

ACTIVE CASE MANAGEMENT IN THE  
HUNGARIAN CIVIL PROCEDURE

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DOI: 10.24193/SUBBiur.67(2022).2.4  
Data publicării online: 30.11.2022

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**Abstract:** The Act CXXX of 2016 on the Code of Civil Procedure introduced the image of the managerial judge into the Hungarian civil litigation. This perception means that the judge has to take an active part in the litigation. It is not just the notion of the Hungarian legislator, but it is also an international requirement. The new principle – so-called the court’s duty to manage the case – entitles and obligates the judge to offer some kind of support to the parties so that they can perform their procedural obligations properly. This means the judge has to guide the parties if their preparatory statements are incomplete, not sufficiently detailed or contradictory. However, this support is not equal to giving advice like a legal counsel does. The judge cannot overtake the functions and tasks of either the party or the legal counsel. The judicial guidance is meant to provide the parties an opportunity to enforce their claims and to get a proper level of legal protection. This image of an active and managerial judge originates from the Austrian social model of litigation, which goes back to 1895. But it is also not unfamiliar to the Hungarian litigation because the Act I of 1911 on the Civil Procedure was based on an active role of the judge too. My goal is to determine what the real essence and function of the active role of the judge is. I also examine that in what kind of situations and in what procedural phases the judge can offer support to the parties. Furthermore, I intend to define the limits of judicial management. In addition, I analyse how some interpretations view the issues that appeared in judicial practice.

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**Keywords:** Hungarian civil procedure, case management, judicial guidance, concentration of the proceedings, managerial judge, main hearing model

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## I. Introduction – The recent reforms of the Hungarian procedural law

It was a significant landmark that the Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP) came into effect on 1st of January 2018. This Act innovated the Hungarian procedural law in many aspects, including the system of the principles and the structure of first instance proceedings. Since then, the procedure of first instance is divided into two stages: the preparatory stage and the main hearing stage. The former phase is for submitting the requests, claims, motions for evidence, defining the framework of the legal dispute and preparing the taking of evidence, while the latter phase is limited for taking evidence. This system is also known as the main hearing model or the concentrational model. In order to define the framework of the legal dispute as soon as possible, the judge must facilitate the concentration of proceedings and enable the parties to fulfil their

procedural obligations. Therefore, the active case management is indispensable to achieve these goals, so the judge has to play a more prominent role in the proceedings.

The active role of the judge is also an international requirement. According to the recommendation of the CEPEJ (European Commission for the Efficiency of Justice), the judge should have a pro-active role in case management in order to guarantee fair and timely case processing, in accordance with timeframes. Moreover, the recommendation suggests that the courts should also play an active role in ensuring the rapid progress of the proceedings with the powers to order the parties to provide such clarifications as are necessary, to order the parties to appear in person, to raise questions of law, to call for evidence and to control the taking of evidence. The recommendations refer to the European Court of Human Rights, which said that the complete inaction by the judicial authorities have been causes of violation of the reasonable time clause.<sup>1</sup>

In my writing, beside reviewing the international and Hungarian evolution of the active judicial role, I aim to define what the essence and purpose of the judicial activity is and in what form it shows up in the Hungarian civil procedural law. In addition, I point to its relation to other principles. I also intend to specify in what procedural phases and in what form the judge can manage the case actively. Primarily, I seek the answer to what factors are the limits of active case management. In other words, my goal is to find out what procedural acts the judge can use to fulfil his duty to manage the case and what acts are prohibited for him.

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<sup>1</sup> Compendium of „best practices” on time management of judicial proceedings, CEPEJ, Strasbourg, 8 December 2006, p. 13.

## II. The origins of the active role of the judge

The German Act on Civil Procedure (deutsche Zivilprozessordnung, hereinafter: dZPO), which was based on the French Act on Civil Procedure (Code de procédure civil) accomplished the liberal procedural perception to the greatest extent. The liberal state acknowledged its citizens' liberty, therefore, the state did not intend to intervene in their legal disputes, since they were strictly treated as private affairs. The parties were the exclusive masters and owners of their lawsuit due to the high level of principle of free disposition. Under the dZPO, the rules of the civil litigation were too complicated for the parties who were unfamiliar with the law, and because of the nearly complete absence of intervention of the state, in some cases it was extremely burdensome to enforce their claim. The dragging on of the litigation due to the lack of obligation to tell the truth and the lack of the requirement to conduct the lawsuit quickly was another disadvantage.<sup>2</sup>

By recognizing these problems, Franz Klein created the Austrian Act on Civil Procedure (österreichische Zivilprozessordnung, hereinafter: öZPO), which was based on the social procedural model. Klein consciously turned away from the German liberal model and dedicated himself to protecting socially disadvantaged parties. This type of disadvantage includes not only their financial situation, but also their unfamiliarity with the law.<sup>3</sup> As a result, the Austrian procedural law protected the socially weaker individuals. On the one hand, it decreased the dominance of the parties; on the other hand, it empowered the judge with more tools in connection with conducting the procedure. The judge was obliged to provide information to the parties who were not represented by a legal counsel and were unfamiliar with the law. Meanwhile, both parties were obliged to tell the truth.

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<sup>2</sup> KENGYEL Miklós, *Magyar polgári eljárásjog*, Osiris Kiadó, Budapest, 2013, pp. 53-55.

<sup>3</sup> KENGYEL, *Magyar polgári eljárásjog*, p. 55. ref. 1.

The Act of 1895 is still in effect in Austria; however, it has been amended numerous times, but it remained loyal to the original perception of the relationship between the court and the parties. The way the öZPO regulates gathering evidence and other information in cases is exemplary, because the judge is the master of the lawsuit in the social procedural model, and he shall manage the proceedings by his discretionary powers in a fair, efficient, and economical way. This model aims to reduce financial inequalities and legal knowledge gaps by using active case management in a way that the judge conducts and manages actively the proceedings.<sup>4</sup>

This shows up mostly in the method of ascertaining the facts, and by this, the Austrian model remarkably differs from the German model. The original dZPO followed the absolute adversarial system, while the öZPO made a cautious step towards the inquisitorial system, but its adversarial characteristics still prevail. In Austria, the main limit of the judicial activity was that the judge must not conduct the proceedings *ex officio* and it is the parties' obligation to provide the evidence. Nevertheless, the judge can gather the evidence only in some special circumstances, especially if certain types of evidence are expected to be the basis for determining the facts.<sup>5</sup>

Similar to the current version of dZPO, the öZPO also obliges the parties to collaborate and to submit their presentations in a timely and complete manner so that the procedure can be carried out as quickly as possible (Prozessförderungspflicht)<sup>6</sup> and so does the Hungarian procedural law. Moreover, the parties are obliged to tell the truth, and they are expected to present the facts clearly and in full.<sup>7</sup> The liberal model did not oblige the

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<sup>4</sup> öZPO, Section 182.

<sup>5</sup> öZPO, Section 183, Subsection 4.

<sup>6</sup> öZPO, Section 178. Subsection 2.

<sup>7</sup> öZPO, Section 178. Subsection 1.

parties to tell the truth, because the German procedural law treated the lawsuit as a “litigious warfare” of the parties. The Austrian social model is the opposite of this, because it expects the parties to tell the truth. The Austrian procedural law intended to establish a “civil litigious working community” in which the judge and the parties could actively cooperate. The responsibility of the parties has increased, since they are obliged to tell the truth, meanwhile the judge’s role has increased noticeably, thus he had to manage the proceedings, provide information to the parties who are not represented by a legal counsel, and conduct the proceedings as soon as possible while pursuing to discover the facts as extensively as possible. In the social procedural model, the judge has to be the manager of the case, so he has to act as a managerial judge who conducts the lawsuit dominantly and actively.<sup>8</sup>

The social model and also the entire Austrian procedural law had a serious effect on the Hungarian procedural law, which appeared in the Act I of 1911 on the Code of Civil Procedure (hereinafter: Civil Procedure of 1911). Due to this, the Civil Procedure of 1911 preferred the active judicial role. In this Act, the active judicial activity showed up in case management completed with the already applied case administration.<sup>9</sup> The latter means that the judge had to conduct the proceedings, open the hearing, call the parties to present their statements, hear and ask questions of the witnesses, experts and other persons, close the hearing, and also, he had to pronounce the decisions. Furthermore, the judge had to make sure that the parties clarify their uncertain requests and statements, make up incomplete statements and

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<sup>8</sup> RECHBERGER, Walter H., *Die österreichische ZPO – (k)ein Vorbild für die ungarische ZPO 1911?*; In: SUTTER-SOMM, Thomas - HARSÁGI Viktória (eds.): *Die Entwicklung des Zivilprozessrechts in Mitteleuropa um die Jahrtausendwende; Reform und Kodifikation – Tradition und Erneuerung*, Schulthess Verlag, Zürich, 2012, pp. 26-27.

<sup>9</sup> KENGYEL Miklós, *A magyar polgári perjog száz éve – az 1911. évi polgári perrendtartás*, Magyar Jog, 2011/6, p. 325.

evidence, and submit the required requests and statements. He also had to consider certain circumstances *ex officio*.<sup>10</sup>

The Austrian model, which was based on the active judicial role and the cooperation of the parties, turned out to be reasonably popular, since beside Hungary, other countries followed it. Within the Germanic law system, it has appeared in the German and Swiss procedural law too. In Germany, the amendment of 1909, so-called *Amtsgerichtsnovelle*, strengthened the position of the judge at the district court level, and then it was extended to all civil procedures in 1924 in the whole country. The German judge was authorized to discuss the facts and requests with the parties, to prepare to discover the facts, to obtain official information, to summon witnesses, to appoint an expert, and to oblige the parties to be present at the hearing. In addition, he was expected to oblige the parties to make statements about every relevant fact and submit appropriate motions.<sup>11</sup> The amendment of 2001 of the dZPO obliged the judge to substantively conduct the proceedings (*materielle Prozessleitung*) and so that he has specific tasks to determine the framework of the legal dispute.<sup>12</sup> According to the current version of the dZPO, if it is necessary, the judge must discuss the factual and legal aspects of the dispute with the parties and ask questions, and he must ensure that the parties give a complete explanation about all relevant facts in time, in particular they add sufficient information on the facts alleged, identify the evidence and make the relevant applications. The court can use measures

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<sup>10</sup> Act I of 1911 on the Code of Civil Procedure, Section 224 and 225.

<sup>11</sup> KIRÁLY Lilla, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?: Az új magyar polgári perrendtartás általános rész osztott perszerkezetének hatékonysági elemzése*, Akadémiai Kiadó, Budapest, 2019, p. 152.

<sup>12</sup> WOPERA Zsuzsa (ed.), *A polgári perrendtartásról szóló 2016. évi CXXX. törvény magyarázata*, Wolters Kluwer, Budapest, 2017, p. 29.

taken by the process management to structure the proceedings.<sup>13</sup> As a result, the German procedural law has got rid of its liberal characteristics through the above-mentioned reforms, and by leaving behind the dominance of the parties, it recognized that the active case management could be the key to an efficient way to enforce claims.

The Swiss Act on Civil Procedure (schweizerische Zivilprozessordnung, hereinafter: schZPO) also applies active case management. Most of all, it shows up in the so-called principle “the court’s obligation to question”. The Act says: if a party’s submissions are unclear, contradictory, indeterminate, or obviously incomplete, the court will give them the opportunity to clarify and supplement by asking appropriate questions.<sup>14</sup> Furthermore, the Romanian Act of 2010 on Civil Procedure uses an especially active case management. Unlike the above-detailed legal systems, the Romanian procedural law prefers the inquisitorial system instead of the adversarial system and aims to completely prove the alleged facts.<sup>15</sup> This means that the Romanian judge has the right to take all measures, which could be reasonably necessary to reveal the truth, even against the will of the parties.<sup>16</sup> The active judicial role fits, but the extended *ex officio* proving method and the inquisitorial system does not correspond with the European tendencies.

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<sup>13</sup> dZPO, Section 139.

<sup>14</sup> schZPO, Article 56.

<sup>15</sup> SZÉKELY János, *Újítások a bizonyítási eljárás terén Románia új Polgári eljárásjogi törvénykönyve rendelkezéseinek fényében*; In: HARSÁGI Viktória – RAFFAI Katalin – SURI Noémi (eds.), *Új jogalkotási perspektívák és tendenciák Magyarországon és az Európai Unióban*, Pázmány Press, Budapest, p. 2014

<sup>16</sup> GHIȚĂ, Daniel, *Procedure Institutions Reformed through the New Romanian Civil Procedure Code: Legal Bases and Prospects*; In: *Revista de Stiinte Politice*, 2015, No. 46., p. 319.



### III. The evolution of the judicial role in Hungary

The social model and also the entire Austrian procedural law had a serious effect on the Hungarian procedural law, which appeared in the Act I of 1911 on the Code of Civil Procedure (hereinafter: Civil Procedure of 1911). Due to this, the Civil Procedure of 1911 was also based on the active role of the judge. In this Act, the active role of the judge showed up in case management completed with the already applied case administration of the proceedings.<sup>17</sup> The latter means that the judge had to conduct the proceedings, open the hearing, call the parties to present their statements, hear and ask questions of the witnesses, experts and other persons, close the hearing, and also he had to pronounce the decisions. Furthermore, the judge had to provide the parties to clarify the uncertain requests and statements, to make up the incomplete statements and evidence and to submit the required requests and statements generally. He also had to take in consideration certain circumstances *ex officio*.<sup>18</sup> The judge was expected to manage the case actively in order to discover the material truth.<sup>19</sup>

After the end of World War II, in the beginning of the communist era, nearly the whole legal system was reformed in Hungary. The civil procedural law was not an exception with the Act III of 1952 on the Code of Civil Procedure. This Act was based both on the Act I of 1911 and the Soviet code of 1923 on Civil Procedure, it was a kind of mixture of them. However, it primarily aimed to get rid of the imperialistic and bourgeois rules that the Act I of 1911 used to have.<sup>20</sup> So, similar to the Soviet procedural law, the court

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<sup>17</sup> KENGYEL, *A magyar polgári perjog száz éve...*, p. 325. ref. 9.

<sup>18</sup> Act I of 1911 on the Code of Civil Procedure, Section 224 and 225.

<sup>19</sup> KENGYEL, *A magyar polgári perjog száz éve...*, p. 326. ref. 9.

<sup>20</sup> NÉMETH János, *A polgári perjogunk fejlődése a felszabadulás óta*, Magyar Jog, 1985/3-4., p. 290.

had to discover the material truth, while the right to disposition was pushed into the background and was divided among the party, the court and the prosecution.<sup>21</sup> In order to find out the truth, the judge was obliged to take a dominant part in the procedure. Generally, judicial dominance was one of the characteristics of the socialist procedural law. This perception prevailed for a while in the post-communist era. Then it was thought that the judge is not expected to enforce the claims of the parties instead of them, despite their will or in the case of their negligence, but it is his task to provide to enforce their claims in an efficient, impartial, and fair trial.<sup>22</sup> It also implies that the judge did not have to discover the truth. The principle of free disposition was strengthened, whereas taking evidence *ex officio* was restricted to special types of procedures. However, the judge was bound to the requests of the parties but was not bound to the right to be enforced, so he can judge a legal dispute under another legal title. After that the Act CXXX of 2016 made a serious change in this aspect.

#### IV. The court's duty to manage the case as a principle

The Hungarian legislator was convinced that the active role of judges in case management was necessary to be expressed as a basic principle. A clearly visible attribute of the CCP is that the chapter about the basic principles contains exclusively those principles that shall apply throughout the entire civil procedure. Beside them, there are more procedural principles regulated by the CCP, but they do not necessarily affect the whole procedure. However, the court's duty to manage the case was regulated as a basic principle because it has to affect the entire civil procedure. By this, the judges' role was strengthened and made more active in order to define the framework

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<sup>21</sup> KENGYEL, *Magyar polgári eljárásjog*, p. 62. ref. 1.

<sup>22</sup> The ministerial justification of the Act LX of 1995.

of the dispute. First of all, it manifested in case management both at first and second instance.<sup>23</sup> The essence of the divided structure of the procedure is that the object of the legal dispute should be determined in the preparatory stage, and after that, the main hearing should be limited only to taking evidence. The closing of the preparatory stage functions as a general preclusion, which means after that the parties can submit new statements or motions for the presentment of evidence or change the action under exceedingly strict conditions. To avoid the extreme formalism of the divided procedural structure, which would be against the interests of both parties, and to prevent it from leading to an ineffective production of the files instead of the pursuit of justice, the judge has to be given a managerial, active role.<sup>24</sup>

The court's duty to manage the case is inseparable from the principle of concentration of proceedings and the parties' obligation to facilitate the proceedings, which are also main basic principles of the civil procedure. The principle of concentration of proceedings applies to both the court and the parties, both of them shall strive to make available at the appropriate time all facts and evidence necessary to deliver the judgment, so that the legal dispute can be adjudicated, if possible, during a single hearing.<sup>25</sup> In addition to this, the parties shall be obliged to enable the proceedings to be conducted and completed in a concentrated manner.<sup>26</sup> The CCP says under the regulation of the court's duty to manage the case: with a view to ensuring the concentration of proceedings, the court shall, in the manner and using the means specified in this Act, contribute to enabling the parties to perform their procedural

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<sup>23</sup> WOPERA, *A polgári perrendtartásról szóló...*, p. 28. ref. 12.

<sup>24</sup> DÖME Attila, *A perkoncentráció kulcsa: a közbenszóló határozat*; In: NÉMETH János – VARGA István (eds.): *Egy új polgári perrendtartás alapjai*, HVG-Orac, Budapest, 2014, p. 406.

<sup>25</sup> CCP, Section 3.

<sup>26</sup> CCP, Section 4, Subsection 1.

obligations.<sup>27</sup> It should be added that primarily the principle of the parties' obligation to facilitate the proceedings should be understood under the procedural obligations, therefore these three basic principles are closely related to each other. Moreover, the principle of concentration of proceedings, the parties' obligation to tell the truth and the principle of good faith should also be understood under it. A Hungarian scholar, Varga doubts that the court's duty to manage the case should be treated as a principle, he views it as only a procedural criterium. In his perception, it does not have an own content, it is merely a reference to the concentration of proceedings and the parties' obligation to facilitate the proceedings.<sup>28</sup>

The relation between the court's duty to manage the case and the parties' obligation to facilitate the proceedings might seem quite controversial at first glance. It might be believed that a certain civil procedural model has to choose either the dominance of the parties or the dominant and active role of the judge. However, in the Hungarian procedural law, these two basic principles should not prevail at the expense of each other, on the contrary, they should strengthen each other in an optimal case. We could also say that they are directly proportional to each other. This means the parties are able to collaborate and collude to facilitate the concentration of proceedings so long as the court offers support to enable the parties to fulfil their procedural obligations. Although we should note that the parties can and have to make an effort to collaborate. As we observe the drafting of the court's duty to manage the case in the Act, it has a supplementary and an auxiliary function in connection with the parties' obligation to facilitate the proceedings. But both principles' main goal is to concentrate the actions, which also cannot

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<sup>27</sup> CCP, Section 6.

<sup>28</sup> VARGA István (ed.), *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja I/III.*, HVG-Orac, Budapest, 2018, p. 32.

have an end in itself. The concentration of proceedings has to provide both the efficient, rapid jurisdiction and the legal protection on individual and social level too.

We could summarize the court's duty to manage the case and the parties' obligation to facilitate the proceedings as the obligation to cooperate or the principle of cooperation. Under this perception, neither the judge nor the parties dominate the proceedings otherwise the procedural rights are divided between them in a way that expects the cooperation of them. The judge is the one whose task is to organize and manage to cooperate, since the parties went to the court because they were not able to solve their legal dispute by themselves. Thus, the judge is expected to conduct the proceedings in a managerial way.<sup>29</sup>

A counter-argument alleged that the active role of the judge might result the legal counsels being pushed into the background, tending to be passive and being unmotivated to get prepared thoroughly. Nevertheless, this is obviously not the purpose of judicial activity, but rather to correct the mistakes of the legal counsels, or properly make up for the deficiencies of the legal counsels who tend to be passive.<sup>30</sup> Although it is indispensable to emphasize that the judge must not replace the legal counsels, he must not take over his tasks, since the active case management works as a safety net, by which the judge can merely correct and make up for the deficiencies in a subsidiary manner.

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<sup>29</sup> ÉLESS Tamás – DÖME Attila: *Alapvetések a polgári per szerkezetéhez*; In: NÉMETH János – VARGA István (eds.), *Egy új polgári perrendtartás alapjai*, HVG-Orac, Budapest, 2014, p. 59., p. 64., p. 78.

<sup>30</sup> DÖME, *A perkoncentráció kulcsa...*, p. 415. ref. 24.

## V. Manifestations of judicial activity

Basically, the measures or the conducts of the court can be classified into two categories. The case administration includes all the measures that serve the scheduling and the continuity of the proceedings.<sup>31</sup> Their goal is to make the proceedings as rapid, cheap, expedient and efficient as possible.<sup>32</sup> These procedural acts can be carried out both at the hearing (*e.g.* opening the hearing) and outside the hearing (*e.g.* summon). Within the case administration, the judge shall determine the sequence of these acts and his task is to maintain order. There is no doubt that the case administration is necessary to conduct the proceedings, even in that type of procedural systems where the judge is expected to be rather passive.

Besides that, case management includes all the measures which aim to give the parties an opportunity to expound their standpoints about the content of the relevant substantive law and to present the facts and their evidence in time that are necessary to judge the lawsuit.<sup>33</sup> Case management is directed at the merit of the legal dispute, which is related to the right to be enforced.<sup>34</sup> Providing information properly in the framework of case management facilitates that the court and the parties are able to be aware of the relevant facts and legal standpoints that were apparently not taken into consideration or were considered irrelevant or unimportant by the parties, but are going to be the basis of the court's decision.<sup>35</sup> The main purpose of

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<sup>31</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 161. ref. 11.

<sup>32</sup> ÉLESS – DÖME, *Alapvetések a polgári per szerkezetéhez...*, p. 74. ref. 29.

<sup>33</sup> URL: <http://jogiforum.hu/interju/137> (14.12.2021).

<sup>34</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 161. ref. 11.

<sup>35</sup> ÉLESS Tamás – ÉBNER Vilmos, *A percezúra – az érdemi tárgyalás előkészítése*; In: NÉMETH JÁNOS – VARGA István (eds.), *Egy új polgári perrendtartás alapjai*, HVG-Orac, Budapest, 2014, p. 388.

case management is to prevent making a decision that cannot settle the legal dispute definitively.<sup>36</sup>

Under the relevant rule of the CCP, if the preparatory statement made by a party including, for the purposes of this section, any statement made in the statement of claim, is incomplete, not sufficiently detailed or contradictory, the court shall intervene to have the party make a complete preparatory statement or rectify its deficiencies.<sup>37</sup> By exercising case management, the judge becomes more active, thus he is able to facilitate the concentration of proceedings. The judge shall call upon the parties to explain their unclear requests and statements, and complete their evidence and statements, moreover, he has to pay attention to the circumstances that must be taken into consideration *ex officio*.<sup>38</sup> In addition to this, the judge can ask a question anytime in order to clarify the case, and he is obliged to provide information to the party without legal counsel concerning his rights and obligations accrued by the judicial proceedings.<sup>39</sup> Case management is important to prevent making a 'surprise judgment' that were not expected by the parties at all, because such a judgment would make the procedure completely ineffective.<sup>40</sup>

Active case management can take place both in written and oral form. The great advantage of the oral form is that the parties are able to react directly to each other's statements, and the judge can make the deficiencies and contradictions clear directly and immediately. The written form could be more advantageous in more complicated legal disputes in which the parties

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<sup>36</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 146. ref. 11.

<sup>37</sup> CCP, Section 237, Subsection 1.

<sup>38</sup> The Conception of the new CCP, p. 62.

<sup>39</sup> CCP, Section 111.

<sup>40</sup> The Conception of the new CCP, p. 61.

need more time to get prepared to make appropriate, reasonable, coherent and detailed statements.<sup>41</sup> Case management is exercised mostly at the preparatory hearing in an oral form. However, it can also be applied in a written form before the preparatory hearing if the judge ordered further preparation in writing.

It is important to note that the court's duty to manage the case and case management are not the same as the obligation to provide information. The CCP of 1952 expected the judge to provide information generally in every case, however, the current CCP does it in a more limited way. While exercising case management, the judge must not distinguish the parties being represented by a legal counsel or not. The obligation of cooperation must be interpreted in the relation between the court and the parties, so optimally the legal counsels should act as a 'professional bridge' between the court and the party represented by them. Therefore, the legal counsels should play the role of an intermediary in the system, which is based on cooperation.<sup>42</sup> If the judge exercised case management asymmetrically, the party represented by a legal counsel would call the judge in question for not being impartial enough. So, the judge must not take over the task and the role of neither of the party, nor the legal counsel.

Providing information in the framework of case management shall be clear enough and adequate, and it shall always be adjusted to the characteristics of the party as well.<sup>43</sup> Although both the party who is unfamiliar with the law and the party represented by a legal counsel should be provided by information, it should not happen in the same measure and the same way due to their circumstances. Under the regulations of the CCP,

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<sup>41</sup> ÉLESS – ÉBNER, *A pervezúra – az érdemi tárgyalás előkészítése*, p. 388. ref. 35.

<sup>42</sup> ÉLESS – DÖME, *Alapvetések a polgári per szerkezetéhez...*, p. 74. ref. 29.

<sup>43</sup> ÉLESS – ÉBNER, *A pervezúra – az érdemi tárgyalás előkészítése*, p. 388. ref. 35.



the court shall have the power to order to have the party heard in person so as to define the framework of the dispute, in particular, with a view to clarifying the party's factual claims, legal allegations and the availability of filing motions, statements of defence and evidence, and the court shall inform the party concerning - where appropriate - the possibility of presentment of evidence, the means of evidence available under this Act, and the relevant conditions having regard to facts requiring evidencing.<sup>44</sup> These are the only occasions that are allowed to exercise case management slightly asymmetrically, but this distinction does not violate either the principle of impartiality, or the principle of equality of the parties.

## VI. Timing of case management

As it was mentioned above, the court's duty to manage the case counts as a basic principle, which must prevail during the entire proceedings. This is a guiding rule, but it is worth clarifying at what phase of the proceedings it should be exercised.

The managerial judge shall exercise case management during the whole procedure until the end of it,<sup>45</sup> including both the preparatory stage and main hearing stage, plus the proceedings of the second instance but with a different intensity. Generally, the main time for active case management is when the judge recognizes that the efficient exercising of the party's right to disposition is not provided sufficiently, and this mostly occurs during the preparatory stage. Therefore, case management has a prominent role during the preparatory stage, since the purpose of the judicial activity is to clarify the facts and define the framework of the legal dispute, and primarily the preparatory stage is the place for that. The judge can exercise case

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<sup>44</sup> CCP, Section 253, Subsection 1-2.

<sup>45</sup> ÉLESS – DÖME, *Alapvetések a polgári per szervezetéhez...*, p. 70. ref. 29.

management if he notices that the party's preparatory statement is incomplete, unclear, not detailed enough or contradictory. It is also important to note that there is a significant difference between the preparatory stage and the proceedings after that in the aspect of case management. Namely, the court has more extensive rights during the preparatory stage because only the framework of the legal dispute is being defined in this procedural phase,<sup>46</sup> which essentially requires the judge to conduct actively. Under the CCP, if the preparatory statement made by a party including, for the purposes of this section, any statement made in the statement of claim, is incomplete, not sufficiently detailed, or contradictory, the court shall intervene to have the party make a complete preparatory statement or rectify its deficiencies.<sup>47</sup> So determining the exact time to intervene belongs to the discretionary powers of the judge. Does that kind of discretionary power cover all phases of the procedure, especially before the preparatory stage? Or to be more precise, while examining whether the statement of claim is suitable for litigation, is the judge allowed to exercise case management?

The National Conference of the Leaders of Civil Law Divisions has interpreted numerous questions like that. Firstly, it was not entirely clear what the correct solution is if the statement of claim does not contain one of the compulsory content elements or contains it incompletely: rejecting the statement of claim, ordering the remedying of the deficiencies, or exercising case management. According to the interpretation, if it does not contain at least one of the compulsory content elements at all, the court shall reject it. If it does contain all these elements, but they are incomplete, the court shall order remedying the deficiencies. If it does contain all such elements completely, but the claim is inconsistent, illogical, or contradictory, the court

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<sup>46</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 164. ref. 11.

<sup>47</sup> CCP, Section 237, Subsection 1.

should neither reject the claim nor order remedying the deficiencies. The right solution is to accept the statement of the claim and deliver it to the defendant. After the defendant has submitted the statement of defence, the court shall exercise case management in the preparatory stage so that the plaintiff can correct the mistake.<sup>48</sup>

From this interpretation we can deduce that the court should not exercise case management before the preparatory stage. However, it is necessary to note that the lawsuit is not established until the statement of claim is delivered to the defendant. The legal effects of the action arise at this procedural moment, so before this moment there is only a bipolar legal relation between the court and the plaintiff, and after that it becomes a tripolar lawsuit. The equality of the parties and the requirement of impartiality expect the judge not to exercise case management until the defendant is not aware of the claim.

Secondly, according to another interpretation, the judge shall not exercise case management if he notices that the right to be enforced is incomprehensible, however it is allowed to order remedying the deficiencies within judicial guidance, so in this way the judge can contribute to enabling the parties to perform their procedural obligations.<sup>49</sup> It indicates that the judicial guidance can be fulfilled without case management, hence the former one is a broader notion. So, they are definitely not equal to each other, case management is not the only way of the duty to manage the case. However, there is no doubt that case management is its primary and most common form.

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<sup>48</sup> Interpretation No. 10 of the National Conference of the Leaders of Civil Law Divisions (07.07.2017.); URL: <https://kuria-birosag.hu/hu/ckot-allasfoglalasok?page=10> (17.12.2021),

<sup>49</sup> Interpretation No. 11 of the National Conference of the Leaders of Civil Law Divisions (21.06.2018.); URL: <https://kuria-birosag.hu/hu/ckot-allasfoglalasok?page=6> (17.12.2021),

So, it is clearly visible that case management can be exercised only after the communication of the claim, however, there is a major difference between exercising it in the preparatory stage or after it. During the preparatory stage, the judge can exercise it in a much wider range, because the legal dispute is just being detected in an abstract way in this stage,<sup>50</sup> which highly demands the active guidance of the judge.

The essence of case management in the preparatory stage is that the parties are able to consider their goals as much as possible, they can reveal their intentions, they can consider their realistic possibilities, and a kind of schedule is being made for the proceedings by the cooperation of the parties and the judge. The primary task of the managerial judge in the preparatory stage is to correct the parties' unintentional errors, to make up for the deficiencies, to unequivocally clarify the relevant questions of law and facts to be decided for all of the parties, and last but not least, to impartially enable and facilitate the parties – without violating their right to disposition – to enforce their legal claims. As a result, the court and the parties should get a full view of the case, thereby the legal dispute gets clear for everyone.<sup>51</sup> Although the frames of the legal dispute can be clarified optimally during a single preparatory hearing, the judicial guidance might be counterproductive. It could be a contradiction that, on the one hand, the parties have to present their statements and motions under the principle of concentration of proceedings, and the judge has to clarify and summarize the legal dispute during the preparatory stage as thoroughly as possible.

Optimally, the framework of the dispute could be determined by case management at only one hearing, the judicial activity might prolong the procedure. On one hand, the parties are obliged to submit their statements as

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<sup>50</sup> ÉLESS – DÖME, *Alapvetések a polgári per szerkezetéhez...*, p. 70. ref. 29.

<sup>51</sup> DÖME, *A perkoncentráció kulcsa...*, p. 406., p. 411. ref. 24.

soon as possible, but on the other hand, the court has to determine the framework of the dispute as thoroughly and precisely as possible. So, to solve this problem, according to an interpretation, it is allowed to postpone the preparatory hearing if the party cannot motion for the presentment of evidence immediately in the preparatory hearing due to exercising case management.<sup>52</sup> The reason behind this is that case management apparently cannot be treated as a fault of the party.

However, the legal dispute is defined by closing the preparatory stage and a certain schedule for taking evidence is made, the judge is entitled to exercise case management during the main hearing stage, especially if such a novum comes to light that needs judicial guidance. Nevertheless, case management is only allowed to exercise within a much narrower range at the main hearing stage,<sup>53</sup> because this phase is only limited to performing the tasks that have already been<sup>54</sup> consulted in the preparatory stage. Case management in exercised the main hearing stage is a legal reason for amendment of the action or the statement of defence or subsequent taking of evidence, which shows how significant it is.<sup>55</sup>

## VII. The limits of the active case management

It is indispensable to delimit the active role of the judge and to point out the procedural criteria and guarantees that must not be violated by active case management. The primary limit is a guiding basic principle, the principle of free disposition. It is of the utmost importance that the judge must not take over the tasks of the parties, not even while exercising case management. Of

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<sup>52</sup> Interpretation No. 19 of the National Conference of the Leaders of Civil Law Divisions (15.04.2019); URL: <https://kuria-birosag.hu/hu/ckot-allasfoglalasok?page=3> (17.12.2021).

<sup>53</sup> ÉLESS – DÖME, *Alapvetések a polgári per szerkezetéhez...*, p. 70. ref. 29.

<sup>54</sup> DÖME, *A perkoncentráció kulcsa...*, p. 406. ref. 24.

<sup>55</sup> CCP Section 215, Section 216, Section 220.

course, the court shall hear and determine disputes upon request, the parties may dispose freely of their actionable rights and the motions, and legal statements of the parties must be binding upon the court. In connection with this, under the rules of the CCP, case management shall be guided by the parties' motions and legal allegations,<sup>56</sup> which are the manifestation of the right to disposition.

The judge must facilitate and enable the parties to perform their acts properly according to their intentions, however, must not take over a task from the parties that they are unable to perform. Besides that, he must not intervene in issues that exclusively belong in their private sphere.<sup>57</sup> The court is allowed to cross the parties' requests only in special types of procedures, such as the entire category of actions concerning civil status<sup>58</sup> which includes for instance the action placement under guardianship, matrimonial actions, actions of origin and actions for custody of a child. In other words, judicial activity is constrained by the trinity of the claim, the statement of defence and the right to be enforced.

By case management the judge must not inform the party about that the facts presented by him bring up a different substantive right to be applied, especially if it needs a change of action, a change of defence or a change of the right to be enforced. So, in essence, the judge is not allowed to point out the suitable and proper legal basis. Notwithstanding, the judge may inform the party about that the claim is unachievable by the right asserted by action.<sup>59</sup>

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<sup>56</sup> CCP, Section 237, Subsection 5.

<sup>57</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 160. ref. 11.

<sup>58</sup> VIRÁG Csaba: *Az alaki igazságosságot előtérbe helyező fair eljárás nem zárja ki a jó és helyes döntés lehetőségét*; In: NÉMETH János – VARGA István (eds.): *Egy új polgári perrendtartás alapjai*, HVG-Orac, Budapest, 2014, 362.

<sup>59</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 160. ref. 11.

The facts and evidence presented by the parties are also the limits of case management because presenting material facts and making available the evidence to corroborate such facts are under their dispositional control. Although case management includes taking evidence, case management does not mean taking evidences *ex officio* at all.<sup>60</sup> The active case management is also perceived as the extension of the adversarial system, since the party who is unfamiliar with the law or just not represented appropriately has a possibility for properly enforcing his claim under the guidance of the judge. Its purpose is to eliminate the dangers and to supplement the deficiencies of the absolute adversarial system, so that it may prevent the party from being deprived of legal protection due to his unclear statements and his unfamiliarity with the law.<sup>61</sup>

The CCP does not oblige the judge to arbitrarily and *ex officio* pursue to discover the truth or enforce a claim, even against the will of the parties. His primary task is to judge the legal dispute, more closely the right to be enforced which is based on the allegation of the infringed right.<sup>62</sup> It is still sufficient to secure procedural or formal justice and to provide the legality of the procedure, while it is not a purpose for the court to find out the material truth. This perception is based on the decision 9/1992 of the Hungarian Constitutional Court, which says there is no constitutional guarantee to find out the material truth, but it is the constitutional obligation of the state to provide an impartial decision in legal disputes. Therefore, the court is not required to discover the truth, but it is expected to provide a fair trial and ensure the legality of the procedure.<sup>63</sup>

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<sup>60</sup> ÉLESS – DÖME, *Alapvetések a polgári per szerkezetéhez...*, pp. 72-73.. ref. 29.

<sup>61</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 162. ref. 11.

<sup>62</sup> VIRÁG, *Az alaki igazságosságot előtérbe helyező fair eljárás...*, p. 362. ref. 58.

<sup>63</sup> UDVARY Sándor, *Polgári eljárásjog I.*, Patrocinium Kiadó, Budapest, 2015, p. 17.

So, both the principle of free disposition and the adversarial principle count as the limit of the court's duty to manage the case, since the judge is prohibited from determining the legal basis of the right to be enforced of neither party.<sup>64</sup> It can be doubted whether case management violates the principle of free disposition or the adversarial principle. According to the view of the Conception of the CCP, both the above-mentioned principles can prevail, because the party is completely free to decide to follow the guidance of the court or not.<sup>65</sup> Since it belongs to the dispositional right of the party to use or what extent to use the measures of case management in his own acts, requests and statements.<sup>66</sup> However, if the party decides not to follow the guidance and hence he loses the lawsuit, he cannot refer to that the court dismissed his claim regard to such a legal argumentation that he had not even known. Although the judge is obliged to comply with the requirement to be active, it is not a cause to vacate the judgment if the court of second instance does not agree with case management of the court of first instance, and this fact reduces his responsibility somewhat.<sup>67</sup>

The criterium of fair trials still has to be provided entirely, so the judge can exercise case management as much as he can keep his impartiality and the appearance of impartiality as well.<sup>68</sup> The active role of the judge should facilitate the parties to enforce their claims, thus the impartiality of the judge should not be realized in indifference, disinterest and passivity but rather in the prohibition of giving preference to either party over the other. The judge can only facilitate the parties exercising their rights to disposition and he

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<sup>64</sup> URL: <http://www.jogiforum.hu/interju/137> (14.12.2021).

<sup>65</sup> The Conception of the new CCP, p. 62.

<sup>66</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 164. ref. 11.

<sup>67</sup> CCP, Section 384, Subsection 1.

<sup>68</sup> KIRÁLY, *Gyorsabb, egyszerűbb, olcsóbb, hatékonyabb?...*, p. 164. ref. 11.



cannot do it instead of them. The judge has tools like asking questions, making the answers clear and calling upon the parties to do something and not like consultation, assistance or giving of advice. This can avoid violating the impartiality or the equality of the parties but can facilitate the progress of the procedure.<sup>69</sup> By deciding not to give advice, consult or assist, the judge does not take over the legal counsel's role. He is neither allowed to give an advice even in a disguised way nor to give information about the substantive law. It is still forbidden to drop a concealed hint to submit a substantive objection or encourage the party to change the action. In conclusion, while exercising case management the judge is expected to pay a lot of attention to impartiality and equality of the parties.

### VIII. Summary

By examining the judicial role in different legal systems, it is clear, that the active role of the judge created by the Austrian social model has become fairly popular in the last century and has been introduced in numerous countries. The court's duty to manage the case should not be treated in itself, because it is inseparable from the principle of concentration of proceedings and the parties' obligation to facilitate the proceedings, because in order to successfully concentrate the actions both the court and the parties have to take part actively in the procedure.

Case management can be defined both in a positive and a negative way. If we would like to define it in a positive way, it needs clarification on what activities are included. So as to summarize it, the judge's task is to clarify the frameworks of the legal dispute as soon as possible using mainly but not exclusively the tools of case management. And there is no doubt that the primary procedural phase for that is the preparatory stage.

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<sup>69</sup> ÉLESS – DÖME, *Alapvetések a polgári per szerkezetéhez...*, p. 62., p. 73. ref. 29.

In order to define it in a negative way, certain principles, rules and criteria must be respected while exercising case management. In order that the principle of free disposition can prevail inviolably, the court is bound to the facts stated by the parties, to the claims and to the right to be enforced. The latter requirement may challenge the judges because the court shall inform the party if the right to be enforced is inappropriate, meanwhile he is not allowed to point out the proper legal title. Due to the adversarial principle, the judge is not empowered to take the evidence *ex officio*. In addition, the judge must avoid even the slightest appearance of impartiality, which might be difficult particularly in those procedures where one of the parties is represented by a legal representative while the other one is not.

I am firmly convinced that case management can be exercised without seeking to discover the material truth, because the latter one is apparently not a procedural purpose or requirement at all. The parties are still the ones who have to present the material facts and the evidence, the judge can only guide them to do so in a fair trial, and he is not obliged to find out the truth, providing the legality of the procedure is sufficient. In my view, case management does not mean discovering the truth at all. It is supported by the fact that a decision on the merits shall not include a right that was not claimed by a party in the action. It is clear, that judges' responsibility has significantly increased for the efficiency of the procedure, because the unlimited case management could cause more damage than benefits. As closing words, I intend to emphasize that the court can contribute to conducting a procedure rapidly and efficiently and to providing a satisfying level of legal protection only through a properly practiced case management and by respecting the limits of it.