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The Influence of Union Law on Hungarian Civil and Commercial Law before Accession, during the Accession Negotiations and thereafter

As the title indicates, I would like to examine the influence of Community law, subsequently Union law, on the Hungarian civil and commercial law in three periods: before the accession of Hungary to the European Union, during the accession negotiations and after accession, while acknowledging that the first period overlaps with the second since the accession negotiations took place, of course, prior to accession. This requires some clarification regarding the terminology to be used. Before accession, the influence of Union law could primarily be understood in terms of the approximation of laws and the alignment of national legislation with Community legislation. Later, while the approximation of national laws was still in progress, a part of Union or Community law directly became part of Hungarian law.

I Before the Accession

Without going back too far in history, I would like to point out that Hungary has always shown itself receptive to taking over foreign laws or legal principles. Hungary has a significant Roman law tradition (do not forget that Latin had been an official language until the 1840s). In the period of modernisation, following the constitutional agreement with Austria in 1867, many of Hungary's economic and commercial legislative acts borrowed elements from Austrian, German and Swiss laws. After the Second World War, and throughout the nineteen seventies and eighties, the European Community (EC) was becoming an increasingly important trading partner to Hungary. By the early nineteen nineties, approximately 45 percent of Hungarian exports went to Member States of the European Community. Inevitably, this development necessitated the adaptation, at least, of measures governing technical standards and requirements for exported goods. In this way, the Community as such and its regulations became familiar within the Hungarian economy.

Nevertheless, the approximation of national laws with Community law only became a legal obligation following the conclusion of the Association Agreement between Hungary and the European Communities and their Member States (known as the Europe Agreement), which was

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signed on 16 December 1991 and, after a long ratification process, entered into force on 1 February 1994. Article 67 of the Agreement provided:

> The Contracting Parties recognize that the major precondition for Hungary's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Hungary shall act to ensure that future legislation is compatible with Community legislation as far as possible.

I can remember that the negotiators representing the Community had wanted this article to be expressed in more stringent terms, and certainly did not favour a text that included the softening formula 'as far as possible', but it was very difficult to find sufficiently precise wording and the Community recognised that an obligation of complete harmonisation could not be imposed upon a country in transition. Ultimately, the Community negotiators accepted the formula which we proposed, convinced by our argument that if we wished to become a member of the Community it would, in any event, be in our own interest to progress as quickly as possible. Article 68 set out specific areas in which progress was needed. They were: 'customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, food legislation, consumer protection including product liability, indirect taxation, technical rules and standards, transport and the environment.'

Only some of these areas may be considered to belong, at least in part, to civil and commercial law, namely, company law and intellectual property, competition and consumer protection. Although competition law is mostly public law – since it regulates state intervention – this branch of law concerns the conduct of private undertakings and makes provision for private remedies. In the event of infringement of competition rules, natural and legal persons may seek damages, and so it seems useful to include this area in this study.

I think that the regulation of public contracts should also be added to the list. Community legislation does not merely provide for forms and procedures in this area, but also sets out certain mandatory elements in respect of the contract documentation which, following the award, will form part of private contracts. The Europe Agreement did not refer to the harmonisation of public contracts but provided that Hungarian companies were to receive equal treatment as Community companies with immediate effect, and that Community companies would also be entitled to equal treatment in Hungary, following the expiration of a ten year transitional period.

I assume that, in this presentation, my focus must be on civil and commercial law in the traditional sense or in a strict sense. Obviously, EU regulations regarding, for example, the four freedoms (free movement of persons, goods, services, capital) affect the contractual freedom of natural and legal persons. Equally, the technical requirements in the area of, for example, food safety may be regarded as determining the content of private contracts. A further example may be found in the area of life insurance. While Community regulations aim at the creation or completion of the internal market, they contain rules that become part of the contractual relationship between the insurance companies and the policy holder (for example, in Directive 92/96/EEC, Article 31 requires information set out in Annex II to be communicated to the policy holder). But I think that I am not supposed to extend our discussions to all these areas, because

in this way, we would cover an extremely large part of Union law. Nevertheless, it is necessary to establish a special category which does not form part of traditional civil and commercial law but belongs to the Union law under the heading 'internal market'. This category includes pieces of EU legislation regulating mainly or typically contractual rights and obligations such as the contracts of commercial agents.

The Europe Agreement became part of Hungarian national law through the adoption of Act I of 1994. Article 3(2) of the 1994 Act provided that 'In the preparation and adoption of legislative acts, the requirements set out in article 67 of the Association Agreement must be met.' At the same time, the 1994 Act amended the Act on legislative procedures and required every legislative proposal having a bearing on areas covered by the Europe Agreement to be accompanied by information specifying the extent to which the proposal fulfils the requirement on approximation to the EC legislation and indicating whether it is in conformity with this legislation.

The Hungarian Government, by resolutions, had adopted several approximation or harmonisation programmes. Without being exhaustive, I would like to highlight some of them. Resolution 2174/1995 (VI. 15.) established a five year programme. At their summit meeting at Cannes on June 26-27, the European Council approved a White Paper presented by the European Commission for the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union. Taking into account this document, Government Resolution 2403/1995 (XII. 12.) adopted a new 'comprehensive' approximation programme. The details of the programme required further work and a programme running until December 31st 2001 was adopted by Government Resolution 2212/1998 (IX. 30.). Government Resolution 2212/1998 was subsequently replaced by Government Resolution 2280/1999 (XI. 5.), which, in turn, was replaced by Government Resolution 2140/2000, establishing a programme lasting until 31 December 2002. The Government also established the institutional framework for the implementation of these programmes, including the responsibilities of Ministers and state organisations.

After the start of the accession negotiations (31 March 1998), the approximation process was adapted so that it followed the structure of the negotiations, which regrouped the various subject areas into 31 chapters. In this new structure, we are particularly interested in the following chapters: '5 Company Law, 6 Competition, 23 Consumer Protection, 24 Cooperation in the field of Justice and Home Affairs.'

Today, in retrospect, we can see that this approximation process progressed quite well, without major difficulties. I would like to highlight the following pieces of legislation.

Company law: Act CXLIV of 1997 on Companies, Act CXLV of 1997 on the Register of Companies, Public Company Information and Court Registration Proceedings.

Intellectual property: Act XXXIII of 1995 on the Protection of Inventions by Patents, Act XI of 1997 on the Protection of Trademarks and Geographical Product Markings.

Consumer Protection: Act CLV of 1997 on Consumer Protection (Directive 92/59/EEC on general product safety, Directive 87/102/EEC concerning consumer credit, amended by Directive 90/88/EEC, Directive 98/27/EC on injunctions for the protection of consumers' interests, Commission recommendation 98/257/EC on the principles applicable to the bodies responsible

for out-of-court settlement of consumer disputes). Government Decree 44/1998 (III. 11.) on Doorstep Selling (Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises). Government Decree 17/1999 (II. 5.) on distance contracts (Directive 97/7/EC on the protection of consumers in respect of distance contracts). Government Decree 20/1999 (II. 5.) on contracts relating to the purchase of the right to use immovable properties on a timeshare basis (Directive 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis). Act CXLIX of 1997 amending Act IV of 1959 on the Civil Code, and Government Decree 18/1999 (II. 5.) on unfair terms in Consumer Contracts (Directive 93/13/EEC on unfair terms in consumer contracts). Act X of 1993 on Product liability as amended by Act XXXVI of 2002. This Act introduced a new concept in Hungarian civil and commercial law namely of kind of strict liability which was expressly taken over from Council Directive 85/374/EEC concerning liability for defective products.

Competition: Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices as amended by Act XXXI of 2003 and several Government Decrees on group exemptions [relevant article of the EC Treaty and Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and corresponding category or block exemption regulations of the Commission].

Public Contracts: Act XL of 1995 on Public Contracts. This Act did not accomplish full harmonisation; it even provided for preference to national operators. Act CXXIX of 2003 on Public Contracts (Directive 92/50/EEC on public service contracts, Directive 93/36/EEC on public supply contracts, Directive 93/37/EEC on public works contracts, Directive 92/13/EEC on procurement procedures in the water, energy, transport and telecommunications sectors, Directive 89/665/EEC on review procedures).

Internal Market: Act LVIII of 1997 on Commercial Advertising (Directive 84/450/EEC concerning misleading and comparative advertising). Act CXVII of 2000 on Contracts of Independent Commercial Agents (Directive 86/653 on self-employed commercial agents). Government Decree 213/1996 (XII. 23.) on the Travel Organisation and Agency Activity, Government Decree 214/1966 (XII. 23.) on Travel Contracts and Travel Agency Contracts (Directive 90/314/EEC on package travel, package holidays and package tours).

There was one important glitch in the approximation process, raising a question of principle. Article 62(1) of the Europe Agreement contained the same basic provisions on competition as the EC Treaty. But we know that competition law is a very wide and complex area. During the negotiations of the Europe Agreement, there was an understanding that in cases where trade between the Community and Hungary would be affected, Community law should apply. Unable to codify all these rules, Article 62(2) simply provided that any practices contrary to this Article would be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community and on the basis of implementation rules to be defined by the Association Council. The Association Council proceeded to lay down the implementation rules in Decision 2/96 but considered it sufficient to set out procedural rules only and otherwise simply referred to the application of Community principles.

The Hungarian Constitutional Court held that the Hungarian authorities were not authorised to apply the criteria referred to in Article 62(2) [Decision 30/1998. (VI. 25.) AB of the Constitutional Court of the Republic of Hungary] directly and annulled the relevant parts of the Government Decree giving effect to the Decision of the Association Council. Even if one might have had a different view to that adopted by the Constitutional Court, the fact remained that it was imperative to respect the judgment of the Court. But it was not easy to implement. The task fell on me, as the former negotiator of the Association Agreement and the negotiator of the Accession Agreement. The Commission at the beginning clearly refused to deal with this issue. The officials said that it was a problem for Hungary and which it had to resolve itself. In any case, under international law, Hungary remained bound. After using all our powers of persuasion, we managed to get the cooperation of the Commission and together we worked out a new decision of the Association Council, which we finalised only in 2002 (Decision 1/2002). This was promulgated by Act X of 2002. Obviously, this decision of the Association Council ceased to apply from Hungary's accession to the Union.

II The Accession Negotiation

I admit that the transposition of EU law in the field of civil and commercial law did not pose any particular difficulty. The really critical issues of the negotiations were freedom of movement of persons, freedom of movement of capital (purchase of agricultural land by persons of other Member States), agriculture (level of direct income support for farmers, production quotas), state aid (tax free treatment for companies making major investments), and budgetary questions.

The Europe Agreement continued to be the legal basis of the approximation of laws but, more significantly, it was the specific commitments undertaken during the negotiations that governed the process.

Despite the fact that Hungary was able to take over the *acquis communautaire* relatively easily, some problems still arose, even in the field of civil and commercial law.

In the area of intellectual and industrial property rights, undoubtedly the immediate application of the system established by Regulation 1768/92 on the supplementary protection certificate for medicinal products could have posed difficulties for the pharmaceutical industry and for the social security system. Hungary initially requested a five-year transitional period, which was later withdrawn in the face of firm resistance from the EU. However, Hungary strongly opposed the EU position, according to which all patent holders that could not have received a product patent in Hungary because of the earlier legislation but received a market authorisation in this country would be entitled to the extension of their protection under this regulation. After long and heated discussions, a cut-off date was agreed, namely 1 January 2000, meaning that no patents which were granted market authorisation prior to that date could benefit from such protection.

It was really not an important issue but still worth mentioning that, in the 'Consumer and health protection' chapter, Hungary at the early stage of the negotiations requested a transitional period for the introduction of the threshold of 500 ECUs or Euros required for the application

of the legislation on product liability. Interestingly, the harmonisation with Directive 85/374/EEC concerning liability for defective products was completed early, already in 1993, and in this legislation the threshold was much lower, taking Hungary's general price and income levels into account. Although the lower threshold meant wider consumer protection, the Community was not willing to grant such a transitional period. Since we came to the conclusion that issues of much greater importance would arise in the negotiations, it was not considered essential to maintain this request and we therefore withdrew it.

The mutual recognition and enforcement of judgments in civil and commercial matters was expected to have a major impact, not so much on the content of civil and commercial law but on its application. During the negotiations we undertook to join the Lugano Convention of 16 September 1988, and later the Brussels Convention of 27 September 1968, but we were subsequently advised that the matter would be covered by regulation which would be directly applicable. It was therefore just a matter of waiting for the accession.

III After Accession

The accession changed the legal basis of approximation or harmonisation. In some areas the primary and secondary law of the Union became directly applicable and made the approximated national laws and regulations superfluous. In other fields, complete harmonisation was needed. Approximation in the sense of just *'getting closer'* to EU rules was not sufficient. After accession, the key word was 'transposition'. In addition, Union law as interpreted by the Court of Justice of the European Union entered into the national legal order. As such, the case law of the Court became a part of the Hungarian legal system.

In the area of competition law, Articles 81 and 82 of the EC Treaty, now Articles 101 and 102 of the Treaty on the Functioning of the European Union, and the case law of the Court of Justice became directly applicable where trade between the Member States was affected. National (harmonised) law continued to apply to agreements, decisions or practices which, although capable of restricting or distorting competition, were not considered to affect trade between Member States. While the Treaty and Regulation 1/2003 permit the coexistence of Union law and national law and tolerate some limited divergences between them, Hungarian national competition law may be regarded as substantially similar to EU law. This conclusion can be derived from the judgment of the Court of Justice of 14 March 2013 in Case C-32/11, *Allianz Hungaria.* In that judgment, the Court accepted the admissibility of this case, referred for a preliminary ruling, on the grounds that it was essentially required to interpret Union law.

By the direct application of the Union law, some new ideas and approaches were introduced into the Hungarian civil and commercial law. As an example, I mention Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of being denied boarding and cancellation of or long delay to flights. This regulation in the area of air transport significantly modified the contractual relationship between the passengers and the air transportation companies in favour of the passengers. The Court continued this course and gave a very extensive interpretation of the rights of the passengers provided for in this regulation (Joint

Cases C-402/07 and C-432/07, *Sturgeon* and C-11/11, *Folkerts*). Another example is Regulation 717/2007 on roaming on public mobile communications networks within the Community, which also modified the contractual relationship between the customers and mobile telephone companies. The Union legislature put limitations on the price of wholesale and retail services, which could be seen as an intrusion into the mechanism of the free market. Nevertheless, the Court, in its judgment C-58/08, *Vodafone,* confirmed the validity of this Regulation, stating that it does not infringe the principle of proportionality or subsidiarity.

Several judgment of the Court, as a result of references made by Hungarian courts, also contributed to the development of the Community law and consequently of Hungarian civil and commercial law. I would like, in particular, to mention Case C-210/06, *Cartesio* and C-378/10, *VALE* in the field of company law. In the area of the consumer protection, the Court has handled many cases, mostly regarding unfair terms on consumer contracts (C-243/08, *Pannon GSM,* C-137/08, *VB Pénzügyi Lízing,* C-472/11, *Banif Plus,* and C-430/13 *Baradics*). Undoubtedly, the most important case is C-26/13, *Kásler* in which potentially unfair terms in foreign currency-based credit contracts will be adjudicated upon. The judgment will be published in a few weeks. From the judgments of the Court, it is clear that terms in consumer contracts found to be unfair cannot be considered binding. Consequently, previous Hungarian legislation which gave the entitlement of the consumer only to requesting and obtaining a declaration of invalidity may not have been sufficient.

Many rules of Union law are interpreted by the Court, not as a part of civil and commercial law but linked to other fields, for example taxation or procedural law. Nevertheless, it is not excluded that if an interpretation is provided by the Court, it might have an impact not only in the context in which it is situated, but in another area of civil and commercial law. I would like to bring up some cases and perhaps it is excusable if these are cases where I was rapporteur or reporting judge.

Immovable property is a fundamental concept of civil law which rarely requires interpretation. However, this concept has great importance in the value added tax system and may constitute grounds for exemption. In Case C-532/11, *Leichenich,* the referring national court referred a question for a preliminary ruling as to whether a boat which is fixed to the bank and the bed of the river and is used exclusively for the permanent operation of a restaurant could be considered as immovable property. Essentially, the Court replied in the affirmative.

Also in the context of the application of directives on value added tax, a French court asked the question whether a sum paid as a deposit for hotel room reservations and retained by the hotel in case of cancellation by the client, is to be regarded as compensation for the loss suffered by the hotel or as supply of service for consideration. In the latter case, of course, the service is subject to VAT. The Court decided in favour of the first option (C-277/05, *Société thermale d'Eugénie-les-Bains*).

In Case C-381/08, *Car Trim,* the referring Court asked for clarification concerning the place of delivery for the application of Article 5(1)(b) of Regulation 44/2001 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters in a situation where the carriage of goods is involved. The Court was of the opinion that where it is impossible to determine the place of delivery on the basis of the contract, the place of delivery is not the place

where the goods were handed over to the first carrier but the place where the physical transfer of the goods to the purchaser took place at the final destination of the sales transactions.

Case C-204/08, *Rehder,* also concerned the interpretation of Article 5(1)(b) of Regulation 44/2001. The referring Court sought guidance, in the context of air transport of passengers from one Member State to another, on the identification of the place of the provision of services. The Court considered that one single place could not be identified, as would be the case with the delivery of goods. It decided that both the place of departure and the place of arrival could establish a territorial jurisdiction of a court.

It should be kept in mind that Hungary is a part of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and also to the Convention on the Law applicable to Contractual Obligations (Rome, 19 June 1980). While I think that these are signs of European or international influence, they are not manifestations of the influence of Union law.

After accession, in the field of civil and commercial law, an outstanding, even historic, event was the adoption of the Civil Code by Act V of 2013 which entered into force recently, on 15 March 2014. At the end of this Act, a list enumerates the EU directives, with regard to which harmonisation has been ensured. This list mostly includes directives in the area of company law, commerce and consumer protection. Theoretically, the objective of the Code had been to codify existing law, which normally should have already been in conformity with EU law. Nevertheless, I think that the occasion was seized to correct or modify any elements of existing law found not to be in order.