

Conclusions of a Hungarian case – from the aspect of the International Cooperation in Civil Matters

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1.1. INTRODUCTION – THE ESSENCE OF COOPERATION – HISTORIC BACKGROUND

In the beginning the primary aim of the European integration was to establish the foundations of a uniform internal market between the member states. The treaty of Rome therefore did not contain legal basis to the Justice and Home Affairs (hereinafter: JHA). Only the “four freedoms” were articulated (the free movement of [goods](#), [capital](#), [services](#) and [persons](#)). At that time these freedoms could emerge in practice only with the help of national procedures as a uniform judicial organism – that could have decided equally about legal disputes with a foreign element – was absent. Until the Treaty of Maastricht in 1993, the JHA formed mostly out of the integration.

The second level of the cooperation was the Treaty of Maastricht. The treaty established the three pillars of the European Union – the third pillar was the [Justice and Home Affairs](#) (JHA), that was essentially more intergovernmental. Some areas of JHA were under the 1st, some were under the 3rd pillar. With the Treaty of Amsterdam the judicial cooperation in civil matters with other issues got into the 1st pillar, and only the judicial and police cooperation in criminal matters stayed in the 3rd pillar on an intergovernmental level. After the Amsterdam Treaty the main aim of the cooperation in judicial matters was to establish the area of freedom, security and justice, that gave a frame to the cooperation in the tasks of both the 1st and the 3rd pillar. The top priority of the Tampere EU Summit was therefore the Justice and Home Affairs. The main themes covered by the summit were a common EU asylum and migration policy, a genuine European area of justice, a Unionwide fight against crime and stronger external action.¹ The Nice Treaty – that went to effect in 2003 – added a few provisions to the policies in the 1st and in the 3rd pillar, especially on the field of decision-making. The next step in the regulation of the Home and Justice Affairs was the Hague Programme, which aimed to strengthen freedom, security and justice in the Union for the years of 2005-2010.

The Treaty of Lisbon entered into force on 1 December 2009. It amended the [Maastricht Treaty](#) (Treaty on European Union) and the [Treaty establishing the European Community](#) (TEC or the Treaty of Rome). In this process, the Rome Treaty was renamed to the [Treaty on the Functioning of the European Union](#) (TFEU). The aim of the treaty was "to complete the process started by the [Treaty of Amsterdam](#) and by the [Treaty of Nice](#) with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving

¹ Fact sheet of Tampere http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf (downloaded: 16. 05. 2012.)

the coherence of its action."² The TFEU extends the competence of the Court of Justice of the European Union to the questions emerging in the field of Justice and Home Affairs. (previous 3rd pillar). It strengthens more the power of the European organs. The European Council accepted the Stockholm Programme in December 2009. The programme sets out the European Union's priorities for the area of justice, freedom and security for the period 2010-2014.

After the Treaty of Amsterdam it became a possibility to regulate with the tool of regulation and directive in the field of cooperation. As a result, the Council and the European Parliament adopted regulations and directives in civil and commercial matters for example on the field of mediation, jurisdiction and the recognition and enforcement of judgments, the taking of evidence, insolvency procedures, the law applicable to non-contractual obligations (Rome II), service of documents, the law applicable to contractual obligations (Rome I).

The cooperation in civil and commercial matters means the cooperation between courts of the European Union on the basis of the principle of mutual trust.

1.2. SPECIAL COOPERATION – THE PRELIMINARY RULING PROCESS

Our goal with our essay was to examine a case with various Hungarian connections and with crucial and interesting questions on civil procedural law. On the basis of a thorough analysis of the three questions of procedure in the famous *Cartesio* case³, we hope to be able to throw new light upon the issue of cooperation in civil matters. In our opinion the preliminary ruling process is in a way a direct cooperation between a court or tribunal of a member state and the Court of Justice of the European Union (hereinafter: ECJ or The Court).⁴ The essence of this process is that the court of a member state may and in special cases shall turn to the ECJ if there is a doubt in the interpretation or validity of a norm of the European Union. This process helps the member states to interpret and to apply uniformly the laws of the Union, throughout the national judicial system of member states. The cooperation of the European Court of Justice and a national court can be regarded as an unconventional aspect of the cooperation between judicial organs within the European Union. In the abovementioned case, the close cooperation of ECJ and the Hungarian court (Szegedi Ítéltábla) – throughout a preliminary ruling process – had its effect not only on other national

² Preamble of the Treaty of Lisbon, 17.12.2007 EN Official Journal of the European Union C 306/3

³ C-210/06. *Cartesio Oktató és Szolgáltató* bt. 2008. ECR I-9641. (hereinafter referred to as 'Cartesio judgment')

⁴ The Court of Justice of the European Union consists of three courts: the Court of Justice (preliminary ruling process is in its' sole competence), the General Court and the Civil Service Tribunal.

court practices, but even on lawmaking in a member state. It also raises various questions: how to strengthen the cooperation? Can unification of national practices be an effective solution? What is the best way to ensure equal access to justice⁵ for EU citizens? What are the chances of unification and a European Code of Civil Procedure?

The cooperation of a national court and the Court have different aspects, in case of doubt, or differing national practices only the Court has the competence to interpret the law of the European Union. In the majority of the cases it is the *right* of the national court or tribunal to turn to the Court of Justice of the European Union, but there are some issues where it is an *obligation*. For example in cases where any such question is raised in a procedure pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law. Although it is not said in the Treaty *expressis verbis*, but it is also the obligation of the national court to turn to the ECJ, when there is a doubt about the validity of a norm of the European Union. This comes from the fact that annulling, or neglecting a rule of the Union does not belong to the competence of any of the national authorities of a member state.

Another distinctive feature of the cooperation of the national court and the ECJ is that the procedure of the ECJ is an intermediate process during the procedure pending before the national court. Consequently, most of the time the original case is suspended until the decision of the ECJ. Therefore the Court does not decide about the costs of the procedure. It is the task of the national judge to decide which party bears the costs of the ECJ's procedure. The Court's decision does not complete the procedure before the national court, but the Court's ruling – in its' European law aspect – is binding to the national judge.

2.1. CARTESIO CASE – FIRST QUESTION – THE DEFINITION OF A ‘COURT OR TRIBUNAL’ WITHIN THE MEANING OF ARTICLE 234 EC⁶

Cartesio is a Hungarian limited partnership whose application for registration of the transfer of its seat to Italy was rejected by the Hungarian Court of Registration. Cartesio intended to transfer its head office to Italy, while continuing to operate under Hungarian company law. The appellate body of the registration court (Szegedi Ítéltábla) turned to ECJ for a preliminary ruling.

⁵ Access to Justice movement directed by Mauro Cappelletti in the late 1970's. In: Gombos Katalin: *Bírói jogvédelem az Európai Unióban – Lisszabon után*. Complex Kiadó Kft., Budapest, 2011., 268. p.

⁶ 29.12.2006 Official Journal of the European Union C 321 E/147, Article 267 of the Treaty on the Functioning of the European Union since the 1st December 2009, C 115/164 EN Official Journal of the European Union 9.5.2008

Article 234 of the EC Treaty (now Article 267 TFEU) says “The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a **court or tribunal of a Member State** against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

The question of defining the court or tribunal of a member state has been raised in several decisions of the ECJ. In this context the expression “court or tribunal” for the purposes of Article 234 EC has a specific European law sense. This cannot be identified with any of the court definitions under national law of member states, this is a unique European Law category, and it is the competence of the ECJ to decide about it case by case. Problems of defining can occur easily in the case of institutions which have both administrative and judicial functions. There are principles adopted by the Court along its jurisdiction. On the basis of these principles it can be decided whether a national organ turning to the ECJ is a court or tribunal or not. These principles or conditions are the following: the organ must be established by law, must be permanent, its jurisdiction must be compulsory to individuals, its procedure must be *inter partes*, it must apply rules of law and must be independent.⁷

2.1.1. The body is established by law, the body is permanent

During the case-law of the ECJ this condition has become a replaceable factor in order to maintain the protection of rights of individuals. It became more important to act on behalf of the state or the public and to have judicial power, than to be established strictly by law. The ECJ has set up a factor in its decision 246/80: ‘If, under the legal system of a Member State, the task of implementing provisions adopted by the institutions of the Community is assigned to a professional body acting under a degree of governmental supervision, and if that body, in conjunction with the public authorities concerned, creates appeal procedures which may affect the exercise of rights granted by Community law, it is imperative, in order to ensure the

⁷ 61/65 Vaassen (née Göbbels) [1966] ECR 261, Vaassen-Göbbels criteria

proper functioning of Community law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings. It follows that in the absence, in practice, of any right of appeal to the ordinary courts, the Appeals Committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are in fact recognized as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty.⁸ Arbitral tribunals are not considered to be courts or tribunals, because of the fact that the parties can choose arbitration in their contract – it is a possibility, not an obligation – and neither the choice nor the procedure can be influenced by state authorities.⁹ The condition of permanence needs no further construing, it speaks for itself, the Court does not give a thorough explanation.

2.1.2. The body applies rules of law

This factor seems to be evident in modern democracies, it is represented in the obligation of giving the motives of the decision. The motives always contain the list of the applied rules of law. For the purposes of the protection of individuals' rights the Court interprets this condition in a broader sense, and applies for bodies who give their decision not only on the basis of laws.

2.1.3. The jurisdiction of the body is compulsory to individuals

This is a two-sided factor, on one hand it means that the decision about the dispute is in the exclusive competence of the organ. On the other hand it means that the decision has a '*res iudicata*', compulsory effect. This condition has also become more and more relative during the years of practice.¹⁰

2.1.4. The independence of the organ

First of all independence means, that the 'court or tribunal' can only be an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings.¹¹ This contains two factors, the first factor is the external factor, which means to be independent of the undue intervention or pressure on the part of the executive¹²,

⁸ 246/80. C. Broekmeulen v. Huisarts Registratie Commissie. 1981. ECR 02311. 1st question para. 16.

⁹ C-126/97. Eco Swiss China Time Ltd v. Benetton International NV. 1999. ECR I-03055. para. 34.

¹⁰ C-54/96. Dorsch Consult Ingenieuresellschaft mbH v. Bundesbaugesellschaft Berlin mbH. 1997. ECR I 04961.

¹¹ C-24/92. Pierre Corbiau v. Administration des contributions 1993. ECR I-01277. para. 15.

¹² C-103/97. Josef Köllensperger GmbH & Co. KG, Atzwanger AG v. Gemeindeverband Bezirkskrankenhaus Schwaz 1999. ECR I-00551. para 21.

and contains guarantees against the removal of judges¹³. The second factor is an internal factor, formed of objectivity and impartiality of the parties involved in the case.¹⁴

2.1.5. *The procedure of the body is inter partes – connections with Cartesio case*

The typical factor of the court proceedings is that the parties in a case can explain their opinion, they can raise evidence and confute the point of view of the counterparty. This is the factor which was in question in the *Cartesio* case, and also became more and more relative along the case-law of the Court. It can be problematic if there are two or more parties in the proceeding, but the court or tribunal turns to the ECJ in an early stage of the process, where one of the parties has not yet explained its opinion. This problem seems to be solved, as it is the right of the national court to turn to the ECJ, even *ex officio*, and the decision of the ECJ does not end the proceeding before the national court. It was pointed out in the case-law of the Court that national courts or tribunals may refer a question to the Court only if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.¹⁵

In the *Cartesio* case the question in the interpretation of European law emerged in the procedure of a court (Szegedi Ítéltőtábla) hearing appeals against decisions of the commercial register courts. This is a procedure *ex parte*. The court therefore wished to know whether it may be classified as a ‘court or tribunal’ within the meaning of Article 234 EC.

The Polish government stated that the function of commercial courts is merely registrative, so as the function of their appellate body, therefore the questions of Szegedi Ítéltőtábla are not admissible by the Court.

As the opinion of advocate general Poiares Maduro, the commercial court merely fulfilled a registry function without being required to resolve a legal dispute. For the purposes of Article 234 EC, this must be classified as a non-judicial function, but by contrast, the appeal proceedings against the decision of the commercial court are, from the perspective of Article 234 EC, judicial proceedings, notwithstanding the fact that they are *ex parte*. A court seized in the framework of such proceedings is consequently entitled to request a reference for a preliminary ruling from the Court of Justice.¹⁶

¹³ C-9/97 Raija-Liisa Jokela and Laura Pitkäranta 1998. ECR I-06267. para. 20.

¹⁴ C-407/98. Katarina Abrahamsson, Leif Anderson v. Elisabet Fogelqvist para. 32.

¹⁵ C-165/03. Mathias Längst, interested parties: SABU Schuh & Marketing GmbH, Präsident des Landgerichts Stuttgart, Bezirksrevisor des Landgerichts Stuttgart 2005. ECR I-5637 para. 25.

¹⁶ Opinion of Advocate General Poiares Maduro delivered on 22 May 2008 Case C-210/06 (hereinafter referred to as ‘Opinion of Advocate General’)

In this first question the Court agreed with the advocate general. ‘A court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *inter partes* proceedings.’¹⁷

As we can see, the formation of the different factors of the organ ‘court or tribunal’ in a European law sense is continuous, and is decided case by case. Still it can be stated that the commercial courts – during their registration procedure, in the lack of legal dispute – are not considered to be ‘courts or tribunals’ under Article 234 EC.¹⁸ There seems to be a similar situation in case of some aspects or stages of liquidation proceedings, and the registration of funds or other types of social organisations.

3.1. THE SECOND QUESTION – A COURT AGAINST WHOSE DECISIONS THERE IS NO JUDICIAL REMEDY

By the second question the referring court asks whether a court such as the referring one, whose decisions in disputes such as that in the main proceedings may be reviewed on points of law, falls to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC (now Article 267 TFEU).¹⁹

Concerning this question the Court first examined its admissibility. The Commission of the Community argued that this question was inadmissible, because it was irrelevant to the resolution of the dispute, since the order for reference had already been submitted to the Court. Contrary to this argument Cartesio claimed that the referring court should have been classified as a court or tribunal against whose decisions there was no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.²⁰

The Court has rejected the objection of the Commission and in its judgement states that the Court declines to rule on a reference for a preliminary ruling if the interpretation of EU law that is sought is unrelated to the actual facts or purpose of the main action, or if the problem is

¹⁷ Cartesio judgment, para. 54.

¹⁸ C-24/92. Pierre Corbiau v. Administration des contributions 1993. ECR I-01277.

¹⁹ Cartesio judgment, para 67.

²⁰ Cartesio judgment, paras 65, 68.

hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer. However, in this case the interpretation of EU law is related to the actual facts and purpose of the main action, and it would be contrary to the spirit of cooperation which must guide all relations between national courts and the Court of Justice to require a national court first to submit a reference for a preliminary ruling only to ask whether it is under the obligation mentioned in Article 234 EC and then, as a second step if the answer turns out to be a positive one, to refer its actual questions for a preliminary ruling. So that means that the second question is admissible.²¹

After the decision of the admissibility the Court turned to the merits of the question. The issue raised by this question is whether the referring court must be regarded as a court or tribunal against whose decisions there is no judicial remedy under national law and which is under the obligation referred to in the third paragraph of Article 234 EC.²²

The second paragraph of Article 234 EC creates the possibility for any court or tribunal of a Member State to initiate a preliminary ruling procedure before the Court of Justice, if the referring court considers it necessary. This paragraph creates a right for reference which cannot be limited either by national procedural rules, or through the practice of the higher courts. It follows from this, that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions necessitating a decision on their part and which questions consider the interpretation or validity of provisions of the Community law. According to the main rule the decision of the court to make a reference cannot be questioned by the higher ruling courts, especially if the referring court presumes that the legal ruling of the higher ruling courts would lead to a judgement contrary to Community law. This freedom of reference does not only apply to the courts, but the parties also have this right.²³ The effectiveness of the system created by Article 234 EC requires that the national courts have the widest possible powers to refer questions to the Court of Justice.²⁴

However for certain courts initiating a preliminary ruling procedure it is not only an option, but it is also an obligation for them in the light of the third paragraph of Article 234 EC. Because courts or tribunals against whose decisions there is no judicial remedy under national law they must refer their questions to the Court of Justice. ‘The obligation on national courts

²¹ *Cartesio* judgment, paras 67, 70., Opinion of Advocate General, para 7.

²² *Cartesio* judgment, para 75., Opinion of Advocate General, para 6.

²³ *Gombos*: op. cit. 242-243. p., Judgment of *Cartesio* case, para. 88.

²⁴ C-348/89. *Mecanarte-Metalurgica da Lagoa v. Alfandega do Porto*. 1991. ECR I-3277. para. 44.

against whose decisions there is no judicial remedy to refer a question to the Court for preliminary ruling has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. That obligation is in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State.²⁵

There has been discussion for many years as to which court should be classified as a court against whose decision there is no judicial remedy. According to the abstract theory that is the highest court in the land against whose decisions there is never a possibility for appeal. The concrete theory, in contrast, states that it is the highest court in the case in hand. So this theory argues that in a specific case it must be examined whether there is a possibility for appeal or not. The third theory makes a distinction on the ground of the structural approach. Where no appeal is possible from a court for structural reasons, that court should be classified as a court against whose decisions there is no judicial remedy. From the case-law of the Court of Justice among these theories the concrete approach can be recognised.²⁶

It is important to note that where a national court considers that one or more arguments for invalidity of a European Union act are well founded, the court must stay proceedings, and make a reference to the Court of Justice for a preliminary ruling on the act's validity. Since national courts do not have the power to declare acts of the European Union institutions invalid, they are obliged to make a reference to the Court.²⁷

Due to the specific Hungarian remedy system it was necessary to clarify that under the Hungarian legal system which court was obliged to make a reference for preliminary ruling. In such cases as the current one, an extraordinary appeal, a review may be brought before the Supreme Court against the decision of the referring court, since Article 270 (2) of Act III of 1952 on the Code of Civil Procedure (Polgári Perrendtartásról szóló 1952. évi III. törvény) provides: 'the parties, interveners and persons affected by the decision may, in respect of the part of that decision which refers to them, bring an appeal on a point of law before the Supreme Court against final judgements and orders which bring proceedings an end, pleading infringement of the law.' The purpose of the review is to ensure the consistency of the case-

²⁵ C-99/00. Kenny Roland Lyckeskog. 2002. ECR I-04839. para. 14.

²⁶ Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti, Adam Tomkins: European Union Law. Cambridge University Press, Cambridge, 2006. 298. p., Gombos: op. cit. 243-244. p.

²⁷ Gombos: op. cit. 245. p.

law, so it is limited to points of law. In the plea for review the applicant shall allege a breach of law, and the review can only be brought against certain decisions, because some decisions are excluded from the scope of it, since Article 271 (1) of the Code of Civil Procedure states that ‘no appeal shall lie: against decisions which have become final at first instance, except in cases which are permitted by law; where one party has failed to exercise the right to bring an appeal and the court of second instance, hearing the appeal brought by other party, confirms the decision at first instance.’ The referring court has also pointed out that the review does not have, in principle, a suspensory effect, because Article 273 (3) of the Code of Civil Procedure provides that ‘the institution of appeal proceedings shall not have suspensory effect but, where a party so requests, the Supreme Court may exceptionally suspend enforcement of the judgement.’²⁸

The Court in its answer for the second question cites the conclusion of the *Lyckeskog* case where a quite similar question has arisen. In its judgement the Court has held that ‘decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 234 EC. The fact that the examination of the merits of such challenges is conditional upon a preliminary declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.’²⁹ These findings of the *Lyckeskog* case are also true in the current case, because the Hungarian procedural system merely imposes restrictions with regard to the nature of the pleas that may be raised before such a court, which must allege a breach of law.³⁰ Furthermore the lack of suspensory effect of review does not deprive the parties of exercising their right of appeal against the decisions of the referring court. The above mentioned restrictions and the lack of suspensory effect are compatible with Community law, especially if the principle of equivalence and the principle of effectiveness are ensured.³¹

Thus, from the fact that a review against a decision of a national court or tribunal of a Member State is limited to points of law and lacks suspensory effect it does not follow that that court or tribunal is under the obligation mentioned in the third paragraph of Article 234 EC. So the answer to the second question of the referring court is that the referring court

²⁸ Gombos: op. cit. 244. p., *Cartesio* judgment, paras 8-10, 75., Opinion of Advocate General, para 8.

²⁹ *Cartesio* judgment, para. 76.

³⁰ *Cartesio* judgment, para. 77.

³¹ *Cartesio* judgment, para. 78., Opinion of Advocate General, para. 9.

(‘Ítéltábla’) cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.³²

The conclusion of the *Cartesio* case is that, due to the possibility of a review, the Hungarian second instance courts cannot be considered as courts that are under the obligation to make a reference for preliminary ruling if a question has arisen concerning EU law interpretation.³³ ‘Any issue relating to the interpretation of EU law constitutes a point of law and could therefore be subject to appeal.’³⁴ From the Court’s answer for the second question it follows that in the Hungarian judicial system on the one hand the Supreme Court is under the obligation referred in the third paragraph of Article 234 EC, and on the other hand those courts are obliged to make a reference for preliminary ruling whose decisions may not be appealed by regular remedy and the possibility of a review against their decisions is not absolutely provided or it is excluded.³⁵

4.1. THE THIRD QUESTION - APPEAL AGAINST A DECISION MAKING A REFERENCE FOR A PRELIMINARY RULING

As early as in the early sixties, the Court of Justice of the European Communities successfully prevented that the legal systems of the Member States would exclude the Community Law with the evolutionary statements of the *van Gend en Loos* case.³⁶ One fundamental statement was the deriving of rights directly from the Community Law. This made a legal basis for the Community Law to function within the Member States’ legal systems in the event of legal disputes between legal entities, authorities or between a legal entity and an authority.³⁷ It was a part of the process by which the Community Law has become an everyday tool for the enforcement of interests within the Member States’ national legal systems.

Within the above mentioned development the following principles have crystallised: Article 234 EC gives national courts the right – and, where appropriate, imposes on them the

³² *Cartesio* judgment, paras 78-79., Opinion of Advocate General, para 10.

³³ Gombos: op. cit. 244. p.

³⁴ Opinion of Advocate General, para 9.

³⁵ Gombos: op. cit. 244. p.

³⁶ 26/62. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos 1963. ECR 00003.

³⁷ Results: 106/77. *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.* 1978. ECR 00629., C-6/90 and C-9/90. *Andrea Frankovich and Danila Bonifaci and others v. Italian Republic* 1991. ECR I-05357., C-224/01. *Gerhard Köbler v. Republik Österreich* 2003. ECR I-10239., 43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* 1976. ECR 00455., etc.

obligation – to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC.³⁸ This right or obligation of the national courts can be deduced directly from the EC Treaty.³⁹ The national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions that involve the interpretation of certain provisions of the Community Law, or the consideration of their validity that necessitates a decision on part of the Court⁴⁰ This means the allocation of powers between the Court and the national courts.⁴¹

The case of *Rheinmühlen-Düsseldorf* fit in the line of development detailed above with its principle of broadening the national courts' freedom of action against the superior courts. The Court stated: a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community Law involving such rulings.⁴² However, according to the understanding of the Court, Article 234 EC does not preclude, in principle, the possibility of an appeal against a decision making a reference for a preliminary ruling if the remedy is otherwise available under national law.⁴³ Regulation of the possibility for such a remedy falls within the competence of the national law.⁴⁴ Nevertheless, attention must be paid to the fact that, by ensuring remedy against a decision making a reference for a preliminary ruling, at least *de facto*, only courts of last instance may refer questions for a preliminary ruling. This would be due to the fact that orders for reference by lower courts, by virtue of national rule or practice, would systematically become subject to appeal and this would give rise to the situation above.⁴⁵

In order to clarify this confusing situation, the referring court addressed the following question to the Court: 'Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it

³⁸ 106/77. *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*. 1978. ECR 00629.

³⁹ Gombos: op. cit. 248. p.

⁴⁰ 166/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* 1974. ECR 00033. para. 4. (hereinafter referred to as *Rheinmühlen-Düsseldorf* case)

⁴¹ Gombos: op. cit. 248. p.

⁴² *Rheinmühlen-Düsseldorf* case, para. 4.

⁴³ *Rheinmühlen-Düsseldorf* case, para. 3.

⁴⁴ Gombos: op. cit. 248. p.

⁴⁵ Opinion of Advocate General, para. 20., Blutman László: Az előzetes döntéshozatalt kezdeményező határozat elleni fellebbezés kérdőjelei In: *Európai Jog* 2009. (9. year) No. 2. 32-33. p

limit that power – derived directly from Article 234 EC – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?⁴⁶

In other words the crucial question was whether national procedural rules may oblige lower courts to suspend or even revoke a request for a preliminary ruling in circumstances where an appeal has been brought against an order for reference. A clear answer was given by the advocate general: no restriction can be applied by national law on the right of a lower court in any Member State to refer questions to the Court.⁴⁷ This is because the possibility for a lower court in any Member State to interact directly with the Court is vital to the uniform interpretation and the effective application of Community law. It is also the instrument by which all national courts become Community law courts. Through the request for a preliminary ruling, the national court becomes part of a Community law discourse without depending on other national powers or judicial instances.⁴⁸ Therefore, the issue of the necessity for a request for a preliminary ruling is a matter that falls to be decided between the referring court and the Court of Justice. Indeed, that is why, ultimately, the admissibility of a request for a preliminary ruling is determined by the Court– and not by domestic courts which, within the national procedural framework, are superior to the referring court.⁴⁹ If the national superior courts were to decide on admissibility, the above mentioned restriction could evolve. Therefore, the Court stated, provision of the Treaty grants any national court or tribunal the right to make a reference to the Court for a preliminary ruling. This right cannot be called into question by the application of national rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.⁵⁰ The Article 234 EC precludes the application of national rules according to which national courts may be obliged to suspend or revoke a request for a preliminary ruling.⁵¹ Thus, the remedy in question is not contrary to the Community Law, but the superior court cannot vary or set aside the order for reference and to order the referring court to resume the domestic law proceedings – without the infringement of the Article 234 EC. This statement was the most important result of the *Cartesio* case.⁵²

⁴⁶ *Cartesio* judgment, para. 40.

⁴⁷ Opinion of Advocate General, para. 17.

⁴⁸ Opinion of Advocate General, para. 19., *Cartesio* judgment, para. 90.

⁴⁹ Opinion of Advocate General, para. 20.

⁵⁰ *Cartesio* judgment, para. 98.

⁵¹ Opinion of Advocate General, para. 21.

⁵² Blutman: op. cit. 34. p

However, a slight imperfection beclouds the success: in the *Cartesio* case, the Court had to deliver an opinion to what extent the national courts' right in question is restricted with reference to the possibility of an appeal against a decision making a reference for a preliminary ruling.⁵³ As mentioned above, the Court has already dealt with this question in connection with the case *Rheinmühlen-Düsseldorf*, where the conclusion was that, in principle, the possibility of the remedy is allowed under the Community Law. The decision was made more than 30 years prior to the *Cartesio* case. During this long period, the European integration process went through several changes. For this fact, it would be fully understandable if the Court of Justice of the European Communities reconsidered its earlier ruling. However, in connection with our *Cartesio* case it is curious that the Court did not make such a reference. Instead, the Court attempted to deduce the new principles from the *Rheinmühlen-Düsseldorf* case, and prove that there is no difference between the two reasonings.⁵⁴ In the *Cartesio* case, the Court kept in line with its former statement, however, it deprived the remedy in question of its essence; namely, the national superior court cannot vary or set aside the order for reference brought by lower courts.⁵⁵ In our view, it was not proved convincingly enough that the conclusions from the two cases are stemmed from the same root. At the same time, the conclusion of the *Cartesio* case is sufficiently accurate for the national legislator to reconsider the provision regarding the remedy against a decision making a reference for a preliminary ruling. The judgment had an effect on the Hungarian civil procedural law. In the following paragraphs, we are going to demonstrate this development.

Articles 155/A (3) and 249/A of Act III of 1952 on the Code of Civil Procedure (a Polgári perrendtartásról szóló 1952. évi III. törvény) established an appeal procedure in connection with the order making a reference for a preliminary ruling. These amendments entered into force on the date of the entry into force of the Treaty of Accession of Hungary, i.e. on 1 May 2004. This regulation raised more problems, than it solved.⁵⁶ The national courts' right to make a reference to the Court for a preliminary ruling is derived directly from the EC Treaty. However, the Article 234 EC does not formulate any restriction in connection with the above mentioned right, while the remedy provided by the Hungarian regulations restricts this right.⁵⁷ The national inferior courts are bound by the rulings of the superior court. If the superior court

⁵³ Blutman: op. cit. 33. p

⁵⁴ Osztoivits András: Köddé fakult délibáb – a Cartesio ügyben hozott ítélet hatása a magyar polgári eljárásjogra kérdőjelei In: Európai Jog 2009. (9. year) No. 2. 28. p

⁵⁵ Blutman: op. cit. 34. p

⁵⁶ Gombos: op. cit. 250. p.

⁵⁷ Gombos: op. cit. 250. p.

varies or sets aside an order making a reference for a preliminary ruling, it makes a decision upon the admissibility of the request for a preliminary ruling, moreover, it causes that the inferior court is not allowed to submit questions on the interpretation of community law to the Court of Justice of the European Communities; furthermore, the Court would be deprived from the autonomous authority of making decision regarding the admissibility of such request. Ultimately, such conduct of the superior court narrows the guaranteed right to a lawful judge.⁵⁸

As mentioned above, the Court of Justice declared that it is the authority of any national court to refer questions for a preliminary ruling to the Court. This authority cannot be qualified by national law. In consequence, the Hungarian procedural law has undergone the following significant development.

As an effect of the Court's judgment, the Hungarian legislator identified the need of the revision of this issue. Later, as an effect of the *Cartesio* judgment, the Hungarian legislator abolished the provisions providing remedy against the request for a preliminary ruling with effect from 1 January 2010.⁵⁹ From the aspect of the right to a lawful judge, the right to an effective remedy and to a fair trial, this can be regarded as a success.

The Hungarian Supreme Court (Legfelsőbb Bíróság) wisely issued guidance⁶⁰ in relation to the treatment of appeals submitted in the transitional period (i.e. the period between the *Cartesio* judgment and the abolishment's entry into force). According to this guidance, the superior court cannot examine whether the reference is appropriate and necessary and so, to this extent, cannot vary the inferior court's order.⁶¹ The correct procedure of the appellate court is to uphold the inferior court's request for a preliminary ruling pursuant to Articles 259 and 253 (2) of the Code of Civil Procedure. Besides, the superior court has to apply the provisions of the Code of Civil Procedure, which may exclude the possibility of making a reference for a preliminary ruling on the ground of the procedural law. (For example, in the case when the court proceeding has to be terminated, etc.)

In our view, the above mentioned effect proves the continuous evolution of the Community Law and its effect on the national legal systems. This is essential to keep abreast of developments with the economic and social changes of the European Union.

⁵⁸ Gombos: op. cit. 250. p., Bohátka Zsófia Ráhel: Az Európai Bíróság előzetes döntéshozatali eljárásának kezdeményezése, mint a törvényes bíróhoz való jog érvényesülése a Német Szövetségi Alkotmánybíróság joggyakorlatában In: Magyar Jog, 2007. (54. year) No. 5. 308-313. p.

⁵⁹ Gombos: op. cit. 251. p.

⁶⁰ 1/2009. (VI. 24.) PK-KK közös vélemény 2. point

⁶¹ Gombos: op. cit. 251. p.

5.1. THE FOURTH QUESTION – FREEDOM OF ESTABLISHMENT VERSUS TRANSFER OF OPERATIONAL HEADQUARTERS

‘The referring court essentially asks whether Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.’⁶² The *Cartesio* case’s single question regarding substantive law incorporates a fascinating fact from a procedural view: The Court’s judgment is a deviation from the opinion of advocate general Poiares Maduro. The advocate general suggests that the Court give the following reply to this question: the quoted articles of the Community Law preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State.

In order to substantiate his claim, he points out: ‘Especially for small and medium sized companies, an intra-Community transfer of operational headquarters may be a simple and effective form of taking up genuine economic activities in another Member State without having to face the costs and the administrative burdens inherent in first having to wind up the company in its country of origin and then having to resurrect it completely in the Member State of destination. Moreover, the process of winding up a company in one Member State and then reconstituting it under the law of another Member State can take considerable time, during which the company at issue may be prevented from operating altogether.’ The present case directly raises the problem of the restriction of the right to freedom of establishment. Such restrictions can be justified on grounds of general public interest. The Hungarian Government did not put forward any grounds of justification and the Hungarian law – as applied by the competent Commercial Court of Registration – did not set conditions for such a transfer, but instead, required that the company in question be dissolved.⁶³ On this basis did Poiares Maduro draw the conclusion mentioned above.

After taking into consideration the status of the Community Law, the Court made a different decision. It stated that, in the present circumstances, the quoted articles are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the

⁶² *Cartesio* judgment, para. 99.

⁶³ Simonné Gombos Katalin: A *Cartesio* ügy eljárási cselekményeiről In: Európai Jog 2009. (9. year) No. 2. 2-7. p., Fazekas Judit: Quo vadis *Cartesio*? - Gondolatok a székhelyáthelyezésről és a letelepedési szabadságról az Európai Bíróság *Cartesio*-döntése nyomán In: Európai Jog 2009. (9. year) No. 2. 21. p.

law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.⁶⁴

6.1. SUMMARY

The *Cartesio* case greatly exemplifies that judicial cooperation cannot only be possible between the national courts, but it can be formed between a national court and the Court of Justice, since it is the spirit of cooperation that has to define the relations between national courts and the Court of Justice. Moreover, the main purpose of the system established by Article 234 EC is to ensure that Community law is interpreted uniformly throughout the Member States and this system institutes a direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiatives from the parties. The national courts become part of the discussion about the Community law by referring questions for preliminary ruling to the Court of Justice.⁶⁵ ‘The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court’s assessment as to whether a reference is appropriate and necessary.’⁶⁶ As we have mentioned above the primary aim of the cooperation is the uniform application of the rules of the European Union. An interesting point of this legal regulation, which can be problematic as well, is that the time of the application of this kind of remedy (preliminary ruling process) is not yet controlled. It belongs to the competence of the national judge to decide when, in which stage of the procedure, to turn to the ECJ. It can cause controversy if the bearings of a case change during the process of the Court, it can even have the effect or necessity of changing the original questions.

This case also shows the significance of the impact the judgement of the Court of Justice in a preliminary ruling procedure has on the legislation of the country of the referring court. This is also confirmed by the fact, that the definition for ‘seat’ was modified in the Hungarian company law before the judgement of the Court of Justice. However in this case not only the questions on substantive law are important, but also the procedural ones, that bear more significant importance according to the followings.

Concerning the first question of the referring court, the interpretation of the national ‘court’ concept was needed. In order to determine whether the referring court was a ‘court or

⁶⁴ *Cartesio* judgment, the operative part of the judgment, para. 4.

⁶⁵ Gombos: op. cit. 249. p., Judgment of *Cartesio* case, paras 70, 90.

⁶⁶ C-2/06 *Kempter*. 2008. ECR I-411. para 42.

tribunal’, the Court of Justice had to take into account a number of factors, which were developed by the case-law of the Court. Due to the assessment of these factors the Court concludes that due to the activity of the commercial courts, they cannot be regarded as courts exercising judicial function. But when a court such as the referring one – hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register – is called upon to give judgment in a dispute, it is exercising judicial function, so it must be classified as a court or tribunal in the light of Article 234 EC, regardless of the fact that its procedure is not *inter partes*. This answer highlights that the *inter partes* procedure is not an obligatory part of the definition of the ‘court or tribunal’. The name of the court or the existence of an *inter partes* procedure is not always enough to give guidance about the nature of the referring court, so it can be very difficult to determine which court is entitled to make a reference for preliminary ruling. That is why suggestions for a new definition of the concept of ‘court or tribunal’ have been raised, but it is not good if the new definitions strictly insist on the requirement of *inter partes* procedure.⁶⁷

The answer for the second question is important because of the specific Hungarian remedy system. The Court of Justice in its answer points out that the referring court (Szegedi Ítéltábla) is only entitled to make a reference for a preliminary ruling, but it is not under the obligation mentioned in the third paragraph of Article 234 EC, due to the institution of a review a final decision. It also makes clear that in the Hungarian judicial system the Supreme Court and those courts are obliged to make a reference, whose decisions cannot be reviewed on points of law.⁶⁸

In the third answer the Court concludes that ‘Article 234 EC precludes the application of national rules according to which national courts may be obliged to suspend or revoke a request for preliminary ruling.’⁶⁹ Due to this judgement, the third paragraph of Article 155/A of the Law on civil procedure, which states that an appeal may be brought against a decision to make a reference for a preliminary ruling, has been modified, as well as Article 249/A and the third paragraph of Article 340 of the same act has been repealed. The modified regulation of the Law on civil procedure states that an appeal cannot be brought against a decision to make a reference for preliminary ruling. From the point of view of legal protection, the right to a lawful judge and the right to effective remedy, is a great leap forward. The provision, which precludes the possibility of an appeal against a decision dismissing a request for a

⁶⁷ Gombos: op. cit. 227, 232-235., Cartesio judgment, para 63.

⁶⁸ Gombos: op. cit. 244. p.

⁶⁹ Opinion of Advocate General, para 36 (3)

reference for preliminary ruling, contributes to the enhancement of the judicial responsibility.⁷⁰

The above summarized cooperation between the referring court and the Court of Justice shows the impact of the preliminary ruling procedure on the national legal systems. The judgement of the Court of Justice in the *Cartesio* case promotes the more effective initiation of the preliminary ruling procedure, which is inevitable for the uniform application of the Community (EU) law.

⁷⁰ Gombos: op. cit. 251. p.