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Preliminary references: challenges and legal conditions in Hungarian domestic law

The accession of Hungary to the European Union entails new challenges for the Hungarian courts. Successful adaptation may especially be hindered by the fact that there is no comprehensive judicial practice for the application of law of foreign origin. Moreover, stemming from the traditional positivist approach and the dualist constitutional practice, Hungarian courts have shown reluctance to apply legal rules of foreign origin directly, including international legal rules adopted by Hungary, too.

1. General sources of adaptation difficulties

The general and foreseeable difficulties of adaptation – which constitute the source of uncertainty – can be summarised in four points.

(1) Requirements of the knowledge of and expertise in Community law. This is a major challenge in view of the volume of Community law. The courts have to make an effort even to follow the constant changes of domestic law. This burden will double when the same requirements have to be met concerning Community law.

(2) Requirement of interpreting domestic law in harmony with Community law. The *Von Colson* principle, extended with the statements made in the *Grimaldi*, *Miret* and *Marleasing* cases, places serious requirements on national courts.[1] According to this, the obligation of national courts to interpret the law of the Member State in harmony with the law of the Community is based on

[1] Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 0189, par. 26., Case C-322/88 Salvatore Grimaldi v Fonds des maladies professionnelles [1989] ECR 4407, par. 19., Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135, par. 8., Case C-334/92 Teodoro Wagner Miret v Fondo de Garantía Salarial [1993] ECR I-6911, par. 20.

Article 10 of the EC Treaty. This ensues from the fact that the Member States and their organs (courts) are obliged to promote the realisation of Community goals while ensuring the effective enforcement of Community law.

The fulfilment of this requirement postulates the comprehensive knowledge of Community law and at the same time the comprehension of the relationship of national law and Community law.

(3) Raising of questions of Community law by the national courts. By the *Peterbroeck* decision and partly by the *Van Schijndel* decision the European Court of Justice set up requirements for national courts with respect to the application of Community law.[2] Ensuing from this obligation, Community law shall be applied not only when it is invoked by one of the parties. The national court is obliged to consider Community legal rules even in the absence of such pleading by the parties. Domestic legal rules hindering this are in conflict with the Community legal order.

The effect of the difficulty mentioned in point (1) is multiplied by this requirement. The reason for this is that courts cannot necessarily count on the parties in litigation as regards the application of Community law. The responsibility of the courts is increased considerably by the enforcement of the *iura novit curia* principle in such a way.

(4) Material and procedural difficulties with the preliminary ruling procedure. In the course of the application of Community law Hungarian courts will encounter legal questions for the solution of which the help of the European Court of Justice will have to be sought. The preliminary ruling procedure, which provides the procedural conditions for this, will have several initial difficulties in store for the Hungarian courts. An especially important question is how this procedure based on Community law can be fitted into Hungarian procedural law.

It is very difficult to estimate the future number of references for preliminary ruling submitted from Hungary. The national courts of some Member States are known to use this possibility more frequently than the courts of other states. From among the present Member States, the legal system, legal practice and legal approach of Austria undoubtedly show great similarity with those of Hungary. Austrian courts use and have used the means of preliminary ruling readily. One could infer from this that Hungarian courts will act in the same manner, but it is by no means certain.

As concerns the above challenges, the present article is focusing on how Hungarian law is trying to fit the preliminary ruling procedure into the framework of its legal system. The reason for this choice is that, the Hungarian

[2] Case C-312/93 Peterbroeck, Van Campenhout & Cie SCS v Belgium [1995] ECR I-4599, paras. 20-21., Joined Cases C-430/93 and C-431/93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten [1995] ECR I-4705.

Parliament has recently amended both the Code of Civil Procedure and the Code of Criminal Procedure. The preliminary ruling procedure is incorporated into the Hungarian procedural law by the amendment, by means of supplementing the existing rules.

2. Incorporation of the preliminary ruling procedure into Hungarian law

The preliminary ruling procedure will be the most important institutional connection between Hungarian courts and Community courts. This procedure may entail several major or minor problems for national courts, and Hungary is not likely to be an exception.

The duty or right of national courts to refer ensues directly from Community law, and it is independent of the existence of any national rule. This is a *sui generis* procedure. National legal rules can supplement but cannot restrict these rules of the Union or within this of the Community (hereafter law of the European Union).[3] It follows from this that the national court can make a reference for preliminary ruling even if its own domestic law does not regulate it or its procedural framework.. The domestic law of several Member States does not contain separate procedural provisions about referring for preliminary ruling (with the exception of, for example, Scotland, England and Wales, or Austria).[4] The absence of domestic legal regulation does not impede preliminary references.

The aim of the amendment of the Hungarian rules of procedural law is to dispel several uncertainties pertaining to references for preliminary ruling after the accession. The amendment contains three supplementary rules which do not ensue from the legal rules of the Union concerning preliminary ruling: first, it prescribes the suspension of the procedure in the case of reference for preliminary ruling; second, it regulates the right of appeal; and third, it prescribes that the Ministry of Justice shall be informed about the preliminary reference.

The general part of the Explanation attached to the amendment extends much beyond the usual framework, the aim and functions of the preliminary ruling procedure as well as its role in the Union are described in short, with some references made to the decisions of the European Court of Justice. The Explanation gives the Hungarian courts applying the amendment a general, comprehensive view about the essence of the whole legal procedure and may serve as the basis for its application.

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[3] See e.g. Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 0629, paras. 20–22., Case C-348/89 Mecanarte – Metalurgica da Lagoa Lda v Chefe do Serviço da Conferencia Final da Alfândega do Porto [1991] ECR I-3277, par. 45.

[4] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. 18th colloquium in Helsinki, 20 and 21 May 2002. General report, point 3.3

In the following some questions of the preliminary ruling procedure are going to be highlighted in connection with the amendment of procedural rules.

3. Scope of the preliminary ruling procedure

The amendment of the rules of civil procedure regulates only preliminary ruling initiated on the basis of the EC Treaty, while the amendment of criminal procedure also refers to the EU Treaty. According to the Explanation this is due to the fact that the fields regulated by the EU Treaty (third pillar) concern only criminal law, not civil law.[5] However, the definition of the legal grounds of preliminary ruling seems to be insufficient even with such reasoning.

(1) The national courts can make preliminary references on the basis of several rules of law. Actually, several preliminary ruling procedures exist in the law of the European Union, and their conditions and rules may differ in many aspects. In view of this, it is difficult to understand why the amendment sets the aim of establishing the applicability of the preliminary ruling procedure based only on Article 234 of the EC Treaty.[6] Hungarian courts may find themselves in a situation in which they have to refer for preliminary ruling on the basis of another provision. Thus the amendment of the Code of Criminal Procedure also refers to Article 35 of the EU Treaty as a matter of course.

Preliminary ruling procedure is provided for not only by Articles 68 and 234 of the EC Treaty and Article 35 of the EU Treaty, but also by Article 150 of the EURATOM Treaty and by several international treaties concluded by the Member States within the Union. The latter ones are not referred to in the amendment of the Code of Civil Procedure or Code of Criminal Procedure. Although preliminary ruling procedures based on the EURATOM Treaty are very rare, the possibility cannot be excluded. If a Hungarian court wishes to refer for a preliminary ruling procedure not on the basis of the EC Treaty or EU Treaty, it cannot make a reference to the amended provisions of either the Code of Civil Procedure or the Code of Criminal Procedure.

(2) As concerns the regulated scope of the procedures, it is also disputable that the amendment of the rules of civil procedure do not even refer to the EU Treaty. The Explanation of the amendment points out rightly that cases, which arise on the basis of the EU Treaty and which can be referred to preliminary ruling (police and judicial cooperation in criminal and customs matters), occur typically in criminal procedure in the Hungarian legal system. However, there are problems arising in this field which can also be encountered in civil cases (for example, data protection, customs matters and some other questions of

[5] Explanation, Particular Provisions /5. §/ point 4.
[6] Explanation, General Part point I/1.1

public administration). It would hardly have been unnecessary to refer to the EU Treaty in the amendment of the Code of Civil Procedure. However, the lack of this is of slight importance in practice as the court proceeding in civil cases is entitled (or in some cases is obliged) to make preliminary references to the European Court of Justice in the absence of national legal rules, too.

(3) The regulations of the Code of Civil Procedure and the Code of Criminal Procedure concern only the preliminary ruling procedure in the European Court of Justice. The present situation is reflected rightly by this part of the amendment. However, it is important to remember that the European Union Treaty and the Treaty of Nice (Nice, 2001) on the amendment of treaties establishing the European Communities and of certain associated documents made it possible that, according to 225(3) of the amended EC Treaty and Article 140a of the EURATOM Treaty, the other Community court, the Court of First Instance can also proceed and make a preliminary ruling in certain cases defined in the Statute of the Community courts. The Statute has not been amended in such a way, thus the Court of First Instance is not yet entitled to proceed in a preliminary ruling procedure. In future, however, this possibility must also be considered, and then the reference made by the present amendment will prove to be too limited.

4. Suspension of the procedure

In the practice of the national courts the preliminary reference may entail the suspension of the procedure, but it is not necessarily so. The first sentence of Article 23 of the Statute of the European Court of Justice refers to the possibility of suspending the procedure, but this can hardly be interpreted as if the suspension of the procedure was made compulsory.

The practice shows great variety in this respect, too. In some countries suspension is automatic, thus the general rule is that during the time of reference the court cannot make any procedural acts (e.g. Austrian courts of public administration, Finnish supreme court of public administration).[7] In some it depends on the proceeding court whether the case is suspended (e.g. England and Wales).[8] In other countries the procedure may go on during the period of reference concerning questions not affected by the legal question in the reference, such as production of evidence (e.g. Danish and Dutch courts).[9] There are countries in which during the period of reference not only can certain procedural acts be taken but a partial judgement can also be made concerning the parties not involved in the legal question in the reference, or concerning the

[7] See note 4: Austrian report, point 2.13, Finnish report, point 2.13.
[8] See note 4: English–Welsh report, point 2.8
[9] See note 4: Dannish report, point 2.13, Dutch report, point 2.9

part of the case not affected by it (e.g. the French *Conseil d'Etat* or the public administration court of Luxemburg). The Greek Council of State is entitled to make a partial judgement with respect to the parties not concerned even in its reference if their case can be separated.[10]

The automatic suspension – of binding force without exception – of the procedure in the case of preliminary reference cannot be justified in every case. The general duration of the preliminary ruling procedure exceeds two years. In many cases certain procedural acts not directly affecting the reference for preliminary ruling could be taken during this period (e.g. production of evidence). As the reference need not necessarily be based on the complete facts of the case, the case may have parts or aspects independent of the reference.

The amendment of the Code of Civil Procedure and the Code of Criminal Procedure regulates the suspension of the procedure as a compulsory consequence in the case of preliminary reference. This solution may not lead to desirable results in every case. Procedural acts are allowed by the Hungarian Code of Civil Procedure for the duration of suspension only in exceptional cases. Thus, in certain cases, compulsory suspension may further delay the procedure. In some cases it is useful to carry out certain procedural acts with the purpose of saving time during the period of the preliminary ruling procedure. However, this is precluded by the Code of Civil Procedure. Similar considerations may be valid as concerns the issue of suspending criminal procedure. These arguments could support more flexible regulation – especially in civil cases –, when the proceeding court would decide for or against the suspension of the case referring the case to the Court of Justice, even if this would fit into the system of the civil procedure not so easily.

5. Decision to refer: possibility of appeal

The possibility of appeal against the decision of the national court to refer for preliminary ruling is a very important question in the light of the fact that the appeal essentially restricts the right of the national court to refer for preliminary ruling. The European Court of Justice has stated in several cases: Article 234 of the EC Treaty makes it possible for national courts to make preliminary references freely and to weigh its necessity.[11] However, according to the Court, Article 234 does not preclude the possibility of appeal against the decision on reference, this is regulated by domestic law. The Treaty does not give autonomy to the referring court in the case when domestic law provides the

[10] See note 4: French report, point 3.1, Greek report, point 2.13

[11] E.g. Case 166/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1974] ECR 0033, paras. 3–4. or Case C-261/95 Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS) [1997] ECR I-4025, par. 20.

possibility of ordinary legal remedy against the reference.[12] Naturally, in this case it is up to the parties in litigation whether they will question the reference with an appeal. The practice in the Member States differs, several states (e.g. Ireland, Italy, Belgium) do not permit to appeal against the decision to refer.[13] In Hungary the possibility of appeal is introduced or maintained in the Hungarian practice by the amendment of the law – with certain restrictions – in the case of referring for preliminary ruling. However, there are some problems associated with this.

(1) According to the new rules, in civil procedure it is possible to appeal against the decision to refer during the procedure of first instance, while no such possibility opens in the case of the decision not to refer. In the procedure of second instance the possibility to appeal opens in both cases.

– The different regulation of the possibility to appeal in the procedures of first and second instance is justified by all means. In the procedure of first instance the court usually has the right but not the duty to refer. In the procedure of second instance the duty to refer may also arise under the existence of certain conditions laid down in the law of the European Union (this is true only generally and not in all cases). Thus, if the proceeding court may have the duty to refer, it is appropriate to provide the possibility to appeal in the case when the motion of the party in litigation to this purpose is dismissed by the court. The basis of the appeal will be that in spite of the existence of the conditions determined in the law of the European Union, the proceeding court failed to decide to refer for preliminary ruling, or did so in spite of the absence of such conditions.

– In the civil procedure of first instance it is possible to appeal only against the decision to refer (and at the same time against suspension). However, the problem is made more complex by the fact that in this case the court has no duty to refer. At the same time it also means that even if all the conditions of referring for preliminary ruling exist, the court of first instance may decide not to exercise this right but to decide the legal dispute without the opinion of the European Court of Justice. There would be no sense in providing the possibility to appeal against the decision denying reference for preliminary ruling as there would be no grounds for such appeal. The court is free to decide not to refer, thus the review has no specified scope. If, in the absence of reference, no proper judgement on the merits is made, the interested party can object to the refusal of reference in his appeal against the judgement on the merits.

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[12] Case 13/61 Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn [1962] ECR 0089, Case 146/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1974] ECR 0139, par. 3.

[13] ANDERSON, D.W.K. – DEMETRIOU, M.: *References to the European Court.* London 2002. p. 215.

– It is possible to appeal against the decision to refer made by the court of first instance. According to the Explanation of the amendment, in this case the review may be aimed at examining whether the conditions of the reference correspond to the conditions laid down in the law of the European Union. In the absence thereof, the reference may prove groundless (and possibly dismissed by the European Court of Justice without any examination of merit), and a lot of time will be wasted unnecessarily during the procedure. Thus the court may be mistaken with respect to the applicability of the rule of law to be interpreted to the facts of the case in question, may word the wrong questions and may state the facts of the case and set forth the relevant Hungarian law in the decision wrongly.

I hold the view that the possibility of review in these questions is essentially very limited. The possibility of reviewing the (temporary) facts of the case set forth in the decision to refer – excluding exceptional cases – is illusory in fact. The expounding of domestic law and the wording of the questions is rather a technical problem, too. Rarely does the latter one hinder preliminary ruling by the European Court of Justice.

Review on the merits may be limited only to establishing whether the formulation of the question corresponds to the basic conditions. Thus, for example, the question may not contain the interpretation of the domestic legal norm either directly or indirectly as this is the task of the national court and not of the European Court of Justice[14]; moreover, the reference may not question the compatibility of the Community rules and the domestic legal norms, much less the possible invalidity of the national rule in conflict with the Community norms. These are simple rules and in my opinion it is not worth maintaining the possibility to appeal for these reasons.

As regards the question of appeal, it cannot be disputed that the model in the amendment is functional. However, based on the above, it seems more reasonable to state that no possibility to appeal against the decision to refer should have been provided in the procedure of first instance, either, by the amendment.

– The serious insufficiency of the model of appeal chosen by the amendment arises in court procedures of one instance. With a very few exceptions, there is no possibility to appeal in actions for judicial review of administrative decisions under the Hungarian rules of civil procedure.

In the foregoing I stressed the importance of providing the possibility to appeal both against the decisions to refer and not to refer in all the procedures in which the court has the duty to refer according to the law of the European Union, under the conditions laid down therein. It seems probable that in procedures of one instance where there is no possibility to appeal, Hungarian

[14] E.g. Case C-37/92 José Vanacker and André Lesage and SA Baudoux combustibles [1993] ECR I-4947, paras. 6-7.

courts will have the duty to refer if they hold the opinion that decision about a legal question of the Community is necessary for making their judgement. In the case of court procedures of one instance, as they are procedures of first instance, the amendment does not provide the possibility to appeal in case the court dismisses one of the parties' request for reference. In this case the party in question will have no possibility to turn to another court in order to decide whether the court fulfilled its obligation incorporated in the law of the European Union. As the application of the legal rules of the European Union is encountered in actions for judicial review of administrative decisions in most of the cases, this insufficiency may have a serious effect in practice, too.

(2) According to the amendment of the criminal procedure, the general rules of appeal against the decision to suspend the procedure are extended to the decision to refer. This results in a solution different from the rules of civil procedure, at least in the procedure of first instance. Due to the extension, in accordance with the new rules of the Code of Criminal Procedure, the possibility to appeal against the decision to refer and against the decision not to refer exists both in the procedures of first and second instance. The extension of the possibility to appeal may cause problems in the procedure of first instance.

– It is difficult to find reasons which support the provision of the possibility to appeal against the decision not to refer in criminal procedures of first instance. The court proceeding on first instance has the right but not the duty to refer. It is free to decide whether to exercise this right if all the conditions of the decision to refer exist. In the light of this the important question is: what can such an appeal be based on? What could be the grounds for contesting the decision of first instance not to refer, by means of which the court does not exercise one of its rights? What can the scope of review be? On what grounds can the court of second instance oblige the court of first instance to exercise one of its rights – in the absence of obligation – the exercising of which belongs entirely to its discretionary powers? In my view there are absolutely no reasons for the possibility to appeal against the decision not to refer in criminal procedure of first instance, what is more, the legal grounds thereof can hardly be determined. My conclusion is that it would suffice to provide the possibility to appeal concerning the decisions to refer for preliminary ruling in the procedure of second instance, and it is hardly justified in the procedure of first instance.

– The rules of Hungarian criminal procedure acknowledge the investigation judge. In their scope of activity, as concerns coercive measures and production of evidence, legal questions of the Community may arise which need to be elucidated and necessitate reference for preliminary ruling.

In Italy investigation judges have made references to the European Court of Justice in criminal cases on many occasions. The question whether, with respect to the application of Article 234 of the EC Treaty, the Italian investigation judge (*pretore*) fulfilling mainly the tasks of public prosecutor in the given criminal case qualifies as a court arose first in the *Pretore di Salo v X* case.[15] There the office of the *pretore* was regarded by the Court as a judicial office with the right to refer. After that the Court did not examine in similar cases to what extent the *pretore* can be considered as a court, the reference was studied immediately on the merits.[16]

On the basis of the reasoning given in the *Pretore di Salo v X* case the Hungarian investigation judge may also have the right to refer. However, this does not fit into the system of the Code of Criminal Procedure. According to the amendment, the court proceeding in the case is provided with the possibility of reference for preliminary ruling together with the suspension of the procedure in the court phase. This possibility does not apply to the investigation judge. Actually – on the basis of the text of the Code of Criminal Procedure – the investigation judge cannot even suspend the procedure, or at least no reference is made to this in the text of the law.

This leads to an interesting situation of procedural law, namely that the law of the European Union provides the investigation judge with the theoretical possibility to refer for preliminary ruling, while the Hungarian procedural law does not give an expressed possibility for this. However, this cannot be an obstacle to reference.

6. The content of the reference

The rules of civil and criminal procedural law provide for the content of the reference in the same manner. According to these, the decision shall contain the questions referred, the facts of the case to the extent necessary for answering the questions and the relevant Hungarian legal rules. This is important, but on the basis of the practice of the European Court of Justice, the reference has to contain other things as well. The decision to refer for preliminary ruling also has to state the reasons why preliminary ruling is necessary for deciding the case. This is not mentioned in the amendment.

The national court has a general obligation to give information about the facts of the case, the questions of domestic law and the reasoning, without which no proper preliminary ruling can be made at all.[17] The necessity of giving

[15] Case 14/86 Pretore di Salo v X [1987] ECR 2545.

[16] E.g. Case 228/87 Pretura unificata di Torino v X [1988] ECR 5099.

[17] Case C-83/91 Wienand Meilicke v ADV/ORGA F. A. Meyer AG [1992]) ECR I-4871, par.26., and see also Joined Cases 36 and 71/80 Irish Creamery Milk Suppliers Association and others v Government of Ireland and others; Martin Doyle and others v An Taoiseach and others

detailed information is frequently pointed out by the Court. An increasing emphasis is laid by the Court on the requirement of information and reasoning, which is evident from many cases decided in the middle of the 1990s.[18]

In the European Court of Justice the prerequisite to understanding a case is the reasoning given by the reference stating why the court deems the answer to the question necessary for deciding the legal dispute, which may concern, for example, why the national court considers Community law applicable in the case, why the Community legal question has to be decided in order to make a judgement in the case, what the relationship of Community law and the relevant domestic law is, etc.[19] In this reasoning the court may expound whether it has doubts, and if so of what nature, about the compatibility of the domestic regulations to be applied with Community law. This can be expressly useful in some cases as the Court can understand the problem to be solved by the national court.[20] The referring court is exempt from the duty to provide reasons only if it is evident from the matter of the legal dispute why the reference is needed in the basic procedure for making a decision. In this case it has to be obvious from the matter of the case.[21]

7. Courts obliged to refer

Those national courts have the duty to refer according to Article 234 of the EC Treaty and also in accordance with Article 68 thereof and Article 150 of the EURATOM Treaty which make decisions against which there is no legal remedy. (The duty to refer is also imposed on courts named in Article 2 of the 1971 protocol on the interpretation of the Brussels Convention of 1968, which has already lost its importance.) The problems associated with the duty to refer are the same concerning these three regulations, but in practice they have emerged in the course of the application of Article 234.

The Hungarian court system has four levels, as follows: municipal courts, county courts, regional courts of appeal and the Supreme Court. It is of great

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[1981] ECR 0735, par. 6., Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 Sandro Gallotti, Roberto Censi, Giuseppe Salmaggi, Salvatore Pasquire, Massimo Zappone, Francesco Segna and others , Cesare Cervetti, Mario Gasbarri, Isidoro Narducci és Fulvio Smaldone [1996] ECR I-4345, C-167/94 Juan Carlos Grau Gomis and others [1995] ECR I-1023, par. 8.

[18] E.g. BLUTMAN L.: Előzetes döntési eljárás az Európai Bíróságon: a szükségesség feltétele. *Jogtudományi Közlöny* 1999/12. 541– 548. p.

[19] E.g. Case C-167/94 Juan Carlos Grau Gomis és mások [1995] ECR I-1023, paras. 8-9.

[20] Joined Cases 141-143/81 Gerrit Holdijk and others [1982] ECR 1299, par. 7.

[21] Joined Cases 141-143/81 Gerrit Holdijk and others [1982] ECR 1299, par. 5., Case 244/80 Pasquale Foglia v Mariella Novello [1981] ECR 3045, par. 17., Joined Cases 98, 162 and 258/85 Michele Bertini and Giuseppe Bisignani and others v Regione Lazio and Unita sanitarie locali [1986] ECR 1885, par. 6.

consequence on which level the duty to refer opens, that is which courts in the Hungarian legal system are subject to paragraph (3) of Article 234.

The practice of the Member States definitely shows the tendency that the exclusion of the possibility of legal remedy is not to be examined generally, one always has to examine in the given case whether the possibility for legal remedy exists or not.[22] The European Court of Justice also seems to connect the opening of the duty to refer to the exclusion of the concrete possibility of legal remedy.[23]

The same direction is taken by the Hungarian legal regulation, too. The following conclusion is drawn by the Explanation of the act amending the regulations of the Code of Civil Procedure and the Code of Criminal Procedure: the guarantees contained in Articles 68 and 234 of the EC Treaty would become void if they were interpreted as if only those courts had the duty to refer against the decision of which there is never any possibility to appeal. Thus this question has to be studied in the light of the given case, not in general.[24] In this way whatever the level of the proceeding court is, the duty to refer will arise if there is no legal remedy in the given case.

However, legal remedy may take several forms. Could paragraph (3) refer to all forms of legal remedy (including extraordinary legal remedy), or the possibility or absence of only certain, typical forms of legal remedy plays a role in the opening of the duty to refer. The field of legal remedies the exclusion of which results in the duty to refer is essential with respect to preliminary ruling.

The concept of legal remedy cannot be limited to appeal. Some experts hold the view that certain extraordinary legal remedies do not belong to the scope of paragraph (3), the possibility thereof does not exempt those courts from the duty to refer against the decision of which such extraordinary legal remedy may be taken (e.g. starting procedures which do not continue the original procedure).[25] The field of legal remedies is very large in the Hungarian legal system. It is by no means certain that some forms of extraordinary legal remedy can be considered from this aspect.

(1) Appeal. Appeal is a legal remedy which has a similar content in the Hungarian legal system as in other states. The possibility to appeal against the judgement on the merits definitely excludes the courts of first instance from the range of courts with the duty to refer, as legal remedy is available against their decision.

(2) Review. A review may be initiated against final judgements on the merits in the Hungarian procedural law, but only if very strict conditions are

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[22] See note 4: General report, point 3.5.

[23] Case 6/64, Flaminio Costa v E.N.E.L. [1964] ECR 1141., see also ANDERSON, D.W.K. – DEMETRIOU, M.: *References to the European Court.* London 2002. p. 165.

[24] Explanation, Particular Provisions / 3– 4. §/ point 5.

[25] SMIT, H. – HERZOG, P.: *The Law of the European Community.* New York 1999. p. 478.

fulfilled. In the majority of the cases it is a means of legal remedy of third instance. According to the interpretation and application of the text of Article 234 of the EC Treaty, review qualifies as extraordinary legal remedy. In practice it is encountered only in a small number of cases.

In criminal cases the field of review is limited as it can cover only legal questions and does not have an automatic suspending effect. In civil cases review is a procedure of different type than in criminal cases. Here it is primarily a form of procedure ensuring uniform legal practice. The field of review is limited, and even a previous breach of law influencing the merits of the case is not sufficient in itself to provide grounds for the review. A special permission is required for review, and it has no automatic suspending effect.

In the light of the above it seems well-founded to hold the view that in criminal cases the theoretical possibility of review against the decision of the court cannot exempt the court proceeding on second instance from the duty to refer. If the possibility of review exempted the court proceeding on second instance from the duty to refer, this duty would not open in the majority of cases (raising Community legal questions). This conflicts with the purpose of Article 234.

Moreover, it seems that the conditions in the *Lyckeskog* decision[26] do not apply either, and the theoretical possibility of review against the decision of the court does not exempt the court proceeding on second instance from the duty to refer. The same conclusion is drawn in the Explanation of the amendment in connection with the possibility of review opening in civil cases.[27]

(3) Reopening a case. In the process of reopening a case the right to refer cannot be disputed in the light of the practice of the European Court of Justice to date. However, the theoretical possibility of reopening a case does not exempt the court making the final judgement on the merits from referring. Consequently, the statements made concerning review also apply to reopening a case.

(4) Constitutional complaint. In Hungary anyone can make a constitutional complaint to the Constitutional Court if a legal rule in conflict with the Constitution was applied in their case. The constitutional complaint qualifies as extraordinary legal remedy.

In general, constitutional courts qualify as courts against the decision of which there is no possibility of legal remedy. On the basis of Article 234 of the EC Treaty, the right of constitutional courts to refer is not questioned in the law of the Community. Constitutional courts have actually made references in several cases.[28] The really interesting question is whether these references are

[26] Case C-99/00 Kenny Roland Lyckeskog [2002] ECR 4839, paras. 17– 19.

[27] Explanation, Particular Provisions /3–4. §/ point 5.

[28] Case C-143/99 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten [2001] ECR I-8365, Case C-93/97 Fédération Belge

made on the basis of the second or third paragraph of Article 234, based on the right or duty to refer. However, this is not evident from the cases and the Court did not examine this question. The Court evidently acknowledges that the reference has been made by constitutional courts, just as it acknowledges that the constitutional courts of certain states do not make references. With this respect the Court considers it essential that the duty to refer shall open in a given procedure. It is of no importance in which court it does so.

However, it seems evident that the court making a final judgement cannot be exempted from the duty to refer by the theoretical possibility of submitting a constitutional complaint. The reason for this is that it is a restricted and extraordinary means used only in a negligible number of cases.

To summarise the above: if in the Hungarian legal system legal remedies other than appeal were considered in ordinary procedures with respect to the arising of the duty to refer, in many cases this duty would not open in practice. This is due to the fact that, with the exception of appeal, these remedies are exceptional and are encountered only in a slight number of cases as both the possibility of their use and their scope are very limited. Consequently, the conclusion can be drawn that these means cannot be considered in weighing the opening of the duty to refer, that is all the Hungarian courts the decision of which cannot be appealed against may have the duty to refer. It seems that in the Hungarian legal system there is no legal remedy which would be suitable for exempting the court making the final judgement from this duty.

The above conclusion does not necessarily apply to extraordinary procedures. Whether the duty to refer may arise in extraordinary procedures and if so, under what conditions, is the subject of another examination.

8. Legal effect of preliminary rulings in Hungarian law[29]

It is not simple to judge the legal effect of the decisions of the European Court of Justice beyond the concrete case. This issue arises here because the Explanation of the amendment makes two references to the fact that preliminary rulings made by the European Court of Justice have a binding force beyond the concrete case.[30]

At present it is a widely disputed question to what extent the preliminary rulings of the European Court of Justice containing legal interpretation are binding beyond the case from which the reference was made. As far as I know the Court has never declared anywhere that preliminary rulings containing legal

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des Chambres Syndicales de Médecins ASBL v Flemish Government, Government of the French Community, Council of Minister [1998] ECR I-4837.

[29] See also BLUTMAN L.: European Court of Justice: a shamefaced system of precedent? *Acta Jur. et Pol. Szeged* Tomus LXIV. 77–92. p.

[30] Explanation, General Part, points I.3.3. and I.6.

interpretation are binding for everybody, and the examples quoted in the Explanation are not suitable for proving this. In the quoted cases the Court only stated that its decisions have a legal effect beyond the concrete case, but it did not state that this legal effect entails the obligation to follow these decisions in general. The content of the legal effect is rather that in similar cases national courts can base their decisions on the previous statements of the European Court of Justice, and that they are exempt from the duty to refer if the Court has already made a preliminary ruling in a similar case.

Needless to say, the domestic law can prescribe that the judgements of the Court are to be followed by the national courts (this was expressly done in the United Kingdom). However, this is a matter of domestic law, not of the law of the European Union. The question arises whether the contents of the Explanation can be regarded as implying that the Hungarian law-maker considers it compulsory for the Hungarian courts to follow preliminary rulings with legal interpretation beyond the concrete case? This question, however, will be answered only by the practice.

LÁSZLÓ BLUTMAN

ELŐZETES DÖNTÉSHOZATAL: KIHÍVÁSOK ÉS JOGI FELTÉTELEK A MAGYAR BELSŐ JOGBAN

(Összefoglalás)

A szerző áttekint néhány általános problémát, melyek a magyar bíróságok számára adódnak Magyarország uniós csatlakozása után. Ezen belül a tanulmány főként az előzetes döntéshozatali eljárást veszi szemügyre, melynek igénybevétele az európai igazságszolgáltatási rendszer részévé váló magyar bíróságok számára néhány eljárásbeli nehézséggel járhat. Elemzi a polgári eljárás és a büntetőeljárás szabályait módosító szabályokat, melyek az előzetes döntéshozatal magyar eljárásokba való beillesztését szolgálják: így vizsgálja többek között az eljárás felfüggesztését, az előterjesztésről hozott döntések fellebbezhetőségét, az előzetes döntés előterjesztésére kötelezett bíróságok körét.