30 Case-Law of the Supreme Court and the Curia in Administrative and Labour Law Cases

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30.1 The European Union Law-Related Adjudicating Activities of the Highest Instance Judicial Body

Since the early stages of European integration, national judges in the Member States have been considered as judges who also had to deal with Community law issues.[1] In its judgement delivered in the *Van Gend & Loos* case, the European Court of Justice declared the direct effect of one of the articles of the EEC Treaty, thus, enabling European citizens to directly request the enforcement of Community law. At the same time, the European Court of Justice obliged the national courts to respect the principle of direct effect and to protect the individual rights emanating therefrom.[2] The Community legal order was institutionalised as a *sui generis* legal order through the creation of the preliminary ruling procedure, the elaboration of the principle of direct effect and the recognition of the supremacy of Community law by the European Court of Justice in the *Costa v. ENEL* case, in addition, through establishing a unique relationship between the European Court of Justice and the national courts which eliminated the risk factors that could have hindered the application of non-national law by national judges. Over time, three main types of questions have been raised by the national courts that had made a reference for a preliminary ruling, these questions have so far concerned: i) the correct interpretation of the provisions of Community law, ii) the direct effect of the provisions of Community law and iii) the compatibility of national legislation with Community law.[3] In this relationship, the Court of Justice of

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1 *See* K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', 44 *Common Market Law Review* (2007), pp. 1625-1659.

2 M. Cremona, 'The Judgement – Framing the Argument', in *Court of Justice of the European Union: 50th Anniversary of the Judgement in Van Gend & Loos (1963-2013)*, *Conference Proceedings*, Luxembourg, 13th May 2013, pp. 26-27.

3 B. Witte, 'The Impact of Van Gend & Loos on Judicial Protection at European and National Level: Three Types of Preliminary Questions', in *Court of Justice of the European Union: 50th Anniversary of the Judgement in Van Gend & Loos (1963-2013)*, *Conference Proceedings*, Luxembourg, 13th May 2013, p. 95.

the European Union gives an interpretation of the applicable provisions of Community law, but ultimately it is the national court, acting as an enforcer of Community law, that has to apply them in concrete cases, the national court decision then ensures that the parties have a greater readiness to comply with the directly effective provisions of Community law.[4] The judicial systems and the high courts of the ten Member States that joined the European Union ten years ago were forced to find their own positions and roles within the framework of a supranational legal order which has been in place and has been developed for several decades.

The Supreme Court and the entire judiciary of Hungary started to prepare for the country's accession to the European Union as early as 1999, i.e. five years prior to the accession. As part of the preparations, the Hungarian Judicial Academy – which later became an independent educational institution – was established and foreign language courses were organised and provided free of charge for the members of the judiciary. Moreover, national trainers were recruited to ensure that each Hungarian court has at least one judge thoroughly trained in EU law and in foreign languages, to whom the peers can turn when they need advice in EU law matters.[5] The network of national trainers constituted the institutional basis for the creation of the Service of Judicial Advisors in European Law in 2009. Judicial advisors in European law provide assistance not only in EU law-related issues, but also in European law-related matters, i.e. in cases touching upon the application of the European Convention on Human Rights and the interpretation of the case-law of the European Court of Human Rights. Judicial advisors insure a constant exchange of information and experience among themselves, in addition, the National Council for the Judiciary has recently reorganised the format of their cooperation, hence, the new Network of Judicial Advisors in European Law also includes coordinators specialised in different fields of law in order to guarantee a more enhanced coordination over and a stronger cooperation between judicial advisors, this new network is expected to better contribute to the uniform interpretation of EU law.[6]

The Curia of Hungary strengthens the above system by its own means, thus, the International Relations and European Legal Office of the Curia prepares the official travels and study visits abroad of the Curia's justices and it monthly publishes a newsletter in which it disseminates information, in a brief and efficient manner, related to the case-law of the Court of Justice of the European Union and the European Court of Human Rights, as well as to the cases of the Curia that concern EU law or the European Convention on

4 Witte, *supra* note 3, p. 15.

5 *See* E. Banicz, 'Preparation of Hungarian judges for European Union related – tasks and functions, Romanian-Hungarian Legal Review' (A magyar bírák felkészítése az uniós feladatok ellátására, Romániai Magyar Jogtudományi Közlöny), http://rmjk.adatbank.transindex.ro/pdf/04.Banicz.pdf, 22nd March 2014.

6 *See* Order of the President of the National Office for the Judiciary n° 7/2013 (VII. 22) on the Regulation of the Network of Judicial Advisors in European Law.

Human Rights. The Curia has also been given the task to analyse the jurisprudence of the Hungarian courts, the so-called jurisprudence-analysing working groups are responsible for conducting examinations in specific fields of law, one of these working groups examined the preliminary ruling procedures before the Court of Justice of the European Union and published its summarised opinion on them[7] in March 2014. The other working groups examining different fields of law also take into account the development of European law.[8]

30.2 Role of the Preliminary Ruling Procedures

Based on the above preparation process, the institutional background and the other aforementioned efforts, a successful cooperation has been established between the Hungarian judicial system and the various European institutions, which is underlined, in particular, by the fact that the Hungarian courts have been relatively keen on initiating preliminary ruling procedures.

According to the summarised opinion of the jurisprudence-analysing working group on preliminary ruling procedures and based on data gathered from 2004 to 2012, the number of preliminary ruling procedures initiated by Hungarian courts is exceptionally high compared to the number of those initiated by the courts of the other Member States that joined the EU ten years ago, even in comparison with the Czech Republic which is of a similar size as Hungary or in comparison with Poland which is much larger than Hungary.[9] It can be stated that in the Member States in which the number of preliminary references is relatively high, national courts have a manifestly open-minded attitude towards EU law, and judges are not reluctant to apply it. This openness can be particularly felt when the proportion of preliminary references made by lower instance courts is relatively high. In such cases, opposed to the courts against whose decisions there is no judicial remedy under national law, as defined in Article 267, paragraph (3) of the Treaty on the Functioning of the European Union, the lower instance courts as referring courts are not under the obligation to make a reference, and they can decide on a discretionary basis to turn to the Court of Justice of the European Union to request its interpretation.[10] The higher the number of preliminary references made by lower instance courts – 85% of the references are made by lower instance courts in Hungary –, the more likely it is that EU law is correctly applied within the judiciary, because individual court cases do not need

7 Summarised opinion of the jurisprudence-analysing working group on preliminary ruling procedures before the Court of Justice of the European Union, www.lb.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf, 20th March 2014.

8 Summarised opinions of the jurisprudence-analysing working groups of the Curia of Hungary. www.lb.hu/hu/joggyakorlat-elemzo-csoportok-osszefoglaloi, 21st March 2014.

9 Preliminary Ruling Procedures Opinion, note 7, p. 26.

10 Preliminary Ruling Procedures Opinion, note 7, p. 27.

to be brought to the highest instance judicial body, being obliged to make a preliminary reference, to have their EU law aspects interpreted by the Court of Justice of the European Union, since these aspects can be examined by the Court of Justice of the European Union already upon the references of lower instance courts.[11]

In administrative court cases, preliminary references have so far concerned financial issues (taxes, customs and excise duties) and other administrative matters (including state aid, consumer protection, immigration and asylum, public procurement, traffic and competition cases) in equal proportions. To date, the Court of Justice of the European Union has dealt with fifteen Hungarian preliminary references in the field of financial law and with sixteen Hungarian preliminary references concerning other administrative matters, eleven similar cases – including five financial law-related cases and six cases related to other matters – are still pending before the Court of Justice of the European Union. The Curia is somewhat more active in making references to the Court of Justice of the European Union in financial-law related legal disputes, however, the number of references from the Curia in other administrative law cases has also increased.

30.3 The EU Law Aspects of Tax and Financial Law Cases

Given that EU harmonisation is less accomplished and mainly carried out through directives in the field of taxation, the direct application of the relevant pieces of EU legislation is considered to be of lesser importance. This is particularly true in the field of direct taxes (personal income tax, corporate tax). On the other hand, the Curia – in the field of indirect, value added taxes – frequently invokes Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and its interpretation given by the case-law of the Court of Justice of the European Union.

In tax cases, a number of important court decisions have been affected by EU law.

The Mahagében and P. Dávid cases,[12] as well as the similar *Tóth* case[13] have significantly influenced and modified the decade-long legal practice of the tax authorities and the courts in respect of the enforcement of the taxpayer's right to value added tax deduction.[14]

In its judgement rendered on 21 June 2012 in the *Mahagében and P. Dávid* joined cases, the Court of Justice of the European Union stated that the right to deduct can be

11 Preliminary Ruling Procedures Opinion, note 7, p. 28.

12 Joined Cases C-80/11 and C-142/11. *Mahagében Kft. v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* (C-80/11) and *Péter Dávid v. Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága* (C-142/11) [not yet published in ECR].

13 Case C-324/11 *Gábor Tóth v. Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága* [not yet published in ECR].

14 *See* the judgement of the Court of Justice of the European Union in Joined Cases C-80/11 and C-142/11, European Law, No. 5, 2012, pp. 36-42. (Az Európai Unió Bíróságának a C-80/11 and C-142/11 sz. egyesített ügyekben 2012. június 21-én hozott ítélete, Európai Jog, 2012/5. szám, 36-42. old.).

refused only where it is established, on the basis of objective evidence gathered by the tax authority, that the taxable person concerned knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with tax fraud. In such cases, there is no strict liability and the tax authority has no general obligation to investigate.

In its judgement delivered on 6 September 2012 in the *Tóth* case, the Court of Justice of the European Union also found that the right to deduct should not be affected by the fact that the individual business operator's license of the issuer of the invoice had been withdrawn before he provided the services in question or issued the invoice for them or by the fact that the employees of the issuer of the invoice had worked in the black economy, and the latter fact was unknown and could not be known to the addressee of the invoice, since he had no obligation to verify the legal status of the employees of the issuer of the invoice. The Supreme Court made a reference for a preliminary ruling in the above case because the Hungarian tax law-related case-law has established a system of liability as regards the exercise of the right of deduction in which the addressee of the invoice could be held liable for certain irregularities found at the issuer of the invoice. The addressee of the invoice was disadvantaged for a lack of care when he did not verify the legal status of the employees of the issuer of the invoice, however, such obligation to verify was not clearly and expressly entrusted to him. The Court of Justice of the European Union set more stringent requirements for the rejectability of the right of deduction when it stated that the tax authority is under the obligation to prove that the addressee of the invoice participated in a transaction involving fraudulent tax evasion. Hence, the tax authority is not entitled to reject the taxable person's right of deduction solely on the basis of the discovery of irregularities at the issuer of the invoice. The tax authority also has to prove that the addressee of the invoice intentionally sought to evade his value added tax payment obligation. The judgement of the Court of Justice of the European Union had an impact not only on the jurisprudence of the Curia, but on the case-law of the lower instance courts as well.[15]

The judgement of the Court of Justice of the European Union in *the Alakor Gabonatermelő és Forgalmazó Kft.* case – rendered as a result of a reference for a preliminary ruling made by the Supreme Court – also contains important findings.[16] The case raised tax issues in the following topics: non-repayment of the entirety of value added tax unduly paid, national legislation precluding the repayment of value added tax because it has been passed

15 *See* T. Gyekiczky, 'The Judgement of the European Court in Hungarian Tax Cases on the Rejectability of the Right of Deduction by Tax Authorities', No. 2, case notes (2013), pp. 48-61 (Az Európai Bíróság ítélete magyar adóügyekben. A hozzáadottérték-adó levonásához való jog adóhatósági megtagadásáról, 2 *Jogesetek Magyarázata* (2013) szám, 48-61. old.).

16 Case C-191/12 *Alakor Gabonatermelő és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága* [not yet published in ECR].

on to a third party, and compensation in the form of aid covering a fraction of the non-deductible value added tax.

30.4 The EU Law Aspects of Other Administrative Cases

Among the other types of administrative cases, *the Shomodi* case needs to be mentioned as one of the legal disputes in which some of Hungary's neighbouring countries were involved. In the above case, the dispute arose between the Hungarian police authorities and certain Ukrainian nationals wishing to enter the country on the basis of the applicable rules on local border traffic, established by a bilateral international treaty concluded between Hungary and Ukraine. This dispute was resolved in favour of the Ukrainian nationals. In its judgement delivered on 21 March 2013, the Court of Justice of the European Union found that the limitation on the stay in the Schengen area of foreign nationals who are exempt from visa requirements for a period of three months within a given half year should not be applied in respect of the beneficiaries of the local border traffic regime.[17] In a similarly noteworthy competition case, the Court of Justice of the European Union ruled that agreements whereby car insurance companies come to bilateral arrangements with car repair shops concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it can be considered to be a restriction of competition, where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.[18]

As regards these other administrative cases, there are numerous fields of law in which the Curia is less likely to make a reference for a preliminary ruling, but which still require the application of EU law on a daily basis. These fields include, among others, environmental protection matters and online gambling cases. In environmental cases, the interpretation of the definition of waste is the most common problem, while in online gambling cases, the interpretation of the freedom to provide services poses difficulties, like in other EU Member States. The lack of preliminary references can be explained by the fact that the Court of Justice of the European Union has a well-established case-law in respect of the definition of waste and the advertisement of online gambling services. It should be noted that the above fields of law constantly require the interpretation of EU law by the national

17 Case C-254/11 *Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhonyi Határrendészeti Kirendeltsége v. Oskar Shomodi* [not yet published in ECR].

18 Case C-32/11 *Allianz Hungária Biztosító Zrt and Others v. Gazdasági Versenyhivatal* [not yet published in ECR].

courts of the Member States, however, the Hungarian judiciary is relatively reluctant to turn to the Court of Justice of the European Union.

In 2013, the administrative panels of the Curia made two references to the Court of Justice of the European Union, the first reference concerned consumer protection measures, while the second one was related to the regulations of an energy sector. In the latter reference, the Curia requested the interpretation of the definition of the 'party concerned' within the meaning of EU law, since the capacity and right to bring a legal action in an administrative case essentially depends on the above definition. The interpretation to be provided by the Court of Justice of the European Union will have a significant impact on the development of administrative law in connection with this fundamental issue.[19]

30.5 The EU Law Aspects of Labour Law Cases

The Hungarian judiciary's adjudication in labour law cases had been considerably influenced by EU law even before Hungary's accession to the European Union. Prior to 2004, the Supreme Court had already taken into account for the interpretation of Hungarian labour law some of the relevant EU directives and the case-law of the Court of Justice of the European Union. These directives contained both individual and collective labour law elements.

The case-law of the Court of Justice of the European Union related to the interpretation of Council Directive 2001/23/EC had, for instance, an important influence on Hungarian labour law. According to this directive, the transfer of an undertaking or business by a transferor to a new employer shall not affect employment relationships existing on the date of the transfer, since the transferor's employment-related rights and obligations shall be automatically transferred to the new employer. The above provision has been implemented into Hungarian law by Article 85/A of Act n° XXII of 1992 on the Labour Code, and the Court of Justice of the European Union has interpreted its meaning by stating that there is a transfer within the meaning of this directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. Such transfer can take place simply by a transfer of resources, and its legal consequences cannot be subject to the continued employment of former employees. The

19 Press release of the Curia of Hungary on the initiation of a preliminary ruling procedure before the Court of Justice of the European Union in the case concerned, www.lb.hu/hu/sajto/tajekoztato-kuria-elozetes-donteshozatali-eljarast-kezdemenyezo-vegzeserol-energiaugyben-az, 25th March 2014.

transfer of businesses is consistently treated by Hungarian courts on the basis of the criteria set by the case-law of the Court of Justice of the European Union.[20]

The principle of equal treatment in matters of employment shall be respected. In numerous cases, the Supreme Court had to interpret the provisions of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, in doing so, it also took into consideration the relevant case-law of the Court of Justice of the European Union.[21]

The Supreme Court and later the Curia had to deal with issues in respect of the organisation of working time in a large number of labour law cases. First, doctors and healthcare workers brought legal actions *en masse* to request remuneration for their on-call time duties. In these cases, the Supreme Court referred to the well-established case-law of the Court of Justice of the European Union according to which the sufficiently precise and unconditional provisions of a Community directive are applicable, without the need to make a reference for a preliminary ruling by the national court, to state authorities and to any organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals if the interpretation of the aforementioned provisions by the Court of Justice of the European Union is clear and unambiguous.[22] Subsequently, a large number of firemen launched legal proceedings to request remuneration for their overtime work. In its decisions rendered in judicial review proceedings, the Supreme Court and the Curia found that working more than 48 hours per seven-day long periods within a six-month time frame at a municipal fire department should be considered overtime work. While dealing with altogether 27 cases related to the organisation of working time, the Supreme Court and later the Curia have taken into account not only

20 Case 24/85 *Jozef Maria Antonius Spijkers v. Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV* [1986 I-01119]; C-13/95 *Ayse Süzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997 I-01259]; Joined Cases C-127/96, C-229/96 and C-74/97, *Francisco Hernández Vidal SA v. Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL* (C-127/96), *Friedrich Santner v. Hoechst AG* (C-229/96), *and Mercedes Gómez Montaña v. Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe)* (C-74/97) [1998 I-08179]; C-340/01 *Carlito Abler and Others v. Sodexho MM Catering Gesellschaft mbH* [2003 I-14023]; C-463/09 *CLECE SA v. María Socorro Martín Valor and Ayuntamiento de Cobisa* [2011 I-00095].

21 BH 2010.194; EBH 2009.2103; EBH 2009.1980; EBH 2010.2155, C-409/95 *Hellmut Marschall v. Land Nordrhein-Westfalen* [1997 I-06363]; C-407/98 *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* [2000 I-05539].

22 C-188/1989 *A. Foster and others v. British Gas plc.* [1990 I-03313]; C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987 03969], Joined Cases C-253/96, C-254/96, C-255/96, C-256/96, C-257/96 and C-258/96, *Helmut Kampelmann and Others v. Landschaftsverband Westfalen-Lippe* (C-253/96 to C-256/96), *Stadtwerke Witten GmbH v. Andreas Schade* (C-257/96) *and Klaus Haseley v. Stadtwerke Altena GmbH* (C-258/96) [1997 I-06907].

the relevant EU directives, but the case-law of the Court of Justice of the European Union as well.[23]

Government officials working for central administrative bodies and other state authorities in Hungary fall within the personal scope of Act n° LVIII of 2010 on the Legal Status of Government Officials. In its Decision n° 8/2011 (II.18), the Constitutional Court annulled, as of 31 May 2011 *pro futuro*, the earlier version of Article 8, paragraph (1) of the Government Officials Act for being unconstitutional. The above decision, however, offered some leeway for lower instance courts in respect of legal actions launched during an interim period, namely from 18 February to 31 May 2011 when several government officials were dismissed without providing reasons. The unlawfulness of such dismissals and the protection requirements of EU law were raised before the lower instance courts. As a result, the Curia initiated a preliminary reference procedure in order to request an interpretation from the Court of Justice of the European Union concerning Article 30 of the Charter of Fundamental Rights of the European Union. On one hand, Article 30 can be read as meaning that the term 'employee' has no universal definition in EU law, consequently national law and case-law shall be applicable even to the extent of neglecting EU protection requirements regarding some specific employment relationships, on the other hand, Article 30 can be interpreted as meaning that EU protection requirements shall be applied in every kind of employment relationship, and national authorities are given the opportunity to choose only among the available methods of implementation of EU rules. In its order delivered in Case C-332/13,[24] the Court of Justice of the European Union held that it had no competence to deal with the preliminary reference made by the Curia, arguing that national rules governing the dismissal of government officials and civil servants have no EU law aspects. According to this court order, pending cases shall be adjudicated under national law.

In a legal action in which the plaintiff requested the determination of his average income which served as the basis for the calculation of his pension,[25] the Supreme Court, having regard *inter alia* to the decision of the European Court of Justice rendered in Case C-102/76, concluded that the relevant pieces of Hungarian legislation which determined the plaintiff's period of employment in Hungary and his average income as the basis for the calculation of his pension were contrary to Community law. The Supreme Court, referring to the decisions of the European Court of Justice delivered in the *Costa v. ENEL* and *Simmenthal* cases, quashed the judgement of the labour court and the decisions of the social security authorities, and obliged the defendant authority to re-open the case and determine the plaintiff's pension without having regard to the non-compliant national rules.

23 C-52/04 *Personalrat der Feuerwehr Hamburg v. Leiter der Feuerwehr Hamburg* [2005 I-07111].
24 C-332/13 *Ferenc Weigl v. Nemzeti Innovációs Hivatal* [not yet published in ECR].
25 Mfv.III.10.261/2010.

30.6 Summary

The adjudication of administrative cases by the Supreme Court and the Curia has been substantially transformed due to Hungary's accession to the European Union. In this field, the application of EU law is required on a daily basis in almost each case, which presents a significant challenge for the Curia as regards its jurisprudence-unifying tasks. The Curia's justices are ready to apply EU law, to make a reference for a preliminary ruling in case of difficulties that may arise during the interpretation of EU law, and to interpret Hungarian law in conformity with the relevant pieces of EU legislation and with the case-law of the Court of Justice of the European Union.