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Changing Views on the Information Duty of the Judge Concerning Evidence – Walking on Narrow Paths

Anna Nyilas
Senior Lecturer, University of Debrecen, Faculty of Law
Department of Civil Procedure
E-mail: nyilas.anna@law.unideb.hu

Abstract. The object of this article is to shed light on the importance of the information duty of the judge concerning evidence. According to the Hungarian Civil Procedural Code, the judge has the duty to inform the parties before their motions for evidence on the facts that need evidence, on which party bears the burden of proof, and on the consequences of failure to provide evidence. There have been various initiatives in Hungary to completely abolish this duty of the judge or at least to narrow its scope of application in civil procedures (e.g. it should not be applicable when the party has a legal counsel). One may perceive various motives behind this abolition. However, the author of this article makes an argument for the importance of the duty in order to give adequate information to the parties. The article analyses three aspects of its significance, namely, timeliness, the scope of the dispute, and procedural rights. The Hungarian Supreme Court (Kúria) has established in multiple decisions the importance and the various aspects of this duty. The scope and limits of the information duty are examined in this article through the judicial practice and the decisions of the Kúria. Examples of good practice in civil procedures from various European countries are presented as a comparison.

Keywords: civil procedure, evidence, burden of proof, Hungarian judicial practice

1. Legal Background

The object of this article is to shed light on the importance of the information duty of the judge concerning evidence. There have been various initiatives in Hungary to completely abolish this duty of the judge or at least to narrow its scope of application in civil procedures (e.g. it should not be applicable when the party has a legal counsel).

In Hungary, the objective of the civil procedure was completely reinterpreted in 1999, and the responsibilities of the parties were clarified. Taking evidence on the court's own motion was excluded from 1995 onwards, and the principles of party control and party disposition were understood in a broad sense.[1] Operating in this conceptual framework, the judge had no tools to establish the facts of the case and to promote its completion. According to the lawmakers, ascertaining the truth and establishing the actual facts became an obsolete objective. Instead, the purpose of the court proceedings is to ensure and guarantee the impartial resolution of disputes in a timely manner.[2]

Article 164 § (1) of the civil procedural code (*Pp*) states that the burden of proof, the consequences of a failure to prove, and late motions must all be borne by the party who has to prove the case. In the field of evidence, the court must inform the parties – whether they act with or without a legal representative – on which facts need evidence, who carries the burden of proof, and on the consequences of a failure to prove a fact. The judge must inform the parties that the court may not take evidence on its own motion except where permitted by law. He/she must warn the parties that they must make their motions for evidence at a stage of the procedure that corresponds to a person acting diligently and which promotes the successful completion of the procedure (Article 141 (2) §). Finally, the court warns the parties that they must exclude evidence if the motion was presented late through the party's own fault. The information provided on the consequences of failure to prove also states that facts left unproved must not be accepted as valid and that therefore the existence of relevant facts cannot be determined. The absence of a fact that underlies a right which is claimed results in the party's inability to establish this right and consequently in the dismissal of the claim on its merits. The parties must be warned that lack of evidence cannot be remedied in the appeal proceedings because new evidence can only be presented in exceptional cases prescribed by law.

In a 2011 modification, the category of 'Cases with important value' was added to the Hungarian civil procedural code with a set of specific provisions for these procedures. It is applied in monetary claims where the amount of the claim exceeds 400 million HUF. One of the new rules (Article 386/J.§) states that in these cases the judge does not have to inform the parties on the facts to be proven, the burden of proof, or the consequence of a failure to prove a certain fact. Besides, legal counsel is obligatory in these cases.

One can understand that the reason behind this abolition is that legal counsel should be able to find out the relevant facts and the burden of proof from the case itself, and he/she should also be acquainted with the consequences of failure. It might seem an appropriate solution to speed up the procedure by burdening the judge with fewer tasks; however, it may equally well have adverse effects.

1 Éless–Farkas 2010. 1–12.
2 Kengyel 2005. 674–680.

The legislator may have thought it unnecessary to inform legal counsel on what facts need evidence and who bears the consequence of any failure to prove a certain fact. However, it is all the more important in these large-scale disputes, some of which are complex in terms of evidence, that these questions be clarified during the first hearing. Abolishing the duty to give this information may add to more frequent postponements of hearings and/or to irrelevant and unnecessary motions for evidence; it therefore constitutes several steps backward in effectiveness, rather than a step forward.

2. Information Duty in General and Special Procedures

When examining other special procedures, such as in small claims cases, one finds that the information duty of the judge is even wider than according to the general rules of procedure. In Article 388.§ (1) of the code, it is stated that the judge shall inform the parties in the summons that the case will be judged in a small claims procedure and that the parties have the duty to appear at the hearing and to make their statements. Finally, information must be given on the consequences of a failure to observe the time limits for making motions for evidence, changing the claim, or filing a counterclaim. It also adds to the information duty that in the judgment, according to Article 391/D.§, the parties must be informed regarding the mandatory content of appeals and the consequences arising if this content is absent.

Consequently, the wider information duty is due to the fact that legal representation is not obligatory in small claims procedures. However, this does not mean that obligatory legal representation can entirely exempt the judge from the duty to give certain information to the parties, and the law should provide for this. This article claims that information given regarding evidence prescribed in the general rules of procedure is a guarantee of fundamental rights and cannot be abolished in a quest for timeliness. These rights include the right to a fair trial and the right of both parties to be heard in a lawsuit. These rights are expressed in Article 3.§ (6), according to which the judge shall ensure that the parties receive all statements, motions, and documents that were submitted to the court in the procedure and that they have the opportunity to examine and respond to them in due time. Due time is specified by the judge, depending on the circumstances of the case.

In terms of party autonomy and party control, and because the judge is bound by the claims of the parties, the law makes it the parties' task and duty to present all facts and evidence to the judge.[3] However, in terms of managing the case, it is the task of the judge to prohibit delaying tactics, in particular, by presenting irrelevant or superfluous facts or evidence. He/she is able to fulfil this task by giving adequate information to the parties.

3 Kormos–Nagy–Wopera 2016.

As to the general rules of civil procedure, for a party to prove his/her case successfully, he/she needs to be informed regarding certain duties in providing evidence, i.e.:

– which facts need to be proven by evidence,

– who bears the burden of proof for which facts,

– what is the consequence of a failure to prove a certain fact, especially if the case may be judged on the merits of this fact.

This information should be given by the judge at the beginning of the evidence process and also during the process when new facts are brought up by a party or when the claim is modified. In one of its rulings, the *Kúria* underlined that any consequences of a failure to provide evidence can only ensue if the information given on the facts that require evidence followed changes in the parties' statements during the course of the procedure.[4]

It is no coincidence that general rules of procedure prescribe this duty of the judge even when the party has legal counsel, whereas other duties – such as information regarding a party's procedural rights and duties or ordering that an incomplete claim form be corrected – are not applicable in this case.

3. Significance of the Information Duty

In the following section, the article will highlight the significance of the information duty from three perspectives. Firstly, it is important to give this information because in this way the course of the procedure can be planned, the judge can foresee the timing and number of continuous hearings and the type of evidence presented at each hearing. It is crucial for a fast and efficient handling of the case that both the judge and the parties are aware of the subject matter of the dispute, which facts are relevant and need proof, and how to prepare for the next hearing. This is the time factor.

Another aspect is that the contents of the lawsuit are clarified by giving this information; namely, it becomes clear which facts are relevant to the case according to the judge. If the existing law contained detailed provisions – which it does not –, they would provide grounds to reject new statements of facts and modifications of the claim raised later at some subsequent hearing. This is the scope factor. In the absence of the scope factor, so-called 'surprise' judgments can be made, when the party only realizes from the judgment that the judge considered a certain fact to be important. As one author pointed out, the claimant is already at a disadvantage because he/she bears the burden of proof for the alleged facts without knowing what conception(s) guide the judge, i.e. how the judge will sort out this 'heap' of facts and evidence, what he/she will consider as an important

4 BH2015. 107.

fact and sufficient evidence and what not. Thus, there must be an information duty to a certain extent, without falling into a prejudication of the facts.[5]

Thirdly, the information duty is a guarantee of the parties' procedural rights. It ensures that their points are taken into consideration by the judge and that they are able to contradict each other's statements. As such, the information must be given even if the party has legal counsel. This is the rights factor. In case BH2007. 123,[6] the court emphasized that the duty to give information on the relevant facts of the case ensures the party's right to legal remedy by clarifying what needs to be proven to fulfil the burden of proof. In the given case, the judge only provided general and formal information regarding the burden of proof and the duty of the parties to provide evidence, and the information was not given with regard to the specific circumstances and facts of the case. The judge did not mention that expert evidence was needed to assess certain facts. Therefore, the court violated the duty to give proper information on evidence. The general duty to provide information laid down in the code must be fulfilled in a case by giving information individually and specifically in the light of the legal cause of action and the subject matter of the case.

The principle of a fair trial implies that the information is not a mere recitation of procedural rules but that it connects the facts presented by the parties with the relevant rule of material law. A party cannot be kept in uncertainty about what is regarded as relevant by the judge in deciding the case. Without this information, the party is not in a position to fulfil his/her duty to provide evidence.[7]

However, there is also a contradictory approach, argued by Haupt (2014), according to which there is no need to maintain the duty to inform the parties concerning evidence.[8] Haupt's opinion is based on the principle of party autonomy and control. He maintains that the claimant should clearly state in the claim form the facts of the case, the evidence relating to them, and the remedy sought. The scope of facts to be proven by the claimant will then be determined by the claim form itself, and there is no need for the judge to give additional information on what needs to be proven. He further believes there is no need to inform the party about the consequences of failure as these are expressly stated in the law. His opinion is that the information duty should be entirely abolished. His reason mainly lies in the assumption that before filing the claim the claimant should see clearly what evidence he/she will put forward. Collecting evidence and preparing it for the litigation should be done before filing the claim.

This opinion is justified in asserting that parties should come to the first hearing well prepared, which is unfortunately not the practice in Hungarian courts. But

5 Ádám 1999. 430–442.

6 All the court cases mentioned in the article can be found in the official journal of the *Kúria* – Kúriai Döntések –, also available online at: http://kuriaidontesek.hu/hu_HU/kezdolap.

7 Molnár 2009. 129–140.

8 Haupt 2014. 699–705.

a thorough preparation cannot be obtained by abolishing the information duty of the judge. At present, the code of civil procedure does not provide appropriate instruments for the parties or their legal counsel (as occurs with disclosure in English civil procedure). Also, this view does not take into account the free evaluation of evidence, which can lead to 'surprise' judgments if there is no information concerning the relevant facts or whether the evidence is sufficient. Haupt wants to lay all responsibility for the evidence process on the parties and their legal counsel. The judge would then receive the case 'ready to decide'. On the contrary, the litigation itself should be the process that serves the purpose of getting the case ready for judgment.

4. Information Duty in Other European Jurisdictions

Given the differences in legal traditions, it is helpful to consider French, English, German, and Austrian civil procedural rules. Through this comparison, one can observe the common presence of some kind of information duty on the part of the judge, but we can also gain an insight into the differences in the scope and application of that duty.

In the French Code of Civil Procedure (NCPC), the facts upon which the resolution of the dispute depends may be subjected to any measures to establish evidence admissible by law, either on request of the parties or *ex officio*.[9] The judge must limit the measures of evidence to what is sufficient in order to decide the case and has to choose the measure that is least expensive and burdensome.[10] Evidence measures can be ordered if the judge has no sufficient information to decide the case.[11] In fact, he/she may order *ex officio* any measure to establish the facts. When ordering evidence, the French law provides that the parties are required to prove the facts necessary for the success of the claimant or of the defence. The judge may not order a measure on his/her own motion (*measured instruction*) unless the alleging party cannot prove it by any means, and the measure must not replace the default duty of the party to submit evidence.[12] However, the law also states that the judge may order any action on his/her own motion (to establish the facts) at all times if there is insufficient information to decide the case.

It is the task of each party to prove the facts necessary according to the law to ensure the success of their claim.[13] The NCPC provides that parties are obliged

9 NCPC Article 143.
10 NCPC Article 147.
11 NCPC Article 144.
12 Cadiet 2000.
13 NCPC Article 9.

to give the necessary facts to support their claim. The claimant must state the subject of litigation as well as the factual and legal grounds. He/she should state the facts and provide the documents in all cases. The parties are responsible for presenting the facts, and the burden of failure to prove them falls on them. This also means that they provide the court with the case material as well as the facts and evidence with which the court will establish the judgment. Thus, it is ultimately the judge who has to establish the facts of the case whether the parties have provided the necessary information or not.[14]

The judge has the power to order *ex officio* all measures of evidence which are legally admissible.[15] He/she may take into account all the relevant facts, even if the parties have not relied on them[16] and may order the production of evidence and order preparatory measures if the statutory conditions are met.

In the English CPR, the claim form includes details of the court, the party's name and address, a brief summary of the claim, the remedy sought, and, if it is a pecuniary claim, the amount must be indicated. The claim form must:

(a) contain a concise statement of the nature of the claim;
(b) specify the remedy which the claimant seeks;
(c) where the claimant is making a claim for money, contain a statement of value in accordance with rule 16.3;
(cc) where the claimant's only claim is for a specified sum, the form must contain a statement of the interest accrued from that sum;
(d) contain such other matters as may be set out in a practice direction (PD).

The claim form must be accompanied by a statement of truth in which the applicant declares that he/she believes the facts alleged are true. The applicant's claim must include factual allegations from which the claim arises. Evidence does not need to be included at this stage and need not contain the legal assessment that the party draws from them. A claim form contains, *inter alia*, the claimant and the defendant's name, the claim accurately and comprehensively, and the decision sought, namely the decision the claimant wants from the court.

Although it is the judge who establishes the facts, the parties need to provide them to the court. Ideally, the judge can only rely on the information that the parties have brought before him/her. Obviously, the parties will present information that conforms to their interest. Therefore, the judge is, in principle, bound to the parties' selection as regards the establishment of the facts. A statement of the case should contain all the facts which the parties claim to be true. Both sides will state a set of facts, and both these two sets will be available to the judge. He/she cannot undertake any research to compile a possible third set of facts. This picture, however, has become more subtle over time. The case

14 Jolowicz 2003. 281–296.
15 NCPC Art. 10.
16 NCPC Article 7.

management idea has also introduced an increased role for the judge in the field of fact-finding. This ensures that parties 'reveal their cards' as soon as possible, in the early stages of proceedings, and today this stretches even to the pre-trial phase. In many disputes, pre-action protocols govern the steps to be taken prior to a lawsuit, which are conditions for starting the litigation.[17]

The court may not prescribe to the parties what evidence should be presented. Evidence from expert witnesses cannot be ordered at the hearing if the parties have not previously requested this from the court. The court may not order that a party provide expert opinion if the party does not wish to use an expert in the proceedings. There is an option for the court to appoint an independent expert on any fact or opinion which does not involve a point of law or legal interpretation, although this may be used only with the consent of both parties. However, there is a tool whereby the judge can indicate to a party that if the party fails to call a witness or does not question the other party's witness in order to prove a disputed fact, the claim will most likely fail. The court in both common and civil law systems may use its own knowledge or well-known facts, for which no proof is needed. On matters of law, the English judge is free to base his/her ruling on legal grounds that the parties have not previously called for.[18]

Among a variety of measures, CPR Section 1.4 contains the active judge's case management obligations concerning evidence – an early clarification of the nature of the dispute, deciding which issues require disclosure and evidence and providing guidance to the parties so that the matter is dealt with in a rapid and efficient way. In fast and multi-track procedures, the judge has the management task of setting relevance and priority; this includes definition of the issues falling within the case, determining the order in which the issues are discussed, deciding which issues require a hearing on the merits and which may be addressed in a simplified way.

The CPR provides that the judge directs the process of proof-taking by determining what facts need evidence, what evidence is needed, and how it should be presented to the court by a party. What remains in the hands of the parties in the fact-finding process is the scope of their factual statements. Case management also involves a certain restriction on the parties' freedom to make their statements on the case as they choose.[19] An example is the explicit power of the judge in evidence-taking to decide which issues need to be proven, the method of proof he/she requires to decide these issues, and how this evidence should be presented before the court. The judge may exclude evidence that would otherwise be permitted.[20] This is a power, which, if used by the judges

17 Nyilas 2011. 60.
18 Graef 1996. 46.
19 Jolowicz 2000. 386.
20 CPR Rule 32.1.

extensively, may greatly limit the parties' right of disposition considering the merits of the lawsuit.[21]

In German civil procedure, the court's obligations, specifically ZPO 139§, were affected by the 2001 Amendment, which extended the court's recording and information tasks. Under this section, the court must discuss the factual and legal sides of the case with the parties, ask the relevant questions, and order the party to complete his/her statement if it is incomplete or erroneous. The party must make the necessary statements and provide the corresponding evidence. The facts that are not disputed between the parties must not be further explored or proved. The judge must indicate those legal aspects of the case which the parties apparently have not noticed or have thought irrelevant. Often, it becomes apparent while discussing the legal aspects which facts are relevant or incomplete. In addition, the judge cannot base his or her decision on a legal basis that the parties have not considered previously and could not refer to during their statements.[22] On the duty to give information, the limits are not strict, but the information cannot serve one party's interest. It should cover the appropriate statements or amendments thereto; for example, if it is the interest of both parties to avoid another lawsuit. However, the judge may not propose a legal option which the party was not even considering. This influence, thus, does not restrict the freedom of the parties. If a party fails to comply with the court's proposal and does not complete or does not specify the statement, the court will be bound by the initially stated facts. According to ZPO 139(2)§, the judge must inform the parties if he/she intends to base his/her judgment on a fact or law the parties have apparently ignored or considered insignificant. He/she is also required to inform the parties on his/her position on a question of fact or law if it differs from the position of both parties. Finally, the court must allow the parties to comment on those facts or points of law which they have ignored, considered insignificant, or interpreted differently from the court. Critics say the practical effect is small, as in case-law there has already been an established practice which operated in accordance with the new regulations, and the court's duty in the direction and the course of the process has already been well defined.[23] What occurred was a reflection of this practice in the rules, rather than any new obligations.[24] The amended 139§ 'Material case management' summarized the tasks of the judge, including the cornerstone of the reform, the *Hinwirkungs und Hinweispflicht*. Accordingly, the court must contribute actively so that the parties submit all significant facts in a timely and comprehensive manner and, in particular, supplement their incomplete factual allegations, indicate their evidence,

21 *Evaluation of Civil Procedure Reforms* (August 2002); available at: http://www.dca.gov.uk/civil/reform/ffreform.htm and *Emerging Findings: an Early Evaluation of the Civil Justice Reforms, March 2001*; available at: www.dca.gov.uk/civil/emerge/emerge.htm (10 November 2010).

22 Walter 2005. 74–75.

23 Schellhammer 2001. 1081–1085.

24 Rühl 2005. 909–942.

and make their motions to promote the case. In order to avoid 'surprise' judgments, the parties should be warned of aspects overlooked or considered unimportant and of circumstances which can be considered *ex officio*. The guidance should be given as early as possible and must be recorded. Failure to give this guidance is a breach of procedural rules, and the first instance judgment will be repealed. The disposal principle and the party control principle continue to apply, as a party is free to decide whether to follow the judge's instructions or not. Nowadays, it is widely accepted that the primary responsibility of a judge is to ensure a fair and efficient management of the case, to ensure that the parties have access to justice and that the right to be heard prevails.[25] The duty of the court to give guidance does not mean it can divert from the requirement of impartiality, and it may not assist a party in winning.[26] The facts that need evidence are those that are relevant to deciding the dispute, which are otherwise not yet proven, and that are disputed. Although presentation of the facts and relating evidence is the responsibility of the parties, the process of evidence itself is conducted by the court *ex officio*.

Similar rules apply in Austria, where, to minimize the loss of time caused by taking evidence relating to facts that later turn out to be irrelevant, the court and the parties discuss the factual and legal aspects of the case in the early stage of the procedure. The judge should not express his/her personal views and evaluation but should caution the parties regarding any possible legal implications of the case in order to avoid any surprise in the legal reasoning of the court judgment.[27]

Article 183§ AZPO allows the taking of evidence *ex officio* if there are reasonable grounds on the basis of the claim or the conduct of the procedure that this evidence will help to clarify the relevant facts. Documentary evidence is only allowed if one of the parties has referred to that particular document. Witness and documentary evidence is not allowed if both parties are against it. Otherwise, taking evidence *ex officio* is rare in practice.[28]

5. Judicial Practice in Hungarian Courts

As regards the case-law of the Hungarian Supreme Court (*Kúria*), it has established in multiple cases that giving incorrect or incomplete information on these aspects of evidence or omitting to give information results in serious violations of procedural law, and therefore the judgment must be set aside. In a recent case,[29] the court ruled that the judge must state *ex officio* that the contract in dispute

25 Murray–Stürner 2004. 156–163.
26 Karst 2003. 239–269.
27 Bajons 2005. 121.
28 Oberhammer–Domej 2005. 103.
29 BH2013. 123.

is a consumer contract and must inform the parties on the reversed burden of proof. Similarly, in a dispute between neighbours, the court ruled that the judge must give appropriate information to the parties on the specific burden of proof. Failing this, a judgment on the merits based on insufficient evidence provided by the party is unlawful and must be set aside.[30]

As is declared in BDT 2001. 426, providing false or improper information about the burden of proof or placing the burden on the wrong party is a serious breach of procedural rules, which cannot be rectified in appellate proceedings and has an effect on the merits of the case. Thus, the judgment must be set aside, and the first instance court is ordered to rehear the case.[31]

Case BDT 2011. 2410 also draws attention to the aim of the information duty. It does not exist for its own sake but ensures that the parties fulfil their duty to make their statements and motions in good faith and in due time, as they are obliged to do. If the party was aware of which facts need evidence and who bears the burden of proof, the information duty could be a formal one. There would be no breach of fair trial, and it would not be a serious breach of procedural rules. However, in this particular case, the claimant claimed that the judge, despite having based the dismissive judgment on the merits on failure to provide evidence, failed to inform the claimant about which facts needed evidence. Furthermore, the judge rejected the claimant's motion to amend the expert opinion; therefore, the claimant concluded that the judge had found the existing evidence sufficient. Thus, the failure to give information here resulted in especially harmful consequences for the claimant. In a prior case, it had been established that the judge may only conclude that the party failed to provide evidence when the information given to the parties had been complete and appropriate to the case.[32] In another case,[33] the court ruled that there was no breach of the information duty when the information had been given individually and completely, according to the facts of the case and the statements of the parties.

As well as defining the scope of application of the duty to give information, there are some cases that define the limits of this duty. No 1/2009 PK Opinion of the *Kúria* set certain limits when declaring that it was a minimal requirement that the party – regardless of whether he/she has legal counsel or not – be informed about which of the alleged facts needed evidence. The information must be given according to the particulars of the claim and defence, based on the relevant facts in terms of the material legal rules. The information also needs to be given during the course of the procedure when a party changes his/her claim or alleges new facts. The decision BH 2005/74 dealt with the link between material rules of law and the

30 BH2015. 6.
31 BDT 2007. 1694 – also contains similar conclusions.
32 BH2006. 298.
33 BH2011. 312.

duty to inform the parties about evidence. It highlighted that during the duty to inform the judge must not inform the parties about the material legal rules but must indicate the facts which he/she considers relevant. Of course, the scope of relevant facts depends on the material rule of law that the judge considers applicable to the case; however, the judge still has no duty – and not even a possibility – to inform the party about his/her material rights. Nor is there a duty for the judge to draw the attention of the party to a possible or necessary modification of the claim. This would go beyond the duty to provide information, and it would represent prejudice, which is prohibited. The judge must never give legal advice to the party on his/her material rights. Only in a case in which a party acts without legal counsel can the judge inform the party on his/her procedural rights to file a counterclaim or to alter the claim but only if the party makes a statement about certain relevant facts.

We should re-evaluate the ruling (also included in the 2009 Opinion) that information given by the judge must not detail what type of evidence is needed – except for the need for expert opinion. Even this ruling states that it is recommended to refer to the type of evidence when the party cannot fulfil the duty to provide evidence without that specific type of evidence. Nevertheless, a party without legal counsel must be informed about the various types of evidence. This rule makes an entirely unnecessary difference in the scope of the information given between parties with and parties without counsel.

It can be concluded from the above how narrow the line is between adequate information and prejudice when considering the 1/2009. PK Opinion. It declares that it is not prohibited (although nor is it required) to call on the parties for further motions for evidence if the judge finds that insufficient evidence had been provided on a certain fact; but, in any case, he/she should not inform the party about whether the evidence provided is adequate or not. Evidence can only be evaluated in the judgment.

This problem could be eliminated and the boundaries could be clarified if the code contained a provision that the judge must call for further motions or evidence if he/she finds it insufficient and inform the party about the consequences of failure to provide further evidence. After being informed of this, if the party does not make a motion for evidence, even if he/she was given the opportunity, then the claim can be rejected on its merits on the basis of insufficient evidence.

One may find an example where the judge can decide what type of evidence is admissible: in the European Small Claims procedure, not only must the judge inform parties about procedural rules if necessary but he/she also has certain duties concerning evidence. The court or tribunal shall determine the means by which evidence is taken and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence.[34] As the Regulation is

34 Article 9, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing a European Small Claims Procedure.

drawn from the legal systems of the member states, it can be assumed that other legislations also highlight the importance of giving information about evidence to the parties. Here, as we have seen, the Regulation contradicts Hungarian legal practice where it is not necessary to give information about the means of evidence.

6. Conclusions

It is the task of the judge to plan the course of the procedure, but it has to be planned in cooperation with the parties. This cooperation duty can be required by law if the parties are adequately informed about their procedural duties and the consequences of non-compliance, especially if these depend on the discretion of the judge and therefore cannot be foreseen; for instance, if there is a possibility of ignoring the late statements and motions of the parties. Thus, in a future code, it should be stated that the court and the parties cooperate in determining the scope of evidence as soon as possible, preferably at the first hearing. If the judge finds that the scope of evidence needs correction or modification later, at least he/she should inform the parties of this, without giving actual legal advice.

However, the information duty is not adequately emphasized in the Hungarian code at present. In terms of evidence, the main rule regarding the judge is the principle of the free evaluation of evidence, which is interpreted widely in judicial practice. The judge may or may not consider evidence presented by a party. The reasons for evaluation must be given in the reasoning part of the judgment. However, the only limit to free evaluation is that evidence must not be contrary to the facts established and that every fact must be validated by some evidence or at least ascertained by the statements of the parties.[35] The extremes of free evaluation can be seen in the following case. In BH 2001/6/301, it was declared that the court may establish the facts of the case by evaluating the evidence in such a way that the evidence is not in accordance with the facts but is not illogical in the light of other materials in the lawsuit.

If we regard the judge's duty to provide adequate information as a guarantee of a fair trial, we can conclude that this duty can only be excluded or limited to a very limited extent without violating the principle of a fair trial. The cases and analyses presented in this article highlight the dangers of departing from the meaning of the information duty established by judicial practice.

The principle of the duty of the judge to give information concerning evidence is crucial to the effectiveness of civil procedures. Therefore, its scope of application, its particular contents and its limits should be carefully established in the new procedural code along with the consequences resulting from any breach of this duty. The principle is, and should be, alive and well, and it continues to be much needed in every civil procedural system.

35 On facts that need no evidence, see also Pribula 2012. 288–297.

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