ELTE LAW JOURNAL

2018/2

ELTE LJ

ELTE LAW
EÖTVÖS LORÁND UNIVERSITY

ELTE LAW JOURNAL

2018/2
ELTE LJ

Budapest, 2018

EÖTVÖS UNIVERSITY PRESS

ELTE Law Journal, published twice a year under the auspices of ELTE Faculty of Law since 2013

Contact • eltelawjournal@ajk.elte.hu
Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1-3, Hungary
For submission check out our submission guide at www.eltelawjournal.hu

Recommended abbreviation for citations: ELTE LJ

ISSN 2064 4965

Editorial work • Eötvös University Press
18 Királyi Pál Street, Budapest, H-1053, Hungary

EÖTVÖS UNIVERSITY PRESS www.eotvoskiado.hu

Executive Publisher: András Hunyady, Eötvös University Press
Layout: Tibor Anders
Cover: Ildikó Csele Kmotrik
Printed by: Multiszolg Bt.

Contents

Foreword: 15 Years in the European Union – The Experience of Hungarian Courts

It is well-known that, following the change of regime in the Eastern European region in the early 1990s, all countries applied for membership of the European Union almost immediately. European economic integration was already visible in the way the internal market was functioning: in EU Member States, in Western European countries; economic development and the emergence of social welfare were also desirable goals for Eastern European countries. The Association Agreements were concluded within a few years, but accession negotiations were delayed, and Europe was reunited almost a decade and a half later, on 1 May 2004.

Since then, the experience and learning gained in the course of fifteen years has been interpreted in many ways. Different questions and answers arise when looking at this period from a political, economic or legal point of view. In this celebratory edition, we intended to analyse the role of the third branch of power, the Hungarian judicature. First, this was done by examining what issues arose in the field of EU law interpretation in different court divisions in Hungary, and what answers were provided by the Hungarian high courts.

In labour disputes, the prohibition of discrimination and the requirement of equal treatment came up for the very first time and then repeatedly appeared later on. The studies written by Szilvia Halmos and Éva Gellérné Lukács illustrate this process, with a view to identify the established opinions in legal literature.

A paper written by András Kovács together with Gergely Barabás reveals that, since Hungary's accession to the EU until now, most EU law-related issues have arisen in administrative cases, also shown by the fact that most questions referred for preliminary ruling were initiated by administrative courts.

EU law has also transformed the regulation of and judicial practice in Hungarian private international law and civil law; the former is analysed by Tamás Szabados, while Bálint Kovács presents the latter. Following the entry into force of the *Treaty of Lisbon,* there has also been a spectacular development in the area of judicial cooperation in criminal matters as a result of the change in EU law-making. By presenting a specific legal institution, Balázs Elek takes a look at the dogmatic difficulties of EU legal harmonization in the field of criminal law.

The authors of this thematic publication include both judges and academics. The judge authors are members of the European Law Advisors Network (ELAN), set up by the President of the National Office for the Judiciary. In addition to their judicial work, members of the ELAN receive regular training on EU law and they – on a voluntary basis – assist their colleagues in answering EU law-related questions. The academic authors are all faculty members at the ELTE Faculty of Law and they have been teaching, observing, documenting and analysing EU-related issues in Hungarian case law since the accession.

Our aim was to present the most important and interesting questions in EU law that have arisen in the course of the first 15 years in a documentary volume, reflecting the Hungarian judicial system and Hungarian legal literature. We hope that, after reading these studies, you will agree with us that the experiences of these years may be summed up in line with Walter Hallstein's idea: 'He who is not optimistic about European things is not realistic.'

Miklós Király
President of the Editorial Board
ELTE Law Journal

András Osztovits
Judge at the Curia
(Supreme Court of Hungary)
Guest Editor

Bálint Kovács*

The Impact of Hungary's EU Membership on Civil Law: a Retrospective Analysis

I Introduction

To offer an overview and paint an accurate portrait of changes occurring over a span of 15 years is only possible to achieve if one selects the appropriate paintbrush. Being comprehensive in anything retrospective is an enormous challenge in itself; also essentially subjective, almost sentimental. By contrast, the topic of legal harmonisation requires a rather orderly approach, which should be devoid of passions. Prior to Hungary's accession to the European Union, the representatives of the entire legal profession but especially those involved in civil legislation were excited about EU accession and what legal challenges it could bring. They were full of anticipation about the time when EU law would wash over the national legal and judicial system, by the stroke of the clock putting an end to the sovereignty of Hungarian legislation and bringing about a state of affairs when, besides our national laws, we would have to adhere to a wholly new set of rules and regulations. Some looked forward to the process with interest, some with aversion. The following paper has been compiled to offer an overview of cases and judgments of Hungarian relevance adopted by European Court of Justice (hereinafter, ECJ) which have proved to be challenging for the Hungarian legislator on the one hand, and have made some profound impact on the national civil law, on the other. Most importantly, the study will give an insight to how Hungarian courts were working towards assuming the State's liability in issues arising during the process of legal harmonisation, and what impacts European regulations on consumer protection have made on Hungarian procedural and substantive law.

II Member State Liability for National Legislation Contrary to EU Law

Since Hungary's accession to the European Union, probably one of the most discussed issues faced by Hungarian civil courts has been the State's liability for any damage caused by legislation and a lack thereof in the Hungarian legal system. Neither the Hungarian legislature,

* Bálint Kovács, judge, Regional Court of Szombathely; European law advisor.

nor the Hungarian courts have so far addressed, in a unified manner, the issues of what conditions are necessary for the establishment of the State's liability for damage caused by legislation; whether the liability for damage caused by legislation and that caused by the State's failure to harmonise its national legislation with EU law are interlinked; and whether the set of conditions elaborated by the ECJ's case-law establishes a new type of liability for damage.

1 The Lack of Liability

It seems that the Hungarian legislature is still reluctant to admit that there should be some limits to the State's immunity, at least in the field of civil law. During the process of drafting the new Civil Code, there was a point when a clear need to address the above issue arose. Section 5:550, subsection (1) of the draft Civil Code of Lajos Vékás introduced a differentiated rule, which made the State's liability conditional upon the establishment of the unconstitutionality of the injurious piece of legislation. The aforementioned concept was ultimately not included in the adopted version of the Civil Code, and since then there has been no legislative attempt to resolve the matter.

In a very recent decision,[1] the Curia of Hungary examined a claim for compensation based on the State's alleged liability for damage caused by legislation seeking to increase gambling tax on the operation of gaming machines, restrict the operation of gaming machines exclusively to the territory of casinos and place a ban on their operation outside them, and reiterated its – constantly followed – viewpoint, according to which, on the basis of decision no. EBH 1999. 14., which then had a decisive influence on the courts' relevant case-law, damage caused by the entry into force of a piece of legislation did not create any legal relationship with a civil law obligation between the legislature and the injured parties and, in the absence of any legal provision to that effect, the rules of civil law liability for damage could not be applied. The Curia also pointed out that, pursuant to civil decision of principle no. 1/2014, which had gone somewhat beyond the courts' earlier jurisprudence related to compensation for damage caused by legislation, a claim for such compensation could be successful only if the damage had been the result of a legal provision that had been adopted within the framework of a dysfunctional legislative process to have an individual effect without any normative content and that, as a consequence, had been annulled by a decision of the Constitutional Court of Hungary.

In another decision published over the past couple of years, the Curia reached substantially the same conclusion when it found that the relevant Hungarian legislation which, due to the unsatisfactory transposition of EU law, had deprived Hungarian employees of their right to paid annual leave and had consequently decreased their free time that could have been dedicated to recreation or nurturing a family ties had amounted to a violation of their right to privacy. In the absence of any national legislation to that effect, the direct liability of

[1] Curia of Hungary Pfv.IV.21.912/2017/6.

the Hungarian State for the damage caused by such violation could, however, not be established.[2]

In the above case, the Curia stressed that the legal provision enshrined in section 339, subsection (1) of Act no. IV of 1959 on the Civil Code (hereinafter: former Civil Code)[3] could not be applied to the relationship between the plaintiff and the defendant, as the parties had not entered into a legal relationship with a civil law obligation, and the courts' case-law had been consistent, in that section 339 of the former Civil Code could not be applied to the State's liability for damage caused by legislation. Consequently, the Curia seemed to accept that the ECJ's settled case-law made it clear that, under appropriate conditions, Member States might be held liable to compensate their citizens for the damage caused by a national legislation contrary to EU law and the determination of the conditions of such liability fell within national competence, and took the position that, due to a lack of appropriate rules in the former Civil Code, the defendant State's liability could not be established.

The Curia is therefore of the opinion that there is no civil law relationship between the legislature and the persons concerned by the former's legislative acts. It appears from the Curia's viewpoint that the lack thereof is due to the absence of any legal fact of civil law relevance that could establish such a relationship. There is no horizontal relation between the legislature and the injured parties that could, without any special statutory mandate, result in a civil law relationship to be governed by the provisions of the Civil Code. In the absence of any express legal provision in the Civil Code to that effect, the injured party's provable damage does not constitute in itself a legal relationship with a civil law obligation between the party who caused the damage and the injured party, hence, the perpetrator of damage has no tort law liability.

On the other hand, the case-law of the Regional Appellate Court of Budapest and the Regional Court of Budapest delivers a different approach, according to which the damage incurred creates in itself a legal relationship between the legislature and the injured parties; thus, the State's liability, if proven, may be established on the basis of section 339 of the former Civil Code and section 6:519 of Act No. V of 2013 on the Civil Code (hereinafter: new Civil Code).

In the Curia's approach, with regard to its highly abstract conceptualisation of legal relationship structures, there is no difference in whether the damage arising from the legislator's misconduct was caused in an EU law context or in a purely domestic situation. Hence, by virtue of the above approach, it matters little whether the unlawfulness of the impugned legislative act, as one of the conditions necessary for the establishment of the State's liability, originates from a failure to harmonise national laws with those of the EU or from a violation of domestic legal – or predominantly constitutional – provisions.

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[2] The Curia based its decision on *Magyarország Alaptörvénye* (2011. április 25) (The Fundamental Law of Hungary of 25 April 2011) art B, para (1), art E, para (2)-(3), art I, para (1) and art VI, para (1) of the Fundamental Law of Hungary, and referred to s 75, item (1), s 76, and *1959. évi IV. törvény a Polgári Törvénykönyvről* (Act IV of 1959 on the Civil Code of the Republic of Hungary) s 339.

[3] Act of 1959 on the Civil Code.

In contrast to the Curia's view, which is based on the rejection of any legal relationship between the legislature and the injured parties and on the State's immunity, it is quite evident that, since Hungary's accession to the EU or even since the beginning of the accession process, the Hungarian legislator has been bound by an obligation to harmonise its national laws with those of the EU. A national piece of legislation adopted as a result of a breach of the above obligation is undoubtedly unlawful.

The Hungarian judiciary and the Hungarian legislature will sooner or later have to accept the fact that the State's liability for damage caused by legislation, primarily due to a breach of the obligation to harmonise, has to be incorporated into the Hungarian legal system in an effectively operational manner.

The question is therefore whether the liability for a legislative misconduct and the liability for a breach of the obligation to harmonise are interlinked in the national courts' case-law or whether Hungary's accession to the *acquis communautaire* has created a separate system of liability in that regard. From another perspective, the question arises as to whether the *Francovich* conditions and the conditions laid down in the *Post-Francovich* judgments provide a separate legal basis for liability, irrespective of whether the relevant national legislation has been adopted or not, and whether the State's liability for damage can be established due to a breach of the obligation to harmonise merely on the basis of the ECJ's case-law or only if national law provides for that possibility.

2 The ECJ's Legal Principles on the State's Liability for Damage

The ECJ came up with the concept of the State's liability for damage caused by a national legislation contrary to Community law relatively recently, only at the beginning of the 1990s, and all that despite the fact that the Community bodies' liability for any damage caused by their legislative acts had already been regulated in the founding treaties since the 1960's and early 70's and had been given a separate theoretical background in the *Lütticke*[4] and *Schöppenstedt* judgments[5, 6]. The State's liability for damage caused by a national legislation contrary to Community law has been based by the EU's legislative bodies on the so-called principle of Community loyalty, known today as the principle of sincere or loyal cooperation.[7]

Until the second half of the 1980s, a Member State's legislative acts contrary to the principle of Community loyalty had primarily been punished by public law sanctions; they had entailed enforcement proceedings as provided for in Article 169 EEC. It was only in the second half of the 1980s that, mainly due to the introduction of the concepts of 'direct effect' and 'direct applicability',[8] the ECJ's case-law started to refer to a set of principles and criteria

[4] C-57/65, *Alfons Lütticke v Hauptzollamt Saarluis,* ECLI:EU:C:1966:8.

[5] C-5/71, *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities,* ECLI:EU:C:1971:116.

[6] Várnay Ernő, Papp Mónika, *Az Európai Unió joga* (Wolters Kluwer 2016, Budapest) 516–517.

[7] Roy W. Davis, 'Liability in Damages for a Breach of Community Law. Some Reflection on the Question of Who to Sue and the Concept of the State' (2006) 31 (1) European Law Review 69–80.

[8] Paul Craig, Gráinne de Búrca, *EU law: text, cases, and materials* (Oxford University Press 2015, Oxford) 251–252.

related to the so-called 'individual Community rights'. Prior to that period, the ECJ could, in essence, refer only to the *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* case in respect of a Member State's liability for damage caused by a breach of the obligation to harmonise its national laws with those of the Community.[9] In the latter case, the ECJ held that

> it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.

Thus, until the mid-1980s, attention had been drawn, based on the *Schöppenstedt* formula, to the conditions of the Community bodies' liability for damage caused by their legislative acts. The theoretical background of the system of executive federalism had been more or less clarified as well. By virtue of this system, if there is no Community piece of legislation to provide for a specific method of enforcement in a particular field then, in accordance with Article 5 EEC, it falls within the competence of the Member States to take 'all appropriate measures, whether general or particular' to ensure fulfilment of their obligations arising out of Community law with the aim of guaranteeing the latter's appropriate application and implementation in their national legal system. Having regard to the principles of Community loyalty and executive federalism, the issue of the Community bodies' liability for damage resulting from their legislative acts and the issue of the Member States' liability for damage caused by their national legislation, in particular by a breach of their obligation to harmonise, emerged simultaneously both in the legal literature on European law and in the ECJ's case-law. It can be deduced from the ECJ's earlier case-law that it had addressed the above two issues in a complex and interlinked manner. Instead of separating the two systems of liability, the ECJ sought, to a certain degree, to bring them together.[10]

The introduction of the loyalty clause and the concepts of direct effect and direct applicability led the ECJ to lay down, in the *Francovich and Bonifaci* joined cases,[11] that the legal principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the founding treaty. Pursuant to the ECJ's viewpoint, a Member State may be held liable if i. the result prescribed by a directive entails the grant of rights to individuals; ii. it is possible to identify the content of those rights on the basis of the provisions of the directive concerned; and iii. there is a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties. Moreover, the national court must,

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[9] C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland,* ECLI:EU:C:1976:188.

[10] Kecskés László, 'Európa-jogi tapasztalatok az állam jogszabályalkotással okozott károkért való felelősségének megalapozásához' (2003) 5 (4) Polgári Jogi Kodifikáció 7.

[11] C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic,* ECLI:EU:C:1991:428.

in accordance with the national rules on liability, enforce the provisions of the directive concerned and a failure to do so entails the State's liability for damage. Hence, the legal principle laid down in the *Francovich* case stipulates that a Member State should be held liable for any damage caused to individuals as a result of a breach of Community law. Nevertheless, it has to be stressed that, according to the *Francovich* case, a Member State's liability for damage originating from breaches of Community law can be established only in cases of breaches of the provisions of the founding treaties (primary Community legislation) and not of directly effective specific rules (secondary Community legislation). Kecskés argued that the case had led to establish that, as a result of the principle of Community loyalty, Member States were to be held liable for breaches of primary Community law.[12] By virtue of the legal principle outlined in the *Francovich* judgment, a Member State's liability for damage is directly based on Community law; however, the State must provide compensation for the damage caused in accordance with the national rules on liability. Craig and de Burca also highlighted that although the importance of the *Francovich* doctrine is essential, only three basic conditions and minimal guidance were established here for breaches of EU law but, for further conditions, the court fell back on the principle of national procedural autonomy.[13]

Following the *Francovich* judgment, both the representatives of the legal literature[14] on European Community law and the national courts seeking to make a reference for a preliminary ruling have been animatedly preoccupied with the issues of how the legal principle outlined in the *Francovich* judgment, the conditions of liability laid down by Community law and the Member States' level of liability can be adjusted to the Community bodies' liability for damage and the Member States' liability for damage caused by national legislation and whether such a regime should be based on strict or a fault-based liability.

The question still remained despite their different nature, whether the Community's legislative bodies' and the national legislature's liability for damage due to acts contrary to Community law were to be applied simultaneously and as to what was the relation between the liability for damage caused by national legislation contrary to Community law and by national legislation contrary to the domestic legal regime.[15]

The principle according to which Member States are obliged to make good loss or damage caused to individuals by breaches of Community law for which they can be held responsible is applicable even where the national legislature was responsible for the breaches, defined by the ECJ in the *Brasserie* and *Factortame III* joint cases.[16] A Member State can be held liable even if the damage is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices. Individuals suffering loss or injury are entitled

[12] Kecskés László, *EU- jog és jogharmonizáció* (HVG-ORAC 2003, Budapest) 459.
[13] Craig, de Búrca (n 8) 253.
[14] Michael Dougan, *National remedies before the Court of Justice: issues of harmonisation and differentiation* (vol. 4, Hart Publishing 2004, Oxford) 238, 241.
[15] Blutman László, *Az Európai Unió Joga a gyakorlatban* (HVG-ORAC 2013, Budapest) 459.
[16] C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport,* ex parte: *Factortame Ltd and others,* ECLI:EU:C:1996:79.

to reparation where the breached rule of Community law is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. The ECJ also emphasised that the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. The conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims. In addition, the national court cannot make reparation of loss or damage conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law. As regards the Member State's level of liability, the ECJ pointed out that the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability; however, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation. The ECJ examined the implementation of the condition of 'sufficiently serious' breach in a Hungary-related case (*Baradics* case) as well, and observed that an infringement was considered to be sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State had manifestly and gravely disregarded the limits on the exercise of its powers. Factors which the competent court may take into consideration include the clarity and precision of the rule breached.[17]

The set of criteria on the State's liability for damage caused by a breach of the obligation to harmonise was further differentiated in a judgment delivered in the *British Telecommunications* case[18] in which the ECJ answered the question of whether a Member State could be held liable if it had incorrectly transposed a Community directive into national law, in a manner slightly incompatible with the directive's purpose. In its judgment, the ECJ found that, in the case at hand, the Member State concerned had transposed the directive into national law by opting for a solution not allowed by Community law; hence, it had breached the provisions thereof. The ECJ concluded, however, that the Member State could not be held liable for damage, because the breach of Community law had not been sufficiently serious, thus, the United Kingdom had not manifestly and gravely disregarded the limits of its powers.[19]

The so-called *Dillenkofer* case[20] marked another turning point. In its judgment in the case, the ECJ held that where, as in *Francovich,* a Member State fails to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion, which leads to the

[17] C-430/2013, *Baradics and others,* paragraph 43, ECLI: EU:C:2014:32.

[18] C-392/93, *The Queen v H.M. Treasury ex parte British Telecommunications plc,* ECLI:EU:C:1996:131.

[19] Márton Varju, András György Kovács, 'The Impossibility of Being a National and a European Judge at the Same Time. Doctrinal rifts between Hungarian and EU Administrative Law' in Michal Bobek (ed), *Central European Judges under the European Influence: The transformative power of the Eu revisited* (Bloomsbury 2015, Oxford) 9.

[20] C-178/94, C-179/94, C-188/94 and C-190/94, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland,* ECLI:EU:C:1996:375.

establishment of its liability for damage. The ECJ pointed out, in essence, that there was a difference between a Member State's failure to implement a directive into national law and the implementation of a directive into national law by a Member State with partly or wholly incorrect content.[21]

3 The State's Liability for Damage Caused by Legislation in the Hungarian Legal Thinking

Evidently, the former Civil Code, in its version in effect at the time of its adoption, did not address the issue of the State's liability for damage caused by legislation. The views on such liability could only be expressed in respect of the liability for damage caused in the exercise of public authority. At the time of the entry into force of the former Civil Code, the latter stipulated that 'liability for damage caused in the exercise of public authority shall arise only if the damage could not be avoided by ordinary legal remedies or the injured party resorted to ordinary legal remedies to avoid the damage and if the public official's guilt or liability had been established as a result of criminal or disciplinary proceedings'.[22] Although the 1977 modification of the former Civil Code softened the set of conditions laid down in section 349 of the former Civil Code by removing the condition 'as a result of criminal or disciplinary proceedings', this legal regime was, for functional reasons, not capable of resolving the issue of non-contractual liability for damage caused by legislation. The problem was that, due to ideological obstacles, the former Civil Code had not given a definition of the term 'in the exercise of public authority'; nevertheless, the Civil Department of the Supreme Court of Hungary sought, in its resolution no. 42, to outline its content. By virtue of the above resolution, liability for damage caused in the exercise of public authority could be incurred only and expressly due to damage caused by misconduct having a public authority nature, meaning that it was caused unlawfully in the exercise of public authority by way of organisational or dispositional acts or their omission. Despite the fact that the deregulation processes linked to the political change of regime, the dilemmas surrounding it and the regulatory aspects of the State's legal personality marginally raised the issue of liability for damage caused by legislation, the latter was not regulated by law. During the process of drafting the new Civil Code, a clear need to have the issue of liability for damage caused by legislation governed by an act of law emerged. Section 5:550, subsection (1) of the draft Civil Code of Lajos Vékás stipulated that the legislature should be held liable for damage caused by the adoption of an unconstitutional piece of legislation, if the Constitutional Court of Hungary had annulled such legislation with retroactive effect to the date of its entry into force. Subsection (2) provided that the legislature should be held liable for damage incurred as of the date of annulment, if the Constitutional Court of Hungary had annulled the unconstitutional piece of legislation without retroactive effect. Subsection (3) set forth that the legislature should be held liable for damage caused by

[21] Kecskés (n 12) 477 and 480.
[22] Act of 1959 on the Civil Code, s 349.

an unconstitutional legislative omission, if the Constitutional Court of Hungary had established that, although having been given statutory authorisation to do so, the legislature had failed to legislate, had consequently caused an unconstitutional situation to arise and had omitted to comply with its obligation to legislate within the deadline prescribed by the decision of the Constitutional Court of Hungary. Subsection (4) provided that the State should be held liable for damage caused by a breach of its obligation to harmonise its national laws with those of the European Union or caused by an inappropriate compliance with the aforementioned obligation. Finally, subsection (5) stipulated that the legislature should be held liable according to the provisions set forth in subsection (1), if the Constitutional Court of Hungary had established that the impugned piece of legislation had qualified, in content, as an individual decision. The above proposed provisions of the draft Civil Code of Lajos Vékás were ultimately disregarded by the legislator and so the new Civil Code has failed to address the issue of liability for damage caused by legislation.

According to the Curia's essentially consistent jurisprudence, damage caused by the entry into force of a piece of legislation does not create any legal relationship with a civil law obligation between the legislature and the injured parties and, in the absence of any legal provision to that effect, the rules of civil law liability for damage cannot be applied. The above judicial approach, promoting the State's absolute immunity, was modified by civil decision of principle no. 1/2014, stipulating that a claim for compensation for damage caused by legislation could only be successful if the damage had been the result of a legal provision that had an individual effect without any normative content and that, as a consequence, had been annulled by a decision of the Constitutional Court of Hungary. The Curia was of the opinion that, in such cases, the legislator's dysfunctional operation made its legislative acts unlawful from a civil law aspect as well, which entailed the State's liability for damage.

In a decision delivered in the mid-1990s, the Supreme Court of Hungary pointed out that damage caused by the entry into force of a piece of legislation did not establish any legal relationship of a civil law nature between the legislature and the injured parties.[23] The Supreme Court's above decision interpreted the rules of liability for damage caused in the exercise of public authority and examined whether the State's liability for damage could be incurred as a result of the subsequent establishment of unconstitutionality by the Constitutional Court of Hungary. The Supreme Court concluded that, as regards the application of section 349 of the former Civil Code, damage was only considered to be caused in the exercise of public authority if it was the result of misconduct having a public authority nature, meaning that it was caused unlawfully in the exercise of public authority by way of organisational or dispositional acts or their omission.[24] The Supreme Court also noted that a piece of legislation included abstractly formulated behavioural rules of general application, therefore the process of legislation and the liability related thereto were to be governed by public law, which provided for the legislator's immunity, even in the event of the annulment of the

[23] Supreme Court of Hungary Pfv.X.23.120/1993/4.
[24] Civil Department of the Supreme Court, Resolution no. 42.

impugned legislative act by the Constitutional Court of Hungary with retroactive effect to the date of its entry into force. Moreover, the Supreme Court implied that the executive branch's norm-making activities fell under the Constitutional Court's control; however, damage caused by the entry into force of a piece of legislation having general normative effect did not create any legal relationship of a civil law nature between the legislature and the injured parties; consequently, the rules of civil law liability for damage could not be applied. In addition, the Supreme Court stressed that the above findings could not be changed by the fact that, in the case at hand, the impugned decrees concerned specific individuals only on one occasion and in an exceptional manner.[25]

In another decision,[26] the Supreme Court held that 'the Constitutional Court's power to exercise an *ex post* norm control created a situation, having an effect on civil law relationships as well, which excludes in itself the applicability of the rules of liability for damage'. According to the Supreme Court's viewpoint, it follows from the above that the Constitutional Court's decision does not allow, in itself, for the application of the general rules of civil law liability for damage. By virtue of the Constitutional Court Act, the Constitutional Court of Hungary is entitled to annul an unconstitutional piece of legislation either with *ex nunc* or *ex tunc* effect; thus, to decide on how to arrange the legal relationships established on the basis of such legislation: the latter may be annulled either with retroactive effect, to allow for the reordering of the legislation concerned and for the eventual submission of claims for compensation, or with *pro futuro* effect to exclude them.

The Supreme Court's above decision, therefore, delivers a divided approach, according to which the State cannot be held liable for damage caused by a piece of legislation that has been annulled by the Constitutional Court with *ex nunc* effect, provided that the legal facts underlying the liability for damage had occurred prior to the annulment; on the other hand, such liability can be established in the case of annulment with *ex tunc* effect, provided that certain additional conditions are also met. The same concept was followed by the Supreme Court in a decision in which it found that damage caused by the entry into force of a piece of legislation did not create any legal relationship with a civil law obligation between the legislature and the injured parties and, in the absence of any legal provision to that effect, the rules of civil law liability for damage could not be applied.[27]

In the mid-2000s, Hungarian courts quasi unanimously took the position that a legislative failure could not establish any civil law relationship and, in the absence thereof, no liability for damage could be incurred. This legal principle was endorsed by the Regional Appellate Court of Debrecen,[28] and was followed by the Curia and the then Supreme Court as well. In addition, the same approach is supported by the Regional Appellate Court of Győr.[29] In a case dealt

[25] Supreme Court Pfv.X.23.120/1993/4, see also BH 1994. 312.; Élő Dániel, 'A jogalkotással okozott kár' (2018) 2 Polgári Jog <https://net.jogtar.hu/jogszabalydocid=A1800201.POJ> accessed on 10 August 2019.

[26] Supreme Court Pfv.IV.20.827/1993.

[27] EBH 1999. 14.

[28] Debrecen Regional Court of Appeal Pf.2.20.422/2007/4.

[29] Győr Regional Court of Appeal Pf.III.20.479/2009/4.

with by the latter, a claim for compensation for damage caused by a municipal clerk's application of the law was primarily examined by the courts; nevertheless, the Regional Appellate Court of Győr also held that damage resulting from the legislative act of a local government did not create any civil law relationship between the local government and the injured parties. From the 2010s onwards, the case-law, primarily of the Regional Appellate Court of Budapest, seemed to change, as the latter court pointed out in one of its decisions[30] that, based on section 349 of the former Civil Code, the State was to be held liable for damage caused by dysfunctional legislation. In parallel, a decision rendered by the Regional Appellate Court of Győr[31] stated that, in accordance with the 'principle of immunity', known to the legal literature and applied generally by the judiciary, damage caused by legislation did not establish any civil (tort) law relationship between the legislature and the injured parties. This principle, functioning as a general rule, is abandoned only if there is a dysfunctional piece of legislation or if it would be contrary to the constitutional protection of 'acquired rights'. If the damage is the result of a piece of legislation that has an individual effect without any normative content and that, as a consequence, is annulled by a decision of the Constitutional Court of Hungary, the legislator's dysfunctional operation makes the impugned legislation unlawful from a civil law aspect as well. The Regional Appellate Court of Győr argued that such was the case when, in the exercise of its power related to statutory regulation, the legislature incorrectly adopted an 'individual decision on a particular matter' under the form of a piece of legislation.

In a decision delivered in 2016, the Regional Appellate Court of Budapest assessed the issue of the State's liability for damage caused by national legislation contrary to Community law.[32] It pointed out that the State was to be held liable for such damage. The legislative action or omission of the Parliament, having no separate legal personality, is to be imputed to the Hungarian State. The conditions of liability for damage caused by legislation were governed by section 339 of the former Civil Code, while the method and rate of compensation for such damage were regulated by section 355. It falls within the competence of the national court to assess the unlawfulness of the impugned national legislation and the breach of Community law and to interpret the relevant EU pieces of legislation, by taking the ECJ's case-law into due account and, if necessary, by launching a preliminary ruling procedure. Dealing with the same case, the Curia reached a different conclusion – based on its earlier decision published under no. EBH 1994. 14. – according to which damage resulting from the entry into force of a piece of legislation did not create any legal relationship with a civil law obligation between the legislature and the injured parties and, in the absence of any legal provision to that effect, the rules of civil law liability for damage could not be applied. Pursuant to civil decision of principle no. 1/2014, which went somewhat beyond the courts' earlier jurisprudence related to compensation for damage caused by legislation, a claim for such compensation can be successful only if the damage is the result of a legal provision that

[30] Budapest-Capital Regional Court of Appeal Pf.5.21.829/2010/4.
[31] Győr Regional Court of Appeal Pf.V.20.095/2015/3.
[32] Budapest-Capital Regional Court of Appeal Pf.5.21.081/2016/6.

has been adopted within the framework of a dysfunctional legislative process to have an individual effect without any normative content and that, as a consequence, has been annulled by a decision of the Constitutional Court of Hungary.[33] Despite the formulation of the above premises, the Curia held that, for other reasons that emerged in the case at hand, the State's liability for damage could not be established.

In yet another decision rendered by the Regional Appellate Court of Budapest, the latter clearly took the view that a claim for compensation for damage caused by legislation should be dealt with on the basis of the former Civil Code's general tort law liability regime. The unlawfulness of the impugned piece of legislation could only be established in the event of its unconstitutionality. However, a decision on the impugned legislative act's compliance with the Fundamental Law of Hungary fell exclusively within the competence of the Constitutional Court of Hungary and not within the competence of ordinary courts. In a newer judgment, the Regional Appellate Court of Budapest added further clarification to its earlier position[34] and pointed out that, in the case of a claim for compensation for damage caused by legislation, the unlawfulness of the impugned legislative act was not a legal issue to be resolved by the competent civil court but a factual issue to be justified by the injured party based on the relevant decision of the Constitutional Court of Hungary. Later on, the Regional Appellate Court of Budapest also argued[35] that the fact that the new Civil Code did not provide for a special liability regime allowing for the compensation of damage caused by legislation did not exclude the legislator's liability for such damage on the basis of the general tort law liability regime. As regards national legislation contrary to Community law, the Regional Appellate Court of Budapest held[36] that the legal basis for the State's liability for damage caused by legislation was provided by section 339 of the former Civil Code, irrespective of whether the claim for compensation was based on a breach of EU law or on the unconstitutionality of the impugned national legislation. There is no EU-law based liability situation that shall not give rise to the application of section 339 of the former Civil Code. The Regional Appellate Court of Budapest further clarified the above legal premise[37] and found that, during the examination of a claim for compensation for damage caused by legislation, the judgment of the ECJ delivered in an infringement procedure and finding a breach of EU law justified the unlawfulness of the piece of national legislation concerned. Failure to meet any of the cumulative conditions necessary for the establishment of liability for damage entails the rejection of the claim for compensation.

In another, very recent, decision, the Regional Appellate Court of Budapest held that, in the absence of any legal provision to that effect, it could not be maintained that the State was

[33] Curia of Hungary Pfv.IV.20.211/2017/13.
[34] Budapest-Capital Regional Court of Appeal Pfv.5.21.199/2017/4.
[35] Ibid, Pf.8.20.941/2017/16.
[36] Ibid, Pf.5.20.117/2018/5.
[37] Ibid, Pf.5.20.542/2018/5.

given immunity against claims for compensation for damage caused by the legislature's eventually dysfunctional operation.[38]

The tendencies of the case-law of the ECJ and of the higher instance courts of Hungary described above show that there is no complete agreement among them as to whether the set of conditions elaborated by the ECJ's case-law serves as a substantive legal basis for the establishment of liability for damage caused by national legislation contrary to Community law, or whether the ECJ has only given a summary of the set of special Community law criteria that defines the conditions of such liability or has merely described the criteria for the Community law assessment of the unlawfulness of the impugned national legislation.

It seems from the Curia's decisions that, in the field of civil law liability for damage caused by legislation, it makes no fundamental difference whether the unlawfulness of the impugned national legislation originates from a breach of EU law or of the national constitutional order, since such unlawfulness cannot serve as a legal basis for the establishment of liability in either of the two breaches with regard to a lack of legal relationship as derived from the relevant public law rules. The starting point of the Curia's position is therefore the State's immunity, which means that there is no legal relationship between the legislature and the injured parties, as long as not stated otherwise by a piece of legislation. From such an abstract approach, it makes no difference whether the process of legislation causing the damage is based on the Community law obligation to harmonise or on the Hungarian legislator's own discretion. If the principle of the State's absolute immunity is to be followed, undoubtedly irrespective of the basis of the unlawfulness of the national legislation concerned, then it necessarily leads to a negation of the civil law relationship between the legislature and the injured parties. There is no horizontal relationship between them in that regard. In the absence thereof, their legal relationship cannot be governed by the Civil Code, which entails that no damage can create a civil law relationship between them. This approach – undoubtedly – complies with the Community law requirement of 'equivalence', because it makes no distinction between claims for compensation for damage caused by national legislation contrary to Community law and the national procedural conditions 'relating to similar actions' of a domestic nature as defined by the *Francovich* and *Brasserie* judgments. On the other hand, it is hardly in compliance with the so-called principle of effectiveness, since it scarcely meets the *Francovich* condition, deriving from the founding treaty, according to which the applicable national laws cannot make it impossible or excessively difficult to obtain reparation and the condition according to which the national court must, in accordance with the national rules on liability, enforce the provisions of the directive concerned and a failure to do so entails the State's liability for damage.

In contrast, the approach of the Regional Appellate Court of Budapest shows that the presumption of unlawfulness within the Hungarian rules of tort law liability, defined by section 6:519 of the new Civil Code and section 339 of the former Civil Code, can prevail in such relations as well; on the other hand, the subject-matter of the legislation concerned can

[38] Ibid, Pf.8.20.345/2018/8.

cancel out any unlawfulness. This approach entails that the legal regime governed by section 339 of the former Civil Code and section 6:519 of the new Civil Code does not mean that there is no legal relationship between the legislature and the injured parties in the absence of any legal provision to that effect. From a tort law aspect, there is no legal relationship only if the latter has no legal subject or there is no tort and tort law liability can be excluded; thus, immunity can only be granted if there exists a statutory circumstance that excludes the unlawfulness of the impugned action or omission. The above approaches' common concern is that they do not make any distinction between liability for damage caused by legislation and liability for damage caused by a breach of the obligation to harmonise. The issue is therefore linked to the problematic interlinkage or separation of the two systems of liability. The Regional Appellate Court of Budapest sought to take a position on the issue of separation when it argued, in the reasoning part of one of its judgments, that there was no separate liability regime under EU law; such a regime was not regulated by the EU's treaties. The ECJ elaborated the principles of liability for damage in the *Francovich* and *Brasserie du Pêcheur* cases, but the judgments delivered in them, as explained in paragraph 58 of the *RWE*[39] judgment, simply give an interpretation to a rule of European Union law, which clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. The Regional Appellate Court of Budapest was of the opinion that the aforementioned principles of liability served as a means for helping the national court to interpret the domestic rules on liability when examining the State's liability for damage caused by national legislation contrary to EU law. With regard to the above, it concluded that there were no two separate systems of liability, one with a legal basis governed by EU law and another one with a domestic legal basis, and that there were no two different treatments in respect of section 339 of the former Civil Code and the relevant EU law.[40]

The possible interpretations of the principles of effectiveness and equivalence were at stake in the *Hochtief* case[41]. Here, the Hungarian Court submitting the request wanted an opinion whether the EU law runs counter to the rule of effectiveness and equivalence where the national law limits damages by applying specific procedural tools. From the judgment provided by ECJ, it seems that the principle of effectiveness can only be interpreted in relation to equivalence.

There is a scholarly position that starts from the premise that the *Francovich* judgment and the ECJ's subsequent case-law have created a separate liability regime for the compensation of damage caused by national legislation contrary to Community law,[42] taking into account that the issue of liability is to be addressed by also applying the national rules of tort law liability, as expressly stated in the *Francovich* judgment regarding compensation for

[39] C-92/11, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein Westfalen eV,* ECLI:EU:C:2013:180.

[40] Budapest-Capital Regional Court of Appeal Pf.5.20.117/2018/5.

[41] C-300/17, *Hochtief AG. v Municipality of Budapest,* ECLI:EU:C:2018:635, paras 32–59.

[42] Király Miklós, 'Fogyasztóvédelmi irányelvek értelmezése az Európai Bíróság joggyakorlatában' in *Ius privatum ius commune Europae, Liber Amicorum Ferenc Mádl Dedicata* (ELTE University Faculty of Law 2001, Budapest) 136 and 149.

damage. The most acceptable approach for the authors of this paper is to consider the condition of 'sufficiently serious' breach, as set forth in the *Factortame III* judgment, as a concept to be applied and interpreted in the context of exculpation, while the requirement of causation, as defined in the *Francovich* judgment, is an additional prerequisite for the national conditions of tort law liability, which requires the existence of a direct causal link between the damage suffered and the breach of Community law. If the *Francovich* conditions do not qualify as a set of criteria to determine the conditions of liability, the former are then to be given substance by the national rules on the conditions of liability, as argued by the Regional Appellate Court of Budapest. In contrast, according to the Curia's approach supporting the State's immunity, there is and can be no liability for damage caused by legislation unless the legislator adopts a national piece of legislation to that effect; thus, the question of what binding force is to be attributed to the conditions laid down in the *Francovich* and *post-Francovich* judgments cannot be answered.

III A Brief Insight into the Hungarian Implications of the Köbler Principle

In the past 15 years, the applicability of the *Köbler* principle has had a number of Hungarian implications. Legal actions were brought in tax law,[43] consumer protection,[44] product warranty[45] and competition law[46] cases, in which the competent Hungarian courts consistently rejected – albeit for different reasons – the applicability thereof. One of the courts' most frequently invoked reasons for rejection was that liability for damage fell on the Member State and not on the courts; hence, the latter could not be held liable for a breach of EU law. This issue has probably been the highest on the agenda of the Hungarian judiciary. The defendant's legal standing in court was examined by the Regional Court of Gyula,[47] which decided to make a reference for a preliminary ruling and seek an answer from the ECJ as to whether the injured party was precluded from the possibility of claiming compensation directly from the injurious State body if the Member State was to be held liable for damage caused by a breach of EU law.[48] A thorough analysis of the *Köbler* doctrine is not possible within the framework of the current paper and therefore we would only highlight that the principles of executive federalism and equivalence cannot only entail a negative answer, meaning that the fact that the above issue is regulated by the Hungarian legislator within the system of liability for damage caused in the exercise of judicial functions is not in itself contrary to Community

[43] Curia of Hungary Pfv.III.22.112/2012/13.
[44] Ibid, 21.591/2013/5.
[45] Budapest-Capital Regional Court of Appeal 6.Pf.20.091/2013/8.
[46] Ibid, Pf.22.234/2013/8.
[47] C-287/2014, *Eurospeed Ltd v Szegedi Törvényszék,* ECLI:EU:C:2016:420, paras. 38–40.
[48] Varga Zsófia, 'A Köbler-doktrína magyarországi alkalmazása – A bírósági jogkörben az uniós jog megsértésével okozott kár megtérítésének gyakorlata' (2015) 1 Európai Jog 5–6.

law. The Hungarian courts' case-law follows the aforementioned argumentation: damage caused in the exercise of judicial functions triggers the liability of the court. It has also been a recurring reference that no liability can arise from court proceedings that have been finally disposed of. In essence, the authority of *res judicata* constitutes a procedural ground for the exclusion of liability. The argument according to which the courts' interpretation of law cannot result in a sufficiently serious breach of law, being one of the conditions of liability, has also been put forward a couple of times. In conclusion, it can be stated, in respect of the Hungarian implementation of the *Köbler* principle, that no judicial decision finding the judiciary's liability has been delivered so far in Hungary in accordance with the *Köbler* judgment, one of the reasons for the lack thereof may, however, also be that the new Civil Code expressly settles this issue with regard to the *Köbler* principle as well.

IV The European Union's Impact on Hungarian Procedural Law and the Hungarian Interpretation of the Freedom of Establishment

Two major Hungarian cases brought before the ECJ and making an enormous impact not only on Hungarian legal practice but also on the whole of European legal thinking were the *Cartesio* case and *Vale* case.

1 The Cartesio[49] and VALE[50] Cases and their Repercussions

From among the Hungarian cases brought before the ECJ, the *Cartesio* case has undoubtedly had the greatest impact on the Hungarian courts' case-law and on Hungarian legislation. Despite the fact that the referring court primarily raised a company registration issue related to the freedom of establishment before the ECJ, the *Cartesio* case also has procedural law implications. The *Cartesio* case 'had a lasting effect, paradoxically, on issues that were of no relevance for the purpose of ruling on the main proceedings by the Regional Appellate Court of Szeged [the referring national court]'.[51] The regional appellate court initiated a preliminary ruling procedure before the ECJ and referred the question of whether a company registry court is entitled to make a reference for a preliminary ruling in proceedings to amend a company registration. If the ECJ would conclude that the referring court had been entitled or obliged to make such a reference, the latter court sought answers as to what extent and how the national system of appeals in civil and criminal matters in respect of decisions seeking to launch a preliminary ruling procedure is compatible with Community law and as to whether national law may exclude the right of appeal against a court decision making a reference for a preliminary ruling.

[49] C-210/06, *CARTESIO Oktató és Szolgáltató Bt.,* ECLI:EU:C:2008: 723.

[50] C-378/10, *VALE Építési Kft.,* ECLI:EU:C:2012:440.

[51] See: Osztovits András, 'Köddé fakult délibáb – a Cartesio-ügyben hozott ítélet hatása a magyar polgári eljárásjogra' (2009) 2 Európai Jog 30.

2 Procedural Law Issues and Their Impact on Legislation

The first question of the Regional Appellate Court of Szeged concerned whether, in company registration proceedings that were not of *inter partes* nature, a company registry court was entitled to make a reference for a preliminary ruling.[52] In the *Cartesio* case, the ECJ expanded its initial concept of a 'forum' that is entitled to make a reference for a preliminary ruling. According to the original concept, in order to determine whether a body is a national court or tribunal entitled to make a reference, the ECJ takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[53] The ECJ established that a company registry court, when it decided an application for registration of a company in proceedings that did not have as their object the annulment of a measure which allegedly adversely affected the applicant, acted as an administrative authority and could not be regarded as exercising a judicial function, therefore it was not entitled to make a reference. In contrast, a court hearing an appeal, which has been brought against a decision of a lower court responsible for maintaining a register, rejecting such an application, and that seeks to have that decision, which allegedly adversely affects the rights of the applicant, set aside, is called upon to give judgment in a dispute and is exercising a judicial function, hence it is to be considered as a judicial forum entitled to make such a reference. Thus, the ECJ held with regard to the first question in the *Cartesio* case that a lack of the *inter partes* nature of the proceedings did not in itself preclude a company registry court from making a reference for a preliminary ruling. Nonetheless, such a court may make a reference only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. Hence, the case's impact on EU law was that it resulted in a change in one of the criteria underlying the concept of court or tribunal, in particular by replacing the *inter partes* principle by the requirement of exercising a judicial function. It has to be emphasised, however, that the ECJ made a distinction between the national courts' first and second instance proceedings and qualified only the latter as falling under the scope of a judicial function.[54]

The second question referred to the ECJ concerned the issue of whether a court such as the referring court was to be classified as a court or tribunal, against the decisions of which there was no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC. The ECJ pointed out that a court such as the referring court, decisions of which in disputes such as those in the main proceedings might be appealed on points of law, could not be classified as a court or tribunal offering no judicial remedy against its decisions under national law. This issue of legal interpretation led to one of the most important procedural consequences of the *Cartesio* case: a legal scholarly debate on the interpretation and

[52] *CARTESIO,* para 40.
[53] C-96/04, *Standesamt Stadt Niebüll,* ECLI:EU:C:2006:254, para 12.
[54] Osztovits (n 51) 29.

application of the provisions of section 155/A, subsection (3) and section 249/A of the former Code of Civil Procedure.

The background to this debate was the exercise of the right of appeal ensured by two pieces of legislation[55] that modified the former Code of Civil Procedure, Law Decree no. 13 of 1979 on Private International Law and Act no. XIX of 1998 on the former Code of Criminal Procedure. As a result of the legislative changes, decisions to launch a preliminary ruling procedure and second instance decisions in civil matters to reject a request to make a reference became separately appealable.[56] Later on, the legislator introduced a new provision under section 340, subsection (3) of the former Code of Civil Procedure, according to which first instance decisions in administrative cases to reject a request to make a reference also became separately appealable, provided that the first instance judgment could not be subject to appeal.[57]

The legislator was then of the opinion[58] that the issue of which judicial forum should be under the obligation to make a reference within the meaning of the third paragraph of Article 234 EC could not be resolved by way of legislation and that the courts of second instance should be regarded as ultimate instance judicial forums. Petitions for judicial review are a means of extraordinary remedy, which may be submitted depending on the content of the final judgment; hence, the court of second instance, before the delivery of its judgment, is not in a position to know whether the judgment to be rendered may result in a petition for judicial review or not and, consequently, whether it has an obligation to make a reference for a preliminary ruling. The same reasoning was put forward by the explanatory notes to section 249/A of the former Code of Civil Procedure: since the parties are not entitled to lodge an ordinary remedy petition against the on-the-merits decision of the court of second instance and to contest the position of the court of second instance regarding the necessity of a preliminary ruling procedure – and having regard to the fact that there are substantial limits as to when a petition for judicial review may be submitted – the parties should be given the right to compel the court of second instance to comply with its obligation to make a reference.

Legal scholars have expressed differing views on the legislative change; the views' common element was that they contained diverse critical remarks. László Blutman[59] recalled that, based on the ECJ's case-law the national legislature might decide to entitle the parties to proceedings to submit an appeal against a decision to launch a preliminary ruling procedure.

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[55] See: Act no. XXX of 2003 on the modification of Act no. III of 1952 on the former Code of Civil Procedure, Law Decree no. 13 of 1979 on Private International Law and Act XIX of 1998 on the former Code of Criminal Procedure.

[56] *1952. évi III. törvény.* a *polgári perrendtartásról* (Act III of 1952 on the former Code of Civil Procedure), s 249.

[57] See: Act XVII of 2005 on the modification of Act III of 1952 (n 56) and on the rules to be applied in certain non-litigious proceedings of the administrative courts.

[58] See: Ministerial explanatory notes to Act no. XXX of 2003 on the modification of Act III of 1952 (n 56), Law Decree no. 13 of 1979 on Private International Law and Act XIX of 1998 on the former Code of Criminal Procedure.

[59] Blutman László, *EUI jog a tárgyalóteremben – az előzetes döntéshozatal* (KJK–KERSZÖV 2003, Budapest) 336.

On the other hand, he considered that the issue needed to be nuanced, because the courts of first instance had no obligation to make a reference. The former Code of Civil Procedure's modified version did not make the scope of such an appeal and the extent of the appellate court's on-the-merits examination sufficiently clear.

Significantly divergent viewpoints have been, however, adopted by legal scholars in respect of the third question, referred to the ECJ, on the national courts' obligation to make a reference: Blutman was of the opinion that a Hungarian court was obliged to make a reference if its on-the-merits decision could not be appealed. Our point of view was that the Supreme Court of Hungary, acting as a judicial forum dealing with petitions for judicial review, should be regarded as a court under the obligation to make a reference, except where the provisions of the former Code of Civil Procedure excluded the possibility of lodging a petition for judicial review: in the latter case, the court of second instance should be considered to be bound by such an obligation. The latter position was contested by Daisy Kiss,[60] who reasoned that if the theoretical possibility of judicial review would discharge the courts of second instance from their obligation to make a reference then no such obligation would arise in the overwhelming majority of cases, which would be contrary to the purposes of Article 234 EC. The issue was further nuanced by the fact that first instance courts dealing with administrative lawsuits were not qualified as ultimate instance judicial forums within the meaning of the third paragraph of Article 234 EC. These courts were entitled but, in principle, not obliged to make a reference.

The answer given by the ECJ to the third question was that the second paragraph of Article 234 EC was to be interpreted as meaning that the adoption of national rules on the submission of appeals against decisions to make a reference for a preliminary ruling fell within the competence of the Member States; such national rules, however, should not permit the appellate court to vary the order for reference, to set aside the reference or to order the referring court to resume the domestic law proceedings.[61]

As a result of the *Cartesio* case, the Hungarian legislator resolved, as of 1 January 2010, the problematic issue of the parties' right of appeal in respect of court decisions to make a reference. Section 249/A and section 340, subsection (3) of the former Code of Civil Procedure were repealed. Section 155/A, subsection (3) of the former Code of Civil Procedure was modified so as to stipulate that decisions to reject a request to make a reference for a preliminary ruling may not be subject to appeal. The result was that the above sections had to be applied in lawsuits launched before 1 January 2010 and disregarded in those brought after that date, except for section 155/A, subsection (3).

The above debate was ultimately concluded by the Curia (the then Supreme Court) of Hungary by way of adopting the Joint Civil and Administrative Departmental Opinion no. 1/2009 PK-KK (of 24 June 2009). The supreme judicial body took the view that if the possibility of judicial review in a given case was not excluded by law then the Supreme Court

[60] Kiss Daisy, *A polgári per titkai* (HVG-ORAC 2006, Budapest) 504.
[61] *CARTESIO,* para 98.

should be regarded as a judicial forum obliged to launch a preliminary ruling procedure within the meaning of the third paragraph of Article 234 EC and the first paragraph of Article 68 EC. The court having the obligation to make a reference is given the discretionary power to decide on whether the conclusion of the appellate or – if no appeal is permitted – judicial review proceedings as to their merits necessitates making such a reference. The Supreme Court also found that, during the assessment of an appeal submitted, on the basis of section 155/A, subsection (3) of the former Code of Civil Procedure, against a decision to make a reference, the court of second instance was not entitled to re-examine the necessity of launching a preliminary ruling procedure and the content and reasonableness of the questions referred or to modify the first instance decision in that regard. In addition, the Supreme Court established that, in second instance proceedings and in first instance administrative lawsuits regulated by Chapter XX of the former Code of Civil Procedure, the appellate court, when examining an appeal lodged – pursuant to section 249/A and section 340, subsection (3) of the former Code of Civil Procedure – against a decision rejecting a request to make a reference for a preliminary ruling, was not entitled to reassess the necessity of making such a reference or to modify the first instance decision in that regard.

3 The Freedom of Establishment

The fourth question referred in the *Cartesio* case concerned the freedom of establishment. The referring court essentially asked whether Articles 43 EC and 48 EC were to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State might not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.[62] According to the case's factual background, Cartesio Bt., a company established in Hungary, sought to transfer its seat to Italy whilst retaining its status as a company governed by Hungarian law. In its judgment, the ECJ pointed out that Articles 43 EC and 48 EC were to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State might not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation. Hence, the ECJ held that, in legal terms, companies had to belong to a particular Member State. Their status is regulated by Member State law and they may exercise their freedom of establishment only if allowed by the relevant national law. In the absence of Community rules, Member States are free to determine the conditions necessary for the establishment of companies, which also includes that they are entitled to preclude companies incorporated under their national law from transferring their seat to another Member State whilst retaining their status under the laws of the Member State of incorporation.

It is clear from the *Cartesio* case that the ECJ did not seek to deviate from its earlier case-law established in the *Daily Mail* case, according to which companies exist only by virtue of

[62] *CARTESIO,* para 99.

the varying national legislation, which determines their incorporation and functioning, and Articles 49 TFEU and 50 TFEU cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management, control and administration to another Member State. On the other hand, it is of legal historical importance that in paragraph 111 of its judgment delivered in the *Cartesio* case, the ECJ answered a question that had not been asked by the Regional Appellate Court of Szeged, thus giving way to the subsequent findings of the *VALE* case.

4 The VALE Case[63]

The Italian company VALE Costruzioni S.r.l. was established and incorporated in Rome under Italian law. In 2006, the company decided to transfer its seat and its business to Hungary and to discontinue business in Italy. The company therefore asked to be removed from the Italian company register and then, at the beginning of the year 2007, to be registered as a new company in accordance with Hungarian law. In addition, the company requested from the competent company registry court in the course of the company registration process in Hungary that VALE S.r.l. be indicated as its predecessor in law in the relevant section of the Hungarian company register. The above request was rejected by the Regional Court of Budapest, which acted as a first instance company court of registration. Proceeding upon the company's appeal, the Regional Appellate Court of Budapest, acting as a court of second instance, upheld the first instance decision rejecting the registration, by arguing that a company that had been incorporated and registered in Italy could not, by virtue of Hungarian company law, transfer its seat to Hungary and could not obtain registration there in the form requested and that a company that was not Hungarian could not be listed as a predecessor in law. The regional appellate court reasoned that, under the Hungarian law in force, the only particulars that could be shown in the company register were those listed in sections 24 to 29 of Act no. V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings and, consequently, a company that was not Hungarian could not be indicated as a predecessor in law. VALE Építési Kft. lodged a petition for judicial review with the Supreme Court of Hungary, seeking the annulment of the decision rejecting registration and a decision that the company be entered in the Hungarian company register. It submitted that the contested decision infringed Articles 49 TFEU and 54 TFEU, which were directly applicable.

The Supreme Court referred four questions to the ECJ for a preliminary ruling, asking in essence whether the Hungarian legislation, which, although enabling a company established under national law to convert, does not allow a company established in accordance with the law of another Member State to convert to a company governed by national law by incorporating such a company, is in compliance with the principle of the freedom of establishment. The Supreme Court sought to determine whether the host Member State may refuse the

[63] *VALE,* 440.

designation 'predecessor in law' for a company previously incorporated in another Member State and seeking registration under the host Member State's law.[64] The VALE case highlighted one of the most important topics of general interest in the field of European company law, the issue of cross-border company conversions. Prior to the VALE case, the ECJ had made a clear distinction, in the *Cartesio* judgment, between the case in which a company, after having transferred its seat to another Member State, continues to operate under the law of the Member State of origin (cross-border transfer of seat without conversion) and the case in which a company incorporated in the Member State of origin seeks to be converted into and incorporated under another company form in another Member State (cross-border conversion). The ECJ interpreted Article 54 TFEU in a rather broad manner and concluded that a company, after its establishment, had to operate in accordance with the law of the Member State of establishment.[65] Hence, a company is not entitled, on the basis of the freedom of establishment, to transfer its seat to another Member State whilst retaining its legal personality and nationality of origin. On the other hand, the Member State of origin shall not preclude a company from converting into a company form governed by the law of another Member State.[66] Prior to the *VALE* and *Cartesio* cases, the ECJ had already distinguished between inward and outward seat transfers. According to the ECJ's earlier case-law in that regard, inward seat transfers had been considered as a legal interest protected by the freedom of establishment, while outward seat transfers were deemed to be part of the freedom of establishment only under very severe restrictions.[67] The ECJ's judgment in the VALE case brought a new element to be taken into account as regards the assessment of the latter type of seat transfers; the host Member State is entitled to determine the national law applicable to cross-border conversions and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies. The ECJ, on the other hand, stressed that such national law continued to be required to comply with the principle of the freedom of establishment. The ECJ found that the Hungarian legislation at issue in the VALE case provided only for the conversion of companies that already had their seat in Hungary, therefore such legislation treated companies differently according to whether the conversion was domestic or of a cross-border nature, which was likely to deter companies that had their seat in another Member State from exercising the freedom of establishment, and amounted to a restriction that was not permitted by EU law.

It has become evident from the Cartesio and VALE cases that companies incorporated in a Member State are entitled, on the basis of Article 43 EC, to establish agencies, branches

[64] The application of European Union law: experiences gained from preliminary ruling procedures. Summary report of the Curia's jurisprudence-analysis working group, 113.

[65] Legal entities are linked to the State through an umbilical cord of legal nature – in Metzinger Péter, 'A társaságok szabad letelepedése a Cartesio-ügy után. Hogyan tovább nemzetközi székhelyáthelyezés?' (2009) 2 Európai Jog 9.

[66] *CARTESIO,* para 112. See also: Tőzsér Tamás, 'Az Európai Bíróság ítélete a VALE Építési Kft. ügyében' (2013) special issue for students, JEMA 43.

[67] Orosz Nóra Natália, 'Az Európai Bíróság ítélete a VALE Építési Kft. ügyében' (2012) 3 JEMA, 67.

or subsidiaries in any other Member State. The guidelines elaborated by the ECJ in the *Centos,*[68] *Überseering*[69] and *Inspire Art*[70] cases are also based on the so-called freedom of secondary establishment when a parent company, whilst having its seat and its central administration in the Member State of origin under an unchanged form, carries out its business activities in another Member State by establishing new business units therein. In contrast, the ECJ pointed out in the *Daily Mail* case[71] that companies were creatures of national law; hence, the freedom of establishment was not capable of resolving the differences between the national systems of company law.[72] With regard to the above, Articles 43 EC and 48 EC do not entitle companies to transfer their central administration to another Member State whilst retaining their legal personality and nationality of origin, should the competent authorities object to such a transfer. All this means that the freedom to conduct a business does not include the right for any business belonging to a Member State to freely transfer its central administration to another Member State.[73]

It follows clearly from the ECJ's interpretation of law that the freedom to conduct a business does not entitle any company established and incorporated in a Member State to transfer its central administration to another Member State whilst retaining its legal status acquired in the Member State of origin.[74]

Based on the *VALE* case, it is evident that the host Member State is entitled to determine the national rules on the conversion of companies; the principles of equivalence and effectiveness preclude, however, national legislation that entitles the host Member State to refuse, in relation to cross-border conversions, to record the company that has applied to convert as the 'predecessor in law', if this option is not excluded for domestic conversions.

The ECJ's judgment validated the aim of expanding the limits of the freedom of establishment: the Curia's jurisprudence-analysis working group was nevertheless of the opinion that the time for the jump forward outlined by the advocate general's opinion,

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[68] C-212/97, *Centros Ltd. v Erhvervs-og Selskabsstyrelsen,* 1999, EBHT I. 1495.

[69] C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC),* 2002, EBHT I-9919.

[70] C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.,* 2003, EBHT I-10155.

[71] C-81/87, *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.,* 1988, EBHT-5483.

[72] See: *Summary report of the Curia's jurisprudence-analysis working group on the application of European Union law: experiences gained from preliminary ruling procedures,* <https://kuria-birosag.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf> accessed on 15 July 2019.

[73] Szabados Tamás provided a detailed analysis on the further trends regarding this issue. Szabados Tamás, 'A társaságok határon átnyúló átalakulása az Európai Bíróság Polbud-ügyében hozott ítélet fényében' (2018) 6 Európai Jog 9–14.

[74] C-55/94, *Gebhard,* paragraph 37, C-108/96, *Mac Quen and others,* paragraph 26, C-98/01, *Payrol and others,* paragraph 26, and C-442/02, *CaixaBank France,* paragraphs 11 and 12; cited also by the *Summary report of the Curia's jurisprudence-analysis working group on the application of European Union law: experiences gained from preliminary ruling procedures,* page 118, <https://kuria-birosag.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf> accessed on 15 July 2019.

i.e. pushing the limits of the freedom of establishment as proposed by the *Cartesio* case, had not yet come.[75]

V Basic Issues in the Field of Private Consumer Law since EU Accession

Accession to the European Union made a considerable impact on Hungarian private consumer law. Pursuant to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter 'Directive'), the notion of unfair terms and conditions and sanctions relevant to invalidity were stipulated in the new Civil Code of Hungary. The Directive also made an impact on the enforcement of consumer rights as well as on the term 'consumer' itself.

1 Unfair Contract Terms in the Civil Code

The legislative process of formulating the concept of unfair terms and conditions was also affected by Hungary's EU accession to the extent insofar as Section 209 of the former Civil Code linked the consequence of avoidance to unfair terms. Hungarian legal experts, however, agreed that the Directive attached the notion of nullity to unfair terms. Avoidance, stipulated in the Civil Code, was not compatible with the rule specified in Article 6 (1) of the Directive whereby it granted relative (unilateral) nullity, i.e. this can only be applied for the benefit of the consumer. This specific sanctioning of unfair contract terms also cannot be regarded as unambiguous or being in conformity with the Directive because the terms of consumer contracts, concluded on the basis of the new Civil Code and to be deemed as unfair, were stipulated by a government decree [on unfair terms concluded in consumer contracts (18/1999)]. The decree differentiated between two categories: absolutely unfair (i.e. black) and presumably unfair (i.e. grey) terms. In the case of the latter (terms presumed to be unfair), the Decree provided a scope for contrary evidence, while absolutely unfair provisions were banned, (i.e. regarded as invalid), despite the fact that the former Civil Code – as a superior piece of legislation – ruled for avoidance as opposed to nullity.

This marked discrepancy was a major factor when Szombathely's Municipal Court – in an ongoing lawsuit between Ynos Kft and Mr János Varga – submitted a request to the ECJ for preliminary ruling. As part of its scrutiny of the inconsistency described above, the Municipal Court asked the ECJ whether the right of avoidance stipulated by Section 209 (1) of the former Civil Code was compatible with the provisions of Article 6 of the Directive. The Court also sought the ECJ's opinion on whether it was a relevant circumstance that the legal

[75] *Summary report of the Curia's jurisprudence-analysing working group on the application of European Union law: experiences gained from preliminary ruling procedures,* page 118, <https://kuria-birosag.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf> accessed on 15 July 2019.

dispute began prior to Hungary's accession to the European Union but subsequent to the transposition of the Directive into the national law.

The judgment adopted in Szombathely received priority in the legal literature, as this was the first Hungarian request for preliminary ruling and experts had high hopes that the clumsy harmonisation of Section 209 of the Civil Code would be eliminated. In the ongoing lawsuit brought to the Szombathely Municipal Court, one specific provision of a real estate brokerage contract was disputed. In the contract between the parties, it was stipulated that the customer shall acknowledge the agency's entitlement to commission when another customer found by the agency makes the customer an offer to purchase or rent the building belonging to him for a price equal to or higher than the price fixed by the customer and the agency in the contract, in compliance with the formalities required by the transaction in question, even if the customer rejects that proposal. Mr Varga contended that this clause of the contract was an unfair term. The customer of the estate agency and two potential buyers concluded a preliminary contract which, however, was not concluded.

The agency considered itself to be entitled under the contract to a commission and therefore submitted a claim to the Municipal Court. The defendant (Mr Varga) based his claim on the unfairness of that specific provision of the contract and said it was invalid. Contrary to the expectations of professional circles regarding the outcome of the case, the ECJ rejected the request on the grounds of jurisdiction and therefore did not express an opinion on the dispute. It, therefore, provided an answer to the third question, namely that, concerning activities that occurred prior to the accession of a State to the European Union, the Court of Justice does not have jurisdiction to answer the first and second questions.

Despite the fact that the ECJ did not provide the Szombathely Municipal Court with an expert opinion on the issue we cannot say that the request was a futile attempt, as it clearly resulted in the amendment of the former Civil Code and other legislations relevant for consumer protection.[76]

On the other hand, the Advocate General providing the ECJ's ruling had a few very interesting insights. As for the scope of the question, he advised that Article 6 of the Directive, stipulating that 'unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer', is incompatible with the former Civil Code's provision specifying that an unfair contract term may only be deemed invalid if the injured party specifically contested it.[77]

It also needs to be highlighted that the conclusions of the *Ynos* case enriched not only Hungarian civil law but also European law. The case neatly illustrated how difficult it is to interpret the ban on retrospective effect when a legal act becomes effective before the national law, leaving the legal relationship incomplete. These problems typically arise with long-lasting

[76] Act of 1959 on the Civil Code, and some other Laws with the Purpose of Harmonization of Consumer Protection Laws, also Act III of 2006 amending Consumer Protection Law with the Purpose of Harmonisation and the related Government Decree 2/2006 (I. 4.) on Government Decrees related to Consumer Protection Law with the Purpose of Harmonisation.

[77] Advocate General Tizzano's motion in the *Ynos* case (C-302/04, ECLI:EU:C:2005:576. 74-75).

contractual relationships. In the *Ynos* case, the ECJ quoted a theory on retrospective effect put forward by the German Federal Constitutional Court and the relevant practice exercised on that basis. From this clump of tenets, it is relatively easy to see that the ECJ relies on the principles of safeguarding obtained rights on the one hand and of the safety of contracts, on the other hand and, in terms of contractual relationships, the Court recommends the application of "instant effect' only in exceptional cases. Regarding these exceptional cases, the ECJ had to decide if the contractual relationship – serving as the basis of the dispute in Szombathely – was a valid relationship at the time Hungary joined the European Union. It is a pity that, although this profound dogmatic predicament was recognised by the ECJ, it was not resolved however in its judgment, as it simply stated that, regarding the facts that 'occurred prior to the accession of a State to the European Union, the Court of Justice does not have jurisdiction' to answer the questions posed by the presiding judge in Szombathely.

2 Unfair Contract Terms and Foreign Currency Loans

The most intensively developing areas of the concept of 'unfair contract term', and that of consumer protection private law are the interpretation issues related to foreign currency loans, a problematic issue arising in several member states affected by the financial recession starting in 2008. Almost 5,000 civil law cases in progress, and thousands of actions have been brought, regarding which Hungarian courts are now seeking advice from the ECJ.

Following the financial recession, Hungarian legislators developed a progressive approach towards defining and sanctioning unfair conditions applied in foreign currency loan contracts. Several issues, however, had to be explored and resolved by civil law experts. Claimants in civil actions tended to base their arguments on the unfairness of general contract terms, hoping that the court would rule the invalidity of a particular term or that of the whole contract. Most typically, these claimants submitted their claim to achieve a court ruling about unilateral contractual modification, cancellation rights, the problems of foreign exchange risks and rate margins, or the breach of the duty to provide information.

As for the problem of rate margin, there were two questions raised, on the one hand whether it was fair for the bank to apply a double rate and, on the other, whether the bank should have indicated the magnitude of the difference between the buying rate and the selling rate, and should have listed it among the costs of the loan. Both issues were brought before the Curia: concerning the first question the Curia requested an opinion from the ECJ, while in the second issue the Curia passed its own judgment.

The Kásler case[78] was one of the most prominent actions on foreign currency loans and its judgment ruled that, based on the Directive, a member state court is entitled to examine the issue of exchange rates in foreign currency loans; however, only if the disputed condition qualified as a definition of the main subject-matter of the contract.

[78] Judgment on the *Kásler* case, C-26/13. ECLI:EU:C:2014:282.

Upon examining the unfairness of the contractual terms, the judgment also highlighted the areas that need closer inspection; first the scope of intelligibility, namely whether the contractual terms are grammatically clear and intelligible to the consumer, and whether the economic reasons for using the contractual term and its relationship with the other contractual term is also clear and intelligible.

Both in the original case[79] and in the relevant Hungarian action (2/2014. PJE), the Curia adopted the same interpretation and stated that applying this specific rate margin was unfair. It also advised that in such contracts the exchange rates determined by the Hungarian National Bank (MNB) should be applied, and highlighted that the unilateral modification of the contract was unfair, and that the exchange risk can only be examined on the basis of the Directive if the consumer had received adequate information.

Concerning the obligation to provide information, the same issue has been raised in the wake of the Romanian Andriciuc judgment which is the current authors expect to be making an impact on Hungarian law in the near future. In this case, the ECJ stated that the requirement for a contractual term to be drafted in plain intelligible language entails that the term relating to the repayment of the loan in the same currency must be understood by the consumer on both a formal and grammatical level, and also in terms of its concrete effect, in the sense that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, but also able to assess the potentially significant economic consequences of such a term for his financial obligations. That requirement cannot, however, go so far as to oblige the seller or supplier to anticipate and inform the consumer of subsequent changes that were not foreseeable, such as those manifested in the fluctuations of the exchange rates of the currencies at issue in the main proceedings, or to bear the consequences of such changes.

According to the ECJ – in relation to the obligation to provide information – the question is whether there is a significant imbalance in the parties' rights and obligations arising under the contract that must be assessed by reference to all the circumstances that the seller or supplier could reasonably have envisaged at the time of concluding the contract. On the other hand, whether such an imbalance exists is not to be assessed by reference to developments subsequent to the conclusion of the contract, such as variations in the exchange rate, which are outside the seller or supplier's control and which he could not have anticipated.[80]

From among the cases brought to dispute foreign currency loans, the case known *as Ilyés and Others*[81] was the one where the most complex group of questions was asked in relation to unfair contract terms.

Here, the Hungarian Court sought an opinion whether the unfairness of general contractual terms may be examined in relation to conditions that would need to be scrutinised

[79] Curia of Hungary Gfv.VII.30.360/2014.

[80] C-186/16, *Ruxandra Paula Andriciuc and Others . Banca Românească SA,* ECLI:EU:C:2017:313. para 91.

[81] C-51/17, *OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt. v Ilyés Teréz, Kiss Emil,* ECLI:EU:C:2018:750. para 92.

in relation to legal provisions created retrospectively to replace unfair conditions. The Court also inquired, in such a case, what the extent of the obligation to provide information may be (based on the Directive), and finally it asked for an opinion whether the consequences of invalidity should be taken into account *ex officio* or upon request.

The ECJ highlighted that the Directive must be interpreted as requiring that the plainness and intelligibility of the contractual terms be assessed by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract, notwithstanding that some of those terms have been declared or presumed to be unfair and, accordingly, annulled at a later time by the national legislature. The ECJ also ruled that it is for the national court to identify of its own motion, in the place of the consumer in his capacity as an applicant, any unfairness of a contractual term, provided that it has available to it the legal and factual elements necessary for that task.

In light of the ECJ's rulings in the three above-mentioned cases, the Curia's advisory body provided the opinion that the lack of, or inadequate nature of information (unclear or non-interpretable) provided on the exchange rate risk borne by the borrower may be declared unfair and it may deem that specific clause of the contract that obliges the borrower to bear the consequences of foreign exchange risk null and void.

Information provided to the consumer is deemed adequate if it clearly states that changes in the foreign exchange detrimental to the consumer have no upper limits; it makes it obvious that the danger of such foreign exchange deviations is a real one, and it may arise during the term of the contract. According to the Curia, courts should not set too high expectations on the average consumer, while taking into account the 'information asymmetry' available to the parties.

3 The Arbitration Clause as an Unfair Term in Consumer Contracts

The concept of unfairness also raised the whether an arbitration clause established without individual negotiation or as a standard contractual term can be regarded as valid. From another perspective, the question is whether it is fair to divert potential legal disputes arising from a consumer contract from ordinary legal proceedings without expressly informing the consumer about it.[82]

In the new Civil Code, the legislator stipulates that any arbitration clause is in itself unfair if established as a standard contractual term or without individual negotiation,[83] which also implies that an arbitration clause in consumer transactions can only be regarded as valid if it was individually negotiated with the consumer. The codification of this rule was not without precedent.

[82] Szabó Péter, 'A fogyasztó fogalma és a fogyasztói szerződés értékelésének egyes kérdései az Európai Unió Bíróságának néhány újabb döntése tükrében' (2017) 1 Európai Jog 3.

[83] Act 2013 on the Civil Code, s 6: para 104 (1) item i).

Prior to the new Civil Code, different positions existed in the Hungarian judicial practice on whether an arbitration clause established as a standard contractual term should be regarded as unfair. Some argued that the unfairness of such a clause cannot be examined because Section 7 (2) of the old Civil Code allows the parties to use it; therefore, under Section 209 (6) of the Old Civil Code, the clause complies with the relevant legal provisions.[84] Others claimed that the clause can be examined on the merits but is not unfair.[85] The third position was that the arbitration clause in any consumer contract is *per se* unfair without further examination, because no cost allowance may be granted in arbitration proceedings.[86]

In this context, in its Decision No. 3/2013 PJE, the Curia quite clearly adopted the position that an arbitration clause in a consumer contract is unfair if established as a standard contractual term or without individual negotiation. The Curia explained that the court shall, of its own motion, take note of the unfairness of such a clause but may only declare it void if the consumer refers to it. According to the Curia, the arbitration clause is primarily unfair due to its exclusivity, as it excludes the option of using the ordinary court system.[87] An arbitration clause may only be validly included in a consumer contract if individually negotiated, that is, not by reference to a standard contractual term.[88]

The first question in the preliminary ruling procedure initiated by the Regional Court of Szombathely in the *Sebestyén* case[89] was whether the arbitration clause should be regarded as unfair, and the second one was whether it should be regarded as unfair even if the consumer had been informed in advance of the difference between arbitration and ordinary court proceedings.

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[84] Budapest-Capital Regional Court of Appeal ÍH 2012.67.

[85] Szeged Regional Court of Appeal Pf.I.20.398/2012/2.,as cited: Darákné Nagy Szilvia, Egriné Salamon Emma, 'Az általános szerződési feltételekben megjelenő választottbírósági szerződéssel kapcsolatos kérdések a fogyasztói kölcsönszerződésben' (2014) 2 Magyar Jog 86.

[86] Metropolitan Court of Budapest 57.Pf.637.436/2012/3. According to Ruling No. 6.Pf.21.740/2012/2 of the Budapest-Capital Regional Court of Appeal, in view of opinion No. 2/2011. (XII. 12.) PK, the judicial practice is consistent in that a term conferring jurisdiction is regarded as unfair if it makes it disproportionately and unnecessarily difficult for the consumer to assert their claims arising from the contract. An arbitration clause can be particularly prejudicial due to the extra costs of such proceedings. As cited in Darákné, Egriné (n 85) 83.

[87] Conversely, certain authors in legal literature argue that the party's ability to assert its civil law claims is not limited, since the arbitration procedure – due to the guarantees built in the procedural rules – provides proper protection to the consumer. The parties, including the consumer, can benefit from a simpler, faster and more flexible process through an arbitration procedure, if that is their contractual intent; while all the means available to explore the facts of the case in 'ordinary' court proceedings are also available in an arbitration procedure. See: Erdős Éva, 'A választottbírósági kikötés megítélése a devizahitelezési szerződésekben az Európai Unió Bíróságának döntései tükrében' in Lentner Csaba (ed), *A devizahitelezés nagy kézikönyve* (Nemzeti Közszolgálati és Tankönyv Kiadó 2015, Budapest) 478; Wallacher Lajos, 'A választottbírósági kikötés tisztességtelensége fogyasztói szerződésekben' (2014) 3 Európai Jog 11. According to the author's position: it does not automatically follow from ECJ case law that an arbitration clause is always unfair.

[88] See: Point IV of the reasons provided to Decision No. 5/2013 PJE.

[89] C-343/13, *Sebestyén* judgment ECLI:EU:C:2015:146.

In its judgment, the ECJ explained that it is for the national court to determine whether a clause contained in a mortgage loan contract concluded between a bank and a consumer – vesting exclusive jurisdiction in a permanent arbitration tribunal, against the decisions of which there is no judicial remedy under national law, to hear all disputes arising out of that contract – must be regarded as unfair.

The ECJ highlighted the main aspects to be examined by the national court. Namely, the national court shall verify whether the clause at issue aims to exclude or hinder the consumer in exercising their rights. It shall also examine whether the consumer was informed before the conclusion of the contract about the differences between the arbitration procedure and ordinary legal proceedings.[90] Interestingly, decision No. 3/2013. PJE of the Curia, in which the Curia established that an arbitration clause is unfair if it is based on a standard contractual term, was adopted five months earlier than the ECJ judgment. However, it was the new Civil Code that finally settled the issue by clearly stipulating that an arbitration clause can only be valid in a consumer contract if it has been individually negotiated.[91]

4 The Unfairness of a Term Conferring Jurisdiction

In the *Pannon GSM* case,[92] it was again the Directive on unfair terms in consumer contracts that needed interpretation. The Municipal Court of Budaörs, as the referring court, first addressed the ECJ with the old question whether the provisions of the Directive and the Civil Code can be interpreted as that unfair terms in a consumer contract are only binding on consumers if they have not successfully challenged them. The ECJ's reply was that an unfair term within the meaning of Article 6 (1) of the Directive is not binding on the consumer; therefore, it is not necessary for the consumer to have successfully challenged it. In its second question, the Municipal Court of Budaörs asked the ECJ whether the national court must examine the unfairness of the contractual term of its own motion. In respect of terms conferring jurisdiction, the ECJ referred to its case law and explained that any term conferring jurisdiction to the court competent over the residence or seat of the party concluding the contract with the consumer shall be regarded as unfair if was established without individual negotiation or as a standard contractual term.[93] In its Océano Grupo judgment, the Court explained that the aim of the Directive would not be achieved if consumers were themselves obliged to raise the unfairness of contractual terms, and that effective protection of the consumer may only be attained if the national court acknowledges that it has the power to evaluate terms of this kind of its own motion.[94]

[90] Ibid, para 36.

[91] Hajnal Zsolt, 'Egyes tisztességtelen kikötések fogyasztói szerződésben' in Osztovits András (szerk.): *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja* (vol. III, Opten Kiadó 2014, Budapest) 261.

[92] C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi.* ECLI:EU:C:2009:350.

[93] C-240/98, *Oceano gruppo,* ECLI:EU:C:2000:346, para 21–22.

[94] Ibid, para 29., For the impact of the judgment on Hungarian law see: Nemessányi Zoltán, 'Océano Grupo magyar tengere' (2008) 3 Európai Jog 31–42.

Interestingly, in the *Pannon GSM* case, the second question of the referring court was word for word identical to the first question raised by a Spanish court in relation to the *Océano Grupo* case.[95] The referring court of Budaörs intended to consolidate the final conclusions of the Court reached in that case in the Hungarian judicial practice. The ECJ could simply repeat its former reply given in a similar case but it did not do so. It completed its former position by stating that the task conferred by the Directive on national courts also includes examination on their own motion.[96]

The Curia specifically addressed the issue in its opinion No. 2/2011. (XII. 12.) PK.[97] In its reasons, analysing in detail the judgment adopted in the *Océano Grupo* case and in the *Pannon GSM* case, it concluded that the national court must, of its own motion and already in the pre-trial phase, examine whether the term conferring jurisdiction is aligned with the seat or residence of the party concluding the contract with the consumer.[98] If the court finds such alignment, it shall call on the respondent to state, within a set deadline, whether it wishes to refer to the unfairness of such term. If the respondent fails to make a timely statement or does not wish to refer to the unfairness of the term, the court is obliged to confer the petition to the court specified in the term; whereas if the respondent refers to the unfairness in a statement then the court shall adjudicate the petition on the merits.[99]

The ECJ examined similar issues in the *VB Pénzügyi Lízing* case,[100] which is often referred to as the sibling of the *Pannon GSM* case. Both the facts of the predicate cases and the legal issues raised are similar in many respects.[101] During the assessment of its own jurisdiction, the referring court noted that the consumer contract confers jurisdiction over disputes arising from the contract to a court close to the seat of the party contracting with the consumer. Interestingly, the referring court modified its original questions – specifically in view of the judgment made in the *Pannon GSM* case – and asked about the correct interpretation of certain provisions of the *Pannon* judgment.

In its reply, the ECJ confirmed its formerly adopted position that it is the task of the national court – and not the ECJ – to assess the unfairness of contractual terms based on the established facts and circumstances. As a new element compared to previous decisions, the judgment provided that the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or

[95] Hans-W. Miklitz, Robert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 780.

[96] C-243/08, *Pannon GSM* judgment, ECLI:EU:C:2009:350, para 32–33.

[97] Opinion No. 2/2011 (12 December) PK on certain issues relating to the nullity of consumer contracts. Court Decisions, 3/2012.

[98] Juhász Krisztina, 'A tisztességtelen szerződési feltételek hivatalbóli vizsgálata' (2018) 2 Eljárásjogi Szemle 40–53.

[99] See comment to Point 5 a) of opinion No. 2/2011 (12 December) PK.

[100] C-137/08, *VB Pénzügyi Lízing* judgment, ECLI:C:EU:2010:659.

[101] See: Osztovits András, 'A közösségi jog hatása a fogyasztói szerződések magyar szabályozására és joggyakorlatára' (2009) 12 Gazdaság és Jog 13.

supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.[102]

5 A Need for Submitting a Request – the Banif Plus Case[103]

One of the major achievements of the ECJ judgments concerning the consumer contracts discussed above was that now judges will have to examine 'ex officio' whether a contract includes an unfair contract term and, as soon as they identify such unfairness, the court needs to inform the litigant consumer. From then on, it will be at the individual judge's sole discretion to decide on this particular contract term and, in the event not making a reference to it, the Court will need to do so.[104]

In the *Banif Plus* case, the referring court was seeking an opinion on whether it was permissible for the court, when examining an unfair contract term, to examine all the terms of the contract, or if it should examine only the terms on which the party concluding the contract with the consumer bases his claim. The ECJ claimed that the answer to the first and second questions is that Article 6(1) and 7(1) of the Directive must be interpreted as meaning that the national court that has found, of its own motion, that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer who has been informed of his rights to submit a statement requesting that the term be declared invalid. However, the principle of *audi alteram partem*, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure.[105]

A similar issue was raised in the *Jörös* case, where an opinion of the ECJ was also sought. The Metropolitan Court of Budapest *(Fővárosi Törvényszék),* trying the case at second instance, requested the ECJ to provide an opinion on whether the national judge may scrutinise the unfairness of a contract term at second instance, provided that no such scrutiny was made at first instance, with a view to national procedural rules that stipulate that no new fact or evidence may be taken into account in appeal proceedings.[106]

Concerning the above issue, the ECJ ruled that the court having jurisdiction in the appeal procedure is entitled to explore all the grounds available for invalidity that can be ascertained from the first instance case. The court is also entitled to redefine the legal basis and is obliged to guarantee that the unfair conditions are assessed in relation to the stipulations of the Directive.[107]

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[102] *Pénzügyi Lízing*, para 56.
[103] C-472/11, *Banif Plus* judgment, ECLI:EU:C:2013:88.
[104] Varga Zsófia, 'Mikor kell a magyar bíróságnak hivatalból alkalmaznia az uniós jogot?' (2016) 6 Európai Jog 3.
[105] *Banif Plus,* paras 28–36.
[106] Muzsalyi Róbert, 'A joggyakorlat dilemmái a szerződési feltételek vizsgálatánál' (2016) 6 Európai Jog 24.
[107] C-397/11, *Erika Jőrös v Aegon Magyarország Hitel Zrt.,* ECLI:EU:C:2013:340.22., para 54.

6 The Definition of Consumer

As has been highlighted above, the third direction among the various tendencies influencing consumer protection private law has been the attempts to provide a proper definition for the concept of the consumer,[108] the most conspicuous question being whether the consumer is a natural person or a legal entity as well.[109] Although there have been no requests for preliminary ruling related to this issue submitted by Hungarian courts, the ECJ has adopted three major judgments that have paved the way for a more accurate definition of consumer from the point of view of substantive law, *Cape Snc v. Idealservice,*[110] the *di Pinto* case[111] and the *Horatiu Ovidiu Costea* case.[112]

Fundamentally, both the ECJ and the Hungarian highest judicial forum accepted the same interpretation. There was, however, one marked dissimilarity, namely that in the early Supreme Court decisions (prior to the accession), consumer protection – to some degree – was extended to legal entities. There are some peculiar scenarios where small and medium-size (family) businesses conclude contracts in situations not strictly attributable to the scope of their professional activities. The theoretical approach, also constituting the basis of legal practice, is that, in such scenarios, legal entities have the same knowledge as a natural person in a contractual relationship.[113] To qualify as a consumer lies not so much in one's entity but in his or her knowledge of the facts and the scope of their objectives at the time of the conclusion of the contract. The Hungarian legislator relied, therefore, on the Directive and on the relevant ECJ judgments when providing a legal definition of consumer in the new Civil Code as 'any natural person acting outside his trade, independent occupation or business activity.'[114]

By modifying the definition of consumer, the Hungarian legislator, has complied with basic EU harmonisation requirements. It has, at the same time, left open some serious questions, lying at the core of defining the term 'consumer', and therefore leaving some scope for further interpretations. Moreover, the natural person v. legal entity debate is still an open one, as is the interpretation of the expression 'outside one's trade'.

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[108] Ádám Fuglinszky provides a detailed analysis on what impacts the ECJ's case law, with a view to the definition of 'consumer', has made on the new Civil Code and on Hungarian judicial practice, up to the highest level, from substantive legal aspects. Fuglinszky Ádám, *Fogyasztói adásvétel-, kellék- és termékszavatosság* (Wolters Kluwer 2016, Budapest) para 2.1.1. and 2.1.2.

[109] Rita Sik-Simon provides an also interesting analysis on the theoretical aproaches of the Hungarian consumer phenomenon. Rita Sik-Simon, 'Fogyasztókép és szabályozás' MTA Law Working Papers, Budapest, 2/2016.

[110] C-541/99. *Cape Snc. v Idealservice judgment* ECLI:EU:C:2001:625.

[111] *Patride Di Pinto judgment* C-361/89. ECLI:EU:C:1991:118.

[112] *Horatiu Ovidiu Costea case,* C-110/14, ECLI:EU:C:2015:538.

[113] Nagy Zoltán, 'Az Európai Unió Bíróságának a devizahitelezéssel kapcsolatos ítélkezési gyakorlata fogyasztóvédelmi aspektusból' in Lentner (n 87) 443.

[114] Act 2013 on the Civil Code, s 8 para 1 item 1).

VI Conclusions

Due to the heterogeneity of civil law problems, only general conclusions can be made when attempting to explore the shared directions of the impacts made in the wake of Hungary's EU accession. Nevertheless, a methodologically novel comparative legal approach has evolved, which has also penetrated the legislative level. Examining the impacts of the past 15 years that have elapsed since Hungary's accession to the European Union, there is one major conclusion that springs to mind: from the point of view of substantive law, the traditional autonomous structures of social phenomena have been affected by EU law only moderately. Following some concerted efforts to harmonise the areas of European contract law, it seems that now legal papers on the issue are becoming scarcer. Admittedly, during the past 15 years it has become part of judges' daily life to apply EU laws and regulations in solving cross-border cases to comply with the requirements in the field of judicial cooperation between member states. Despite these efforts, from the point of view of substantive law, there are only a handful of values or interests that need to be protected by EU law arising in civil cases and therefore stipulated by the Civil Code. Such regulatory attempts would typically be made where the 'protection of the weaker party' requires EU intervention. Civil judges in Hungary, by contrast, would typically deal with issues of consumer protection, where the majority of the cases are brought to dispute loan contracts, or to seek damages in competition law cases.

Réka Somssich highlighted that the number of requests for preliminary ruling submitted by Hungary was a record high in the first decade of EU membership; in the year of accession, only Hungary submitted such a request to the ECJ.[115] Assessing the first 10 years of Hungary's membership, Somssich underlined that, except for a few years (2007, 2009 and 2010), it was Hungary that requested the largest number of opinions from the ECJ and these requests were reported to have been worded with outstandingly high-level professionalism. It is therefore possible to summarise that, over the past 15 years, Hungarian judges have had both the intention and the courage to ask questions. However, with all the flattering comments, one may also be tempted to express that both the legislator and judges should be encouraged to develop a comprehensive conceptual attitude in assuming Member State liability for national legislation contrary to EU law.

[115] 'Az Európai Unió jogának alkalmazása: az előzetes döntéshozatali eljárások kezdeményezésének tapasztalatai elnevezésű joggyakorlat-elemző csoport összefoglaló véleménye' (Applying EU law: *Summary of legal analysis working group on Hungary's experience with requests for preliminary ruling*) 25–26; <https://kuria-birosag.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf>, accessed on 15 July 2019.

Tamás Szabados*

EU Private International Law in Hungary

An Overview on the Occasion of the 15th Anniversary of Hungary's Accession to the EU

I Introduction

The accession of new Member States to the European Union (EU) in 2004 brought crucial legal, economic and social changes in the acceding countries, including Hungary. Legal changes did not leave private international law immune either. EU accession triggered remarkable interactions between EU law and the domestic law of the acceding countries. The more straightforward impact of EU integration has been that it required states joining the EU to conform to the EU private international law regime. However, the accession not only affected the legal systems of the acceding countries, but also brought about certain changes for EU private international law.

This article focuses on the principal changes resulting from EU accession from the standpoint of autonomous private international law, in particular the reception of the EU legal instruments on private international law, in one of the acceding countries, namely Hungary. The reception of EU private international law will be examined first of all in light of those interpretation problems leading to preliminary references to the Court of Justice of the European Union (CJEU) by Hungarian courts, and, second, in the broader context of Hungarian court practice related to the application of EU private international law instruments. However, before analysing the effects of EU private international law rules on Hungarian private international law, the impact of the accession of new Member States on EU private international law will briefly be discussed.

II The Impact of the EU Accession of New Member States on EU Private International Law

We usually think only of how EU accession has affected the laws of the acceding countries. However, the gradual nature of the EU integration process has left an imprint on the development of EU private international law, too. The variables of the integration process

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– its geographical extension, its depth in substance, the presence and articulation of interests strengthening particularism – can be noticed also in the development of EU private international law.

First, EU private international law has a dynamic geography. Some geographical differences in the application of the EU private international law rules already existed before the 2004 accession wave. Although the old Member States joined the Rome Convention on the law applicable to contractual obligations,[1] they could avail themselves of the possibility to make reservations to it, giving rise to differences in the application of the rules of the convention. Denmark opted out of the application of the EU rules on judicial cooperation in civil matters,[2] while the UK and Ireland have the right to opt-in regarding the application of the otherwise common rules.[3] After the accession in 2004, the geography of EU private international law rules has become even more heterogeneous. The Rome Convention entered into force in the acceding Member States on different dates, resulting in differences in the temporal scope of application of the convention and rendering it more difficult to find the applicable legal source. Furthermore, several Member States joining the EU in 2004 refrained from participating in certain EU private international law instruments adopted in the framework of enhanced cooperation.

Second, the depth of integration is not uniform across the EU. The possibility of enhanced cooperation contributes to the fragmentation of EU private international law. The Rome III Regulation has been adopted in the framework of enhanced cooperation and some of the Member States acceding the EU in 2004 do not participate in its application.[4] Similarly, the regulations on the matrimonial property regimes and the property consequences of registered partnerships have been adopted in the framework of enhanced cooperation.[5] In addition to other Central and Eastern European countries, Hungary refrained from taking part in the application of the property regulations.

Third, the diverse policy interests and values of the Member States unavoidably influence the course of private international legislation. The private international law regulations related to family law demonstrate the sensitivity of the acceding countries regarding the regulation

[1] 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 OJ [1980] L266/1.

[2] Protocol (No 22) on the position of Denmark OJ [2012] C326/299.

[3] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice OJ [2016] C202/295.

[4] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10. The Czech Republic, Cyprus, Poland and Slovakia do not apply the Rome III Regulation.

[5] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes OJ [2016] L183/1 and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships OJ [2016] L183/30. In addition to Hungary, Poland and Slovakia do not apply these regulations.

of certain questions. In particular, Hungary and Poland opposed the property regulations because of their worries about determining the concept of marriage and, in general, to safeguard national interests. The appearance of the new Member States in the EU lawmaking process also involves them pursuing particular policy considerations – which may be based either on changing political interests or on the deeply-rooted traditions and values of their social and legal order.

III The Impact of EU Accession on Private International Law in Hungary

It is intended to give a brief examination here of how EU accession impacted autonomous private international law. First of all, following the change of the political system in Hungary in 1989, the international mobility of persons and the number of international commercial transactions started to grow significantly.[6] This tendency was further strengthened when, thanks to the EU accession, many of the barriers to the mobility of persons and commercial transactions were eliminated. These changes underlined the role of both EU and autonomous private international law in the acceding states.

Second, the accession required the reception of EU private international law instruments by both the legislature and the judicature. The countries joining the EU in 2004, including Hungary, had to adapt themselves to an already existing EU private international law regime. At the time of accession, Article 65 of the *Treaty establishing the European Community*,[7] the predecessor of the current Article 81 of the *Treaty on the Functioning of the European Union* (TFEU) had already been introduced.[8] Article 81 TFEU enables the EU to adopt measures in the field of private international law, including with regard to conflict of laws, jurisdiction and the recognition and enforcement of foreign judgments. In 2004, the Brussels Ia Regulation,[9] the Brussels IIa,[10] the Rome Convention and the former Insolvency Regulation[11] were already applied in the Member States. Hungary became a party to the Rome Convention

[6] See, for example, Vékás Lajos, 'Egy új nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről' (2015) 70 Jogtudományi Közlöny 292–299, 292; Tamás Szabados, 'The New Hungarian Private International Law Act: New Rules, New Questions' (2018) 82 Rabels Zeitschrift für ausländisches und internationals Privatrecht 972–1003, 974–975.

[7] *Treaty establishing the European Community* OJ [1997] C340/203.

[8] Consolidated version of the *Treaty on the Functioning of the European Union* [2012] OJ C 326/47.

[9] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ [2001] L12/1.

[10] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ [2000] L160/19, later repealed and revised by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 OJ [2003] L338/1 (Brussels II bis Regulation).

[11] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ [2000] L160/1.

following accession.[12] Hungary did not have an influence on the drawing up of these legal instruments; however, the development of EU private international law did not stop there. Not long after the accession of the Central and Eastern European countries, the Rome Convention was converted into a regulation, the Rome I Regulation on the law applicable to contractual obligations,[13] and the EU legislature adopted the Rome II Regulation on the law applicable to non-contractual obligations,[14] the Rome III Regulation on the law applicable to divorce and legal separation,[15] the Maintenance Regulation,[16] the Succession Regulation,[17] the Regulation on matrimonial property regimes and the Regulation on the property consequences of registered partnerships. Hungary takes part in the enhanced cooperation for the application of the Rome III Regulation, but it does not in the application of the regulations on matrimonial property regimes and the property consequences of registered partnerships. The Brussels I Regulation[18] and the Insolvency Regulation[19] were revised after the accession. A number of further legal instruments were prepared in the field of international civil procedure; these are applied in Hungary.[20] The coexistence of EU private international law rules and autonomous

[12] *2006. évi XXVIII. törvény a szerződéses kötelezettségekre alkalmazandó jogról szóló, Rómában, 1980. június 19-én aláírásra megnyitott egyezmény és jegyzőkönyvei, valamint az azokat módosító egyezmények, továbbá a Ciprusi Köztársaságnak, a Cseh Köztársaságnak, az Észt Köztársaságnak, a Lengyel Köztársaságnak, a Lett Köztársaságnak, a Litván Köztársaságnak, a Magyar Köztársaságnak, a Máltai Köztársaságnak, a Szlovák Köztársaságnak és a Szlovén Köztársaságnak az említett egyezményhez és jegyzőkönyveihez történő csatlakozásáról szóló, Brüsszelben, 2005. április 14-én aláírt egyezmény kihirdetéséről* (Act XXVIII of 2006 on the promulgation of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 and its protocols, and of the conventions amending those, and of the convention on the accession of the Republic of Cyprus, the Czech Republic, the Republic of Estonia, the Republic of Poland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Slovak Republic and the Republic of Slovenia to the mentioned convention and its protocols signed in Brussels on 14 April 2005).

[13] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ [2008] L177/6.

[14] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ [2007] L199/40.

[15] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ [2010] L343/10.

[16] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ [2009] L7/1.

[17] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ [2012] L201/107.

[18] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ [2012] L351/1.

[19] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings OJ [2015] L141/19.

[20] See in particular, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure OJ [2007] L199/1; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure OJ [2006] L399/1.

rules gives rise to a plurality of legal sources in the Member States and private international law has become multi-layered. This undoubtedly renders the selection of the applicable legal source more difficult in practice.

Third, Hungarian legislation had to conform to EU law from the date of accession. From a regulatory point of view, the legislative reception of EU law posed a challenge for legislature already under the previous Hungarian private international law regime (Old PIL Code)[21] and this was one of the major questions during the codification process leading to the adoption of the new Hungarian Private International Law Act (New PIL Code).[22] From the multitude of questions concerning the relation between EU law and domestic law, we refer here only briefly to the treatment of the primacy of EU law in formal and substantive terms.

Before EU accession, autonomous private international law was in principle restrained by international conventions and constitutional limits. EU accession required further adaptation to EU law. The legislature may choose to acknowledge the existence of this limit in formal terms, expressly referring to the primacy of EU law or the private international law instruments of the EU. We can notice here a change in the regulatory approach in Hungary. The Old PIL Code referred only to the primacy of international treaties without mentioning the primacy of EU law.[23] From the date of accession, even in the absence of an explicit provision, the principle of the primacy of EU law applied automatically. Following the adoption of the Rome I and Rome II Regulations, the Hungarian legislature repealed the previous autonomous conflict-of-laws rules and referred explicitly to the primacy of the Rome I Regulation[24] and the Rome II Regulation.[25] The Old PIL Code established that its provisions apply only to contractual and non-contractual obligations that fell outside the scope of application of these regulations. The references to the EU regulations were inconsistent, because no reference was made to the other EU regulations determining the governing law, jurisdiction or the recognition and enforcement of foreign decisions. The New PIL Code reflects a more conscious approach towards EU law than its predecessor. First, the New PIL Code refers explicitly to the primacy of EU law in addition to international conventions. Section 2 of the New PIL Code establishes that the provisions of the New PIL Code apply only to questions that do not fall under the scope of application of a legal act of the European Union that has general application and is directly applicable or an international treaty. Second, the drafters of the New PIL Code abandoned references to specific EU regulations, because the primacy of EU legislative acts after the accession is evident and this is also made clear by Section 2 of the New PIL Code.

More importantly, EU accession requires the substantive alignment of domestic law with EU law. It means that, in the fields where the EU legislature intervened and regulations were

[21] *1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról* (Decree-Law 13 of 1979 on private international law).

[22] *2017. évi XXVIII. törvény a nemzetközi magánjogról* (Act XXVIII of 2017 on private international law). On the adaptation of autonomous private international law rules to EU law, see: Réka Somssich, 'Cohabitation of EU Regulations and National Laws in the Field of Conflict of Laws' [2015] ELTE Law Journal 67–79.

[23] Old PIL Code, s 2.

[24] Old PIL Code, s 24.

[25] Old PIL Code, s 32.

adopted, the national legislature lost its power to regulate. Autonomous lawmaking only has a role in areas that are not covered by EU law, or where EU legislation expressly enables national legislatures to regulate. It must also be noted that compliance with EU law may prove necessary, even in areas that are not covered by EU regulations, to the extent this is required by primary law and the related case law of the CJEU. This may be well illustrated by the issue of use of the name in Hungarian private international law. In the *Garcia Avello* judgment, the CJEU ruled essentially that Union citizens who have dual nationality can choose between the laws of their states of citizenship concerning the registration of their family name.[26] This was deduced from the principle of the prohibition of discrimination and the provisions on Union citizenship. The original wording of the Old PIL Code required the application of the personal law of the person concerned regarding the use of a name. As a main rule, the personal law of a person having multiple citizenships, including Hungarian citizenship, was Hungarian law. Therefore, the law applicable to names of dual nationals who were also Hungarian citizens was Hungarian law. Following the *Garcia Avello* judgment of the CJEU, the Hungarian legislature decided to amend the Old PIL Code so as to grant a choice of law concerning the registration of the birth name for persons having multiple citizenships to ensure conformity with the judgment.[27] The Old PIL Code was so amended after the *Garcia Avello* judgment that in the course of the registration of a birth name the court, at the request of the person concerned, had to apply the law of that other state of citizenship and not Hungarian law. Regarding names, choice of law for multiple nationals has been enshrined in the New PIL Code, too.[28]

Fourth, the need for compliance with EU law, along with social and economic changes following the change of the political system in the Central and Eastern European countries, was a factor justifying the enactment of new private international law codes in these Member States. They found it necessary to revise their pre-existing codes in order to ensure conformity with EU law and recodify their autonomous private international law rules. The fact that more and more states in the region adopted a new private international law code triggered a self-generating process, because the legislature in other countries could consider the new enactments as a possible model and they also decided in favour of devising a new private international law code. The result was a wave of codification in the Central and Eastern European countries. New private international law codes were adopted in particular in Slovenia (1999), Estonia (2002), Bulgaria (2005), Poland (2011) and the Czech Republic (2012). Hungary was not out of this recent legislative wave. Accordingly, the recodification of Hungarian private international law took place in 2017.

Finally, in relation to the recodification of autonomous private international law, it must be noted that EU law even impacts autonomous private international law in areas not covered by EU legislation. The solutions of EU private international law are often considered as models

[26] C-148/02, *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.
[27] Old PIL Code, s 10(2).
[28] New PIL Code, s 16(2)-(3).

for the autonomous legislation of the Member States. In several Central and Eastern European countries, autonomous private international law increasingly applies habitual residence instead of the previously used connecting factor, citizenship, to determine questions related to personal status following the widespread use of this connecting factor in EU conflict of laws.[29] The new Hungarian private international law code retained citizenship as the main connecting factor in matters related to personal status, but habitual residence is used, for example, regarding conservatorship,[30] a declaration made by an adult having disposing capacity for the event of a future limitation of his disposing capacity or the absence of his capacity to protect his interests[31] and the violation of personality rights.[32] Another illustration is the possibility of a person whose personality rights were breached to choose the law of the state where the centre of his interests is situated.[33] This connecting factor was used in some judgments of the CJEU for determining jurisdiction in relation to the violation of personality rights.[34] The appearance of this connecting factor, never used before in Hungarian private international law, was definitely due to the consideration of EU law as a model. Furthermore, it can also be noted that although Hungary does not take part in the enhanced cooperation regarding matrimonial property regimes and the property relationships of partners, the possibility of a choice of law is ensured by the New PIL Code following the rules of the EU regulations,[35] with the single difference that the law of the forum, i.e. Hungarian law, may additionally be selected by the parties.[36]

IV Preliminary Ruling Requests by Hungarian Courts

So far, the legislative reception of EU private international law has been discussed. Another layer, the judicial reception of the EU private international law instruments, must also be examined to get a full picture. Judicial reception embraces the interpretation and application of the EU legal sources by courts and an involvement in a judicial dialogue with the CJEU through the preliminary ruling procedure where it is necessary to solve problems of interpretation.

At an EU level, the number of preliminary references related to private international law is growing, which is probably due to the boost in the international mobility of persons, the

[29] Tamás Szabados, 'Bestimmung des Personalstatuts in den postsozialistischen Staaten' [2016] Zeitschrift für Europäisches Privatrecht 278–299, 288–292.
[30] New PIL Code, s 18.
[31] New PIL Code, s 19.
[32] New PIL Code, s 23.
[33] New PIL Code, s 23(2) *a)*.
[34] Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN Limited* [2011] ECR I-10269, paras 48–52.
[35] Matrimonial Property Regulation, art 22.
[36] New PIL Code, ss 28 and 36.

increasing number of international commercial transactions and to the fact that the EU legislature occupies a continually broadening domain in the field of private international law, by adopting more and more legislative acts.[37]

The preliminary ruling requests referred by Hungarian courts fit into the broader picture of preliminary ruling requests submitted by the courts of the Member States of the EU, as far as the legal sources applied are concerned. This means that there were many more preliminary ruling requests referred in relation to jurisdictional questions under the Brussels Ia and I bis Regulations, while only a few requests were submitted by Hungarian courts to the CJEU regarding conflict-of-laws issues. This is in line with the general tendency that there were many more preliminary references concerning the Brussels Convention,[38] the Brussels Ia and I bis and the Brussels IIa and the Brussels II bis Regulations than regarding the Rome Convention and the regulations providing for conflict-of-laws rules. It is difficult to see the reasons behind this. One might be that the adjudication of all international private law disputes starts with the question of jurisdiction and, once the court establishes that for some reason it cannot assert jurisdiction, there is no need for going ahead with the question of the governing law. Chronologically, because of the earlier adoption of the Brussels Convention, national courts had more time to refer cases on jurisdiction, the recognition and enforcement of foreign judgments to the CJEU than in the case of conflict-of-laws instruments.

According to the statistics contained in the 2018 report on the judicial activity of the CJEU, Hungarian courts referred 187 cases in total to the CJEU since the EU accession of the country.[39] From this number, 10 preliminary ruling requests concerned EU legal instruments related to judicial cooperation in civil matters. The preliminary rulings given by the CJEU in the cases referred by Hungarian courts most often required the refinement of certain points in the previous case law and did not necessitate essentially new pronouncements. However, it must be noted that, in terms of private international law, not only the preliminary references submitted regarding questions related to the area of freedom, security and justice are relevant, but other preliminary ruling requests may be equally significant. For instance, the preliminary rulings on the cross-border mobility of companies, which indirectly touched upon the law applicable to companies as well, cannot be ignored, although they were not rendered on the basis of a legal instrument related to the area of freedom, security and justice, but in the context of the freedom of establishment provisions of the TFEU. However, this does not alter the fact that these preliminary rulings made a significant contribution to private international law.

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[37] In the context of the freedom, security and justice, see: Réka Somssich, 'Uniform or Diverging Application of EU Instruments in the Field of Private International Law by National Jurisdictions – Preliminary References in the Area of Judicial Cooperation in Civil Matters' in Miklós Király, Tamás Szabados (eds), *Perspectives of Unification of Private International Law in the European Union* (Eötvös Kiadó 2018, Budapest) 53–84.

[38] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version) OJ [1972] L299/32.

[39] Court of Justice of the European Union, *Annual Report 2018 – Judicial Activity* (European Union 2019, Luxembourg) 143.

All of the preliminary ruling requests were found admissible but one. In *Herrenknecht,* the CJEU considered the request for a preliminary ruling as manifestly inadmissible, because the referring court failed to present the facts in relation to the preliminary questions concerning the choice-of-forum and choice-of-law clauses of a contract entered into between a German and a Hungarian company; it did not provide information on whether the parties challenged the jurisdiction of the court seised indicating the parties' will and did not state the reasons for the request for a preliminary ruling.[40] In the *IBIS* case, the reference made concerning the interpretation of the Brussels Ia Regulation by the Hajdú–Bihar County Court was withdrawn by the referring court.[41]

1 Jurisdiction and the Recognition and Enforcement of Foreign Judgments

Most of the cases referred to the CJEU by Hungarian courts concerned a jurisdictional question. The relevant cases required the interpretation of the Brussels Ia and Brussels I bis Regulations. No preliminary reference was made by the Hungarian courts regarding other EU private international law instruments concerning jurisdiction. In one case, the Brussels Ia Regulation was construed with regard to the European Order for Payment Regulation.

Regarding the interpretation of the EU jurisdictional rules, it must be noted that although Hungary was not a party to the Brussels Convention, the CJEU judgments interpreting the Brussels Convention could not be ignored by Hungarian courts. This is due to the fact that most provisions of the Brussels Convention correspond to the provisions of the Brussels Ia and Brussels I bis Regulations and the CJEU often held that the rulings rendered under the Brussels Convention also govern issues under the Brussels Ia and I bis Regulations.

The preliminary references made by Hungarian courts concern topics that are popular subjects of preliminary ruling requests in other Member States as well. Somssich summarised the most common topics of preliminary rulings in the context of the application of the Brussels Convention as well as the Brussels Ia and I bis Regulations as follows: the concept of 'civil and commercial matters' and the subject-matter scope of application of the Brussels Convention and the Regulations; the definition of 'matters relating to a contract'; jurisdiction clauses; *lis pendens* cases; multi-defendant cases; and the interpretation of certain factors establishing jurisdiction, such as the place where the harmful event occurred.[42] If we look through the Hungarian preliminary references, Hungarian courts had to deal mostly with questions from this list: the temporal and subject-matter scope of application of the Regulations and in particular the concept of 'civil and commercial matters'; the interpretation of certain grounds of jurisdiction (the category of claims in matters relating to a contract can

[40] C-366/14, *Herrenknecht AG v Hév-Sugár Kft.,* ECLI:EU:C:2014:2353.
[41] C-490/11, *IBIS S.r.l. v PARTIUM '70 Műanyagipari Zrt.,* ECLI:EU:C:2012:229.
[42] Somssich (n 37) 76–83.

be also mentioned here as establishing special jurisdiction on the basis of the place of performance); and the prorogation of jurisdiction.

A number of the preliminary references concerned the scope of application of the Brussels Ia and Brussels I bis Regulations, in particular the concept of 'civil and commercial matters'. In the *Siemens* case, the Hungarian Competition Authority imposed a fine on Siemens, a company domiciled in Austria, for breaching competition law rules.[43] The fine was reduced later by administrative court decisions following a challenge by Siemens. The Competition Authority therefore repaid to Siemens a part of the fine together with interest. However, the Curia of Hungary confirmed the original amount of the fine. Siemens again paid the balance due, but without interest. The Hungarian Competition Authority claimed the restitution of the interest on the ground of unjust enrichment before a Hungarian court. After Siemens contested the jurisdiction of the Hungarian courts, the question whether a claim for the reimbursement of interest in such a case falls under the scope of the Brussels Ia Regulation and whether jurisdiction may be established on the basis of Article 5(3) of the Brussels Ia Regulation, which provides for special jurisdiction in matters relating to tort, delict or quasi-delict, was referred to the CJEU. In essence, the CJEU confirmed that the actions by public authorities made in exercising public power fall outside the ambit of the Brussels Ia Regulation. The imposition of a fine by a competition authority for a breach of competition rules is based on the exercise of public power and a claim for the restitution of interest due under competition law rules qualifies as an administrative matter excluded from the scope of the Brussels Ia Regulation and not a civil or commercial matter that comes within the scope of the Brussels Ia Regulation.

The *Weil* judgment of the CJEU concerned an issue related to the enforcement of foreign judgments and the scope of application of the Brussels Ia Regulation.[44] Ms Weil and Mr Gulácsi were unregistered partners. After the termination of their partnership, Ms Weil, who was domiciled in Hungary, brought proceedings against Mr Gulácsi, who was domiciled in the UK, and the Municipal Court of Szekszárd ordered Mr Gulácsi to pay Ms Weil an amount of ca. EUR 2 060 in order to settle the property relationships arising out of their *de facto* non-marital partnership. The judgment could not be enforced in Hungary as the defendant had no assets in Hungary. Ms Weil therefore requested a certificate be issued under Article 53 of the Brussels I bis Regulation in order to enforce the judgment in the UK. In this case, the referring court essentially asked first whether the court of a Member State must issue the certificate on the enforceability of a decision automatically or if it can examine whether the case falls within the scope of the Brussels I bis Regulation and, second, whether a compensation claim arising from the dissolution of the property relationships between *de facto* non-registered partners falls within the concept of 'civil and commercial matters', and thereby within the material scope of application of the Brussels I bis Regulation. First of all, the CJEU established that *ratione temporis* the case falls under the scope of application of the Brussels Ia Regulation, as

[43] C-102/15, *Gazdasági Versenyhivatal v Siemens Aktiengesellschaft Österreich,* ECLI:EU:C:2016:607.
[44] C-361/18, *Ágnes Weil v Géza Gulácsi,* ECLI:EU:C:2019:473.

the judgment for which the certificate of enforcement was sought was given on 23 April 2009, i.e. before the starting date of application of the Brussels I bis Regulation, which was 10 January 2015. The CJEU recognised not only the possibility but also the obligation of the courts of the Member States to examine whether the dispute falls under the scope of application of the Brussels Ia Regulation before issuing the certificate. This follows from the requirement of legal certainty on which the mutual trust in the administration of justice in the EU is based. The CJEU answered the second question so that claims related to the dissolution of property relationships arising out a *de facto* unregistered partnership, come within the concept of 'civil and commercial matters' and thus fall under the scope of application of the Brussels Ia Regulation. Although the Brussels Ia Regulation excludes rights in property arising out of a matrimonial relationship from its scope of application, exceptions must be construed narrowly. The parties to the dispute were not married and the property relationships resulting from their *de facto* unregistered partnership could not be characterised as 'rights in property arising out of a matrimonial relationship'.

In some cases, Hungarian courts asked guidance from the CJEU regarding the interpretation of certain grounds of jurisdiction. In *OTP v Hochtief,* a Hungarian company did not repay a loan to OTP, a Hungarian bank. In the meantime, the German Hochtief acquired 75% ownership of the debtor company.[45] Under Hungarian company law rules, in the event of such an acquisition, the acquiring company had to declare the acquisition of ownership to the court of company registration and have the fact and extent of the acquisition published in the company gazette. If the acquiring company failed to declare the acquisition, it was fully and unlimitedly liable for the debts of the controlled company, provided that the assets of the controlled company were insufficient to meet the creditors' claims. This happened in *OTP v Hochtief*. The controlled company became insolvent and could not pay back the loan to OTP. OTP made a claim against Hochtief as the controlling company, which failed to comply with its obligation to declare the acquisition of ownership in the debtor company.

The question was whether Hungarian courts had jurisdiction in this case under Article 5(1) a) of the Brussels Ia Regulation, pursuant to which a person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question. The CJEU established that the underlying legal relationship could not be excluded from the scope of application of the Brussels Ia Regulation under the insolvency exception [Article 1(2) b) of the Brussels Ia Regulation] and the exclusive jurisdictional ground for company law matters [Article 22(2) Brussels Ia Regulation] could not be applied either, because that jurisdictional ground concerned only disputes over the validity of the constitution, the nullity or the dissolution of companies or of the validity of the decisions of company organs. The CJEU added that the claim did not even qualify as a contractual claim under Article 5(1) a) of the Brussels Ia Regulation. This is because a contractual claim presupposes a freely assumed obligation by one party to another. Hochtief

[45] C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság v Hochtief Solution AG,* ECLI:EU:C:2013:674.

did not act as a party to the underlying contracts entered into between OTP and the debtor company. Nevertheless, the CJEU noted that it is not ruled out that the jurisdiction of Hungarian courts may be established on the basis of another jurisdictional ground of the Brussels I Regulation, such as Article 5(3), which allows bringing a claim against a person domiciled in an EU Member State in matters relating to tort, delict or quasi-delict in the courts for the place where the harmful event occurred or may occur. The CJEU laid down that the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Brussels Ia Regulation covers all actions that seek to establish the liability of a defendant and are not related to a 'contract' within the meaning of Article 5(1) a).

Following the preliminary ruling, the referring court, the Curia of Hungary, stated that the obligation of the dominant member to declare and have the acquisition published gives rise to a statutory, *sui generis* liability based on company law.[46] It pointed out that, for establishing liability relating to tort, delict or quasi-delict, the CJEU required the existence of causality between the damage and the harmful acts. At the same time, the failure to comply with the statutory obligation on declaration and publication does not necessarily cause damage to creditors. The failure to meet the claims of creditors usually cannot be traced back to the fact that the person acquiring influence failed to comply with its obligation to declare the acquisition. Therefore, in the view of the Curia of Hungary, the statutory liability at issue could not fall under Article 5(3) of the Brussels Ia Regulation and there was no available ground of jurisdiction that could establish the jurisdiction of Hungarian courts in the case.

The *Nothartová* case concerned counterclaims related to a personality right claim and, more generally, the establishment of jurisdiction for counterclaims.[47] Ms Nothartová, a Slovak national, brought an action against Mr Boldizsár, a Hungarian national domiciled in Hungary for establishing the violation of her image and phonogram rights by publishing photographs and videos of her on the internet without her permission. The defendant brought a counterclaim for damages on the grounds that, first, the claim restricts the distribution of his intellectual creations; second, he was referred to incorrectly by the claimant using his father's name, infringing his right to a name and the deceased person's right to respect; and, third, mentioning the registration number of his vehicle by the claimant breached the 'vehicle's personality right'. The referring court asked the CJEU to interpret Article 8(3) of the Brussels I bis Regulation, which lays down that a person domiciled in a Member State may also be sued before the court in which the original claim is pending in respect to a counterclaim arising from the same contract or facts on which the original claim was based. The CJEU established that the special jurisdictional ground specified in Article 8(3) concerns only claims having a common origin. In the given case, it could be applied provided that a decision on the counterclaim required the court to assess the lawfulness of the actions on which the applicant based her own claims. Article 8(3) is an alternative to other jurisdictional grounds. Hence, it is an alternative to the

[46] BH 2014. 115.

[47] C-306/17, *Éva Nothartová v Sámson József Boldizsár,* ECLI:EU:C:2018:360.

general rule of jurisdiction laid down in Article 4(1) of the Brussels I bis Regulation, as well as to the other rules of special jurisdiction set out in the Brussels I bis Regulation.

Furthermore, the pending *Tibor-Trans* case poses the question of the applicability of Article 7(2) of the Brussels I bis Regulation and requires the interpretation of the concept of the 'place where the harmful event occurred' in establishing the jurisdiction of the Hungarian forum with regard to the effects of an anticompetitive agreement entered into abroad.[48]

The validity of a choice-of-forum clause was in issue in *Hőszig*.[49] The question referred to the CJEU was whether a jurisdiction clause that was found in the general terms and conditions of one of the parties to which the parties' contract referred, and which stipulated the jurisdiction of the courts of a city in a Member State, namely the courts of Paris, is to be considered as valid under Article 23(1) of the Brussels Ia Regulation. In relation to a contractual dispute between a Hungarian and a French company, the Hungarian company brought an action against the French company before a Hungarian court, notwithstanding a jurisdiction clause included in the general terms and conditions of the French company in favour of the courts of Paris. The jurisdiction of the Hungarian court was challenged by the French party. The CJEU concluded that the jurisdiction clause complied with the conditions set out in Article 23. First, the parties' contract explicitly referred to the general terms and conditions of one of the parties. Second, it was also noted that the designation of the courts of the capital of a Member State undoubtedly intended to confer exclusive jurisdiction to the courts belonging to the judicial system of that Member State.

The *Flight Refund* case required not only the interpretation of the Brussels Ia Regulation, but also that of the European Order for Payment Regulation.[50] A flight passenger assigned her right to compensation against the flight company for a delayed flight to Flight Refund, a company specialised in the recovery of such compensation claims. Flight Refund requested a Hungarian notary to issue a European order for payment against Lufthansa. The European order for payment was issued by the notary, but Lufthansa opposed it. Therefore, the procedure should have been continued in accordance with the rules of ordinary civil procedure before the competent court of the Member State where the order for payment had been issued. However, the notary could not identify the competent court, therefore asked the Curia of Hungary to do so. In essence, the CJEU was asked by the Curia of Hungary to give it guidance on how to proceed in the case. The CJEU first stated that jurisdiction for flight passengers' compensation claims must be established based on the Brussels Ia Regulation. The European Order for Payment Regulation provides for the application of national rules of civil procedure to any question not settled by that regulation once the proceedings continue following an opposition. However, the rules of civil procedure must allow the examination of international

[48] C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF TRUCKS N.V.* – Request for a preliminary ruling from the Győr Regional Court of Appeal (Hungary) lodged on 10 July 2018.

[49] C-222/15, *Hőszig Kft. v Alstom Power Thermal Services,* ECLI:EU:C:2016:525.

[50] C-94/14, *Flight Refund Ltd v Deutsche Lufthansa AG,* ECLI:EU:C:2016:148.

jurisdiction under the Brussels Ia Regulation. If, based on the Brussels Ia Regulation, the courts of the Member States of the referring court have jurisdiction to hear the case, the court cannot terminate the proceedings because it could not identify the competent court. Instead, it has to identify or designate the competent court. However, if the jurisdiction of the courts of the Member State of origin cannot be established based on the Brussels Ia Regulation, the referring court is not required to review the order for payment.

2 Conflict of Laws

A single preliminary reference made by Hungarian courts concerned the EU conflict-of-laws instruments. The former Insolvency Regulation had to be interpreted by the CJEU at the request of the Supreme Court. Under the Insolvency Regulation and its former version, the law applicable is the law of the Member State where the insolvency proceedings are opened. However, the Insolvency Regulation allows a deviation in favour of the application of the *lex rei sitae* regarding rights *in rem* of creditors or third parties in respect of assets belonging to the debtor that are situated within the territory of another Member State at the time of the opening of proceedings. In the *Erste Bank* case, the question was whether the Insolvency Regulation and in particular the possibility of deviation in favour of the *lex rei sitae* contained therein may be applied to a case where the main insolvency proceedings were opened in an EU Member State, in Austria, but a security deposit was located in Hungary, which was not yet a member of the EU when the insolvency proceedings were opened, but was already a member when an action was brought in Hungary concerning the right over the security deposit.[51] The CJEU pointed out that the former Insolvency Regulation had entered into force on 31 May 2002 and the insolvency proceedings against the Austrian company was initiated after this date. In Hungary, the former Insolvency Regulation had to be applied from the date of Hungary's accession to the EU, that is from 1 May 2004. From this date, Hungarian courts are required to recognise judgments on the opening of insolvency proceedings rendered by courts in other Member States. This requirement may be traced back to the principle of mutual trust. Hence, Hungarian courts had to apply the former Insolvency Regulation together with the rule permitting deviation in favour of the *lex rei sitae* to insolvency proceedings opened in a Member State before Hungary's accession regarding rights *in rem* of creditors over a debtor's assets located in Hungary, which had been an EU Member State at the time when an action was brought there concerning the right *in rem*.

Hungarian judges contributed significantly to the development of EU law with two preliminary ruling requests related to the cross-border mobility of companies. This is a field not yet covered by EU legislation, but the relevant case law has private international law implications. The *Cartesio*[52] and *VALE*[53] cases helped the clarification of the relationship

[51] C-527/10, *ERSTE Bank Hungary Nyrt v Magyar Állam and Others,* ECLI:EU:C:2012:417.
[52] C-210/06, *Cartesio Oktató és Szolgáltató Bt.,* [2008] ECR I-9641.
[53] C-378/10, *VALE Építési Kft.,* ECLI:EU:C:2012:440.

between EU law and national law concerning the law applicable to companies. Following the *Centros*,[54] *Überseering*[55] and *Inspire Art*[56] judgments of the CJEU, it was called into question whether the real seat doctrine is compatible with the freedom of establishment provisions of the TFEU. In *Cartesio,* the Hungarian court of registration established that the transfer of seat of a Hungarian company to Italy with the retention of Hungarian law as governing law was not possible under domestic law. Although the obstacle here stemmed from the absence of substantive and procedural rules on the cross-border movement of companies, the CJEU held that 'a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.'[57] This statement may result in the conclusion that a Member State of origin can opt either for the incorporation or the real seat theory. The cited statement of the CJEU was also confirmed in the *VALE* case, where an Italian company wanted to convert itself into a corresponding Hungarian company form; this time, with a change in the governing law, but this was rejected, again due to the absence of rules in Hungary for cross-border conversions.[58] Neither primary, nor secondary EU legislation determines the connecting factor for the law applicable to companies. The CJEU case law does not even exclude *a priori* the application of any of the connecting factors. Hence, Member States are free to determine the connecting factor. However, the application of the connecting factor selected by national law must be in compliance with EU law. Due to the case law of the CJEU, in particular the *Centros, Überseering* and *Inspire Art* judgments, in the relationship between the company and the host Member State, the real seat doctrine has been to a large extent supplanted by the incorporation doctrine.

V Reception of the EU Private International Law Instruments in Hungarian Court Practice

The cases where Hungarian courts faced an interpretation problem and submitted a preliminary ruling request to the CJEU represent only the tip of the iceberg. In fact, EU private international law regulations had to be applied in many more cases; preliminary ruling has been asked only in a few of them. Therefore, this chapter intends to give a brief overview of

[54] C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.
[55] C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.
[56] C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.
[57] *Cartesio,* para 110.
[58] *VALE,* para 29.

the Hungarian court practice related to the application of the EU private international law instruments.

The analysis of the case law is not intended to be exhaustive. It is instead limited to some illustrations on the application of the EU private international law regulations. Cases raising jurisdictional issues under the Brussels Ia and I bis Regulations and the Succession Regulation will be discussed along with the domestic court practice related to the Rome I and II Regulations. It must be noted that, among the EU private international law sources, the former Insolvency Regulation had to be construed by Hungarian courts both in the context of the governing law and jurisdiction.[59]

Typical questions include the temporal and subject-matter scope of application of the regulations, the relationship between international conventions and the EU private international law regulations, the interpretation of certain grounds of jurisdiction or connecting factors determining the governing law, prorogation of jurisdiction and choice of law, as well as questions related to enforcement. Often, the jurisdiction or the governing law was not contested and courts limited themselves simply to state that the jurisdiction and applicable law was established based on a given regulation.

1 Jurisdiction and the Recognition and Enforcement of Foreign Judgments

Domestic court practice related to the Brussels Ia and I bis Regulations is abundant. Often courts simply stated that jurisdiction must be established in accordance with the Brussels Ia or the Brussels I bis Regulation.[60] It happened that the jurisdiction of the court could be established due to the appearance of the defendant in accordance with Article 24 Brussels Ia Regulation.[61]

A first group of cases concerns the temporal and subject-matter scope of application of the jurisdictional regulations. Courts sometimes had to delimit *ratione temporis* the application of the Brussels Ia and I bis Regulations, when, for instance, at the time of the emergence of the case, the Brussels Ia Regulation had been applicable, while at the time of filing the statement of claim the Brussels I bis Regulation was already in force.[62] The court correctly chose in favour of the application of the Brussels Ia Regulation. The temporal scope of application of the two Regulations also arose regarding enforcement and it was confirmed that the Brussels Ia Regulation had to be applied to a judgment given in legal proceedings instituted before the starting date of application of the Brussels I bis Regulation, i.e. 10 January 2015.[63] In relation

[59] See in particular BH 2017. 97; EBH 2013. G.4.

[60] Szeged Regional Court of Appeal Gf. 30.147/2013/5; Budapest-Capital Regional Court Pf. 638.807/2016/4; Budapest-Capital Regional Court Pf. 640.701/2013/4. Budapest-Capital Regional Court Pf. 640.701/2013/4; Pécs Regional Court G. 20.694/2017/5.

[61] Budapest-Capital Regional Court P. 22.877/2012/10.

[62] Budapest-Capital Regional Court of Appeal BDT 2019. 3983.

[63] BH 2016. 144.

to the enforcement of a maintenance claim, the Curia of Hungary applied the Brussels Ia Regulation to a judgment given in legal proceedings instituted before the starting date of the application of the Brussels I bis Regulation, and even before the starting date of application of the Maintenance Regulation, which, referring to the rules of the Hague Maintenance Protocol, replaced the maintenance rules of the Brussels Ia Regulation.[64] The subject-matter scope of application of the Brussels I Regulation was examined in several cases. The priority of the CMR Convention was established in relation to the Brussels Ia Regulation based on Article 71(1) of the Regulation, which provides that the Regulation does not affect any convention to which the Member States are parties and which in a certain special field, governs jurisdiction or the recognition or enforcement of judgments.[65] In another case, the court stated that, for the question of establishing the existence and accepting a claim by a creditor in insolvency proceedings, the jurisdiction had to be ascertained on the basis of the Insolvency Regulation, because Article 1(2) b) of the Brussels Ia Regulation excluded from its scope of application 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.'[66]

Prorogation of jurisdiction was examined in a more detailed manner in a few cases. A jurisdiction agreement in a consumer contract in favour of an Austrian court was found to be invalid, because it did not comply with Article 17 of the Brussels Ia Regulation as it was not entered into after the dispute had arisen and did not allow the consumer to bring proceedings in courts other than those referred to in the general provisions on jurisdiction over consumer contracts.[67] The consumer could not be deprived of the alternative ground of jurisdiction that enables him to bring proceedings against the other party either in the courts of the Member State in which that party is domiciled or in the courts of the state in which the consumer is domiciled. The provisions of the Brussels I bis Regulation on prorogation of jurisdiction had to be taken into consideration in the course of a European order for payment procedure started before a Hungarian public notary between an Italian and a Slovakian party.[68] After a statement of opposition was filed by the defendant, the notary referred the case to the Curia of Hungary for the purpose of designating the competent court, because, in his view, no Hungarian court was competent in the case. The claimant argued that the place of performance was Hungary, as indicated in certain confirmations of orders that could establish the jurisdiction of Hungarian courts under Article 7(1) of the Brussels I bis Regulation. At the same time, the parties' agreements referred to the exclusive competence of the court of Milan in Italy. The Curia of Hungary stated that the choice-of-court of the parties must be examined

[64] Curia of Hungary Pfv. 21.258/2018/3.

[65] EBD 2015. G.3. *Convention on the Contract for the International Carriage of Goods by Road (CMR)*, date of signature 19 May 1956, 399 UNTS 189 (entered into force 2 July 1961).

[66] BH 2017. 97.

[67] Budapest-Capital Regional Court of Appeal BDT 2019. 3983.

[68] BH 2019. 80.

by the designated court *ex officio* in light of Article 25 of the Brussels I bis Regulation and it cannot be ignored. An alternative ground of jurisdiction, such as the place of performance, can establish the jurisdiction of a Hungarian court insofar as the rules on prorogation of jurisdiction are not applicable.

The application of the special jurisdiction ground set out in Article 5(3) of the Brussels Ia Regulation was at issue in relation to an alleged violation of personality rights caused by two foundations protecting animals, one of which was Hungarian while the other Austrian, and by the legal representative of the Austrian foundation, due to certain statements published on the websites of the foundations regarding the plaintiff, a poultry processing company seated in Hungary.[69] The Budapest-Capital Regional Court of Appeal extensively referred to the case law of the CJEU and held that the claimant could bring an action in respect to the full damage suffered in the courts of the Member State where it has the centre of its interests.[70] The centre of interests can coincide with the place where a company has its registered office. However, the court argued that, in the given case, the place of the registered office of the plaintiff company did not coincide with the centre of its interests, because the harmful act occurred in a different Member State; the harmful statement was made in the language of this country and this country was equally the destination of the goods intended to be exported by the plaintiff. Consequently, the direct damage was sustained in Austria and Germany, and not in Hungary; therefore, concerning the Austrian foundation, the jurisdiction of the Hungarian courts could not have been established based on this special ground of jurisdiction. Nevertheless, one of the defendants was domiciled in Hungary and Hungarian courts could assert jurisdiction regarding it. Jurisdiction regarding the Austrian defendants could be established under Article 6 of the Brussels Ia Regulation, since the court found that the claims brought against the defendants factually and legally covered each other; it could therefore be concluded that the claims were so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

Issues related to the enforcement of foreign decisions also arose.[71] In one case, it was held that the request for issuing an enforcement certificate and the issue of the enforcement certificate may not be considered as acts interrupting the prescription of the claim to be enforced if the request for issuing the enforcement certificate is not accompanied by a request to order enforcement.[72]

The Succession Regulation was also subject to court interpretation in Hungary. A court had to decide whether to assert jurisdiction under the Succession Regulation upon the plaintiff's request in relation to a claim by the plaintiff for the declaration and registration of ownership of some real estate located in Croatia and shareholding due to the community of property stemming from his/her partnership and subsequently matrimonial relationship with the

[69] Budapest-Capital Regional Court of Appeal BDT 2019. 4038.

[70] In particular, it referred to C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB,* ECLI:EU:C:2017:766 and *eDate.*

[71] See in particular BH 2012. 98; Curia of Hungary Pfv. 21.258/2018/3.

[72] BH 2016. 144.

deceased person.[73] The court stated that it could not assert jurisdiction because the Succession Regulation does not govern matrimonial property relations. Article 1(2) *d)* and *l)* exclude from the scope of application of the Succession Regulation 'questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage' and 'any recording in a register of rights in immovable or movable property'. The plaintiff's claim did not concern legal succession regarding the property of the deceased; even the claimant argued that the assets concerned did not belong to the property of the deceased person.

The Hungarian application of the Brussels II bis Regulation also reflects the proportions of the preliminary ruling requests. Although in Hungary, courts did not request a preliminary ruling from the CJEU regarding the interpretation of the Brussels II bis Regulation, some courts in other Member States did so. These preliminary ruling requests mostly concerned parental responsibility and not marital questions.[74] The same holds for the Hungarian court practice related to the Brussels II bis Regulation. Domestic court decisions mainly addressed parental responsibility and child abduction[75] rather than marital issues, mostly examining whether Hungarian courts have jurisdiction[76]. We find only a few illustrations for referring to the Brussels II bis Regulation, for instance in divorce cases to establish jurisdiction.[77] The scope of the Brussels II bis Regulation was examined in a case where the court stated that it does not apply to matrimonial property.[78]

In a child custody case, prorogation of jurisdiction was established by the Supreme Court under Article 12(3) of the Brussels II bis Regulation.[79] It found that the defendant accepted in an unequivocal manner the jurisdiction of Hungarian courts, as she appeared before the court, submitted a counterclaim on the merits and argued that another Hungarian court was competent in the matter, which assumed the jurisdiction of Hungarian courts and declared at a hearing that she was ready to make a settlement with the plaintiff. Recognition and enforcement of a foreign decision was also at issue in relation to parental responsibility.[80] In relation to the recognition and enforcement of a decision of a Belgian court, it was held that the enforcement of a foreign decision may not be denied, even if the child concerned was not heard, provided that the court ensured the possibility of a hearing.[81] Moreover, the recognition of a court decision may not be refused on the grounds of public policy if the court decision concerned ignored mandatory rules of the state where recognition is sought without breaching the fundamental principles or rules of that state. The recognition and enforcement

[73] Debrecen Regional Court of Appeal BDT 2019. 4057.
[74] See Somssich (n 37) 82.
[75] BH 2015. 100; BH 2013. 271.
[76] BH 2013. 344; BH 2013. 19; BH 2012. 224; EBH 2011. 2318; BH 2009. 298; BH 2013. 68.
[77] Pest Central District Court P. 102.782/2012/55.
[78] Debrecen Regional Court of Appeal BDT 2014. 3091.
[79] EBH 2010. 2141.
[80] BH 2011. 167.
[81] BH 2014. 248.

of a foreign decision may not be denied on the grounds of public policy if a study of the circumstances of the child was not prepared or psychological examination of the persons concerned was not conducted, because even Hungarian courts are not obliged to take these measures.

The Maintenance Regulation was simply referred to in several instances in order to establish jurisdiction and the applicable law.[82] The maintenance issue often arises in relation to a divorce. Additionally, it also happened that the court examined the temporal scope of application of the Maintenance Regulation and held that it could not be applied to the recognition and enforcement of a foreign decision, because the decision was rendered before the starting date of application of the Maintenance Regulation.[83] In relation to the enforcement of a French court decision in Hungary, the court confirmed that, in accordance with Article 41(1) of the Maintenance Regulation, the law governing the enforcement procedure is the law where the enforcement takes place.[84]

2 Conflict of Laws

As far as conflict-of-laws questions are concerned, Hungarian courts interpreted in several instances the Rome Convention, the Rome I Regulation and the Rome II Regulation. We equally find an example for the application of the Insolvency Regulation.[85] We are, however, not aware of domestic court practice related to the Rome III Regulation and conflict-of-laws issues related to the Succession Regulation.

It is a general trend that although there have been only a few cases referred to the CJEU in relation to the interpretation of the Rome I Regulation or the Rome Convention, cases where national courts apply the Rome I Regulation are abundant. Hungarian court practice confirms this, too. Nonetheless, in the relevant cases, courts often simply stated that the law governing the contract must be determined under the Rome I Regulation.[86]

Courts often examined whether the case must be decided on the basis of the Rome I Regulation, the Rome Convention or autonomous private international law *ratione temporis*.[87] In a judgment, the court stated that the Rome Convention did not have to be applied to a contract that was entered into before the promulgation of the Rome Convention in Hungary, but which was modified thereafter in 2007.[88]

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[82] Curia of Hungary Pfv. 22.223/2017/4; Pest Central District Court P. 102.782/2012/55; Budapest-Capital Regional Court Pf. 630.704/2017/12.

[83] Curia of Hungary Pfv. 21.258/2018/3.

[84] BH 2018. 120.

[85] BH 2017. 97.

[86] Budapest-Capital Regional Court of Appeal Gf. 40.608/2017/12; Budapest-Capital Regional Court G. 42.072/2014/17.

[87] Curia of Hungary Pfv. 22.111/2015/12; Debrecen Regional Court of Appeal Gf. 30.372/2012/7; Győr Regional Court of Appeal Pf. 20.267/2013/3; Győr Regional Court of Appeal Pf. 20.074/2011/5; Somogy County Court G. 40.024/2010/21.

[88] Budapest-Capital Regional Court G. 41.731/2009/92.

Choice of law had to be assessed by courts in several cases under the Rome I Regulation and the Rome Convention.[89] Interestingly, the distinction between the Rome Convention and the Rome I Regulation caused a problem for the Curia of Hungary, where, in relation to a credit agreement between a foreign financial institution and the Hungarian borrower entered into on 11 October 2007, it stated that a choice in favour of the Austrian law did not violate the Rome I Convention *(sic!)* and it complied with the Old PIL Code, in particular because it did not constitute a fraudulent connection *(fraus legis),* since there were foreign elements in the case.[90] Although the judgment of the Curia of Hungary was given in 2016, when the Rome I Regulation already had to be applied, the Rome Convention needed to be applied in the matter, since the validity of the underlying contract had to be decided and, at the relevant time (11 October 2007), the Rome Convention had already entered into force between Hungary and Austria.[91] In addition to the terminological inaccuracy as far as the reference to the Rome I Convention is concerned, the Curia of Hungary ignored that the cited legal sources cannot be applied simultaneously because, like the New PIL Code, the Old PIL Code gave priority to the application of international conventions to autonomous private international law. Moreover, fraudulent connection was known by the Old PIL Code, but not by the Rome Convention or the Rome I Regulation. The problem of simultaneous application of the EU and autonomous private international law sources to buttress choice of law was not unique. A reference to jurisdiction of two Hungarian courts and to the Hungarian Civil Code was considered by the Budapest-Capital Regional Court as a choice in favour of Hungarian law, not only under the Rome I Regulation, but in parallel under the Old PIL Code.[92] The underlying guarantee contract was concluded on 27 January 2006, while the

[89] BH 2017. 97; Curia of Hungary Pfv. 20.489/2014/7; Győr Regional Court of Appeal Gf. 20.062/2015/8; Pécs Regional Court of Appeal Pf. 20.024/2016/3; Pécs Regional Court of Appeal Gf. 40.051/2014/8; Budapest-Capital Regional Court G. 40.306/2015/23; Budapest-Capital Regional Court Pf. 639.898/2014/5; Békéscsaba District Court P. 20.930/2013/37; Győr Regional Court P. 20.197/2012/33; Győr Regional Court P. 20.052/2012/79; Budapest Environs Regional Court G. 40.464/2015/16.

[90] Curia of Hungary Pfv. 20.919/2015/6.

[91] *27/2006. (XI. 29.) KüM határozat a szerződéses kötelezettségekre alkalmazandó jogról szóló, Rómában, 1980. június 19-én aláírásra megnyitott egyezmény és jegyzőkönyvei, valamint az azokat módosító egyezmények, továbbá a Ciprusi Köztársaságnak, a Cseh Köztársaságnak, az Észt Köztársaságnak, a Lengyel Köztársaságnak, a Lett Köztársaságnak, a Litván Köztársaságnak, a Magyar Köztársaságnak, a Máltai Köztársaságnak, a Szlovák Köztársaságnak és a Szlovén Köztársaságnak az említett egyezményhez és jegyzőkönyveihez történő csatlakozásáról szóló, Brüsszelben, 2005. április 14-én aláírt egyezmény kihirdetéséről szóló 2006. évi XXVIII. törvény 2–5. §-ainak hatálybalépéséről* (Decision of the Minister of Foreign Affairs No. 27/2006. (XI. 29.) on the entry into force of ss 2-5 of Act XXVIII of 2006 on the promulgation of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 and its protocols, and of the conventions amending those, and of the convention on the accession of the Republic of Cyprus, the Czech Republic, the Republic of Estonia, the Republic of Poland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Slovak Republic and the Republic of Slovenia to the mentioned convention and its protocols signed in Brussels on 14 April 2005).

[92] Budapest-Capital Regional Court G. 42.206/2012/102.

Rome I Regulation is applicable only to contracts concluded after 17 December 2009. At the time of the conclusion of the guarantee contract, the Rome Convention had not yet been promulgated, therefore the case should have been decided on the basis of the Old PIL Code alone. The Pécs Regional Court of Appeal pointed out that, under the Rome I Regulation, the parties domiciled in Hungary could have opted for the applicable law, but choice of law must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.[93] A reference to the German BGB did not suffice to establish a choice of law, because the parties also referred simultaneously to some Hungarian laws.

In the absence of choice of law, courts decided on the applicable law under Article 4(1) of the Rome I Regulation, for instance concerning a sales contract,[94] a construction contract,[95] a mandate[96] and other types of services contracts.[97] The Győr Regional Court of Appeal referred to Article 4(2) of the Rome I Regulation regarding a works contract and applied the law of the habitual residence of the person carrying out the repair works, though the contract could certainly qualify as a service contract within Article 4(1) b).[98] The determination of the applicable law was more challenging in a case where the Curia of Hungary had to find the law governing a cooperation agreement.[99] The Curia of Hungary held that the cooperation agreement constituted in fact a mandate and thereby qualified it as a service contract under Article 4(1) b) of the Rome I Regulation. Due to the peculiar circumstances of the case, the habitual residence of the German claimant, who provided services in Russia under the agreement concluded with a Hungarian company, could not be established unequivocally. It could be either Russia or Germany. The Curia of Hungary called attention to the fact that Article 4 constitutes a cascade system of conflict rules and explained that Article 4(4) of the Rome I Regulation can be applied, i.e. the governing law can be determined on the basis of the closest connection only if the applicable law cannot be determined pursuant to paragraphs (1) or (2). Without having been able to determine with certainty the habitual residence of the plaintiff, the court concluded that the contract is manifestly more closely connected with Hungary based on Article 4(3), because the defendant's personal law was Hungarian. The judgment might be seen as an illustration of the homeward trend due to some flaws in the argumentation. Article 4(3) of the Rome I Regulation may be applied provided that it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country. The contract demonstrated some connections to Russia, Germany and Hungary. It is questionable why the personal law of the company weighed more than other connecting factors. The Rome I Regulation refers directly to the habitual residence. The concept of personal law is not even used in the Rome I Regulation; it is a concept taken from the Old

[93] Pécs Regional Court of Appeal Gf. 40.051/2014/8.
[94] Szeged Regional Court of Appeal Gf. 30.147/2013/5; Kaposvár Regional Court P. 20.365/2015/82.
[95] Zalaegerszeg Regional Court G. 40.161/2013/47.
[96] Buda Central District Court P. 22.689/2012/57.
[97] Szekszárd Regional Court Pf. 20.006/2016/4; Veszprém Regional Court G. 40.031/2014/8.
[98] Győr Regional Court of Appeal Gf. 20.100/2017/5.
[99] BH 2018. 250.

PIL Code, which has been retained by the New PIL Code. If the personal law of the defendant could have mattered, the personal law of the agent could have also been taken into account, pointing to the application of German law. If the habitual residence of the service provider could not be established by the Curia of Hungary, it should have determined the governing law under Article 4(4), because the law applicable could not be determined pursuant to paragraphs 1 or 2. Article 4(3) may be applied only if the governing law can be determined in accordance with paragraphs 1 or 2, but the case is manifestly more closely connected to the law of another country. It must be noted, however, that the court could have drawn the same conclusion – the application of Hungarian law – even on the grounds of Article 4(4) of the Rome I Regulation.

The law applicable to certain contracts was determined in accordance with the special rules of the Rome I Regulation, such as Article 5 on carriage contract.[100] The rules of the Rome Convention were applied in the absence of choice of law to a carriage contract.[101] The law governing a consumer contract was ascertained under the Rome Convention and the court applied Hungarian law, taking the habitual residence of the consumer into account.[102]

In one instance, the court had to decide whether a domestic provision qualified as an overriding mandatory provision. The Győr Regional Court of Appeal did not consider the provisions of Hungarian law on the creation, form, validity and content of a legal relationship concerning a loan and the scope, extent and performance of obligations and rights, as well as the termination of the legal relationship, as (overriding) mandatory provisions under Article 7 of the Rome Convention.[103]

The Rome II Regulation also gained application in Hungarian court practice. Courts correctly did not apply the Rome II Regulation to claims related to the violation of personality rights and found the Old PIL Code applicable.[104] Due to its temporal scope of application, courts could not apply the Rome II Regulation in several cases.[105] Concerning a damages claim related to a traffic accident, the court applied the law of the place where the damage occurred, in accordance with Article 4(1) of the Rome II Regulation.[106] The general *lex loci damni* rule of the Rome II Regulation was similarly applied to other damages claims, for example when a Hungarian poultry breeding company brought a damages action against an Austrian foundation and other entities for its loss suffered because the latter pursued a policy against feather harvesting from live animals due to which the claimant allegedly could not sell its

[100] Budapest-Capital Regional Court G. 41.170/2015/22; Budapest-Capital Regional Court G. 44.567/2014/26; Budapest-Capital Regional Court G. 41.332/2010/41.
[101] Budapest Environs Regional Court G. 40.138/2010/64.
[102] Budapest-Capital Regional Court of Appeal Pf. 20.095/2015/5.
[103] Győr Regional Court of Appeal Gf. 20.062/2015/8.
[104] Budapest-Capital Regional Court of Appeal BDT 2019. 4038.
[105] Pécs Regional Court of Appeal BDT 2016. 3562.
[106] Győr Regional Court of Appeal Pf. 20.174/2011/10; Budapest-Capital Regional Court P. 24.487/2012/47; Budapest-Capital Regional Court Pf. 641.647/2013/4; Budapest-Capital Regional Court Pf. 640.701/2013/4.

products on the market.[107] In Hungarian court practice, we even find an example of a choice of law regarding the non-contractual relationship of the parties, in a case where a claim was brought by the plaintiff bank against an appraiser for stating a higher market price for a real estate than the real price, in breach of professional rules. Here, the court noted that the parties requested the application of Hungarian law according to Article 14(1) a) of the Rome II Regulation and so it had to be applied by the court.

VI Summary

EU accession required legislatures to adapt autonomous private international law to EU law. The New PIL Code in Hungary explicitly recognises the primacy of EU law. Moreover, in the course of drawing up the New PIL Code, the legislature took the solutions of EU law into account, even in fields not covered by EU regulations. Courts are also obliged to apply the EU private international law regulations. The reception of EU private international law regulations by the Hungarian judicature took place smoothly. Judges often cited the judgments of the CJEU given in private international law matters. More serious interpretation problems concerning the EU private international law regulations seldom arose before Hungarian courts. In these rare cases, Hungarian courts were ready to refer the case to the CJEU in the framework of the preliminary ruling procedure. As far as the number of preliminary ruling requests, Hungarian courts seem to be relatively active in the judicial dialogue with the CJEU in the field of judicial cooperation in civil matters. The preliminary rulings given by the CJEU in these cases tended to require the refinement of certain points in the previous case law and did not necessitate essentially new pronouncements. Where courts decided cases requiring the application of the EU private international law regulations independently, without requesting the guidance of the CJEU, they did not hesitate to apply EU law and most often this took place correctly. Only minor uncertainties could be identified in the case law, such as the parallel reliance on the autonomous law and EU regulations by courts ignoring the primacy of the latter, and in a few instances finding the appropriate connecting factor caused some difficulty, though these usually did not affect the outcome of the case.

[107] Debrecen Regional Court G. 40.057/2012/118.

Balázs Elek*

The Connection Between Harmonising Criminal Law and the Occurrence of an Error in Law – Presented Through Criminal Offenses Against the Natural Environment

I Introduction

European integration is deepening cooperation in criminal justice, which leads to a continuously increasing amount of community and national legislation that has to be known. Not only the maze of national legislation requires awareness but also the developing European legislation system, with directives, frameworks, decisions and regulations. There are also several criminal offences that are filled with content by an EU rule. It is sometimes hard even for specialists to cope with the complexity in this legal environment, so this raises whether a lack of awareness of the legislation can be accepted as an error in law.

This is also confirmed by regulating cases of a preliminary ruling when a national court is not sure of the legal rules. In the notorious 'Vajnai case,' initiated on whether wearing a red star to a political event is a criminal offence, the Hungarian court of appeal asked the Court of Justice of the European Union (CJEU) whether the national provisions – according to which using symbols of dictatorships, e.g. red star or swastika is a criminal offense – are compatible with the European standards of fundamental human rights and freedom of expression. As a result, it was established that the Hungarian court had violated the freedom of expression of the person concerned.[1] This case clearly shows that even the court was uncertain whether the defendant has to be sentenced or not.

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[1] Koltay András, 'A Vajnai ügy. Az Emberi Jogok Európai Bíróságának ítélete a vörös csillag viselésének büntethetőségéről' (2010) 1 Jogesetek Magyarázata 77–82.

II Legal Harmonisation of Criminal Law in the European Union

In the present day, the European Union and EU law influence essentially all areas of the law in member states. Criminal law is no exception. The European Union can require member states to criminalise certain defined behaviours, can determine the opinion on criminal sanctions that will punish perpetrators, and can oblige the states to apply measures in certain areas of criminal law and laws on criminal procedure. As such, the harmonisation of substantive and procedural norms in the member states' criminal law falls within the EU's scope of authority.[2] When interpreters of national criminal law explore the intent of national criminal legislation, it is not possible to disregard the meaning and goals of the underlying EU legal act.

In 2001, Professor Ferenc Nagy did not yet regard the expression 'European criminal law' as signifying a particular branch of law in the classic sense, but rather as an umbrella term that referred to the developmental processes that were underway in European law as well as the process of Europeanisation and cross-border cooperation in criminal law.[3] Likewise, Krisztina Karsai notes that the term 'integration of European criminal law' did not refer to a well-defined area of law until the *Lisbon Treaty* took effect. Legal scholars used it as a blanket term to cover the extraordinarily heterogeneous results of the developmental processes that were occurring in the subsystems of member states' criminal statutes.[4]

Cooperation in matters of criminal law between member states of the European Communities entered a new phase when the *Lisbon Treaty* entered into force on 1st December 2009. A massive new area of law, generated by a supranational organisation, took shape in the form of 'European criminal law'. Today, this expression is generally accepted and is understood to mean the (existing and evolving) regulatory and institutional systems in the European Union's substantive and procedural criminal law. This new area of law is transforming approaches to international as well as 'traditional' criminal law.[5] Karsai currently defines 'European criminal law' as simply an independent area of law that derives from the body of EU criminal legislation that came to life through the *Treaty on the Functioning of the European Union* (TFEU).[6]

In the European Union, 'legal harmonisation' means dismantling certain differences in national (member-state) legal systems in the interest of achieving a common goal without introducing unitary rules. Legal harmonisation is clearly never an end in itself; it always takes place in support of some common goal. Through the process of legal harmonisation, national

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[2] Udvarhelyi Bence, 'Büntető anyagi jogi jogharmonizáció az Európai Unióban' (2018) 36 (2) Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica 295–315.

[3] Nagy Ferenc, 'Az európai büntetőjog fogalmáról' (2001) 1 Európai Jog 5–7.

[4] Karsai Krisztina, *Alapelvi revolúció az európai büntetőjogban* (A Pólay Elemér Alapítvány Könyvtára 2015, Szeged) 15–16.

[5] Farkas Ákos, 'Az európai büntetőjog fejlődésének irányai a Lisszaboni Szerződés után' in Juhász Zsuzsanna, Nagy Ferenc and Fantoly Zsanett (eds), *Ünnepi kötet Dr. Cséka Ervin professzor 90. Születésnapjára* (Szegedi Tudományegyetem Állam-és Jogtudományi Kar 2012, Szeged 139–158.).

[6] Karsai (n 4) 15–16.

law is being transformed in a manner that allows EU objectives to be realised through the introduction of identical or similar legal institutions and measures.[7]

The obvious goal of harmonising criminal law is to create a legal environment where all member states adjudicate certain unlawful behaviours in an identical manner and punish perpetrators with sanctions of equal measure. By extension, legal harmonisation can become a tool for eliminating 'forum shopping' – the practice by which perpetrators exploit the differences between member states' criminal laws by choosing to have their case heard in the country where the regulations are most favourable to their particular circumstances.[8]

The *Lisbon Treaty* authorises the harmonization of definitions of criminal offences and sanctions only when they fall in the 'extraordinary' category. Although some EU harmonisation norms do address certain questions pertaining to definitions of criminal offences in the 'general' category, we can hardly speak of a unitary, harmonised 'general' category. There is also little justification for harmonising the definitions of 'classic' offences (e.g. murder, rape, theft) in the 'extraordinary' category. Here, harmonisation is not appropriate because there may be significant cultural and historical differences between member states' criminal-punishment norms; moreover, legal regulations are often the product of centuries-old national traditions.[9]

The Treaty contains several provisions that convey the concept of *ius puniendi*. Article 79 of the TFEU gives authority to the EU in the field of human trafficking, while Articles 82–83 grant powers in relation to shared competences and Article 325 with respect to financial crime and fraud.[10]

> TFEU Article 83 (1) states:
> The European Parliament and the Council may, by means of Directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These crimes are the following: terrorism; human trafficking and sexual exploitation of women and children; trafficking of illegal weapons; money laundering; corruption; trafficking of illegal narcotics; counterfeiting of money and other financial instruments; computer-related crime; and organized crime.

As criminal activity develops, the Council may pass resolutions establishing that other kinds of criminal acts fulfil the criteria defined in this article. These must be passed by

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[7] Karsai Krisztina, 'A jogharmonizáció általános tanai' in Kondorosi Ferenc and Ligeti Katalin (eds), *Az európai büntetőjog kézikönyve* (Magyar Közlöny Lap- és Könyvkiadó 2008, Budapest) 432–433.

[8] Ligeti Katalin: 'Bevezetés' in Kondorosi Ferenc and Ligeti Katalin (eds), *Az európai büntetőjog kézikönyve* (Magyar Közlöny Lap- és Könyvkiadó 2008, Budapest) 24.

[9] Karsai (n 7) 34.

[10] Karsai (n 4) 26.

unanimous decision in the Council and require prior approval from the European Parliament.[11] This sphere includes acts related to racism and xenophobia, inasmuch as they constitute violations of the central principles of freedom, security and justice; they also represent components of the prohibition of discrimination, a fundamental right.[12]

Since community law regulates certain legal relations, it may have a priori influence over the construction of definitions of certain crimes, and hence – in a given sphere – community law can determine indictable behaviours and the boundaries of criminality. The European Court of Justice's partial acknowledgement of competence for making criminal law allows the Community legislator to deem a human behaviour to be a crime and require member states to build prohibitions against such behaviour into their own law. Community law may also hold sway over punishments, since criminal-law sanctions can play a role in denying rights that community law guarantees as fundamental freedoms; in such cases, the standards of community law supersede the member states' sanctions.

Criminal regulations may not engender discrimination if community law, with respect to a given case, acknowledges the principle of equal footing. The adoption of national rules that are stricter than Community law and, in some cases, the limitation of Community fundamental freedoms are allowed (in the absence of a specific provision stating otherwise) depending on whether the common rules provide a minimum level or a maximum extent of protection with respect to the matter in question. This principle applies to criminal-law provisions as well. It follows that a member state's internal law, and thus the application of internal criminal law, may not result in a restriction of freedoms that are guaranteed by the Community.[13]

The adoption of the minimum rules, as laid out in the *Lisbon Treaty,* may relate to criminal offences and punitive sanctions. The harmonisation of components of criminal offences entails an obligation for member states to designate the various offences defined in EU legal acts as crimes. The national legislator may not supplement its criminal offence definitions with additional components that would narrow the scope of culpability.[14] However, since the Treaty can only prescribe minimum harmonisation, it is possible for member states to apply stricter rules than those outlined in the Directive.

The EU legislator can prescribe the nature and scope of the punishment as well. EU norms prescribe efficient, proportional and dissuasive sanctions – in most cases, imprisonment lasting for a determinate period. They often stipulate other kinds of sanctions, such as monetary fines, confiscation of property, expulsion orders or disqualifying perpetrators from practicing their professions. A monetary fine is the most common sanction applied against legal entities. It is also possible to bar perpetrators from receiving state benefits and subsidies, forbid them to conduct a certain business activity on a temporary or permanent basis, place

[11] TFEU Article 83 (1).
[12] Osztovits András, *Az Európai Unió Alapító Szerződéseinek magyarázata 2* (Complex Kiadó 2008, Budapest) 1957–1958.
[13] Ibid, 1950–1951.
[14] Karsai (n 7) 443.

them under court supervision, apply a court-ordered liquidation, or order the temporary or permanent closure of facilities used in the commission of a crime.

With respect to the European Union's secondary sources of law, Regulations facilitate the consolidation of laws while Directives (and the former Pillar III framework resolutions) serve the purpose of legal harmonisation. Regulations have a general effect; member states are obliged to apply them directly and in their entirety. Member states must also adopt Directives and framework resolutions but, in their case, it is up to national authorities to determine the form of the law and the tools employed to achieve the legislation's goals. The *Lisbon Treaty* cites Directives as the primary tool for achieving harmonisation in criminal law.[15] However, the EU is entitled to issue Regulations in relation to the fight against financial crime.[16]

A Regulation is directly applicable in all member states with no need for any additional internal legal action. Where a punishable behaviour is sanctioned by Regulation, the perpetrator may be held accountable on the basis of EU law directly. When criminal-law norms are specified in Directives, national legislators must take action to transplant the rules into their internal law so that perpetrators who engage in behaviours defined as sanctionable under the Directive can be held accountable under national law. Thus, in the case of Directives, the national legislator determines the text of the criminal-law norm – that is, the normative sanction that may be applied to perpetrators who engage in a crime or behaviour that is designated as punishable. In so doing, the legislator must abide by the provisions of the Directive.[17]

The professional literature no longer disputes whether the EU has the competence to create criminal law under the wording of Articles 82 and 83 of the TFEU. The EU legislator, in the normal course of law creation, may define limitations to given articles and may prescribe norms with punitive content in the form of Directives.[18] A 'direct vertical effect' comes into play when national legislators fail to incorporate a Directive into domestic law by the given deadline. At such a time, a person on trial may invoke the Directive and its content in his defence against the state, even though the Directive is not yet part of national law. The converse is not true: Failure to incorporate a Directive by the deadline means the state cannot enforce the Directive's provisions against defendants.

When certain criminal offences were created under Act C of 2012 on the Criminal Code (hereinafter referred to as the Hungarian Criminal Code), the legislator had to devote particular attention to conforming with international conventions and recommendations in addition to European Union law. When interpreting and applying the definitions of the criminal offences examined in this study, knowledge of EU legal acts is indispensable for those charged with applying the law.

[15] TFEU Articles 82–83.
[16] TFEU Article 325.
[17] Udvarhelyi (n 2) 295–315.
[18] Karsai (n 4) 31.

III The Appearance of European Environmental and Nature Protection Law

The environmental protection movements existing in parallel to European integration resulted in the appearance of environmental criminal policy and criminal law.[19]

At the beginning, environmental legislation in the EU aimed to establish fair competition; the protection of the environmental heritage was only secondary.[20]

Community law is strongly attached to the economic sector as a result of the internal market and economic integration, and the harmonisation of economic legal rules through community legislation has had a significant influencing force towards economic and environmental criminal law. Crimes against the environment are often committed through economic activities in connection with production process, as a result of a concrete technological solution. According to some legal positions, crimes against the environment have to be regarded as a kind of the economic crime.[21]

Kőhalmi also emphasises that the creation of environmental law has not been provided against the intensity or the cross-border nature of environmental problems, but for economic reasons.[22]

Directives and Regulations (EC) are the fundamental regulatory instruments in the field of environmental protection within the Community.[23] Directives mainly regulate general environmental management issues on every area of environment protection and special provisions on environmental compartments or sectors such as air quality protection, waste management and nature protection.[24]

One of the best-known institutional conflicts brought before the Court was exactly over the regulation of environmental protection. The Council accepted the Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law

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[19] Görgényi Ilona: 'A környezetvédelmi büntetőjog aktuális fejleményei Európában' (2002) 10 Belügyi Szemle, 39–50.

[20] Kőhalmi László: 'Az európai környezeti büntetőjog fejlődési irányai és problémái' (2009) 1 Rendészeti Szemle, 42–63.

[21] Görgényi (n 19) 40.

[22] Kőhalmi (n 20) 42–63.

[23] See Directives and Regulations related directly to the chapter of nature and environmental protection in the Criminal Code:
– Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28.;
– Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7.;
– Council Directive 92/43/EEC of 20 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.;
– Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1996] OJ L61/1.;
– Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer [2009] OJ L286/1.;

[24] Laczi Beáta: 'Irányelv kontra kerethatározat. Környezetvédelmi büntetőjogi szabályozás az Európai Unióban' (2006) 10 Magyar Jog 577–587.

as initiated by Denmark. However the Commission's legal perspective was that this type of regulation was not appropriate for prescribing that the member states establish national criminal sanctions against environmental crimes. Accordingly, the Commission brought an action before the Court. As a result, the Court of Justice annulled Framework Decision 2003/80/JHA on 15th April 2005.[25] The Framework Decision had formally infringed the procedural rules of harmonisation legislature as it usurped the Community's competence. In the view of the Court, the criminal protection of the environment should have been regulated by a Directive.[26]

Karsai considers that a part of *ius puniendi* thus appeared in Community law, that is to say among the supranational competences. The decision facilitated the process of criminal integration and the Commission drew up a programme for exchanging Framework Decisions with Directives.[27]

Directive 2008/99/EC provides criminal regulation in order to establish more effective protection of the environment. The starting point was the recognition that administrative penalties are not enough to fulfil the law on environmental protection. Criminal sanctions have to be formulated in order to ensure compliance with the law. This expresses a different form of disapproval from society compared to an administrative penalty or civil claims for damages.

In order to ensure effective environmental protection, there is a particular need for more dissuasive criminal sanctions against environmentally harmful activities causing or that may cause significant damage to the air – including the stratosphere –, soil, waters, animals or plants, – including the conservation of the species.

The Directive raises the states' awareness that failure to comply with a legal duty to act may have the same result as an activity; therefore, an omission also has to be sanctioned. The Directive emphasises that intentional and grossly negligent acts have to be classified as criminal offences.

In accordance with the international and European agreements dealing with the protection of the environment and nature, the Hungarian Constitution sets out the rights and obligations regarding the protection of the environment and nature more widely, compared with the previous Hungarian Constitution. The Avowal in the Fundamental Law states that we bear a responsibility for our descendants, so therefore we protect the future generations' living conditions by the careful usage of material, intellectual and natural resources. It states that the environmental resources – especially agricultural land, forests and the water sources –, biodiversity – especially native plant and animal species –, and cultural values are the elements of the national common heritage; its protection, sustenance and conservation for the future generations are the obligation of the state and all citizens.

[25] C-176/03, *Commission of the European Communities v Council of the European Union* [2005].
[26] Kőhalmi (n 20) 42–63.
[27] Karsai (n 4) 25–26.

Incorporating crimes against nature and the environment in a separate chapter is a key innovation in the new Hungarian Criminal Code.[28] Crimes under the umbrella of this chapter are very diverse, although they have common features that justify their presence in this chapter. A common feature, for instance, is that their aim is to protect the environment, nature and also their elements.[29]

IV An Overview of Crimes Against the Environment and Nature

Damaging the environment as a crime is provided in Section 241 of the Hungarian Criminal Code. This crime is regulated as a framework, which means that other legal regulations give the concrete substance. Section 241 divides this crime structurally, the first part is about the protection of the elements and the second part lists the penalties for such crimes.

It needs interpretation to decide whether a Hungarian citizen commits the crime of destroying nature if he commits it abroad; for instance if a hunter brings down a protected or a specially protected animal during a hunt, if it is allowed by the national legislation for the location of the hunting. According to the Hungarian Criminal Code, its rules unequivocally have to be used for crimes that are committed abroad by a Hungarian citizen,[30] but the text mentions only the Criminal Code. In light of this, the exact rules on protecting nature are not contained by the Criminal Code. However, international agreements also aim to protect endemic species. That is why the Criminal Code criminalises activities such as importing or transferring protected or specially protected animals, or products made therefrom (for instance a trophy).

The Hungarian Criminal Code categorises the objects harmed by environmental crime on the basis of the underlying law, especially the Nature Protection Act[31] and in the view of Hungary's membership of the European Union.

Damaging the environment as a crime can be committed against specially protected living organisms or protected living organisms. These latter objects are only protected by criminal law if the protected living organisms' monetary value reaches the lowest monetary value of specially protected living organisms. Decree 13/2001. (V. 9.) KöM of the Hungarian Ministry of Environmental Protection sets out the monetary values of protected plant species and animal species listed in Annexes No 1 and 2 of the decree. The lowest value of any specially protected animas is HUF 100,000 HUF.

The crime can also be committed against the living organisms listed by the Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and

[28] Sinku Pál, 'Crimes against the nature and the environment' in Polt Péter (ed), *Új Btk. kommentár 5. kötet, különös rész* (Nemzeti Közszolgálati és Tankönyvkiadó 2013, Budapest) Chapter XXIII., 309–311.

[29] Elek Balázs, *Vadászok, halászok a büntetőjog hálójában* (HVG-ORAC 2015, Budapest) 281.

[30] Hungarian Criminal Code s 3 para 1 item *c)*.

[31] Act LIII of 1996 on nature protection.

flora by regulating trade therein, listed in Annex A and B. This Regulation (EC) lays down detailed rules on the import, export and also the trade in these plant and animal species.

Article 16 of the Regulation (EC) obliges Member States to take appropriate measures in order for infringements against the Regulation to be punished. However, the Regulation (EC) gives discretion to the Member States in applying administrative sanctions or criminal sanctions against the infringer.[32]

The Annex to the Regulation (EC) can be amended by the Commission of the European Communities. Such an amendment was Commission Regulation (EU) No 101/2012 of 6 February 2012 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein. This Commission Regulation contains the plant and animal species covered by the Council Regulation. In the light of this, the crime can be committed against the living organisms listed by the Commission Regulation and can also be committed against the living organisms covered by Annex A and B of the Council Regulation itself.

The definition of living organisms is set out in the Hungarian Criminal Code by an explanatory note considered the underlying law.

The crime can be committed by acquisition, keeping, placing on the market, import, export, trade, damage and destruction.

A qualified instance of the crime of damaging the environment is destroying the specially protected or protected living organisms to a level that results in damage, the monetary value of which reaches double the highest monetary value of the specially protected plant or animal species.

Significantly, destroying living organisms not protected by the State of Hungary but covered by the Regulation (EC) is also a qualified instance.

The base instance can be only committed intentionally; however, the qualified instance can also be committed by negligence.[33]

Section 243 of the Hungarian Criminal Code regulates damaging nature related to the environmental heritage and protected areas. The crime can be committed on Natura 2000 sites, protected caves, protected natural sites and also the community or the habitat of protected living organisms.

The category of Natura 2000 sites was implemented into Hungarian law by Decree 275/2004. (X. 8.) Korm. of the Hungarian Government. Natura 2000 sites had to be demarcated on the basis of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 20 May 1992 on the conservation of natural habitats and of wild fauna and flora. This section ensures the protection of these areas.

The main aim of the Directive is to promote the conservation of biodiversity, taking economic, social, cultural and regional needs into account and to support the common aim

[32] Laczi (n 24) 577–587.

[33] The explanatory memorandum of the Hungarian Criminal Code s 242.

of sustainable development, as conserving biodiversity requires certain human activities to be promoted and continued. The aims of measures taken in accordance with the Directive are to conserve and restore natural habitats and establish the conservation status of wild animals and plants of community interest.

The conduct of the crime is an alteration that has to cause significant damage or loss; that is to say, every activity infringing the Nature Protection Act. Alteration is a broad definition, which even contains changing the scope of the area. The determination of what is significant requires an expert. The crime can also be committed through negligence.

V Misunderstanding as Grounds for Denying Criminality in Offences Against Nature and the Environment

If there is a misunderstanding, a notion may develop in the perpetrator's mind that is different from reality, or the perpetrator might not know anything about the actual rules. Misunderstanding affects intent. In accordance with the previous Code, the Hungarian Criminal Code sets out two types of misunderstanding, one is an error in facts and the other is an error in assessing the danger to society. Misunderstanding is relevant if it has a connection with a fact that has to relate to the intention.

We can talk about an error in facts if the perpetrator's mind doesn't cover all of the necessary facts on the prohibited activity. The result is that these facts have to be considered as non-existent.

Intent is characterised by the fact that the offender's mind covers all of the elements of the crime. Misunderstanding excludes criminality if the offender errs in a fact about the crime. Misunderstanding is relevant if it relates to any objective element of the offence. If misunderstanding is caused by negligence and the specific type of offence due to negligence is not punishable by the law then criminal liability is excluded.

However, if misunderstanding is caused by negligence and negligence is also punishable under the law then the perpetrator must be considered responsible for the crime.

It cannot be considered a crime if a hunter shoots a protected ferruginous duck by negligence during a wild duck hunt. However it can be considered as a crime if a hunter shoots a large number of protected birds, and negligence can be excluded under specific circumstances. A defence of an error may be acceptable regarding a wild duck hunt at twilight; however, it can be excluded after several ferruginous ducks were shot. Shooting eight ferruginous ducks is a qualified instance of the crime so therefore committing the crime, whether intentionally or negligently, is punishable. Committing the crime negligently can be stated if the perpetrator himself, as a professional hunter, failed to pay attention and exercise due care.[34]

[34] Elek Balázs, *A vadászszenvedély bűncselekményei. Vadászbalesetek, vadorzás, vadvédelem* (Magyar Közlöny Lap- és Könyvkiadó 2008, Budapest) 168.

An error in the danger to society occurs when the offender is not aware of the disapproval of society.

There is no clear dividing line between the two types of misunderstanding and an error in law. An error in the danger to society can occur due to ignorance of the law or also a significant misunderstanding of the facts. It is therefore important to analyse their interaction with each other.[35] According to the latest judicial practice '[…] the awareness of the illegality, immorality and the disapproval of society, or any of these, precludes an error in assessing the danger to society'.[36] 'The awareness of its danger to society can be discovered from criminal law, other areas of law, morality or the appraisal of society.'[37]

Wiener predicates that a relevant and irrelevant error can be distinguished through their moral content. That's why an error in assessing the danger to society can be considered differently than administrative rules and basic regulations in international law that give the concrete substance to a framework-type crime. Administrative rules don't have a moral content but international law has, so stating an error in assessing the danger to society cannot be accepted.[38]

On the contrary, I consider that an error in assessing the danger to society can occur due to ignorance of international law. Adopting international and European legislation is usually preceded by serious debates. The Member States of the European Union often have different opinions; we therefore cannot refer exclusively to common moral values.

István László Gál predicates that an error in law is when the offender does not know that the activity is prohibited by law, the legal status of the activity or an error occurs regarding the quantum of the penalty.[39]

However, for us to abide by the phrase *'ignorantia iuris neminem excusat'* the law must be available for legal entities. The date of entry into force should be chosen in such a way that allows enough time for legal entities to prepare for the new regime.[40]

Do we think whether the average-educated citizen is able to access legal databases, search them and find the appropriate European legal act? Ferenc Nagy also emphasises that above Latin dictum has gradually disappeared in some European countries.[41]

Some people identify an error in law with an error in assessing the danger to the society while others separate them. Ignorance of the law can lead to an error in assessing the danger to society in several cases. József Földvári states it in the following:

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[35] Hati Csilla 'A társadalomra veszélyességben való tévedés' (2012) 3 Büntetőjogi Szemle 1–11.

[36] BH 2015. 92.

[37] Gellér Balázs, Ambrus István, *A magyar büntetőjog általános tanai I.* (ELTE Eötvös Kiadó 2019, Budapest) 315.

[38] Wiener A. Imre 'Elméleti alapok a Büntetőtörvény Általános Része kodifikálásához' (2000) MTA Jogtudományi Intézete Közlemények 1992–2009, 94. Wiener A. Imre, *Büntetendőség, büntethetőség* (KJK – MTA Állam- és Jogtudományi Intézet 1999, Budapest) 212–214.

[39] Gál István László, *Gazdasági büntetőjog közgazdászoknak* (Akadémiai Kiadó 2007, Budapest) 41.

[40] Rácz Attila 'A jogszabályok kötelező ereje – érvényessé válása, időbeli hatálya és alkalmazhatósága' (1996) 1–48 Acta Universitatis Szegediensis: acta juridica et politica 493.

[41] Nagy Ferenc, *A magyar büntetőjog Általános része* (HVG-ORAC 2010, Budapest) 173.

> Awareness of the law isn't a prerequisite for declaring intent. An offender who doesn't consider the activity to be dangerous for society because of being unaware of the law can't be punished. However, the reason is not an error in the law but error in the danger to society, as long as it is based on a justifiable reason.[42]

According to a different approach 'an error in the law isn't regulated by the Hungarian Criminal Code; it has to be judged under the umbrella of an error in the danger to society'[43].

S 81 of the first Hungarian Criminal Code (Act V of 1878 on the Criminal Code) explicitly stated that 'Ignorance of the law or an incorrect interpretation does not exclude criminality' although the defendant could prove his unawareness of the rules of private or other law if it was a relevant fact.[44]

An error is irrelevant if the offender commits a crime while believing it is just an administrative offence. This situation can occur in particular when an activity has been transposed to the Criminal Code from the Code of Administrative Offences[45]. In this case, the offender knows about the danger to society, an error occurs regarding the legal status, which does not exclude criminality.[46]

An error in the administrative regulation's content typically occurs as an error in the danger to society.

The Hungarian Supreme Court acquitted a defendant of the charges of damaging nature by applying these rules about misunderstanding.[47]

The defendant arrived at Ferihegy Airport, Budapest, from the United States on 7th January 2005. He attempted to follow the green channel when a customs clearance was initiated against him. It turned out that packed in his luggage was a prepared alligator head, which he had bought as a present. Alligators are marked as 'Aligator mississippiensis' in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and in the Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. According to these regulations, a special prior permit is needed to import an alligator or its parts, which has to be shown when crossing the border. In the absence of this prior permit, the alligator head, as a prepared element, cannot be brought into the country.

In the first instance proceedings, the defence submitted by the defendant was that he did not know that taking a prepared alligator – bought as a present for a small amount – is prohibited as he was not aware of the legal regulation. The court of first instance did not consider this defence, just stated that a person travelling abroad or arriving back has to 'find out the rules on whether exporting or importing needed a permit or other special conditions.'

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[42] Földvári József, *Magyar Büntetőjog Általános rész* (Osiris Kiadó 1998, Budapest) 164–165.

[43] Elek Balázs, 'A tévedés' in Polt Péter (ed), *Új Btk. Kommentár 1. kötet általános rész* (Nemzeti Közszolgálati és Tankönyv Kiadó 2013, Budapest) 137–147.

[44] Bernolák Nándor *A tévedés tana a büntetőjogban* (Kassai Kir. Jogakadémia 1910, Kassa) 59.

[45] Act II of 2012 on offences, the procedure in relation to offences and the offence record system.

[46] Elek (n 43) 137–147.

[47] Hungarian Supreme Court Bfv.II.360/2007/5.

Who commits a crime on a false assumption that the activity is not a danger to society and has a justifiable reason for it cannot be punished. According to this, the defence of the defendant should not just be examined in the light of gathering information in general.

The defendant failed to gather the required legal information before committing the crime. It means that the defendant's crime is a result of negligence. If the defendant errs in assessing the danger to society of the activity because of being negligent then the offence is negligent instead of intentional. That is to say, the defendant can be held accountable if the crime can be committed due to negligence according to the law. In this case, only the qualified instance of the crime can be committed negligently.

The activity committed by the defendant infringed a regulation that can be accessed and studied with greater difficulty compared to generally known information. The extensive list of protected and specially protected plant and animal species or those which are protected under international treaties require expertise in order to understand the relevant legal background.

It might be difficult to find and compare the relevant national and international law; moreover, these lists change from time to time. It can be clearly noted from the circumstances that the defendant had not planned to buy the alligator head before he travelled to the United States. He bought it as a souvenir for a small amount from a public shop. Considering these circumstances, it is unrealistic to hold his lack of knowledge of the necessary legal regulations against him.

The legal literature takes it for granted that if the offender is aware that the activity is prohibited by law, immoral or dangerous, it means awareness of its danger to society. If, contrary to that, all of these conditions are missing, the offender is unaware of the danger to society. It is particularly common when the offender infringes an administrative rule that give the concrete substance to a framework-type crime. To be aware of a regulation with an administrative nature can be expected from people who are dealing with them regularly or of their own motion. However, those who infringe these kinds of regulations occasionally and randomly can make an error regarding their danger to society.

Considering these circumstances the Hungarian Supreme Court deemed the defence to be admissible.

The defendant who acquired and held a prepared alligator head protected under international treaties had a justifiable reason for assuming the lack of danger to society.

Its result was no punishment was ordered on the basis of the Hungarian Criminal Code.[48]

Increased requirements must be placed against people with specific experience when considering the content of the law and in relation to this, the error in assessing the danger to society. [49] To state such an error depends on the person of the defendant, because of their current level of awareness, and it may change over time, especially if a less known regulation enters into the public consciousness. Regulations on the danger to society require the concrete activity to be considered in every case.

[48] Elek (n 34) 1–176.

[49] Elek (n 43) 137–147.

In a similar case, the court did not accept the error in assessing the danger to society as a defence, because the perpetrator was a hunter, who even took part in hunts abroad, and should have known the legal regulations on hunting as part of his profession.[50]

The perpetrator took part in a pre-arranged hunt in Bosnia-Herzegovina on 30th March 2007, where he brought down a grey wolf. The perpetrator attempted to import its skull and flayed skin to Hungary at the border crossing point in Röszke on 1st April 2007. Grey wolf is listed in Annex 'A' of the Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. Art 4(1) of the Regulation states that a special CITES authorisation – regulated by the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) – is required to import species listed in Annex 'A' to the European Community's area. According to art 15 of the Commission Regulation (EC) No 865/2006 of 4 May 2006, this authorisation cannot be issued subsequently. The defendant did not have such authorisation.

Annex 4 of Decree 13/2001. (V. 9.) KöM of the Hungarian Ministry of Environmental Protection sets out that grey wolf is a specially protected species; to own any part thereof requires authorisation from the nature conservancy authority – according to Section 43 para 2 of the Nature Protection Act – and it is only permitted in the public interest.

The argument of the defence was that the perpetrator was unaware of the obligation to obtain authorisation and that it cannot be issued subsequently; the crime regulated in section 281 (1) c) of Act IV of 1978 on the Criminal Code (hereinafter referred to as the previous Criminal Code) cannot be committed negligently.

The Hungarian Supreme Court (today the Curia of Hungary) has set out that the case-law is consistent on the irrelevance of an error regarding prohibition under criminal law. There may be an exception from this principle if an error occurs regarding the administrative legislation that provides the content of the framework criminal legislation, which can be considered as an error in assessing the danger to society in view of the special circumstances and the expected knowledge. However, this shall not apply to this case. The defendant was an experienced hunter who also took part in hunts abroad (he was also invited to the mentioned hunt in Bosnia-Herzegovina), he – by his own admission – knew that the specially protected grey wolf is listed in the CITES agreement. The person, whose profession is hunting, had to be aware of the rules and legislation – including prohibitions. In the light of this, the defendant was not able to claim that he was not aware – so he was negligent – of the legislation that set out the obligation to obtain the CITES authorization. The defendant's intent extended to importing the skull and flayed skin of the grey wolf – without the required authorisation – which he committed. In the light of this, the defendant had committed the crime of destroying the nature according to section 281 (1) c) of the previous Criminal Code – in view of section 285 (5) item c).[51]

[50] Hungarian Supreme Court Bfv.III.843/2008/5.
[51] Hungarian Supreme Court Bfv.III.843/2008/5.

VI Conclusions

Awareness that an activity is against the law, immoral and dangerous means awareness of its danger to society, which can even be stated about people with a low level of education. Criminal authorities however must not ignore the defendant's knowledge of the legal regulations that are realistically available to him. Examining the area of environmental protection it may be concluded that the amount and complexity of the related administrative rules are almost incomprehensible to a layperson.

In a wider context, it may lead to the possibility of a misunderstanding of the legal rules because not only national but also European law must be taken into account.

Szilvia Halmos*

The Impact of EU Law on Hungarian Anti-discrimination Law in Employment

I Introduction

The primary purpose of anti-discrimination law in employment is to provide legal tools to dismantle the harmful stereotypes that are deeply embedded in society, traditionally giving rise to labour market segregation and marginalisation of vulnerable and disadvantaged groups of society. The Hungarian labour market could be characterised by several forms of traditionally existing, overt and covert discriminatory trends before the accession of Hungary to the European Union. Even though Hungarian law, including Hungarian labour law, had enshrined some initial provisions on the prohibition of discrimination before the process of adopting the relevant EU law, European standards in relation to the regulation of equality required the implementation of a set of predominantly new and unknown concepts and legal instruments. The implementation of EU law on equal opportunities in employment significantly redesigned the previously existing national law, rendering it much more differentiated and enriching it with several new instruments. Although the implementation of the relevant EU directives was undertaken even before the accession, a deeper understanding and practical implementation of the union norms are a long-term and still ongoing process. Since most of the fundamental legal concepts of anti-discrimination law had been formulated in Anglo-Saxon legal cultures, and were adopted from there to the *acquis communautaire,* those who consult and apply this set of rules in practice may still have the impression that anti-discrimination law constitutes an albeit not longer so new, but nevertheless a 'foreign body' among the traditional constructs of domestic labour law.[1] In addition, the body of EU law on

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The author is grateful to Annamária Fürjes (PhD; judge at the Budapest-Capital Administrative and Labour Court; consultant judge on European Union law) for her valuable contributions supporting the research, as well as to Krisztina Szolnokiné Csernay (judge at the Administrative and Labour Law Department of the Kúria, consultant judge on European Union law) and Éva Gellérné Lukács (senior legal expert in European law and assistant professor at the Faculty of Law of ELTE University) for the peer review of the text and for their useful comments.

[1] See: Dagmar Schiek, Lisa B. Waddington, Mark Bell, *Cases, materials and text on national, supranational and international non-discrimination law* (Hart Publishing 2007, Oxford and Portland, Oregon) 360.

equal treatment in employment is also dynamically evolving and developing, thanks especially to the activity of the Court of Justice of the European Union (hereinafter: CJEU).[2]

The purpose of this study is to give an overview of the impact of EU law on some specific aspects of equal treatment in Hungarian labour law. In Section II, a short description is given on the main features of relevant EU and national legislation. In Section III the current status of national implementation of EU law is analysed concerning a central instrument of national equality law, i.e. the rules on burden of proof. The main developments of the case law of Hungarian courts is followed up; this was recently summarised and evaluated by the Case Law Analysing Group of the Kúria[3] appointed to scrutinise the judicial practice of equal treatment regulation in the field of labour law. In Section IV, it is evaluated how far Hungarian labour law has come in the implementation process over the past 15 years in the analysed fields, and which challenges have to be addressed in the forthcoming 15 years.

II The Main Characteristics of EU and Current Hungarian Employment Equality Law

1 Development of EU Equality Law in Employment

The Treaties establishing the European Communities included only one provision concerning the discrimination of workers: Article 119 of the *Treaty of Rome* exclusively prohibited the gender-based discrimination of employees, and exclusively in terms of pay. Out of this brief rule, the European Community and later the European Union has developed a robust body of law on equal treatment in employment over the past six decades, encompassing more provisions in primary[4] and secondary law,[5] supported by a vast number of decisions of the CJEU and various soft law and policy instruments (e.g. action programmes). The CJEU has played a particularly vital role in the extension and development of equality law: formulas, definitions, tests and principles processed by judgements constituted the conceptual basis of later directives;[6] and represented a consistent trend in the extensive interpretation of the

[2] This study refers to the predecessor of the CJEU ('European Court of Justice') as 'CJEU' as well.

[3] Before 31 December 2011, the supreme judicial forum of Hungary was denominated as 'Supreme Court', subsequently: 'Kúria'.

[4] The key provisions of primary law include the *European Union Charter of Fundamental Rights* (hereinafter: EUCFR), Art. 20 (equality before the law) and 21 (non-discrimination); the *Treaty on the European Union* (hereinafter: TEU), Art. 2, 3(3), 9 as well as the *Treaty on the Functioning of the European Union* (hereinafter: TFEU), Art. 10, 18, 45. See in more detail below in this Section.

[5] Relevant secondary law includes a number of – from time to time in part recast – directives. For a list of the key documents of secondary law see: European Union Agency of Fundamental Rights, *Handbook on European Non-Discrimination Law* (Publications Office of the European Union 2018, Luxembourg) <https://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination> accessed on 6 June 2019, 283–284.

[6] For example the rules on burden of proof and the definition and justification of indirect discrimination were first invented by the CJEU, and were later transposed to the text of directives. (See in more detail in Section III.; Schiek et al. (n 1) 360, 353–354; Sandra Fredman, *Discrimination law* (2nd edn, OUP 2011, Oxford, reprint 2012) 190, 224.

terms of Community/Union law (e.g. regarding protected characteristics,[7] and the definition of 'wage'[8]). The increasing number of linkages between EU law and international law[9] on equality has given new perspectives to the further development of the acquis. In consequence, we can consider European law on equality in employment as a continuously evolving and spreading set of standards for Member States (including Hungary), presenting more and more challenges for national law and its practice.[10] Prior to the assessment of certain instruments of Hungarian equality law in employment in the mirror of these standards, it is useful to describe some key characteristics of the relevant union law at present, giving perspectives for the activity of Member States that endeavour to ensure compliance.

a) A mixed pattern of equality concepts

Academic literature employs various typologies of approaches of equality. According to a well-known typology, the set of approaches of equality can be distinguished, including 'equality of treatment', 'equality of results', 'equality of opportunities' and 'equality as an element of dignity'.[11] Initially, the anti-discrimination law of the European Communities took a rather formal

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[7] See in detail: Kajtár Edit, 'Old limbs, new twigs: From classic to novel forms of protected characteristics in European anti-discrimination law' (2015) 8 (1–2) Pécsi Munkajogi Közlemények 37–51, 40. C-13/94, *P v S and Cornwall County Council,* ECLI:EU:C:1996:170; C-303/06. *S. Coleman v Attridge Law and Steve Law,* ECLI:EU:C:2008:415. (hereinafter: *Coleman* judgement).

[8] E.g. C-33/89, *Maria Kowalska tegen Freie und Hansestadt Hamburg,* ECLI:EU:C:1990:265; C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group,* ECLI:EU:C:1990:209; C-12/81, *Eileen Garland v British Rail Engineering Limited,* ECLI:EU:C:1982:44 etc.

[9] Article 6, paragraph 2 of the *Treaty of Functioning of the European Union* (TFEU) expresses the EU's destination to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and acknowledges the common heritage of the Member States in the field of protection of human rights as general principles of EU law.
It should be mentioned that the EU acceded to (Decision 2010/48.) the Convention on the Rights of Persons with Disabilities (CRPD) as one of the key binding human rights document of the UN. As the CJEU affirmed, by this the CRPD became an integral part of the European Union legal order; consequently, the relevant EU law should be interpreted in a manner consistent with that convention. (Joined Cases C-335/11, HK Danmark, acting on behalf of *Jette Ring v Dansk almennyttigt Boligselskab* and C-337/11, *HK Danmark,* acting on behalf of *Lone Skouboe Werge v Dansk Arbejdsgiverforening,* acting on behalf of Pro Display A/S; ECLI:EU:C:2013:222)

[10] Further development of the scope of protection against discrimination is a continuous priority of EU legislation, however accompanied by setbacks. In 2008, the European Commission presented a proposal for a Council directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief, which aims at extending protection against discrimination through a horizontal approach. However, as unanimity is required in the Council, the draft has remained blocked at that stage since then. In 2014, the European Commission declared its intention to complete the legislation process concerning the proposal. On 16 April 2019, the Commission approved a Communication [COM(2019)186 final] highlighting the gaps in protection and proposing ways of facilitating decision-making in the area of non-discrimination through the use of enhanced qualified majority voting and the ordinary legislative procedure. (Source: <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive> accessed on 12 June 2019).

[11] In the academic literature there are a number of classifications of approaches of equality. A more detailed description of these classifications is presented by Kriszta Kovács [Kovács Kriszta, *Az egyenlőség felé. A hátrányos*

approach of equality ('equality of treatment'), prohibiting wage discrimination against women. This approach is based on the Aristotelian theory of justice, which says that 'likes should be treated alike,'[12] and prohibits the less favourable treatment of two similarly situated individuals on grounds of a protected characteristic (prohibition of direct discrimination).[13] The requirement of equal payment for equal work (or work of equal value) for women, the horizontal direct effect of which was later acknowledged by the CJEU,[14] constituted the earliest and a key intervention by the EC/EU to support women's equality.[15]

Nevertheless, in a short time the CJEU had to face the fact that disadvantages suffered by women or other marginalised groups cannot be eliminated effectively via such a formal approach of equality. The other half of Aristotle's justice principle says that 'differents should be treated differently'.[16] Cases where the identical treatment of workers caused a considerably more disadvantageous effect on female than on male workers inspired the CJEU to create the

megkülönböztetés tilalma és a támogató intézkedések (L'Harmattan 2012, Budapest) 30–56. This study relies basically on the typology introduced by Sandra Fredman, identifying the following four approaches.]

– 'Equality of treatment' is predicated on the principle that justice inheres in consistency; hence like should be treated alike. This rather formal approach does not take into account existing distributions of wealth and power, thus it may result in unequal outcomes.

– 'Equality of results': this concept of equality represents a material approach, concentrating on correcting maldistribution in society. Such a principle would require unequal treatment, if necessary to achieve an equal impact.

– 'Equality of opportunities': this notion of equality (representing a material approach as well) focuses on facilitating personal self-fulfilment, by equalising opportunities ['the start line'] for all. This approach may comply with inequality of treatment and inequality of results as well. Unequal treatment might be necessary to equalise the opportunities of all individuals, but once opportunities are equal, different choices and capacities might lead to inequality of results.

– 'Equality as an element of dignity': in terms of this approach, dignity replaces rationality as a trigger for equal rights. As the German Constitutional Court puts it: 'Since all persons are entitled to human dignity and freedom and to that extent are equal, the principle of equal treatment is an obvious postulate for free democracy' [Communisty Party, 5 BVerfGE 85 (1956)] [Fredman (n 6) 2–3, 20–21, 23–25].

As Fredman underlines, the choice between different concepts of equality is not one of logic but of values or policy. [Fredman (n 6) 25]. Kriszta Kovács suggests that the Hungarian Constitution (as well as the Hungarian Fundamental Law, replacing the Constitution from 01.01.2012) and the practice of the Constitutional Court predominantly take the stance of 'equality of sources' approach, corresponding notably with the aforementioned category of 'equal opportunities'. This means that the Constitution/Fundamental Law, as interpreted by a large body of decisions of the Constitutional Court, endeavours to distribute the sources on an equal basis to all, giving an opportunity to everyone to establish his/her plan of life. The political community is responsible toward marginalised groups, which gives a justification for the continuous redistributive activity of the State. [See: Kovács (n 11), 50–51, 57, 59, 62; Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Harvard University Press 2000, Cambridge, Mass) 113f, 285–288].

[12] Aristoteles *Nikomakhoszi Etika* (translated by Szabó Miklós, Európa Kiadó 1997, Budapest) V. 6.

[13] See: Fredman (n 6) 153.

[14] C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena,* ECLI:EU:C:1976:56.

[15] Fredman (n 6), 156–157; Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 South African Journal of Human Rights 214–234.

[16] Aristoteles (n 12) V. 6.

concept of indirect (or hidden) discrimination, giving rise to a more material approach of equality ('equality of results'). In a series of cases, the CJEU worked out those principles that provide adequate direction to achieve a satisfactory balance between the assessment of the individual's merits and the necessity of taking measures in favour or women to achieve equality in practice (positive actions). This stance fits notably within the framework of the approach of 'equality of opportunities'.[17] The most important tenets elaborated by the CJEU were incorporated in the generation of directives of the 2000's.

In the recent case law of the CJEU, the approach of 'equality as an element of dignity' is given increasing emphasis. We find the first emergence of this approach in a judgment of the CJEU as well.[18] Specific discriminatory conducts, such as sexual harassment and harassment, where no comparator is required to establish the discrimination, also reflect this approach.[19]

It can therefore be concluded that EU law requires Member States to depart from a mere formal approach of equality, however upholding the limits of substantive equality. Legal instruments such as indirect discrimination and positive actions serve this latter purpose. The approach of EU law stands the closest to the approach of 'equal opportunities', endeavouring to draw an equal start line for all, but leaving the freedom for persons to create their own life plans. In parallel, the human rights character of equality, and its linkages with human dignity are emphasized with increasing force.

b) Fields and means of EU regulation

European anti-discrimination law has been established in an organic way, through a step by step inclusion of new subject matters, new protected characteristics, new definitions and new instruments. As a result, there is still no all-encompassing anti-discrimination secondary law in the EU in terms of protected characteristics or regulated spheres of life.

EU law concerning equality consists of resources of primary and secondary law. In currently effective primary law, the most important rules are the following: according to Article 2 of the *Treaty on the European Union* (hereinafter: TEU), the non-discrimination principle is one of the fundamental values of the Union.[20] Article 10 of the *Treaty on the Functioning of the European Union* (hereinafter: TFEU) requires the EU to combat discrimination based on sex,

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[17] C-319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice,* ECLI:EU:C:2004:574; C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen,* ECLI:EU:C:1997:533; C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen,* ECLI:EU:C:1995:322; C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist,* ECLI:EU:C:2000:367; C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen,* ECLI:EU:C:2000:163; see: Fredman (n 6) 241.

[18] In the *Coleman*-case (n 7) AG Maduro proposed that 'to protect the dignity and the autonomy of persons belonging to those suspect classifications… treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being humans' [cited and commented by Fredman (n 6) 227].

[19] Fredman (n 6) 20–21.

[20] Commitment of the EU to combat discrimination is also stipulated in Article 3 paragraph 3 and Article 9 of the TEU.

racial or ethnic origin, religion or belief, disability, age or sexual orientation when defining and implementing its policies and activities. Prohibition of non-discrimination on the basis of nationality is laid out in Articles 18 and 45 of the TFEU. The Charter of Fundamental Rights of the European Union (hereinafter: EUCFR),[21] as adopted in 2000, was merely a non-binding 'declaration' of human rights, inspired by those rights contained in the constitutions of the Member States.[22] However, when the *Treaty of Lisbon* entered into force in 2009, it altered the status of the EUCFR to make it a legally binding document with the same legal value as the EU Treaties. As a result, EU institutions are obliged to comply with the EUCFR, as are EU Member States but only when implementing EU law.[23] Under the title 'Equality' (Articles 20 to 26), the EUCFR emphasises the importance of the principle of equal treatment in the EU legal order. Article 21 of the EUCFR lays down prohibition of discrimination on various grounds (sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation).[24]

The central concepts of EU secondary legislation on equal treatment are the specific protected characteristics. In the field of employment, there are currently nine protected characteristics covered by anti-discrimination directives constituting the hard core of the EU's anti-discrimination legislation: gender,[25] race and ethnical origin,[26] religion and belief, disability, age, sexual orientation,[27] part-time work,[28] fixed-term work[29] and temporary-agency work.[30] The catalogue of protected characteristics is exhaustive.[31] The detailed regulation in

[21] *Charter of Fundamental Rights of the European Union,* OJ C 202, 7.6.2016, 389–405.

[22] See: C-283/83, *Firma A. Racke v Hauptzollamt Mainz,* ECLI:EU:C:1984:344; C-15/95, *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux,* ECLI:EU:C:1997:196; C-292/97, *Kjell Karlsson and others,* ECLI:EU:C:2000:20.

[23] Article 51 of the EUCFR.

[24] Article 21 of the EUCFR. About the nature of this Article, see below in more detail. About the development of primary law on equality: EU Fundamental Rights Agency (n 5) 20–23.

[25] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, 23–36 ('Gender Directive'), Article 1. The 'Gender directive' repealed and recast a set of previous directives related to gender-based discrimination in the field of employment.

[26] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; OJ L 180, 19.7.2000, 22–26 ('Race Directive'), Article 1.

[27] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22 ('Framework Directive'), Article 1.

[28] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 14, 20.1.1998, 9–14 ('Part Time Work Directive'), Annex, Section 1.

[29] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, 43–48 ('Fixed-term Work Directive'), Annex, Section 1.

[30] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, 9–14 ('Temporary Agency Work Directive'), Article 1, 2 and 5.

[31] The EUCFR extended the list of protected characteristics as will be described below.

relation to the specific protected characteristics are similar but not identical in terms of definition of discriminatory conducts, exemptions and justifications, margin of positive actions etc.

As for the regulated subject matters in the field of employment,[32] the main topics of the three overarching anti-discrimination directives (Gender Directive, Race Directive, Framework Directive, hereinafter together: 'Directives') are the following: (1) definition of the scope, (2) definition of the most typical discriminatory conducts, (3) margin of positive actions, (4) declaration of the minimum standard characteristic of the directive, (5) requirements of the sanctions and remedies, (6) rules on burden of proof (7) measures targeting effective implementation (dissemination of information, dialogue with social partners and NGOs, prohibition of victimisation). The other three directives each set out only one or two generally formulated sections on the prohibition of discrimination against the employees covered.[33]

As is known, directives only require the Members States to achieve specific results, leaving them free choice to determine the measures of implementation.[34] In consequence, as a general rule, directives do not have a direct effect, i.e. they cannot be directly referred to by private entities in national lawsuits. So far as a rule of a directive complies with a set of specific conditions (it is unconditional, adequately precise, it grants rights and the deadline for transposition has expired), private entities may refer to the not yet or not properly transposed rules of a directive against the omitting Member State[35] ("vertical direct effect)'.[36] In contrast, as it has been several times reinforced by the CJEU, directives never have horizontal direct effect (i.e. private entities may not refer to the not yet or not properly transposed rules of directives against another private entity).[37]

Nevertheless, a new opportunity of direct reference to EU law was opened by the CJEU in the Mangold judgement, as it established that non-discrimination must be regarded as a general principle of Community law, on the grounds of the various international instruments and in the constitutional traditions common to the Member States. Therefore, the Framework Directive lays down only the general framework for combating discrimination on specific grounds. Consequently, the national court has to guarantee the full effectiveness of the general principle of non-discrimination, by setting aside any provision of national law that may conflict with Community law, even where the period prescribed for transposition of that

[32] Race Directive covers other spheres of life as well.

[33] Temporary Agency Work Directive, Article 5; Fixed-term Work Directive, Annex, Article 4; Part Time Work Directive, Annex, Article 4.

[34] TFEU, Article 288.

[35] The concept of 'Member State' implies also a state entity as an employer, so improperly transposed directives may also be referred in a public service employment relationship (C-152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching),* ECLI:EU:C:1986:84).

[36] C-41/74, *Yvonne van Duyn v Home Office,* ECLI:EU:C:1974:133; C-148/78, Criminal proceedings against Tullio Ratti, ECLI:EU:C:1979:110; C-8/81, *Ursula Becker v Finanzamt Münster-Innenstadt,* ECLI:EU:C:1982:7).

[37] *Marshall*-case (n 35); C-188/89, *A. Foster and others v British Gas plc,* ECLI:EU:C:1990:313; C-91/92, *Paola Faccini Dori v Recreb Srl,* ECLI:EU:C:1994:292.

directive has not yet expired, in horizontal lawsuits as well.[38] Later, the CJEU several times reiterated this position, supplemented by a reference to Article 21 paragraph 1 of the EUCFR along with the common international law and constitutional traditions of the Member States.[39] In its landmark decision (*Association de médiation sociale*-case) the CJEU held that Article 21 Section 1 of the EUCFR, as an EU primary law,[40] has a horizontal direct effect, i.e. it is sufficient in itself to confer on individuals an individual right that they may invoke as such.[41]

It is not yet clear how the direct effect of Article 21 Section 1 of the EUCFR will affect the development and the interpretation of national anti-discrimination laws (including Hungarian statutory and case law), as long as the primary reference of compliance with EU anti-discrimination law should not be the directives but the aforementioned rule of the Charter, providing a more extended list of protected characteristics and a far more generally formulated clause on non-discrimination. The detailed analysis of this question would go far beyond the scope of this study.[42]

It should also be noted that the CJEU refers to the European Convention on Human Rights (hereinafter: ECHR)[43] and the European Social Charter (hereinafter: ESC) as providing guidance for the interpretation of EU law. Both documents are also referred to in the EU

[38] In the *Mangold*-case (C-144/04, *Werner Mangold v Rüdiger Helm,* ECLI:EU:C:2005:709), these establishments referred only to age discrimination; however, other protected grounds were also included later (C-144/08, *Jürgen Römer v Freie und Hansestadt Hamburg,* ECLI:EU:C:2011:286)

[39] C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG,* ECLI:EU:C:2009:429; C-441/14, *Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen,* ECLI:EU:C:2016:278; C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V,* ECLI:EU:C:2018:257; *Römer*-case (n 38); C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others,* ECLI:EU:C:2014:2.

[40] It should be noted that other discrimination-related primary law rules have also been declared as having direct effect, for being unconditionally and genuinely precisely formulated, such as the provisions on prohibition on wage discrimination on the grounds of gender [TFEU, Article 157; *Defrenne No I* (n 14); C-149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena,* ECLI: EU:C:1978:130 ('Defrenne No. II')]; and on prohibition of discrimination on the grounds of nationality (TFEU, Article 18, 45, 56; C-36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo,* ECLI:EU:C:1974:140).

[41] *Association de médiation sociale*-case (n 39); Mark Bell, 'The right to equality and non-discrimination' in Tamara Hervey, Jeff Kenner (eds), *Economic and Social Rights under the EU Chatter of Fundamental Rights: A Legal Perspective* (Hart Publishing 2003, Oxford – Portland Oregon) 91–110, 101.

[42] For more in detail on the nature and the future role of the EUCFR see: Wolfgang Weiß, 'The EU Human Rights Regime post Lisbon: Turning the CJEU into a Human Rights Court?' in Sonia Morano-Foadi, Lucy Vickers (eds), *Fundamental rights in the EU: a matter for two courts* (Bloomsbury Publishing 2015, London) 69–90; Sybe de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony' in Sybe de Vries et al. (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013, Oxford) 53–94; Bell (n 41); Mirjam De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18 (1–2) Maastricht Journal of European and Comparative Law 109–135.

[43] C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci,* ECLI:EU:C:2010:329

Treaty framework[44] and in the EUCFR.[45] The *Treaty of Lisbon* contains a provision mandating the EU to join the ECHR as a party in its own right and Protocol 14 to the ECHR (on equal treatment) amends it to allow this to happen. It is not yet clear when this would take place and what the future relationship between the CJEU and the European Court of Human Rights (hereinafter: ECtHR) would be.[46]

2 The Structure of Current Hungarian Employment Equality Law

The Hungarian Fundamental Law, which repealed and replaced the previous Constitution[47] from 1 January 2012 on, preserved the general equality clause of the latter (nonetheless, amended in a few aspects), containing a somewhat broader list of protected grounds (including e.g. disability). Like the previous Constitution, the Fundamental Law still refers to the general prohibition of discrimination, not explicitly referring to the prohibition of indirect discrimination.[48] However, the Constitutional Court's practice acknowledging the inclusion of indirect discrimination in the general provision is still applicable.[49] Applicability of the substantive concept of equality is also indicated by the inclusion of paragraphs 4 and 5 of Article XV of the Fundamental Law, which oblige the State to introduce positive actions in order to promote equal chances for specific disadvantaged groups. The Fundamental Law represents more or less the same stance concerning the equality concepts as the former Constitution. It should be noted that the former special reference to equal pay for equal work has not been transposed from the Constitution into the Fundamental Law.

The basic systemic features of Hungarian anti-discrimination field have also not been significantly modified since the status before the accession to the EU.[50] This means that the

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[44] Article 3 paragraph 1 of the TEU, Article 151 of the TFEU.

[45] Article 52 paragraph 3 of the EUCFR.

[46] EU Fundamental Rights Agency (n 5) 17. For reasons of space, the expectable consequences of the future joining of the EU to the ECHR cannot be outlined in detail in this study with regard to the high complexity of this question.

[47] Act XX of 1949 on the Constitution of the Republic of Hungary (in effect from 20 August 1949 to 31 December 2011).

[48] Article XV of the Fundamental Law: '(1) Everyone shall be equal before the law. Every person shall have legal capacity'.
(2) Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, color, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever.
(3) Women and men shall have equal rights.
(4) Hungary shall promote equal opportunities and social convergence by means of introducing special measures.
(5) Hungary shall introduce specific measures to protect families, children, women, the elderly and the disabled.'

[49] See for example: Decision No. 42/2012. AB, Reasoning [22], [24]–[27], [34]; confirmed by decisions No. 23/2013. AB, No. 3079/2017 AB; Kiss Barnabás, *Az egyenlő bánásmód követelménye az Alkotmánybíróság gyakorlatában.* (Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Acta Universitatis Szegediensis 2005, Szeged) 14–15; Győrfi Tamás, M. Tóth Balázs, '70/A. § [A diszkrimináció tilalma]', in Jakab András (ed), *Az Alkotmány kommentárja* (Századvég 2009, Budapest) 30–31.

[50] About the structure of Hungarian equality law in more general terms, within the context of social law see: Gellérné Lukács Éva, 'Szociálpolitika – Az Európai Szociális Alap' in Osztovits András (ed) *Az Európai Unióról és az Európai*

main instrument for implementing the duties of the State in relation to Article XV of the Fundamental Law is Act CXXV of 2003 on equal treatment and on the enhancement of equal chances (hereinafter: ETA Act), regulating the main subject matters of principle of equality in a uniform manner. These regulations are referred to and supplemented by sectoral acts, including Act I of 2012 on the Labour Code (hereinafter: LC 2012). According to the ETA Act, these sectoral acts shall be interpreted in consistency with this act.[51] Section 12 of the LC 2012 provides a general reference to the ETA Act, adding only a few special rules to the body of antidiscrimination regulation in employment, as follows.

> (1) In connection with employment relationships, such as the remuneration of work, the principle of equal treatment must be strictly observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other employees.
> (2) For the purposes of paragraph (1), 'wage' shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship.
> (3) The equal value of work for the purposes of the principle of equal treatment shall be determined – in particular – based on the nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts expended, experience, responsibilities and labour market conditions.

Further, the LC 2012 enshrines a set of other provisions having relevance in respect of anti-discrimination law as well, even though the statutory law does not refer explicitly to the structural linkage between these rules and the Section 12.[52]

Equal treatment duty has been consistently recognised as a 'real' fundamental principle of labour law across academia and in the judiciary.[53] Around the beginning of the development of Hungarian anti-discrimination law, there were significant uncertainties in terms of the structural position of the equal treatment principle, resulting in courts becoming somewhat reluctant to accept the prohibition of discrimination as a limitation of the margin of discretion of the employer.[54] The Resolution of the Labour and Administrative Department of the Kúria No. 4/2017. (XI. 28.) KMK on specific issues of labour law disputes related to equal treatment

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Unió működéséről szóló szerződések magyarázata (Complex Kiadó 2011, Budapest) 2325–2378; Gyulavári Tamás, Gellérné Lukács Éva, 'Szociális politika' in Kende Tamás, Szűcs Tamás (eds), *Bevezetés az Európai Unió politikáiba* (Complex Kiadó 2011, Budapest) 437–462.

[51] ETA Act, sec. 2.

[52] For example the Section 51(4) of the LC 2012 provides on the reasonable accommodation duty of the employers, which clearly corresponds with the Article 5 of the Framework Directive; Section 60(1) of the LC prescribes a kind of accommodation duty in respect of pregnant employees and women parenting a child under 1 year of age, also representing a rule protecting women against unfair treatment on the grounds of pregnancy.

[53] Gyulavári Tamás (ed), *Munkajog* (3rd edn, ELTE Eötvös Kiadó 2014, Budapest) 72; Halmos Szilvia, 'Az "egyéb helyzet" alapján történő diszkrimináció a foglalkoztatásban: A magyar gyakorlat elemzése az elmélet, a nemzetközi jog és az alkotmánybírósági gyakorlat tükrében' in Ábrahám Márta (ed), *Mailáth György Tudományos Pályázat 2017: Díjazott dolgozatok* (Országos Bírósági Hivatal 2017, Budapest) 603–672, 616–618; Halmos Szilvia, Petrovics Zoltán, *Munkajog.* (NKE KTK 2014, Budapest) 40; Executive Report, 72–74.

[54] From the case law of former Supreme Court: cases No. BH 1999. 427., BH 1997. 3. 157.

(hereinafter: KMK Resolution), based on an Executive Report (hereinafter: Executive Report)[55] of the previously referred Case Law Analysis Group of the Kúria, declares (Section 4) that the discriminatory nature of a measure of an employer is to examine precisely where the provision is formally lawful; i.e. does not breach the statutory employment law (e.g. in the event of a dismissal, it meets the formal criteria of fairness, such as clarity, reality and reasonability). This means that, like the prohibition of abuse of rights,[56] the prohibition of discrimination also constitutes a limitation of exercising the prerogatives of the employer laid down in statutory law. Several judgements demonstrate that courts are consistent in finding that a provision of an employer's act that is formally lawful but violates the equal treatment duty is deemed unlawful (e.g. in the field of singling out persons in the course of implementing redundancies, in dismissing the employee during the trial period without giving reasons, in distributing a bonus for the workers etc.).[57]

The ETA Act, addressing a harshly criticised failure of the previous regulation,[58] introduced and regulated the conditions of positive actions[59] and presented a move from the formal to the substantial approach of equality. Accordingly, in the structure of the ETA Act, positive actions are regarded as lawful exceptions to the duty of formal equal treatment. Considering the fact that positive actions always involve differences in treatment on the basis of otherwise protected grounds, applying these measures should be performed with a high degree of diligence in order not to render these actions discriminatory *per se*. Hence, the case law of the CJEU and the Directives detailed the criteria for the lawful introduction of positive actions.[60] The conditions of positive actions as formulated in the ETA Act are in line with these standards. A recent country report summarises the positive actions enshrined in the statutory law currently in place in Hungary.[61]

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[55] Kúria: Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat – Összefoglaló vélemény, 2016. <https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_-_egyenlo_banasmod.pdf> accessed on 12 June 2019.

[56] LC, sec. 7. General principles of labour law, particularly the prohibition of abuse of rights, have traditionally been construed by the courts as limits of this margin of discretion (See for example the following judgements of the Supreme Court/Kúria: BH 1995. 608., BH 1996. 399., BH 2001. 38. and BH 2002. 242., as well as its following resolutions: MK 95., MK 122.).

[57] Summary of relevant decisions: Kulisity Mária, 'A bizonyítási eljárás szabályai az egyenlő bánásmód sérelmére hivatkozás esetén' in Kúria, *Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat* [Annex of the Executive Report] 2017, 139–141, 144–146.

[58] Bitskey Botond, Gyulavári Tamás, 'Kell-e [anti]diszkriminációs törvény?' (2003) 58 (1) Jogtudományi Közlöny 1-8, 5.

[59] ETA Act, sec. 11; specifically for employment discrimination: sec. 23.

[60] Summarised by Schiek et al (n 1), 801–821. The most notable cases of the CJEU see at Section II.1.b.

[61] András K. Kádár, Country report – *Non-discrimination, Hungary 2017* (European Commission, Directorate-General for Justice and Consumers, Publications Office of the European Union 2018, Luxembourg) 101–102.

III Specific Key Achievements of Hungarian Equality Law Since the Accession – Regulation on Burden of Proof

A higher standard of excuse on the side of the employer is an inherent part of the structure of anti-discrimination law. The procedural aspect of this higher standard is represented by the rules on shared or reversed burden of proof. These higher standards can be justified on both doctrinal and practical grounds.

Concerning the doctrinal reasons for shared burden of proof, one should be reminded, as referred in Section II.1.b, that EU anti-discrimination law is primarily structured according to specific protected characteristics. An impulsive extension of protected characteristics can be witnessed since the foundation of the European Communities. The circle of protected characteristics covered by the primary law has an overlap with the catalogue covered by secondary law; nevertheless, EU law has never taken the position that the list of protected characteristics would be open. In contrast, in a number of national laws (e.g. the federal law the US[62] and Canada[63]) and some documents of international law (primarily the ECHR)[64] apply an open list of protected characteristics, ending in the category of 'other status' or have no catalogue at all.

The question reasonably arises of why anti-discrimination laws need (and often use) a list of protected characteristics, considering that every arbitrary distinction between people may violate human dignity.

As already referred to in Section I, the primary purpose of anti-discrimination law in employment is to provide legal tools to dismantle and disable harmful stereotypes deeply embedded in society. These stereotypes create unjust hierarchical structures, dividing society into dominant and minority groups according to certain characteristics (gender, race, age, physical and mental ability, religion etc.). General tendencies may be observed, in that members of dominant groups employ hidden 'scoring systems,' deeming members of minorities as more risky, of inferior status etc. and underscoring them in societal interactions. This results in outcasting persons bearing these characteristics from the main resources and mainstream spaces of life.[65] Such scoring stereotypes may and often actually drive the decision-making of

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[62] See: the judgement of US Supreme Court, in the case *United States v Carolene Products Co* 304 US 144, 58 S Ct 778 (1938). [Commented by Sandra Fredman, 'Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India. European Commission' (DG for Justice 2012, Luxemburg]; <http://ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf> accessed on 12 June 2019, 32). See further: Krizsán Andrea, 'Amerikai megközelítés a faji alapú diszkrimináció értelmezésében' (2000) 3 Fundamentum 13–32; Győrfi, M. Tóth (n 49) index [70].

[63] See the judgement of the Supreme Court of Canade in the case of *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203. Commented by Fredman (n 62) 33.

[64] Article 14 and the Protocol 12 of the ECHR.

[65] Cf. for example Tal Z. Zarsky, 'Understanding Discrimination in the Scored Society' (2014) 89 (4) Washington Law Review 1375–1412, 1375, 1384–1385; Danielle K. Citron., Frank Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 (1) Washington Law Review 1375–1412; Kiss György, *Alapjogok kollíziója a munkajogban* (Justis Tanácsadó Bt. 2010, Pécs) 317.

employees, motivating them to treat persons with particular characteristics in a more disadvantageous way than others.

Anti-discrimination laws identify the aforementioned marginalised groups of society by defining protected characteristics. Relying on the general societal experience that persons with protected characteristics are commonly subject to detrimental treatment on the grounds of this characteristic, it is reasonable to establish the presumption that the precise reason for the suffered detriment was indeed this characteristic. Nevertheless, this presumption is rebuttable: the perpetrator (in employment, the employer) may establish that (1) there was no causation between the protected characteristic and the caused disadvantage or (2) even if there was causation, it was justified by a 'weighty' ground. This scheme legitimises the higher standard of excuse used in anti-discrimination laws against suspected perpetrators, on the one hand in procedural aspects (shared or reversed burden of proof) and, on the other hand, in substantive aspects (narrowly formulated justification grounds and exemptions).[66]

Rules on reversed burden of proof cannot only be justified on the above outlined doctrinal grounds, but for simple practical reasons as well. Since the biasing patterns motivating an employer to decide to underscore any person with a specific protected characteristic often remain undisclosed by the employer, in many cases the victim of discrimination could hardly be able to deliver any evidence to duly support his/her claim.[67] The general rule on the burden of proof for civil proceedings in the EU (and its Member States) is that a claimant must prove that the action is well-founded. However, proving discrimination in this way can be very difficult in comparison to other civil claims. This is because establishing discrimination requires the claimant to show why a particular (disadvantageous) thing happened to them. This is usually something that will only be known to the defendant(s), and in some cases may not consciously be known even by them.[68]

Under EU law, rules on shared burden of proof emerged first in the jurisprudence of the CJEU. The subject matter of the first landmark case *(Danfoss)*[69] related to the question of reversed burden of proof was wage (indirect) discrimination. In this case, female workers received lower pay on average than male colleagues, and the pay system that led to this result was completely lacking in transparency.[70] In the judgement, the CJEU indeed placed the burden of proof on the employer, arguing that otherwise female workers 'would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving

[66] Halmos (n 53) 612–614. In this study, the system of exemptions and justifications under EU and national law is, for reasons of space, not described.

[67] See: Kiss (n 65) 22.

[68] Anne Beale, 'Proving discrimination: the shift of burden of proof and access to evidence' (Cloisters 2018) <http://www.era-comm.eu/oldoku/Adiskri/03_Burden_of_proof/118DV18_Beale_Paper_EN.pdf> accessed on 12 June 2019, 2.

[69] C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss,* ECLI:EU:C:1989:383.

[70] Summarized by Beale (n 68) 4.

that his practice in the matter of wages is not in fact discriminatory'. Apparently, the core of the argumentation of the CJEU was that the use of the ordinary scheme of burden of proof would considerably harm the victim's effective assertion of his/her claim and in a lack of sufficient information and evidence on the background to the employer's (allegedly discriminatory) provision.[71] This formula obviously left unanswered the question of the extent to which it is expected of the victim of discrimination to support his/her claim to reverse the burden of proof on the employer. The CJEU proceeded to a more general statement of principle in the *Enderby* case.[72] The CJEU stated that the existence of a 'prima facie' case of discrimination casts the burden of proving objective justification onto the employer.[73] This line of case law was further developed and refined later on.[74] The essence of the relevant judgements was ultimately consolidated and included in the Burden of Proof Directive[75] (covering only sex discrimination cases). Today, the rules on shared burden of proof are included in all three Directives. According to the current formulation of the main rule of the burden of proof in the Directives, 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them, establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'[76]

In practice it means that a two-stage scheme of scrutiny should be applied in terms of a discrimination claim. (1) The claimant has to demonstrate facts that prima facie ('at the first sight') support that he/she become the victim of a discriminatory act of the employer. According to a simple formulation: the claimant is not expected to prove that he/she actually suffered a detriment and the precise reason for this was his/her protected characteristic, but

[71] As the subsequently developed case law clarified, no intention or subjective motivation of the employer is required to establish the discriminatory nature of a specific provision of the employer (See: *Enderby*-judgement [C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health,* ECLI:EU:C:1993:859] and the attached Advocate General's opinion; *Dekker*-judgement [C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus,* ECLI:EU:C:1990:383], *Jenkins*-judgement [C-96/80, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.,* ECLI:EU:C:1981:80]. [Evelyn Ellis, Philippe Watson, *EU Anti-Discrimination Law* (2nd edn, Oxford EU Law Library 2013, Oxford) 163–169].

[72] See (n 71).

[73] See also: C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG;* ECLI:EU:C:2001:171.

[74] C-400/93, *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S.,* ECLI:EU:C:1995:155; C-297/93, *Rita Grau-Hupka v Stadtgemeinde Bremen,* ECLI:EU:C:1994:406; Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg,* ECLI:EU:C:1994:415.

[75] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; OJ L 14, 20.1.1998, 6–8 ('Burden of proof directive').

[76] Gender Directive, Article 19(2); Race Directive, Article 8; Framework Directive, Article 10.

he/she is only supposed to demonstrate that his/her protected characteristic could be the reason for the detriment suffered. Once the claimant successfully completes this requirement, (2) the employer has to prove that the provision in question was not discriminatory.[77]

Member States are not prevented from introducing rules of evidence that are more favourable to plaintiffs. Preferential rules on burden of proof do not apply to criminal procedures and need not be applied to inquisitorial proceedings.[78]

Under Hungarian law, the reversed burden of proof related to discrimination cases was statutorily defined since the entry into force of the LC 1992, so already at a time when formulating the relevant case law of the CJEU was at a quite early stage. Section 5, paragraph 2 of the LC 1992 laid down that, in the event of a dispute arising in relation to a violation of the prohibition against detrimental discrimination, the employer shall prove that its procedure did not violate those provisions on discrimination. Although the very existence of this rule at this time should be appreciated, the contemporary literature already expressed weighty criticisms. A study suggested that the burden of proof be placed onto the employer once the employee simply alleges a discriminatory harm, which may also give rise to concerns as it might be unfair for the employer's side and may open the way for the successful assertion of completely unsupported claims. Further, it was not clear whether and how an employer may justify differential treatment.[79]

Upon the entry into force of the ETA Act, the regulation on burden of proof was deleted from the LC 1992, and since then the relevant norms can be found in the ETA Act. The current text of Section 19 of the act lays down that

> (1) [i]n procedures initiated because of a violation of the principle of equal treatment, the injured party […] must make it presumable that a) the injured person or group has suffered a disadvantage […], and b) the injured party or group possessed (or at least as supposed by the other party possessed) a protected characteristic as defined in Section 8 at the time of the injury. (2) If the case described in paragraph (1) has been made presumable, the other party shall prove that a) the facts made presumable by the injured party did not exist, or b) it has observed, or in respect of the relevant relationship was not obliged to observe, the principle of equal treatment. (3) The provisions set out in paragraphs (1)-(2) shall not apply to criminal procedures and to procedures of minor offences.

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[77] See Ambrus Mariann, 'Vizsgálati modell az egyenlő bánásmód megsértésével kapcsolatos ügyekben' in Majtényi Balázs (ed), *Lejtős pálya. Antidiszkrimináció és esélyegyenlőség* (L'Harmattan Kiadó 2009, Budapest) 164; Beale (n 68) 4–6.

[78] Gender Directive, Article 19(3)(5); Race Directive, Article 8; Framework Directive, Article 10.
For more detail of the development of regulation on burden of proof in the EU, see: Ellis, Watson (n 71) 157–163; Ambrus (n 77) 79; Kádár András K., 'A bizonyítási teher megosztásának kérdései' (2006) 10 (4) Fundamentum 115–124.

[79] See: Kardos Gábor, Nacsa Beáta, Gyulavári Tamás, 'A Nemek közötti diszkrimináció értelmezése az Európai Bíróság esetjogában és a magyar bírósági gyakorlatban' in Kardos Gábor (ed), *Törvénykezés és jogérvényesítés a nők elleni diszkrimináció leküzdésére* (Szociális és Családügyi Minisztérium Nőképviseleti Titkárság 2000, Budapest 1–18), 16.

The original text of this section used the phrase 'must prove' instead of the current phrase of 'must make it presumable'. The provision was amended by Act CVI of 2006, decreasing the standard of proof required from the claimant, in order to approximate the content of the provision to the requirements of the Directives.

This provision clearly establishes a different scheme of scrutiny from the general rule of burden of proof as stipulated in Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP 2016).[80] Section 265, paragraph 1 of the CCP 2016 sets out that '[u]nless otherwise provided for by an act, facts that are considered material for the case shall be evidenced by the party who harbours an interest that such facts are recognised by the court as true (hereinafter referred to as 'burden of proof'); moreover, the consequences of failure to provide such evidence or to corroborate said facts shall also fall upon that party.'[81] According to a special rule applicable in labour cases, where the burden of proof is defined by substantive labour law in derogation from the provisions of the act, it is to be interpreted in accordance with substantive law.[82] As Section 19 of the ETA Act is such a derogating rule, it must obviously be applied instead of the general rule of burden of proof in occupational discrimination cases.

Comparing the national scheme of scrutiny with the one enshrined in the Directives, it can be concluded that the Hungarian system is on the one hand more accurate and on the other hand more favourable for the claimant. The higher degree of accuracy follows from the fact that the Hungarian provision clearly defines which facts should be established by the claimant: exclusively the existence (or the supposed existence by the employer) of a protected characteristic and the occurrence of the detriment. Notably, the claimant is not required at all to support the causation between these two facts. This latter circumstance means that the Hungarian regulation can be assessed as more favourable on the side of the employee than it is prescribed by the Directives, because under the Directives it is not excluded that the national law requires the claimant to support (however, complying with the 'prima facie' standard) the causation between the protected characteristic and the detriment. 'Making any fact presumable' means, in the Hungarian practice, a sort of proving, which is not expected to reach the standard of complete certainty, but instead it is sufficient if the claimant delivers some evidence that makes his/her allegations credible.[83] Briefly formulated: making an allegation presumable is somewhat more than a mere allegation of a fact, but is less than proving it beyond all reasonable doubt.

Once this first stage is successful, the burden of proof is placed on the employer, which may use three options to excuse itself. (1) It may prove that the facts made presumable by the claimant are indeed false (e.g. the claimant did not possess the protected characteristic he/she states).

[80] The same general rule was applicable under the previous Code of Civil Procedure as well [Act III of 1952 on the Code of Civil Procedure (hereinafter: CCP 1952), sec. 164(1)]. The CCP 2016 took effect in 1 January 2018.

[81] This general rule corresponds with the general rules of burden of proof prevailing in other Member States as well [Beale (n 68) 2].

[82] CCP 2016, sec. 522(2).

[83] Executive Report, 34–35.

It should be stressed that, in relation to the same facts alleged by the claimant, the law requires different standards of proof by the employee (for prima facie support) and the employer (for the excuse). As far as the employer is not able to prove this, (2) it may prove that the duty of equal treatment had been observed. This means that the employer may prove that there was no causation between the protected characteristic and the disadvantage suffered by the claimant. As far as the employer is not able to excuse itself by this, (3) it can prove that, in respect of the relevant relationship, the employer was not obliged to observe the principle of equal treatment. This latter term means that even if there was causation between the protected characteristic and the detriment (or the employer could not successfully rebut it), the employer may refer to an exception or to a ground as stipulated in the ETA Act.[84]

Although this scheme of scrutiny appears to be precise and clear enough at the first sight, a huge uncertainty prevailed concerning its application in the judicial practice for many years. The source of controversies was that the courts interpreted the relation of the general rule of burden of proof in the CCP 1952 and the special rule enshrined in the ETA Act in different ways, particularly in terms of the burden of proof related to the causation between the protected characteristics. There were cases[85] in which even the Supreme Court/Kúria held that the mere allegation by the claimant of the causation between the protected characteristic and the detriment is not sufficient; he/she should at least make it presumable.[86] This approach clearly reflects that the courts attempted to apply the general rule of burden of proof (CCP 1952) in parallel with the special rules (ETA Act), instead of applying the *lex specialis derogat legi generali* principle. Later on, the development of case law took a different position and crystallised that, in terms of causation, the burden of proof lies on the employer, i.e. it should be interpreted to the detriment of the employer if it cannot rebut the causation.[87] The Case Law Analysis Group of the Kúria gave a detailed analysis of the development of the relevant Hungarian case law in the light of the Directives' standards, concluding that, in terms of causation, the employee is only required to make allegations, and the burden of proof is completely placed on the employer.[88] This position was transposed to the KMK Resolution as well, enhancing the uniform interpretation of the rules on burden of proof for courts for the future.[89]

A study annexed to the Executive Report suggest that the very frequently used defence by the employer, stating that it was not aware of the existence of the protected characteristic of the claimant (e.g. sexual orientation, adherence to a specific nationality or ethnicity) should also be proved by the employer (in the framework of rebutting the causation due to a lack of knowledge of the protected characteristic), and the claimant may not be required to prove (or to make presumable) the awareness of the employer.[90] In the author's opinion, this approach

[84] ETA Act, sec. 22 (or in a narrow range of cases: sec. 7).
[85] E.g. judgment of the Supreme Court No. EBH 2010. 2272.
[86] A summary of this practice: Kulisity (n 57) 164–165.
[87] Decisions of the Kúria No. EBH 2015. M.24.; Mfv.I.10.630/2014.
[88] Executive Report, 56.
[89] KMK Resolution, sec. 1.
[90] Kulisity (n 57) 129.

is correct, without prejudice to the mere existence of the protected characteristic being required to be made presumable by the employee, even if it concerns sensitive personal data (e.g. similarly the gender identity or sexual orientation, race, ethnicity, criminal or medical records).[91]

IV Conclusions and Agenda for the Next Fifteen Years

In terms of the position of Hungarian equality law in the framework of the typology of different approaches of equality, we can assess that the national body of law reaches further than the formal approach, and contains elements reflecting the approaches of 'equality of results', 'equality of opportunities' and 'equality as an element of dignity'. Even though the Constitution and the principles elaborated by the Constitutional Court related to the constitutional understanding of the equality clause gave already indications for the legislature and the jurisdiction to exceed the formal approach of equality in the '90s, a set of new instruments reflecting the substantiveand the dignity-based approach of equality became part of national law as a consequence of implementing EU law (e.g. indirect discrimination and positive actions).

The structural position of equal treatment duty as a 'real' fundamental principle of labour law was not at all obvious in the 90s: courts often took the position that if the employer was exercising its prerogatives correctly in a formal sense, the discriminatory nature of this provision cannot be the subject matter of a lawsuit. By now, the trend of judicial practice took a preferential direction: prohibition of discrimination is regarded as a fundamental principle of labour law and, by this, constitutes a genuine limitation of the margin of discretion of employers in exercising their employers' rights. As a result, any discretional decision of an employer (e.g. dismissal during the trial period, rewarding the workers, making workers redundant) can be contested if it does not meet the requirements of equal treatment.

The rules on shared or reversed burden of proof lie at the heart of anti-discrimination law. Although the pre-accession national law referred to the reversed burden of proof in discrimination cases, the ETA Act, in correspondence with the Directives, significantly refined and clarified the obligations of the parties. Even though the national rules now comply with the EU standards, they might be assessed as being slightly too generous toward the claimants. The KMK Resolution, in line with the CJEU's case law and the Directives, gave full clarity on the application of rules on burden of proof, dissolving the previous controversies in the case law.

Looking back over the past 15 years of the development of national anti-discrimination law in employment, we cannot disregard the high value added by relevant EU law to the

[91] For more detail on the burden of proof see: Halmos Szilvia, 'Bizonyítás az egyenlő bánásmóddal kapcsolatos munkaügyi perekben az új Pp. alapján' in Pál Lajos, Petrovics Zoltán (eds), *Visegrád 15.0: A XV. Magyar Munkajogi Konferencia szerkesztett előadásai* (Wolters Kluwer 2018, Budapest) 21–71.

domestic achievements. The body of anti-discrimination law indeed was, and perhaps also will continue to be, a 'foreign body' in the eye of Hungarian law practitioners and judges for a long time more. Nevertheless, it can be asserted that it has been and is still worth the effort to gain an increasingly profound understanding of the instrument of EU anti-discrimination Directives and case law, which has so far given many valuable indications for the improvement of national law, and one hopes will do so for its development in the future as well.

Éva Gellérné Lukács*

From Equal Treatment to Positive Actions Through Non-discriminative Obstacles – Regarding the Free Movement of Persons

I Introduction

It is common knowledge that legal development in the field of the mobility of persons was rooted in the principle of non-discrimination and its equivalent, equal treatment, introduced and developed by the Court of the European Union (ECJ). It is equally undisputed that another principle has been built upon the fundament of equal treatment, namely the concept of obstacles to freedom of movement. These two bastions paved the path for the protection of individuals under EU law and effectively safeguarded the rights of free movers for several decades. The article aims at summarising the essentials in these areas by focusing on earlier landmark cases, as well as on more recent cases of the ECJ in the fields of employment and education. Additionally, the article undertakes to introduce a new dimension to the analysis, namely to present initiatives through which better enforcement and enhanced protection of rights are targeted. These are called positive actions, because they support free movers through programmes and activities by different institutions, as opposed to the previous notions (equal treatment and obstacles) where the common denominator is more to guarantee rights through the ECJ declaring the breach of EU law and providing remedy. The article concludes that the role of positive actions is expected to increase, although cases in the field of equal treatment and obstacles to it have not disappeared from the jurisprudence of the ECJ at all.

II Equal Treatment

In the realm of equal treatment, the axis is Article 18 of the TFEU,[1] which prohibits discrimination on grounds of nationality. The rule ensures equality in the host Member State for nationals and family members of other Member States.[2] This measure, which may seem obvious at first

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[1] *Treaty on the Functioning of the European Union* (TFEU).

[2] De Groot David A.J.G., 'Free Movement of Dual EU Citizens' (2018) 3 (3) European Papers 1–39. <https://www.researchgate.net/publication/327843871_Free_Movement_of_Dual_EU_Citizens> accessed on

glance, actually represents a profound change in the history of modern nation-state economic relations, because international public and private international law have traditionally afforded national treatment for foreign natural persons in terms of legal capacity only.[3] States are only willing to give substantive rights to a limited number of foreigners, and generally on the basis of reciprocity, if the beneficiary states grant the same benefits to their nationals in return.[4] The importance of equal treatment will first be presented in the field of employment, followed by education.

1 Employment

Articles 18 and 45 of the TFEU[5] expressly prohibit discrimination on the ground of nationality in the field of free movement of persons in the Internal Market. Related secondary implementing laws charge Member States to provide equal treatment for nationals of other Member States and their family members.[6] In the field of employment, for a long time the bible and source of rights was Regulation 1612/68, which has been replaced by Regulation 492/2011 from 15 June 2011.[7] The core provisions on equal treatment have remained intact in the revision process.[8]

30 September 2019; Gyeney Laura, 'Kettős állampolgárság az Európai Unió erőterében' *(Dual nationality in the EU)* (2013) 9 (2) Iustum Aequum Salutare 157–169.

3 Mádl Ferenc, Vékás Lajos, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga (International Private Law and Law of International Economic Relations)* (3rd edn, Tankönyvkiadó 1992, Budapest) 258–265.

4 The Association Agreement did not guarantee equal treatment to Hungarian nationals within the EEC. Király Miklós, 'Magyarország érettsége az Európai Közösség tagságára a négy szabadság területén' *(Preparedness of Hungary to membership in the EC in the field of four freedoms)* (1994) 4 Magyar Jog, 237–247. There was no freedom of movement for workers during the transition period, either. See Gellérné Lukács Éva, Szigeti Borbála, *Munkavállalási szabályok az átmeneti idő alatt (Rules of taking up employment during the transition period)* (KJK Kerszöv 2005, Budapest).

5 There have been renumberings of these Treaty Articles since 1958 (Article 48 followed by Article 39 and now Article 45); the content however has been remained unchanged. This paper uses diffferent numberings in accordance with the exact date of the respective case.

6 Gellérné Lukács Éva, *Munkavállalás az Európai Unióban (Employment in the European Union)* (KJK Kerszöv 2004, Budapest); Somssich Réka, *Az európai jog fogalmai (Definitions under EU Law)* (ELTE ÁJK 2011, Budapest); Sára Hungler, 'Atypical employment relationship in Hungary' in Viktor Križan et al (eds), *Implementation and Enforcement of EU Labour Law in the Visegrad Countries* (Univerzita Palackého v Olomouci 2014, Olomouc, Czech Republic) 119–125.

7 Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19/10/1968 P. 0002 – 0012. Regulation 492/2011/EU replacing it.

8 Article 2 of Regulation 1612/68/EEC: 'Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.' Article 7(1) of Regulation 1612/68/EEC: 'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.' Articles 2 and 7 (1) of Regulation 492/2011/EU contain the same provisions.

The case-law of the Court of the European Union (ECJ) developed an extensive jurisprudence based on the TFEU and the afore-mentioned regulations. Both the former and the presently effective legal instruments contain textually the same provisions, case-law stemming from the old and the new regulatory framework applies without distinction. This paper does not make a distinction either; 'old' landmark ECJ cases and recent cases will both be referred to.

The ECJ applies the concept of prohibiting discrimination in the TFEU and that of equal treatment appearing in secondary laws as two equally valued sides of a coin. The ECJ made clear that

> Article 45(2) TFEU prohibits any discrimination based on nationality between workers of the Member States as regards employment, remuneration or other conditions of work and employment. Article 7(1) of Regulation No 492/2011 constitutes merely the specific expression of the principle of non-discrimination laid down in Article 45(2) TFEU within the specific field of conditions of employment and work and must therefore be interpreted in the same way as Article 45(2) TFEU.[9]

Legal literature on free movement and equal treatment is widespread, and secondary law and the jurisprudence of the ECJ have been heavily commented on.[10] Based on this background, the paper aims at focusing more on how findings in earlier ECJ cases have been endorsed or fine-tuned in recent case-law.

Case law is not only anchored in prohibiting direct (overt) but also indirect (covert) discrimination. The ECJ held in the famous Sotgiu case in 1973 that the prohibition of discrimination extends to indirect discrimination:

> The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria, lead in fact to the same result.[11]

As compared to overt discrimination where the distinction is plainly based on nationality, covert discrimination is related to national legislations that appear to be nationality-neutral at first sight, but in reality and practice affect nationals of other Member States adversely.

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[9] C-514/12, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH and Land Salzburg,* ECLI:EU:C:2013:799, paragraph 23.

[10] Miklós Király, *Unity and diversity: the cultural effects of the law of the European Union* (ELTE Eötvös Kiadó 2011, Budapest); European Commisison, *Analytical Report 2014 – The notions of obstacle and discrimination under EU law on free movement of workers* FreSsco, December 2014. Gyulavári Tamás, 'Három évvel az antidiszkriminációs jog reformja után' *(3 years after the reform of antidiscrimination law)* (2007) 18 (3) Esély 3–35; Márton Leó Zaccaria, 'Egyenlő(tlen) munkáért egyenlő(tlen) bér – az egyenlő munkáért egyenlő bér elvről másként' *[(Un)equal pay for (un)equal work – about the princile of equal pay for equal work in a different prospective]* (2019) 3 (2) Munkajog 1–8; Steve Peers, 'Amending EU free movement law: what are the legal limits?' <https://neweuropeans.net/article/534/amending-eu-free-movement-law-what-are-legal-limits> accessed on 8 September 2019.

[11] C-152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost,* ECLI:EU:C:1974:13, paragraph 11.

There are several ECJ cases that touch upon discrimination based on nationality. The French Maritime Labour Code case from 1973 has to be cited in first place.[12] French law required that '…employment on the bridge and in the engine and wireless rooms on board merchant ships or fishing vessels or pleasure cruisers was reserved to persons of French nationality, and employment generally was so limited in the ratio of three to one'. According to the European Commission, these provisions were contrary to Regulation 1612/68 and Article 48 of the Treaty and thus brought an action against France. The ECJ upheld this position by referring to the primacy of Community law over national legal systems, to the direct effect of Article 48 EC and to the direct applicability of Regulation 1612/68. The decision also asserted that '…the absolute nature of the prohibition on discrimination under Article 48'[13] must be enforced in all economic areas, including transport.[14]

In the case of *Commission v Italy* in 1985, the ECJ challenged the employment conditions of employees of the Italian National Research Council.[15] Under Italian law, nationals of other Member States who worked for the National Research Council could only work on a fixed-term contract, the extension of which was doubtful. In addition, there was no promotion opportunity for non-Italian nationals, which adversely affected both their salary and their subsequent pension. The ECJ ruled that Italian law was incompatible with EU law because of the differences in the level of legal protection between Italian and non-Italian citizens.

Frontier workers are also protected against discrimination. The *Commission v Belgium* case concluded that, by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement, the French Republic failed to fulfil its obligations under Article 48(2) of the Treaty and Article 7 of Regulation 1612/68.[16] The ECJ reinforced its standpoint in relation to Regulation 492/2011 as well: '…in accordance with settled case-law, the fact that migrant and frontier workers have participated in the labour market of a Member State creates, in principle, a sufficient link of integration with the society of that State, allowing them to benefit from the principle of equal treatment as compared with national workers'.[17]

In the realm of indirect discrimination, in the *Kalliope* case in 1998, the ECJ highlighted a German provision, according to which periods completed in the Greek public service as a specialist doctor were not taken into account under German law; consequently, promotion into a higher salary group was denied.[18] The ruling echoed the argumentation in the Sotgiu

[12] C-167-73, *Commission of the European Communities v French Republic,* ECLI:EU:C:1974:35.
[13] Ibid, paragraph 45.
[14] Ibid, paragraph 33.
[15] C-225/85, *Commission of the European Communities v Italian Republic,* ECLI:EU:C:1987:284.
[16] C-35/97, *Commission v French Republic,* ECLI:EU:C:1998:431.
[17] C-410/18, (10 July 2019) *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche,* ECLI:EU:C:2019:582. Former cases have dealt with social advantages (C-542/09, *Commission v Netherlands,* ECLI:EU:C:2012:346, paragraph 65, C-20/12, *Giersch and Others,* ECLI:EU:C:2013:411, paragraph 63.
[18] C-15/96, *Kalliope,* ECLI:EU:C:1998:3.

case by stressing that German legislation manifestly worked to the detriment of migrant workers and contravened the principle of non-discrimination.[19]

In another case related already to Regulation 492/2011, an Austrian provision on the remuneration of civil servants employed by Land Salzburg was explored.[20] If the employee had only ever worked for Land Salzburg, full account was to be taken of the entire period of service; otherwise, only 60% of the periods of service were acknowledged. As a result, an employee who had worked for Land Salzburg from the very beginning of his career was placed on a higher pay scale than an employee who accumulated comparable professional experience of equal length but with other employers. The ECJ overturned the national measure as being 'liable to restrict freedom of movement for workers, an effect which is in principle prohibited by Article 45 TFEU and Article 7(1) of Regulation No 492/2011'.[21]

The ECJ gave a concise summary of its notions regarding covert discrimination in the recent Eschenbrenner case in 2017:

> Therefore, a provision of national law — even if it applies regardless of nationality — must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the migrant worker at a particular disadvantage, unless objectively justified and proportionate to the aim pursued.[22]

Article 45 TFEU lays down the abolition of all discrimination based on nationality. The ECJ has solidly protected this fundamental right, as a result of which, in the 1990s, cases of direct discrimination started to centre on the only legitimate exception under the Treaty, public service. Article 45 (4) TFEU provides that free movement is not to apply to employment in the public service. The ECJ exemplified that the concept of public service covered posts that involved direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State.[23] In 2003 the ECJ expanded its understanding by invoking a new condition for the exception to be legitimate under the TFEU. This new condition was that occasional or exceptional exercise of public power could not at all be exempted.[24] In the later *Haralambidis*[25] case from 2014, for example, it asserted this position by pointing out that EU law did not allow Italy to reserve the exercise of the duties of President of a Port Authority for its nationals.

Under secondary legislation,[26] Member States are entitled to set criteria relating to the linguistic knowledge required by reason of the nature of the post to be filled. This is an

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[19] Ibid, paragraph 23. The ECJ cited Article 48 of the Treaty and Article 7(1) and (4) of Regulation 1612/68/EEC.

[20] C-514/12, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH and Land Salzburg,* ECLI:EU:C:2013:799.

[21] Ibid, paragraph 35.

[22] C-496/15, *Eschenbrenner,* (2 March 2017) ECLI:EU:C:2017:152, paragraph 36.

[23] C-290/94, *Commission v Greece,* ECLI:EU:C:1996:265; C-47/02, *Anker,* EU:C:2003:516; C-89/07, *Commission v France,* ECLI:EU:C:2008:154.

[24] C-405/01, *Colegio de Oficiales de la Marina Mercante Española,* ECLI:EU:C:2003:515.

[25] C-270/13, *Iraklis Haralambidis v Calogero Casilli,* ECLI:EU:C:2014:2185.

[26] Second subparagraph of Article 3(1) of Regulation 1612/68/EEC and of Regulation 492/2011/EU.

expressis verbis exception to equal treatment. The *Groener* and *Angonese* cases, having the basis in Regulation 1612/68, well demonstrate the very heart of this exception.[27] According to the ECJ, national measures regarding language knowledge or certificates attesting a certain knowledge of the language '…must not in any circumstances be disproportionate to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States'.[28] This line of argumentation has equally been reflected under Regulation 492/2011. The ECJ has endorsed its previous findings in the *European Commission v Kingdom of Belgium* case. [29] Belgian law required that a person applying to take part in a recruitment competition must provide evidence of his linguistic knowledge by means of one particular diploma issued only in Belgium. Belgian law was deemed to circumvent equal treatment; in practice, it put nationals of other Member States wishing to apply for a post in a local service in Belgium at a disadvantage.[30] Similarly, proportionality has not been accepted regarding the promotion and use of the official language of the state in the *Las* case.[31]

2 Education and Children

The provisions on the free movement of workers also cover the children of persons exercising the right to free movement, who have always belonged to a group of persons with rights under EU law.[32] The very first legal instruments in the history of the EU (at that time the EEC – European Economic Community) already explicitly addressed the educational rights of children of persons exercising free movement rights. Regulation 1612/68, which has since been replaced by Regulation 492/2011, laid down the general principle of equal treatment of children of workers as regards access to education.[33] This right has been retained in Article 10 of the new Regulation 492/2011. The notion of equal treatment of mobile persons' children has been a robust fundament overt decades; to be more precise, the only legal basis prior to the introduction of union citizenship by the *Maastricht Treaty* in 1993.

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[27] C-379/87, *Groener,* ECLI:EU:C:1989:599; C-281/98 *Angonese,* ECLI:EU:C:2000:296.

[28] Ibid, *Groener* case, paragraph 19.

[29] C-317/14, *Commission v Kingdom of Belgium,* ECLI:EU:C:2015:63 (5 February 2015).

[30] Ibid, paragraph 30.

[31] C-202/11, *Anton Las v PSA Antwerp NV,* ECLI:EU:C:2013:239. Drafting employment contracts in a language other than Dutch resulted in an *ex officio* nullity of the contract, which was disproportionate.

[32] Gellérné Lukács Éva, 'A családtagok kérdéskörének kapcsolata a személyek szabad mozgásával az EU-jogban, a Brexit fényében' *(Relation between family members and free movement in the EU in light of Brexit)* in Szeibert Orsolya (ed), *Család és családtagok: Jogági tükröződések* (ELTE Eötvös Kiadó 2018, Budapest) 109–136. Gyeney Laura, 'Aki a bölcsőt ringatja: avagy az uniós polgárságú gyermeket nevelő, harmadik állambeli személy státusza a közösségi jogfejlődés fényében' *(Third country national's status as primary carers of union citizens in light of development of EU law)* (2006) 2 (2) Iustum Aequum Salutare 113–129.

[33] Article 12 of Regulation 1612/68/EEC.

a) Case-law on the basis of Regulations 1612/68 and 492/2011

Articles 10 and 11 of Regulation 1612/68 are considered the primary source of educational rights. The ECJ has developed the principle of equal treatment as enshrined in these articles in many cases; in particular in the *Casagrande, Echternach & Moritz, Carmina di Leo, Meeusen* and *Gravier* cases.[34] In the *Casagrande* case, it explained that children of Community workers shall be treated in the same way as nationals of the host Member State under Article 12 of Regulation 1612/68: 'Integration presupposes that the child of a Community worker is entitled to study grants under the same conditions as nationals of the host State in a comparable situation.'[35] Study grants encompass 'also […] general measures intended to facilitate educational attendance'. [36] The ECJ has opened up the avenue from general to vocational training (including higher education).[37] And even beyond: in the case of *Meeusen,* the daughter of a Belgian national, as a child of a Community worker, was deemed to be eligible for a Dutch study grant for her studies in her state of origin, Belgium.[38] In summary:

> Any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training skills for such a profession, trade or employment, is vocational training, whatever the age and the level of training of the pupils or students.[39]

Hence, equal treatment applies to all forms of education; neither discriminative registration fees (in the *Gravier* case), nor discriminative entrance qualifications (in the *Commission v Austria* case) are allowed under EU law.

In the very recent *Aubriet* case[40] the ECJ made recourse to previous case-law already related to Regulation 492/2011 and confirmed that indirect discrimination towards mobile workers' children is not tolerated. Consequently, it reiterated that

> …a rule such as that laid down by the national legislation at issue in the main proceedings, which makes the grant to non-resident students of financial aid for higher education studies subject to the requirement that a parent who has worked in Luxembourg for a minimum period of five years in the course of a reference period of seven years preceding the application for financial aid, entails a restriction which goes beyond what is necessary to achieve the legitimate objective of increasing the number of residents holding higher education degrees.[41]

No departure from previous judicature could be perceived.

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[34] C-9/74, *Casagrande,* ECLI:EU:C:1974:74; C-308/89, *Carmina di Leo,* ECLI:EU:C:1990:400; Case 293/83, *Gravier,* ECLI:EU:C:1985:69.

[35] Ibid, paragraph 7.

[36] C-308/89, *Carmina di Leo,* ECLI:EU:C:1990:400.

[37] C-389-390/87, *Echternach & Moritz,* ECLI:EU:C:1989:130; paragraph 35; C-147/03. *Commission v Austria,* ECLI:EU:C:2005:427, paras 32–33.

[38] C-337/97, *Meeusen,* ECLI:EU:C:1999:284], paras 23–25.

[39] Ibid, paragraph 30.

[40] C-410/18, *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche,* (10 July 2019) ECLI:EU:C:2019:582. The ECJ availed itself of Article 45 TFEU and Article 7(2) of Regulation 492/2011/EU.

[41] Ibid, paragraph 46.

b) Case-law on the asis of Union citizenship and Directive 2004/38/EC

The case-law of the ECJ can be divided chronologically and thematically into two groups. One group is mainly associated with mobile economically active categories of persons (employees, self-employed persons) and their family members (see the respective cases under the former points). The other group of cases involves mobile union citizens since the late 1990s (following the *Maastricht Treaty* due to the introduction of Union citizenship). The distinction gains ground in the gradual extension of workers' rights, which initially related to freedom of movement or its probability, to economically inactive citizens.[42] The introduction of Union citizenship has made it possible for economically inactive persons, including pensioners and students, to fall within the ambit of equal treatment if they do not fall short of certain requirements.[43] It is important to note that the *Maastricht Treaty* not only introduced Union citizenship but also added Title VIII of Part Three and a new chapter 3 devoted to education and vocational training.

The approach of the ECJ follows the following pattern: first, the possibility of invoking rights based on economically active status is examined, thus assessing whether that right is based on the status of mobile worker or self-employed in the EU.[44] It only wanders around the existence of entitlements on the basis of Union citizenship if the former status cannot be invoked. This occurs when the person concerned is a student. This line of argumentation has been followed in several cases,[45] last but not least in the field of education.

The point of departure is the *Grzelczyk* case.[46] The ECJ conceptualised union citizenship in light of the new *Maastricht Treaty* provision by ascertaining that:

> …the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof [Article 18 TFEU].[47]

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[42] Related legal literature is widespread in this area, e.g. Laura Gyeney, 'The Free Movement of Economically Inactive Citizens: the Right to Reside Test' (2019) 3 (1) Bratislava Law Review 43–57; Herwig Verschueren, 'Free Movement of EU citizens: including for the poor?' Paper presented at the ISLSSL 21st World Congress, Cape Town 15–18 September 2015, <http://islssl.org/wp-content/uploads/2015/10/Belgium-HerwigVerschueren.pdf> accessed on 1 September 2019.

[43] Sándor Illés, 'Elderly immigration to Hungary' (2005) 2 (2) Migration Letters 164–169; Sándor Illés, Áron Kincses, 'Foreign retired migrants in Hungary' (2008) 86 (Special number 12) Hungarian Statistical Review 88–111.

[44] C-456/02, *Trojani,* ECLI:EU:C:2004:488, paragraph 46: '…a citizen of the Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC.'

[45] Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 (4) Common Market Law Review 889–937. 'Early statements on the nature of Union citizenship isolated a new dimension of free movement rights at the level of primary law, loosened from the requirement of economic activity and reflecting a surge in expectations of equal treatment.' Lilla Kiss, The optician's dilemma: can all these lenses be polished into the same frame or do we need new frames, too? – Brexit: time to reform EU citizenship? (2019) 77 Curentul juridic 21-37.

[46] C-184/99, *Grzelczyk,* ECLI:EU:C:2001:458.

[47] Ibid, paragraph 34.

Furthermore

> However … the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty […]. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union.[48]

The new legal milieu nurtured the ambitions of the ECJ to shape the rights of union citizens in a broader sense. By adjudicating *Grzelczyk,* the ECJ changed the perception that only mobile workers (self-employed persons) and their family members could become entitled to equal treatment in terms of rights and benefits. It moved away from the grant of particular rights to particular groups of actors, and was instead 'embracing a powerful mission of protection of individual rights.'[49]

However, in 2005 in *Bidar*[50] the ECJ stepped back and narrowed the scope of entitlements; the Court found it legitimate for a Member State to grant assistance only to students who have demonstrated a certain degree of integration into the society of the host Member State.[51] Such integration could be established if the student has resided in the host Member State for a certain period of time. The condition of sufficient link with the host Member State was thereby taken up and conveyed into the realm of education.

Why the ECJ has shifted away the generous approach in *Grzelczyk,* is probably connected to the adoption of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ('the Free Movement Directive') in 2004.[52] Apart from replacing the fragmented rules in the realm of residence rights, the new regime has given new perspectives regarding equal treatment. Pursuant to Article 24, all Union citizens residing in the territory of another Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. There is an exception, however: the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or prior to acquisition of the right of permanent residence, nor it is obliged to grant maintenance aid, student grants or student loans for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families. In simple words, economically active Union citizens and their family members can avail themselves of equal treatment regarding study support: other persons, however, can be excluded from the benefits prior to obtaining long-term residence status.

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[48] Ibid, paragraph 35.

[49] Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 (2) The Modern Law Review 233–267.

[50] C-209/03, *Bidar,* ECLI:EU:C:2005:169.

[51] Ibid, paragraph 57.

[52] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, 77–123).

In a way, *Bidar* has overruled *Grzelczyk* and affirmed the new secondary legislation by putting forward a minimum period of residence as a condition for entitlements. This has been motivated by the desire for burden-sharing between the economically inactive mobile citizen and the host state: until a sufficient link is established, social responsibility remains with the mobile citizen and the State of origin. The ECJ reinforced this burden-sharing principle in the *Förster* case[53] by honouring a residence requirement for maintenance grant. National law did not go beyond what was necessary to attain the objective of ensuring that students from other Member States were, to a certain degree, integrated into the society of the host Member State.

The ECJ was soon invited to rule specifically on study grants in relation to the above-mentioned exception in Article 24 of the Free Movement Directive in the *Commission v Austria*[54] and in the *Commission v Netherlands* cases.[55] In the first case, Austria granted reduced travel fares to students whose parents received family allowances from the Austrian State. Austria classified the grant as a 'student grant' and treated it as a legitimate exemption from the equal treatment principle. In the view of the ECJ, however, the reduced fare could not be accommodated as a student grant; it was not linked to funding for studies, but it covered students' maintenance costs.[56] As such, there was inequality of treatment related to maintenance costs and it was deemed contrary to the principles that underpin the status of citizen of the Union:

> …by granting reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances, the Republic of Austria has failed to fulfil its obligations.[57]

On the contrary, in the *Commission v Netherlands* case, the ECJ accepted the Netherlands' reasoning, namely that free of charge use of public transport only by Netherlands students is part of the wider educational framework and constitutes a conditional study loan. If the student completes his studies within a period of 10 years, the loan becomes a grant; if not, the loan is to be repaid with interest. The complaint of the European Commission alleging direct discrimination was therefore rejected as unfounded.

III Non-discriminative Obstacles

The ECJ was soon confronted with the fact that invoking discrimination was not sufficient to eliminate all barriers to free movement. Several cases were submitted to the ECJ that did not contain any discriminatory element based on nationality, but concerned legal facts that had

[53] C-158/07, *Jacqueline Förster kontra Hoofddirectie van de Informatie Beheer Groep,* ECLI:EU:C:2008:630.
[54] C-75/11, *European Commission v Austria,* ECLI:EU:C:2012:605.
[55] C-233/14, *European Commission v Kingdom of the Netherlands,* ECLI:EU:C:2016:396 (2 June 2016).
[56] C-75/11, *European Commission v Austria,* ECLI:EU:C:2012:605, paragraph 43.
[57] Ibid, paragraph 66. The ECJ referred to the combined provisions of Articles 18 TFEU, 20 TFEU and 21 TFEU and also Article 24 of Directive 2004/38/EC.

clearly impeded freedom of movement. The ECJ has therefore developed a new approach, based not on discrimination between nationals and non-nationals, but on the mere fact of restricting freedom of movement, which was sufficient to declare the measure incompatible with Community (and later EU) law. In these cases, the rule itself is in breach of EU law, irrespective of whether applied to its own citizen or to another EU citizen. However, the obstacle can be justified if it is necessary and proportionate.[58]

1 Employment

The first wave of ECJ cases in the 1990s comprised the *Kraus* case,[59] related to the use of foreign academic titles, and the famous *Bosman* case[60] related to professional football. In the *Kraus* case a German national was denied permission to use in Germany a postgraduate academic title awarded to him in the United Kingdom. In the *Bosman* case, a Belgian national was hindered by his Belgian club, based on Belgian rules on transfer fees, prospective employment in France.

The ECJ followed the same line of argumentation in these cases by reiterating that EU law includes the abolition, as between Member States, of obstacles to freedom of movement for persons.[61] Moreover, Article 48 precludes measures that, even though applicable without discrimination on grounds of nationality, are liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State that enacted the measure, of fundamental freedoms guaranteed by the Treaty.[62] More precisely, provisions that preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom, even if they apply regardless of the nationality of the workers concerned.[63] The presence of obstacles has also been benchmarked in the *Lehtonen* case[64] in the field of basketball.

The landmark *Köbler* case from 2003 should also be mentioned, where an Austrian provision was examined by the ECJ.[65] University professors who had completed 15 years'

[58] Tryfonidou Alina, 'Purely Internal Situations and Reverse Discrimination in a Citizens Europe: Time to "Reverse" Reverse Discrimination?' <https://www.um.edu.mt/europeanstudies/books/CD_MESA09/pdf/atryfonidou.pdf> accessed on 10 July 2019. Herman H. Voogsgeerd, 'Autonomy in the light of the so called "Internal Situation" case law of the CJEU' lecture held on 19 September 2019., University ELTE Budapest, at the 12th International Conference of the Legal Research Network.

[59] C-19/92, *Dieter Kraus kontra Land Baden-Württemberg,* ECLI:EU:C:1993:125.

[60] C-415/93, *Bosman,* ECLI:EU:C:1995:463.

[61] Ibid, C-19/92, *Kraus,* paragraph 29, and C-415/93. *Bosman,* paragraph 94.

[62] C-19/92, *Kraus,* paragraph 32.

[63] C-415/93, *Bosman*, paragraph 96.

[64] C-176/96, *Lehtonen és Castors Canada Dry Namur-Braine ASBL kontra Fédération royale belge des sociétés de basket-ball ASBL (FRBSB),* ECLI:EU:C:2000:201. Article 39 EC precludes the application of rules laid down in a Member State by sporting associations that prohibit a basketball club from fielding players from other Member States in matches in the national championship, where they have been transferred after a specified date, if that date is earlier than the date which applies to transfers of players from certain non-member countries.

[65] C-224/01, *Gerhard Köbler v Austria,* ECLI:EU:C:2003:513.

service in that capacity in Austrian universities became entitled to a special length-of-service increment to be taken into account in the calculation of their retirement pension. Mr Köbler had those 15 years but not only from Austrian universities. He claimed that the condition of completion of 15 years' service solely in Austrian universities – without taking account of periods of service in universities in other Member States – amounted to indirect discrimination unjustified under Community law. The ECJ declared that 'Articles 48 of the Treaty and 7(1) of Regulation No 1612/68 are to be interpreted as meaning that they preclude the grant… of a special length-of-service increment' under the above-mentioned conditions.[66]

According to the ECJ, the Austrian measure was likely to impede freedom of movement for workers in two respects. First, that regime clearly operated to the detriment of migrant workers who were refused recognition of periods of service completed in other Member States. Second, that absolute refusal hindered freedom of movement for workers established in Austria too, as they could be deterred from leaving Austria by the rule that envisaged the loss of periods in the pursuit of comparable activities elsewhere.[67] Because of the latter aspect, the ECJ ruled that the Austrian measure qualified as an 'obstacle to freedom of movement for workers' and declared its inadmissibility under EU law. [68]

In the *Commission v Cyprus* case[69] a Cypriot rule applicable to Cypriot civil servants was examined. A civil servant under the age of 45, who resigned from his employment in the Cypriot civil service and left the country, was to receive only a lump sum and to lose his future pension rights, whereas a civil servant who continued to carry on a professional activity in Cyprus retains those rights. Above the age of 45, no similar restriction was in place. The ECJ first recalled that nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order to pursue an economic activity.[70] In turn, Articles 45 to 48 TFEU are intended to prevent a worker who has been employed in more than one Member State from being treated less favourably than one who has completed his entire career in only one Member State. The ECJ declared that the Cypriot legislation was likely to hinder or to make less attractive the exercise of the right to freedom of movement by the Cypriot civil servants concerned, and therefore constituted an obstacle to the freedom of movement for workers.[71]

Consequently, a breach of EU law could be committed not only by the host Member State *vis-à-vis* nationals of other Member States, but also by the State of origin (as in the case of Cyprus), by making prospective employment in another Member State impossible or less attractive. The ground for incompatibility with EU law is therefore not discrimination but the very fact that national law of the State of origin imposes a prohibitive (disproportionate and unnecessary) restriction for all EU citizens.

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[66] Ibid, paragraph 88.
[67] Ibid, paras 73–74.
[68] Ibid, paragraph 77.
[69] C-515/14, *Commission v. Cyprus,* ECLI:EU:C:2016:30.
[70] Ibid, paragraph 39.
[71] Ibid, paragraph 45.

In the contrary, the ECJ found to be compatible with EU law, in the *Erzberger* case,[72] that only workers employed in Germany had the right to vote and could stand as a candidate in elections of workers' representatives to the supervisory board of TUI. The TUI group employs around 50 000 persons, of whom slightly more than 10 000 work in Germany, and only those employed in Germany had the right to vote and stand as a candidate. Mr Erzberger claimed that preventing workers employed by a subsidiary of the TUI group located in a Member State other than Germany, who it can be assumed are in general not German citizens, from participating in the composition of TUI's supervisory board, infringes Article 18 TFEU. Moreover, the loss of membership in the supervisory board, in the event of a transfer to a Member State other than Germany, is likely to deter workers from exercising their right to free movement throughout the territory of the Member States.[73] According to the ECJ, Article 45 TFEU does not grant that workers have the right to rely, in the host Member State, on the conditions of employment that they enjoyed in the Member State of origin under the national legislation of the latter State. There are no harmonisation or coordination measures at Union level in the field concerned; the loss of rights in the event of leaving Germany does not constitute an impediment to the free movement of workers.[74] Here, the lack of harmonisation of employment conditions was the basis of the findings.

Similarly, in the *Eurothermen* case decided in 2019, the Court found that an Austrian provision was not in breach of EU law.[75] The case is worth noting because it remained under the radar of the proportionality test. The question was whether it is lawful for a worker who has a total of 25 years of service and has not completed those years with the same Austrian employer to receive only five weeks' paid annual leave, whereas a worker who has completed 25 years with the same Austrian employer receives six weeks of paid leave each year. The ECJ has found the provision compatible with EU law. It was not shown that the legislation particularly favours Austrian workers over those who are nationals of other Member States.[76] Furthermore, it did not find it to be a barrier, claiming that the rule was not liable to deter Austrian workers who were considering leaving their current employer and moving to another Member State according to the right to free employment.[77] It seemed that rewarding loyalty could have been an acceptable justification for otherwise illegitimate obstacles.

2 Education

There was no case regarding a purely educational situation in which the ECJ could have adjudicated on obstacles to the free movement of students. The reason for this lies in the

[72] C-566/15, *Konrad Erzberger,* ECLI:EU:C:2017:562.
[73] Ibid, paragraph 15.
[74] Ibid, paragraph 39.
[75] C-437/17, *Betriebsrat EurothermenResort Bad Schallerbach GmbH és EurothermenResort Bad Schallerbach GmbH,* ECLI:EU:C:2019:193. (13 March 2019).
[76] Ibid, paragraph 28.
[77] Ibid, paragraph 40.

absence of an exclusive Treaty-based right to free movement of students. Cases that are of importance have always had a link to employment, assistance in finding employment or prospective employment.

The *D'Hoop* case was related to indirect discrimination.[78] Belgian law granted a tide-over allowance to students seeking their first employment if they completed their secondary education in Belgium, while those having obtained that education in another Member State were excluded from the benefit. D'Hoop was a Belgian national who completed her secondary education in France; consequently, her application was refused. According to the ECJ, unjustifiable discrimination took place:

> …a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. It unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tide-over allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore goes beyond what is necessary to attain the objective pursued.[79]

Such inequality of treatment was held contrary to the principles that underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move, in spite of *D'Hoop* being a Belgian national in Belgium.

In the *Kranemann* case,[80] in the course of his mandatory legal traineeship preceding the second State examination in law, Mr Kranemann underwent training in London. The respective laws of Land Nordrhein-Westfalen, his region of origin, laid down that travel expenses outside Germany could not be reimbursed, so he had to bear part of his travel expenses on his own. The ECJ declared Mr Kranemann to be a worker and stressed that

> such legislation creates a financial obstacle which may deter trainee lawyers, particularly those with limited financial resources, from taking up a traineeship in another Member State, regardless of whether the decision to undergo such practical training is motivated generally, as the Land Nordrhein-Westfalen observes, by reasons relating to the trainee's specialisation or by personal reasons, such as the wish to gain experience of another legal culture.[81]

The traineeship was a requirement for obtaining his diploma, in a sense his studies had not finished; moreover, Mr Kranemann was a German national studying in Germany. The ECJ conceived the traineeship as cross-border work and emphasised the doctrine of obstacles.

The Hungarian rules on student contracts with the state deserve special attention here. The ECJ has not had the opportunity to rule on this issue, but it is of peculiar interest in the field of non-discriminatory obstacles. The case centred around a Hungarian government decree passed in 2011, which prescribed that Hungarian students who are fully or partially

[78] C-224/98, *Marie-Nathalie D'Hoop kontra Office national de l'Emploi,* ECLI:EU:C:2002:432.
[79] Ibid, paras 39.
[80] C-109/04, *Kranemann* (7 March 2005), ECLI:EU:C:2005:187.
[81] Ibid, paragraph 29.

financed by the state should sign a contract with the state obliging them to work for at least double the time of their studies in the territory of Hungary after completing their studies, within a period of 20 years.[82] In addition, if they work less than the required years, they must pay back the whole costs of their studies, plus interest. The issue was presented by the European Students Union to the European Commission. The competent Commissioner however reacted by pointing out that

> Requiring a person to work for a certain number of years in Hungary after completing education could potentially be an obstacle to free movement of workers. … However, according to the EU law on free movement of workers … obstacles can be justified if they pursue a legitimate aim and are suitable to attain it and are proportionate to the aim pursued.[83]

The European Commission, after carefully examining the government decree and consulting with different stakeholders, accepted the Hungarian rule as justifiable. The main underlying reason for compatibility was the complete lack of discrimination on the basis of nationality; hence – due to the special nature of the Hungarian language – almost every single student was Hungarian. The lack of discrimination, however, would not have been sufficient to rule out the obstacle doctrine. Proportionality and need for the restriction were necessary to avoid incompatibility with EU law. These could have been backed up by the voluntary nature of the contract and the possibility of pursuing studies without signing the contract (based on the private resources of the student). It was also agreed upon that no less disadvantageous system could have been established in order to keep highly skilled career starters in Hungary.

This case is very similar to the *Olympique Lyonnais* case,[84] in which young football players were required to accept professional contracts if they were offered one by their club. Whether the impossibility of choice infringed the Treaty was raised. The ECJ acknowledged the efforts and social importance of training young players by clubs and decided that Article 45 TFEU did not preclude a scheme that foresees an obligation to enter into a professional contract. It added, however, that the scheme must be suitable for ensuring the attainment of public policy objectives and shall not go beyond what is necessary to attain it.[85] We can also draw a parallel with the *Bressol* case, in which the ECJ – focusing on the health care sector – accepted the reasoning that public health aspects and the need to train health care workers of Belgian nationality can justify restrictions regarding the number of foreign students in medical higher education.[86] Even if Hungarian student contracts can form an obstacle to the free movement of workers, this restriction could be justified by public interest, namely to guarantee a required

[82] <https://www.esu-online.org/?news=commission-replies-to-esu-on-restriction-of-freedom-for-state-funded-students-in-hungary> accessed on 11 September 2019.

[83] The European Commission's reply to the urgent letter from the European Students' Union (ESU) on the new Hungarian Higher Education bill, dated 22 March 2012.

[84] C-325/08, *Olympique Lyonnais SASP,* ECLI:EU:C:2010:143.

[85] Ibid, paragraph 49.

[86] C-73/08. *Nicolas Bressol,* ECLI:EU:C:2010:181. Kovács Réka et al., 'Managing intra-EU mobility—do WHO principles of ethical recruitment have relevance?' (2017) 15 Human Resources for Health, Article Number: 78.

number of highly skilled professionals in Hungary. Finally, the European Commission did not initiate an infringement procedure against Hungary.[87]

The doctrine of obstacles is widely used and was gradually developed by the ECJ. The cases point to the extent to which the obstacle can be considered necessary and proportionate and can therefore be justified from the perspective of EU law.

IV Positive Actions

The main thrust of EU law until the 2000s was determined by the two milestones mentioned in the previous points: the need to ensure equal treatment and to overcome non-discriminatory obstacles. At the same time, more and more cases have emerged showing that the majority of people exercising the right to freedom of movement are vulnerable, so that even the widespread application of the two main legal concepts is not sufficient in itself to protect them effectively.

1 Employment

A new directive in the field of labour mobility was adopted on 16 April 2014, Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.[88] Despite the substantive rights conferred by Article 45 of the Treaty and Regulation 492/2011, the effective enforcement of free movement remains a major challenge, as described in the preamble of the Directive. According to Preamble 5, 'There is, therefore, a gap between the law and its application in practice that needs to be addressed.'[89]

At the end of 2018, a report on the application of the Directive was published.[90] Among the concluding thoughts we find important sentences:

> The Directive is already operational and the Commission has not detected major problems of non-conformity among the national transposition measures. However, a lot remains to be done in practice to ensure the Directive's aims are attained.[91]

[87] According to Láncos '…it is doubtful whether the student contract could stand the proportionality test set up by the European Court.' Láncos Petra Lea: 'A kötelező hallgatói szerződések értékelése az uniós jog szemszögéből' *(Evaluation of student contracts in light of Union law)* Pázmány Law Working Papers, 2011/39, <http://plwp.eu/docs/wp/2012/2012-1.pdf> accessed on 10 July 2019.

[88] HL L 128, 2014.4.30.

[89] Ibid, preamble 5.

[90] COM(2018)789 final – Implementation of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (4 December 2018).

[91] Ibid, page 9.

Moreover:

> …the Directive has had a positive impact for all stakeholders. This is mainly because it has provided more legal certainty and clarity for workers, employers and administrations by laying down free movement rights, together with rules for better enforcement.[92]

As has been mentioned, the Directive obliged Member States to set up a designated body and entrust it with the task of providing information and help to free movers. The report referred to a wider vision, namely to the creation of the European Labour Authority (ELA): 'the proposal to establish a European Labour Authority should further help to maximise awareness of the key free movement rights.'[93]

In fact, the report on the application of Directive 2014/54/EU rightly observed the need for an EU Agency. The European Commission has launched the proposal for a Regulation on the European Labour Authority in March 2018 after the customary public consultation. During the public consultation,[94] which lasted between 27 November 2017 and 7 January 2018, questions were asked on the efficacy of the present network and directions for its improvement. In essence 390 replies were collected[95] and 70% of respondents supported the improvement of cross-border information flows, alongside enhanced cooperation between national authorities. Furthermore, they agreed that a new authority could mean a real addition to overcome insufficient access to information and insufficient cooperation coupled with enhanced awareness-raising.[96]

The ELA soon became a reality; the ELA Regulation, after having adopted by the Council on 13 June 2019, was published on 11 July 2019.[97] Its main tasks are best summarised in its preamble 6:

> …the Authority should assist the Member States and the Commission in strengthening the access to information, should support compliance and cooperation between the Member States in the consistent, efficient and effective application and enforcement of the Union law related to labour mobility across the Union…[98]

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[92] Ibid, page 10.

[93] Ibid, page 10.

[94] <http://ec.europa.eu/social/main.jsp?catId=333&langId=en&consultId=30&visib=0&furtherConsult=yes> accessed on 2 April 2018.

[95] 8809 answers were received but 8420 were identical (as a result of a campaign of the European Trade Union Confederation).

[96] Éva Gellérné Lukács, 'European Labour Authority: The guardian of posting within the EU?' (2018) 1 Magyar Munkajog e-folyóirat 1–21. <http://www.hllj.hu/letolt/2018_1_a/01.htm> accessed on 10 September 2019; Sára Fekete, 'The Challenges of Defining Posted Workers' (2018) 1 Magyar Munkajog e-folyóirat 22–45. <http://hllj.hu/letolt/2018_1_a/A_02_FeketeS_hllj_2018_1.pdf> accessed on 10 September 2019.

[97] Regulation 2019/1149/EU of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

[98] These objectives are further elaborated in Article 2 of the ELA Regulation.

Two areas deserve our special attention. First, it is worth mentioning that the ELA shall explicitly '(f) facilitate cooperation between the competent bodies designated in accordance with Directive 2014/54/EU to provide information, guidance and assistance to individuals and employers in the area of labour mobility within the internal market.'[99] Consequently, the ELA has been designed to act as a supranational umbrella for the designated bodies mentioned above under Directive 2014/54. Secondly, the ELA became the primarily responsible EU body for the functioning of the EURES system. Pursuant to preamble 16 of the ELA Regulation,

> The Authority should replace the Commission in managing the European Coordination Office of the European network of employment services (EURES), established by Regulation (EU) 2016/589 of the European Parliament and of the Council.[100]

The merger of these two landmark initiatives in the field of labour mobility into the realm of the ELA is a strong message that intensification of access to information and enforcement of existing laws are the key expectations that the ELA will face in the forthcoming years. It is strongly hoped that vulnerable mobile workers will gain additional help and the gap between laws and practice will be tightened.

An interesting report has been published by the European Court of Auditors in the middle of 2018.[101] The report assessed how the European Commission ensures the freedom of movement of workers and the effectiveness of EU actions facilitating labour mobility. It examined five Member States (three target countries and two sending countries) through evaluating the operation of EU funds. The conclusions contain several criticisms of funding and monitoring, on the coherency of funds and the ability to measure outputs.[102] The report suggests that the European Commission should work with Member States to improve the collection and use of data on patterns and flows of labour mobility and labour market imbalances, and also to improve the design of EU funding to address labour mobility.[103] In contrast, another report commissioned by the European Parliament[104] about obstacles to the right of free movement and residence does not identify problems related to equal treatment.

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[99] Article 5 f) of the ELA Regulation.

[100] Regulation (EU) 2016/589 of the European Parliament and the Council of 13 April 2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations 492/2011 and 1296/2013 (OJ L 107, 22.4.2016, p. 1.).

[101] ECA special report, *Free Movement of Workers – the fundamental freedom ensured but better targeting of EU funds would aid worker mobility,* European Union, Luxembourg, 2018. <https://www.eca.europa.eu/Lists/ECADocuments/SR18_06/SR_Labour_Mobility_EN.pdf> accessed on 1 September 2019.

[102] Ibid, pages 8–9: 'We found that the EaSI-EURES has similar policy objectives to those of the ESF with regards to labour mobility, meaning the required complementarity of both EU funds is challenging.'; '…weaknesses in the projects' monitoring resulted in their inability to aggregate outputs and results at programme level'.

[103] Ibid, page 9.

[104] European Commission, *Obstacles to the right of free movement and residence for EU citizens and their families,* Comparative Analysis, Luxemburg, 2016. <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL_STU(2016)571375_EN.pdf> accessed on 12 September 2019.

It deals with access to employment on only half a page, exclusively related to non-recognition of professional qualifications from other Member States.[105] Both reports propose the collection of more systematic and comparable information and data at Member State level and enhancing awareness-raising on rights. These are clearly the main domains of ELA.

2 Education

The situation of children and education is even more challenging because the Treaty powers are much more limited. Nevertheless, Directive 77/486/EEC,[106] which stipulates that the children of migrant workers need to be provided language courses in the host Member State, is still in force. According to it, Member States shall take appropriate measures to ensure free education on their territory for the integration of such children, including in particular the official language or one of the official languages of the host State for the special needs of such children.

In addition, there are several targets for tertiary education students in the EU. A Council Communication sets an explicit target for mobility: by 2020, at least 20% of tertiary education students should study in another Member State.[107] This target also includes degree mobility, as defined in EU terminology, and credit mobility related to part-time or credit recognition.[108] On the other hand, the Europe 2020 strategy states that 'at least 40% of EU citizens aged 30-34 should have a university degree'.[109] This is supported by the Erasmus+ programme, which is intended to contribute to the objectives of the Europe 2020 strategy for growth, employment, social justice and inclusion and to the EU2020 strategic framework for education and training. In turn, the School Education Gateway is an online platform that connects teachers and education professionals across borders and provides an opportunity to share and exchange good practices and build professional communities.[110]

The Erasmus+ programme and the Council objective have boosted the mobility of higher education students. Many analyses have been made of the magnitude and direction of movements. Mobility is customary in Western Europe, with rates more or less similar for outgoing and incoming students. The patterns in the new Member States are slightly different.

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[105] Ibid, page 77.

[106] HL L 199/32. (1977).

[107] The Council conclusions on a benchmark for learning mobility (2011/C 372/08) specified that by 2020 'an EU average of at least 20% of higher education graduates should have had a period of higher education-related study or training abroad'.

[108] Student mobility in tertiary education: institutional factors and regional attractiveness, JRC Science for Policy Report, JRC Science Hub (https://ec.europa.eu/jrc), Luxembourg: Publications Office of the European Union, 2017. <https://publications.europa.eu/en/publication-detail/-/publication/fb34ffb9-ff3a-11e7-b8f5-01aa75ed71a1/language-en> accessed on 1 July 2019.

[109] COM(2010) 2020 final: *A strategy for smart, sustainable and inclusive growth.*

[110] COM(2017) 30 final: *Strengthening Citizens' Rights in a Union of Democratic Change,* EU Citizenship Report 2017. page 16.

An analysis of the situation in Romania in 2014[111] points out that most students from Romania go to France, Germany, Italy, Spain and Greece, while many students come from France, Spain, Turkey and Portugal. However, the number of outgoing students is significantly higher than that of incoming students, so the report concludes that the country's higher education must be made more competitive.[112] There are growing numbers of Erasmus students coming to Hungary as well, with more than 5,000 students coming to Hungarian higher education institutions or internships each year.[113] Coming from Germany, France and Turkey, the greatest number of students are attracted by ELTE, the number of incoming students in 2016 and 2017 exceeded the number of outgoing students.[114]

The current approach encourages higher education mobility even before it has actually been planned or effectuated. It does not focus on making the situation of those already practicing mobility better and easier, but it exerts influence much sooner. Additionally, it does not address the situation in relation to the mobility of other persons (mainly parents) but it focuses on students as a distinct target group. This separate segment of mobility involves Union citizens who travel to another Member State and thus become EU mobile persons only because of their education there. The underlying vision of enhancing students' mobility was made possible by Union citizenship, which endorsed students as a distinct group of persons.

Practical challenges are however constant, as far as empirical summaries suggest. There are cases where Union citizens are put at a disadvantage. A British/Canadian student living and studying in Ireland sought to apply for an internship to complete his medical training in Ireland. He discovered, however, that students who applied to study medicine in Ireland through the national third-level entrance system (the Central Applications Office (CAO)) were prioritised for internships compared with other non-CAO students, thereby indirectly discriminating against non-Irish students.[115] It was also a violation of EU law when a British student studying medicine in Romania realised that he was paying EUR 5,000 in tuition fees while Romanian students were paying EUR 1,000.[116] Another example is that of a Spanish citizen who studied in a Slovenian university under the Erasmus+ programme. He complained about the different dormitory fees for Slovenian and EU students, with EU students being charged EUR 20 more.[117] EU law is clear in this field, what comes next is to give publicity to such breaches of the equal treatment principle and then to seek sanctions and remedies.

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[111] Elena Marin, 'The Mobility of Romanian Students in Europe' (2014) 116 (February) Procedia – Social and Behavioral Sciences 4884–4888.

[112] Ibid, 5.

[113] <https://ec.europa.eu/hungary/news/20170126_erasmusplus_hu> accessed on 22 October 2018.

[114] <https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/30year_country_fact_sheets/erasmusplus-factsheet-hu-hd_1.pdf> accessed on 23 October 2018.

[115] Your Europe Advice, Quarter Feedback Report No. 14, Quarter 4/2015 (October–December) 45.

[116] Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April–June) 37.

[117] Your Europe Advice, Quarterly Feedback Report No.10, Quarter 4/2014 (October–December) 41.

V Conclusions

The objective of the article is to review the state of play and give brief comments on the chosen fields. First and foremost, it has to be flagged that the field of free movement of persons is very special in relation to equal treatment. Neither the Treaty basis, nor the substantive provisions in the implementing regulations dealing with free movement of workers has changed in the last 60-plus years. Textually, Regulation 1612/68 which has since been replaced by Regulation 492/2011 contain the same wording regarding the free movement rights of workers and their family members (including equal treatment of children of workers regarding access to education). In addition to intact implementing secondary provisions, the case-law of the ECJ could organically evolve and serves as a stable compass to this day.

The findings of the ECJ related to equal treatment in the field of employment have followed the same pattern since the 1970s. The ECJ coherently and consequently protects mobile workers and their family members within the realm of direct discrimination. The ECJ rigorously invalidates national requirements that are applicable to their own nationals and nationals of other Member States alike, but in practice have put nationals of other Member States wishing to apply for a post or to gain certain benefits at a disadvantage.[118] The ECJ has unambiguously provided enlightenment in that regard, referring to indirect discrimination. Later the concept of obstacles was invented, where a rule might deter or discourage free movement of workers in general, irrespective of the nationality of the workers. There are approaches that focus on the common denominator of the two concepts, which is the negative effect on intra-Union mobility:

> The classification as 'discrimination' or 'obstacles/restrictions/barriers' in the case law should not be considered excessively rigid. What really matters is whether the rule has an effect on intra-Union migration. If such an effect is found through either discrimination or a barrier to movement or an obstacle then the rule will have to be justified.[119]

Cases brought before the ECJ become increasingly complicated. The very recent *Österreichischer Gewerkschaftsbund* case sets a great example.[120] In Austrian law, the remuneration seniority of contractual civil servants was based on service periods. Service periods from the whole EU, plus Turkey and Switzerland, were to be taken into account but only if these were completed with a local / municipal authority or with any similar body. All other previous service periods were taken into account only up to a maximum of 10 years and insofar as they were relevant. It was clear from the outset that that the legislation at issue applied to contractual public servants without distinction on the grounds of nationality and the criterion did not seem to be capable of affecting workers from other Member States more than Austrian

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[118] E.g. C-317/17. *European Commission v Kingdom of Belgium* (5 February 2015), ECLI:EU:C:2015:63, paragraph 30.
[119] European Commission, *Analytical report – 2014,* 6–7.
[120] C-24/17, *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst and Republik Österreich* (8 May 2019), ECLI:EU:C:2019:373.

workers.[121] Therefore, no discrimination was present. The criterion of taking into account only certain service periods – namely those completed with state bodies – was the only restriction; that however, was chosen for professional reasons. The ECJ stressed that the criterion made the free movement of workers less attractive; it was an obstacle. Although rewarding experience acquired in a particular field through pay policy constitutes a legitimate objective, in this case it was not justifiable because professional experience must be taken into consideration in its entirety, not only partially.[122] The ECJ consequently held the Austrian rule to be in breach of Article 45 TFEU and Article 7(1) of Regulation 492/2011 and the breach could not be justified.[123]

It is clear that justification of both indirect discrimination and obstacles runs along similar lines, coupled with difficulties related to how to evidence a fact under national procedural laws using statistics.[124] The justification for a restriction – according to well-established case-law – may only be allowed if it pursues a legitimate objective in the public interest, is appropriate for ensuring the attainment of that objective, and does not go beyond what is necessary to attain that objective.[125] Even if there is a legitimate interest, proportionality must also be observed and national measures that are less prejudicial to freedom of movement of workers must be adopted. Beyond doubt, the ECJ declared that 'derogation must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the general interests of the Member State concerned'.[126] Abuse of EU law by Union citizens is also a challenge for national administrations and the field is very narrow between the misuse of rights and justification of restrictive national practices to counteract this misuse.[127]

Additionally, equal treatment means the same treatment, even though it might bring negative consequences for the mobile worker. In the very recent *Tarola* case, a person who had only worked in another Member State for two weeks, which, pursuant to national law did not entitle any worker for benefits or support, claimed the breach of his free movement rights.[128] The ECJ availed itself of equal treatment:

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[121] Ibid, paragraphs 72. and 75.

[122] Ibid, paragraph 87.

[123] Ibid, paragraph 82.

[124] Halmos Szilvia, *Bizonyítás az egyenlő bánásmóddal kapcsolatos munkaügyi perekben az új Pp. alapján (Evidence in labour law litigation under the new Hungarian civil procedural law)* in Pál Lajos, Petrovics Zoltán (eds), *Visegrád 15.0: A XV. Magyar Munkajogi Konferencia szerkesztett előadásai* (Wolters Kluwer 2018, Budapest) 21–71. Somssich Réka, *Egységes jog – egységes értelmezés? Az uniós jog értelmezése a tagállami bíróságok szintjén* (ELTE Eötvös Kiadó 2016, Budapest).

[125] C-212/06, *Government of the French Community and Walloon Government* [2008] ECR I 1683, paragraph 55., Tóth Judit, 'Közérdek az Európai Bíróság előtt' (2007) 1 Európai Tükör 31–58.

[126] C-270/13, *Iraklis Haralambidis v Calogero Casilli,* ECLI:EU:C:2014:2185, paragraph 59.

[127] Töttős Ágnes, 'A közrendre, közbiztonságra veszélyesség uniós szabályozása a legális migráció területén' *(EU law on threats to public order and public security in the area of legal migration),* (2012) 13 Pécsi Határőr Tudományos Közlemények 285–297; Tamás Szabados, 'National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive' (2017) 33 (85) Utrecht Journal of International and European Law 84–102.

[128] C-483/17, *Neculai Tarola v Minister for Social Protection* (11 April 2019), ECLI:EU:C:2019:309.

> It follows that … where national law excludes persons who have worked in an employed or self-employed capacity only for a short period of time from the entitlement to social benefits, that exclusion applies in the same way to workers from other Member States who have exercised their right of free movement.[129]

Not only the award but also exclusion from a benefit was put on the same footing. Restrictions to entitlement to benefits for Union citizens became admissible only if the same restriction (condition) applied to nationals of the host state (e.g. that only workers were eligible for benefits).

Beyond workers' rights, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the legal regime applicable to freedom of movement for workers requires the best possible conditions for the integration of children into the society of the host country. The ECJ finds it essential for the child who resides with his family in the host Member State to have the opportunity to choose and pursue a course under the same conditions as a child of a national of that State, including registration fees, study grants, educational scholarships and other benefits. All forms of education are covered, from primary level to university level education. Importantly, these legal principles are equally valid after the repeal of Regulation 1612/68 by Regulation 492/2011.[130]

Similarly to workers' rights, national laws pushed the boundaries of EU law also in the field of education. The above-cited *Aubriet* case[131] from 2019, which followed on from the *Giersch and Others* and *Bragança Linares Verruga and Others (*that were all requested for a preliminary ruling from the same national court), deserves special attention.[132] Essentially, Luxembourg intended to provide financial aid only for those students whose parents worked there for a longer period (at least 5 years). According to the ECJ, it contravened the rules of equal treatment and was not justifiable by the governments' intention to increase the number of its own nationals in higher education. The interests of mobile workers' children outweighed those of the state to pursue an independent policy on financial supports. It is worth commenting on this case in light of the *Olympique Lyonnaise* case and the afore-cited Hungarian law on student contracts. These cases show that a national legislature may be in a difficult situation when it comes to dealing with social pressures, such as the promotion of domestic students in medical training in the *Bressol* case or the continuous brain drain in the Hungarian case caused by higher wages in other Member States. In such cases, it may be necessary to intervene at the legislative level to establish or maintain an appropriate social balance. Apparently, the ECJ is generally reluctant to tolerate restrictive national practices when mobile persons' rights are at stake. Numerous legal obligations are bestowed upon Member States in

[129] Ibid, paragraph 56.

[130] Articles 10 and 12 of Regulation 1612/68/EEC has been inserted into Directive 2004/38/EC.

[131] C-410/18, *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche* (10 July 2019), ECLI:EU:C:2019:582.

[132] C-20/12, *Giersch and Others,* ECLI:EU:C:2013:411; C-238/15, *Bragança Linares Verruga and Others,* ECLI:EU:C:2016:949.

the Internal Market and non-compliance with EU law can be only justified in a limited number of cases.[133]

Initially, only workers had the right to free movement, in line with Article 45 TFEU. This right was gradually extended over time to all citizens of the Union and their family members by current Article 20 (2) (a) TFEU.[134] Union citizenship is indeed becoming increasingly emancipated from a purely economic paradigm, moving towards being the fundamental status of Member State nationals.[135] The ECJ has linked together the main citizenship rights and the right to non-discrimination on grounds of nationality in its case law, which certainly extended the normative dimension of EU citizenship and moved the concept towards being a fundamental status, anchored in fundamental law.[136] Union citizenship, however, only partially changed the situation of students in terms of social benefits. The reason for this is Article 24 (2) of the Free Movement Directive, which contains exceptions to equal treatment, and this exception (restriction) is acknowledged by the ECJ. In the *Commission v Netherlands* case[137] the ECJ made explicit:

> …the Kingdom of the Netherlands may rely on the derogation in that regard in order to refuse to grant such support, before the person concerned has acquired the right of permanent residence, to persons other than employed persons, self-employed persons, persons who retain such status or their family members.[138]

The same has been confirmed in the *L.N* case.[139] The ECJ left it to the national court to decide what status the applicant had in the case: whether his activity corresponded to that of a worker (qualifying for subsistence allowance for nationals of that Member State to pursue his studies) or a student (and could not claim benefits).

Despite a relatively stable and complete set of rules, Union citizens may continue to face practical problems in exercising their free movement rights. To try to close the gap between the law and its application is the main target now. It became a priority to strengthen the tools that facilitate enforcement of the law in practice, and to help mobile persons or persons who

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[133] Mónika Papp, 'Member State Interests and EU Internal Market Law' in Márton Varju (ed), *Between Compliance and Particularism* (Springer AG 2019, Switzerland) 103–127.

[134] Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We The Burden?* (Hart Publishing 2016, Oxford); Töttős Ágnes, 'Az Európai Bíróság legújabb ítélkezési gyakorlatának hatása az idegenrendészeti jogalkalmazásra' *(The effect of recent case-law of the European Court on law enforcement in the field of alien's policy)* (2011) 12 Pécsi Határőr Tudományos Közlemények 307–322.

[135] Nina Fehrenkamp, 'European Citizenship – a new bond between the EU and the citizens of the Member States?' Bachelor Thesis, 2013. <https://essay.utwente.nl/63294/1/Bachelor_Thesis_N.FEHRENKAMP_(s1112929).pdf> accessed on 3 July 2019.

[136] Aurelia Colombi Ciacchi, 'A clash of two autonomies: The autonomy of religious organisations versus the autonomous interpretation of EU Law' lecture held on 19 September 2019, University ELTE Budapest, at the 12th International Conference of the Legal Research Network.

[137] C-233/14, *Commission v Kingdom of the Netherlands* (2 June 2016), ECLI:EU:C:2016:396.

[138] Ibid, paragraph 94.

[139] C-46/12, *L. N. és a Styrelsen for Videregående Uddannelser og Uddannelsesstøtte,* ECLI:EU:C:2013:97.

plan to exercise their free movement rights in the future. The strengthened continuation of the ERASMUS programme and the establishment of the European Labour Authority are milestones on the path. The role of positive actions is expected to increase and bring its fruits in the future, although cases in the field of equal treatment and obstacles have not at all disappeared from the jurisprudence of the ECJ.

András György Kovács* – Gergely Barabás**

Why Judicial Independence Matters?

Administrative Judiciary: the Transmission Point Between National and EU Law

I Introduction

This paper shows that the trends in Hungarian requests for preliminary ruling proceedings, which constitute the main connection and transmission point between national and EU law, are strongly determined by administrative justice. Our premise is that, if there are challenges to the perception of administrative judicial independence, those are likely to lead to the disengagement of national and EU law. The number and trends of references for preliminary rulings can be one but not the exclusive litmus test of judicial independence. In our view, the independence of the administrative judiciary is a cardinal and strategic issue for both the European Union and Hungary. The Hungarian EU law judicial advisors (members of ELAN) have had a decisive role in the implementation of EU law, though the centralisation of their network in 2013 has not yet had a significant impact on the quality of references. The study states that conclusions on the independence and impartiality of administrative justice can only be drawn from at least a seven-year period of administrative judicial case-law related to the initiation of preliminary rulings.

The paper discusses the essential characteristics of preliminary rulings given on the initiative of Hungarian administrative courts since the accession of Hungary to the European Union in 2004 until 2018. The text summarises the implications of these references to the ECJ for preliminary rulings on the depth of the harmonisation of EU law, as well as on the role of Hungarian administrative jurisdiction in the implementation of EU law.

For this purpose, we have compiled a database of 170 queries with 158 lines and grouped the data into 9 columns. The database contains all the data on Hungarian references for preliminary ruling procedures that are relevant for the evaluation of administrative case law.

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We have also collected the additional comparative data needed to evaluate the data from this database. The data were obtained from EUR-Lex (https://eur-lex.europa.eu) and were individually assessed.

It is worth remarking, regarding the methodology, that the database contains all Hungarian references, irrespective of whether a judgment or order was rendered at the end of the procedure or it is pending. Still, the aggregated data of EU Member States and the data of the countries in the CEE region are not exactly the same due to inconsistent inputs or input errors in the EUR-Lex database.[1] There is a certain degree of inaccuracy in the data for the European Union as a whole and for other countries (although we attempted to refine the data using several types of control searches), so the Hungarian data used for comparison were not exactly the same as the data collected in our detailed database. However, the difference between the data with the same parameter is in reality 1-2 judgments or orders per country of the total processed 15-year data. We therefore did not focus on the specific numbers, which may be inaccurate by some minor margin of error, but rather on tendencies, shifts and trends. Hence, accurate data are indicated only where the exactness of the data is beyond any doubt and its reliability – based on control queries – is unquestionable.

It must be noted that we have written this paper as EU law judicial advisors[2] and administrative law judges, with more than 20 and nearly 10 years of judicial experience at various levels of administrative justice. We – as referring courts – have submitted more than 10% (10) of the overall Hungarian administrative court requests (98) for preliminary rulings in the last 15 years. As such, the paper contains some background information and assessments of the effects of the cases on the judiciary and national case law – whether we were directly involved or not – which are not publicly available or only partially accessible. Various data cannot be quantified precisely in the absence of suitable domestic databases. Accordingly, several pieces of information are not verifiable by scientific methodology or only partially verifiable, but we believe that our expertise can be an interesting and useful supplement to the scientific discourse on preliminary ruling proceedings. Hence, we did not refrain from sharing and using such less scientifically verifiable information; however, we make the anecdotal non-scientific nature of this kind of information recognizable in this paper. In some respects, we have also been forced to override the traditional dogmatic interpretations in favour of a narrative methodology.[3]

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[1] For example, the search in the text 'Hungary,' '(Hungary),' and '[Hungary]' can all cause discrepancies, not to mention that the name of the country changed from the 'Republic of Hungary' to 'Hungary' during the period examined.

[2] The most important task of the ELAN (European Law Advisors' Network) judicial advisors is to advise Hungarian judges on their references regarding the interpretation and application of European Union law and the European Convention on Human Rights. In addition, they share their EU law expertise through a number of other means as well: they give lectures at training sessions for judges, publish working papers and prepare templates. Judicial advisors elaborate, according to certain criteria, explanatory notes – to be published on the blog site of ELAN's webpage – on the judgements of the Luxembourg-based European Court of Justice (ECJ) and the Strasbourg-based European Court of Human Rights (ECHR), as well as on those judgements of the Curia of Hungary that have EU law relevance. They perform their functions within their respective fields of law.

[3] Kazai Viktor Zoltán, 'A joggyakorlat értelmezésének nehézségei illiberalizmus idején – érvek a narratív módszer mellett' (2018) 2–3 Fundamentum 51–58.

II The Place of Administrative Case Law in Preliminary Rulings

1 Preliminary Rulings in General

The history of requests for preliminary rulings in Hungary can be divided into two 7-year periods based on the number of judgments of the ECJ: 2005-2011 (hereinafter referred to as 'period I') and 2012-2018 (hereinafter referred to as 'period II'). Between 2005 and 2011, annually less than 3 (totally 20) judgments of the ECJ were given on the initiative of Hungarian courts on average, while between 2012 and 2018 it was annually more than 10 (altogether 74). It means that the number of the judgments in the second phase more than tripled (3.65). In the case of period II judgments, requests for preliminary rulings were made from 2010. An upward trend in the number of references could be traced from 2011. The requests have steadily and continuously increased in the past few years; the number of ongoing procedures and requests submitted in 2018 are especially high.[4] In general, the total number of judgments of the ECJ has increased by 50% between the two periods. Accordingly, the judgments delivered on the initiative of Hungarian courts increased fourfold, from 0.5% to almost 3.5% of all ECJ judgments. This ratio is significantly higher than many relevant indicators connected to the number of cases would suggest (population / 1.9% / GDP / 0.8%).[5]

It would be an oversimplification to explain the above-mentioned trends either with the establishment of the constitutional system in 2010, which is politically based on a dominant-party public law system[6] ('dominant party with a competitive fringe'), or with the political confrontation with EU institutions. Even though the cases of period II stem from 2010 and after, the factual basis of these cases dates back to the pre-2010 period. Also, the number of judgments of the ECJ was already on the rise by then. A number of factors can explain this rise. Among others, the expansion of the volume and scope of applicable EU law, wider and deeper integration, the growing tension between the EU institutions and the interests of the Member States (not only Hungary), as well as the internal tensions within the EU institutional system, all contributed to the rise. Consequently, we checked these numbers in the other members of the V4 states joining the EU with Hungary in 2004, along with the data for Romania and Bulgaria that joined later.

In the first period, the average number of judgments per year in Poland was slightly above 3, while in the second, it was moderately below 10, which is slightly more than a threefold (3.13.) increase. The Czech data shows a multiple of 3.3, the Romanian a 4.06 rise (where the first judgment of the ECJ appears in 2008), while the Bulgarian data almost triples (2.9). In this

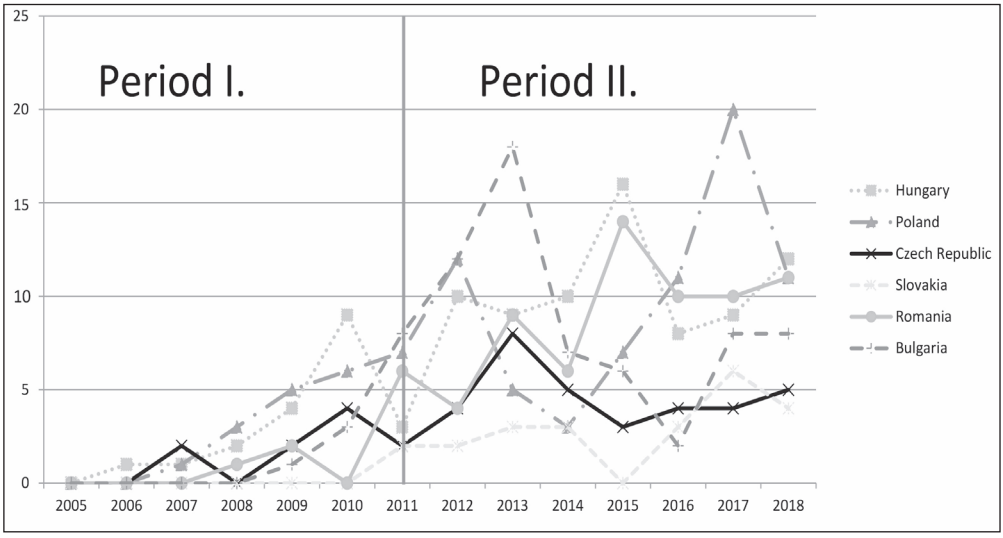
[4] 30 of 158 references are still pending (22 were made in 2018).

[5] Eurostat 2018.

[6] Kornai János, 'Még egyszer a rendszerparadigmáról, Tisztázás és kiegészítések a posztszocialista régió tapasztalatai fényében' (2016) October Közgazdasági Szemle 1074–1119; Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 (6) Foreign Affairs 22–43, 27; See also Unger Anna, 'A választás, mint rendszerkarakterisztikus intézmény' (2018) 23 Fundamentum 5–16.

respect, the result in Slovakia is staggering. There were some unsuccessful requests in the first period (3 cases closed by order), and only one request was qualified admissible in 2011. The ten-fold (10.5) increase from such a low base is not surprising and it still means only 3 judgments on average per year. In the case of Slovakia, the lack of successful requests for preliminary ruling procedures in the first period is due to the brevity of its pre-accession period and the consequent delay in adapting the judicial system to EU law compared to other Eastern European countries.[7] If we ignore the data for Slovakia as being an outlier, the Hungarian data of period II are not so surprising and they not only fit the general phenomenon of growth in the European Union, but also that of the Eastern European region, characterised by a three- or fourfold increase. This implies that the first period can be considered as a learning or training period, while the second one is a mature phase of consolidation and adaptation of the national judicial system to EU law.

Chart 1. Number of ECJ judgments according to referring countries (2005–2018)



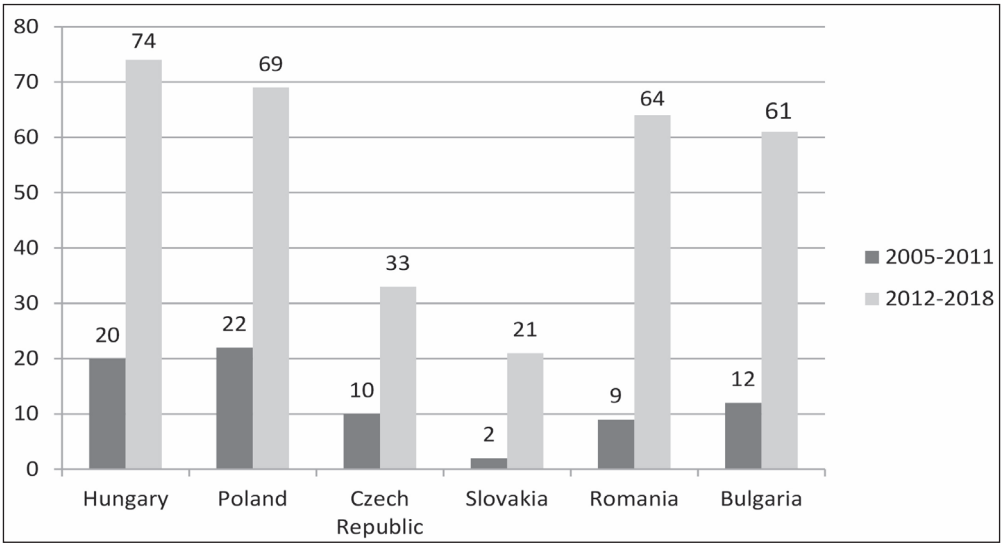
As demonstrated, there is one outlying data concerning Hungary in period I, the 9 judgments in 2010, which may be explained by the emergence of disputes concerning agricultural subsidies based directly on EU regulations (2 out of 9 judgments). Otherwise, in Hungary, the period 2012–2018 shows a constant rise. Although the chart illustrates some minor leaps in other countries, there is a clear upward trend in the last three years (2016–2018) in Poland, in the last four years in Romania (2015–2018), and in a four-year period in Bulgaria (2011–2014) peaking in 2012–2013. The number of requests for preliminary ruling proceedings remains relatively stable and high after that. As for the Czech Republic and Slovakia, there is a slow but steady increase with some irregular peaks in the number of references, taking into account that there

[7] In Slovakia the accession negotiations were actually launched in 1999, Mečiar's premiership, which resulted in a 5-6 year delay in preparation for EU Membership.

were no successful – i.e. admissible – requests until 2011 in Slovakia. The fact that in Poland the upward trend materialised just after the parliamentary elections in 2015, when serious tensions emerged due to the intervention in the justice system triggering an Article 7 procedure, raises suspicion about the correlation. This is also true in the case of Hungary, as the intention to transform the Hungarian court system had become apparent from April 2011. However, it may be a coincidence, especially taking the Romanian data into account, which weakens the former explanation, as it cannot be explained by such interventions. We have also seen that there are no fractures in the Czech data; the number of judgments shows a similar growth rate for the same period as for Hungary and Poland.

Despite the fact that a clear conclusion cannot be drawn from the trend change in period II, both the Hungarian legal theory[8] and the case law-study group of the Curia[9] have already noted that, among those countries that joined in 2004, the number of requests for preliminary rulings initiated by Hungarian courts is the highest. The Hungarian cases account for 3.5% of all judgments given by the ECJ, which is basically the same as the Polish data and more than double the Czech data, while the fall-off in the Slovakian data is proportional to the size (and population) of the country.

Chart 2. Number of ECJ judgments according to referring countries (2005–2018) in Period I. and Period II.



[8] Somssich Réka, 'Előzetes döntéshozatali eljárások – nemzetközi kitekintés a 2004-ben csatlakozott országok vonatkozásában' in Osztovits András (ed), *A magyar bírósági gyakorlat az előzetes döntéshozatali eljárások kezdeményezésének tükrében 2004–2014.* (HVG-ORAC 2014, Budapest) 32–33.

[9] <https://kuria-birosag.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf> accessed on 18 September 2019.

These data can be explained by structural (population, willingness to litigate, level of compliance with EU law) and non-structural, country-specific factors.[10] Although structural factors have some explanatory power, the significant deviations from the trend suggest that non-structural factors also play a significant role.[11] The larger the population, the higher the number of requests for preliminary rulings. Hungary is on the trendline,[12] so the data from other Eastern European countries seem to be low. However, any misconception that Hungary stands out in the region due to a high willingness to litigate should be dispelled. Analysing the number of administrative cases per 100 inhabitants in 2016, which we have compared with 2012 data (in the case of the Czech Republic, those of 2014) the rate is 0.2 in Hungary, 0.2 in Poland and 0.16 in Slovakia. The Romanian 0.6 and Bulgarian 0.35 rates are significantly higher, while the Czech willingness to litigate (0.11) is indeed significantly lower. The correlation coefficient is 0.441 between the number of the judgments of the ECJ in period II and the number of administrative cases per 100 inhabitants in 2016.[13] This is a weak relationship and cannot establish a causal connection. Ongoing infringement procedures are often used as an indicator for the level of compliance with EU law, but it does not constitute a high figure in Hungary either.[14]

Accordingly, these data do not confirm that the change in the political system in Hungary after 2010 had significant impact on the growing trend for requests for preliminary ruling proceedings and on the relationship between EU and national law. Therefore, it seems necessary to dig deeper, as well as to identify the cases of references influenced by the political change in 2010 by means of a qualitative analysis and finally to show the summary of the structural effects, if there are any.

The number of requests for preliminary ruling procedures can be influenced by non-structural, country-specific factors, such as language skills, specialised training, judicial preparedness for the enforcement of EU law, national judges' attitude towards parties' initiatives and the time and cost of such proceedings before the ECJ.[15] The first three issues are going to be discussed in Chapter 3, while in Chapter 4 we turning to other issues explored by the legal literature on preliminary rulings, such as turf wars inside the judiciary.

2 The Weight of Administrative Cases in the Number of Requests for Preliminary Rulings

In Hungary, 2/3 of the requests for preliminary ruling procedures are referred to the ECJ by administrative courts, whether based on the number of requests (65.6%) judgments of the ECJ (64.5% and 66.3%[16]), or even pending cases (63.3%).

[10] Morten Broberg, Niels Fenger, 'Variations in Member States Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?' [2013] European Law Journal.

[11] Várnay Ernő, 'Előzetes döntéshozatali eljárás – nemzetközi kitekintés' in (n 8) 51–67.

[12] Várnay (n 11) 52.

[13] CEPEJ Efficency of judicial system.

[14] Report from the Commission SWD(2018)377.

[15] Várnay (n 11) 55–58.

[16] We have taken into account the joined cases separately.

Chart 3. Number of successful and ongoing Hungarian courts requests to ECJ according to the nature of cases and all in each year

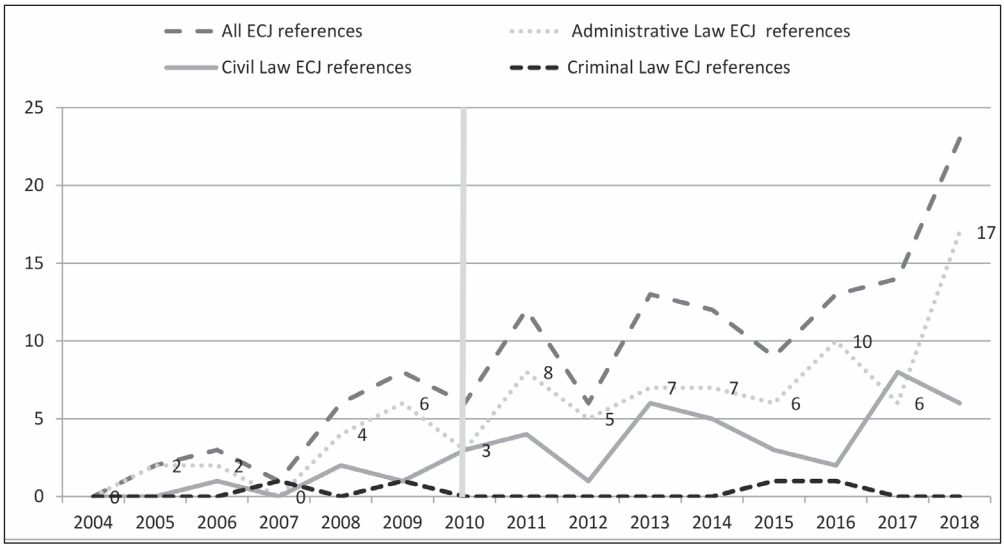
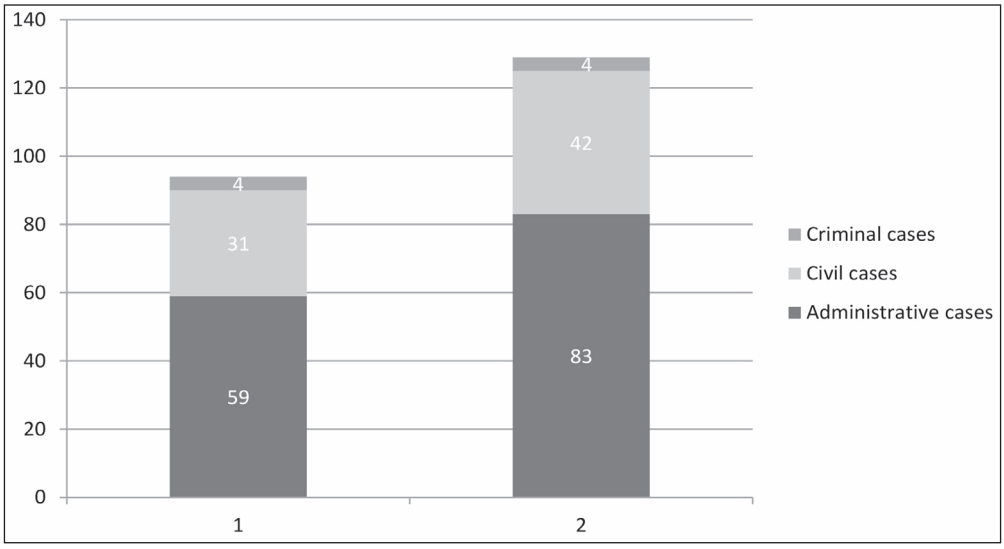


Chart 4. ECJ judgments delivered on the initiative of Hungarian courts and successful and ongoing procedures according to the nature of cases (2004–2018)

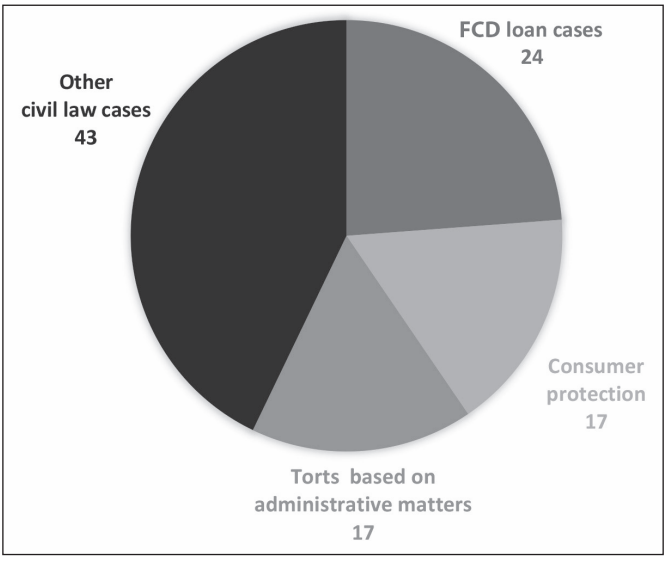


The charts show that no successful request has been submitted by Hungarian labour courts since 2004. Regarding criminal cases, there were 4 requests and 4 judgments of the Court. Accordingly, administrative and civil courts dominate the requests for preliminary rulings in

a 3:1 ratio. This not only shows the overwhelming importance of administrative justice in the enforcement of EU law, but it also proves that administrative courts in Hungary determine the trends of requests for preliminary rulings.

In addition, 16.6% of the 42 civil court requests were partly related to administrative matters. For example, the judgment of the Court (C-56/13) concerning compensation for damages caused in the exercise of public authority in relation to measures controlling avian influenza,[17] or the *Incyte Corporation* case (C-492/16) could both be considered from a theoretical point of view as administrative cases.[18] In this latter case, the National Intellectual Property Office refused to grant the rectification of the date of expiry of a supplementary protection certificate for a medicinal product developed by Incyte. Furthermore, we include among the administrative law-related matters three public procurement cases, one case on the regulation of the gambling market, and the *Eurospeed* case (C-287/14)[19] which concerned compensation for the damage resulting from fines imposed by Szeged Administrative and Labour Court.

Chart 5. Types of request for preliminary ruling procedures made by civil courts (2004–2018, percentage)



Considering that nearly 25% of the references made by civil courts were brought before the Court in the so-called 'foreign currency-denominated loan cases' ('FCD loan cases' in the graph), linked to a specific and unique legal and social situation, we can assume that the implementation of EU law is primarily based on administrative justice in Hungary. This observation is

[17] C-56/13, *Érsekcsanádi Mezőgazdasági Zrt. v Bács-Kiskun Megyei Kormányhivatal,* ECLI:EU:C:2014:352.
[18] C-492/16, *Incyte Corporation v Szellemi Tulajdon Nemzeti Hivatala,* ECLI:EU:C:2017:995.
[19] C-287/14, *Eurospeed Ltd v Szegedi Törvényszék,* ECLI:EU:C:2016:420.

confirmed by the fact that the criminal and a third of the civil cases classified as 'other civil law cases' (6 of 18 [42% on the graph]) in the above graph are related to subject matters that can be subject to classic international agreements. These do not require the level of integration already achieved in the EU, even if their enforcement is more effective as EU law. These matters include cases of jurisdiction in civil matters, mutual recognition of judgments and judicial cooperation, which are traditionally international private law matters, regulating the relationships between natural and legal persons of different nationalities. Beyond these international private law issues, civil courts promote EU integration by deciding compensation claims for damages due to EU law infringements,[20] and with the enforcement of the four basic freedoms and consumer protection regulations. An emerging area is the private enforcement of competition law, including litigation on prohibited state aid. In this regard, the first two requests have already been submitted before the ECJ (C-451/18 and C-672/13)[21]. This means that, in the end, civil courts are expected to implement important EU policy, even if the number of cases is not expected to reach that of foreign currency-denominated loan cases. These have been 60% of the requests for preliminary rulings filed by Hungarian civil courts (10 + 7 + 7 = 24 cases between 2004 and 2018).

In contrast, administrative law cases requiring preliminary rulings directly concern the policies of the EU as, in the implementation of EU law, Member States' public administrations are essentially orientated by the case law of national administrative courts. While civil court judges meet EU law in a small, but rapidly rising percentage of the cases, dealing with EU law has become commonplace for administrative law judges. In addition, the types of cases invoking EU law are usually the more difficult and complex ones (public procurement, competition law, environmental protection, tax law) and cover – at least in Budapest – cca. 70% of the overall number of cases.[22] Hungarian judges apply national law in the light of EU law every day; where necessary, they also routinely set aside national law in favour of EU law without a reference for preliminary ruling. Furthermore, cases referred for preliminary ruling generally affect several other cases, as the same legal question often appears at the same time in different cases. While the ECJ has never joined civil court cases, six joined administrative cases (including withdrawn references involving two pairs of joined cases 2-2 cases) were judged by the ECJ. The number of withdrawn requests may therefore indicate that the same legal question is at issue in ongoing cases before the national courts. For example, two of the four

[20] Varga Zsófia, *Az EU jog alkalmazása – Kézikönyv gyakorló jogászoknak* (Wolters Kluwer 2017, Budapest) 173–176.

[21] Győri Ítélőtábla (Hungary) lodged on 10 July 2018 — *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF TRUCKS N.V.* and JUDGMENT OF THE COURT (Sixth Chamber) 19 March 2015 C-672/13, *OTP Bank Nyrt. vs Magyar Állam, Magyar Államkincstár,* ECLI:EU:C:2015:185.

[22] Data of Budapest Metropolitan Court and Administrative and Labour Court of Budapest (2017), Annual Statistical Yearbook of Hungarian Judiciary, 2017 published by NOJ, <https://birosag.hu/statisztikai-evkonyvek> accessed on 05 June 2019 The proportion of initiated administrative cases in Budapest is 1 to 3 (cca 30%) compared to countryside courts, although almost 50% of requests of preliminary references stemmed from Budapest (31 from 68). It shows, too, that cca 40% of administrative cases have an obvious connection with EU law. We estimated – in respect of the proportation of requests for preliminary references, and considering the above mentioned data – that 50% of cases are linked to EU law.

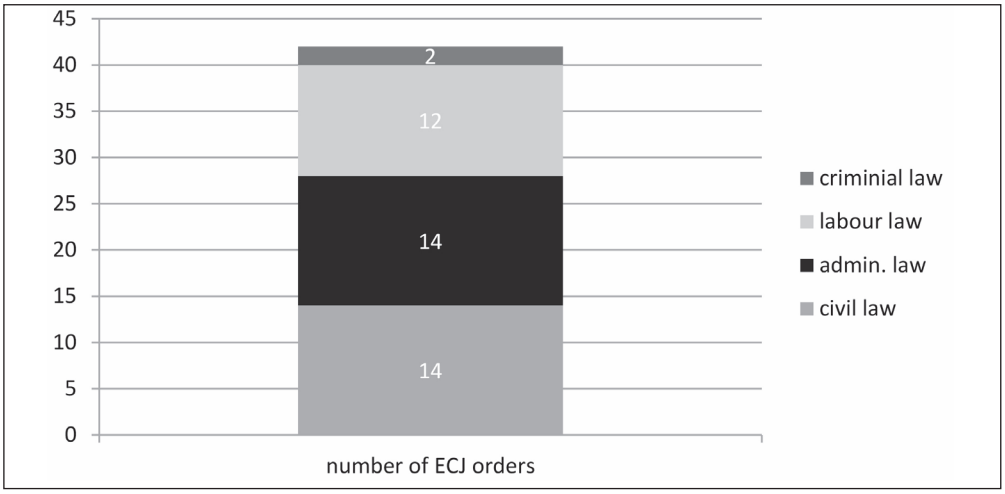
withdrawn administrative cases concerned the nature of HIPA, the local business tax (joined cases C-283/06, C-312/06).[23]

In our view, the independence of the administrative judiciary is a cardinal and strategic issue for the European Union and Hungary. This statement can be supported by the thorough analysis of preliminary ruling procedures in this article. The interaction between EU and national law would cease to exist without the independence of administrative courts, which is likely to lead to the creation of a colonial-type, isolated coexistence of the two legal systems.[24] Our conviction is that it is neither in the interest of Member States nor in the interest of the EU.

III Quality of References in Administrative Cases

It is worth exploring briefly how effective the relationship between national and EU law is. Perhaps the best indicator for this is a comparison of cases ending with judgment and order. One in five (18.9%) requests concerning administrative matters, and one in three civil cases (31.8%) have ended with an order. Although 33% of criminal cases were closed by an order, it only means that 2 out of 6 requests were unsuccessful, while all the 12 references regarding labour cases resulted in an order.

Chart 6. All ECJ orders according to judicial branches (2004–2018, Hungary)



[23] C-283/06, *KÖGÁZ Rt. és társai v Zala Megyei Közigazgatási Hivatal Vezetője* and C-312/06, *OTP Garancia Biztosító Rt. v Vas Megyei Közigazgatási Hivatal,* ECLI:EU:C:2007:598.

[24] Shalini Randeria 'Példabeszéd a Neemfáról, a jog transznacionalizációja ás a civil társadalmi szereplők szerep' [2003] Eszmélet 60, <http://www.eszmelet.hu/shalini_randeria-peldabeszed-a-neemfarol-a-jog-transznacio/> accessed on 18 April 2019.

The content of orders varies greatly; therefore it is difficult to draw a clear conclusion from these numbers. Some of them contain substantive answers, where the referring court had not recognised that there already was clear case-law in that matter. In these cases, as in those of withdrawal of a reference, ECJ case-law often develops after the request. As such, we cannot reach an unambiguous conclusion about quality problems. A more accurate conclusion can be drawn from orders based on manifest inadmissibility or lack of jurisdiction. All orders delivered on requests for preliminary ruling submitted by the Hungarian labour courts in 2012–2013 concerned the dismissal of civil servants without justification. The abundance of the references was a judicial reaction to the new legislation adopted by the new government in 2010. The Hungarian Constitutional Court annulled the provisions in question *'pro futuro'*, which did not remedy the situation of the government employees concerned.[25] The referring courts (Curia, Budapest Metropolitan Court, Administrative and Labour Court of Budapest and Debrecen), which had just been placed under institutional reform at that time, expected the restoration of rule of law and the implementation of the Charter of Fundamental Rights of the European Union. The ECJ dismissed these requests on the ground of lack of jurisdiction, owing to the inapplicability of the Charter, since the legal context of the dismissal of the civil servants did not concern the implementation of EU law. A possible explanation for this outcome is that Hungarian labour court judges were not sufficiently prepared to cope with EU law matters, but the truth is that the scope of the Charter was rather equivocal at that time. The *Akerberg Fransson* judgment was only delivered on 26 February 2013 (C-617/10) and until then it was ambiguous whether the fundamental rule of law guarantees would be enforceable by EU law.[26]

This argument is confirmed by case C-45/14.[27] The ECJ dismissed a reference for a preliminary ruling submitted by a Hungarian criminal court based on manifest lack of jurisdiction of the Court because of the inapplicability of the Charter. The other – and the first Hungarian – reference for a preliminary ruling made in criminal proceedings, was in the Vajnai case (C-328/04).[28] The request concerned the interpretation of the principle of non-discrimination as a fundamental principle of EU law in the course of criminal proceedings brought against Mr. Vajnai for the violation of the Hungarian Criminal Code, which sanctioned the use of 'totalitarian symbols' (the five-point red star) in public. The ECJ stated that it had no jurisdiction over national provisions outside the scope of EU law and in cases when the subject matter of the dispute is not connected in any way to any of the situations contemplated by the treaties. It was clear for the Court that Mr Vajnai's situation was not connected in any way to any of the situations contemplated by the provisions of the treaties and the Hungarian provisions applied in the main proceedings were outside the scope of EU law. The legal assessment of the use of the five-point red star in public was not at all uniform in the Hungarian and European practice and theory. In the end, the ECtHR and not the CJEU solved

[25] 8/2011. (II. 18.) AB határozat.
[26] Blutman László, *Az Európai Unió Joga a gyakorlatban* (HVG-ORAC 2013, Budapest) 531.
[27] C-45/19, *Compañía de Tranvías de la Coruña,* ECLI:EU:C:2014:2021.
[28] C-328/04, *Vajnai Attila,* ECLI:EU:C:2005:596.

the problem – again.[29] In our opinion, it is not possible to draw a general conclusion from these cases, because the relatively high proportion number of orders the Court delivered on the initiative of Hungarian criminal courts was due to the small number of references and not to inadequate preparation. The occurrence of some false erroneous references is in fact the sign of the proper functioning of the judiciary. Occasional mistakes must not prevent national courts from exercising their powers guaranteed by the treaties.

However, the slightly lower level of preparedness of civil judges compared to that of administrative law judges can be demonstrated by the 1:5 to 1:3 ratio of the 74 administrative and 44 civil court orders received on reference. This observation is supported by the fact that only 2.7% of the administrative law requests were dismissed based on manifest inadmissibility or lack of jurisdiction of the Court, while in civil matters 11.3% of the references fall into this category. The proportion of reasoned orders[30] is the same regarding administrative (8%) and civil (9%) cases. The latter data may indicate that the interpretation of the referring court and the ECJ on the existence of relevant practice differs once in every 10 cases. This incidence seems acceptable. The remaining orders concerned either cases with a factual basis from Hungary's pre-accession period or withdrawn references, from which it is impossible to draw exact conclusions. The quality of the references is not measurable based on withdrawn cases, which is well-illustrated by cases C-447/06 and C-195/07 related to local business tax.[31] The Court delivered its judgment in the joined cases C-283/06 and C-312/06.[32] The fact of the withdrawal in these cases shows only that the same legal issue arose in several cases in the national practice of the taxation authorities, which can result in simultaneous requests. For the sake of comparison, we looked at the number of orders in the EUR-Lex database with the search criteria of 'country of origin' and discovered that the number of orders in Romania is peaking, while the number of orders in Polish cases is slightly lower. All in all, we might also conclude, based on the available data, that the slightly weaker Hungarian performance can be attributed to the weaker performance of civil courts. The real question is, however, whether this is just a weaker performance during an initial period and the courts will improve or the capabilities capacity of the courts will stay as they are.

In Hungary, due to the specific linguistic conditions, the level of foreign language proficiency is lower than in other Member States. The Hungarian judicial system has been trying to eliminate this disadvantage by establishing the institution of the ELAN. In 1999, 46 judges were appointed as national trainers and by 2002 this trainer network consisted of 58 judges. In 2009, the participating judges were awarded the title of European law judicial

[29] Legfelsőbb Bíróság (Supreme Court of Hungary) Kfv. II. 38.073/2010/4, EJEB *Vajnai v Hungary,* judgment of 8 July 2008, no. 33629/06, 3/2013. (II. 14.) AB határozat.

[30] Article 99 of the Rules of Procedure of the Court of Justice: Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge Rapporteur and after hearing the Advocate General, decide to rule by reasoned order

[31] C-447/06, *Vodafone Magyarország Mobil Távközlési és Innomed Medical Orvostechnikai,* ECLI:EU:C:2007:216; C-195/07, *OTP Bank és Merlin Gerin Zala,* ECLI:EU:C:2007:686.

[32] C-283/06 and C-312/06, *OTP Garancia Biztosító,* ECLI:EU:C:2006:602.

advisor; their role is to provide professional advice to judges in EU law matters. The centralisation of the network was completed in 2013, after the 12 requests for preliminary rulings submitted by Hungarian labour courts were dismissed for lack of jurisdiction. The network is chaired by the President of National Office for the Judiciary. Its actual operation can be evaluated from 2015 on the following graph.

Chart 7. Number of orders according to country of origin (2004–2018) without withdrawn cases[33]

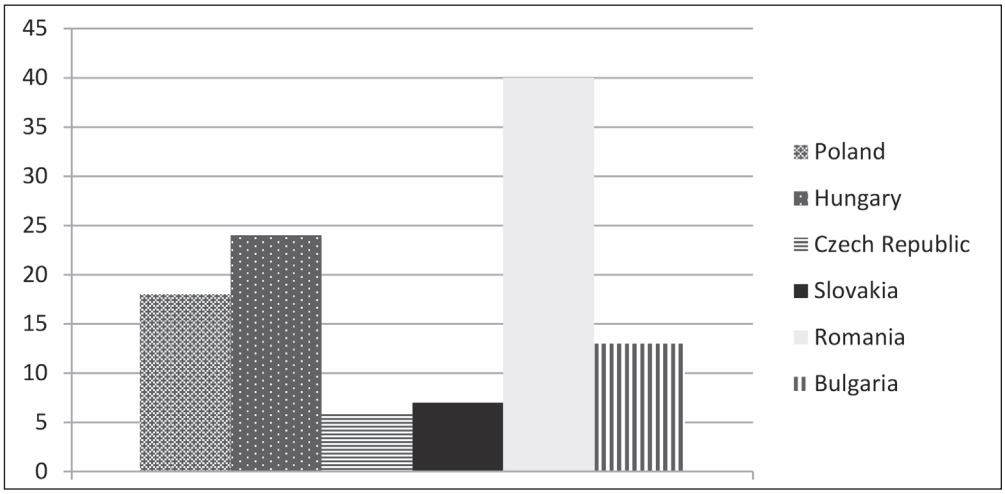
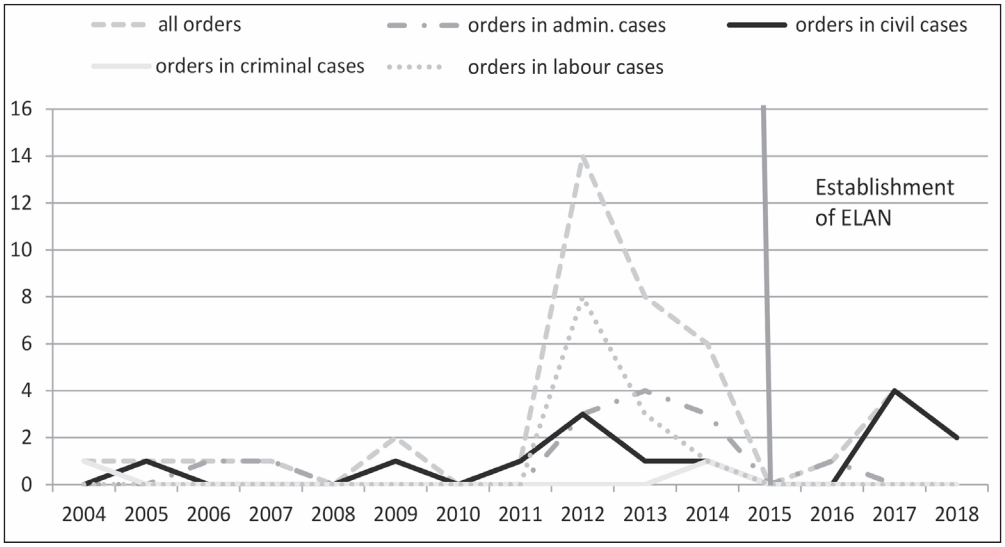


Chart 8. Preliminary ruling procedures ending with order according to judicial branches (2004–2018)



[33] In case of Romania and Bulgaria: 2007–2018.

While the number of references has not decreased, the number of requests ending with an order has decreased significantly. Due to the low number of criminal cases, no meaningful conclusion can be drawn for criminal courts, but the number of administrative and labour law references ending with an order has reduced to almost zero. In 2014, the Court dismissed two – very poor quality – administrative law requests for preliminary rulings on the ground of manifest inadmissibility, while in 2015 the Court delivered one reasoned order on the initiation of one of the administrative law panels comprising a European law judicial advisor (C-28/16), by qualifying the referred questions as *'acte clair'*. The occasional and rare occurrence of such cases is not a mistake, but rather the normal operation and dialogue between the ECJ and national courts. However, this is not the case for civil courts' requests.

One of the requests for preliminary ruling in 2014 resulting in manifest inadmissibility was known to the ELAN, but the newly appointed judicial advisor was insufficiently prepared and gave inappropriate advice.[34] The other case where the reference was manifestly unfounded on several grounds was completely out of sight of the network.[35] Orders delivered by the Court based on manifest inadmissibility or lack of jurisdiction indicate a malfunction in the network. There are two causes: either the judicial advisor can reach the judge opting for referring questions to the Court but does not give proper advice, or the advisor cannot even reach the referring judge. It can be clearly seen from the above chart that in 2017–2018 there were six orders in civil cases, two of which were reasoned orders, while three others were completely and one was partly manifestly inadmissible. In our view, this implies that the network operates efficiently where it has been configured in a matrix system, meaning that all court levels and judicial communities are covered by at least one judicial advisor. This was feasible in the relatively small administrative law judge community (100–120 judges)[36], while such access to the numerous (several thousand) civil and criminal law judges was not possible. In addition, since the centralisation, the network has become a self-training group of civil and criminal law counsellor judges, who put more emphasis on judicial advisors' professional training than on providing EU law advice.

[34] C-356/14, *Hunland-Trade Mezőgazdasági Termelő és Kereskedelmi Kft v Földművelésügyi Miniszter,* ECLI:EU:C:2014:2340.

[35] C-204/14, *István Tivadar Szabó v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága,* ECLI:EU:C:2014:2220.

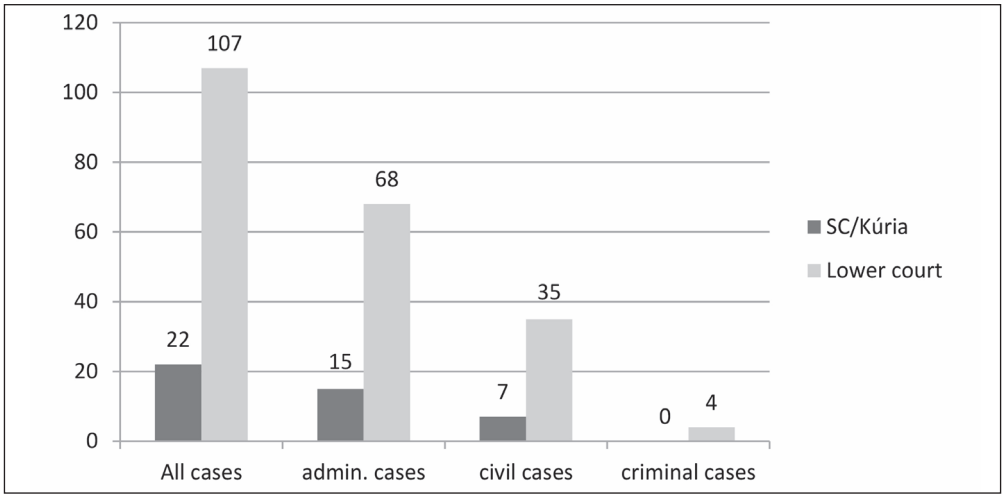
[36] The number of administrative judges has been increasing strongly in the last two years due to the challenge of setting up separate administrative courts for the future. Many new judges have come from administrative bodies, thus by 30 April 2019 162 judges had decided to enter the new administrative court system, which was finally not established.

IV Requests for Preliminary Ruling Procedures According to Levels of the Hungarian Judicial System

Between 2004 and 2013, there were three administrative court levels. General courts at county level heard administrative cases in the first instance. The Regional Court of Budapest heard appeals brought against decisions delivered by general courts. The *Supreme Court* was the supreme and final judicial body of Hungary, hearing motions for review in administrative matters, ensuring that courts apply the law uniformly, and adopting law harmonisation decisions binding on all courts. Since 2013, administrative and labour courts have been operating in the first instance. Until the end of 2017, general courts heard appeals delivered by administrative and labour courts in cases specified by law. The Curia (The name of Supreme Court from 2012) and its administrative section is the supreme administrative judicial body in Hungary. The general appeal function of general courts ceased to exist from 2018, and the Budapest Metropolitan Court became the first instance administrative court in priority administrative cases, such as public procurements, competition law and media law. Meanwhile 8 of the 20 administrative and labour courts were transformed into general first instance administrative courts hearing 95% of administrative cases.

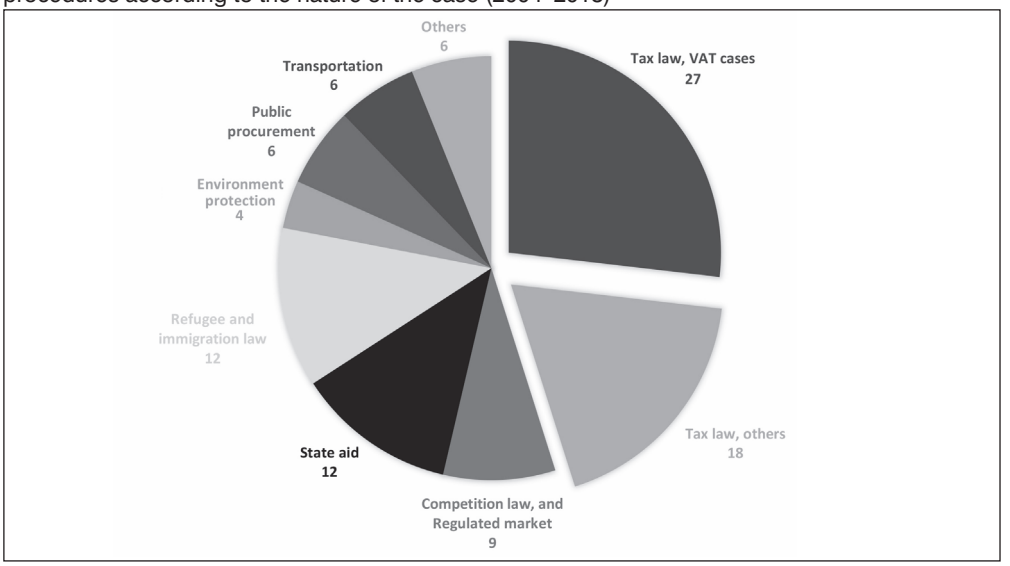
For the purposes of Article 267 TFEU, it is important to distinguish between the Curia taking the final decision in most of the cases and the other lower courts. 15 of 22 requests made by the Curia resulting in a judgment before the Court were submitted by the administrative, and 7 by the civil section of the Curia, while 68 of 106 references judged on the initiation of lower courts belonged to the administrative branch, 7 (as seen below in the graph) concerned civil law and 3 in criminal cases. 18% of the references belonged to the Curia in administrative, and 16% in civil matters. It follows that the large number of requests was due to the overwhelming activity of lower courts.

Chart 9. References according to judicial instances (2004–2018)



In period I, there was only one Supreme Court request, in 2006, which followed the references of the lower courts relating to local business tax (C-283/06 C-312/06 Joined Cases)[37] and was joined to the request made by a lower court in Zala County. All other requests were submitted in period II. The number of administrative law requests started to increase in 2011. This shows that the activity of the lower courts has triggered the sensitivity of the Supreme Court to EU law, even though the difference in time can also be partly explained by the fact that the first cases in which applications concerned European law were brought only later before the supreme judicial body. Half of the references are VAT cases, except for the first local business tax case. In addition, requests concern competition law (2), state aid (2), consumer protection (1), immigration policy (1) and data protection (1). Five of the taxation cases stem from the administrative panel of the Curia (Supreme Court), one of whose members is the European advisor judge of the Curia while five of the references concerning 'classic' administrative law fields were initiated by the administrative panel, a member of which is responsible for the coordination of European law advisor administrative judges (one of this publication's writer). A few more references emerged from other panels, which reflect the continuous development of implementing EU law in the national case law.

Chart 10. Percentage of administrative law references (successful and ongoing) for preliminary ruling procedures according to the nature of the case (2004–2018)



It is clear that every 4th reference (every 5th judgment) is related to VAT. A third of the judgments (37.45%) and about half of the references (45.12%) concern tax matters. During the same period, 18.02% of all the judgments of the ECJ concerned tax law, which shows that tax

[37] C-283/06 (n 23) ECLI:EU:C:2007:598.

law requests outweigh all other fields of law in the Hungarian practice (or the number is too low in other cases). VAT cases are followed by (agricultural) state aid cases (10), which relate to a field of law totally governed by directly applicable regulations, so almost each case requires the interpretation of EU law. Then come a relatively large number of requests concerning asylum and immigration policy, and competition law in a broad sense.

V Evaluation of References According to Fields of Law

1 Taxation and Customs

There are 26 judgments given by the ECJ and 8 preliminary ruling procedures are pending in the field of taxation and customs. Most of the cases are VAT cases. In this field, 22 references were submitted; 5 of them are still pending and the ECJ has given 16 judgments representing 60% of all tax and customs cases. In most of these cases, tax authorities refused to allow the right to deduct input value added tax (VAT) on transactions considered to be suspicious. According to the applicable Taxation Act, the right of deduction may only be exercised by persons who hold documentation attesting to the amount of tax charged. Invoices, simplified invoices and documents that take the place of an invoice, made out in the name of the taxable person, are to be considered to constitute such documentation. In addition, Paragraph 44(5) of the VAT Act provides that the issuer of the invoice or simplified invoice shall be responsible for the veracity of the information given therein. According to the ECJ, the prevention of possible tax evasion, avoidance and abuse is an objective recognised and encouraged by EU law and it cannot be relied on for abusive or fraudulent ends. Therefore, it is a matter for the national authorities and courts to refuse to allow the right to deduct where it is established, based on objective evidence that the right is being relied on for fraudulent or abusive ends. A taxable person can be refused the benefit of the right to deduct if it is established, on the basis of objective factors that the taxable person knew, or ought to have known, that that transaction was connected with fraud previously committed by the supplier or another trader at an earlier stage in the transaction. We have to add that this had already been a well-known problem in Hungarian theory and practice before the accession to EU.[38]

The phrase 'the issuer of the invoice shall be responsible' in Paragraph 44(5) was considered by Hungarian administrative courts as a special form of civil liability. The tax authority used this interpretation to refuse a taxable person (recipient of the invoice) the right to deduct from the VAT, which he is liable to pay, the VAT due or paid in respect of services supplied to him. The ground for this was only that the issuer of the invoice relating to those services, or one of his suppliers, acted improperly, without that authority establishing that the taxable

[38] C-80/2011 and C-142/11; Élise Daniel, 'Droit à la déduction de TVA' (2017) 12 Europe 35; Gyekiczky Tamás, 'Az Európai Bíróság ítélete magyar adóügyekben – A hozzáadottérték-adó levonásához való jog adóhatósági megtagadásáról' (2013) 2 Jogesetek Magyarázata 42–54.

person concerned was aware of that improper conduct or colluded in that conduct himself.[39] The Taxation Act was complemented later by the rule that the taxation rights of the taxable person indicated as the purchaser in the receipt may not be called into question if that person acted with due diligence as regards the chargeable event, bearing in mind the circumstances under which the goods were supplied or the services performed. This modification did not have a significant impact on the case-law. Although the non-payment of VAT by invoice issuer could no longer justify the refusal of VAT deduction by the taxable person, supply-chain arguments (i.e. deduction may be refused in the case of a supply chain with non-existent or improper transactions) however continued to allow this practice. Despite the legislative and theoretical efforts, only the intervention of the ECJ was able to overcome these barriers.

The large number of references for preliminary ruling procedures connected to this topic show the slow process of how national authorities have changed the way they have thought about tax evasion and the right to VAT deduction. The ECJ – by means of the preliminary ruling procedure – had a key role in the transformation of national case law and administrative practice.[40] New and more effective technological devices have been developed and launched against tax evasion (for example online cash-registers and implementation of the EKÁER, Electronic Trade and Transport Control System). The case law of the ECJ has made an extra-ordinary contribution towards the creation of a 'client-friendly' and supportive attitude by tax authorities, which were at least partly forced to leave behind the punitive approach to taxpayers.

The other smaller group of requests within taxation cases consists of industry-based discriminatory tax issues resulting directly from the political change in 2010. It includes store retail trade (Hervis 2014, national tax legislation establishing an exceptional tax on the turnover of store retail trade), advertisement tax (Google 2018) and references concerning discriminatory taxation resulting in prohibited state aid (Tesco 2018).

One of the largest ECJ judgments in terms of financial effects[41] ruled that the HIPA (local business tax) differed from VAT so much that it could not be characterized as a turnover tax for the purposes of Article 33(1) of the Sixth Directive. In the *Nádasdi* case, involving a wide range of other consumers, the ECJ declared that a vehicle of the same model, age, mileage and other characteristics, bought second-hand in another Member State and registered in Hungary, attracted the full rate of registration duty for that category of vehicle. The duty was thus a heavier burden on imported used vehicles than on the similar used vehicles already registered in Hungary, which have already borne that duty at an earlier stage. Thus, although the purpose of and reason for the registration were environmental in nature and unrelated to the market value of the vehicle, the consequence of the first paragraph of Article 90 EC was that account must be taken of the depreciation of used vehicles when they were being taxed. The duty was characterised by the fact that it was charged only once when the vehicle was first registered

[39] Kovács András, 'Közigazgatási Jogi Felelősség egyes kérdései az ÁFA perek gyakorlatában' (2003) 58 (11) Jogtudományi Közlöny 471–481.
[40] Juhász Endre, 'Magyarország és az Európai Unió Bírósága' (2014) 61 (April) Közgazdasági Szemle 373–390.
[41] Juhász (n 40) 379.

for use in the Member State concerned and was thus incorporated in that value. The facts of these disputes were linked to period I. However, the largest taxation case ever in which a Hungarian administrative court submitted a reference for a preliminary ruling was the *Webmindlicenses* case in 2014. Here the taxpayer prevailed and the tax authority – again – had serious difficulties in obtaining evidence lawfully and establishing the facts.

2 Proportionality of Administrative Penalties

Four of the five cases concerning transport touch on the topic of proportionality of administrative penalties, but they overlap with taxation cases as well and so these cases may cover several issues.

The inefficiency in taking evidence on the part of the Hungarian public administration, as seen in taxation cases, is a more general problem. In transport cases, it is demonstrated by the institution of strict liability penalties, meaning a flat-rate fine for all breaches, no matter how serious they are. Recognizing the imperfections of the Hungarian administrative operation, the ECJ accepted the system of strict liability as a whole in the *Urban* case, but the judgment shows inconsistency. Questioning the proportionality of the punishment, it applies the '*little guilty*' principle. The Hungarian administrative law theory already pointed out that it is hard to compare a Danish truck driver's income level to a Hungarian truck driver's. In spite of the prohibition of discrimination on the basis of nationality, different amounts of fines could be considered proportionate according to this judgment.[42] The Urban judgment has been applied by Hungarian administrative courts with much difficulty. The inconsistency of this judgment is also obvious here: if the system of administrative penalties based on strict liability can be justified: in other words, a penalty must be imposed without any margin of appreciation and the administrative court shall not be capable of exercising judicial discretion in order to deliberate the proportionality of the fine. It is illustrated by the administrative court judgement delivered on the basis of C-384/17, which declared the imposed penalty disproportionate by setting aside the Government Decree that regulated the amount of fines for breaches of certain provisions concerning the transport of goods and persons. Instead, the court applied the provisions of the Act on Road Transport, which were not fully applicable to the case, hence their application them seems somewhat arbitrary. At same time, it is quite understandable that the court tried to create a legal framework to meet the requirements of EU law and find a national legal basis for imposing proportionate penalties.

According to the position of the ECJ (C-255/14), Article 9 (1) of Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Community[43] must be interpreted as

[42] András Kovács, Márton Varju, 'Hungary: The Europeanization of Judicial Review' (2014) 20 (2) European Public Law 224–225.

[43] Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community.

precluding national legislation, such as that at issue in the main proceedings. The legislation in question imposed a payment of an administrative fine of up to 60% of the amount of the undeclared cash, where that sum is more than EUR 50,000, in order to penalise the failure to comply with the obligation to declare. The case again concerned the proportionality of administrative penalties. The ECJ recognised in this case that the requirement that the penalties introduced by the Member States under Article 9 of Regulation No 1889/2005 must be proportionate does not mean that the competent authorities must take account of the specific individual circumstances of each case. However, in light of the nature of the infringement concerned, namely a breach of the obligation to declare laid down in Article 3 of Regulation No 1889/2005, a fine equivalent to 60% of the amount of undeclared cash, where that amount is more than EUR 50 000, was disproportionate. Such a fine goes beyond what is necessary in order to ensure compliance with that obligation and the fulfilment of the objectives pursued by that regulation.

In nearly all fields of administrative law, the Hungarian legislation tends to solve the inefficiency of taking evidence and the lack of a comprehensive doctrine of administrative law responsibility by devising serious and non-discretionary administrative penalties, which cannot be effective.[44] However, it is likely that sooner or later the EU law will enforce the application of the results of domestic legal theory using preliminary ruling proceedings.

3 Competition Law and State Aid

Of the seven competition law cases, only two concerned agreements with an anti-competitive aim. The judgment in the *Allianz* case is a rare example of how EU law is shaped by national law and not vice versa. This decision made the concept of 'restriction of competition by object' fluid. According to the ECJ, in order to determine whether an agreement involves a restriction of competition 'by object', regard must be paid to the content of its provisions, its objectives and the economic and legal context of which it forms a part.[45] When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account.

The other case, the so-called *MIF cartel* case, is still pending. Nevertheless, there are only a few 'classic' competition law cases, despite the fact that even the administrative decisions

[44] Nagy Marianna, *A közigazgatási jogi szankciórendszer* (Osiris 2000, Budapest) 111–121.

[45] Nagy Csongor István, 'Állítsátok meg Leviatánt! A „versenyellenes cél" új fogalma a versenyjogban' in Nagy Csongor István, Kiss Ferenc László, Valentiny Pál (eds), *Verseny és Szabályozás* (KRTK KTI 2016, Budapest) 163–194; and 'The Concept of Anti-competitive Object Under EU Competition Law: Comparative Perspectives and European Realities' in Adriana Almășan, Peter Whelan (eds), *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges* (Springer International Publishing 2017, Cham, Studies in European Economic Law and Regulation 9) 55–70.

adopted exclusively on the basis of national law by the Hungarian Competition Authority are generally based on the soft law of the Commission and the case-law of the ECJ. This is also a consequence of the Allianz case, which was also based solely on national competition law. The explanation for this small number is that the ECJ has a well-established and extensive case-law in the field of competition law and so many questions can be answered without a request for a preliminary ruling. It is also typical that the parties attempt to initiate a reference for a preliminary ruling on questions of evidence (direct or circumstantial evidence, *unum testis* etc.), while the Hungarian administrative courts have so far only submitted questions on legal issues. In addition, the Hungarian Competition Authority's ability to take appropriate evidence is not questioned in general by administrative courts, compared to other administrative authorities' capabilities.

There are many more competition cases concerning regulated or state-controlled markets. Requests for preliminary rulings in relation to electronic communication also encompass cases regarding the principles of the freedom to provide services and the free movement of goods. In the *E.ON* case, E.ON Földgáz, the holder of a gas transmission authorisation, lodged several requests for long-term capacity allocation at the entry point of the gas interconnector between Hungary and Austria with the Hungarian manager of the gas transmission network. Given that those requests clearly exceeded the capacity available at that entry point, the network manager requested the regulatory authority to inform him what position had been adopted on those requests. Following the network manager's request, the regulatory authority adopted a decision that amended the previous decision approving the network code. It thus redefined the rules of the network code governing the allocation of capacity for a term longer than one gas year. E.ON brought an action before the national administrative court for the annulment of the decision concerning capacity allocation mechanisms relating to the gas year 2010/2011, but its action was dismissed. The regional court also dismissed the appeal brought by E.ON, on the grounds that the company did not have *locus standi* in the judicial review of an administrative decision concerning the network code. E.ON had failed to show that it had a relevant direct interest in relation to the contested provisions of the decision, insofar as it had not concluded a contract with the network manager and the decision referred only to that. Under Hungarian law, a party to an administrative procedure only has *locus standi* to bring an action against an administrative decision only that action is directed against a provision of the decision that directly affects its rights. It raises the question therefore whether the interest on which E.ON relies, which it describes as an economic interest, can constitute a direct interest capable of conferring *locus standi* on that applicant in the context of a legal action against a regulatory decision in the sphere of energy. According to the ECJ's ruling, the relevant EU law must be interpreted as precluding national legislation that, in circumstances such as those at issue in the main proceedings, does not make it possible to confer on an operator, such as E.ON, *locus standi* to bring an action against the decision of the regulatory authority on the gas network code. The ECJ has broken down the principle of Hungarian administrative law, which says that competitors, market participants do not have *locus standi* in general to bring an action against an administrative decision with reference only to an

economic interest. This also illustrates that the efficiency of administrative disputes concerning administrative acts of sector-specific national regulatory bodies could still be improved. In relation to the gambling industry, Hungarian administrative courts submitted three requests for preliminary rulings concerning market regulation and barriers to market entry contrary to EU law. These cases can be explicitly linked to the modification of the regulatory system introduced after 2010.

Out of the ten references concerning state aid, nine are directly linked to agricultural subsidies and cover different interpretations of the directly applicable EU regulation. The relatively high number of requests for preliminary rulings is entirely natural, considering that both the substantive and procedural rules of this field are defined by EU law and therefore Hungarian administrative courts apply EU law directly in every case. More than half of the cases (four) ended in 2009-2010, which shows that the novelty of this field of law induced a higher number of requests. Subsequently, in period II, there were only three cases between 2010 and 2017 in which the ECJ ruled substantively, and another request was manifestly inadmissible. Compared to this data, there were surprisingly many references (three) in 2018, two of which are currently pending. In all these cases, the question was whether the applicable national law was compatible with EU law, while in the past cases the interpretation of EU law was at issue. In the *SD* case (C-490/18) one of the referred questions is whether the EU Regulation can be interpreted as permitting the adoption of a national law under which a *de minimis* aid payment is subject to a requirement that is not compatible with EU law. However, the main point of the questions is still the interpretation of EU law. In the *UTEP 2006 SRL* case (C-600/18) the referring court asked whether Article 92 TFEU should be interpreted as precluding the interpretation of the national law on small and medium-sized enterprises[46]) and the practice of the authorities, according to which Article 12/A of the KKV Law cannot be applied to small and medium-sized enterprises (legal entities) that are not registered in Hungary but in another Member State. As such, this case is about a discriminatory support. The third request, in the F*armland* case (C-489/18) was declared manifestly inadmissible in 2019, because of the failure of the national court to explain the relevance of the reference in the case.

Classic competition law-related unlawful state-aid cases have already appeared in Hungarian case-law, but for the moment these requests for preliminary ruling are submitted by civil courts (C-672/13). It should be borne in mind that there is an overlap between unlawful state aid and tax matters. For example, in the Tesco Global case (C-323/18) the referring court wanted to know whether Articles 107 TFEU and 108(3) TFEU must be interpreted as meaning that their effects extend to a tax measure that is intrinsically linked to a tax exemption (constituting State aid) financed by means of the tax receipts generated by the tax measure. The legislature has achieved the amount of budgetary revenue forecast, which was fixed before the introduction of the special tax on retail trade (based on the

[46] Article 12/A of Act No XXXIV of 2004 on small and medium-sized enterprises and aid for their development ('KKV Law').

turnover of market operators), through the application of a progressive tax rate based on turnover and not through the introduction of a standard tax rate, meaning that the legislation deliberately seeks to grant tax exemption to some market operators. Tax law cases may have competition law aspects as well. It follows from the above observations that the conflicts between national and EU law in period II cannot be linked explicitly to the political changes in 2010, even if legal problems arose from the legislations of that decade.

4 Asylum and Immigration Policy

In asylum cases, five judgments have been delivered and three proceedings are pending. One judgment has been delivered on immigration matters and one is pending. three of these references for preliminary ruling proceedings were submitted between 2009 and 2011, and seven (!) after 2015. These numbers show that the press and media campaign of the Hungarian government between 2015 and 2018, which started with the refugee crisis in 2015, was accompanied by changes in the law, the interpretation of which necessitated the intervention of the ECJ in order to reconcile them with EU law. Moreover, the ECJ clearly refused to accept the deprivation of the substance of asylum-seekers' right to judicial remedy. In case C-473/16, the ECJ ruled that Article 4 of Directive 2011/95/EC[47] must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection or the reviewing courts from ordering an expert's report for the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant. The procedures for such a report must be consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union. The authority and the courts or tribunals shall not base their decision solely on the conclusions of the expert's report and they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation. This case points out that in where the assessment of certain facts is difficult (sexual orientation or age determination), because there are no clear expert methods, the – false – expectation was that courts should recognise the findings of the experts as compulsory.

In the C-369/17 *Shajin Ahmed* case, the Hungarian legislation was also contrary to EU law, because it deprived the national courts of all margin of appreciation. According to the ECJ, Article 17(1)(b) of Directive 2011/95/EU[48] must be interpreted as precluding legislation of a Member State, pursuant to which the applicant for subsidiary protection is deemed to have 'committed a serious crime' within the meaning of that provision, which may exclude

[47] Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

[48] Ibid.

him from that protection, on the basis of the sole criterion of the penalty provided for a specific crime under the law of that Member State. The ECJ rules that it is for the authority or competent national court ruling on the application for subsidiary protection to assess the seriousness of the crime at issue, by carrying out a full investigation into all the circumstances of the individual case concerned.

It follows from the case-law of the ECJ that the Court accepted the Hungarian government's concept of 'return to a safe third country', judging it appropriate to solve the crisis of mass immigration, but it precluded the deprivation of effectiveness of judicial review. The ongoing references for preliminary ruling procedures are challenging increasingly severe legal norms and administrative practices restricting the right to an effective remedy. Hungarian administrative courts are seeking to know whether Article 47 of the Charter of Fundamental Rights and Article 31 of Directive 2013/32/EU can be interpreted, in the light of Articles 6 and 13 of the European Convention on Human Rights, as meaning that a judicial remedy is effective, even if the courts cannot amend decisions given in asylum procedures, only annul them and order a new procedure to be conducted. In the C-40/19 and C-60/19. cases, the ECJ must also examine whether the same legal provisions can be interpreted as allowing a Member State to lay down a single mandatory time limit of 60 days for judicial proceedings in asylum matters, irrespective of any individual circumstances and without regard to the particular features of the case or any potential difficulties in relation to evidence. One case concerns the right to family reunification (C-519/18) and the practice of the Hungarian Immigration Agency, which applies a much stricter interpretation than usual. However, this case is an example of increasingly rigid law enforcement and not legislation as such. Consequently, only four of these cases could be considered as a result of the political change in 2010 (the cases on the restraint of judicial review) and not a necessary consequence of the immigration crisis.

5 Environmental Protection

Three references were submitted in the area of environmental protection. The relatively small number of requests is due to the abundant ECJ case-law in this field. There was a unique case on dangerous animals and another regarding waste management, where there is a decade of Hungarian case-law regarding the notion of waste and transport of waste. It is worth describing the third case, *Túrkevei Tejtermelő Kft.,* (C-129/16) in detail. It concerned one of the basic problems of Hungarian environmental regulation on liability for environmental damage. Under Article 102(1) of the Act on Environmental Protection, liability for environmental damage or for environmental hazard is — except where evidence to the contrary is provided — to be borne jointly and severally by those who own or are in possession (the user) of the land on which the environmental damage or hazard has occurred. Under Article 102(2), the owner is relieved of joint and several liability if he identifies the actual user of the land and unequivocally proves that he cannot be held responsible. In the administrative practice, the Hungarian environmental protection agency is usually unable to decide on who is responsible

for the damages. It imposes a fine on the person who appears to be the most solvent. This is usually the current owner and not the polluter. Another problem in the practice is that, if the administrative enforcement of the fine is unsuccessful, the authority will initiate new administrative procedures, for example against the former owner(s) of the land and keep taking new administrative decisions until it can establish someone's responsibility for the damages. It is very difficult to bring a successful action against these further administrative enforcements, because these owners did not participate in the previous decision procedures.

According to the ruling of the ECJ, the provisions of Directive 2004/35/EC[49] read in the light of Articles 191 and 193 TFEU must be interpreted as meaning that the national legislation is not precluded from identifying another category of persons who, in addition to those using the land on which unlawful pollution was produced, share joint liability for the environmental damage. More specifically, the owners of that land can be identified as liable, without it being necessary to establish a causal link between the conduct of the owners and the damage established, provided that such legislation complies with the general principles of EU law, all relevant provisions of the EU and FEU Treaties and of the acts of secondary law of the European Union. Article 16 of Directive 2004/35 and Article 193 TFEU must be interpreted as not precluding national legislation, pursuant to which the owners of land are not only held to be jointly liable for environmental damage alongside the persons using that land, but may also have fines imposed on them by the competent national authority. Such legislation must be appropriate for the purpose of contributing to the attainment of the objective of more stringent protection and the methods of determining the amount of the fine shall not go beyond what is necessary to attain that objective, this being a matter for the national court to establish.

Similarly to other fields of administrative law, in the field of environmental protection this kind of regulation is used to eliminate the inefficiencies of taking of evidence and the assessment of facts, as well as the complete lacks of an overall administrative responsibility theory, which is still in its infancy in Hungarian administrative law.[50]

6 Public Procurements

As a result of the Hungarian judicial review system, in the field of public procurement law, both civil and administrative courts submitted several requests for preliminary rulings before the Court. According to the Public Procurement Act (hereinafter referred to as the PPA) of 2015, the Public Procurement Arbitration Board (hereinafter referred to as the PAB) is empowered to

[49] Directive 2004/35/EC1 of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

[50] Bögös Fruzsina, 'A környezetvédelmi törvény 102. §-ának értelmezése a 2004/35/EK irányelv rendelkezései tükrében' (2018) 4 Közjogi Szemle 21–31; Sulyok Katalin, 'Az okozatiság követelményének fontossága a szennyező fizet elv érvényesítésében az uniós és a hazai joggyakorlat tükrében – válasz dr. Bögös Fruzsina tanulmányára' (2018) 4 Közjogi Szemle 31–39.

conduct proceedings initiated against any infringement of the legislative provisions applicable to public procurement or contract award procedures. This includes proceedings initiated against the rejection of a request for prequalification specified in a separate act of legislation and deletion from the prequalification list. The PAB may open a procedure upon a claim or *ex officio*. The claim can be submitted by a contracting authority, a tenderer (in the case of a joint tender, any of the tenderers), or a candidate (in the case of a joint request to participate, any of the candidates). In addition, any other interested person whose right or legitimate interest is being harmed or is at risk of being harmed by an activity or default that is in conflict with the PPA can initiate a procedure. No direct appeal can be lodged against the PAB's decisions. The courts can only review these decisions if so requested in the form of a statement of claim. Therefore, the PAB has national jurisdiction to proceed as a first instance public administration agency in disputes concerning contract award procedures, and its resolutions are subject to judicial review exercised by the administrative judiciary.

However, jurisdiction is reserved to the civil-law courts related to procurement procedures, concession award procedures and contracts concluded pursuant to procurement procedures, as well as work or service concessions and the amendment thereto or the performance thereof. With the exception of some cases, any civil law claim grounded on an infringement of legislation applicable to public procurement or to the procurement procedure shall be admissible if the infringement has been stated in a legally enforceable decision by the PAB, or in the course of the review of the decision of the PAB by the court. Although it seems that the different branches of the judicial review are sharply divided, there is a strong interaction between them in practice. However, the division can raise serious 'fair trial' issues, not to mention the effectiveness of the right to remedy in public procurement law. For example, in the *Hochtief* case (C-300/17) the Curia decided to refer the following question to the Court for a preliminary ruling: Does EU law preclude a procedural provision of a Member State that makes the possibility of asserting any civil right of action resulting from an infringement of a public procurement provision conditional on a final declaration by an arbitration committee [PAB] or a court (hearing an appeal against a decision of the PAB that the provision has been infringed)? The Court replied that the relevant EU law must be interpreted as not precluding a national procedural rule that makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by an arbitration committee or, in the context of a judicial review of a decision of that arbitration committee, by a court. In the light of Article 47 of the Charter of Fundamental Rights of the European Union, EU law must be interpreted as meaning that, in the context of an action for damages, it does not preclude a national procedural rule that restricts the judicial review of arbitral decisions issued by an arbitration committee responsible at first instance for the review of decisions taken by contracting authorities in public procurement procedures to examine only the pleas raised before that committee.

It shows that, even in public procurement cases, Hungarian courts intend to implement not just the provisions of the relevant secondary sources of EU law, but also the principles

provided by the Charter. Requests for preliminary rulings made by the Hungarian administrative courts are related more to technical and professional issues (see among others C-138/08, C-218/11, C-470/13) rather than the political changes in 2010. Hungarian administrative courts are hugely active in submitting references in this field. The reason for this tendency is the frequent and self-perpetuating modifications of the public procurement legislation, at both national and EU level, which usually 'overwrites' the elaborated case-law and thus necessitates further references.

7 Other Cases

The other six cases concern the relation between free movement of goods and public health (C-108/09) and unfair and misleading commercial practices (C-388/13 – erroneous information provided by a telecommunication undertaking to one of its subscribers, which has resulted in additional costs for the latter). In the *VIPA* case, the court referred the question whether the relevant EU law must be interpreted as meaning that the national legislation is contrary to the mutual recognition of prescriptions and to the freedom to provide services, and therefore incompatible therewith. The legislation distinguishes between two categories of prescriptions and allows medicinal products to be dispensed to a doctor who exercises his healthcare activity in a State other than the Member State concerned in the case of only one of those categories. The *Weltimmo* case (C-230/14) concerned the protection of individuals with regard to the processing of personal data and the determination of the applicable law and the competent supervisory authority in Member States.

The *Segro and Günther* joined cases (C-52/16; C-113/16) concerned the regulation of transactions in agricultural and forestry land. The ECJ stated that Article 63 TFEU must be interpreted as precluding national legislation under which rights of usufruct which have previously been created over agricultural land and the holders of which do not have the status of a close relation of the owner of that land are extinguished by operation of law and are, consequently, deleted from the property registers. The legal context of the case was that Hungarian legislation stated that any right of usufruct or right of use existing on 30 April 2014 and created for an indefinite period or for a fixed term expiring after 30 April 2014 by a contract between persons who had not been close members of the same family shall be extinguished by operation of law on 1 May 2014. The Hungarian legislator adopted these measures preventing the application of legal arrangements known, in everyday language, as 'pocket contracts', which was a way of evading the previous prohibitions and restrictions concerning the acquisition of ownership by foreign natural and legal persons. The Hungarian Constitutional Court declared that the Hungarian Fundamental Law had been infringed because the legislature did not adopt, as regards the rights of usufruct and rights of use, exceptional provisions permitting compensation, which compensation, even if it related to a valid contract, could not have been claimed in the context of a settlement between the parties to that contract. In the judgment, the Constitutional Court also called on the legislature to rectify that omission by 1 December 2015 at the latest. That period expired without any

measure being adopted for that purpose. According to the *Segro and Günther* case, this legal situation also represented a serious breach of EU law. The ECJ's ruling has been applied by the Hungarian administrative justice not only in cases clearly falling within the scope of EU law, but also in matters without foreign elements. For example, in a case where a Hungarian citizen living on a farm in an underdeveloped eastern region lost his right of usufruct by the operation of the law, after having received a right of exploitation from his former life companion because of his previous house extensions. If the Curia had not done so, the legal regulation would have had the opposite effect, and Hungarian citizens would have suffered severe negative discrimination.[51]

VI Conclusions

This paper has proved that period I was a learning period for EU law in Hungary, while period II is the consolidation phase of the uniform and organic functioning of EU and national law. In period II the number of requests increased three- or fourfold, which fits into the regional trends, and there is no clear link to the political or public policy change in 2010. Based on content analysis, only nine of the administrative law references can be considered as related to political issues. Three taxation and gambling cases concerning sector-specific discrimination, four requests challenging legislation hindering effective judicial review in asylum cases, and two but joined cases regarding transactions in agricultural lands can be clearly placed among those cases that have resulted from the government change in 2010. This is around 10% of all administrative references (83), which is not a striking figure.

Two-thirds of the requests for preliminary ruling proceedings are referred by administrative courts in Hungary, and a significant part of civil cases are related to administrative disputes. Civil justice is an important element in the enforcement of EU law, in particular in consumer protection and competition law. It also plays a cardinal role as a final instrument in case administrative justice does not function properly for any reason. Nevertheless, the administrative judiciary system is the main institution that serves as a transmitter between EU and national law. The number of Hungarian references is still higher than the regional average, which cannot be explained by objective factors, unless it is imputable to the networking of EU advisor judges, in particular in the fields of administrative law, where the network is able to reach the entire administrative judiciary, given the relatively smaller number of judges (100-200 judges). This statement is supported by the fact that the lower courts (where most judicial advisors work) are extremely active in referring and that the Supreme Court (now Curia) has reacted to this trend with a much longer delay (here more than two-thirds of the requests are/can be linked to advisor judges). It is also clear that the operation of Hungarian public administration is inadequate compared to the EU average. This is especially due to

[51] C-235/17, *Commission v Hungary,* ECLI:EU:C:2019:432.

shortcomings and inconsistencies in the rules and theory of administrative law liability, which is closely related to the inadequacy of taking evidence. The disproportionate number of VAT cases and the issue of the proportionality of fines, along with the increasingly overwhelming number of asylum cases related to the limitation of the scope of judicial review, prove these points

As we have demonstrated, the efficiency of the application and implementation of EU law can be analysed over a 7-year period at least. Since the accession of Hungary to the European Union, the trends in the initiations of references for preliminary ruling procedures are clear, and they show a manifest upward trend. These trends may have several reasons. However, we state that the independence of administrative judiciary is one of the key indicators for the efficient operation of this transmission point, i.e. the preliminary ruling mechanism between national and EU law. If there is an independent administrative judiciary the number of requests will continue to increase. In addition there are several tendencies in the European Union that will increase the number of requests in the coming years. For example in the case C-416/17, the Court declared that, since the Conseil d'État (Council of State, France) failed to make a reference to the ECJ, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, the French Republic failed to fulfil its obligations under the third paragraph of Article 267 TFEU. A reference should have been made to the Court, because in this case (on the reimbursement for the advance payment of the tax unduly paid), the provisions of EU law based on the judgments of 10 December 2012, *Rhodia*, and of 10 December 2012, *Accor*, were not so obvious as to leave no scope for doubt. This case law is expected to give incentives to the national (supreme) courts to bring more references before the Court.

If the number of requests will not increase in the next seven-year period, but stagnate or decrease, it will clearly point out that the most important transmission point between EU law and national law has broken down. It is also conceivable that the lower courts become more active. What is going to happen? We will know seven years from now – not sooner than in 2026.

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