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## ‘HALF EMPTY OR HALF FULL?’ – THE CASE LAW OF THE HUNGARIAN COURTS REGARDING THE PRELIMINARY RULING REFERENCES DURING THE FIRST TEN YEARS AFTER THE EU ACCESSION

### Introduction

In 2013, in an effort to assess the Hungarian judiciary’s references for preliminary ruling procedures, the President of the Curia of Hungary ordered the setting up of working groups to analyse case law (“working group”), specifically focusing upon this particular proceeding and covering all branches of law.<sup>795</sup>

Each of the working groups is made up of judges of the Curia and examines Hungarian judicial practice in a specific area of law. As the work of judges involves decision-making, an analysis of judicial practice, in fact, means an analysis and assessment of court rulings. The leader of a working group may invite judges from the lower levels of the Hungarian court system as well as theoretical and practical experts to participate in the activities of the group. The findings of the group are collected in a summary opinion and discussed by the competent department of the Curia.<sup>796</sup> One of the most important outcomes of the work by a working group may be drawing attention to issues that may lead to the adoption of legal standard-setting decisions<sup>797</sup> or even new legislation.

For the purpose outlined above and in accordance with the relevant provisions of the law, the working group named “*the application of European Union law: the les-*

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<sup>795</sup> As the supreme legal forum in Hungary, the Curia, in addition to ruling on cases that are subject to its jurisdiction, is also responsible for ensuring a consistent application of the law by the courts as specified in Article 25 of Hungary’s Constitution. The Curia has a number of options to carry out this task, including what are known as legal standard-setting decisions, which are binding on the courts, as well as in-principle decisions and rulings, and the opinions of its departments. In addition to the powers listed above, since 2011 the Curia has also operated work groups designed to analyse case law, including exploring and examining the judicial practices of courts. Section 24. (1) d) of Act CLXI of 2011 on the Organisation and Administration of Courts in Hungary.

<sup>796</sup> Currently, the Curia of Hungary has three departments: criminal, civil and public administration/labour law.

<sup>797</sup> The legal standard-setting decisions by the Curia are binding on all Hungarian courts and no deviation from them is permitted.

*sons of preliminary ruling procedures*” was formed with a focus on two key issues. The working group first studied and assessed the number and types of cases referred by the Hungarian courts for a preliminary ruling procedure since Hungary’s accession to the European Union, the ECJ’s judgments on the merits of the cases, and the effects that the ECJ’s judgments and the decisions made by the referring courts in the main proceedings had on Hungarian legislation and judicial practice. The other half of the analysis was designed to identify cases not referred for a preliminary ruling procedure despite the litigants’ relevant motion.<sup>798</sup>

The purpose of this study is to provide, via the Summary Opinion, an overview of the lessons learned in connection with preliminary ruling procedures during the ten-year period since Hungary’s accession to the European Union.

### 1. Preliminary ruling procedures in numbers

During the ten years since Hungary’s accession to the European Union, Hungarian courts made 91 references for a preliminary ruling procedure to the ECJ. The activity level of the courts of a particular Member State in referring cases for preliminary ruling depends on a number of factors. These factors can be classified as structural and non-structural. Structural factors are those independent from the courts, such as the population of a Member State, how litigious its citizens are, and the level of compliance of the national law with Community law. The last parameter can be studied in terms of the infringement procedures lodged against the specific Member State. Based on the investigation, there is a significant correlation between the two phenomena (the more infringement procedures are lodged against a specific country, the higher the number of the cases referred for a preliminary ruling procedure) but this assumption is not too strong.<sup>799</sup> In our opinion, it cannot be clearly established from the above that a large number of infringement procedures automatically result in a large number of preliminary ruling referrals. Non-structural factors, such as language competence and special training, the acceptance of EU law, how courts relate to the intention of the parties (they refer cases of their motion or at the parties’ motion) and the time and cost requirements of a preliminary ruling procedure,

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<sup>798</sup> The summary opinion of the work groups (hereinafter: Summary Opinion) was discussed and approved at the plenary meeting of the Curia held on 27 January 2014.

<sup>799</sup> The correlation coefficient of the number of infringement procedures in progress in late 2011 and the number of references for a preliminary ruling between 2008 and 2012 is 0.548. See E. Várnay, *Az előzetes döntéshozatali eljárás – nemzetközi kitekintés* (Preliminary Ruling Procedure – An International Outlook), in A. Osztovits (ed.), *A magyar bírósági gyakorlat az előzetes döntéshozatali eljárások kezdeményezésének tükrében 2004–2014.* (Hungarian Jurisprudence Related to References for Preliminary Rulings 2004–2014.), Budapest, 2014, 51–53.

however, play a more significant part in determining how often courts refer cases for a preliminary ruling procedure.

The time and cost factors of preliminary rulings are worth discussing in some detail. An average preliminary ruling procedure of a Hungarian case takes 16 months,<sup>800</sup> which may result in a significant violation of the interests of, and a disadvantage for, the parties of the legal dispute. Another important criterion when examining this issue is whether the inquiry directed to the ECJ is related to the merits of the case or is it (only) a request for an interpretation of a procedural issue that has no effect on the merits of the case. A statistical analysis of the preliminary ruling procedures must also address the time factor. On average, the ECJ needs 16.3 months<sup>801</sup> to complete a preliminary ruling procedure. In theory, a court in a Member State cannot consider it as a factor affecting the interpretation of the EU law that referring the case for a preliminary ruling procedure could extend the judicial proceeding by 15 to 20 or even 30 months. In actual practice, however, a final ruling based on the response by the ECJ and issued with one or two years of delay may render the legal dispute meaningless or may result in the imposition of heavy charges (e.g. interest) on the parties of the case. The ECJ may clarify a crucial legal issue in the specific case, and this judgment may even set a milestone in terms of the evolution of Community law. However, it is cold comfort for the given party that its name is listed as an example in Europe two or three years later. Such examples include *Cartesio Bt.*<sup>802</sup> and *Vale Kft.*,<sup>803</sup> whose application for a transfer of the company seat or a change in company registration was delayed for 31 and 24 months, respectively. Another example is the *Pannon GSM* case,<sup>804</sup> which affected not only Hungarian but also EU consumer protection.<sup>805</sup> However, this judgment also resulted in the accumulation of 30 months' worth of interest for the respondent in the case. Therefore, we are convinced that even

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<sup>800</sup> A calculation by the authors based on the body of completed cases between 2004 and 2013.

<sup>801</sup> The data refers to 2013. Press release No. 34/14 of the Court of Justice of the European Union, Luxembourg, 13 March 2014.

<sup>802</sup> Judgment in *Cartesio*, C-210/06, ECLI:EU:C:2008:723. For the implications of the case for Hungarian civil procedural law see: A. Osztovits, *Köddé fakult délibáb – a Cartesio ügyben hozott ítélet hatása a magyar polgári eljárásjogra*, (Fog Faded into a Mirage – The Effect of the Cartesio Ruling on the Hungarian Law of Civil Procedure) *Európai Jog* 9/2 (2009), 26–30.

<sup>803</sup> Judgment in *Vale*, C-378/10, ECLI:EU:C:2012:440. N. N. Orosz, *Az Európai Bíróság ítélete a VALE Építési Kft. ügyében: az EUMSZ 49. és 54. cikkéből eredő tagállami kötelezettségesség kérdése* (The Judgment of the European Court of Justice in the Case of Vale Építési Kft.: Member States' Failure to Fulfill Obligations under Articles 49 and 54 TFEU) *Jogesetek Magyarázata* 3/3 (2012), 66–73.

<sup>804</sup> Judgment in *Pannon GSM*, C-243/08, ECLI:EU:C:2009:350.

<sup>805</sup> There are more than 20 studies dealing specifically with this specific case: Notes aux arrêts de la Cour de justice, CJCE-System MINIDOC, Édition du 26/08/2013.

if time is not a decisive factor, it must be taken into account by Hungarian courts when considering the option of referring a case for a preliminary ruling procedure.

Society in the 21st century expects the administration of justice to be quick and efficient, and the European Union also has this undisputed objective.<sup>806</sup> In 2013, 699 new cases were referred to the ECJ, the number of which is approx. 10% higher than in 2012 and marks the highest number since the Court was instituted. Statistical data on the proceedings have seen a favourable change over the past year. Nonetheless, the average period of settling a preliminary ruling procedure is 16.3 months, which is still too long and may be many times longer than an average national proceeding. Therefore, the EU legislators should introduce changes to ensure that the preliminary ruling procedure offers an efficient and effective tool to the parties in a specific case to enforce their rights.

### 1.1. *International comparison*

A number of factors must be taken into account to determine if a Member State refers many or few cases for a preliminary ruling. Clearly, the size of the Member State and the structure of its court system and legal culture all play a role in that. The legal culture is relevant in determining what role judges have in the specific Member State in the dispensation of justice, how much judges are expected to be active or simply just to apply the letter of the law to the specific case without any independent interpretation of the law. In countries with legal cultures where judges are expected to be highly “independent” (e.g. in France), judges tend to apply Community law with less hesitation and refer fewer cases for a preliminary ruling procedure. In legal systems with a high degree of independence and complexity on the level of the written law (e.g. in Germany), there may be more cases of uncertainty regarding the interpretation and the substance of Community law.<sup>807</sup> Even though these two Member States are comparable in size, there is a difference of 1,100 in terms of the number of cases referred for a preliminary ruling procedure.<sup>808</sup>

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<sup>806</sup> Article 47 of the Charter of Fundamental Rights of the European Union.

<sup>807</sup> R. Somssich, *Előzetes döntéshozatali eljárások – nemzetközi kitekintés a 2004-ben csatlakozott országok vonatkozásában* (Preliminary Ruling Procedures – An International Outlook for Member States of the 2004 Enlargement Round) in A. Osztovits, (ed.), *A magyar bírósági gyakorlat az előzetes döntéshozatali eljárások kezdeményezésének tükrében 2004–2014*, (Hungarian Jurisprudence Related to References for Preliminary Rulings 2004–2014.), Budapest, 2014, 51–53.

<sup>808</sup> The number of references for a preliminary ruling by the German courts between 1961 and 2013 was 2,050, whereas French courts referred only 886 cases during the same period. Annual Report 2013 by the Court of Justice of the European Union, Luxembourg, 2014 (hereinafter: Annual Report), p. 111.

When comparing the number of references for a preliminary ruling procedure from the various Member States, it is best to compare countries that began applying Community law at the same time. An analysis of statistical data reveals that of all the Member States that acceded to the European Union in 2004, Hungarian courts have referred the highest number of cases (over one-third) for a preliminary ruling procedure over the past 10 years. Only Hungary referred cases during the year of accession, and a comparison of the figures show that the number of Hungary's references for a preliminary ruling was double the number from the Czech Republic, a country of similar size, and even exceeded (by 13) the number of references from Poland, a country much bigger both in terms of population and size.<sup>809</sup>

The number of references for a preliminary ruling by the Hungarian authorities has gradually increased after the accession, with 20 being the latest and highest number in 2013. The average among the 28 Member States of the European Union was 15.5 references in 2013. Germany (97) and Italy (62) were at the top of the list while three Member States (Malta, Luxembourg and Croatia) made no reference for a preliminary ruling in 2013.<sup>810</sup>

The number of procedures, in and of itself, does not provide an absolute quality assessment, of course. It does not imply that the courts of the countries making more or relatively more references for a preliminary ruling are "better" at applying the Community law than those with fewer references.<sup>811</sup> Yet, it is probably safe to say that the Member States with a relatively high number of references are clearly more open to Community law, the judges are not reluctant to apply it, and that the legal counsels are probably adept at taking advantage of the opportunities provided by EU law in moving the proceeding in a direction favourable to their clients.

### 1.2. *Distribution of preliminary ruling procedures by jurisdiction*

The open-mindedness of the Hungarian judiciary is indicated by the fact that instead of the courts of the last instance, mostly courts of the first instance made references for a preliminary ruling. Statistical data reveal that in over 70% of the cases references were made by courts of the first instance, whereas courts of the second instance and the Curia referred only 20% of the cases for a preliminary ruling. Just for the sake of comparison, in Latvia two-thirds of the references for a preliminary ruling procedure

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<sup>809</sup> The Member States that acceded to the EU in 2004 referred the following number of cases for a preliminary ruling: Czech Republic – 34, Cyprus – 5, Estonia – 15, Poland – 60, Lithuania – 23, Latvia – 30, Hungary – 84, Malta – 2, Slovakia – 24, Slovenia – 5. Annual Report, pp. 111–113.

<sup>810</sup> Ibid.

<sup>811</sup> Somssich, *op. cit.* 34–35.

were made by the supreme judicial forum while in Poland this ratio was above 40%.<sup>812</sup>

The Hungarian data indicate that in Hungary an EU-related case does not necessarily have to go all the way to the highest court, which has the obligation to refer it to the ECJ, to ensure that the EU law is interpreted correctly in the specific case, but it is rather managed appropriately even at lower levels.<sup>813</sup>

The fact that the majority of references to the ECJ from Hungary are made in the proceeding at first instance can be interpreted as a positive result. Namely, the correct interpretation of the Community law is incorporated in the judgment of first instance, which, in this regard, limits the chances for appealing against or overturning the decision as a result of a judicial review. This is specifically true in cases when the ECJ must be contacted in issues of procedural issues, most specifically those of jurisdiction. Good examples in this regard are the *Pannon GSM* and *VB-Pénzügyi Lízing*<sup>814</sup> cases, where references for a preliminary ruling procedure were made in the pre-trial phase of the procedure to clarify issues regarding jurisdiction. In contrast, the lack of jurisdiction under the Brussels I Regulation was determined and, consequently, the lawsuit was terminated (5 years after the petition was filed) in the review proceeding before the Curia in the *OTP* case.<sup>815</sup> In *OTP* case, it would have been justified to contact the ECJ in the proceeding at first instance and, in possession of the appropriate interpretation, terminate the lawsuit. These two contrasting examples illustrate that the tendency in the Hungarian courts to submit their inquiries to the ECJ during the proceeding at first instance greatly facilitates the effective enforcement of EU law.

The working group also examined the regional distribution of the district courts and tribunals making references for a preliminary ruling procedure.<sup>816</sup> There are a number of counties where not a single court has made a reference for a preliminary ruling since Hungary's accession 10 years ago. Although the exact reasons are unknown, it is not realistic to assume that the courts in those regions have never felt the need to interpret and apply EU law. Such data also strongly suggest that the 90 references made since Hungary's accession do not necessarily mean 90 different judges. Taking one or two counties and courts as examples, it can be established that the same judicial council made all references for a preliminary ruling both in Baranya and Hajdú-Bihar counties, and from the departments of the Curia, only the

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<sup>812</sup> Annual Report, pp. 99–100.

<sup>813</sup> Somssich, *op. cit.* 36.

<sup>814</sup> Judgment in *VB Pénzügyi Lízing*, C-137/08, ECLI:EU:C:2010:659.

<sup>815</sup> Judgment in *OTP Bank*, C-519/12, ECLI:EU:C:2013:674.

<sup>816</sup> If the statistical data are applied to the map of Hungary, it can be established that 80% of the references were made by courts from Budapest, Baranya County and Hajdú-Bihar County. Figure 3 in A. Osztovits (ed.), *A magyar bírósági gyakorlat az előzetes döntéshozatali eljárások kezdeményezésének tükrében 2004–2014*. (Hungarian Jurisprudence Related to References for Preliminary Rulings 2004–2014.) Budapest, 2014, 235.

council acting in economic cases requested the interpretation of EU law from the ECJ. Consequently, the majority of acting councils, for some reason, are not willing to take advantage of the preliminary ruling procedure.

### 2. Lessons learnt from the ECJ judgments in preliminary ruling procedures referred by Hungarian courts

Hungarian judges have made references for a preliminary ruling in various topics. Most of the references were made in the field of tax law. With regards to the references in tax law as well as other fields, there are related cases referred for a preliminary ruling such as consumer protection cases<sup>817</sup>, cases examining company seat issues<sup>818</sup> and cases on intellectual property.<sup>819</sup> Other groups of cases where references for a preliminary ruling were made deal with Palestinian refugees<sup>820</sup>, tax deductions<sup>821</sup> and the VAT Directive.<sup>822</sup>

#### 2.1. Cases completed without judgment on the merits

In terms of the cases completed without judgment on the merits, the ECJ issued negative decisions in only a few proceedings referred by Hungarian courts, which

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<sup>817</sup> Judgment in *Ynos*, C-302/04, ECLI:EU:C:2006:9., Judgment in *VB Pénzügyi Lízíng*, C-137/08, ECLI:EU:C:2010:659., Judgment in *Pannon GSM*, C-243/08, ECLI:EU:C:2009:350., Judgment in *Banif PlusBank*, C-472/11, ECLI:EU:C:2013:08., Judgment in *Jörös*, C-397/11, ECLI:EU:C:2013:340. Judgment in *Invitel* C-472/10, ECLI:EU:C:2012:242, and Judgment in *Kásler*, C-26/13, ECLI:EU:C:2014:282.

<sup>818</sup> The legal issue in *Cartesio*, ECLI:EU:C:2008:723 was the transfer of the company seat to Italy while remaining a Hungarian legal entity. *Vale* ECLI:EU:C:2012:440 was about an Italian company applying for conversion into a Hungarian company.

<sup>819</sup> In Judgment *Bericap*, C-180/11, ECLI:EU:C:2012:717 the ECJ examined the issues of limitations imposed by applications, decisions (facts of the case) and the exclusion of evidence already assessed within the context of the invalidity of a design. In Judgment in *Peró Gáz* C-349/12, ECLI:EU:C:2013:80 the issue of invalidating a patent was raised; thus the ECJ had to examine the same issues in both cases.

<sup>820</sup> Judgment in *Abed el Karem*, C-364/11, ECLI:EU:C:2012:826 may be considered as a continuation of Judgment in *Bobol*. C-31/09, ECLI:EU:C:2010:351. In both cases, interpretations of Article 1.D of the Geneva Convention of 1951 and Article 12 of Directive 2004/86/EC were required.

<sup>821</sup> For the judicial practice on this topic, see Section 2.2 of this article.

<sup>822</sup> In Judgment in *Parat*, C-74/08, ECLI:EU:C:2009:261 the referring court inquired about the ban on deducting the VAT part proportionate to subsidies. This continued in Judgment *Alakor* C-191/12, ECLI:EU:C:2013:315 which the referring court requested a legal position on whether the national legislation precluding repayment of VAT because it has been passed on to a third party was compatible with the principle of fiscal neutrality.

indicates that most references were, indeed, justified. Yet, it must be noted that even a negative decision by the ECJ is useful and may have an impact on the decision in the main proceeding.<sup>823</sup> In the majority of the cases, the clear lack of jurisdiction and revocation of the reference explained why the ECJ did not make a judgment in the case.

In accordance with its consistent case law, the ECJ has no jurisdiction in cases where the main proceeding does not have a single element that is related to EU law and if the regulation on which the preliminary ruling was requested is not part of Community law.<sup>824</sup> Thus, the ECJ rejected references in several cases (mostly on public administration and labour affairs) when the Hungarian Courts requested interpretation of the Charter of Fundamental Rights of the European Union within the framework of a preliminary ruling procedure. The ECJ explained that the references do not include any element based on which it could be established that the dispute on fundamental rights would affect the interpretation and application of EU laws outside the scope of the Charter, and the provisions of the Charter themselves cannot be used as grounds for jurisdiction, and therefore the ECJ, after the hearing the Advocate General’s opinion, issued an order.<sup>825</sup>

Several references for preliminary ruling by Hungarian courts have been revoked due to the termination of the main proceeding; in this case, the President of the ECJ orders the removal of the case from the registry.<sup>826</sup>

According to Article 104 of the ECJ’s Rules of Procedure, where the answer to the question referred to the Court for a preliminary ruling may be clearly deduced from existing case law, the Court has to give its decision by reasoned order. Such reasoned

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<sup>823</sup> An example of this type is the Order in *RANI v Hankook*, C-298/09, ECLI:EI:C:2010:343 Summary Opinion p. 78 and p. 205. In addition, it is worth mentioning the first Hungarian reference for a preliminary ruling procedure, i.e. the *Ynos* case, where even though ECJ failed to answer all the questions asked by the Hungarian judge, it did provide important guidance on the period of validity of the Community law. In this judgment, the ECJ ruled that with regard to the preliminary ruling procedure, “*in circumstances such as those of the dispute in the main proceedings, the facts of which occurred prior to the accession of a State to the European Union, the Court does not have jurisdiction to answer.*” The significance of the *Ynos* case will be discussed later.

<sup>824</sup> See Judgment in *Hermes Hírel és Faktor Zrt.* C-16/12, ECLI:EU:C:2012426 paragraph 14 and the judicial practice cited there.

<sup>825</sup> See Section 16–17 of the order in the Joined Cases C-488/12, C-489/12, C-490/12, C-491/12, C-526/12, 10, and Section 13–14 of the Order in *Weigl*, C-332/13, ECLI:EU:C:2014:31 and the judicial practice cited there.

<sup>826</sup> Order in *Vodafone*, C-447/06, ECLI:EU:C:2007:216. Order in *IBIS*, C-490/11, ECLI:EU:C:2012:229 and Order in *Franklin Templeton*, C-112/12, ECLI:EU:C:2012:769.

orders have been given four times in Hungarian cases.<sup>827</sup> The case law of the ECJ is undergoing a continuous evolution, which may result in a change in its previously established positions. One such good example is the *Pannon GSM* case where the second question of the judge referring the case to the ECJ was a verbatim repetition of the first question submitted by a Spanish court in the *Océano Grupo* case.<sup>828</sup> The Hungarian judge wanted to transpose the conclusions of the Spanish case in Hungarian case law by the ECJ's judgment, and the Hungarian case with the same facts seemed to offer a good opportunity. The ECJ could have simply repeated its answer given in the earlier case, but this is not what happened. Changing its opinion from nine years before, the ECJ gave an answer containing new elements and conclusions and thereby discontinued its previously uniform judicial practice.<sup>829</sup>

### 2.2. Tax cases concluded with judgment on the merits

In this category, tax cases were analysed as a separate group, because these cases were referred to the ECJ in the largest number (almost 20% of the total).<sup>830</sup> Courts of other Member States also seek the ECJ's judgments in tax and competition cases most of

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<sup>827</sup> Order in *Lakép and others*, C-261/05, ECLI:EU:C:2006:98; Order in *RANI v Hankook*, ECLI:EI:C:2010:343, Judgment in *Pannon GSM*, ECLI:EU:C:2009:350 and Order in *Hardimpex*, C-444/12, ECLI:EU:C:2013:318. Other cases were repealed when ECJ answered the inquiries in other procedure after the specific proceeding commenced. In this case the Office of ECJ contacts the referring court and inquires whether they intend to maintain their reference in light of the judgment in the other case. If the referring court gives a negative answer, the case is removed from the registry as per the rules on repeal.

<sup>828</sup> C-240/98 *Océano Grupo*. See also Z. Nemessányi, *Océano Grupo magyar tengere* (The Hungarian Sea of Océano Grupo), *Európai Jog* 8/3 (2008), 31–42.

<sup>829</sup> ECJ amended the reasons in its earlier judgments by stating that the role attributed to the national court under Directive 93/13/EC in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction. Judgment in *Pannon GSM*, ECLI:EU:C:2009:350, Section 32–33.

<sup>830</sup> In addition to tax law, the most cases concerned consumer protection (primary private law rules) and the common agricultural policy. For consumer protection cases, see A. Osztovits, *Magyar fogyasztóvédelmi ügyek az Európai Közösségek Bírósága előtt* (Hungarian Consumer Protection Cases Before the Court of Justice of the European Communities), *Fogyasztóvédelmi Szemle* 2009 3/2. 65–70; A. Osztovits, *A közösségi jog hatása a fogyasztói szerződések magyar szabályozására és joggyakorlatára* (The Impact of Community Law on the Hungarian Regulation and Practice of Consumer Contracts), *Gazdaság és Jog* 17/12 (2009), 11–15.

the time, as these cases amounted to 18% of the total in 2013.<sup>831</sup> Within the tax law category, the majority of issues referred by Hungarian courts to the ECJ concerned the interpretation of value added tax rules,<sup>832</sup> but there were a fairly large number of references involving cases associated with local business tax<sup>833</sup> and agricultural aid<sup>834</sup> as well. This is mainly explained by the fact that the majority of administrative lawsuits that are filed for the judicial review of resolutions by regulatory and administrative agencies are based on Community law, and this is where the application of EU law is most often needed. It stands to reason that the need for the interpretation of Community law will be greater in areas where the scope of Community law is larger. The rules governing the introduction of European Union’s common value added tax regime are included in the VAT Directive.<sup>835</sup> In the case of directives, it is often a question whether they have been transposed into national law correctly and in line with their objectives and spirit.

In the joint cases *Mahagében* and *Dávid*<sup>836</sup>, the ECJ ruled that the right to deduct tax can be refused only if the tax authority can prove that the taxpayer knew, or ought to have known, that the transaction in which he participated had tax evasion as its purpose. Strict liability and a general obligation to investigate do not apply in such cases. In the *Tóth* case, the ECJ found that it is irrelevant for the purposes of the right to deduct tax if the licence to operate as an individual contractor of the person who issued an invoice had been revoked or that his employees had worked “in the black economy” as long as the recipient of the invoice was not and cannot have been aware of this, because the recipient has no obligation to inspect the status of the workers. There were a number of other tax deduction cases: in *Hardimpex*, the question submitted by the national court concerned the purchase of goods of unconfirmed origin and the right to deduct tax; in *BDV Hungary Trading*, the limitation period pertaining to the release of goods to a third country and the reclassification of transactions as taxable transactions; and in *Mecsek Gabona*, the intra-Community supply of goods.

In addition to the above reasons, we believe that there is very simple explanation for the large number of tax cases: the amounts involved in the cases referred for the ECJ’s judgment are significant. Just to highlight two Hungarian tax cases, the

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<sup>831</sup> Annual Report pp. 85–87.

<sup>832</sup> Judgment in *Pannon Gép Centrum*, C-368/09, ECLI:EU:C:2010:441. Order in *Hardimpex*, ECLI:EU:C:2013:318., and Judgment in *Uszodaépítő Kft.*, C-392/09, ECLI:EU:C:2010:569.

<sup>833</sup> Order in *Lakép and others* C-261/05, ECLI:EU:C:2006:98. Judgment in joint cases *KÖGÁZ*, C-283/6 and *OTP Garancia Biztosító* C-312/06, ECLI:EU:C:2007:598.

<sup>834</sup> Judgment in *Uzonyi*, C-133/09, ECLI:EU:C:2010:563. Judgment in *Bábolna*, C-115/10, ECLI:EU:C:2011:376.

<sup>835</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

<sup>836</sup> Judgment in joint cases *Mahagében* C-80/11 and *Dávid*, C-142/11, ECLI:EU:C:2012:373.

### 3. REJECTION OF MOTIONS TO REFER A CASE FOR PRELIMINARY RULING

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modification of the legislation following the *Nádasdy* case<sup>837</sup> resulted in tax refunds of HUF 10 billion (approx. EUR 35.6 million), whereas the judgment in *PARAT* enabled taxpayers to reclaim HUF 37.1 billion (approx. EUR 132 million).

#### 3. Rejection of motions to refer a case for preliminary ruling

Another task that the working group intended to perform was to identify cases where Hungarian courts did not refer a matter for preliminary ruling despite one of the litigant's motion. This article will focus on two typical mistakes that the courts made in the explanations for rejecting the motions.<sup>838</sup>

##### 3.1. Hungarian law corresponds to Community law verbatim

The fact that a national and a Community regulation is the same word-for-word does not in itself mean that the court should not refer the case for preliminary ruling because, as the ECJ noted several times,<sup>839</sup> the terms and words used in EU law have their autonomous meaning, and must be interpreted independently, by reference to the scheme and purpose of the provision in which they are used. The meaning of words can be questionable even in such simple cases as the meaning of matters relating to the contract (see the *OTP* case: the interpretation of jurisdiction)<sup>840</sup> or matters relating to tort, delict or quasi-delict.<sup>841</sup> While a term might be used in national law, it can have a different meaning under Community law. This is aptly illustrated by the *Fixtures Marketing* case,<sup>842</sup> where the meaning of "obtaining" the contents of a database of football fixtures was questioned. The Advocate General's opinion devoted a separate chapter to the comparison of the versions of the term in different languages, and found that the Finnish and Danish versions applied a narrow interpretation of it, whereas the English and German versions used a wide interpretation and therefore gave rise to an erroneous interpretation.<sup>843</sup> Consequently, Community law cannot be applied on

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<sup>837</sup> The commentary to Act CXXXIII of 2011 on the Execution of the 2010 Budget of the Republic of Hungary.

<sup>838</sup> For a discussion of rejecting orders see P. Szabó, *A Pp. előzetes döntéshozatali eljáráshoz kapcsolódó rendelkezéseinek felsőbb bírósági gyakorlata* (The Practice of the Superior Courts vis-à-vis the Provisions of the Code of Civil Procedure Related to the Preliminary Ruling), *Európai Jog* 9/1, (2009) 3–12.

<sup>839</sup> See the Judgment in *Zuid-Chemie* C-189/08, ECLI:EU:C:2009:475. Section 17. and the practices cited there.

<sup>840</sup> Judgment in *OTP Bank*, ECLI:EU:C:2013:674.

<sup>841</sup> Judgment in *OFAB*, C-147/12, ECLI:EU:C:2013:490.

<sup>842</sup> Judgment in *Fixtures Marketing*, C-444/02, ECLI:EU:C:2004:697.

<sup>843</sup> The opinion of Advocate General Hackl in C-444/02. ECLI:EU:C:2004:339.

the basis of the Hungarian text alone; a comparison of versions in various languages is indispensable; and attention must also be paid to the *sui generis* terms of EU law.

### 3.2. Hungarian law is harmonised with Community law

Simply because a piece of Hungarian legislation was adopted to bring Hungarian law in line with Community law (according to the harmonisation clause),<sup>844</sup> does not relieve a court from its obligation to examine the applicable EU regulations. The fact that the relevant clause of a Hungarian regulation refers to a specific EU directive will not mean that it is actually aligned with the objectives and provisions of the directive in every respect. Additionally, even if a Hungarian regulation is harmonised with the relevant Community regulation, the interpretation of the harmonised Hungarian regulation must also be aligned with EU law. Therefore, an examination of EU law will be necessary in the application of the Hungarian regulation, and a preliminary ruling procedure cannot be excluded *ab ovo*.<sup>845</sup> Judgments made by the ECJ in preliminary ruling procedures that resulted in modifications of the Hungarian regulations can be cited as examples for such cases.

## 4. The effect of ECJ judgments on Hungarian legislation

The importance of preliminary ruling procedures and of the interpretations expressed by the ECJ in its judgments is illustrated by the changes in Hungarian law that resulted from certain judgments. Although the ECJ is authorised to interpret Community law, its judgments in effect are opinions on whether any regulations that have similar or identical features as the disputed national regulation are compatible with EU law.<sup>846</sup> If an ECJ judgment makes it clear that a national regulation is not compatible with EU law, national legislatures usually have no choice but to adopt a new legislation.

In general, Hungarian legislators reacted relatively quickly (with a few exceptions) to judgments adopted by the ECJ in cases referred for preliminary ruling by Hungarian courts when it was necessary.<sup>847</sup>

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<sup>844</sup> Section 88 of the Decree No. 61/2009 of the Minister of Justice states that if the purpose of a provision in a statute is to implement a Community rule, this must be stated in a clause that includes references to the relevant Community rules.

<sup>845</sup> P. Metzinger, *Az előzetes döntéshozatali eljárások kezdeményezésének tapasztalatai – ügyvédi észrevételek* (The Experience of References for Preliminary Rulings – Remarks by an Attorney.) in A. Osztovits (ed.), op. cit. 227.

<sup>846</sup> See Section 23–24 of the judgment in C-118/08 *Transportes Urbanos* and the judicial practice cited there.

<sup>847</sup> R. Somssich, *Gondolatok az előzetes döntéshozatali eljárásban hozott ítélet jogalkotási, jogalkalmazási összefüggései kapcsán* (Thoughts on Legislative and Judicial Implication of Judgments Rendered in Preliminary Ruling Procedures), in A. Osztovits (ed.), op. cit. 222–223.

##### 4.1. Cases involving consumer contracts and procedural rules

As a consequence of the *Ynos* case<sup>848</sup> (which was one of the first Hungarian references), the provisions on consumer protection in the Civil Code were modified.<sup>849</sup> In the light of the European Commission's and Advocate General's opinion, Section 209/B of the Civil Code was modified, and the concept of relative nullity was introduced with respect to consumer contracts and relative invalidity was defined and made objective. It is interesting that while the ECJ did not respond to the national court's questions on the grounds of not having jurisdiction, the Advocate General's opinion<sup>850</sup> suggested that the relevant provisions of the Hungarian Civil Code are incompatible with Community law.<sup>851</sup>

The rules of civil procedure were also modified as a result of a judgment adopted in a preliminary ruling procedure. The ECJ had previously held that a term of a contract that is not individually negotiated between a consumer and a supplier is unfair if it confers jurisdiction on a court that has territorial jurisdiction over the principal place business or domicile of the supplier.<sup>852</sup> In *Pannon GSM*,<sup>853</sup> the ECJ added that the role attributed to national courts by Directive 93/13/EC<sup>854</sup> is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of their own motion. In carrying out that obligation, a national court is not, however, required under the Directive to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status. Hungary's rules on civil procedures did not include provisions dealing with

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<sup>848</sup> Judgment in *Ynos*, C-302/04, ECLI:EU:C:2006:9. For the aftermath of the judgment, see P. Szabó, *Az Ynos Kft.-ügyben hozott luxemburgi bírósági ítélet előzményei és utóélete – az előterjesztő magyar bíró szemével* (Preliminaries and Consequences of the Decision of ECJ in Case *Ynos Kft.* – Comments of the Initiative Hungarian Judge), *Európai Jog* 6/5 (2006), 31–36.

<sup>849</sup> Act III of 2006 on the Modification of Act IV of 1959 on the Civil Code and Certain Acts for the Purpose of Harmonisation in the Field of Consumer Protection.

<sup>850</sup> Section 74–75 of the opinion of Advocate General Tizzano in C-302/04 *Ynos*, ECLI:EU:C:2005:575.

<sup>851</sup> This reference was probably the reason why the relevant provisions of the Civil Code were modified in order to align it with Community law.

<sup>852</sup> Judgment in joint cases *Océano Grupo Editorial* C-240/98 and *Salvat Editores* C-244/98, ECLI:EU:C:2000:346, Section 21–22.

<sup>853</sup> Judgment in *Pannon GSM*, ECLI:EU:C:2009:350.

<sup>854</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter: Directive).

such obligations. The Hungarian Parliament adopted Act L of 2009<sup>855</sup> to modify the rules on how jurisdiction can be stated in contracts. Under the modified rules, if the jurisdiction of a court is determined by the general terms of a contract, the court so determined will, at the claimant’s motion, transfer the case to a court of general (or alternative) jurisdiction specified by the claimant.

The modified rules do not make a distinction between the general terms of consumer and non-consumer contracts, and they do not apply to jurisdiction clauses that are determined by the supplier in advance, without negotiations with the consumer. The Curia’s civil law department addressed this issue specifically in its opinion No. 2/2011<sup>856</sup> and held that courts, in line with the Directive and the ECJ’s relevant case law, have to examine of their motion in the pre-trial phase whether the jurisdiction clause of a consumer contract is based on the supplier’s principal place of business, and if so, they should ask the claimant to state within a deadline specified by the court whether he or she believes that such term is unfair. Courts do not have his obligation in the case of contracts that do not qualify as consumer contracts. If the consumer does not respond within the deadline, the court has to transfer the case to the court specified.<sup>857</sup>

#### 4.2. Cases involving civil procedure rules

The ECJ’s judgment in *Cartesio* resulted in another modification of Hungarian civil procedure rules<sup>858</sup> and the adoption of joint opinion No. 1/2009 by the civil and pub-

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<sup>855</sup> Section 62 (1) of Act L of 2009 on Summary Debt Collection. Under the Act, the modified provisions have to applied in lawsuits that start after 30 June 2009. Although the commentary to the Act does not name the judgment in *Pannon GSM*, but the fact that the judgment was announced on 9 June 2009 and the Act was promulgated on 23 June 2009 suggests that the legislators took the ECJ’s judgment into account.

<sup>856</sup> Opinion No. 2/2011 of the civil law department of the Curia on certain issues associated with the invalidity of consumer contracts. The opinions of the civil law department are abstract interpretations of the law that do not formally bind courts but aim to ensure a consistent judicial practice.

<sup>857</sup> For a discussion of this topic, see L. Darázs, *A “bíróválasztás” mint tisztességtelen szerződési kikötés* (“Choice of Court” as Unfair Contract Term), *Gazdaság és Jog* 2012/12, 19–24, A. Osztoivits, *A bíróságok feladatai a fogyasztói szerződésekkel kapcsolatos jogvitákban* (The Role of Courts in Litigations Related to Consumer Contacts.), *Gazdaság és Jog* 2012/3, 11–17.

<sup>858</sup> Act LXVIII of 2009 on the Modification of Act III of 1952 on the Code of Civil Procedure was adopted to make the adjudication of disputes between companies easier (and it took effect on 1 January 2010).

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lic administration departments of the Curia.<sup>859</sup> Civil procedure rules had previously stated that orders by Hungarian courts concerning preliminary ruling procedures were subject to appeal both at the first instance and the appeals level. Therefore, a national court's decision to refer a case for preliminary ruling or to deny the motion seeking such reference was subject to appeal and could be overridden by the appellate court. However, the ECJ ruled in *Cartesio* that the jurisdiction conferred on any national court or tribunal to make a reference to the ECJ for a preliminary ruling cannot be called into question by the application of rules that permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.<sup>860</sup>

In response to the judgment, the procedural rules that allowed appeals against orders for references for preliminary rulings were repealed or modified. Under the act on the modification, the new rules applied to cases that started after the rules had taken effect, but it was silent on how courts should proceed in connection with appeals against orders for reference in cases that started before the new rules had taken effect but after Hungary's accession to the EU. The Curia's opinion No. 1/2009 intended to resolve this issue. In order to ensure a uniform interpretation and application of the law, the Curia stated that the interpretation that is best aligned with the ECJ's judgment in *Cartesio* and with the jurisprudence underlying Hungarian civil procedure law is that which deprives appellate courts of the right to overrule orders for reference either in terms of the questions asked or in terms of whether such questions are justified. The joint opinion also held that in the Hungarian justice system, the Curia must be viewed as the forum that is subject to the obligation to make references, if the possibility of judicial review is not excluded by law.<sup>861</sup>

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<sup>859</sup> Joint opinion No. 1/2009 by the civil and public administration benches of the Curia on the evaluation of appeals associated with references for preliminary ruling and on the obligation to refer cases.

<sup>860</sup> Judgment in *Cartesio*, ECLI:EU:C:2008:723. Section 98.

<sup>861</sup> Although it did not require a modification of any regulation, the *Cartesio* judgment made another important ruling when it stated that the court that acts as the appellate court in a case concerning the rejection of an application for the registration of corporate changes must be regarded as a court or tribunal within the meaning of Article 234 EC, with jurisdiction to refer a question to the Court for a preliminary ruling, regardless of the fact that registration court's decision is not made and the appeals are not evaluated in *inter partes* proceedings. R. Muzsalyi, *Az előzetes döntéshozatali eljárás kezdeményezésének magyar joggyakorlata EU tagságunk első tíz évében* (The Hungarian Case-law of the Initiation of Preliminary Ruling Proceeding during the first 10 years of our EU membership), *Európai Jog* 14/3, (2014) 8.

#### 4.3. *Modification of tax regulations*

According to the general commentary to Hungary’s Act CXXX of 2006 on the Refunding of Vehicle Registration Tax, the legislation was necessitated by the judgment in the joint cases *Nádasdi and Németh*.<sup>862</sup> The ECJ held that the Hungarian regulation that imposed higher taxes on used vehicles imported from other Member States than on similar used vehicles registered in Hungary was incompatible with Community law. As a result of the preliminary ruling procedures, the Hungarian Parliament modified the rules of how the registration tax was calculated, and it adopted an act on the partial refunding of the registration tax.

The ECJ’s judgment in *Parat*,<sup>863</sup> another tax-related case, required a modification of the Act on the Rules of Taxation.<sup>864</sup> The ECJ held that Community law precluded the Hungarian legislation which, in the case of acquisition of goods subsidised by public funds, allowed the deduction of related VAT only up to the limit of the non-subsidised part of the costs of that acquisition. The modification of the Act introduced new procedural rules that allowed the relevant taxpayers to reclaim tax within a deadline following the announcement of the ECJ’s judgment.

#### 4.4. *Cases involving corporate tax regulations*

The following case is an example that legislators sometimes fail to make the necessary modifications despite the ECJ’s opinion on the incompatibility between Community and national law.

In *Vale*,<sup>865</sup> the ECJ had to provide an interpretation of the freedom of establishment under Articles 49 and 54 of the TFEU in connection with a cross-border conversion. On 3 February 2006, a company based in Rome (VALE S.r.l.) asked to be removed from Italian commercial register on the grounds that it intended to transfer its seat and its business to Hungary, and to discontinue business in Italy. In accordance with the request, the authority responsible for the commercial register in Rome deleted the entry relating to VALE S.r.l. from the register on 13 February 2006. The director of VALE S.r.l. and another natural person adopted the articles of association of VALE

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<sup>862</sup> Judgment in joint cases *Nádasdy*, C-290/05 and *Németh*, C-333/05, ECLI:EU:C:2006:478.

<sup>863</sup> Judgment in *Parat*, C-74/08, ECLI:EU:C:2009:261. For a discussion of the judgment, see P. Tárnoki, *Az áfa-levonási jog korlátozásának határai: az Európai Bíróság által a C-74/08. számú PARAT-ügyben hozott előzetes döntéshozatali ítélet* (The Limits to the Restriction on the Right to Deduct Value Added Tax: Preliminary Ruling of the ECJ in Case C-74/08, the Parat Case), *Európai Jog* 9/4, (2009) 37–40.

<sup>864</sup> Act XXXV of 2009 on the Modification of Certain Acts on Taxation and Other Related Acts.

<sup>865</sup> Judgment in *Vale*, ECLI:EU:C:2012:440.

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Építési Kft. (a limited liability company governed by Hungarian law) (VALE Kft.) in Rome on 14 November 2006, stating that “the company, originally established in Italy under Italian law, has resolved to transfer its seat to Hungary and to operate under Hungarian law.” At the same time, the shareholders paid up the share capital as required under Hungarian law in the case of the registration of a limited liability company.

On 19 January 2007, the representative of VALE Kft. applied to the Budapest Metropolitan Court, acting as the Commercial Court, to register the company in accordance with Hungarian law. In the application, the representative stated that VALE S.r.l. was the predecessor in law to VALE Kft.

The Budapest Metropolitan Court, acting as a commercial court at first instance, rejected the application for registration, and its decision was upheld by the appellate court. The appellate court held that a company which was incorporated and registered in Italy could not, by virtue of Hungarian company law, transfer its seat to Hungary and could not obtain the registration there in the requested form. It argued that Hungarian company law did not include any specific rules on cross-border conversions and international transfers of corporate seat.<sup>866</sup> Similarly, secondary EU law did not regulate the cross-border conversions and international transfers of corporate seat of companies established under national law.

Vale Kft. sought a review of the appellate ruling and requested the annulment of the order rejecting its registration and that the company be entered in the commercial register. It argued that the contested order infringed Articles 49 and 54 of the TFEU, which were directly applicable, and that it did recognise the fundamental difference between the international transfer of the seat of a company and the international conversion of a company. It was in these circumstances that the Curia referred the case for a preliminary ruling and sought the ECJ’s interpretation of Articles 49 and 54 of the TFEU.

In its judgment, the ECJ set out several conditions in connection with the Member States’ treatment of similar applications. It stated that the freedom of establishment is incompatible with national legislation which, although enabling a company established under national law to convert, does not allow a company established in

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<sup>866</sup> Except for company forms that are based on EU law, where the transfer of the seat is regulated partially by EU and partially by national rules.

accordance with the law of another Member State to convert to a company governed by national law.<sup>867</sup>

In its ruling based on the judgment, the Curia stated that a cross-border conversion must satisfy the condition that the articles of association of the successor company must be adopted in the form and with the method specified in Act IV of 2006 on Business Associations (“Companies Act”), on or near the date when the decision on the dissolution of the predecessor is made, but in no later event than the deletion of the predecessor from the commercial register. The Curia also stated that out of the corporate law rules applicable to domestic conversions, the rules under which at least one of the shareholders of the predecessor must be a shareholder in the successor and at least some of the assets of the predecessor must be transferred to the successor are particularly applicable to cross-border conversions. If these conditions are not met, a key element of succession in law, namely legal continuity, will be absent. As the existence of the successor company’s founding document at the time of the predecessor’s deletion is a basic requirement, the Curia ruled that VALE Kft could not be lawfully registered as VALE S.r.l.’s successor in the given situation (nine months had elapsed between the deletion of the Italian company and the establishment of the Hungarian one). In our view, the ECJ’s interpretation of the regulations and the Curia’s ruling clearly pointed out the shortcomings of Hungarian corporate law. Nevertheless, these shortcomings were not addressed by the rules of the recently introduced new Civil Code or in any other regulation.

These examples show that Hungarian regulations are not always harmonised with EU law, and the harmonisation clauses attached to Hungarian statutes are not a guarantee that a given statute will be fully compatible with EU law. The cases described above also illustrate that the correct enforcement of a judgment adopted in a preliminary ruling procedure sometimes requires guidance from the courts when the regulation introduced to enforce it fail to address every issue. Until a solution that is compatible with Community law is found, courts must determine the inter-

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<sup>867</sup> The ECJ’s judgment has been discussed by a large number of authors. E.g. J. Borg-Barthet, *Free at Last? Choice of Corporate Law in the EU Following the Judgment in Vale*, *International and Comparative Law Quarterly* 2013, 503–512; G. Van Gelder, *The European Cross-Border Conversion from a Dutch Tax and Legal Perspective*, *EC Tax Review* 2013, 202–208; J. Jakubowski and P. Ondrejka, *EuGH: Rs VALE - Grenzüberschreitende Umwandlung von Gesellschaften*, *Österreichisches Recht der Wirtschaft*, 2012, 704–708; J. Houet, *Cross-Border Mobility Within the EU: the Saga Continues*, *European Law Reporter* 2012, 206–212; T. Biermeyer, *Shaping the space of cross-border conversions in the EU. Between right and autonomy: VALE*, *Common Market Law Review* 2013, 571–590; M. Varju, *A Cartesio-ügy. Társasági székhely áthelyezése és az előzetes döntés kérésének joga* (The Cartesio Case. The Transfer of a Company Seat and the Right to Refer for a Preliminary Ruling), *Jogesetek Magyarázata* 2010/2, 51–72.

pretation of national laws in accordance with Community law, and as discussed in connection with analysis of the cases above, the Curia's opinions have a prominent role in ensuring that this task is carried out properly and in a consistent manner.<sup>868</sup>

### Conclusions

Perhaps the best way to describe the lessons learned from the cases referred for a preliminary ruling by Hungarian courts is to use the analogy of a glass half empty and half full. It is half empty if one thinks of the fact that courts from seven counties have not referred a single case to the ECJ in the last ten years. It is nearly impossible that the courts there never met a case where the application and interpretation of Community law was necessary. The glass is also half empty if we look at how courts explain why they deny the parties' motions for a reference.

The glass is definitely half full, however, if we compare the practices of Hungarian courts with that of the courts of the other nine Member States that also acceded to the EU in 2004, because we will see that the Hungarian judiciary was prepared for the tasks and challenges associated with EU membership.<sup>869</sup> The fact that the ECJ heard many Hungarian cases in the Grand Chamber and that only ten percent of the cases was rejected shows that Hungarian courts referred cases for preliminary ruling with good reason. It is a positive sign and commendable that the references were often made in connection with issues where the ECJ's subsequent judgment prompted legislators to adopt regulatory modifications that affected a wide spectrum of society, including rules on consumer protection and taxation.

The Summary Opinion of the working group is that Hungary's highest tribunal remains open in the direction of the law of the European Union and, in line with its obligations under the Constitution, it is committed to ensuring that Hungarian courts apply the law consistently, whether it be Community law or Hungarian law.

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<sup>868</sup> Somssich, *op. cit.* 223–224.

<sup>869</sup> Suggesting that the mandatory pre-accession training courses for judges were successful.