31 Case-Law of the Supreme Court and the Curia in Civil and Economic Law Cases

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31.1 The First Steps towards the Application of EU Law – The Special Hungarian Provisions Concerning the Preliminary Ruling Procedure[1]

Legislation concerning the reference for a preliminary ruling was initiated almost one year before Hungary's accession to the EU. Act n° XXX of 2003 amended Act n° III of 1952 on the Code of Civil Procedure as well as Act n° XIX of 1998 on the Code of Criminal Procedure with regard to the aforementioned Community law instrument. As the most important amendment it ensured the right of appeal against court decisions making a reference for a preliminary ruling as of 1 May 2004. Moreover, newly-introduced Article 249/A of the Code of Civil Procedure stipulated that appeal may be filed against a second instance decision that dismisses a request for a reference for a preliminary ruling. Later on, under Article 340, paragraph (3) of Act n° XVII of 2005, the legislator allowed the parties to lodge an appeal also against a first-instance decision which dismisses a request for a reference for a preliminary ruling if no appeal can be lodged against the decision, like in administrative disputes regulated in Chapter XX of the Code of Civil Procedure.

Although these amendments have broadened the parties' procedural rights regarding this legal instrument, they have raised more questions than they answered. It is unclear what aim the parties' appeal may serve: the appeal can aim to achieve that no reference for a preliminary ruling shall take place, or the parties can influence the content of the questions raised in the order, including raising new questions, or the aim of the appeal can be to stay the proceeding without affecting the reference for a preliminary ruling. Although a lot of Hungarian lawyers predicted these problems before the amendments

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1 This chapter is based on A. Osztovits, 'The Case Law of the Hungarian Supreme Court Regarding the Appeal against a Preliminary Ruling Reference – before and after the Case Cartesio', in 6 *Studia Iuridica Caroliensia* (2011), p. 152-161.

came into force, the new legal regulation entered into force unaltered as of 1 May 2004. (Act n° XVII of 2005 came into force as of 1 November 2005.)[2]

Hungarian case-law inevitably met the complex legal problem how and to what extent a national judge's right under Article 234, paragraph (2) of the EC Treaty can be restricted by the appellate court that examines the appeal brought against the order making a reference for a preliminary ruling.

The fact that before the *Cartesio* case the European Court of Justice did not take an unambiguous legal standpoint in this question makes it more difficult to answer this legal problem correctly. In its often cited decision rendered in Case C-146/73 *Rheinmühlen/Düsseldorf* without long reasoning the European Court of Justice set forth only that appeal against the order making a reference for a preliminary ruling is compatible with Community law. In the given case the European Court of Justice concluded that national judges have unrestricted power to refer matters to the European Court of Justice if they consider that a case pending before them raises questions on the interpretation of Community law provisions, or the consideration of their validity necessitating a decision on their part. The European Court of Justice held that regardless of the existence of a rule of national law whereby courts other than those of last instance are bound on points of law by the rulings of a superior court, the courts other than those of last instance remain free to refer questions to the European Court of Justice in connection with Community law regarding these points of law. If courts other than those of last instance were bound and unable to refer matters for a preliminary ruling, the jurisdiction of the European Court of Justice as well as the application of Community law at all levels of the national judicial systems would be compromised.

The most important result of the European Court of Justice's interpretation is that lower courts may depart from the interpretation of superior courts. If we further consider Court of Justice of the European Union judgements that examine what rights the parties have concerning referral for a preliminary ruling, formulating the concrete questions or amending them, we may conclude that the superior courts may amend the lower courts' intention only under exceptional circumstances. Making manifestly ill-founded or arbitrary references may serve as such exceptional reasons. It would be contrary to the aim of the reference for a preliminary ruling as a legal instrument if lower courts could not pose their questions to Luxemburg as a result of national case-law.

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2 L. Wallacher et al., 'Az előzetes döntéshozatali eljárás koncepciója a 2003. évi XXX. törvényben' (The Conception of the Preliminary Ruling Procedure in Act XXX of 2003), in 5 *Európai Jog* (2003), pp. 4-11; A. Osztovits, 'Jogharmonizációs délibáb – megjegyzések a 2003. évi XXX. törvényhez' (Lawharmonizational Mirage – Remarks on Act XXX of 2003) in 5 *Európai Jog* (2003), pp. 21-27; L. Blutman, 'Az eljárási törvények újabb módosítása és az uniós jog' (The New Amendments of the Procedural Law Acts and the EU Law). in 5 *Európai Jog* (2003), pp. 12-20.

31.2 Case-Law of the Supreme Court before the *Cartesio* Case

The Supreme Court examined the guiding principles of judging an appeal brought against the order requesting a preliminary ruling for the first time in order n° Pf.X.24.705/2005/2 (BH 2006.216). The order was rendered upon appeal lodged against order n° Pf.III.20.346/2004/11 of Szeged Court of Appeal which had made a reference for a preliminary ruling.

The Supreme Court amended the order of the appellate court, set aside the reference for a preliminary ruling as well as the suspension of the proceedings. The Supreme Court examined the questions raised by the appellate court in a different order. First of all, it examined the fifth question which expressed the need for the interpretation of Community law, and thereby disputated the Supreme Court's jurisdiction in the case based on Article 249/A of the Civil Procedure Code on grounds of Community law. The Supreme Court examined the European Court of Justice's case-law in detail and held that the European Court of Justice had already answered the question in Case C-166/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreie und Futtermittel*. It stated that in the case of a court against whose decisions brought on the merits of the case there is a judicial remedy under national law, Article 177 of the EC Treaty (currently Article 234 of the EC Treaty) does not preclude decisions of such a court by which questions are referred to the European Court of Justice for a preliminary ruling from remaining subject to the remedies normally available under national law. In this case the European Court of Justice left it to the national legislator to decide whether it provides remedy against the order making a reference for a preliminary ruling in case there is remedy against decisions brought on the merits of the case.

The Supreme Court then examined whether the Court of Justice of the European Union's interpretation was different in respect of courts whose order making a reference for a preliminary ruling is subject only to an extraordinary appeal like in the current case. The Supreme Court pointed out that the European Court of Justice made its standpoint on this question clear in Case C-99/00 *Kenny Roland Lyckeskog*. In that case the European Court of Justice had held that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article 234, paragraph (3) of the EC Treaty. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the Supreme Court does not deprive the parties of a judicial remedy. It therefore follows that as a result of the possibility of appeal on a point of law as an extraordinary judicial remedy, the provision of the Code of Civil Procedure which ensures the right of appeal against the appellate court's order making a reference for a preliminary ruling does not restrict the powers set

forth in Article 234 of the EC Treaty. With regard to the above, the Supreme Court did not deal with the first three questions posed in the order requesting a preliminary ruling.

Finally, the Supreme Court also referred to Case C-283/81 *S.r.l. CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, in which the European Court of Justice held that although Article 177, paragraph (3) of the EEC Treaty unreservedly requires national courts against whose decisions there is no judicial remedy under national law to refer to the European Court of Justice every question of interpretation raised before them, the authority of an interpretation already given by the European Court of Justice may however deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or where previous decisions of the European Court of Justice have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.

The Supreme Court examined the questions one by one and addressed each question individually on why making a reference for a preliminary ruling is unnecessary. It ultimately concluded that no question shall be referred to the Court of Justice of the European Union. Among the subsequent and published orders of the Supreme Court and the appellate courts of the same content, which amend a first instance order and set aside the reference for a preliminary ruling, currently there are not any orders that set aside not all but only certain questions.

The same panel of the Supreme Court specified its guidelines on making a reference for a preliminary ruling in its order n° 4 rendered in Case n° Gf.X.30.120/2005 and confirmed the order of the Metropolitan Court of Appeal (Fővárosi Ítélőtábla), which had rejected the plaintiff's request for a reference for a preliminary ruling by adding that reference shall only be made if the question is relevant with regard to the consideration of the case.

The plaintiff requested in fact the interpretation of Article 1 of Protocol n° 1 attached to the Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention'), according to which every natural or legal person is entitled to the peaceful enjoyment of their possessions. The Supreme Court held that on the basis of Article 32 of the Convention, the European Court of Human Rights had jurisdiction for the interpretation of the Convention and the protocols thereto. Articles 155/A and 249/A of the Code of Civil Procedure shall not apply to making a reference to the European Court of Human Rights.

In its reasoning the Supreme Court also pointed out dismissing the reference for a preliminary ruling was also appropriate because the plaintiff did not request the interpretation of Community law but the declaration of the incompatibility of applicable Hungarian law with the principles of Community law. However, it is not the Court of Justice of the

European Union but the national court that has jurisdiction for the interpretation of national law.[3]

It appears from order n° Gf.X.30.379/2006/3 of the Supreme Court that in the given case the plaintiff requested a referral to the Court of Justice of the European Union in its appeal against the first instance judgement along with the suspension of the proceeding. It asked whether Article 27, paragraph (1) of Act n° XLIX of 1991 on bankruptcy and liquidation proceedings was not incompatible with Article 3, paragraphs (4) and (5) of the first directive of the Council of the European Community (Directive 68/151/EEC) and the content of Council Regulation 1346/2000/EC on insolvency proceedings.

The Metropolitan Court of Appeal dismissed the plaintiff's request. According to the reasoning of its order, as a national court other than that of last instance it exercised its power of assessment ensured in Article 234 of the EC Treaty and considered that making a reference for a preliminary ruling was unnecessary. It held that the content of Article 3, paragraphs (4) and (5) of the first Council directive, which the plaintiff requested to be interpreted, is unambiguous. It pointed out that Article 10, paragraph (1) of Act n° CXLV of 1997 on company registry implemented Article 3, paragraph (5) of the aforementioned directive. Furthermore the Court of Appeal held that the question raised by the plaintiff was not important from the point of view of the adjudication of the dispute.

The Supreme Court held the appeal ill-founded, and in its reasoning cited the argument already known from BH 2006/1/18., according to which it follows from Article 234 of the EC Treaty that the interpretation, scope, applicability or compatibility of national law with the Community law is not subject to reference for a preliminary ruling. As it was set forth in C-37/92 *José Vanacker and André Lesage v. S.A. Baudoux combustibles*, the European Court of Justice had no jurisdiction for the interpretation of the Member States' national law. The Supreme Court claimed that on the basis of Article 234 of the EC Treaty and the case-law of the European Court of Justice, the Court of Appeal had not infringed any legal regulation by dismissing the request for a preliminary ruling. It was entitled to assess whether the question raised by the plaintiff was necessary from the point of view of the adjudication of the case, or the content of the judgement would have affected the decision to be made, or the regulation of Community law to be interpreted was unambiguous.

The reasoning of order n° Gf.X.30.421/2006/3 of the Supreme Court also contains a convincing argumentation. In the given case, the representative of the defendant requested in the appellate procedure that the court of second instance make a reference for a preliminary ruling regarding the interpretation of Article 6, paragraph (2) of the Treaty on European Union. The Metropolitan Court of Appeal rejected the defendant's request for

3 The Supreme Court published the aforementioned order in Court Decisions (BH n° 2006/1/18) and also as a decision on principle (decision on principle n° 2005/2/1320), therefore it necessarily determined the relevant Hungarian case-law subsequently.

a preliminary ruling by its order rendered on 5 September 2006. In accordance with its legal standpoint the questions to be answered in the case required the interpretation of national law, for which the European Court of Justice had no jurisdiction. The Metropolitan Court of Appeal referred to Decision BH 2006/18. of the Supreme Court.

The Supreme Court held the defendant's appeal ill-founded and accepted the legal standpoint of the Metropolitan Court of Appeal, according to which the questions to be answered in the given case required the interpretation of national law. The defendant demanded the declaration of invalidity concerning resolutions that had been made by a public body (chamber) established and operated under Hungarian law in order to advance international economic activities. The question whether ordinary courts or – according to the statutes of the chamber – an arbitration tribunal shall have jurisdiction in the given dispute may not be considered a point of law that necessitated the interpretation of Article 11 of the Convention, since it does not affect the freedom of association. The question whether the rights that originated from chamber membership may be exercised through a representative at the general meeting shall be decided on the grounds of Hungarian law, it affects the freedom of association as set forth in Article 11 of the Convention in a rather indirect way, so it shall not be considered as the restriction thereof. The case-law of the Court of Justice of the European Union is unambiguous in that it has no jurisdiction for the interpretation of national law (e.g. in Case C-52/76 *Benedetti* the European Court of Justice stated that 'it is not for the European Court of Justice to interpret national law and assess its effects').

In addition to the above the Supreme Court held that under Article 234, point a) of the EC Treaty the Court of Justice of the European Union shall have jurisdiction to give preliminary ruling concerning 'the interpretation of this Treaty'. The defendant referred to the fact that the interpretation of 'this Treaty' shall cover not only the EC Treaty but also other treaties e.g. the accession treaties, and with restrictions set forth in Article 46 of the EU Treaty. The European Court of Justice repeatedly referred to the Convention when applying Community law (e.g. in Case C-4/73 *Nold* it held that 'fundamental rights are an integral part of the general principles of law the observance of which the European Court of Justice ensures'), although it has not directly interpreted it. Neither did the defendant refer to such a case. According to the Supreme Court, the questions raised by the defendant in fact required the interpretation of Article 11 paragraphs (1) and (2) of the Convention. With regard to Article 32 of the Convention, the European Court of Human Rights has jurisdiction for the interpretation of the Convention, although the national courts proceeding in the given case may not make a reference thereto.

With reference to Decision n° BH 2006/1/18 (Decision on principle n° 2005/2/1320), in order n° 14.Gpkf.43.604/2007/2 the Metropolitan Court of Appeal amended the Metropolitan Court (Fővárosi Bíróság) order making a reference for a preliminary ruling. In the given case, where the Metropolitan Public Prosecutor's Office (Fővárosi Főügyészség)

initiated a lawsuit as plaintiff against CIB Credit Zrt. as defendant for the statement of the invalidity of the standard terms and conditions which were applied by the defendant, the defendant filed a request for a preliminary ruling in the first instance procedure with reference to the fact that the legislator went beyond the scope of obligees settled in Article 7, paragraph (2) of Council Directive 93/13/EEC when endowing the prosecutor's office with the power of taking action in case of unfair contract terms.

In its order n° 15.G.40.336/2006/34 the Metropolitan Court made a reference for a preliminary ruling on 16 February 2007. According to its reasoning the lawsuit between the parties may not be decided without the interpretation of Article 7, paragraph (2) of Council Directive 93/13/EEC and the collation – executed by the national court – of such interpretation and the regulation concerning the prosecutor set forth in Article 5 of Law Decree n° 2 of 1978 on the amendment and the unified text of the Civil Code. Since the text of the directive does not contain a definition of the person or organization having a legitimate interest, the legislator's intention concerning who shall be regarded as a person or organization having a legitimate interest for taking action remains unclear. The directive was implemented into Hungarian law by Act n° CXLIX of 1997 on the amendment of the Civil Code and on the ground thereof by Decree n° 18 of 1999 (II. 5) issued by the Government on unfair conditions of agreements concluded by a consumer.

According to the legal standpoint of the first instance court the interpretation is essential not only for the purposes of deciding whether the plaintiff has a right to take action but also for the purposes of establishing subsequent case-law in compatibility with Community law, with regard to the fact that before the court in question it is only the prosecutor who may file an action in lawsuits regarding the statement of the invalidity of unfair standard terms and conditions. Therefore the first instance court made a reference for a preliminary ruling on the basis of Article 234 of the EC Treaty and Article 155/A of the Code of Civil Procedure and simultanesouly stayed its proceeding.

The Metropolitan Court of Appeal held the plaintiff's appeal well-founded. According to its legal standpoint, although the first instance court set out the factual context of the case correctly when considering the request for a reference for a preliminary ruling, on the basis of an incorrect interpretation of the applicable regulation and the ill-founded legal conclusion, it made a reference for a preliminary ruling by staying its proceeding. Whether such regulation is in conformity with Community law, the Metropolitan Court of Appeal in its reasoning pointed out that on the grounds of the settled case-law no reference for a preliminary ruling can be made if the party requests not the interpretation of Community law but the declaration that Hungarian law is not in conformity with Community law (EBH 2005/1320); concerning its merits the legal argumentation of the plaintiff is adequate.

In its order n° Kpkf.III.37.211/2005/2 published under BH 2006/1/18 (decision on principle n° 2005/2/1320), the Supreme Court came to a similar conclusion with a different

reasoning. In the main proceeding the plaintiff made an appeal against the judgement of the first instance court, arguing among others that reference should have been made for a preliminary ruling. The Metropolitan Court of Appeal dismissed the request for a reference for a preliminary ruling. Against this order the plaintiff filed an appeal which the Supreme Court held ill-founded. The Supreme Court agreed with the second instance court in that the judicial review of the defendant's resolution constituted the subject of the lawsuit. The second instance court adequately referred to the fact that the defendant stated lawfully the lack of its jurisdiction. In the examination of the order dismissing the request for a reference for a preliminary ruling the Supreme Court made the conclusion that the second instance court was right in claiming that no question was raised which necessitated the application or interpretation of Community law. The Supreme Court maintained its legal standpoint even in light of the detailed argumentation of the plaintiff's appeal and confirmed the second instance order.

In the case which was pending before the Supreme Court under n° Kfv.IV.37.268/2005, the plaintiff brought legal proceedings against the defendant's decision and requested that it be set aside. The plaintiff referred among others to the fact that the challenged procedure did not conform to the principles of Community law, it violated the right to a fair trial and requested a reference for a preliminary ruling.

The first instance court dismissed the plaintiff's statement of claims and held the reference for a preliminary ruling unnecessary. The Supreme Court agreed with the first instance court on that point and held that making a reference was not justified in the given case.

31.3 The Case-Law of the Supreme Court after the *Cartesio* Case

In its judgement delivered on 16 December 2008 in Case C-210/06 (*Cartesio*), the European Court of Justice interpreted in detail the mechanism of references for a preliminary ruling and the relationship between Article 234 of the EC Treaty which sets forth the framework of references and the Code of Civil Procedure. Although this judgement of the European Court of Justice has no *erga omnes* effect, the principle of good faith *vis-à-vis* the Community set forth in Article 10 of the EC Treaty requires the courts of the Member States that they interpret and apply Community law in the light of the relevant case-law of the European Court of Justice.[4] This decision allowed the Supreme Court to provide detailed guidance to the Hungarian courts in order to ensure their uniform case-law in respect of appeals lodged against court orders making a reference for a preliminary ruling.[5]

4 *See* the judgement delivered in Case C-224/01 *Gerhard Köbler* on 30 September 2003, Paras. 31 and 56; and the judgement delivered in Case C-2/06 *Willy Kempter KG* on 12 February 2008, Paras. 34-35.

5 The judgement of the European Court of Justice delivered in the *Cartesio* case had repercussions on the national legislation as well. By adopting the Act on the acceleration of the decision-making process in legal

The Civil and Administrative Departments of the Supreme Court adopted a joint opinion on 26 June 2009. The opinion refers to the fact that, in its the judgement rendered in the *Cartesio* case, the European Court of Justice, answering the question whether an appeal can be lodged on the basis of Article 155/A, paragraph (3) of the Code of Civil Procedure, set out that the jurisdiction conferred on any national court by Article 234, paragraph (2) of the EC Treaty to make a reference to the European Court of Justice for a preliminary ruling cannot be called into question by the application of those national rules which permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.

In the reasoning of its judgement, the European Court of Justice considered that it is not contrary to Community law if national law allows appeal against the order making a reference for a preliminary ruling, however, the appellate court may not take over or restrict the referring court's aforementioned jurisdiction ensured in the EC Treaty. Paragraph 96 sets out that thus it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

According to the standpoint of the Civil and Administrative Departments of the Supreme Court, the judgement of the European Court of Justice is hardly compatible with the applicable theoretical system of the Code of Civil Procedure with regard to the fact that the judgement delivered by the appellate court is binding on the first instance court under any circumstances, and the first instance court is not entitled to differ from the appellate court's position in any way. The same argument applies to appeals based on Article 155/A, paragraph (3) of the Code of Civil Procedure.

In cases where the previous provisions, in force until 1 January 2010, of the Code of Civil Procedure shall be applied, the interpretation most in line with the judgement of the European Court of Justice and with the theoretical system of the Code of Civil Procedure with particular regard to the relevant Hungarian case-law developed until then is the following: the court of appeal shall neither call into question the necessity of the reference, nor the substance or the appropriateness of the preliminary questions, it shall only confirm the referring order on the grounds of Article 253, paragraph (2) applicable on the basis of

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disputes between enterprises, amending Act n° III of 1952 on the Code of Civil Procedure, the Parliament decided to abrogate Art. 249/A and Art. 340, Para. (3) of the Code of Civil Procedure as of 1 January 2010, and to amend Art. 155/A, Para. (3) as follows: 'No appeal shall be lodged against a court decision making a reference for a preliminary ruling or dismissing a request for a reference for a preliminary ruling.' According to Art. 12, Para. (3) of the amending Act, the new provisions shall apply to legal proceedings initiated only after their entry into force. Consequently, the abrogated and amended provisions of the Code of Civil Procedure shall still apply to legal proceedings initiated before the entry into force of the new regulation. Therefore, the uniform interpretation and application of the previous provisions will still be important in the following years.

Article 259. Nevertheless, the appellate court shall still apply those provisions of the Code of Civil Procedure which exclude the reference for a preliminary ruling for procedural reasons.

In its opinion, the Supreme Court also referred to the fact that in the Hungarian courts' case-law concerning the consideration of appeals lodged on the basis of Article 249/A and Article 340, paragraph (3) of the Code of Civil Procedure, cases in which the appellate court ordered the second or first instance court, despite its earlier decision that had dismissed a request for initiating a preliminary ruling procedure, to make a reference for a preliminary ruling have been unprecedented. One apparent reason for the aforementioned lack of such cases is that the applicable law and the interpretation thereof is part of the decision delivered on the merits of the case and until the proceeding court has not rendered such decision, the appellate court cannot give a binding order regarding its content.

In the explanatory statement of Act n° XXX of 2003 regarding Article 249/A of the Code of Civil Procedure, the legislator argues that it is expedient to regard the second instance court as the one who is obliged to refer on the basis of Article 234, paragraph (3) of the EC Treaty. The parties may enforce that the second instance court comply with its obligation to make a reference by lodging a separate appeal against the order dismissing the request for a reference for a preliminary ruling.

In the operative part of the judgement delivered in the *Cartesio* case, the European Court of Justice declared that Article 234, paragraph (3) of the EC Treaty shall not apply to a court whose decisions in disputes such as that in the main proceedings may be appealed on points of law. The interpretation suggested in the reasoning is not in accordance with the cited operative part of the judgement. Throughout its ruling, the Court of Justice of the European Union argues that the referring court has exclusive responsibility to decide whether the request for a preliminary ruling is appropriate or necessary. However, the Court of Justice of the European Union does not state the above expressively, therefore, based on the *a contrario* argument, it follows that the national courts which are not obliged to refer may consider that in the given case there is no need for making a reference for a preliminary ruling. The discretionary powers of the lower instance courts would be restricted contrary to Article 234, paragraph (2) of the EC Treaty by an appellate decision that could oblige the proceeding court to depart from its intention to make a reference. Meanwhile, the appellate court still has the possibility to make a reference for a preliminary ruling if it deems it necessary, in a later phase of the appellate procedure involving the examination of the lower instance decision rendered on the merits of the case, to request an interpretation from the Court of Justice of the European Union.

31.4 References for a Preliminary Ruling Made by the Civil Department of the Curia

Since Hungary's accession to the EU ten years ago, the Civil Department of the Curia has made four references for a preliminary ruling, out of which three have been answered.

The first of these was Case C-527/10 (*ERSTE Bank*) in which the Curia had to examine whether it had jurisdiction in an insolvency proceeding based on Council Regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings. In its judgement delivered on 5 July 2012 the Court of Justice of the European Union ruled that Article 5, paragraph (1) of the Regulation must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where, on 1 May 2004, the debtor's assets on which the right *in rem* concerned was based were situated in that State, which is for the referring court to ascertain.[6] With its order n° Gfv.VII.30.236/2012/5, the Curia – in light of the judgement given by the Court of Justice of the European Union – established that the Hungarian courts had jurisdiction in the case, and by overturning the final order that had said the opposite, it called upon the first instance court to conduct a new proceeding.[7]

In Case C-378/10 (*VALE*) the Curia had to interpret the freedom of settlement in a case concerning the cross-border company conversion. According to the facts of the case, the company called VALE S.r.l. that had its seat in Rome asked on 3 February 2006 to be removed from the register, referring to the fact that the company wanted to transfer its seat and activities to Hungary. Acting upon the request, the office of registry removed the company from the company register on 13 February 2006. On 14 November 2006 the managing director of VALE S.r.l. and a natural person signed the company contract of VALE Construction Kft. (Ltd), stating that 'the company that had originally been created in Italy according to Italian law decided to transfer its seat and activities to Hungary'. At the same time the members paid their share in the manner prescribed by Hungarian law for the purposes of the registration of a newly-established company.

The legal representative of VALE Kft. requested the registration of the company as one created under Hungarian law. In its request VALE Kft. indicated VALE S.r.l. as its predecessor.

6 In his opinion Advocate-General Ján Mazák proposed to the European Court of Justice not to answer the question of the Curia because of its hypothetical nature.

7 I will not get into details about the facts of the case due to their complexity. In line with its relevant case-law the European Court of Justice did not say anything new about the notion of contractual demand under Art. 5, Para. (1) of Regulation 1346/2000/EC, but it unambiguously excluded from that notion the demand that constituted the basis of the case.

The first instance registry court rejected the request for registration. The second instance court approved the first instance order. According to its reasoning, under Hungarian law a company created and registered in Italy cannot transfer its seat to Hungary and cannot be registered in Hungary in the requested manner. In its request for a review of the final order the applicant asked for the reversal of the order and for the registration of the company. He argued that the disputed decision violated the directly applicable Articles 49 and 54 of the Treaty on the Functioning of the European Union and did not make a distinction between transfer of seat across the borders and cross-border company conversion. The Curia referred to the Court of Justice of the European Union for the interpretation of Articles 49 and 54.

In its judgement delivered on 12 July 2012 the Court of Justice of the European Union laid down several criteria for the Member States in adjudicating such requests. It stated that Articles 49 and 54 are to be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.[8]

In its decision passed according to the guidelines of the Court of Justice of the European Union judgement, the Curia held that in case of cross-border company conversion the contract of the successor company shall be concluded not around the time the decision to terminate the operation of the predecessor company was taken but by the time of the removal of the predecessor company from the register at the latest in the manner stipulated in Act n° IV of 2006 on business associations. In the case of cross-border company conversion, from among the national legal rules on internal (not cross-border) conversion the Curia considers two factors to be guiding: at least one member of the predecessor company should be a member of the successor company and part of the assets of the predecessor company should form part of the assets of the successor company. Not meeting these criteria means a lack of legal succession and continuity between the two companies. Since according to the above it is a fundamental criterion that the document of establishment of the successor company shall be signed at the time of the removal of the predecessor company from the registration at the latest, VALE Kft. cannot be registered as the legal

8 This Court of Justice judgement has been widely reviewed and examined, *see* for example J. Borg-Barthet, 'Free at Last? Choice of Corporate Law in the EU Following the Judgment in Vale', *International and Comparative Law Quarterly* (2013), pp. 503-512; G. Van Gelder, 'The European Cross-Border Conversion from a Dutch Tax and Legal Perspective', *EC Tax Review* (2013), pp. 202-208; J. Jakubowski and P. Ondrejka, *EuGH: Rs VALE – Grenzüberschreitende Umwandlung von Gesellschaften, Österreichisches Recht der Wirtschaft*, 2012, pp. 704-708; J. Houet, 'Cross-Border Mobility within the EU: the Saga Continues…', *European Law Reporter* (2012), pp. 206-212; T. Biermeyer, 'Shaping the Space of Cross-Border Conversions in the EU. Between Right and Autonomy: VALE', *Common Market Law Review* (2013), pp. 571-590; M. Varju, 'A Cartesio-ügy. Társasági székhely áthelyezése és az előzetes döntés kérésének joga' (The *Cartesio* Case. The Transfer of Company Seat and the Right to Refer a Preliminary Question), 2 *Jogesetek Magyarázata* (2010), pp. 51-72.

successor of VALE S.r.l. (nine months passed between the deletion of the Italian predecessor company and the establishment of the Hungarian successor company).

In Case C-519/12 (*OTP Bank*) the Curia had to decide in an issue of jurisdiction again, this time by interpreting the notion of contractual demand as stipulated in Article 5, paragraph (1), point a) of Council Regulation 44/2001/EC. The plaintiff based its claim on Article 292 of Act n° CXLIV of 1997 (repealed in 2006), according to which the existence of a significant interest, a majority interest or a controlling interest shall be reported to the court of registration competent for the registered office of the controlled company by the party holding such interest within a period of thirty days after establishment thereof. In the event of delayed performance or non-performance of the disclosure obligation, upon the liquidation of the controlled company, if the assets of the controlled company do not cover satisfaction of creditors, dominant members shall bear unlimited and full liability for debts of the company incurred up until performance of the disclosure obligation. The plaintiff argued that the defendant failed to comply with its reporting obligation, therefore it was obliged to pay the debts of the controlled company under liquidation proceeding. Since the defendant was a company with a registered seat in Germany, according to the general rule of jurisdiction of the Regulation the Hungarian courts were not competent in the case, that is why an interpretation of the parallel rule of jurisdiction of Article 5 was sought.

In its judgement delivered on 17 October 2013 the Court of Justice of the European Union held that an action such as that in the main proceedings, in which national legislation renders a person liable for the debts of a company which he controls, where that person did not comply with the reporting obligations following the acquisition of that company, cannot be regarded as concerning 'matters relating to a contract' for the purposes of Article 5, paragraph (1), point a) of Council Regulation 44/2001/EC. In light of the judgement, with its order n° Gfv.VII.30.319/2013/7 the Curia established the lack of jurisdiction of Hungarian courts, and ruled on the discontinuation of the case.

In Case C-26/13 *Kásler*, the Curia asked for the interpretation of Article 4, paragraph (2) of Council Directive 93/13/EEC on unfair terms of consumer contracts. In this case of considerable public interest the Curia examined for the first time in relation to the so-called foreign currency based loan contracts whether the application of two different exchange rates shall be considered a contract term whose unfairness can be examined by the courts or whether the above mentioned provision of the directive excludes the possibility of judicial review in the issue. The opinion of the Advocate-General has been delivered, the Court of Justice of the European Union will deliver its judgement on 30 April 2014.