The Gradual Shaping of Hungarian Law by Consecutive Preliminary References

The Experiences of the Last 20 Years

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Abstract

Since the 'Big Bang' accession of 2004, Hungary has been the second most active Member State from the EU-10 in initiating preliminary ruling procedures, after Poland which is in the lead. After 20 years of membership, we can conclude with good reason that Hungarian courts are effectively and efficiently using this form of judicial cooperation at all levels of the court system. In addition, experience shows that often the questions referred to the ECJ have significant repercussions, raising new questions sent to the Court. These are not only finetuning the European case law but have an important impact on the national law too, shaping it step by step.

Keywords: preliminary ruling, Hungary, VAT, usufruct, consumer contracts

1. Introduction

The past 20 years have transformed the EU in profound ways. The accession of new Member States and the departure of the United Kingdom, the Lisbon Treaty, the sovereign debt crisis, the migration crisis, the COVID-19 pandemic, the increased focus on the rule of law in Member States, and as of lately Russia's war on Ukraine – to name the most significant elements of this process – have also had a great impact on the workload and the

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functioning of the CJEU. Not only have the competences of the EU spread to new areas of law during these years, prompting new litigation and preliminary ruling procedures in these areas, but some of the cases that come before the ECJ and the General Court also tend to raise more complex and sensitive issues than before. The CJEU has also had to find new ways to deal with the fact that with the accession of 13 new Member States since 2004 the number of judges at the ECJ and the General Court had almost doubled. In 2015, the CJEU underwent a major reform, whereby the Civil Service Tribunal, established in 2005, ceased to exist and returned its competences to the General Court, which in turn has seen the number of its judges doubled, *i.e.* to two judges per Member State.[1]

For the fall of 2024 another, possibly even more significant reform is foreseen, intended to relieve the ECJ of some of its workload and enable it to focus resources on the more significant cases that shape union law and the EU itself. The modification of the Statute of the CJEU, as already agreed upon by the European Parliament and the Council of the European Union as co-legislators,[2] will transfer the competence to hear preliminary ruling cases to the General Court in certain areas of union law,[3] thereby activating, for the first time, Article 265(3) TFEU, originally inserted in the Treaty by the Treaty of Nice in 2001.

Such transfer of competences to the General Court raises a number of questions.[4] On the one hand, institutional and procedural conditions must

1 *See* Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union; and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants. For a critical evaluation of the 2015 reform, *see* Alberto Alemanno & Laurent Pech,'Thinking justice outside the docket: A critical assessment of the reform of the EU's court system', *Common Market Law Review,* Vol. 54, Issue 1, 2017, pp. 129–175.

2 *See* the Draft Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, adopted in first reading by the Council on 19 March 2024, at https://data.consilium.europa.eu/doc/document/PE-85-2023-INIT/en/pdf.

3 These areas are the common system of value added tax (VAT), excise duties, the customs code, the tariff classification of goods under the combined nomenclature, compensation and assistance for passengers whose transport services are delayed or cancelled or who are denied boarding, and the scheme for greenhouse gas emission allowance trading.

4 For a preliminary assessment of the reform and some of the questions it raises, *see* Daniel Sarmiento, 'On the Road to a Constitutional Court of the European Union:

be created under which the General Court, which currently only hears cases of direct actions, is enabled to fulfil its new duties. These must also ensure that in cases where the competent union court is not *prima facie* obvious the matter is actually dealt with by the jurisdiction to which the Statute of the CJEU has assigned competence.[5] The transfer of competences may have the unintended consequence of undermining the acceptance of the preliminary rulings if they were to be perceived to be of inferior quality delivered by a lower court. To ensure that national courts do not doubt that the General Court is up to the task, the ECJ should exercise constraint and let the General Court work without being overruled too often.[6] It will be interesting to see whether the courts of the Member States continue to present preliminary ruling requests with the same willingness knowing that they will be dealt with by the General Court instead of the ECJ, or whether they will try to steer their cases to the ECJ by inflating their importance by, for example, systematically raising questions relating to the interpretation of primary union law, including the Charter of Fundamental Rights.[7]

The reform will also have a considerable impact on Hungarian requests for preliminary ruling as one of the areas where the transfer of competence

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The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court (Editorial Note)', *Croatian Yearbook of European Law and Policy*, Vol. 19, 2023, pp. VII–XVII; Davor Petrić, 'The Preliminary Ruling Procedure 2.0', *European Papers,* Vol. 8, Issue 1, 2023; Sara Iglesias Sánchez, 'Preliminary Rulings before the General Court Crossing the last frontier of the reform of the EU judicial system?', *EU Law Live Weekend Edition,* No 125, 17 December 2022, pp. 15–16; Michal Bobek, 'Preliminary Rulings before the General Court: What Judicial Architecture for the European Union', *Common Market Law Review,* Vol. 60, Issue 6, 2023, pp. 1515–1550.

5 In that regard see also the amendments of the Rules of Procedure of the Court of Justice, at https://data.consilium.europa.eu/doc/document/ST-7225-2024-INIT/en/pdf, and of the General Court, at https://data.consilium.europa.eu/doc/document/ST-7226-2024-INIT/en/pdf, submitted to the Council for approval in February 2024.

6 In exceptional cases, where the there is a serious risk of the unity or consistency of union law being affected, the Court of Justice may review the decisions of the General Court pursuant to Article 62 *et seq.* of the Statute of the CJEU.

7 According to recital (8b) of the approved text of the Draft Regulation, "[…] the Court of Justice will retain jurisdiction where the request for a preliminary ruling raises independent questions of interpretation of primary law, public international law, general principles of Union law or the Charter, having regard to their horizontal nature, even where the legal framework of the case in the main proceedings falls within one or more of the specific areas […]."

will take place, VAT, is an area where Hungarian requests are abundant[8] and will most likely continue to be so in the future. Other areas such as the compensation and assistance to passengers[9] and the tariff classification of goods under the Combined Nomenclature[10] have also seen several Hungarian preliminary ruling procedures in past years. It will therefore be interesting to see how Hungarian judges adapt to the new judicial architecture of the EU in which preliminary ruling procedures will undoubtedly continue to play a central role, in particular as 20 years ago they have proven ready, willing and able to cooperate with the CJEU as soon as the accession of Hungary to the EU empowered them to raise questions of union law and request preliminary rulings from the ECJ. From the Member States that joined in 2004, it was Hungary whose courts presented the first two preliminary references and seeing the relevant statistics we can easily conclude that Hungarian courts remained active in initiating references ever since. The average number of references from Hungarian courts is around 20 each year, which is in certain years very close to the number of references emanating from France[11] and definitely higher than the Czech references[12] (a country which joined the same year and is approximately of the same size).

It is widely known that the preliminary ruling procedure constitutes one of the pillars of the 'complete system of judicial protection' of the EU beside direct actions that may be brought straight before the union courts. National courts are 'functional' union courts in the sense that it is before national courts that private parties may bring cases involving issues of

8 As of 21 April 2024, 62 of the overall 286 Hungarian preliminary ruling procedures related to VAT directly or indirectly.

9 *See e.g.* Judgment of 29 September 2022, *Case C-597/20, LOT*, ECLI:EU:C:2022:735; the requests for a preliminary ruling in cases *C-476/18, PannonHitel, C-771/21, Wizz Air Hungary* and *C-51/22, PannonHitel* have been withdrawn by the national courts after the parties in the main proceedings have settled their dispute.

10 *See e.g.* Judgment of 9 April 2014, *Case C-74/13, GSV*, ECLI:EU:C:2014:243; Judgment of 8 September 2016, *Case C-409/14, Schenker*, ECLI:EU:C:2016:643; Judgment of 16 November 2023, Case C-366/22, *Viterra Hungary*, ECLI:EU:C:2023:876.

11 For instance, in 2022, the number of Hungarian preliminary references was 20, while French courts sent 23 cases to the Court the very same year (Annual Report of the Court 2022, Judicial statistics, p. 5.).

12 In 2018 Hungarian courts referred 29 cases to the court, while Czech courts referred only 12. The numbers for 2019 are 20 – 5, and not to count the years of the pandemic for 2022 20–13. (Annual Report of the Court 2022, Judicial statistics, p. 5.).

union law.[13] Private parties lack standing before the union courts to call into question the conformity of national law with union law, as they are not entitled to initiate infringement proceedings *vis-à-vis* Member States under the Treaties, a prerogative of the European Commission (Article 258 TFEU) and other Member States (Article 259 TFEU). Preliminary ruling procedures are therefore frequently rooted in national litigation concerning the conformity of national law with union law, and in particular administrative law litigation, where the applicants claim that the decision of the national authority or the national law underlying the decision is contrary to union law. It is also not surprising that the conformity of national law may be raised at the same time by private parties before national courts and by the European Commission before the ECJ[14] – and as some of the examples below will illustrate, this phenomenon has also occurred in cases relating to Hungarian legislation. From among the Hungarian preliminary ruling procedures of the past two decades several groups of cases may be identified where later cases seek further clarification regarding the consequences of a previous judgment of the ECJ, delivered either in an infringement procedure or a preliminary ruling procedure.

There might be several reasons for such consecutive references. One might be that the judgment in the previous proceedings is itself not sufficiently clear or its application is not obvious when it comes to cases with slightly different facts. Another reason might be that there are some doubts regarding the compatibility of the national law aiming to implement the judgment. The consecutive cases – sometimes amounting to a dozen in a particular area throughout several years – contribute not only to the finetuning of EU law but to the gradual shaping and aligning of national law too. This shaping results in a gradual evolution of the legal area concerned.

Below we will give a general overview of those areas – VAT, unfair contract terms, free movement of capital, transfer of company seat and gambling – which were primarily affected by such consecutive references. We will try to show how Hungarian law has developed under the effect of the preliminary ruling procedures and why it was crucial for the Hungarian courts to seek further guidance from the ECJ on certain topics.

13 Koen Lenaerts *et al*., *EU Procedural Law*, Oxford University Press, Oxford, 2023, p. 3.

14 Incidentally, private parties may have originally set into motion the Commission's infringement procedure by way of a complaint.

2. Consecutive Preliminary References Gradually Shaping Hungarian Law

2.1. VAT Cases Concerning 'The Paid Consideration Condition' and the Compensation Due for Withholding Excess VAT

In the 'paid consideration condition' VAT cases a first ruling of the ECJ in an infringement case prompted several 'follow-up' preliminary ruling procedures over the years in which the national courts have requested further guidance concerning the consequences of the original judgment and the adequacy of national legislation and administrative practice implementing that judgment. These resulted in a judgment and three reasoned orders so far.[15]

In 2006 the Commission initiated infringement proceedings against Hungary in relation to national legislation that required taxable persons whose tax declaration for a given tax period recorded an 'excess' within the meaning of Article 183 of Directive 2006/112[16] to carry forward, in certain cases more than once, that excess or a part of it to the following tax period where the taxable person had not yet paid the supplier the full amount for the purchase in question. After the pre-litigation phrase was concluded without Hungary conceding, the Commission brought an action before the ECJ in 2010 pursuant to Article 258 TFEU seeking a declaration that Hungary has failed to fulfil its obligations under Directive 2006/112. In its judgment the ECJ did in fact find the legislation in question to be in breach of Article 183 of Directive 2006/112. The ECJ declared that Article 183 does not permit Member States to impose a condition relating to the payment of the amount due for the transaction in question on the exercise of the right to a refund of a deductible VAT excess and thus, by precluding the refund of a VAT excess where the consideration, including VAT, due for the transaction on which the deductible VAT arises has not yet been paid, Hungary has exceeded the limits of the freedom available to the Member

15 Judgment of 28 July 2011, *Case C-274/10, Commission v Hungary*, ECLI:EU:C:2011:530; Order of 17 July 2014, *Case C-654/13, Delphi Hungary Autóalkatrész Gyártó*, ECLI:EU:C:2014:2127; Judgment of 23 April 2020, *Cases C-13/18 and C-126/18, Sole-Mizo and Dalmandi Mezőgazdasági*, ECLI:EU:C:2020:292; Order of 20 June 2023, *Case C-426/22, Sole-Mizo*, ECLI:EU:C:2023:517; Order of 10 April 2024, *Case C-532/23, Lear Corporation Hungary*, ECLI:EU:C:2024:316.

16 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

States under Article 183 of Directive 2006/112.[17] The ECJ also found that, given that the national legislation at issue provides for tax periods from one month to a year in duration, this may create a situation in which certain taxable persons, do not, because of the repeated carry-over of an excess, obtain a refund of that excess within a reasonable period.[18]

The Hungarian legislation was subsequently modified to comply with the judgement and the condition relating to the paid consideration was repealed. However, as it is often the case with national tax legislation found to be at odds with union law, new questions have arisen concerning the compensation that taxable persons who were previously caught by the legislative provision were entitled to. Following the initial judgment of the ECJ the Hungarian legislator adopted the rules for refunding the excess VAT. Under these rules the taxable persons could claim refund of the excess VAT that could not have been claimed previously due to the legislation in question.

In procedures brought before the national courts, certain companies claimed that a simple possibility of a one-off refund of existing excess VAT is not adequate compensation for all the periods during which the excess VAT was withheld due to the condition set out in the legislation found to be incompatible with union law. The companies claimed that they were entitled to default interests, within the statute of limitations, for all the sums of excess VAT that they had previously not been refunded. Upon a request for a preliminary ruling by the *Szombathelyi Közigazgatási és Munkaügyi Bíróság*, the ECJ indeed affirmed, in a reasoned order pursuant to Article 99 of the Rules of procedure of the Court[19] that, under the case law of the Court, when the refund to the taxable person of the excess VAT is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue be compensated through the payment of default interest.[20] The ECJ also reiterated that in the absence of EU legislation, it is for the internal legal order of each

17 Judgment, *Case C-274/10, Commission v Hungary*, para. 54.

18 Id. para. 55.

19 Under Article 99 of the Rules of procedure the ECJ may decide to rule by reasoned order where a question referred for a preliminary ruling is identical to a question on which the ECJ has already ruled, where the reply to such a question may be clearly deduced from existing case law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt.

20 Order, *Case C-654/13, Delphi Hungary Autóalkatrész Gyártó*, para. 32.

Member State to lay down the conditions under which such interest must be paid. Those conditions must however comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or be arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible.[21] The ECJ also made clear that under the case law, a national court which is called upon to apply provisions of union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation.[22]

Although it was clear from the order of the ECJ that the legislation adopted after the judgment in the infringement case should have provided for adequate compensation for the financial losses incurred by reason of the withholding of excess VAT by means of default interest, the precise conditions of the calculation of these interests remained unclear.

The Hungarian tax authority subsequently adopted an administrative practice relying on previously enacted provisions of the Code of Fiscal Procedure that provided for an interest rate equal to the base interest rate of the Hungarian National Bank for any reimbursement of tax that was a result of a declaration by the Constitutional Court, the Supreme Court or the CJEU finding that the tax provision in question was in breach of the Fundamental Law, any other rule of law in case of municipal legislation or union law, respectively. This administrative practice was later assessed by the *Kúria* (the supreme court of Hungary), which found that these rules shall indeed be applied, by analogy, for the compensation of periods between tax declarations, whereas for the period where these interests were due following a request for compensation by the taxable person but before the tax authority has actually paid them, the rules relating to the 'late' interest rate shall apply, which amounts to the double of the base interest rate of the Hungarian National Bank.

In a series of cases, certain companies again questioned the legislative provisions and the practice of the Hungarian tax authorities. They argued that the sum due by way of interest on the amount of excess deductible VAT which was not recoverable because of the paid consideration condition should also be determined by applying a rate corresponding to double

21 Id. para. 35.
22 Id. para. 38.

the Hungarian National Bank's base rate: namely, the interest rate applied in other cases where the tax authority's payment was overdue. In two preliminary ruling procedures, the *Szegedi Közigazgatási és Munkaügyi Bíróság* and the *Szekszárdi Közigazgatási és Munkaügyi Bíróság* raised a series of questions relating to the relevant periods of the calculation of the different interests as well as the conformity with union law of the procedural requirements relating to the claims for interest. This time, the ECJ delivered a judgment. Although the requests for preliminary ruling did not directly call into question the adequacy of applicable the interest rates, but rather inquired as to which interest rate should be applied to which period, the ECJ nevertheless found that the principles of effectiveness and fiscal neutrality exclude the application of an interest rate corresponding to the national central bank's base rate, where that rate is lower than the rate that a taxable person who is not a credit institution would have to pay to borrow a sum equal to that amount and where the interest on the excess VAT concerned runs for a given reporting period without the application of interest to compensate the taxable person for the monetary erosion caused by the passage of time following that reporting period up until the actual payment of that interest.[23] On the other hand, the ECJ found that a five-year limitation period may be applied on requests for payment of interest on excess deductible VAT retained in breach of union law.[24] Furthermore, the ECJ also stated that in cases which relate to claims in respect of a refund of excess VAT retained in breach of union law the payment of interest due because the tax authority has not paid within the time limit set may be made dependent on the submission of a specific request. This is so, notwithstanding the fact that in other cases such interest is awarded automatically, and may be applied from the end of a period of 30 or 45 days within which the administration is required to deal with such a request, and not necessarily from the date on which the excess was accrued.[25]

One would think that by then all questions relating to the refund and the compensation of the unlawfully retained excess VAT had been raised and answered. Yet, as we have seen, the ECJ, in *Sole-Mizo and Dalmandi*, called into question the appropriateness of the interest rate equivalent to the base

23 Judgment, *Cases C-13/18 and C-126/18, Sole-Mizo and Dalmandi Mezőgazdasági*, para. 49.
24 Id. para. 60.
25 Id. para. 69.

interest rate of the Hungarian National Bank and set a requirement relating to the applicable interest rates that proved difficult if not impossible to comply with. In 2020 the Hungarian legislation was modified to take into account the judgment and the applicable interest rate was set at a level that corresponded to the base interest rate of the Hungarian National Bank plus two percentage points. The legislation also allowed the taxable person to reclaim the difference between the new rate and the interest originally provided for by a final decision of the tax authority.

Having received a new request for a preliminary ruling from the *Szegedi Törvényszék*, the ECJ once again decided by way of reasoned order. Although the ECJ recalled that under the case law Member States are entitled to lay down default interest at a flat rate in order to ensure compensation according to rules which are easily managed and supervised by the tax authorities,[26] it went on to state that while Hungarian legislature has indeed adjusted the level of the applicable interest rates, it seems that it did not fully take into account the lessons of the *Sole-Mizo and Dalmandi* judgment. The latter concerned the period that should have been covered by such interest, in particular in order to remedy the effects of the monetary depreciation.[27] The ECJ went on to find that it is for the referring court to affirm whether the rate and method of calculating the interest imposed by the Hungarian legislature results in the applicant in the main proceedings being deprived of adequate compensation for the loss caused by the unavailability of the sums concerned or whether it offsets the economic burden of the applicant in the main proceedings.[28]

Finally, in the latest request for a preliminary ruling the *Fővárosi Törvényszék* raised several new questions relating *inter alia* to the possibility of an extension to new tax periods of the original claim for interests due in relation to the excess VAT withheld. This reference was made in view of the evolution of the case law of the ECJ and the national supreme court that had unfolded in the meantime. Once again the ECJ decided by way of order and found, in essence, that if the taxpayer has only become aware of the possibility of extending the period for which it originally claimed interests following new case law, the second claim for payment of interest

26 Order, *Case C-426/22, Sole-Mizo*, para. 45.
27 Id. para. 50.
28 Id. para. 52.

must be regarded as supplementing the first claim if they relate to the same infringement of union law.[29]

2.2. Cases Relating to the Cancellation of Usufruct Rights over Agricultural Land

Another series of cases where preliminary ruling procedures were intertwined with an infringement procedure related to legislative provisions adopted in 2013 whereby rights of usufruct and use over agricultural land were terminated, with the exception of those belonging to close relatives of the owner of the agricultural land in question.[30]

Already in 2014 the Commission opened an infringement procedure, whereas at the same time several natural and legal persons had filed court actions against the administrative decisions of the Hungarian authorities deleting those rights from the property register on the basis of the relevant legislative provisions. These court cases lead to two requests for preliminary ruling by the *Szombathelyi Közigazgatási és Munkaügyi Bíróság* in 2016. The referring court asked the ECJ in essence whether Articles 49 and 63 TFEU and Articles 17 and 47 of the Charter of Fundamental Rights of the EU precluded national legislation which extinguishes rights of usufruct and rights of use over agricultural land, without providing compensation for the financial loss which cannot be claimed in the context of the settlement of accounts between the parties. The question was also raised whether such legislation discriminates against nationals of other Member States, having regard to the fact that the continuation of rights of usufruct and rights of use depended on proof of the existence of a close family tie with the owner of the agricultural land.

In its judgment, the ECJ first considered the objections raised by the Hungarian government relating to the admissibility of the questions. One of these related to the fact that since the usufruct contracts at issue in the main proceedings were entered into before the accession of Hungary to the EU, their validity depended exclusively on the rules of national law in

29 Order, *Case C-532/23, Lear Corporation Hungary.*

30 Judgment of 6 March 2018, *Cases C-52/16 and C-113/16, SEGRO and Horváth*, ECLI:EU:C:2018:157; Judgment of 21 May 2019, *Case C-235/17, Commission v Hungary*, ECLI:EU:C:2019:432; Judgment of 10 March 2022, *Case C-177/20, Grossmania*, ECLI:EU:C:2022:175; *Case C-419/23, Nemzeti Földügyi Központ*, pending.

force when they were concluded. In that regard, the ECJ found that these rights still existed on 30 April 2014 and they were cancelled and deleted from the property register not pursuant to legislation which was in force and produced all its effects in their regard before the date of Hungary's accession to the EU, but exclusively by virtue of the provisions at issue in the main proceedings, which were adopted nearly 10 years after Hungary's accession.[31]

After stating that the Treaty provisions on free movement of capital were applicable to the case at hand,[32] the ECJ went on to find the national provisions in question to be contrary to Article 63 TFEU. According to the ECJ, legislation such as that at issue in the main proceedings, which provides for the extinction of rights of usufruct acquired by contract over agricultural land, including those held as a result of an exercise of the right to free movement of capital, restricts that freedom on account of that fact alone. The legislation deprives the person concerned both of the ability to continue to enjoy the right which he has acquired and of the ability to dispose of that right.[33] Although the requirement relating to the existence of a close family tie between the usufructuary and the owner of the land is a criterion which is ostensibly independent of the usufructuary's nationality and the origin of the capital, and is therefore is not directly discriminatory, the legislation operates to the disadvantage of nationals of other Member States more than Hungarian nationals, and is thus liable to conceal indirect discrimination based on the usufructuary's nationality or the origin of the capital.[34]

As regards the possible justifications raised by Hungary, the ECJ has held, first, that the legislation in question did not appear to be appropriate to achieve the objectives relied upon by the Hungarian Government and that these objectives had no direct connection with the legislation. The required family tie does not guarantee that the usufructuary farms the land concerned himself and that he has not acquired the right of usufruct at issue for purely speculative purposes. Similarly, it cannot be assumed that a person outside the owner's family who has purchased a usufruct over such land would not be in a position to farm that land himself and that the purchase would necessarily have been made for purely speculative

31 Judgment, *Cases C-52/16 and C-113/16, SEGRO and Horváth*, para. 40.
32 Id. paras. 50–60.
33 Id. paras. 61–66.
34 Id. paras. 67–74.

purposes.[35] As regards the assertion that the legislation had intended to sanction infringements of the applicable exchange control rules, the ECJ held that even if it were so, it would still be necessary to check that the legislation is not disproportionate to that objective. Other measures with less far-reaching effects could have been adopted for the purpose of penalising any infringements of the applicable exchange control legislation, such as, for example, administrative fines.[36] Although the case law accepts that a measure restricting a fundamental freedom may be justified where its purpose is to combat wholly artificial arrangements, aimed at circumventing the national legislation concerned, in order to comply with the principle of proportionality, such a measure should enable the national court to carry out a case-by-case examination in order to assess, *inter alia*, the abusive or fraudulent conduct of the persons concerned. However, according to the ECJ, it was apparent the legislation at issue in the main proceedings did not satisfy any of these requirements. Even assuming that the legislation in question could be regarded as having been adopted with the specific aim of combating artificial arrangements, a general presumption of abusive practices cannot be allowed. Namely, it cannot be inferred from the mere fact that the holder of a right of usufruct is a legal person or a natural person who is not a close relative of the owner that the conduct of such a person when acquiring the right of usufruct constituted an abuse.[37]

While the preliminary ruling procedures were pending before the ECJ, the infringement procedure also reached the litigation stage as the Commission filed its action in 2017. The Commission submitted that by adopting the legislation Hungary had failed to fulfil its obligations under Articles 49 and 63 TFEU and Article 17 of the Charter of Fundamental Rights. By the time the ECJ delivered its judgment in the infringement procedure, the *SEGRO and Horváth* cases had already been closed, therefore the ECJ mainly relied on its findings in the preliminary ruling procedures to conclude that the provisions infringed Article 63 TFEU and Article 17 of the Charter.[38] Whereas in *SEGRO and Horváth* the ECJ had bypassed the question whether the legislation infringed Article 17 of the Charter, stating that it was not necessary to examine Articles 17 and 47 of the Charter in order to resolve the disputes in the main proceedings, in the infringement

35 Id. paras. 81–94.
36 Id. paras. 95–107.
37 Id. paras. 108–126.
38 Judgment, *Case C-235/17, Commission v Hungary,* paras. 54–58.

procedure the ECJ was bound to address the question as it was one of the forms of order sought by the Commission in its action. In a significant development of its case law, the ECJ has, for the first time, found a Member State to be in breach of a provision of the Charter of Fundamental Rights.[39]

Before new legal provisions could have been adopted to deal with the consequences of the two judgments, another preliminary ruling request was put before the ECJ in a case where a company had requested the reinstatement of its right of usufruct relying on the judgment in *SEGRO and Horváth*. The *Győri Közigazgatási és Munkaügyi Bíróság* essentially asked the ECJ whether the mandatory effects of preliminary rulings required that the national courts disregard the national legislation at issue on the ground that it contravenes union law and order the competent authorities to reinstate the rights of usufruct which have been deleted. In its judgment the ECJ, having regard to the specifics of the case, addressed the issue of final national administrative decisions which have been adopted on the basis of national legislation found later to be in infringement of union law. In that regard, the ECJ first recalled that in accordance with the principle of the primacy of union law, national courts must disapply national legislation that contravenes a provision of union law having direct effect, where it is not possible to interpret that legislation in accordance with union law.[40] The ECJ held that in accordance with the principles of effectiveness and sincere cooperation under Article 4(3) TEU, particular circumstances may require a national administrative body to review a decision that has become final, while stating that in this context a balance must be struck between the requirements of legal certainty and legality under union law.[41] According to the ECJ, in the absence of specific rules in union law on how to remedy the consequences of an infringement of Article 63 TFEU in the circumstances of the case, measures such as the reinstatement of unlawfully deleted rights of usufruct may be applicable. However, the national court must ascertain whether such reinstatement was not precluded by objective and legitimate obstacles, such as the acquisition in good faith by a new owner of the land

39 Id. paras. 59–89 and 123–129. Hungary argued that a separate examination of an infringement of the Charter was not possible in an infringement procedure. Advocate General Saugmandsgaard Øe has examined this question in detail in his opinion, coming to the conclusion that the ECJ lacked jurisdiction to give a ruling on Article 17 of the Charter as requested by the Commission, *cf.* Opinion, *Case C-235/17, Commission v Hungary*, ECLI:EU:C:2018:971, paras. 55–126.

40 Judgment, *Case C-177/20, Grossmania*, paras. 29–32.

41 Id. paras. 47–62.

in question. If this were the case, the former holders of the rights of usufruct shall be awarded appropriate compensation to remedy the economic loss resulting from the cancellation of their rights.[42] The ECJ also reminded that, by virtue of the principle of State liability for loss or damage caused by national legislation in breach of union law, individuals have a right to compensation in accordance with the conditions laid down by the case law.[43]

Meanwhile, negotiations between the Commission and the Hungarian government had concluded and new legislation was adopted to implement the judgments in *SEGRO and Horváth* and *Commission/Hungary*. The new provisions established a standardised procedure for the request for the reinstatement of the right of usufruct as well as compensation based on the value of the right of usufruct and the period during which that right could not be exercised due to the provisions found to have infringed union law. The legislation provided for the reinstatement of rights save for certain cases where either or both of the parties involved was deemed to have acted in bad faith for the purposes of the request. These new legislative provisions are the subject-matter of a new preliminary ruling procedure,[44] where the *Győri Törvényszék* asks the ECJ whether the new legislation should have provided for a mandatory examination of the circumstances of the original acquisition of the right of usufruct for the purposes of determining whether the right may be reinstated. In the case before the national court, the owner of a land objected to the reinstatement of a right of usufruct terminated by the previous legislation on the grounds that the original right of usufruct was created in contravention of the national rules applicable at the time. Ironically, the contravention of national rules at the time of the acquisition of the right of usufruct was one of the unsuccessful justification grounds relied on by the Hungarian government in *SEGRO and Horváth* and *Commission/Hungary.* This justification was dismissed by the ECJ, which stated that such contravention of national rules did not warrant a systematic termination of the rights of usufruct.[45]

Concerning the *SEGRO and Horváth* cases, it is worth noting that their implementation had considerable effect on the Hungarian jurisprudence. Both the *Kúria* and the Constitutional Court expressed diverging views

42 Id. paras. 63–68.
43 Id. paras. 69–72.
44 *Case C-419/23, Nemzeti Földügyi Központ*, pending.
45 Decision No. Kf.V.39.162/2020/5.

on the constitutional implication of the judgments. As a result of this divergence, the Constitutional Court even quashed the *Kúria*'s decision in a case applying the *SEGRO* judgment. In this case (and in similar cases concerned with the same legal problem) no preliminary reference was made – and indeed, this was excluded as the problematic issue was of constitutional nature concerning reverse discrimination. In a national case before a first instance administrative court *(Győri Közigazgatási és Munkaügyi Bíróság)*[46] which reached the level of the *Kúria*, the issue was whether Hungarian nationals could also rely on the *SEGRO and Horváth* judgments. The question was whether they could request the reregistration of their right of usufruct in the land register from which it was deleted by virtue of the national legislation found in breach of the free movement of capital by the ECJ in *SEGRO and Horváth* or, alternatively, such right is only available for EU citizens who can efficiently rely on the free movement of capital provisions. Thus, the issue was whether reverse discrimination (*i.e.* Member States treating their own national less favourably than EU citizens) is allowed under Hungarian constitutional law. In its judgment,[47] the *Kúria* found that enforcing CJEU judgments only in cases where EU law should be applied would result in reverse discrimination and such a discrimination can – according to the *Kúria* – only be avoided if national legislation is disapplied in these purely domestic cases, too. The Constitutional Court[48] annulled the *Kúria*'s decision. It argued that the primacy of union law and Article E of the Fundamental Law, authorising the transfer of exercise of certain powers to the EU institutions, do not allow – not even in exceptional circumstances – the extension of the scope of union law in areas not falling under union law. Disapplying national law in a non-EU context would run counter to the principles of reserved sovereignty and restrictive interpretation of national agreements.

It not only flows therefore from the judgment that the elimination of reverse discrimination cannot be deduced from Article E, but at the same time it seems that reverse discrimination as such does not violate the Fundamental Law and there are no other constitutional principles under which such a situation could be remedied.

46 Decision No. K.27.384/2018/10.
47 Decision No. Kf.V.39.162/2020/5.
48 Decision No. 16/2021. (V. 13.) AB of the Constitutional Court.

2.3. Cases Relating to Unfair Terms in Consumer Contracts

The Hungarian cases[49] relating to the interpretation of Directive 93/13/EEC[50] on unfair terms in consumer contracts also illustrate the way in which the interpretation of a given EU legislative instrument or a legislative provision develops through subsequent cases as national courts seek further guidance and clarification from the ECJ. In certain instances, discontent with national legislation or the case law of the higher courts inspires new references by lower courts, until every new aspect of the problem is resolved, or at least until the ECJ has had the opportunity to rule on them.

It is perhaps symptomatic of the socioeconomic conditions of the era that the very first preliminary ruling request made by a Hungarian court following the 2004 accession, and as it happens, also the first reference

49 Judgment of 10 January 2016, *Case C-302/04, Ynos,* ECLI:EU:C:2006:9*;* Judgment of 9 November 2010, *Case C-137/08, VB Pénzügyi Lízing,* ECLI:EU:C:2010:659; Judgment of 4 June 2009, *Case C-243/08, Pannon GSM*, ECLI:EU:C:2009:350; Judgment of 26 April 2012, *Case C-472/10, Invitel,* ECLI:EU:C:2012:242; Judgment of 30 May 2013, *Case C-397/11, Jőrös*, ECLI:EU:C:2013:340; Judgment of 21 February 2013, *Case C-472/11, Banif Plus Bank*, ECLI:EU:C:2013:88; Judgment of 30 April 2014, *Case C-26/13, Kásler and Káslerné Rábai,* ECLI:EU:C:2014:282; Order of 3 April 2014, *Case C-342/13, Sebestyén*, ECLI:EU:C:2014:1857; Judgment of 12 February 2015, *Case C-567/13, Baczó and Vizsnyiczai*, ECLI:EU:C:2015:88; Judgment of 1 October 2015, *Case C-32/14, ERSTE Bank Hungary*, ECLI:EU:C:2015:637; Judgment of 3 December 2015, *Case C-312/14, Banif Plus Bank*, ECLI:EU:C:2015:794; Judgment of 31 May 2018, *Case C-483/16, Sziber*, ECLI:EU:C:2018:367; Judgment of 5 June 2019, *Case C-38/17, GT,* ECLI:EU:C:2019:461; Judgment of 20 September 2018, *Case C-51/17, OTP Bank and OTP Faktoring*, ECLI:EU:C:2018:750; Judgment of 14 March 2019, *Case C-118/17, Dunai*, ECLI:EU:C:2019:207; Order of 22 February 2018, *Case C-126/17, ERSTE Bank Hungary*, ECLI:EU:C:2018:107; Order of 21 November 2017, *Case C-232/17, VE*, ECLI:EU:C:2017:907; Order of 21 November 2017, *Case C-259/17, Rózsavölgyi*, ECLI:EU:C:2017:905; Judgment of 11 March 2020, *Case C-511/17, Lintner,* ECLI:EU:C:2020:188; Judgment of 8 October 2019, *Case C-621/17, Kiss and CIB Bank,* ECLI:EU:C:2019:820; Judgment of 19 September 2019, *Case C-34/18, Lovasné Tóth,* ECLI:EU:C:2019:764; Order of 8 November 2018, *Case C-227/18, VE*, ECLI:EU:C:2018:891; Judgment of 2 September 2021, *Case C-932/19, OTP Jelzálogbank and Others,* ECLI:EU:C:2021:673; Judgment of 31 March 2022, *Case C-472/20, Lombard Lízing,* ECLI:EU:C:2022:242; Order of 6 December 2021, *Case C-670/20, ERSTE Bank Hungary,* ECLI:EU:C:2021:1002; Judgment of 27 April 2023, *Case C-705/21, AxFina Hungary*, ECLI:EU:C:2023:352, Order of 9 April 2024, *Case C-628/23, AXA Bank Europe and Others*, ECLI:EU:C:2024:317. Still pending before the ECJ at the time of the submission of the manuscript were *Case C-565/23, Cofidis Magyarországi Fióktelepe, Case C-630/23, AxFina Hungary* and *Case C-47/24, Cofidis Magyarországi Fióktelepe.*

50 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

from the new Member States, was related to Directive 93/13/EEC. The *Szombathelyi Városi Bíróság* has asked the ECJ for the interpretation of Article 6(1) of the Directive, under which Member States are to adopt legislation whereby unfair terms used in a contract concluded with a consumer are not binding on the latter. However, since the facts of the case occurred prior to the accession of Hungary to the EU, the ECJ found that it lacked jurisdiction to answer the questions of the national court.[51]

Of those relating to Directive 93/13/EEC several Hungarian preliminary ruling procedures dealt mainly or incidentally with the question of whether national courts are required to examine of their own motion the unfair nature of a term in a consumer contract,[52] and the consequences to be drawn from a finding that a term is unfair.[53] Some cases related to the unfair nature of different arbitration clauses and jurisdictional terms,[54] as well as procedural provisions determining which court was competent to hear actions alleging unfair contractual terms.[55] Certain cases related to the particular role public notaries played in the drawing up and the enforcement of mortgage loan contracts, the nature of these notarised instruments, and how the unfair nature of a contractual term may be raised in the context of the judicial review of the contract's enforcement.[56]

A good number of Hungarian preliminary references concerning Directive 93/13/EEC relate to loan contracts denominated in foreign currencies. Following the 2007–2008 economic crisis and the deterioration of the exchange rate of the Hungarian forint compared to the currencies these contracts were denominated in, consumers experienced a sharp rise in the amount of their monthly instalments, leading to widespread foreclosure and litigation.[57]

51 Judgment, *Case C-302/04, Ynos,* paras. 34–38.

52 Judgments in *Case C-137/08, VB Pénzügyi Lízing, Case C-243/08, Pannon GSM*, *Case C-397/11, Jőrös, Case C-472/11, Banif Plus Bank, Case C-51/17, OTP Bank and OTP Faktoring, Case C-511/17, Lintner, etc.*

53 Judgments in *Case C-397/11, Jőrös, Case C-472/11, Banif Plus Bank, etc.*

54 Judgments in *Case C-137/08, VB Pénzügyi Lízing, Case C-243/08, Pannon GSM*, Order in *Case C-342/13, Sebestyén, etc.*

55 Judgment in *Case C-567/13, Baczó and Vizsnyiczai.*

56 Judgments in *Case C-32/14, ERSTE Bank Hungary, Case C-34/18, Lovasné Tóth.*

57 *See* in more detail: Miklós Zoltán Fehér, 'From Kásler to Dunai. A Brief Overview of Recent Decisions of the CJEU in Hungarian Cases Concerning Unfair Terms in Consumer Contracts', *Hungarian Yearbook of International Law and European Law,* Vol. 7, 2019, pp. 289–302.

In 2013 the *Kúria* requested a preliminary ruling in relation to one of the controversial terms that most of these loan contracts contained: the term that allowed the lender to calculate the amount of the monthly instalments owed by the consumer in accordance with the selling rate of exchange of the foreign currency it applied. In *Kásler and Káslerné Rábai* the ECJ found that the national court may find such a term to constitute the 'main subject-matter of a contract' only in so far as it laid down an essential obligation of that agreement which, as such, characterised it. The ECJ also excluded that the contractual term in question constituted 'remuneration', the adequacy of which could not be the subject of an examination as regards unfairness under Directive 93/13/EEC.[58] It went on to interpret the requirement of transparency of contractual terms laid down by Directive 93/13/EEC as requiring not only that the relevant term be grammatically intelligible to the consumer, but also that the contract sets out transparently the specific functioning of the mechanism of conversion for the foreign currency and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences of these terms.[59] Finally, the ECJ answered the question of the *Kúria* relating to the possible substitution of an unfair term with a national legal provision in the affirmative by stating that the Directive does not preclude a rule of national law enabling the national court to remedy the invalidity of an unfair term by substituting it with a supplementary provision of national law.[60]

The judgment in *Kásler and Káslerné Rábai* had several consequences. First, the *Kúria* adopted a uniformity decision[61] to give guidance to lower courts and ensure uniform application of the law in cases relating to consumer loan contracts denominated in foreign currencies. In the decision, the *Kúria* concluded that the contractual term considered in *Kásler and Káslerné Rábai* was unfair because the financial institution did not provide any direct service to the consumer, and therefore it constituted an unjustified cost for the consumer. According to the *Kúria*, these terms were also unfair because the economic reasons for their application were not clear, not intelligible and not transparent to the consumer. The *Kúria* decided that

58 Judgment, *Case C-26/13, Kásler and Káslerné Rábai,* paras. 44–59.
59 Id. paras. 62–74.
60 Id. paras. 76–84.
61 Decision No. 2/2014 PJE.

the buying and selling rates applied in foreign exchange loan contracts as rates of conversion were to be replaced by the official foreign exchange rate of the Hungarian National Bank. The *Kúria* also considered another term frequently applied in loan contracts, namely contractual clauses allowing for the unilateral amendment of a contract, and has found that these terms were only fair as long as they complied with a set of principles such as clear and intelligible drafting, objectivity, effectivity and proportionality, transparency, *etc.*

Second, in 2014 the Hungarian Parliament adopted legislation to implement the judgment in *Kásler and Káslerné Rábai* and the uniformity decision of the *Kúria*. The new legislation declared the contractual term relating to the application of different exchange rates, discussed above, to be unfair. The contractual clauses allowing for a unilateral amendment of the contract were presumed to be unfair with the possibility for financial institutions to demonstrate in court proceedings that they satisfied the conditions defined by the *Kúria*. The new legislation provided for the settlement of accounts by the lenders as a consequence of the unfair nature of the two terms in question, while also setting out a series of procedural rules relating to ongoing court procedures. The Hungarian legislator also prescribed a mandatory transformation of contracts, which were to be denominated in Hungarian forints, to exclude any future escalation of consumer burdens in relation to fluctuations in the exchange rate of the foreign currency in which the contract was originally concluded.

It is no surprise that several subsequent Hungarian preliminary ruling procedures dealt with the different provisions and the consequences of this legislation. In *Sziber* the ECJ was asked to assess certain procedural requirements of the new legislation, such as the obligation of the applicant to amend the application after the two unfair terms discussed above had been removed from the contract by stating the legal consequences sought in the event of a finding that the contract or part of it was invalid due to further unfair terms, with the exclusion of the possibility of *restitutio in integrum*, and to specify the amounts considered to have been paid on the basis of such terms. The ECJ 'approved' these provisions on the condition that it was possible to effectively challenge these unfair terms and to restore the legal and factual situation that the consumer would have been in, had those unfair terms not existed.[62]

62 Judgment, *Case C-483/16, Sziber,* paras. 30–55.

In *OTP Bank and OTP Faktoring* the ECJ found that the terms relating to the foreign exchange rate risk, *i.e.* that the consumer exclusively wore the burden of the change of the exchange rate of the currency in which the contract was denominated – were not excluded from the scope of the Directive, as these were not covered by the statutory provisions.[63] The ECJ further clarified the requirement for a contractual term to be drafted in plain intelligible language as concerns the term relating to the foreign exchange rate risk.[64]

In *Dunai,* the ECJ concluded that Directive 93/13/EEC precluded legislation that would prevent a national judge from cancelling the loan contract on the basis of the unfair nature of a term relating to exchange rate risk where it was found that that term is unfair and that the contract cannot continue to exist without that term. The ECJ also found that whereas in *Kásler and Káslerné Rábai* it had ruled that a national court may substitute an unfair contractual term with supplementary provision of domestic law in order to ensure the continued existence of the contract, that possibility was limited to cases in which the cancellation of the contract in its entirety would expose the consumer to particularly unfavourable consequences. This appeared not to be applicable in the case at hand, as it seemed that the continuation of the contract would be contrary to the interests of the consumer.[65]

Recent Hungarian cases relating to Directive 93/13/EEC still mainly deal with loan contracts denominated in foreign currencies. In *Lombard Lízing* the ECJ considered whether it was compatible with the Directive for the highest court to guide lower courts by way of a non-binding opinion to declare a contract valid or effective between parties where that contract cannot continue in existence because a term relating to its main subject matter is unfair.[66] As regards the consequences of a finding that a term relating to the main subject matter of the contract is unfair, the ECJ basically reiterated its earlier case law by adding that if the national court takes the view that it was not possible to restore the parties to the situation they would have been in if the contract had not been concluded, the onus is on

63 Judgment, *Case C-51/17, OTP Bank and OTP Faktoring,* paras. 51–69.
64 Id. paras. 72–77.
65 Judgment, *Case C-118/17, Dunai,* paras. 34–55.
66 Judgment, *Case C-472/20, Lombard Lízing,* paras. 33–34.

that court to ensure that the consumer is ultimately in the position he or she would have been in if the term held to be unfair had never existed.[67]

In *Kiss and CIB Bank* the ECJ was once more called upon to consider the requirement of drafting contractual terms in plain, intelligible language. The ECJ found that in the context of contractual terms in a consumer loan contract which specified the exact amount of management charges and of a disbursement commission to be borne by the consumer, their method of calculation and the time when they have to be paid, it was not indispensable that all of the services provided in return for the amounts concerned were given in detail.[68]

Most recently, in *AxFina Hungary* the preliminary ruling request by the *Győri Ítélőtábla* concerned the compatibility with Directive 93/13/EEC of the approach based on the opinion of the advisory body of the *Kúria*, according to which national courts should declare contracts that contained unfair terms which placed the exchange risk on the consumer to be valid by adapting the consumer's obligations by judicially amending the contract. According to the opinion the contract's validity should be upheld either by changing the currency of the contract and the corresponding interest rate, or by setting a ceiling for the exchange rate of the currency. The ECJ found that such an amendment of the contract by the national court was precluded by the Directive, as the national court's powers cannot extend beyond what is strictly necessary to restore the contractual balance between the parties and to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the contract at issue.[69] Following the delivery of the judgment the *Kúria* abandoned this approach and has chosen to uphold the validity of the contract by eliminating the exchange risk of the consumer altogether, *i.e.* by applying the exchange rate and the interest rate applicable at the time of the conclusion of the contact to settle the accounts. The *Kúria* requested a preliminary ruling – presumably to make sure this new solution was in line with the Directive and the case law in *C-630/23, AxFina Hungary* –, this is currently pending before the ECJ.

While this overview of the Hungarian cases concerning Directive 93/13/EEC is far from exhaustive, and although only the aspects deemed the most important were highlighted from the individual cases mentioned,

67 Id. paras. 40–60.
68 Judgment, *Case C-621/17, Kiss and CIB Bank,* paras. 30–45.
69 Judgment, *Case C-705/21, AxFina Hungary*, paras. 35–49.

this study illustrates how Hungarian courts have made use of the preliminary ruling procedure to map the precise content of, and the requirements imposed by the Directive with the assistance of the ECJ. Step by step, case by case the Hungarian courts have sought clarification on both procedural and substantive issues to resolve, in line with union law, the complex legal questions that the widespread application of consumer loan contracts denominated in foreign currencies have raised.[70]

2.4. Cases Concerning the Cross-border Transfer of Seat or Conversion

While the previous set of cases all concerned the clarification of a judgment (or judgments) of the ECJ delivered in a Hungarian case, seeking its further and deeper interpretation, the *Cartesio* case started with the quite obvious aim of urging the Court to review its case law in *Daily Mail.* In the English case *Daily Mail* the ECJ found that the Treaty articles on the freedom of establishment do not entail the right for companies to transfer their seats to another Member State. It maintained that companies are the creatures of national laws and therefore these states have the right to define the connecting factor between them and their companies.[71] But the *Daily Mail* judgment was delivered in the late 80's and company mobility became much more intensive after that. Even follow-up case law, especially the *SEVIC* case,[72] concerning the cross-border merger of companies showed major progress in the interpretation of freedom of establishment articles – yet the doctrine of *Daily Mail* was not overruled. It was however repeatedly discussed that *Daily Mail* should be revisited either by the Court or

70 It must also be noted that the issue of consumer loan contracts denominated in foreign currencies was not unique to Hungary and that several questions relating to such contracts, and unfair terms in consumer contracts in general, have quite naturally been brought before the ECJ by national courts of other Member States. That being said, national courts not only revisit or further advance issues previously raised by courts of their own Member State, but are in a constant dialogue with the national courts of the other Member States as well through the preliminary ruling procedure and the judgments of the ECJ.

71 Judgment of 27 September 1988, *Case C-81/87, Daily Mail,* ECLI:EU:C:1988:456, para. 19.

72 Judgment of 13 December 2005, *Case C-411/03, SEVIC,* ECLI:EU:C:2005:762.

revised through harmonisation measures.[73] The 1997 draft proposal of the Commission on the cross-border transfer of a company' registered office or de facto head office to another Member State was finally not channelled into the legislative procedure and processes came to a stalemate.[74] In 2006 a Hungarian regional court, the *Szegedi Ítélőtábla*, finally had the opportunity to challenge the ECJ about the actual scope of the freedom of establishment in a case where a Hungarian company wanted to transfer its seat to Italy while retaining its status under the Hungarian law.[75] The Court insisted on its earlier case law by confirming that a Member State has the power not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.[76] In the same judgment, however, the ECJ distinguished the situation in *Cartesio* from a hypothetical one where the company would not want to transfer its seat, but wants to convert into a company form governed by another Member State thereby changing the applicable law. In such a case the Member State of incorporation could not require the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.[77] With this addition the ECJ took a step further towards finetuning the principle of the freedom of establishment. At the same time, however, it should be underlined that with this addition it seems to have overstepped the powers it is entrusted with to interpret EU law. It has namely answered a question which was not asked from it and does not have any factual links with the case at hand. According to the case law the function of the ECJ in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or

73 Federico M. Mucciarelli, 'Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited', *European Business Organization Law Review,* Vol. 9, Issue 2, 2008, pp. 267–303.

74 Dubravka Aksamovic, 'Transfer of Corporate Seat in EU: Recent Developments', *Athens Journal of Law,* Vol. 5, Issue 4, 2019, pp. 419–434.

75 Judgment of 16 of December 2008, *Case C-210/06, Cartesio,* ECLI:EU:C:2008:723.

76 Id. para. 111.

77 Id. para. 112.

hypothetical questions.[78] Meanwhile, the issue of converting into the legal form of another Member State was definitely a hypothetical issue as this is not what the Hungarian company, Cartesio wanted to do. Still, it was this very sentence which generated a new reference in the *Vale* case.[79] This time, the case was more about the compatibility of Hungarian legislation with the *Cartesio* judgment than a finetuning or further development of EU law. In the instant case in which the reference was made in 2010 there was a former Italian company which was deleted from the Italian company register for having moved to Hungary. The owners of the Italian company wanted to register a new Hungarian company with the same name as the Italian company and asked the Commercial Court in Budapest to indicate that VALE Costruzioni was the predecessor in law to VALE Építési, the new Hungarian company. The assets of the Italian company were fully transferred to the New Hungarian entity.[80] The Hungarian Commercial Court refused to state this information in the registry arguing that a company which was incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested. In fact, what Vale wanted was a conversion into the legal form a Member State in the sense of the newly established principle of the *Cartesio* judgment, in particular, the wording "if it is permitted under the law to do so". In its judgment the ECJ continued its line of reasoning developed in its earlier case law *Überseering* and *Sevic* and found that

> "Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company".

78 Judgment of 12 of June 2003, *Case C-112/00, Schmidberger*, ECLI:EU:C:2003:333, para. 32; Judgment of 8 of September 2009, *Case C-478/07, Budějovický Budvar* ECLI:EU:C:2009:521, para. 64.

79 Judgment of 12 of July 2012, *Case C-378/10, Vale*, ECLI:EU:C:2012:440.

80 The transfer of assets is an essential feature of the effective application of para. 111 of the *Cartesio* judgment according to Péter Metzinger – who represented *Cartesio* and later *Vale* in the respective cases – as without the continuity of assets one could not speak of a real conversion (Péter Metzinger, 'A társaságok szabad letelepedése a Cartesio ügy után: Hogyan tovább nemzetközi székhelyáthelyezés?', *Európai Jog,* 2009/2., pp. 8–15.)

In *Vale* the ECJ therefore made clear that the Hungarian law was not in line with what was laid down in the *Cartesio* judgment. The *Vale* judgment was followed up some years later by an amendment in Hungarian law[81] which made cross-border conversion possible. At the same time, *Cartesio* and *Vale* also had an effect on EU level, with the 2019 Mobility Directive[82] codifying the main findings of the above cases and supplementing them with the necessary secondary legislation.

2.5. Gambling Cases Concerning the Prohibition of Slot Machines in Amusement Arcades

From the series of gambling cases[83] concerning the prohibition of slot machines in amusements arcades that reached the ECJ from Hungary, the *Berlington* judgment and the order rendered in *Pólus Vegas* may be considered consecutive cases where the latter sought the interpretation and proper application of the former. The *Berlington* case was initiated at national level after the Hungarian legislator significantly changed gambling legislation in 2011 and 2012, respectively. First, it increased the flat rate for tax without a transitional period in the case of slot machines operating outside casinos, and then it prohibited operating such machines outside casinos. The applicants in the main proceedings were gambling companies with mostly EU clientele which were operating slot machines in amusement arcades. They claimed compensation for the damage they allegedly suffered, resulting from the application of certain provisions of the 2011 and 2012 amendments. According to the applicants, the alleged damage resulted from the imposition of gambling taxes which they had paid, the depreciation of their slot machines and the expenses incurred in the main proceedings.[84] The *Fővárosi Törvényszék* had doubts about the compatibility of the natio-

81 *See* Act LXI of 2017 on the amendment of certain acts to enhance the legal competitiveness of business environment.

82 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

83 Judgment of 11 of June 2015, *Case C-98/14, Berlington*, ECLI:EU:C:2015:386; Judgment of 22 of June 2017, *Case C-49/16, Unibet*, ECLI:EU:C:2017:49; Judgment of 28 February 2018, *Case C-3/17, Sporting Odds*, ECLI:EU:C:2018:130; Order of 4 of June 2019, *Case C-665/18, Pólus Vegas,* ECLI:EU:C:2019:477.

84 Judgment, *Case C-98/14, Berlington,* para. 20.

nal measures with EU law and sent fifteen questions to the ECJ on the interpretation of EU law. It wished to ascertain not only the compatibility of the amendments with EU law, but also the conditions of awarding damages on the basis of the *Brasserie du pêcheur* and *Factortame* case law. In its judgment, the ECJ came to the conclusion that national legislation prohibiting the use of slot machines outside casinos without any compensation or transitional period, constitutes a restriction on the freedom to provide services guaranteed by Article 56 TFEU.[85] At the same time, it made clear that this article is intended to confer rights on individuals, in such a way that its infringement by a Member State, including as a result of its legislative activity, gives rise to a right of individuals to obtain from that Member State compensation for the damage suffered as a result of that infringement. To receive compensation however, the infringement must be sufficiently serious and there must be a direct causal link between the infringement and the damage sustained, which is for the national court to determine.[86]

Following the judgment, many claims for compensation were submitted by former gambling service providers. However, the jurisprudence at national level reflected diverging interpretations. Some decisions refused those claims where no cross-border element could be identified, meaning that the providers could not ascertain their clients were mainly non-Hungarian EU citizens.[87] Other decisions at second instance found that under the *Anomar* case law,[88] even the theoretical breach of EU law could suffice in order to establish cross-border relevance.[89] This uncertainty concerning the significance of the cross-border element led to the next preliminary reference in the *Pólus Vegas* case. In this case, a first instance court, the *Fővárosi Közigazgatási és Munkaügyi Bíróság,* faced with the strongly diverging judicial approaches asked the ECJ whether in the case of operating slot machines the cross-border element should be presumed, as there is a potentiality that citizens of other Member States will try to access these services.

85 Id. para. 52.

86 Id. para. 106.

87 *See* the following judgments: P.22.701/2015/35, p. 26; P.21.074/2016/14, p. 3; P.24.991/2016/33, p. 11. Réka Rákos, *Az uniós jog megsértéséért fennálló tagállami kártérítési felelősség: Pürrhoszi győzelem? A Francovich-doktrína érvényesítése és alkalmazása a magyar jogban*, OTDK dolgozat, 2023, p. 26.

88 Judgment of 11 of September 2003, *Case C-6/01, Anomar*, ECLI:EU:C:2003:446.

89 *See* the following judgments: 8.Pf. 21.280/2018/8, p. 8; 5.Pf.20.097/2019/6/II, p. 11; 5.Pf.20.270/2019/6/II, p. 7; 5.Pf.20.800/2018/7/II, p. 11; 5.Pf.21.081/2016/6/II, p. 21; 8.Pf.20.231/2017/8, p. 6. *See* Rákos 2023, p. 27.

The ECJ decided to rule in the case by way of an order (instead of a judgment) arguing that the referring court could clearly deduce the answers from the existing case law. This is even more interesting in the light of the fact that the decision is not completely in line with the overall conclusions in the *Anomar* case to which no reference is made in the order. First, the ECJ argued that in *Berlington* the reason why the Court found that Article 56 TFEU was breached was that the clientele of the applicants in the main proceedings was partly from EU Member States. If, however, the case before the national court is of purely internal nature and does not show any connection to one of the freedoms, the cross-border element cannot be presumed for the mere eventuality that non-Hungarian EU citizens might have access to such services.[90]

The order in *Pólus Vegas* led to a controversial situation in Hungary – similarly to the post *SEGRO* case law – where those amusement arcades which operated slot machines but could not provide proof that they had clients from other Member States did not receive compensation, while those which could prove such a cross-border element, were awarded considerable damages as a result of the very same legislation. Moreover, ever since the Constitutional Court's 2021 decision it is undisputed that Article E cannot be given a broader interpretation and EU law cannot be applied in purely domestic situations, not even if it results in reverse discrimination.

3. Conclusions

"Learning to talk" – was the title of an article written by the later Advocate General Michal Bobek published only some years after the Eastern enlargement, giving a first impression of the early experiences with preliminary ruling procedures from the new Member States.[91] The above cases show that in Hungary the use of the procedure not only resulted in a genuine dialogue between the referring courts and the ECJ, but became a real conversation with the contribution of many actors who often further specified earlier questions put forward by their colleagues or approached the same legal issue from a different angle. The fact that references generate more and more questions shows that the successful application of EU law and

90 Order, *Case C-665/18, Pólus Vegas,* paras. 23–24.

91 Michal Bobek, 'Preliminary Rulings, the Courts of the New Member States and the Court of Justice', *Common Market Law Review,* Vol. 45, Issue 6, 2008, pp. 1611–1643.

confirms that preliminary references are in most of the cases not isolated decisions, but are embedded in a set of judgments and their essence can only be assessed in light of this line of decisions. Consecutive preliminary references are evidence that the application of the judgments of the ECJ is an integral part of the legal work of national judges and that EU law is in fact in use.