

# The Hungarian Constitutional Court's Judgment Concerning the Preliminary Ruling Procedure – Comments on a Rejection Order

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*The Hungarian Constitutional Court rejected the admission of a constitutional complaint which held that the violation of the right to fair procedure and right to a fair trial is infringed in case courts refuse their obligation to initiate a preliminary ruling procedure. In the case at hand, the examined questions are constitutional law issues of fundamental importance, and the Hungarian Constitutional Court had the possibility to declare that the Fundamental Law of Hungary does not allow the arbitrary application of law, and that the CJEU may be considered the forum of fair trial.*

*Keywords: preliminary ruling procedure, right to fair procedure, right to a fair trial, arbitrary application of law*

## 1. Preamble

On 19 May 2014, the Hungarian Constitutional Court (HCC) rejected the admission of a constitutional complaint which held that the violation of the right to fair procedure and right to a fair trial<sup>2</sup> is infringed in case courts refuse their obligation to initiate a preliminary ruling procedure.<sup>3</sup>

The complainant initiated the annulment of a decision of the Curia of Hungary by reference to Article 27 of Act CLI of 2011 on the Constitutional Court (hereinafter: Act on the HCC), because according to his view, the Curia of Hungary denied his claim for the initiation of the preliminary ruling procedure of the Court of Justice of the European Union arbitrarily. He claimed that the denial should be justified professionally, objectively, and in detail. The applicant emphasized that during the review procedure, the Curia of Hungary did not fulfill its obligation of initiation established by Article 267 of the Treaty on the Functioning of the European Union unlawfully, so it did not proceed fairly, and deprived him of a fair trial.<sup>4</sup>

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<sup>2</sup> Art. XXVIII of Fundamental Law of Hungary.

<sup>3</sup> For similar previous decisions of the HCC see Decision of the Constitutional Court 3147/2013. (VII. 16.) and 3110/2014. (IV. 17.).

<sup>4</sup> Decision of the Constitutional Court 3165/2014. (V. 23.), Reasoning [5].

In his reasoning the complainant referred to the criteria regarding the initiation of the a preliminary ruling determined by the CJEU in the *CILFIT*<sup>5</sup> and *Köbler*<sup>6</sup> cases, and how they were not fulfilled. He stated that the Curia refused its duty based solely on Hungarian law (the rules of the review procedure regulated in the Hungarian Code of Civil Procedure): the refusal was not justified by European law, or by the jurisprudence of the CJEU, thus the non-compliance with the obligation of initiation was arbitrary. According to the practice of the European Court of Human Rights (ECtHR) non-compliance with this obligation is not in accordance with the requirement of fair procedure, if the member state court explains its refusal exclusively by its own internal law, neglecting European Union law. The refusal is not arbitrary if it occurs with detailed and professional justification in accordance with European law, and the CJEU's practice. According to the complainant in the case at hand the Curia arbitrarily disregarded the competence of the CJEU established by Article 267 of the Treaty on the Functioning of the European Union, and at the same time deprived him of his right to a fair trial (before the CJEU), which would have had competence to interpret the relevant law in his case. Consequently, the Curia infringed his rights by ignoring the right to a fair trial in the civil procedure.<sup>7</sup>

## 2. The HCC's reasoning

The HCC rejected the constitutional complaint based on Article 29 of the Act on the HCC, because according to its judgment the complaint did not contain conflict with the Fundamental Law, and the case did not raise constitutional law issues of fundamental importance. As the starting point of its reasoning the HCC referred to its previous practice,<sup>8</sup> and recalled that according to Article 24 (1) of the Fundamental Law of Hungary, the Constitutional Court shall be the principal organ for the protection of the Fundamental Law. According to Article 24 (2) d), the Constitutional Court shall review the conformity with the Fundamental Law of any judicial decision from the point of view of constitutionality; its jurisdiction is limited to examine and eliminate conflicts with the Fundamental Law in case they significantly affected the judicial decision. Therefore it has no competence to review the whole judicial procedure, so it must not examine the direction of the judicial decision or the judicial discretion and evaluation of evidences.<sup>9</sup> During the constitutional review of judicial decisions, the Constitutional Court does not adjudge specific legal questions belonging to the courts' competence or questions the aim of is the interpretation of a certain legal act.<sup>10</sup>

In this case the HCC agreed with the court of first instance's reasoning in the rejected order, in which the complainant initiated the preliminary ruling procedure. According to this reasoning, the complainant's questions did not concern the interpretation of the Treaties or the review of validity or the interpretation of the EU intuitions' legal acts, but the review of the decision of a national court, thus they do not fall within the competence of the CJEU.<sup>11</sup>

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<sup>5</sup> Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415.

<sup>6</sup> Case 224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.

<sup>7</sup> Fort the anonymized complaint see:  
[http://public.mkab.hu/dev/dontesek.nsf/0/9f5779f56d0e13fcc1257cb600589364/\\$FILE/IV\\_507\\_0\\_2014\\_inditvany\\_anonim.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/9f5779f56d0e13fcc1257cb600589364/$FILE/IV_507_0_2014_inditvany_anonim.pdf).

<sup>8</sup> Decision of the Constitutional Court 3028/2014. (II. 17.)

<sup>9</sup> Decision of the Constitutional Court 3231/2012. (IX. 28.), Reasoning [4].

<sup>10</sup> Decision of the Constitutional Court 3003/2012. (VI. 21.), Reasoning [4], Decision of the Constitutional Court 3028/2014. (II. 17.), Reasoning [12].

<sup>11</sup> Decision of the Constitutional Court 3165/2014. (V. 23.), Reasoning [14].

In its argument the HCC summarized its previous and relevant practice in connection with the right to fair procedure.<sup>12</sup> In the course of this, it emphasized that according to its interpretation the essential element of the right to fair procedure is the compliance with procedural rules of fundamental importance. At the same time further parts of the judicial procedure, especially the decision in certain cases by the application of legal rules and the practice of courts' discretionary rights are not constitutional issues. According to the HCC in this case the competent judge by the national law has the right to decide whether there is needed to initiate the preliminary ruling procedure or not by the interpretation of the applicable legal rules and the consideration of factual questions. Thus, according to the reasoning the HCC has no competence to examine this case under Article 29 of the Act on the HCC.<sup>13</sup>

### 3. Critical remarks

The Constitutional Court – in order to fulfill its obligation declared by law – conducts at first necessarily a formal, and then a material examination regarding a constitutional complaint: it checks whether the complaint fully corresponds to the formal and material conditions prescribed in the Act on the HCC.<sup>14</sup> In this system of conditions, two alternative criteria of admissibility regulated by the Article 29 of the Act on the HCC deserve high regard, because by the declaration of these not utterly unambiguous criteria, the legislator accepted the filtration of complaints (or their selection?) as legitimate.<sup>15</sup> The interpretational traditions of the criterion “*constitutional law issues of fundamental importance*” derive from German example.<sup>16</sup> The Federal Constitutional Court of Germany rejects most of the constitutional complaints by referring to this criterion, which means that the Constitutional Court interprets the criterion “*constitutional law issues of fundamental importance*” freely, and it is also used for the rejection of the majority of constitutional complaints.<sup>17</sup> In order to avoid a possible arbitrary practice aiming at reducing the high number of cases, the criterion of “*constitutional law issues of fundamental importance*” would have to inspire the Constitutional Court to protect rights objectively. Thus the aim of the procedure is not only to enforce the concerned person's rights, but also to clarify constitutional issues. Those problems can be considered as “*constitutional law issues of fundamental importance*” which cannot be solved either by the Fundamental Law of Hungary or the previous practice of the HCC,<sup>18</sup> and regarding which the

<sup>12</sup> Decision of the Constitutional Court 3165/2014. (V. 23.), Reasoning [15].

<sup>13</sup> Decision of the Constitutional Court 3110/2014. (IV. 17.), Reasoning [24].

<sup>14</sup> Art. 52 Para (1) of the Act on the HCC. According to the Article 56 Para (2): „[T]he panel shall examine in its discretionary power the content-related requirements of the admissibility of a constitutional complaint – in particular the concernment pursuant to Sections 26 to 27, the exhaustion of legal remedies and the conditions specified in Sections 29 to 31.”

<sup>15</sup> Georgina Naszladi: *Válogatás vagy szűrés? Az „alapvető alkotmányjogi jelentőségű kérdés” az alkotmányjogi panaszjárásban* in Törő Csaba & Cservák Csaba & Rixer Ádám & Fábián Ferenc & Miskolci Bodnár Péter & Deres Petronella & Trencsényiné Domokos Andrea (eds.): IX. Jogász Doktoranduszok Országos Szakmai Találkozója 2013, Károli Gáspár Református Egyetem, Budapest, 2014, pp. 53-60.

<sup>16</sup> The German legal basis: Bundesverfassungsgerichtsgesetz (the Act of the Federal Constitutional Court of Germany) Article 93a Para (2) item a). About the German experiences' evaluation see: Kelemen Katalin: *Van még pálya. A magyar Alkotmánybíróság hatásköreiben bekövetkező változásokról*. Fundamentum 2011, Vol. 4, pp 91.

<sup>17</sup> Donald Kommers: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke University Press, Durham, 1997, pp. 19-20.

<sup>18</sup> In the Decision of the Constitutional Court 22/2012. (V. 11.), Reasoning [40] was declared, that: “[T]he Constitutional Court can apply in the new cases the arguments connected to the questions of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law was put into force, provided that it is possible on the basis of the concrete provisions – having the same or similar content as that of the previous Constitution – and of the rules of interpretation of the Fundamental Law.”

jurisprudence is divided or where the problem goes far beyond a personal issue.<sup>19</sup> Prescribing the criterion of “*conflict with the Fundamental Law, which significantly affected the judicial decision*” – which would reduce the possibility of subjective interpretation – the HCC’s examination aims to answer whether the HCC can provide remedy for the violation of the concerned person’s fundamental rights by changing the legal status of the decision made by the general court.<sup>20</sup>

In the case at hand, regarding the previous case law of the HCC, it is important to emphasize that the HCC has not yet ruled on whether the CJEU is to be considered an independent and impartial court established by law under Article XXVIII of the Fundamental Law of Hungary. Furthermore, it has not decided whether it would be contrary to the affected person’s right to a fair procedure if the judicial forum – despite its obligation laid down by Article 267(3) TFEU – would fail to initiate a preliminary ruling procedure. The clarification of these questions is a fundamentally important constitutional law issue, because these problems may potentially occur in numerous other cases.

In connection with the other criterion (conflict with the Fundamental Law, which significantly affected the judicial decision) it can be stated that without substantive examination, only in the course of the admissibility procedure it cannot be excluded that unlawful non-initiation of the preliminary ruling procedure would not influence the legally binding judicial decision. The Curia of Hungary would have been obligated to request a preliminary ruling from the CJEU, because the subject of its procedure connected to the interpretation of EU law,<sup>21</sup> and the CJEU would have had competence to decide about it.

By its – unsuitable – interpretation, the HCC considered that the initiation of the preliminary ruling procedure was the petition. Although the complainant stated that the court had applied the national and EU law with incorrect content and he had therefore incurred damages, he did not base his petition on this, and he also did not request the review of how the court had applied the law, nor the review of the entire judicial procedure. It was only the conclusion of his constitutional criticism that if the Curia of Hungary had fulfilled its obligation to initiate a preliminary ruling procedure, there probably would have been a different decision in his case. According to the complaint, the violation of fundamental rights was attributed to the court, since it did not fulfill its legal obligation and the rejection was not justified by professional reasons. Thus the judicial procedure cannot be considered as fair, and the complainant was deprived from his right to a fair trial. Hence I am of the view that if the HCC had examined the procedure of the Curia of Hungary from the point of view of constitutionality related to the right to fair procedure, the constitutional complaint procedure would have provided remedy for the violation of the fundamental right.

It has to be remarked that the HCC agreed with the court of first instance’s decision, even though the Curia of Hungary and the court of appeal – as detailed by the petition<sup>22</sup> – did not accept the arguments of the court of first instance regarding the preliminary ruling procedure. This is important, because while the court of first instance held that the CJEU did not have competence in this case, the court of appeal and the Curia of Hungary disagreed. This means that according to the latter courts, the Curia would have been

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<sup>19</sup> These aspects are just examples. About the material clarification of the constitutional law issues of fundamental importance see especially Kadlót Erzsébet: *Az indítványok szűréséről*. Alkotmánybírósági Szemle 2012, Vol. 1, pp. 96-104.

<sup>20</sup> Vissy Beatrix: *Az individuális alapjogvédelem kilátásai az alkotmánybíráskodásban. Merre mutat az alkotmányjogi panasz iránytűje?* Magyar Közigazgatás 2012, Vol. 2, pp. 31.

<sup>21</sup> The subject of the procedure was a suit for compensation against the Curia of Hungary based on the EU law.

<sup>22</sup> [http://public.mkab.hu/dev/dontesek.nsf/0/9f5779f56d0e13fcc1257cb600589364/\\$FILE/IV\\_507\\_0\\_2014\\_inditvany\\_anonim.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/9f5779f56d0e13fcc1257cb600589364/$FILE/IV_507_0_2014_inditvany_anonim.pdf) (24 March 2015).

responsible to initiate the preliminary ruling procedure, and thus it should have explained in detail why it did not do so.

Examining the constitutional review of the violation of the right to a fair trial and the right to fair procedure, this problematic decision of the HCC cannot be evaluated separately from the procedure leading up to it. The right to fair procedure and the right to a fair trial guarantee not only that the decision made at the end of the procedure is formally fair and is promulgated by the judge designated by law, but also that in the procedure leading up to the decision the right to fair procedure and the right to a fair trial were ensured all along for the concerned person. Consequently, the unconstitutionality of the decision at hand can and should be examined in the context of the procedure of the Curia of Hungary, because the requirement of the right to fair procedure is a quality which can only be adjudged by considering the entire procedure and its circumstances.<sup>23</sup> Thus, if the Curia of Hungary had ignored the preliminary ruling procedure arbitrarily, it would have violated the complainant's right to fair procedure guaranteed by Article XXVIII Para. (1) of the Fundamental Law of Hungary.

In order to decide about the arbitrary nature of the rejection of admissibility, the ECtHR's jurisprudence should be invoked, because according to the HCC, the level of the protection of fundamental rights provided by the HCC cannot be less effective than the level of international protection which is binding upon Hungary.<sup>24</sup> The ECtHR dealt with the question whether the non-initiation of the preliminary ruling procedure based on Article 267 TFEU violates the concerned persons' right to a fair procedure (declared by Article 6 of the ECHR) several times. On the one hand, according to the ECtHR's clear and constant practice the concerned persons do not have absolute rights to have their petition submitted to the CJEU by the competent national court. On the other hand, the right to fair procedure can be violated – under certain circumstances – if the national judicial forum of the highest level refuses the initiation of the preliminary ruling procedure, especially if this denial is arbitrary.<sup>25</sup>

In the course of the examination of arbitrariness, the ECtHR also refers to the CJEU's decision in the *CILFIT case*,<sup>26</sup> and it follows its content during the examination of whether the right to fair procedure has been violated, and evaluates whether the non-initiation of the otherwise obligatory preliminary ruling procedure taking into account the *ratio decidendi* of the *CILFIT case*. For example, according to the ECtHR there is no arbitrariness if the national court explains in detail why the initiation of the preliminary ruling procedure was refused by referring to the CJEU's relevant practice in connection with the case at hand.<sup>27</sup> Furthermore, it is not arbitrary if the European laws invoked by the concerned person were not relevant or did not raise any question of interpretation.<sup>28</sup>

Consequently, according to the ECtHR's interpretation, the concerned person's right to a fair trial will be violated due to the non-initiation of the preliminary ruling procedure if this occurs contrary to the rules determined in the *CILFIT case*. The omission of the preliminary ruling procedure is arbitrary if the

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<sup>23</sup> The Decision of the Constitutional Court 36/2013. (XII. 5.), Reasoning [32].

<sup>24</sup> the Decision of the Constitutional Court 36/2013. (XII. 5.), Reasoning [26].

<sup>25</sup> See for example *Divasga v. Spain* (App. no. 20631/92) EctHR (1993), *Wynen and Centre Hospitalier Interrégional Edith-Cavell v. Belgium* (App. no. 32576/96) EctHR (2002), *Dotta v. Italy* (App. no. 38399/97) EctHR (1999). These cases are examples close to the revealed problem, and would be considered in the course of adjudgement of the constitutional complaint.

<sup>26</sup> *Ullens de Schooten and Rezabek v. Belgium* (App. no. 3989/07) ECtHR (2001).

<sup>27</sup> *Divasga v. Spain* (App no. 20631/92) EctHR (1993).

<sup>28</sup> *Dotta v. Italy* (App. no. 38399/97) EctHR (1999).

competent forum does not explain its reasons professionally, objectively and in detail, hence if the forum ignores turning to the CJEU discretionally.

In the case at hand, the Curia of Hungary would have had the possibility to legally omit the initiation of the preliminary ruling procedure only if the conditions laid down by the CJEU in the *CILFIT* case had been met, i.e. if the competent court would have had ascertained that the issue was not relevant for the case, or if the provision of EU law in question had already been interpreted by the CJEU, or if the correct application of EU law was evident beyond any reasonable doubt. Nevertheless, the Curia of Hungary did not make reference to any of these arguments when it refused to initiate the preliminary ruling procedure.

Regardless, the HCC's reasoning was limited only to emphasizing that the competent court has the discretionary right to decide whether it initiates preliminary ruling, and the decision about it is not a constitutional law issue. It is, however, true that the violation of an individual procedural rule does not always result in an unfair procedure, and as it was stated in the HCC's decision 3352/2012. (XI. 12.), the right to fair procedure does not always imply the right to a correct and fair decision due to the fact that factual and legal mistakes of judges are inherent to the current judicial system. At the same time, the violation of the right to fair procedure can be established if – as it happened in this case – the court practices its obligatory rights arbitrarily. Thus it is not the subject of the HCC's procedure to determine whether the decision about the preliminary ruling procedure was correct or not, rather to examine whether the decision was fair and not arbitrary. To rule on this is not only a possibility but an obligation for the HCC.

#### 4. The significance of the HCC's decision

The analyzed constitutional complaint is based on the right to fair procedure and the right to a fair trial declared in Article XXVIII Para (1) of the Fundamental Law of Hungary. The professional consideration of the constitutional complaint requires the HCC to evaluate whether the fulfilment of the preliminary ruling procedure's initiation may be refused *in abstracto* constitutionally, and on the basis of this whether the negligence of the preliminary ruling procedure is *in concreto* arbitrary, and subsequently unconstitutional, in the light of the ECtHR's jurisprudence, Article 267 of the TFEU Union, and the *CILFIT* conditions.

Accepting that for the present case solely the Hungarian law should be applied, the HCC – beside the applicable European law – ought to have invoke, in case of doubt, the practice of the Federal Constitutional Court of Germany, as the HCC's practice and criteria regarding the question at hand have not been developed yet. The HCC has – from the beginning – considered the case law of the Federal Constitutional Court as an example when passing decisions.<sup>29</sup> According to the Federal Constitutional Court of Germany, if a national Constitutional Court, which would be obligated by the TFEU to initiate a preliminary ruling procedure, fails to do so (and the conditions under which it would be released from its

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<sup>29</sup> About the Federal Constitutional Court of Germany's practice whether it is possible to initiate constitutional complaint based on the right to fair trial because of the violation of the obligation of preliminary ruling procedure's initiation see Osztovits András: *Az előzetes döntéshozatali eljárás legfontosabb elméleti és gyakorlati kérdései*. KJK-Kerszöv, Budapest, 2005, pp. 176-179.

obligation are not met), it commits such infringement which is suitable to violate the concerned person's right to fair procedure and right to a fair trial.<sup>30</sup>

In the case at hand, the examined questions are constitutional law issues of fundamental importance, and the HCC had the possibility to declare that the Fundamental Law of Hungary does not allow the arbitrary application of law, and that the CJEU may be considered the forum of fair trial. In addition, the HCC could have made it clear that in case a competent court against whose decisions there is no judicial remedy under national law fails to initiate the preliminary ruling procedure despite its obligation under Article 267(3) of the TFEU, it deprives the concerned person from the right to a fair trial, which violates the right to fair procedure.

Furthermore, it is obvious that the revealed questions reach beyond an individual issue, as in January 2013 the president of the Curia of Hungary – under Article 29 of Act CLXI of 2011 on the Organisation and Administration of the Courts – set up a working group to analyze national jurisprudence regarding the subject of 'The application of EU Law: the experiences of the initiation of the preliminary ruling procedure'. The report made by the group expressly pointed out that the unlawful omission of the preliminary ruling procedure has occurred several times in the Hungarian judicial system.<sup>31</sup> This professional finding makes it also necessary for the HCC to review the preliminary ruling procedure's role in Hungarian procedural law in order to clarify the constitutional criteria – in accordance with the Decision of the Constitutional Court 3/2013. (II. 14.) – which should be considered in the legal practice in the future.

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<sup>30</sup> See especially the following decisions of the Federal Constitutional Court of Germany: 1 BvR 230/09., 1 BvR 1036/99, 2 BvR 947/11 etc.

<sup>31</sup> [http://www.lb.hu/sites/default/files/joggyak/az\\_europai\\_unio\\_joganak\\_alkalmazasa.pdf](http://www.lb.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf) (24 March 2015)