32 Case-Law of the Supreme Court and the Curia in Criminal Law Cases

Gábor Molnár[*]

32.1 Introduction

Hungary joined the European Union a decade ago, on 1 May 2004. This ten-year anniversary provides an excellent opportunity for national institutions to assess the impact of EU membership on the modification, development and fulfilment of their core activities. The past ten years have also considerably influenced the adjudicating activities of the Criminal Department of the Supreme Court and its legal successor, the Curia, therefore an overview of the requirements emanating from Hungary's EU membership and of the opportunities provided by the EU integration is well justified.

32.2 The Legal Background Provided by the European Union

The European Union was created by the Maastrich Treaty.[1] The treaty established the three pillars of the European Union – firstly, the European Community pillar, secondly, the Common Foreign and Security Policy pillar, and thirdly the Justice and Home Affairs Cooperation pillar. The third pillar had an intergovernmental characteristic, as the Member States' sovereignties in this field were not transferred to the EU's supranational institutions, excluding the adoption of compulsory EU norms by them. The pieces of legislation in the third pillar included various international agreements, as well as joint positions adopted by the European Council, and the Member States preserved their sovereignty to decide whether to accede to third pillar agreements in the area of cooperation in criminal matters. These third pillar agreements concluded by the Member States aimed at deepening criminal cooperation in the fields of criminal proceedings and the enforcement of criminal sanctions.

The Amsterdam Treaty, entered into force on 1 May 1999, gave high priority to the reform of the EU's justice and home affairs policy. The treaty transferred some of the fields covered by the third pillar to the first pillar, in particular, the criminal protection of the

* Head of Panel at the Criminal Department, Curia of Hungary, Judicial Advisor in European law. E-mail: MolnarG@kuria.birosag.hu.

1 The Treaty on European Union signed on 7 February 1992 in Maastricht entered into force on 1 November 1993.

financial interests of the European Communities became a first pillar issue, however, the treaty provided no efficient criminal protection at Community level. Thus, third pillar intergovernmental cooperation remained the only available means for the use of criminal law instruments. The Member States were unwilling to transfer their legislative powers in criminal matters to the European Union, therefore neither the Maastricht Treaty, nor the Amsterdam Treaty contained any provisions in this regard. At that time, the EU had no legitimate legislative body that could be able to draft a common criminal code, the EU probably still lacks such a legislative body even today.

In 1999, the European Council held a special meeting in Tampere on the creation of an area of freedom, security and justice in the European Union which also aimed at improving cooperation in criminal matters within the EU. The participants of the meeting declared that, in the framework of international cooperation in criminal matters, 'the principle of mutual recognition of judicial decisions and judgements should become the cornerstone of judicial cooperation in criminal matters within the Union'. The participants also considered that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a fast track transfer of such persons.

The principle of mutual recognition in the field of extradition means that each national judicial authority is required to recognise, *ipso facto*, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State. On 13 June 2002, the Council of the European Union adopted Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, which replaced the extradition system by a new judicial mechanism. The framework decision entered into force on 1 January 2004, while Hungary and the other newly acceding Member States had to apply it as of their accession to the EU: This judicial mechanism contributed to an enhanced cross-border cooperation between Member States in the fields of criminal justice and law enforcement at European Union level.

The regulation by framework decision was chosen as the most appropriate method of legislation in order to take fully into account the requirements of efficiency and effectiveness. The provisions of the framework decision on the European arrest warrant and the surrender procedures between Member States have already been transposed by each Member State into their national law.

Based on the experience gained from the implementation of the Tampere Programme, the Council of the European Union adopted, on 4 November 2004, the so-called Hague Programme that set out ten priorities for the Union between 2005 and 2010 with a view to strengthening the area of freedom, security and justice. The programme aimed at introducing new judicial mechanisms, and urged the Member States to correctly implement the previously adopted pieces of EU legislation and international agreements.

In the reform of the European Union, policy-makers examined the possibility of adopting a common criminal code at EU level. The Union's criminal policy could be implemented either by harmonisation or by unification. Harmonisation leads to the adoption of new provisions of national criminal law for the purpose of protecting EU interests. The process of harmonisation is relatively effortless, given that harmonisation acts can be transposed into domestic law by a simple legislative measure, however, their application requires a thorough knowledge of foreign legal regimes.

The only way to create European criminal law is if the Member States transfer some of their punitive powers to the EU institutions with the result that the Union is entitled to legislate in criminal matters and to establish a criminal justice apparatus (courts, prosecution offices) at EU level. For the time being, this is not a realistic option, not from a dogmatic point of view, but rather from a political perspective. There is a general opinion that the direct effect of Community norms adopted with the aim of harmonising criminal law would seriously jeopardise the integrity of criminal law and the principle of legal certainty.

Hungary enacted the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community by Act n° CLXVIII of 2007. The Treaty of Lisbon entered into force on 1 December 2009.

As a result of the Treaty of Lisbon, Chapter 4 of Title V of the Treaty on the Functioning of the European Union regulates judicial cooperation in criminal matters. This chapter stresses the importance of the principle of mutual recognition of judgements and judicial decisions, defines the basic principles that should be applied in national legislation in criminal matters, and determines the structure, operation, field of action and tasks of the EU's judicial authorities (Eurojust, European Public Prosecutor's Office).

The above overview shows that judicial cooperation in criminal matters within the EU is essentially of a procedural nature, therefore these EU mechanisms are not applied on a daily basis by the Criminal Department of the Supreme Court (Curia). This is due to the fact that the Supreme Court can deal with ordinary appeals only as a third instance judicial forum and is not entitled to take evidence in third instance proceedings. The Curia mostly deals with extraordinary judicial remedies which rarely necessitate the direct application of the EU instruments of judicial cooperation in criminal matters.

32.3 The Role and Importance of the Preliminary Ruling Procedures in the Case-Law of the Criminal Department of the Supreme Court (Curia)

In 2013, the President of the Curia ordered the establishment of a jurisprudence-analysing working group focusing on the application of EU law and on preliminary ruling procedures before the Court of Justice of the European Union.[2]

The working group concluded that the Criminal Department of the Supreme Court (Curia) has not yet made, either *ex officio* or upon the parties' request, any reference for a preliminary ruling. However, the Criminal Department must be prepared for such an eventuality. Article 266, paragraph (1), point d) of the Code of Criminal Procedure stipulates that the court shall, either *ex officio* or upon request, stay its proceedings if it decides to make a reference for a preliminary ruling to the Court of Justice of the European Union according to the relevant provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union. In its referring order, the court shall formulate its questions which should be answered by the Court of Justice of the European Union and shall inform, to the extent necessary to answer, the Court of Justice of the European Union about the factual background of the case and the relevant provisions of national law. The referring order shall be sent to the Court of Justice of the European Union and forwarded, for information, to the Hungarian Minister of Justice as well.[3]

The above provision of the Code of Criminal Procedure has not yet been applied by the Curia, and, as has already been mentioned, it is not likely to occur in the area of judicial cooperation in criminal matters. There are, however, some segments in the field of substantive criminal law that can be directly affected by EU law. With regard to these segments, the Curia has to ensure the full implementation of EU law in both ordinary appeal cases and extraordinary judicial remedy proceedings.[4]

32.4 The Application of Community Law in Issues of Uniform Application of Law

According to the Fundamental Law, the Curia shall 'ensure uniformity in the judicial application of laws.' The uniformity decision is an efficient tool to achieve this aim since it is binding on all courts.

---

2 The summarised opinions of the jurisprudence-analysing working groups are available on the Curia's website (www.kuria-birosag.hu/hu/joggyakorlat-elemzo-csoportok-osszefoglaloi).

3 This provision of the Code of Criminal Procedure was enacted by Art. 89, Para. (4), point d) of Act n° XXVII of 2007.

4 *See* Point 37.5. hereunder for more details.

Shortly after Hungary's accession to the European Union the Supreme Court realised that judicial practice related to the interrupting effect of the international and European arrest warrant on the limitation period was not coherent. Therefore, the Uniformity Panel of the Criminal Department of the Supreme Court adopted uniformity Decision n° 1/2005 on the interrupting effect of the international arrest warrant and the extradition request on the limitation period.[5] According to the decision:

a) The international arrest warrant, which was issued after the issuance of the national arrest warrant interrupts the limitation period. Similarly, the European arrest warrant, issued after the issuance of the national arrest warrant and pursuant to Act n° CXXX of 2003 on cooperation with Member States in criminal matters, also interrupts the limitation period. If an international arrest warrant comes to effect in a Member State of the European Union, where the person concerned might be surrendered, the European arrest warrant issued thereafter does not interrupt the limitation period.

If the authority proceeding in a criminal matter issued only an international or European arrest warrant (and did not issue a national arrest warrant), the national arrest warrant whose issuance has been necessitated by new facts also interrupts the limitation period.

In extradition procedures based on Act n° XXXVIII of 1996 on international legal assistance in criminal matters, an arrest warrant issued by the judge or the penitentiary judge pursuant to Article 32 of the said act interrupts the limitation period.

b) Procedural measures taken by foreign authorities pursuant to an extradition request issued by the Minister of Justice are to be considered as the procedural acts of national authorities from the aspect of limitation.

c) An extradition request issued by the Minister of Justice with respect to another state interrupts the limitation period at the time of issuance.

In its detailed reasoning the decision pointed out that the European arrest warrant as a new legal instrument included the search for the wanted person, his arrest, detention and his surrender to the issuing authority. Thereby the traditional extradition procedure is shortened, creating direct cooperation between the authorities of the Member States.

The provision of the Criminal Code on the limitation of punishability and the enforcement of punishment does not differentiate between steps taken by Hungarian authorities in respect of their scope.

Therefore, from the aspect of limitation, an international arrest warrant, a European arrest warrant or an arrest warrant pursuant to Article 32 of Act n° XXXVIII of 1996 that was issued after the issuance of a national arrest warrant cannot be considered an administrative step repeating the national arrest warrant.

At the time of the issuance of an international arrest warrant, one does not know if the wanted person stays or will be arrested in an EU Member State or outside the EU.

5 Published in the 35 *Hungarian Official Journal* (2005).

If the accused is arrested based on an international arrest warrant, in the ensuing procedure extradition is initiated in cases belonging under Act n° XXXVIII of 1996 and surrender is initiated in cases belonging under Act n° CXXX of 2003.

Consequently, in cases belonging under Act n° CXXX of 2003, the European arrest warrant issued subsequently does not interrupt the limitation period: it only replaces the international arrest warrant, as if the arrest had been started originally with the European arrest warrant.

This rule, however, cannot be applied to persons against whom extradition was initiated pursuant to Act n° XXXVIII of 1996, since the rule can be applied only in the EU and in cases belonging under Act n° CXXX of 2003.

Considering the fact that an arrest warrant issued pursuant to the Code of Criminal Procedure can be directly targeted at a foreign country, further circumstances may rise, which will necessitate the issuance of a national arrest warrant. A national arrest warrant issued in this way cannot be considered an administrative step, therefore it shall have an interrupting effect on the period of limitation.

A further important statement of the decision was that an extradition request lodged by the Minister of Justice also interrupts the limitation period because pursuant to provisions of Act n° XXXVIII of 1996 the Minister proceeding in the matter shall be considered an authority.

32.5 The Direct Application of Community Law in Cases of Incomplete Rule (Frame Statutory Definition of Offences)

The Criminal Department of the Curia has recently passed an important, guiding decision from the aspect of the practical application of Community law. Decision n° Bfv.II.222/2012/5 was rendered in a criminal case of tax fraud, but the principles laid down in the decision can be guiding in the judicial practice of numerous other types of crimes.

The regulation of tax fraud is an incomplete rule. Incomplete rules do not contain all the constituent elements of an offence, in other words they do not meet the requirements of *nullum crimen sine lege*. Missing elements are defined in other legal rules. Tax obligation, which is in the focus of tax fraud, is not a criminal but an administrative law concept whose detailed definition is given in legal rules on taxation.

The EU is entitled to create rules on taxation that Member States are obliged to implement into their national law. Member States have to ensure that both national legislation and national judicial practice comply with community regulation and the case-law of the Court of Justice of the European Union.

As the Curia pointed out, the criminal courts proceeding in tax fraud cases are also obliged to create a judicial practice that complies with Community law. Therefore, in the

criminal case instituted in VAT fraud, the Curia took into account community regulation and the case-law of the Court of Justice of the European Union when examining the legislative conditions of tax fraud.

Sixth Council Directive 77/388/EEC of 17 May 1977 regulated the harmonization of the laws of the Member States relating to turnover taxes, it provided a common system of value added tax and a uniform basis of assessment, and then, as of 1 January 2007, it was replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. According to Recital 3 in the preamble to Directive 2006/112/EC, in order to ensure that the provisions are presented in a clear and rational manner, it was appropriate to recast the structure and the wording of the Directive although this did not bring about material changes in the existing legislation.

Upon requests for a preliminary ruling submitted by Hungarian courts, the Court of Justice of the European Union gave a ruling on the interpretation of the common system of VAT in 2012, too. Such was the judgement of 21 June 2012 in joint cases C-80/11 and C-142/11, which was given as an answer to the questions asked in proceedings where the dispute arose between Mahagében Kft. (Ltd.) and a Regional Directorate-General of the National Tax and Customs Authority (C-80/11), and Péter Dávid and another Regional Directorate-General of the National Tax and Customs Authority (C-142/11). The referred questions concerned Council Directives 77/388/EEC and 2006/112/EC.

In paragraph 3 of 'legal context' the Court pointed out that Directive 2006/112 repealed and replaced, as from 1 January 2007, European Union law on VAT, including the Sixth Directive. According to Recitals 1 and 3 in the preamble to Directive 2006/112/EC, the recasting of the Sixth Directive was necessary to ensure that all the applicable provisions are presented in a clear and rational manner in a revised structure and wording while, in principle, no material changes are made. The provisions of Directive 2006/112/EC are therefore, essentially, identical to the corresponding provisions of the Sixth Directive.

In paragraph 38 the Court held that the right to deduct provided for in Articles 167 *et seq.* of Directive 2006/112/EC is an integral part of the VAT scheme and in principle may not be limited. In particular, the right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs.

Pursuant to paragraph 39, the deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject in principle to VAT.

In paragraph 40 the Court ruled that the question whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT. VAT applies to

each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components.

In paragraph 41 the Court recalled that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112/EC. In that regard, the Court has already held that EU law cannot be relied on for abusive or fraudulent ends. Therefore, as paragraph 42 stipulates, it is a matter for the national authorities and courts to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends.

These rules and principles were applied by the Curia when it examined the petition for a judicial review that had been lodged with it by the defence attorney of a second accused. The Curia pointed out that the ruling of the Court of Justice of the European Union in the above case shall be guiding in cases that are subject to incomplete rules in the Criminal Code. That is, the missing elements of the offence subject to incomplete regulation are defined by community norms. Such norms include, among others, damage to the environment (Article 241 of the Criminal Code), damage to the natural environment (Article 242), violation of waste management regulations (Article 248), money laundering (Chapter XL), acts of terrorism (Articles 314-319), abuse of weapons prohibited by an international treaty (Article 326), violation of international trade restriction (Article 327), abuse of military products and services (Article 329), abuse of dual-use items (Article 330), criminal protection of products subject to customs and excise duty. This list neatly illustrates the wide scope of the direct application of Community law in criminal jurisprudence and in the judicial practice of the Curia.

32.6 Summary

In the field of criminal justice, the European Union regards ensuring uninterrupted judicial cooperation in criminal matters as its most important task. One of the undesirable consequences of the completion of the four fundamental freedoms in today's Europe is that crime knows no national borders. In the light of this phenomenon, criminal law enforcement can work effectively only if it were able to overcome the difficulties emanating from state sovereignty, and from the shortcomings and erratic functioning of law enforcement bodies and judicial authorities.

In the traditional areas of criminal law, the Union exerts no significant influence on the determination of criminal acts. Nonetheless, the so-called technical pieces of criminal law, as the ones referred to above, are gaining ever more ground in the Member States' criminal legislation. Some argue that the number of technical pieces of criminal law will eventually exceed the number of traditional criminal acts of law. In addition, the essential

contents of traditional criminal law are increasingly defined by EU norms that are directly applicable by the national courts.

In its adjudicating activities, the Curia also has to ensure the application of a number of other norms that are referred to by the domestic pieces of criminal legislation. These other norms include all the important pieces of international humanitarian law (such as the Hague Conventions, the Geneva Conventions, and the Statute of the International Criminal Court as one of the United Nations' most fundamental pieces of humanitarian law) and the European Convention on Human Rights.[6] At the same time, the Curia takes into consideration the case-law of the European Court of Human Rights, the Fundamental Law of Hungary and the case-law of the Constitutional Court as well. The Criminal Department of the Curia has to take account of the above norms in both its day-today adjudication and its jurisprudence-unifying tasks. By taking into account the foregoing, it is expected that, in the coming years, the Curia's role in interpreting the law and unifying the case-law of the lower instance courts will be gradually extended and completely fulfilled.

6 Hungary enacted the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950 in Rome and eight of its protocols by Act n° XXXI of 1993.