National Courts and the Enforcement of EU Law

Hungarian Experiences

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Abstract

The present study was originally meant for the FIDE XXIX Congress, which provided an excellent opportunity to review how the acquis communautaire has been implemented by ordinary courts as well as the Constitutional Court of Hungary since the country's accession to the EU. As it is widely known, national courts play a key role in enforcing rights and obligations under EU law, so that the application of EU law remains uniform in all the Member States, in compliance with the jurisprudence of the CJEU. On the other hand, national constitutional courts must take a position more frequently and emphatically on issues related to national sovereignty: in defining what comes within the scope of the EU's legislative competence and what remains under the control of national constitutional and legislative power. The relationship between national ordinary courts, constitutional courts and the CJEU, as well as the national implementation of Luxembourg case-law may be analyzed in a variety of ways and from different perspectives. The main principles governing EU law (such as direct effect, supremacy, mutual trust) have been developed in increasing detail over the years. Since their effect and practical consequences are outstanding, in what follows, we are shall explore these issues first in the light of Hungarian case-law. In the context of the principle of mutual trust, the discussion surrounding the independence of national courts is gaining impetus. Therefore, we will also touch upon this issue in our study. Finally, as far as the issue of effective enforcement of EU law is concerned, we shall present the Hungarian experience related to the preliminary ruling procedure, which is the most important element linking the CJEU and national courts. In this respect, we approach the issue from the domestic angle, focusing primarily on how exceptions to the obligation to submit a request for preliminary ruling have been clarified on the basis of the guidelines of the Curia of Hungary and the Constitutional Court of Hungary.

Keywords: Constitutional Court of Hungary, supremacy, mutual trust, constitutional identity, preliminary ruling.

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1. Principle of Direct Effect

The most important general feature of Hungarian judicial practice relating to EU law is that Hungarian judges of ordinary courts are consistent in applying EU law sources and following EU principles. The vast majority of misinterpretations and decisions are not down to the rejection of principles, but rather to incomplete factual information.

Another important feature is that EU legal issues reach Hungarian judicial thinking with a delay of several years. Since Hungary has been a member of the EU for over 15 years, the parties to cases tend to argue, and courts respond to traditional legal questions in most pending cases, such as how to interpret a Hungarian law if the substance of the underlying EU directive provides otherwise a different answer.[1] This practice may be discerned in economic branch of jurisprudence regarding VAT, as well as in the civil branch regarding consumer protection cases.

The biggest delay may be observed in the criminal branch. This is due not only to the short time that has passed since Hungary's accession to the EU, but also to the fact that the respective EU law development could only start following the entry into force of the Lisbon Treaty. Following the CJEU's ruling in *Balogh*,[2] Hungarian criminal jurisprudence had to, for first time deal with the question what the scope of this judgment was and whether it was possible to deviate from the application of Hungarian law, which, according to the CJEU, violated EU law but was formally still in force in Hungary. The Budapest Regional Court turned to the Constitutional Court to settle the question. Several courts suspended their proceedings, but few came to the correct conclusion to set aside the formally applicable Hungarian law. Finally, the Hungarian legislator resolved the situation in a way that was clear for all, namely, by amending the disputed legislation following the guidelines of the CJEU.

The direct applicability of the Charter of Fundamental Rights first arose in employment lawsuits. The claimants referred to the Charter in employment lawsuits launched on the grounds that Hungarian law allowed the termination of a government officials' employment without having to give reasons. It caused some uncertainty in Hungarian judicial practice that the CJEU had rejected the reference for a preliminary ruling as clearly unacceptable by its order.[3] Although by now the case-law of the CJEU is now much more detailed with regard to the applicability of the Charter, its direct applicability among private parties is currently not an issue in Hungarian judicial practice. There have been, and there are some references for preliminary rulings initiated by Hungarian courts with reference to the Charter, but rather as an exceptional element and mainly with

1 *See* 2/2011. (XII. 12.) and 3/2011. (XII. 12.) Civil Division Opinions of the Curia of Hungary. András Osztovits, 'Az Európai Unió Bírósága mint az uniós jog védelmezője – Mi marad a nemzeti legfelsőbb bíróságok számára?', *Európai Jog,* 2019/6, pp. 9-13.

2 Judgment of 9 June 2016, *Case C-25/15, Balogh,* ECLI:EU:C:2016:423.

3 Order of 16 January 2014, *Case C-332/13, Weigl,* ECLI:EU:C:2014:31; Order of 16 January 2014, *Case C-614/12, Dutka,* ECLI:EU:C:2014:30.

the purpose of supporting the legal opinion of the referring judge. In such cases, the submitted question is less relevant to the merits of the instant case.[4]

The question of the direct applicability of the Charter cannot be answered without considering the direct applicability of rights and freedoms regulated in the constitution of the given Member State, in Hungary's case, the Fundamental Law. Article 28 of the Fundamental Law prescribes to the ordinary courts that they interpret domestic laws in conformity with, *inter alia*, the Fundamental Law. Compulsory interpretation of the rules of the Fundamental Law is granted by the Constitutional Court.[5] The Constitutional Court has invariably ruled in the last 30 years that clauses guaranteeing fundamental rights and freedoms do not apply directly in private relations. The principle of direct applicability is only relevant in the context of actions against the state (no *Drittwirkung*). Otherwise, all other laws, except for the constitution, would lose their binding force. Ordinary courts are to directly apply laws regulating the given private relation, the Fundamental Law, including rights and freedoms, is given effect through interpretation of laws in conformity with it. Should ordinary courts have any doubts regarding the constitutionality of a law applicable in a particular case, they may petition the Constitutional Court for the annulment of that law (or other legislative act). Should ordinary courts fail to achieve such a coherent and constitutional interpretation of laws, the Constitutional Court, acting upon a (full) constitutional complaint, has the power to quash their decision.[6]

In other words: within the Hungarian legal system, it is only the Constitutional Court who is authorized to apply the Fundamental Law directly. Ordinary courts may not deviate from laws, may not decide to ignore laws with reference to the Fundamental Law. This division of competences between the Constitutional Court and ordinary courts derives from the Kelsenian-type court system: the Constitutional Court, institutionally separated from the structure of ordinary courts, is the guardian of the constitution. Hungary, not unlike the majority of European legal systems, with the exception of the UK, has followed this model since the transition (1990) and its EU membership (2004). A formal or informal (step-by-step) acceptance of the direct application of the Constitution (*Drittwirkung*) would lead to a decentralized constitutional judiciary. In principle, this model would not be unprecedented (*cf.* the US, *etc.*), but it would be absolutely contrary to the Hungarian constitutional establishment.[7]

The Charter of Fundamental Rights exhibits strong similarities to the human rights provisions of constitutions. This requires a cautious approach in application. Direct application of the Charter would lead to ignorance of national laws and what is more, to ignorance of the national constitution. This approach would not only define cases under conferred competencies, but would encroach

4 Judgment of 28 February 2018, *Case C-3/17, Sporting Odds,* ECLI:EU:C:2018:130; *Case C-564/19, IS* (pending).

5 Lóránt Csink & Balázs Schanda, 'The Constitutional Court', *in* András Zs. Varga *et al.* (eds.), *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution,* Clarus Press, Dublin, 2015, pp. 190-191.

6 Id. pp. 191-192; András Patyi, 'The Courts and the Judiciary', *in* Id. p. 218.

7 Zsolt Balogh, 'Alkotmánybíráskodás egykor és ma', *Alkotmánybírósági Szemle*, 2011/1, pp. 78-79.

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upon cases regulated by national laws as well. This effect would be contrary to Articles 4(1) and 5 TEU and could only be avoided through the annulment of the ordinary court's decision. The Hungarian Constitutional Court has the requisite powers to protect the primacy of the Fundamental Law at least in cases falling under non-conferred competencies. The application of the Charter of Fundamental Rights is indirect: the interpretation of ordinary (national or EU) laws should be in coherence with the Charter (in a manner similar to what was described in respect of the Fundamental Law).

2. Principle of Supremacy

As pointed out above, the judicial practice of Hungarian ordinary courts is characterized by consistent compliance with obligations under EU law. There is no known decision of the Curia of Hungary (*Kúria*, the Supreme Court of Hungary) or of the courts of second instance where the supremacy of EU law over national law was denied or questioned with reference to constitutional principles.

There is no known case where this would have been a major legal issue. The problem of the correct interpretation of national law in the light of EU directives is rather typical and is not always answered correctly even at the level of the highest court. Most often the Curia of Hungary averts EU legal questions by referring to national procedural rules, without giving a substantive answer. (Infringements not referred to by the party in the preliminary proceedings cannot be included in the petition for review submitted to the Curia of Hungary).

The answer is more ambiguous if the practice of the Constitutional Court is also taken into consideration. In the framework of the (full) constitutional complaint, the Constitutional Court has the power to annul a decision of the ordinary court if it is unconstitutional. The case-law of the Constitutional Court cannot be ignored.

On the one hand, the Constitutional Court has never contested the supremacy of EU law or judgments of the CJEU when these fall within the ambit of Articles 4 and 5 TEU (conferred competencies). On the other hand, the Constitutional Court vigilantly patrols the boundaries between conferred and national competencies.[8]

The first important doctrine was elaborated in the *Quota decision*.[9] The decision responded to the petition submitted by the Hungarian Commissioner for Fundamental Rights (and his Deputy Commissioner and Ombudsman for Future Generations) requesting the abstract interpretation of Article E, also referred to as the *Europaklausel* of the Fundamental Law of Hungary. The Constitutional Court ruled that:

8 Tamás Sulyok, 'Die Erga-Omnes-Wirkung der mitgliedstaatlichen Verfassungen die Kompositverfassung', *in* Péter Darák *et al.* (eds.), *Freiheit und Verantwortung: Verfassung und Menschenrechte im Wandel der Zeit in Ungarn und in Deutschland*, Universitätsverlag Winter, Heidelberg, 2018, pp. 219-230.

9 Decision No. 22/2016. (XII. 5.) AB, available in English at http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf.

> "The Constitutional Court may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E(2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution."[10]

The reasoning of the *Quota decision*, which gives a sweeping overview of the relevant case-law of other constitutional courts, brings two important novelties concerning the interpretation (or coexistence) of EU and Hungarian domestic law. Firstly, it stipulates that the Constitutional Court

> "interprets the concept of constitutional identity as Hungary's self-identity, unfolding the substance of this concept from case to case, on the basis of the entire Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution, as it is required by Article R(3) of the Fundamental Law."[11]

The Constitutional Court underlined: the constitutional self-identity of Hungary[12] is not a list of unchangeable and closed values. Many of its important components are identical with the constitutional values generally accepted today.[13] Moreover,

> "The issue of the protection of constitutional self-identity may arise in cases having an influence on the living conditions of individuals, in particular their privacy protected by fundamental rights, their personal and social security, their decision-making responsibility, and when Hungary's linguistic, historical and cultural traditions are affected.
>
> The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created but merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty: Hungary can only be deprived of its constitutional identity with the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary remains a sovereign State. Accordingly, sovereignty and constitutional identity share several common elements, and as a consequence, their control must be performed with due regard to the other in the concrete cases."[14]

This doctrine of constitutional self-identity is linked (without a clear reference) to Article 4(2) TEU. Its main message is the principle of recognition: if the

10 Id. Operative part.
11 Id. Reasoning [64].
12 'László Trócsányi: The Dilemmas of Drafting the Hungarian Fundamental Law: Constitutional Identity and European Integration (book review)', *Pro Publico Bono,* 2016/3, pp. 200-201.
13 Decision No. 22/2016. (XII. 5.) AB, Reasoning [65].
14 Id. Reasoning [66]-[67].

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constitutional self-identity of Hungary is a fundamental value that was not constituted, but merely recognized by the Fundamental Law, then this self-identity is resistant to change by any international treaty. While the *Quota decision* does not explicitly highlight the fact that the doctrine has a natural retrospective effect, its context certainly confirms this: constitutional identity as a legal fact is and was resistant to change by any international treaty. As such, this also applies to the Accession Treaty of Hungary to the EU.

The other novelty of the *Quota decision*'s doctrine of constitutional self-identity is the presumption or principle of retained sovereignty. The Constitutional Court expressed that:

> "Since by joining the EU, Hungary has not surrendered its sovereignty, but much rather allowed for the joint exercise of certain competences, the retention of Hungary's sovereignty should be presumed when reviewing the joint exercise of further competences in addition to the rights and obligations provided for in the Founding Treaties of the EU (principle of retained sovereignty). Sovereignty has been laid down in the Fundamental Law as the ultimate source of competences and not as a competence. Therefore, the joint exercise of competences shall not result in depriving the people of the possibility of possessing the ultimate opportunity to control the exercise of public power (either jointly or individually, by the Member State)."[15]

Without any direct or tacit reference, the *Quota decision* shows certain similarities with the reasoning in *Opinion 2/13* of the CJEU rendered on the accession of the EU to the ECHR. However, it should be stressed that the principle of retained sovereignty elaborated by the Constitutional Court applies only to those cases where reasonable doubt arises with respect to the conferral of a competence. Where there is no doubt or the doubt is not reasonable, the supremacy of EU law is beyond dispute.

The principle of retained sovereignty seems to have become a reference-point for the Constitutional Court. It was not only repeated but used as a legal anchor in another case, the *Exclusivity decision*.[16] The decision responded to the petition submitted by the Minister of Justice on the abstract interpretation of Articles E, R, 24 and XIV of the Fundamental Law of Hungary.

The Constitutional Court ruled that as a consequence of Article R(1) stating that the Fundamental Law shall be the foundation of the legal system of Hungary, "applicability of European Union law in Hungary shall be based on Article E of the Fundamental Law."[17] This means that the law of the EU is not connected to the Hungarian legal system through Article Q, as general

15 Id. Reasoning [60].

16 Decision No. 2/2019. (III. 5.) AB, available in English at http://public.mkab.hu/dev/dontesek.nsf/0/a69aec612ba90baec125830c005216db/$FILE/2_2019_EN_final.pdf.

17 Id. Operative part.

international law. It permeates domestic law through the specific integration clause of Article E.[18]

In short: the *Exclusivity decision* underlines that in Hungary, EU law is not automatically binding, but rendered applicable through a specific clause of the Fundamental Law. This leads to the conclusion that the Fundamental Law cannot be ignored when EU law is interpreted for it to be applied in Hungary.

In the second provision of the operative part of the decision, the Constitutional Court declares that it is solely up to the Constitutional Court to give an authentic interpretation of the Fundamental Law. The interpretation provided by the Constitutional Court cannot be derogated by an interpretation given by another body; the Constitutional Court's interpretation must be respected by everyone. When interpreting the Fundamental Law, the Constitutional Court takes into account the obligations binding Hungary on the basis of its membership in the EU and under international treaties.

Together with the *Quota decision*, this declaration of exclusive interpretation makes the Constitutional Court unavoidable: the CJEU is the authentic and final interpreter of EU law and the Constitutional Court is the authentic and final interpreter of the Fundamental Law of Hungary. Hence, the Fundamental Law cannot be ignored when EU law is interpreted in order to be applied in Hungary, and neither can the Constitutional Court. This means that the Constitutional Court has the power, albeit not used in practice to date, to overrule the application of EU law in the judgments of the ordinary courts. It should be stressed once again, that these interpretations are based on the principle of retained sovereignty established in the *Quota decision*.

Applying earlier interpretations, the Constitutional Court stated in the third provision of the operative part of the decision that

> "granting asylum to a non-Hungarian citizen who arrived to the territory of Hungary through a country where he or she was not subject to persecution or imminent risk of persecution, shall not be regarded as a constitutional obligation of the Hungarian State, however, the Parliament may also grant asylum to such persons according to the substantive and procedural regulations it specifies."[19]

18 Article E (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity. (2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.

19 Decision No. 2/2019. (III. 5.) AB, Operative part.

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The last and very recent decision in this line of cases is the *Trade-of-land decision*.[20] In a pending lawsuit related to a land trade dispute, the Győr Administrative and Labor Court petitioned the Constitutional Court to annul a statutory provision of the Hungarian Act on the trade of land. The Constitutional Court dismissed the court's petition, however, it also ruled *ex officio* that in the course of the application of the Act, it is a constitutional requirement that the court may not refrain from applying Hungarian law, provided that EU law is not relevant to the case.

The Constitutional Court did not challenge the supremacy of the EU law, yet it considered it necessary to resolve the contradiction between the supremacy of EU law and the Fundamental Law arising in judicial interpretations. According to the Constitutional Court, in the absence of a specific legal act uniformly applicable in the Member States of the EU, a court cannot ignore a law in force by way of a broad interpretation of the judgment of the CJEU. On the contrary: the Fundamental Law obliges all state bodies, including the courts to protect the constitutional identity of Hungary. An unjustified failure to apply existing domestic law violates the principle of the rule of law, therefore, an arbitrary disapplying of domestic law in force, be it for whatever reason, is in conflict with the Fundamental Law. This shall not be allowed, neither by the unjustified application of EU law, nor by resolving a perceived but in fact non-existent collision of laws.

The Constitutional Court thus established as a constitutional requirement that the court may not refrain from applying Hungarian law, provided that EU law is not affected. Constitutional requirements are mandatory guidance for the courts not only with respect to the case under investigation, but also in general. In case of any doubt in this respect, it is justified to submit a judicial petition to the Constitutional Court concerning the application of domestic law, because only in this case will the Constitutional Court be in a position to resolve a potential collision of laws.

3. Principle of Mutual Trust

The principle of mutual trust between the Member States appeared in the Hungarian ordinary judicial practice with no objection in principle, and its application in practice can be considered unproblematic.[21]

We have no knowledge of any cases where a Hungarian ordinary court would have expressly made a decision or would have initiated a preliminary ruling procedure before the CJEU with reference to this principle. On the other hand, it evoked a serious resonance and resentment that courts in other Member States questioned the independence of Hungarian courts, thus infringing the principle of mutual trust. It is important to state that the principle of mutual trust is one of the pillars of judicial cooperation within the European Area of Justice. But with

20 Decision No. 11/2020. (VI. 3.) AB.

21 Katalin Raffai, 'The Principle of Mutual Trust Versus the Child's Right to be Heard – Some Observations on the Aguirre Zarraga Case', *Acta Juridica Hungarica,* 2016/1, pp. 76-86.

reference to this, national judges cannot question the independence and impartiality of the courts of another Member State in individual cases. If this latter trend continues and national judges follow suit, the European judicial area could collapse very soon.

In this respect, the development of case-law of the CJEU is also unfortunate: it has not allowed national judges any discretion in the application of the regulations adopted in the field of judicial cooperation in civil matters for a long time.[22] Meanwhile, it has lifted that rigor in the field of judicial cooperation in criminal matters in recent years, by referring to the rights guaranteed by the Charter of Fundamental Rights. This seems to be a dangerous approach since the judge acting in an individual case is unlikely to have all the factual information needed to judge objectively the judicial situation of another Member State. In this way, judicial cooperation becomes involuntarily unpredictable, discretionary and in the end, inoperative. The moderate approach of Hungarian ordinary courts is evidenced by the fact that they have never re-considered or questioned the recognition or enforcement of any judicial order taken in another Member State under the Charter of Fundamental Rights.

Both the *Quota* and *Exclusivity decisions* refer to constitutional dialogue among constitutional courts of the Member States and the CJEU as an instrument to achieve more compliance with the constitution of the Member States, with international law and with EU law at the same time. One example of constitutional dialogue is the *AUCP decision* of the Constitutional Court.[23] The case responded to the petition of the Minister of Justice on the abstract interpretation of Articles E and Q of the Fundamental Law of Hungary concerning the potential ratification of the Agreement on a Unified Patent Court signed by 25 Member States of the EU. The Constitutional Court decided that

> "According to the provisions of the Fundamental Law in force, an international agreement created in the framework of enhanced cooperation, transferring to an international institution not included in the founding treaties of the EU the jurisdiction of adjudicating a group of private law disputes under Article 25(2)(a) of the Fundamental Law, thus removing the adjudication of such legal disputes as well as the constitutional review under Article 24(2)(c) and (d) of the judicial decisions adopted in such disputes from under the jurisdiction of the Hungarian State, may not be promulgated."[24]

The reasoning of the *AUCP decision* explicitly repeated the arguments of the CJEU in *Opinion 1/09*[25] putting constitutional dialogue into practice.

The philosophy of this approach is that the Treaty of Lisbon created a reasonable balance between two different sets of values. On the one hand, Article

22 *See e.g.* Judgment of 16 January 2019, *Case C-386/17, Liberato*, ECLI:EU:C:2019:24; Judgment of 19 November 2015, *Case C-455/15 PPU, P*, ECLI:EU:C:2015:763.

23 Decision No. 9/2018. (VII. 9.) AB, available in English at http://public.mkab.hu/dev/dontesek.nsf/0/fd1f9b7e8c54e0d7c1258162002ecc58/$FILE/9_2018_EN_final.pdf.

24 Id. Operative part.

25 Opinion of 8 March 2011, *Opinion 1/09 pursuant to Article 300(6) EC*, ECLI:EU:C:2011:123.

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2 TEU identifies common values of the Member States, such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Article 6 mentions fundamental rights, as guaranteed by the ECHR and as they result from the well-known constitutional traditions common to the Member States. On the other hand, Article 4 provides that the EU shall respect the equality of the Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, including their regional and local self-government systems.

The consequences of the TEU are on the one hand that common traditions such as international or supranational values will be protected by the CJEU which will maintain the supremacy of the EU law against national constitutions. But on the other hand, the TEU also provides a strong basis for the position that the common European constitutional heritage must not be opposed to national constitutional identity and *vice versa*. The two sets of values should be balanced not only at the level of the Treaty but also in individual cases solved by individual judgments.

This means that the constitutional identity of the different nations cannot be dissolved in an artificially constructed common formula. The common values contain what is common; the national values cover what is not common. These national values that are not common are also values, and they are also worthy of legal protection. If constitutional identity disappears, common values also lose their importance: all will be reduced to an imperial order. There can be no common European identity without national constitutional identities.

From an institutional perspective this means that if the common European heritage is developed and protected by international and supranational courts, namely, the CJEU and the ECtHR, the balance needs similar judicial protection. This balancing protection is vested in the constitutional courts of the Member States of the Council of Europe and the EU. Therefore, while constitutional courts may have a lot of different tasks, their primary mission is protection of their own constitutional identity.

This is not only a national but, if we accept the TEU, also a European mission. It also reinforces respect for the TEU, respect for Europe and respect for its nations at the same time. The Fundamental Law of Hungary provides the constitutional basis for this, while the practice of the Hungarian Constitutional Court fulfils, step by step, this double mission: it safeguards the constitutional identity of Hungary thereby contributing to the development of the common European identity.

4. Judicial Independence of Hungarian Courts

The issue of judicial independence is the subject of many procedures before the CJEU. Judicial independence is the cornerstone of justice, and as such it has a common component in every Member State flowing from the relevant case-law of the ECtHR. A particular change can be observed in the way the independence of

the Hungarian judiciary is perceived externally: the independence of the judiciary was not questioned systematically during and after EU-accession, and Hungary was considered to be the best student in applying EU law. Nowadays, as a result of the Sargentini report, Hungarian judges have become the 'black sheep' of the Union. This has happened even though no significant changes have taken place in the composition of the judiciary, apart from the change in status resulting from reaching retirement age. Recently appointed judges, who are the members of the new generation, studied EU law at university and have been studying it ever since. They regularly participate in international trainings and conferences. The Hungarian judiciary was thrown into a special situation since it has to prove its own independence and professionalism against concerns that are not clearly defined and specified. Besides criticism from abroad, there are Hungarian opinions that question the independence of the judiciary. This criticism is almost exclusively geared at the new judicial administration model that came into force in 2012.[26] Meanwhile, it is important to emphasize, that Hungary is in the first third of the Member States based on all objective indicators in the Justice Scoreboard used by the CJEU to measure and compare national justice.[27] All these facts and statistics confirm that judicial independence and the vindication of EU law is not in danger at national level in Hungary. Moreover, the implementation of EU law has been most effective in Hungary compared to other Member States that joined the EU at the same time with us or later.

Similarly, there is no legal argument questioning the independence of the Constitutional Court. There is no opinion of the Venice Commission to this effect. On the contrary, the Hungarian Constitutional Court operates in strong cooperation with the Venice Commission, the World Congress of Constitutional Justice and a number of other constitutional courts. Another recent evidence of independence and effective judicial protection ensured by the Constitutional Court is the ECtHR's in *Szalontay*.[28] The ECtHR found that a constitutional complaint is normally an effective remedy to be exhausted before an application is submitted to Strasbourg. This statement was repeated in *Repcevirág*.[29]

5. Effective Judicial Protection

The Hungarian National Assembly passed the new Code on Civil Procedure and the new Code of General Administrative Procedure in 2016 which entered into force on 1 January 2018. The previous civil procedural code did not regulate the 'class action', it only contained a so-called action in the public interest. In these

26 Zoltán Fleck, 'A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts', *in* Attila Badó (ed.), *Fair Trial and Judicial Independence: Hungarian Perspectives*, Springer, 2014, pp. 3-25.

27 Mátyás Bencze *et al.*, 'The Evaluation and Development of the Quality of Justice in Hungary', *in* Francesco Contini (ed.), *Handle with Care: Assessing and Designing Methods for Evaluation and Development of the Quality of Justice*, IRSIG-CNR, Bologna, 2017, pp. 127-175.

28 *Szalontay v. Hungary (dec.),* No. 71327/13, 4 April 2019.

29 *Repcevirág Szövetkezet v. Hungary,* No. 70750/2014, 30 April 2019.

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cases, institutions listed in the code (such as the prosecutor's office, ministries, consumers' associations, *etc*.) had the possibility to file an action in disputes that affect a wide range of consumers, in particular to establish an infringement of the law. The scope of such judgments covered all consumers that were in a contractual relationship with the defendant. Although an action in the public interest would have been appropriate to relieve the courts and parties from individual litigation, the competent institutions did not initiate many proceedings. This passivity was remarkable in the foreign currency loan cases dominating litigation at Hungarian courts in the past seven years. During this period, hundreds of thousands of lawsuits were filed by consumers against banks usually attacking the same general contractual terms and conditions. These procedures could have been solved more efficiently with an action in public interest. Typically, most of these litigation cases turned on issues of EU law, the interpretation of Articles 3, 4 and 6 of Directive 93/13/EEC being the subject of the dispute. Hungarian ordinary courts made several references for a preliminary ruling in these procedures;[30] however, the questions raised in the various references were not necessarily synchronized because the different courts had different opinions about these contracts.[31]

The new Code on Civil Procedure provides the opportunity to file class actions for the first time in Hungarian legal history. Due to a lack of legal traditions, the drafters of the Code found it hard to decide which European model should be followed.[32] Finally, the opt-in model was chosen, but rules governing the conditions for filing a claim have become over complicated, they tend to be oversecured, so it is not surprising that no such action has been adjudicated by courts so far. The new Code on Civil Procedure also maintained the possibility to file actions in the public interest with almost the same rules as those enshrined in the old Code.[33] The main question about these actions is how to encourage competent institutions to take their chance and initiate such proceedings more often.

6. Preliminary Ruling Procedure – Obligation and Exceptions

Hungarian judges of ordinary courts have requested preliminary rulings in by far the largest number from among the judges of the Member States that joined the

30 Judit Fazekas, 'A Kásler-ügytől a Dunai-ügyig, avagy az Európai Bíróság devizathitelezéssel kapcsolatos döntéseinek hatása a devizahiteles perekre', *in* Vanda Lamm & András Sajó (eds.), *Studia in honorem Lajos Vékás*, HVG-ORAC, Budapest, 2019, pp. 96-105; Katalin Gombos & Balázs Lehóczki, 'A tisztességtelen szerződési feltételek eltávolítása a magyarországi devizaalapú hitelszerződésekből', *Jogtudományi Közlöny,* Vol. 74, Issue 11, 2019, pp. 434-444.

31 Judgment of 5 June 2019, *Case C-38/17, GT,* ECLI:EU:C:2019:461; Judgment of 20 September 2018, *Case C-51/17, OTP Bank and OTP Faktoring,* ECLI:EU:C:2018:750; Judgment of 1 October 2015, *Case C-32/14, ERSTE Bank Hungary,* ECLI:EU:C:2015:637.

32 János Németh & István Varga (eds.), *Egy új polgári perrendtartás alapjai,* HVG-ORAC, Budapest, 2015, pp. 412-415.

33 Sándor Udvary, 'A közérdekű és társult perek a polgári perrendtartásban', *Jogtudományi Közlöny,* Vol. 73, Issue 5, 2018, pp. 221-230.

EU in 2004 or later. Among other things, the reasons for making a reference for preliminary ruling and the distribution of such references within the judiciary were investigated by the Case Study Analysis Group set up in 2013 by the Curia of Hungary. The Group published a summary opinion in 2014,[34] which shows that in Hungary lower courts were more active than the Curia of Hungary in making references for preliminary rulings compared to other Member States (where supreme courts are typically more active than the lower courts). The Hungarian judicial practice and jurisprudence have been dealing with the obligation to submit almost from the moment of Hungary's accession, and different views have emerged.[35]

Some interpreted Article 267(3) TFEU in a way that second instance courts are under an obligation to refer the questions for preliminary ruling to the CJEU, since the final judgment passed at second instance may only be challenged in extraordinary remedy by filing a petition for review to the Curia of Hungary. It is no coincidence that one of the questions referred to the CJEU by the Szeged Court of Appeal in *Cartesio*,[36] was precisely the interpretation of the TFEU cited above. Following the clear answer of the CJEU, the Curia of Hungary (at the time: Hungarian Supreme Court) confirmed in its Joint Opinion 1/2009 PK-KK, that the obligation to submit a reference rests with the Curia of Hungary acting in the context of a petition for judicial review.

One of the subjects of the Case Study Analysis Group was also the issue of exceptions to the obligation to submit a reference. The analysis shows that the most common reason for the court to reject making a preliminary reference requested by the parties was that the issue raised was not necessary to resolve the specific dispute. This is based on the procedural rule that an infringement cannot be brought up in the petition for review if it had not been previously referred to in the proceedings beforehand.

The analysis of the study group also pointed out that the decisions of the Curia of Hungary did not always make clear the reason why the court rejected the initiative. The recommendations made at the end of the summary opinion specifically called for a clear statement in each case in a separate order, but in the reasoning of the judgment made on the merits of the case at the latest.

The preliminary rulings referred by the Curia of Hungary were almost exclusively initiated by one of the parties however the Curia of Hungary also

34 Conclusions of the summary report on the experiences gained on references for preliminary ruling at https://kuria-birosag.hu/sites/default/files/juryreport/joggyak_elemzes_elozetes_donteshozatal_en.pdf.

35 Lajos Wallacher *et al.*, Az előzetes döntéshozatali eljárás koncepciója a 2003. évi XXX. törvényben', *Európai Jog,* Vol. 3, Issue 5, 2003, pp. 4-11; András Osztovits, 'Jogharmonizációs délibáb – megjegyzések a 2003. évi XXX. törvényhez', *Európai Jog,* Vol. 3, Issue 5, 2003, pp. 21-27.

36 Judgment of 16 December 2008, *Case C-210/06, Cartesio,* ECLI:EU:C:2008:723.

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made *ex officio* references,[37] where the judgment of the CJEU affected tens of thousands of pending litigations.

In currently pending cases before the Curia of Hungary, litigants – also considering the developing judicial practice of the ECtHR and the CJEU – regard references for a preliminary ruling to be a procedural right. This tendency is reason for concern, since under the regime of European justice, this procedure should remain an institution between the national and EU courts. If litigants received more rights than they have at present, either to initiate the procedure or to formulate questions, this would raise numerous issues of public law and EU law and would eliminate the monopoly of the national judge make the decision in the concrete case.

The Constitutional Court made a decision which reinforces respect for the supremacy of EU law and the position of parties referring to it. In its *Decision No. 26/2015. (VII. 21.) AB* on a constitutional complaint against a judgment of the Budapest-Capital Regional Court the Constitutional Court decided that if a party requests the ordinary court to make a preliminary reference to the CJEU, the court may not ignore this request. If the court does not accept the arguments of the party and does not make the preliminary reference, the court must reject it by a formal interim decision or in its final judgment. In both cases, rejection of request should be reasoned. If the court simply ignores the request of the party, it violates the constitutional right to be given reasons court decisions, as component of the right to fair trial.

There is the question whether the Constitutional Court is obliged to make a preliminary reference to the CJEU. In the Hungarian legal system, the Constitutional Court is not an ordinary court, even if – as a special court established by the Fundamental Law – it has the power to supervise the constitutionality of judgments of ordinary courts. It means that the Constitutional Court is not obliged as ordinary courts are to seek a preliminary ruling if the substance of EU law is unclear. However, this difference between ordinary and the Constitutional Courts does not mean that the Constitutional Court may not make use of this proceeding. To date, the Constitutional Court had not turned to the CJEU for a preliminary ruling. This abstention does not mean that the legal position of the CJEU is ignored. On the contrary, in a number of cases the Constitutional Court, after having been informed of a parallel proceeding before CJEU has suspended its procedure until the judgment of the CJEU is given. This happened *e.g.* in a taxation case by *Order No. 3220/2018. (VII. 2.) AB*[38] and in the Central European University case by *Order No. 3200/2018. (VI. 21.) AB*.[39]

37 Judgment of 30 April 2014, *Case C-26/13, Kásler and Káslerné Rábai,* ECLI:EU:C:2014:282. Réka Somssich, 'Az Európai Bíróság ítélete a fogyasztókkal kötött szerződésekben alkalmazott tisztességtelen feltételekről. A tisztességtelenségi vizsgálat terjedelme', *Jogesetek Magyarázata*, Vol. 5, Issue 4, 2014, pp. 83-88.

38 *See* Judgment of 23 April 2020, *Case C-13/18, Sole-Mizo,* ECLI:EU:C:2020:292.

39 *See Case C-66/18, Commission v. Hungary* (pending).

7. Conclusions

In the practice of Hungarian ordinary courts, there are no new tendencies or questions that would negatively influence the enforcement of EU law. Today, the greatest challenge for the EU justice system is the preservation and reinforcement of mutual trust among national courts, and also between national courts and EU courts. Among the excessive amount of information available, it is getting harder and harder for the national judge to receive objective information and knowledge about the different justice systems in order to decide on an individual case. It certainly helps if there are forums, trainings and conferences where judges from different Member States can meet, get to know each other personally and exchange experiences. It is also important for the CJEU to remain *primus inter pares* in the preliminary ruling proceedings, and it should only elaborate and formulate legal principles that the CJEU itself will comply with.

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