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

I Introduction

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

II Member State Liability for National Legislation Contrary to EU Law

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

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

1 The Lack of Liability

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

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

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

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

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

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

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

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

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

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

[3] Act of 1959 on the Civil Code.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[27] EBH 1999. 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Procedural Law Issues and Their Impact on Legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 The Freedom of Establishment

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

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

[62] *CARTESIO,* para 99.

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

4 The VALE Case[63]

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

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

[63] *VALE,* 440.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Unfair Contract Terms in the Civil Code

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

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

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

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

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

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

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

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

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

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

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

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

2 Unfair Contract Terms and Foreign Currency Loans

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 The Arbitration Clause as an Unfair Term in Consumer Contracts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 The Unfairness of a Term Conferring Jurisdiction

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

[90] Ibid, para 36.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 The Definition of Consumer

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

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

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

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

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

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

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

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

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

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

VI Conclusions

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

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

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