisis, and in order to organise the coordinated fulfilment of tasks by state organs, and these requests shall be complied with without delay and free of charge.³⁵ As compared to the rules adopted under the state of danger,³⁶ it is a positive addition from the aspect of data protection that according to the Transitional Act the Operational Group is entitled to request data only to the extent that is essential for achieving the purpose above, taking into account the principle of data minimisation as well.³⁷ However, this guarantee can be effective only if an independent data protection authority ensures compliance with the law. From a fundamental right perspective, it is problematic that the scope of subjects obligated to provide data is completely unlimited. It is a similarly grave regulatory anomaly that the scope of data that can be requested is not defined, thus, it is of unrestricted scope. The Transitional Act prescribes not only that the data suitable for the identification of the persons referred to and those who came in contact with them shall be provided, but also that a wide scope of their personal data shall be shared. Furthermore, the Operational Group can access the data of the so-called e-Health Care Cloud Hosting Service, including its health care database filled with personal data, without any meaningful limitation.³⁸

Data protection concerns in connection with the official home quarantine

The Transitional Act adds to the already existing powers of the police related to searching for and taking into short-term arrest affected persons the power of monitoring compliance with home quarantine rules, with a view to the related provisions introduced during the state of danger and the experiences regarding their application.³⁹ Furthermore, if the epidemiological authority involves them in the "fight against epidemics", the police may request personal data from any data controller in the interests of performing epidemiological authority tasks, and stores the data in a registry. When

³³ Transitional Act, Article 266(1)

³⁴ Transitional Act, Article 266(3)

³⁵ Transitional Act, Article 317

³⁶ Government Decree 93/2020. (IV. 6.), Government Decree 46/2020. (III. 16.)

³⁷ Transitional Act, Article 317

³⁸ Transitional Act, Article 317

³⁹ Government Decree 81/2020. (IV. 1.)

the epidemiological measure is concluded, the data shall be deleted from the registry.⁴⁰ Instead of referring to the fight against epidemics in general, it should have been necessary to set out explicitly that the police is entitled to request personal data only in connection with and in the framework of the official procedures conducted by the epidemiological authority, and only to the extent strictly necessary to carry out the procedure, even if this limitation can be derived from the text of the Transitional Act.

The discriminatory nature of fines imposed for violating the rules of home quarantine

The Transitional Act reiterates the content of the government decree⁴¹ that made it possible for the epidemiological authority to order that adults with full legal capacity in official home quarantine are to be monitored by a software, provided that the affected person consents and the technical preconditions are complied with.

Due to amending the Health Care Act, electronic monitoring remains possible, and the police will continue to carry out the monitoring,⁴² using an application installed on smartphones, the so-called Home Quarantine System. Even though the Transitional Act, similarly to the earlier government decree, emphasizes that using the software is voluntary, in reality the law “punishes” those who do not want or are not in the position to opt for electronic monitoring by applying disproportionately stricter sanctions in their case. If someone does not opt for electronic monitoring, they will be subject to enhanced police control, and if they violate the rules of the home quarantine, they may receive a fine ranging from 5,000 to 500,000 HUF, and the police may not give them an oral warning instead of a fine.⁴³ As opposed to that, if someone consents to the electronic monitoring, but violates the rules, the fine may range from 3,000 to 300,000 HUF, and the police may give them an oral warning instead as well.⁴⁴ Consequently, it is clearly more advantageous and cheaper to consent to the electronic monitoring, and so voluntariness in this regard is only illusory. Because of that, the rules have a disadvantageous effect on those who do not have smart devices suitable for electronic monitoring, resulting in unjustified differentiation, for example based on financial status: for those who do not have a smart device, enhanced police control and a higher potential fine remains the only option. Albeit the reasoning attached to the Transitional Act refers to “positive practical experiences” in this regard, according to the Government’s report of 3 June 2020, out of the 11,000 persons who were in official home quarantine at that time, only 880, that is, 8% chose the electronic monitoring.⁴⁵

It is a positive development that while the government decree allowed the authorities to process the data of the person affected for 60 day after the home quarantine was lifted, the Transitional Act prescribes that the data processed shall be deleted at once when the quarantine is lifted.⁴⁶

Extending the rights of Military Forces

The Transitional Act supplements the Defence Act⁴⁷ with new provisions applicable in a state of danger and in a state of medical crisis. These provisions radically widen the possibility to apply military force, even with the right to use of firearms. Considering that the state of danger and the

⁴⁰ Transitional Act, Article 310

⁴¹ Government Decree 181/2020. (V. 4.)

⁴² Transitional Act, Article 311

⁴³ Transitional Act, Article 187

⁴⁴ Transitional Act, Article 187

⁴⁵ *Jól működik a hatósági házi karantén ellenőrzése [The monitoring of the official home quarantine works well]*, 3 June 2020, <https://www.kormany.hu/hu/a-kormanysozovo/nemzetkozi-kommunikacioert-felelos-allamtitkar/hirek/jol-mukodik-a-hatosagi-hazi-karanten-elektronikus-ellenorzese>

⁴⁶ Transitional Act, Article 311

⁴⁷ Act CXIII of 2011 on Defence, the Hungarian Army and the Measures Applicable under Special Legal Order

state of medical crisis do not serve to prevent the attack of a foreign power, an armed act of violence or a terrorist attack, under these provisions armed forces will primarily be used against the civilian population of Hungary.

The new provisions broaden the possibility of using the military in three areas:

- (i) The Government gains unlimited authorization to "*establish by decree the scope of cooperation of the Military Forces in tasks related to the state of danger and the state of medical crisis*".⁴⁸ This means that the Government has full discretion to decide on the allocation of military forces, and to order the involvement of armed forces even in areas not covered by the Defence Act. This provision renders meaningless the provisions of the Fundamental Law according to which the detailed regulation concerning the tasks of the Hungarian Military Forces shall be established by cardinal law.⁴⁹ Contrary to the Fundamental Law, in a state of danger and a state of medical crisis, the application of the military will not be determined by a cardinal law, but by a governmental decree, without any restrictions or limitations.
- (ii) The above unlimited authorization is all the more alarming because the Transitional Act automatically attaches the right to use firearms by the military to the tasks defined by a government's decree in a state of danger and in a state of medical crisis.⁵⁰ This alone contradicts the Fundamental Law as it provides for the possibility to extend the right to use firearms by the military without connecting it to a well-determined task or goal, and links it only to declaring a state of danger or a state of medical crisis. The law merely prescribes that the cooperation of the military "*may assist to performing the tasks necessary for the eradication of the state of danger and the state of medical crisis*",⁵¹ but does not make the possibility of using firearms subject to a determined goal. By being free to use military forces in the state of danger and in the state of medical crisis, the Government also has freedom to impose the use of firearms. In this way, the Transitional Act renders meaningless the obligation to adopt cardinal law provisions, and gives the Government leeway to order the use of firearms. This problem is not merely of constitutional or theoretical significance: the use of armed forces is the severest possible coercive measure, as a part of which the soldiers may intentionally open fire at a person. In some cases (e.g. preventing an unlawful entry into protected buildings, or avoiding an attack against the soldier himself/herself or his/her companion) the right to use firearms entitles the soldier to use guns outside the scope of legitimate protection and force majeure.
- (iii) Additionally, the Transitional Act extends the scope of participation of military police in the state of danger and the state of medical crisis.⁵² There is a significant modification as compared to the original provisions of the Defence Act in terms of the involvement of military police: according to the Transitional Act, soldiers do not simply assist to the execution of certain measures by the police, but gain right to execute police measures⁵³ independently, on their own. The declaration of a state of danger or a state of medical crisis *per se* automatically opens up the possibility of involving the military police.

⁴⁸ Transitional Act, Article 351

⁴⁹ Fundamental Law of Hungary, Article 45(5)

⁵⁰ Transitional Act, Article 348

⁵¹ Transitional Act, Article 349

⁵² Transitional Act, Article 350

⁵³ Soldiers are vested with the power of carrying out the following police measures included in the Police Act: identity check, on-site confiscation of an object, increased level of control, search of clothes, baggage and vehicle, apprehension and arrest, immigration measures, security measures, measures taken at a private residence and other venues not qualifying as public space, visual recording, audio recording, securing a venue.

The Transitional Act expressly names one single form of applying military forces: the system of hospital commanders.⁵⁴ By a decree⁵⁵ issued in connection with declaring the state of medical crisis, the Government upholds the hierarchical system of hospital commanders established within the first weeks of the state of danger. The system is constructed of members of armed forces, where every single position is filled by a person appointed by the Prime Minister. Hospital commanders are entitled to issue “mandatory proposals” – i.e. commands – to the leaders of hospitals and health care facilities. Although their right to command shall not cover medical issues, due to the fact that hospital commanders have power to decide matters of stock-management, their commands may ultimately affect core medical issues. Deciding how many tests and masks can be used clearly determines the ambit of employees and patients who can be tested and provided with protective equipment. While the independent decision-making powers of the hospital leaders are limited by the right to command of hospital commanders, the leaders of the hospitals still bear full responsibility for the operation of the health care facilities. In essence, the system of hospital commanders has converted hospital leaders into subordinates of the members of armed forces assigned as hospital commanders, without ensuring the guarantees attached to the right to command in the traditional sense, such as setting the limits of the right to command, the responsibility of the commander, and the right to resist the command.

By maintaining the system of hospital commanders unaltered, the Government assumes tight control over the most vulnerable group of persons: the employees of health care facilities, working in the front lines of the medical crisis, and the patients.

Kartonpack: maintaining the state control assumed over a private company

The Transitional Act sustains the state control assumed over KARTONPACK Plc. (hereafter: Kartonpack) even after the termination of the state of danger, until 15 August 2020 the latest.⁵⁶ As a result, a legal measure serving to avert the state of danger will be upheld notwithstanding the declared termination of the state of danger, without substantiating by law the necessity and the proportionality of the restriction. The Transitional Act makes the actual date of termination of the state control subject to a formal and unilateral act of the government commissioner assigned as supervisor,⁵⁷ and this way the government commissioner may decide arbitrarily on the effect of release from state control and may even extend it until the last moment prescribed by law. Considering that the state control of Kartonpack was ordered with effect of 17 April 2020, the “transitional period” may actually double the term of the restrictive measure, while in reality, the provisions of the Transitional Act are not interim in nature and the powers of the government committee remain unchanged.

Originally, the Disaster Management Act provided for assuming state control in the case of a direct threat of the aggravation of the state of danger and in order to effectively serve its prevention.⁵⁸ The Government assumed state control over Kartonpack referring to these cardinal provisions,⁵⁹ but – making use of the provisions of the Authorization Act – applied the measure in a distorted manner. The powers of the assigned supervisor were determined far beyond the ambit defined by the Disaster Management Act, and therefore completely deprived the shareholders of their property rights. The government commissioner did not exercise the authority of a supervisor, but the rights of the owners. When exercising the rights of shareholders, the government commissioner introduced measures that changed the operation of Kartonpack in the long run, irreversibly, and without the possibility of

⁵⁴ Transitional Act, Article 318

⁵⁵ Government Decree 287/2020. (VI. 17.)

⁵⁶ Transitional Act, Article 162(1)

⁵⁷ Transitional Act, Article 162(2)

⁵⁸ Disaster Management Act, Article 48(1)

⁵⁹ Government Decree 128/2020. (IV. 17.)

restoring the original status quo. Acting on behalf and in the name of the shareholders, the government commissioner withdrew the mandate of the whole management and the auditor, and appointed new executive officers, determined their remuneration and comprehensively modified the deed of foundation of the company. Within a couple of days after assuming state control, several lawsuits pending for years against the company were terminated. While the provisions of the Disaster Management Act only entitled the supervisor to exercise shareholders' rights exceptionally and subject to the immediate notification of the executive officers and the supervisory board, in the case of Kartonpack, this possibility became unlimited and – as indicated in the Transitional Act – lacked the guarantee of the immediate notification obligation by the government commissioner. Although within the constitutional framework regulated by the provisions of a cardinal law, assuming state control is exclusively possible in the case of a direct threat of the aggravation of the state of danger and in order to effectively serve its prevention, the Government failed to justify the prevalence of these preconditions both when assuming state control, and when maintaining it under the Transitional Act. As a consequence of all the above, the state control of Kartonpack became an outstanding example of the measures introduced under the Authorization Act and the Transitional Act disregarding the rule of law and constituting a severe violation.

Labour law concerns

The Transitional Act allows employers to set a maximum of 24-month reference period for allocated cumulative working time (the period within which the employer can prescribe when the employee has to perform work and when he/she has resting period) and payroll periods with permission from the state, in the case of investments that create jobs and are considered to be of national economic interest.⁶⁰ According to the Labour Code, in ordinary circumstances this may be maximum 4 months or 16 weeks.⁶¹ The Transitional Act prescribes that companies shall submit the respective requests to the Békés County Government Office, but it is not clear why it prescribes that permission processes are to be carried out only by this government office.

All large trade union alliances objected to these provisions, arguing that it is uncertain what will qualify as "national economic interest".⁶² The trade unions voiced objection also because, in violation of the respective statutory provisions,⁶³ the Government failed to consult with them in advance.

According to the respective EU directive,⁶⁴ the ordinary 4-month reference period may be raised to a maximum of 12 months, but that may be set for employees only in a collective agreement. However, the new rule introduced by the Transitional Act may result that an employee works 12 hours a day for a considerable period of time, but only gets 1 day of rest per month.⁶⁵

A government decree issued in the state of danger already allowed any employer to unilaterally set a reference period of a maximum of 24 months (i.e. raise the allocated cumulative working hours), for the period of the state of danger.⁶⁶ Any reference period extended on the basis of this government decree is kept in force by the Transitional Act for the period after the state of danger. Thus,

⁶⁰ Transitional Act, Article 56(4)

⁶¹ Act I of 2012 on the Labour Code (hereafter: Labour Code), Article 94(1)

⁶² See e.g.:

https://www.napi.hu/magyar_vallalatok/rabszolgorveny_20_az_osszes_szakszervezet_tiltakozik_az_eltitkolt_terv_miat.707436.html.

⁶³ Act CXXXI of 2010 on Social Participation in the Preparation of Laws, Article 5

⁶⁴ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Article 19

⁶⁵ Labour Code, Article 93(2)

⁶⁶ Government Decree 104/2020. (IV. 10.), Article 1(1)

employees may only escape the disadvantageous reference period, set for a maximum of two years under the state of danger, if they quit.

Changes affecting the criminal procedure and the penitentiary system

The Transitional Act contains several provisions in this area which are justified, but at the same time give rise to numerous problems in practice. With a view to an epidemiological measure or any other reason related to the state of medical crisis, the Director General of the Hungarian Prison Service may restrict personal visits with regard to one or more penitentiary institutions.⁶⁷ (According to the information available, visits are still not permitted in any of the Hungarian penitentiaries at the time of issuing this paper.) The law strives to facilitate contact with the outside world via telecommunication devices. However, similarly to the quarantine software, the Transitional Act does not take it into account that in practice not everyone has access to smart devices and the internet. This is also shown by the fact that according to available data, the approximately 16,560 detainees in Hungarian penitentiaries made altogether 3,145 Skype calls between 20 and 26 April 2020, so at most only every fifth detainee could resort to this possibility. Even though in theory the Transitional Act ensures the possibility of more frequent phone calls, the quite high costs of phone calls shall be borne by the detainee. This issue is not solved by the provision setting out that if a detainee does not have enough money on his prison service account to make a phone call, upon his/her request, based on an individual decision, the penitentiary institution may cover the costs of the phone call. Irrespective of this provision, it may occur that a detainee is not able to contact his/her loved ones in any form, neither personally, nor via Skype or phone, until the state of medical crisis is in place.

The Transitional Act allows for ordering a closed trial if the court building cannot be accessed by the public due to a measure adopted for a reason related to the epidemic.⁶⁸ If the public is not allowed to enter the court building, this restriction cannot be lifted for the time of promulgating decisions adopted at court hearings either, and so the law prescribes that in these instances the court decision shall be promulgated with the exclusion of the public. However, there is no possibility to submit a separate appeal against the decision ordering a closed trial, and so the stakeholders who are entitled to submit an appeal against the in-merit decision in the case may express their grievances in relation to ordering a closed trial only in their appeal against the in-merit decision.

In these instances, the court shall, upon their request, allow the defendant or the defence counsel to record the trial hearing with their own electronic device, except if the court itself records the trial hearing audiovisually, or the closed trial was ordered for another statutory reason and not the epidemic.

Even though limiting the number of persons present in courtrooms may be justified with a view to the epidemiological situation, it shall be highlighted that the public nature of trials serves not only the interests of the defendant and the defence counsel. The requirement that trials are public is a fundamental guarantee, since the public nature of trials ensures that the justice system is transparent and subject to review, and contributes to courts and other official persons participating in the procedure acting truly independently and impartially, subjected only to the law. This is not only in the interests of the parties in a given procedure, but society as a whole.

The transformation of the asylum system

The Transitional Act incorporates, with one exception that further restricts access to procedure, the provisions of Government Decree 233/2020. (V. 26.) that established fundamentally new rules on

⁶⁷ Transitional Act, Article 237

⁶⁸ Transitional Act, Article 205

access to asylum.⁶⁹ The government decree, although issued under the state of danger and the authorization the government obtained through the Authorization Act, had little to do with the pandemic. The government did not even attempt to hide this⁷⁰ when it announced the changes in reaction to the judgment of the Court of Justice of the European Union that found placement in the transit zones to be unlawful detention.⁷¹ The new asylum system makes exclusive a procedure that exists only in a handful number of Member States as merely an additional option for accessing the asylum procedure. The government decree, and with its incorporation the Transitional Act, introduces a concept unknown to the Hungarian legal system: a “statement of intent” for the purpose of lodging an asylum application to be submitted at Hungarian embassies, practically as the only opportunity to initiate an asylum procedure. The asylum-related provisions of the Transitional Act are in breach of the Fundamental Law of Hungary as they establish the positive outcome of the statement of intent as a precondition for initiating an asylum procedure, and because the new system does not respect the principle of *non-refoulement*.⁷² The new system is also in breach of EU law, as the Treaty on the Functioning of the European Union establishes that Member States develop a common asylum policy⁷³ through adopting measures for a common European asylum system.⁷⁴ One of the cornerstones of this common European asylum system is the Asylum Procedures Directive which clearly states that asylum applications can be lodged at borders and on the territory of Member States, as opposed to the new Hungarian system.⁷⁵ The provisions of the Asylum Procedures Directive also make it clear that the “statement of intent” to be lodged at a Hungarian embassy abroad as a precondition for registering an asylum application is unlawful.⁷⁶ These provisions of the Transitional Act are also incompatible with the 1951 Geneva Convention as they do not ensure access to protection or the prohibition of *refoulement*.⁷⁷

⁶⁹ Transitional Act, Articles 260-268

⁷⁰ See the summary of the statement of the Minister of the Prime Minister’s Office on the government spokesperson’s site: <http://abouthungary.hu/blog/gergely-gulyas-on-the-european-court-of-justices-new-ruling-on-immigration-its-dangerous-for-all-of-europe/>.

⁷¹ C-924/19 PPU and C-925/19 PPU

⁷² Fundamental Law of Hungary, Article XIV

⁷³ Articles 67 TFEU

⁷⁴ Article 78 TFEU

⁷⁵ Article 3 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

⁷⁶ Article 6 of the Asylum Procedures Directive

⁷⁷ See UNHCR Position on the new system: <https://www.refworld.org/docid/5ef5co614.html>.