THE CONSTITUTIONAL AND STATUTORY FRAMEWORK OF THE APPLICATION OF EU LAW IN HUNGARY

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Participation is not an end in itself; it must promote human rights, welfare and security.[1]

Hungary acceded to the European Union in 2004.[2] At the time of its accession, the goal was clearly to achieve perfect coherence of the Hungarian legal system and the law of the European Union (harmonisation of law[3]). As a starting point of creating this coherence, Parliament amended the Constitution and added a new Article 2/A.[4]

"By virtue of treaty, the Republic of Hungary, for the purposes of its participation as a Member State in the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as the 'European Union'); these powers may be exercised independently or through the institutions of the European Union." [5]

The new Fundamental Law, which has been in effect since 1 January 2012, states in Section E) paragraph (1) that "Hungary shall contribute to the creation of European unity, in pursuit of the greatest freedom, well-being and security for the peoples of Europe". Paragraph (2) adds that "[b]y virtue of treaty, Hungary, for the purposes of its participation as a Member State in the European Union, may exercise certain powers granted by the Fundamental Law jointly with other Member States, through the institutions of the European Union, to the extent necessary in connection with the rights and obligations conferred by the founding treaties." Paragraph (3) states that "[t]he law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out

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1 Decision 145/2010 (VII. 14.) AB, ABH 2010.

2 In this paper, I will use the terms "Community law" (EC Treaty) and "EU law" (TEU, TFEU) according to chronology, with regard to the effective date of the Treaty of Lisbon (31 December 2009).

3 For more information about this, see KENDE, T. – SZÜCS, T. (eds.): *Európai Közjog és politika* [European Public Law and Policy]. Budapest: Complex, 2006, pp. 775–789.

4 Not all agreed in scholarship that this constitutional amendement was an ultimate necsesity for accession. See e.g. KECSKÉS, L.: Az EU-Csatlakozás magyar alkotmányjogi problémái [Constitutional Law Issues of Hungary's Accession to the EU]. *Magyar Tudomány*, 2006, Iss. 9. pp. 1081–1082.

5 See KENDE, T. – SZÜCS, T., pp. 769–775 on the interpretation of Article 2/A.

in paragraph (2)". And paragraph (4) of this Section stipulates that "[t]he authorisation to recognise the binding nature of an international agreement referred to in paragraph (2) shall require a two-thirds majority of the votes of the Members of Parliament".[6]

In the next couple of pages, I will describe how the Constitutional Court, by interpreting the Constitution and the Fundamental Law – partly due to a lack of relevant petitions –, has refrained from giving an exact definition of the extent of state powers conferred on the European Union. Therefore the Constitutional Court also refrained from determining the consequences of EU accession as to the relationship between Hungarian and EU law, and in particular to the role of the Fundamental Law in the new system and to the detailed tasks of the Hungarian entities applying the Hungarian and EU law (1).

While with Treaty of Lisbon, legal instruments on the level of Hungarian legislation concerning legal harmonisation and the area of Hungarian participation in the adoption of EU law, provide more or less clear guidelines (2), public administrative authorities and courts (at least according to legal literature assessing the situation) have only non-binding statements of position issued by courts at the supreme level to rely on when facing issues related to the application of EU law (3). Legal scholarship evaluate the constitutional situation quite diversely, however all emphasize a certain need for general identification of the core of sovereignty (3). My aims are primarily descriptive and analytical, however in part (4) I give a possible solution for how the Constitutional Court should act in case of petitions referring to the unconstitutionality of EU law.

I. THE FRAMEWORK ESTABLISHED BY THE CONSTITUTIONAL COURT

1. THE CONSTITUTION AND THE FUNDAMENTAL LAW AS THE STARTING POINT

The oft-criticized[7] EU clause of the Constitution textually did not help much the Constitutional Court in answering constitutional issues raised by the petitions because this clause focuses on the criteria of accession rather than the consequences of it.[8] Although the Constitutional Court did not limit the scope of its examination under Article 2/A of the Constitution to issues with direct impact on the original transfer of sovereignty,[9] it in effect restricted its authority regarding such issues. Possibly, this

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[6] See Decision 22/2012 (V. 11.) AB in connection with this, which, under the Court's power of abstract interpretation of the Fundamental Law, resolved what treaties fall within the scope of this Section with regard to the most recent act of transfer of powers.

[7] For a summary, see VÖRÖS, I.: *Csoportkép Laokoonnal: A magyar jog és az Alkotmánybíróság vívódása az európai joggal.* Budapest: MTA TK Jogtudományi Intézet, 2012, p. 95–111. [Laocoon Group Photo: The Hungarian Law and Constitutional Adjudication in the Light of European Law].

[8] In a large number of countries whose relevant constitutional rules are similar, constitutional courts adopted decisions discussing this set of issues much more exhaustively, e.g. Germany, Italy, Spain or the Czech Republic.

[9] Prior to the accession the Constitutional Court analysed the possibility of limiting sovereignty in the following decisions: Decision 36/1999 (XI.26.) AB, ABH 1999 320, 322; Decision 5/2011 (II. 28.) AB, ABH

cautious stance was partly a result of the fact that before 2012 the Constitutional Court basically did not examine judicial practice from other aspects neither.[10]

Article 6 paragraph (4) of the Constitution declared that "[t]he Republic of Hungary shall contribute to the creation of European unity, in pursuit of the greatest freedom, well-being and security for the peoples of Europe".

The corresponding regulations of the new Fundamental Law are definitely of consolidating nature as, beyond some linguistic fine-tuning, the Fundamental Law only adds one new rule to the version in the previous Constitution: that the law of the European Union may set generally applicable rules of conduct. The fact that the EU may adopt such rules was recognised by court practice before: "Article 2/A paragraph (1) of the Constitution, by limiting the exclusive power of legislation, allows Community law adopted pursuant to the founding treaties of the European Union to grant rights to and impose obligations on persons under the sovereignty of a Member State without a separate legal act of the Member State."[11]

This means that the above-mentioned supplementary sentence of the Fundamental Law is in effect the codification of the practice of Hungarian courts (developed pursuant to the basic principles of Community law) with the purpose of raising this characteristic of EU law to a constitutional level in domestic law. It is not yet known whether this sentence will provide sufficient legal grounds to allow the Constitutional Court to examine with a broader scope the relationship between national law (including the Fundamental Law) and EU law.

According to the commentary of Section E) of the Fundamental Law:

> The European Union has an independent legal system established by international treaties, and under EU law it is possible to define rights and obligations directly for persons and entities, and some rules are directly applicable in the territory of the Member States. As Hungary's EU membership has a significant impact on the order and framework of exercising public power in Hungary, and as EU law very much determines the rights and obligations of Hungarian persons and entities, it is necessary for the Fundamental Law to provide a specific authorisation for exercising powers within the framework of the European Union (under organising principles affecting the entire Fundamental Law). [This rule] allows Hungary to exercise some of its powers through the institutions of the European Union as a Member State of the European Union. The relevant specific powers must be identified by an international treaty, but the extent of exercising powers through the institutions of the European Union may not exceed the extent necessary with regard to the international treaty, and may not involve more powers than those the Hungarian state has under the Fundamental Law.[12]

2001, 86, 89; Decision 1154/B/1995 AB, ABH 2001. 823, 826, 828; Decision 30/1998 (VI. 25.) AB, ABH 1998, 220.

10 The Constitutional Court has been reviewing law unity decisions of the Supreme Court (Curia as of 1 January 2012) since 2005 (see Decision 42/2005 (XI. 14.) AB) and since 1 January 2012 it has been possible for the Constitutional Court to review court decision on the basis of constitutional complaints even in cases when unconstitutionality is not caused by the the application of unconstitutional laws.

11 (Supreme Court, Mfv.II.10.921/2005, BH+ 2006.422).

12 The author's translation.

2. THE BASIC FINDINGS OF CONSTITUTIONAL COURT DECISIONS AND THEIR CRITICISM IN LEGAL LITERATURE.

The Constitutional Court has been focusing on two fundamental issues concerning its findings. First, it interpreted Article 2/A in conjunction with Article 2 paragraph (1)[13] on the rule of law in order to consider the extent of conferring powers on the EU, and second, it interpreted certain rules of EU law and of rules of domestic law originating from EU law to find their place in Hungarian law and to define the characteristics and, in particular, the boundaries of possible constitutional review.

Regarding the relationship between domestic law and EU law, the position of the Constitutional Court is quite inconsistent, even concerning fundamental issues, which inconsistency is evidenced by the numerous dissenting opinions and concurring reasonings. This may partly be a result of the fact that the relationship between Hungarian law and international law and also the possibility of constitutional review of international law are somewhat uncertain in Hungarian law.[14]

The dilemmas of constitutionality review before the accession were clearly shown by the constitutionality review of Article 62 of the Association Agreement Hungary made with the European Communities, also known as the Europe Agreement (Act I of 1994). In Decision 30/1998 (VI. 25.) AB[15] the Constitutional Court defined constitutionality criteria for the interpretation of prohibitions under competition law. The essence of these conditions was that the authority applying the law was not authorised to apply directly the application criteria referring to or included in Community law because at the time the decision was made by the Court, the Republic of Hungary had not yet become a Member State of the European Union, and conflict of laws principles could not be cited either to allow Hungarian authorities to apply Community law criteria directly.[16]

After the date of Hungary's accession, the first Constitutional Court decision discussing the relationship between EU law and domestic law was Decision 17/2004 (V. 25.) AB. The Decision established the unconstitutionality of some provisions of the Act on carrying agricultural surplus stocks for commercial purposes.[17] In his petition for establishing unconstitutionality, the President of the Republic raised constitutionality concerns about a number of provisions in the Act. The Act was passed for the purpose of implementing a number of regulations of the Commission. The petition underlined that the objections relate to provisions the contents of which are not established by Community law, therefore they rather qualify as products of the legislation of the Member State. For this reason, Article 2/A of the Constitution was not applicable.[18] The Constitutional

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[13] Article 2 paragraph (1) The Republic of Hungary is an independent and democratic state under the rule of law.

[14] VÖRÖS, I.: Laokoon and SULYOK, G.: A nemzetközi szerződések alkotmányossági vizsgálata In *Az Alkotmány Kommentárja* [Commentary to the Constitution]. Budapest: Századvég, 2009.

[15] ABH 1998, 220, with reference to Decisions 53/1993 (X.13.) AB and 4/1997 (I.22.) AB, which also analyse the relationship between international law and Hungarian law.

[16] VÖRÖS, I.: Az EU-csatlakozás alkotmányjogi, dogmatikai és jogpolitikai aspektusai [The Constitutional Law, Dogmatic and Legal Policy Aspects of EU Accession]. In CZUCZAI, J. (ed.): *Jogalkotás, jogalkalmazás hazánk EU- csatlakozásának küszöbén* [Legislation and Application of Law on the Eve of Hungary's Accession to the EU]. Budapest: KJK-Kerszöv, 2003, p. 47.

[17] ABH 2004, 328.

[18] The petition is available on the website http://www.keh.hu.

Court agreed with this opinion and did not establish general guidelines on how Community law should be managed in the Hungarian constitutional legal order; instead, it restricted the scope of its examination to the constitutionality review of statutory rules adopted in domestic law.

According to András Sajó, if one reads between the lines, it may be concluded on the basis of the decision that according to the Constitutional Court the essence of the cooperation with the European Union is an unconditional acceptance of the direct effect of EU Regulations.[19] In András Jakab's opinion, the position of the Constitutional Court rather (and correctly) suggests only that the two legal regimes, EU law and Hungarian law, should be handled separately and, if necessary, the rule under domestic law implementing the EU legislation must be reviewed on the basis of the provisions of the Constitution.[20]

The various opinions relating to the interpretation of Decision 17/2004 (V. 25.) AB include a notion according to which the Constitutional Court's decision unambiguously declares that it is authorised to review and annul a Hungarian law implementing Community legislation. This means that, similarly to some other states' bodies responsible for constitutionality review, the Hungarian Constitutional Court does not recognize it either that Community law has unconditional supremacy over domestic law.

A relevant objection to this reading of the decision is that this way annulling EU laws would mean beyond doubt that Hungary would not be able to comply with its obligations to the European Union, which would in turn violate Article 2/A and Article 6 paragraph (4) of the Constitution itself.[21] While it is a generally accepted principle in legal literature that a constitutional court of a Member State may not declare a piece of secondary Community legislation unconstitutional,[22] the nature of domestic legislation implementing EU law from the aspect of constitutionality review is highly disputed.

Evidently, the range of interpretations of Decision 17/2004 (V. 25.) AB is quite broad. Although it was an excellent opportunity to draw general and unambiguous conclusions about the relationship between domestic law and EU law, the decision did not include the ambitious and large-scale analysis of constitutional law as many expected. Different legal arguments may be cited in connection with the Constitutional Court's power to examine primary and secondary legislation of the European Union.

One thing is clear: it is not possible to avoid the dilemma of precedence of application in practice. However, if the applicable sets of norms conflict in a given case, a choice must be made whether one treats Hungarian law and EU law as coexisting legal systems or one wants to lay the theoretical foundation of the conclusion that EU law is part of Hungarian law. According to the latter approach, the decision is about more than the precedence of application: it would lead to a conclusion that one rule is superior to the other in the Hungarian hierarchy of norms.

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[19] SAJÓ, A.: Miért nehéz tantárgy az együttműködő alkotmányosság [Why Cooperative Constitutionalism Is a Difficult Subject]. In SAJÓ, A. (ed.): *Alkotmányosság a magánjogban* [Constitutionality in Private Law]. Budapest: Complex, 2006, pp. 97–101.

[20] JAKAB, A.: *A magyar jogrendszer szerkezete* [The Structure of the Hungarian Legal System]. Budapest: Dialog-Campus, 2007, pp. 250–252.

[21] See KENDE, T. – SZŰCS, T., pp. 774–775.

[22] VÁRNAY, E.: Az Alkotmánybíróság és az Európai Unió joga [The Constitutional Court and the Law of the European Union]. *Jogtudományi Közlöny*, 2007, Iss. 10, p. 428.

Another relevant decision for this topic is Decision 744/B/2004 AB on the unconstitutionality of Section 12 of Act XXIV of 2004 on firearms and ammunition. The Act of Parliament under review in the case transposed a Directive into Hungarian law, namely Council Directive 91/477/EEC on control of the acquisition and possession of weapons. However, the Constitutional Court limited its examination to the constitutionality of a Hungarian law adopted on the basis of the Directive, and discussed neither the validity of the Directive nor the appropriateness of the implementation. A number of experts also criticized the decision because the Constitutional Court had failed to take into account the EU law aspects of the case, that is, it did not examine the implemented law by taking into account the underlying Directive or the relevant EU legal policy.[23]

In the petition that led to Decision 1053/E/2005 AB, the petitioner challenged Act XXXIV of 1991 on activities of organising gambling and Act LVIII of 1997 on economic advertising because, in the petitioner's opinion, Parliament failed to fulfil its obligations under Article 20 of the EC Treaty (currently Article 4(3) of the TEU). The case focused on the legislator's decision to leave unchanged the regulations on the sale of gambling organised abroad in Hungary and the related advertising activities, or to make them more stringent after the accession date. According to the petitioner, this violated the provision of the EC Treaty on the free movement of services, which in turn violated Article 2/A paragraph (1) of the Constitution.

In the Constitutional Court's opinion, the so-called accession clause in Article 2/A of the Constitution defines the conditions and framework for the Republic of Hungary's membership in the European Union and also the place of Community law in the system of sources of law in Hungary. The Constitutional Court pointed out that no specific obligation to adopt legislation derives from this rule of the Constitution.

In agreement with the relevant legal literature,[24] it should be added that this decision did not help much in resolving uncertainties developed in the practice of the Constitutional Court. It stayed still unknown how the accession clause defined the position of EU law within the sources of Hungarian law or the framework of cooperation in connection with the conferring of powers.

In his dissenting opinion, Péter Kovács, a member of the Constitutional Court presents a very specific vision about the competence of the Constitutional Court. He declares that "[t]he petitioner identified an omission in connection with the EC Treaty, a *sui generis* international treaty with a number of elements that are directly applicable in Hungary. As it is within the powers of the Court of Justice of the European Communities to provide an authentic interpretation and to apply EU law (Community law), it may be declared as a matter of principle that it may only be examined by the Constitutional Court whether the legislator has violated its duties arising from the so-called 'primary law' or the so-called 'secondary legislation' if a constitutional right is directly threatened." As in the European integration it is the Court of Justice of the European

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[23] VÖRÖS, I.: Európai jog-magyar jog: konkurencia vagy koegzisztencia? [EU Law and Hungarian Law: Competition or Coexistence?]. *Jogtudományi Közlöny*, 2011, p. 373.

[24] For a detailed critical analysis of this section of the decision, see DEZSÖ, M. – VINCZE, A.: *Magyar alkotmányosság az európai integrációban* [Constitutionality in Hungary within the Framework of European Integration]. 2nd edition, manuscript. Budapest: HVG-Orac, 2006. The book provides a critical analysis of all Constitutional Court decisions that have relevance concerning this topic.

Communities that has the exclusive right to provide authentic interpretation of EU law (Community law), the Constitutional Court would exceed its inherent powers if it was examining whether duties under EU law (Community law) could be interpreted in a way that it would fall within the Constitutional Court's scope of competence to establish that the state had violated a norm under EU law (Community law).

Decision 72/2006 (XII. 15.) AB (ABH 2006, 578.) on the fee for on-call duty did not go further regarding the analysis of this issue. In the given case, ordinary courts, with reference to the European Court of Justice's interpretation of the law, refused to apply Hungarian laws violating Community law. In its examination of constitutionality, the Constitutional Court did not examine this conduct of the courts but nevertheless annulled the Hungarian legal regulations violating Community law. The twist of the case was, however, that these laws were not annulled because they violated Community law but because they conflicted with the Hungarian Constitution.[25]

In his concurring reasoning, Péter Kovács explained that in his opinion this case would have been suitable for the Court to establish a precedent, even without a "doctrinal definition", on how the relationship between Hungarian law and Community law should be handled. Péter Kovács underlines that this particular case could have been solved with ease if the Constitutional Court had made a decision on the place of Community legislation within the hierarchy of sources of law in Hungary. The essence of his arguments is that if a Directive is directly applicable, its position in the Hungarian legal system would be equivalent to a Regulation, i.e. it would have the rank of an Act of Parliament. However, it would be considered *lex specialis*, meaning that it would have precedence in application over domestic laws. Therefore, directly applicable EU law would enjoy a superior position in the hierarchy of norms (author's note: and, naturally, would also have the precedence of application) both against laws inferior to Acts of Parliament and against Acts of Parliament. As Kovács puts it, Hungarian laws that contradict directly applicable EU law "do not have any legal effect; they barely exist". According to him, when the Constitutional Court makes its decision, it should be taken into account that in areas of Community competence the institutions of the Community determine the law and, in effect, it is never the constitutional courts of the Member States but the European Court of Justice that has the power to resolve legal disputes affecting integration-related duties.

In Decision 32/2008 (III. 12.) AB on the European Arrest Warrant, the Constitutional Court confirmed that "the legal system of the European Union is an independent legal system despite its origin in international law, thus the Constitutional Court does not consider the so-called primary law, i.e. the founding and amending treaties of the European Union, as international treaties although they were adopted as treaties" (Decision 1053/E/2005 AB, ABH, 2006, 1824, 1828) and these "treaties as primary legislation and the Directive as secondary legislation are part of domestic law as parts of Community law, as Hungary has been a member of the European Union since 1 May 2004. As far as the competence of the Constitutional Court is concerned, Community law does not

[25] VÁRNAY, E.: *op. cit.*, p. 436.

qualify as international law as defined in Article 7 paragraph (1) of the Constitution." [Decision 72/2006 (XII.15.) AB, ABH 2006, 819, 861]

The basic hypothesis of Attila Vincze's criticism of this decision is that although the Constitutional Court seems to declare in all of its relevant decisions that it does not handle EU law as international law, it is unclear what the consequences of this statement are. This is because the *a contrario* argument does not help us interpret EU law within the Hungarian constitutional framework.[26]

Decisions 8/2011 (II. 18.) AB and 29/2011. (IV. 7.) AB made unsuccessful attempts at defining the relationship between EU law and Hungarian law.[27] According to the Constitutional Court's relevant decisions, the Constitutional Court has no competence to examine whether or not a particular law violates Community law. The Constitutional Court has therefore rejected such petitions citing lack of competence. This decision seems to suggest that the Constitutional Court would rather handle EU law and the Hungarian legal system as separate sets of laws. And it would examine rules of EU origin but adopted in the form of domestic legal acts through its regular constitutionality tests.

Decision 143/2010 (VII. 14.) offers the most comprehensive interpretation of Article 2/A of the Constitution. The petitioner requested the subsequent examination of the unconstitutionality and also the annulment of the Act of Parliament implementing the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. In the petitioner's opinion, certain rules of the Treaty of Lisbon restricted Hungary's sovereignty to an extent that, if their binding nature was recognized, the Republic of Hungary "would no longer qualify as an independent state governed under the rule of law".

The Constitutional Court conducted a substantive constitutionality review and the final conclusion of this review was that the Act of Parliament promulgating the Treaty of Lisbon is not unconstitutional because the constitutions of the Member States can still exercise control over the operation of the European Union. The principles of subsidiarity and proportionality would remain, and they ensure that the parliaments of Member States would still have the power to review draft legislation. Also, Member States would have the right to initiate an action for annulment and citizens could turn to the institutions of the EU through a citizens' initiative. Also, the Charter of Fundamental Rights, which safeguards basic rights, now has the same value as the treaties.[28]

Although László Blutman had recognised the Constitutional Court's efforts to establish a constitutionality standard, he stated in his commentary of the decision that any review of the characteristics referred to above means a quite negligible control of

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[26] For more information about the decision, see: VINCZE, A.: Az Alkotmánybíróság esete az Unió által kötött nemzetközi szerződésekkel [The Constitutional Court's Affair with International Treaties Made by the European Union]. *Európai jog*, 2008, Vol. 4, pp. 27–34.

[27] In the Decision, the Constitutional Court examined the constitutionality of certain provisions of Act LVIII of 2010 on the legal status of government officials and Act XXIII of 1992 on civil servants. The petitioners cited, in connection with the alleged violation of the requirement of social partnership, Articles 27 and 28 of the Charter of Fundamental Rights of the European Union, which was implemented by Act CLXVIII of 2007 on the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, and in connection with termination without cause, they cited Articles 27, 28 and 30 of the Charter of Fundamental Rights.

[28] Section IV.2.5 of the Decision.

constitutionality.[29] In his opinion, the Hungarian Constitutional Court, similarly to the German's ruling on the Treaty of Lisbon, should have discussed in detail whether the Hungarian state indeed confers, under Article 2/A of the Constitution, the power on the EU to establish new EU competences.[30]

In this case, the Constitutional Court, as an explanation to the theoretical possibility of reviewing the Treaty of Lisbon already in effect, included in the decision the thought that "if the Constitutional Court found an Act of Parliament implementing such a treaty (i.e. a treaty amending the founding and amending treaties of the European Union) unconstitutional, the decision of the Constitutional Court establishing unconstitutionality may not have an effect on the Republic of Hungary's duties as a Member State of the European Union. The result of the Constitutional Court's decision is that the legislator must create a situation in which the Republic of Hungary is able to fully comply with its duties under EU law without violating the Constitution.

According to the dissenting opinion of Péter Paczolay and Miklós Lévay:

> [b]y virtue of Article 2/A paragraph (1) of the Constitution, the undertaking of duties under the country's EU membership, the terms of participation as a member and the joint exercising of competence are only possible if an international treaty is made, therefore the possibility of subsequent constitutionality review of such international treaties and the Acts of Parliament implementing them in national law cannot be excluded. However, the time available for this is limited: constitutionality review may only take place during the period between the promulgation of the incorporating Act of Parliament and the effective date of the fundamental treaty. This is because an international treaty affecting the fundamentals of the relationship between the European Union and its Member States is, as a part of EU law, of *sui generis* nature and, after its effective date, as opposed to other international agreements, it impacts Hungarian law in accordance in the unique legal environment of EU law, which is regulated by its autonomous basic principles. After it has taken effect, a fundamental treaty "slips out" from the Act of Parliament incorporating it into domestic law and starts to lead its own life in domestic law independently from the Hungarian legislator. Therefore, as fundamental treaties receive their legal effect differently under domestic law, this denies the Constitutional Court the power to carry out a subsequent constitutionality review. (…) This reasoning, however, does not contradict the notion that Hungarian Acts of Parliament or decrees interpreting secondary legislation may be reviewed from the aspect of constitutionality because, for these purposes, it is not the legal act of the European Union but the work of the Hungarian legislator that is reviewed.

András Bragyova did not join this dissenting opinion but drafted his own declaring that the constitutionality of the Hungarian Act of Parliament implementing the Treaty of Lisbon could have been reviewed substantively by the Constitutional Court before the effective date of the Treaty of Lisbon. For this reason, the procedure of the Constitutional Court should have been closed as the petition had lost its purpose.

László Trócsányi highlighted in his own dissenting opinion that:

> … it is essential that the transfer of competence under Article 2/A of the Constitution has its limits, and for this reason the supremacy of Community law is somewhat restricted. (…) In

[29] BLUTMAN, L.: *op. cit.*, p. 98.
[30] BLUTMAN, L.: *op. cit.*, p. 99.

his view, it is also important that this rule of the Constitution only allows the joint exercising of "certain" constitutional powers. This means that the joint exercising of powers is limited to powers Hungarian public authorities themselves are allowed to exercise under the Constitution.[31]

It seems evident that the members of the Constitutional Court could hardly agree on a minor issue such as whether the Constitutional Court had the right to examine the contents of the Act of Parliament implementing the Treaty, i.e., from what point primary EU law becomes "sacrosanct". The notion the Constitutional Court used as a starting point, namely that EU law is not international law, made it even more challenging to discuss this issue.

László Blutman's assessment of the decision in legal literature, similarly to that of Imre Vörös, points out that the source of confusion in handling EU law from the aspect of constitutionality is quite likely the approach of constitutional law to international law. The instantly identifiable paradox about EU law is, of course, that the Hungarian Constitution provides a general authorisation concerning Hungary's membership of such an association of nations whose own legislation demands supremacy over the Constitution or the Fundamental Law.[32] However, in Hungarian law, the supreme rule is the Constitution (the Fundamental Law).[33] It is a deeper issue that while Hungarian law has a dualist approach towards international law, in the case of EU law, the Hungarian Constitutional Court must deal with a *sui generis* legal system. And the Hungarian Constitutional Court encounters the problem that, due to the nature of EU law, some legal acts of the European Union define mandatory rules of conduct with monist methods, i.e. without implementation, while other legal acts achieve the same through a legal act adopted by the Hungarian legislator. Due to this unwanted mixture of the monist and dualist approaches and as the theoretical background has not been clarified yet, the Constitutional Court is unable to define without controversy which legal acts affecting EU law it is allowed to review (and what types of review it may use) and how it can take into consideration that a particular law originates from EU law and has such a character.[34]

As the theoretical and dogmatic foundations are ambiguous, the Constitutional Court, when evaluating former petitions, has "escaped" to using a very formalist approach (implemented law is Hungarian law, and may be reviewed from the aspect of constitutionality; non-implemented EU law may not be reviewed). However, this overly simplified approach is insufficient to answer the fundamental questions concerning the status of EU law.

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[31] See in connection with this decision: BLUTMAN, L.: Reagálás az első szám vitaindítójára – A Magyar Lisszabon-határozat: Befejezetlen szimfónia Luxemburgi hangnemben [Reaction to the First Issue's Article That Sparked a Debate – the Hungarian Lisbon Ruling: Unfinished Symphony with a Luxembourgish Tone]. *Alkotmánybírósági Szemle*, 2010, Vol. 2, pp. 90–99.

[32] SKOURSIS, V.: Az Európai Unió Bírósága elnökének a magyar Alkotmánybíróság 20 éves fennállásának alkalmából tartott nemzetközi tudományos konferencián tartott beszéde [The President of the European Court of Justice's Speech at the International Scientific Conference Celebrating the 20th Anniversary of the Establishment of the Hungarian Constitutional Court]. *Alkotmánybírósági Szemle*, 2010, Vol. 1., pp. 142–148.

[33] BLUTMAN, L. – CHRONOWSKI, N.: Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában [The Constitutional Court and Community Law: Trapped in the Constitutional Law Paradox]. *Európai Jog*, 2007, Vol. 2, p. 3.

[34] BLUTMAN, L.: *op. cit.*, p. 91.

In its decision on the Treaty of Lisbon, the Constitutional Court explains that it is not authorised to interpret EU law because it is the task of the courts and, ultimately, of the European Court of Justice. The Constitutional Court may only interpret laws on the basis of the Hungarian Constitution or Fundamental Law, but these means are not suitable for assessing EU law. As this is also a valid opinion, it is indeed unknown how the constitutional law paradox of the coexistence of EU law and Hungarian constitutional law could be theoretically resolved. However, it should be noted here that not even the President of the European Court of Justice believes that the European Court of Justice is the only tribunal allowed to provide an authentic interpretation of EU law. When applying EU law, in addition to ordinary courts, constitutional courts may also analyse the current content of the legal act; in fact, it is indispensable for them to apply EU law.

Souris believes common rules should be taken into account not only by ordinary courts but, in the case of certain constitutionality issues, by the constitutional courts, too. It is essential for actual interpretation that the Constitutional Court must use diverse methods to construe the varied and diverse EU law and must use a unique constitutionality test to contrast it with the rules of the Fundamental Law. Also, in the spirit of cooperative constitutionalism, it may turn to the European Court of Justice and request a preliminary ruling if it believes that the rule under scrutiny violates the constitutional traditions common to the Member States.[35]

Attila Vincze believes that the procedure of the European Court of Justice may lead to the invalidity of the EU rule, directly applicable or which a domestic law is based on, but the Constitutional Court may also declare the rule unconstitutional without annulling it. However, in the course of the constitutionality review (focusing on the legitimate goal of the legislator, proportionality, necessity etc.), it may not disregard the objectives of the EU. In Vincze's opinion, the Constitutional Court could exercise its authority to establish omission in certain cases, which could possibly resolve the issue of constitutionality review of EU law in practice in a large number of cases. It will help cooperation of the Constitutional Court turns to the European Court of Justice and request a preliminary ruling if issues of law under primary or secondary EU legislation fundamentally impact the assessment of the constitutionality dilemma.[36]

II. HUNGARY'S PARTICIPATION IN THE EU'S LEGISLATIVE ACTIVITY AND LEGAL HARMONISATION

In addition to the Fundamental Law's provision on sovereignty transfer, Article 19 of the Fundamental Law regulates the cooperation between the Government and Parliament concerning decision-making within the EU. "Parliament may ask the Government for information on its position to be adopted in the decision-making process of the European Union's institutions operating with the Government's parti-

[35] SKOURSIS, V.: *op. cit.*, p. 148.
[36] TRÓCSÁNYI, L. – CSINK, L.: Alkotmány v. közösségi jog: Az Alkotmánybíróság helye az Európai Unióban [Constitution vs. Community law: The Constitutional Court in the European Union]. *Jogtudományi Közlöny*, 2008, Vol. 2, pp. 63–69.

cipation, and may express its position about the draft on the agenda in the procedure. In the European Union's decision-making process, the Government shall act on the basis of Parliament's position." According to the detailed commentary of the Bill of the Fundamental Law of Hungary (T/2627), "[i]n the institutions of the EU operating with the participation of national governments, the representatives of the executive branch very often adopt a position concerning issues that fall within the competence of the legislative branch at a Member State level. The purpose of the rule is, therefore, to mitigate this shift of power between the two parties (compared to their traditional roles on a domestic level)."

1. HUNGARY'S PARTICIPATION IN THE EU'S LEGISLATIVE ACTIVITY

Protocol (No 2) of the Treaty of Lisbon on the application of the principles of subsidiarity and proportionality provides more opportunities for Member States' parliaments than previously to review draft EU legislation. Articles 6 and 7 of the Protocol allow Member States to voice their opinion on a proposed legal act of the EU as early as when it is still just a proposal of the Commission (*a priori*). When the relevant decision within the EU is made, the Government informs Parliament of the decision and of any differences from Parliament's position.[37]

The subsidiarity examination of draft legislation is closely connected to the cooperation procedure of Parliament and Government for the purpose of developing the position of the Member State concerning draft legislation of EU institutions that operate through the involvement of national governments. Also, in relation to subsidiarity examinations, Article 8 of Protocol (No. 2) declares that an action for annulment may be brought against already enacted legislation before the European Court of Justice (*a posteriori*).

In Decision 143/2010 (VII.14.) AB, the Constitutional Court established on the basis of this fact and as described above that these procedures provide guarantees for Parliament's "active and originator role" in supervising the "necessary extent" of sovereignty transfer.[38] The difficulty of interpreting this declaration is due to the fact that it is disputed who ultimately decides what the "necessary extent" of sovereignty transfer is if the European Court of Justice has the final word concerning the interpretation of EU objectives and competence.[39]

A question emerges in connection with sovereignty transfer: how does Hungary participate in the European Union's decision-making activities and what parliamentary and governmental cooperation mechanisms are in place? The administrative management of Hungary's participation in the activities of the European Union is a complex task.[40] Hungary's participation in the European Union's decision-making activities and the

[37] Közigazgatási Szakvizsga, Kül-és Biztonságpolitikai ágazat [Public Administration Examination, Foreign Policy and Security Policy Division]. Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013 [cit. 2. 2. 2014], available at: http://vtki.uni-nke.hu/downloads/szv/Tankonyvek2013/valaszthato/print/kul-es-biztonsagpolitikai-agazat2013_print.pdf, pp. 72–73.

[38] Decision 143/2010 (VII. 14.) AB, ABH 2.5.

[39] For more information about this topic, see the discourse described in the third part of this paper.

[40] For an up-to-date summary of the procedure, see: Közigazgatási Szakvizsga, Kül-és Biztonságpolitikai ágazat [Public Administration Examination, Foreign Policy and Security Policy Division]. Nemzeti Közszol-

related intra-governmental coordination activities are regulated by Government Resolution 1169/2010 (VIII. 18.). It is the responsibility of the European Inter-Ministerial Coordination Committee and its expert groups, the meetings of public administration state secretaries, the Minister of Foreign Affairs and the Government to adopt Hungary's position for the negotiations, and also to prepare for carrying out, to coordinate and to supervise tasks related to Hungary's membership. The Inter-Ministerial Committee's job is to adopt the negotiating position related to the EU's legislative activities, and to discuss the Government's draft proposals in connection with EU policies and tasks related to Hungary's EU membership.

The Minister of Foreign Affairs notifies Parliament of any draft EU legislation that has particular relevance for Hungary. The rules of cooperation between the Government and Parliament concerning EU affairs are regulated by Chapter VI of Act XXXVI of 2012 on Parliament (Parliament Act) and Chapter V of Parliamentary Resolution no. 40/1994 (IX. 30.) OGY (Parliamentary Resolution).

According to Section 15 paragraph (1) of the Fundamental Law, the Government is responsible for the foreign policy related activities of Parliament. In the Hungarian Parliament, oral and written interpellations concerning foreign policy issues are a common phenomenon. However, special rules apply to the cooperation between the Government and Parliament in connection with European Union affairs. Parliament is authorised to supervise the Government's activities in those institutions of the EU that operate through the involvement of governments; Parliament may delegate this power to a standing committee. Parliament also has the right to be informed and consulted.

Under the consultation procedure, the Government sends all EU legislative drafts, proposals and documentation that are on the agenda of the decision-making process of any EU institution that operates through the involvement of national governments. The Government highlights those drafts that in its opinion fall within the scope of Parliament's roles and competence, and in particular those whose subject-matter must be regulated by a cardinal law according to the Fundamental Law, and those that contain provisions conflicting with statutes currently in effect. The Government must also highlight drafts that, in its view, are particularly significant for Hungary and therefore should be discussed during a session of Parliament.

Parliament may request the Government concerning any draft EU legislation to inform Parliament of the position it wishes to adopt and represent. In connection with such drafts, Parliament may issue a statement of position indicating those considerations that, according to Parliament, should be taken into account during the decision-making process of the EU. The Government has discretionary powers to decide what position it will adopt in the decision-making process except for questions concerning which Parliament has issued a statement of position.

According to the Parliament Act, EU affairs are managed by a standing committee; it is currently called Committee of European Affairs. The roles of the Committee include that it may make a decision in Parliament's stead concerning European Union affairs. It checks compliance with EU duties and maintains contact with domestic and foreign

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gálati és Tankönyv Kiadó, Budapest, 2013 [cit. 2. 2. 2014], available at: http://vtki.uni-nke.hu/downloads/szv/Tankonyvek2013/valaszthato/print/kul-es-biztonsagpolitikai-agazat2013_print.pdf, pp. 72–73.

governmental and non-governmental organisations in connection with the cooperation between Hungary and the EU.

The Committee also checks whether the principle of subsidiarity is respected in connection with the European Commission's draft legislation as required by the relevant rules of the EU. If the Committee assumes that the principle has been violated, it must inform the Speaker of Parliament and submit a proposal with commentary to Parliament; according to this proposal, Parliament should request the Government to bring an action before the Court of Justice of the European Union under Article 263 TFEU. The Government may reject this proposal. In line with the above, it is also the duty of the Committee of European Affairs to adopt a position on the Government's position.

2. THE EVALUATION OF EVERYDAY PRACTICE

In this subpart, I will discuss in a nutshell the characteristics of the practical cooperation between the Hungarian Parliament and Government, how the principle of subsidiarity appears in the agenda of Parliament and before the Parliamentary Committee of European Affairs. The power of the Member States' parliaments to examine subsidiarity and proportionality has been regulated basically since the effective date of Act LIII of 2004 on the cooperation activities of the Government in European Union related affairs, which was passed as a result of the Maastricht Treaty. The Treaty of Lisbon raised fundamentally the level of influence by the Member States' parliaments, but subsidiarity examinations have a relatively long history in the Hungarian Parliament.[41] The regulatory framework allows all pieces of draft EU legislation presented to Parliament to be examined under a subsidiarity examination procedure. For this reason, the conciliation procedure (which is basically designed to enable Parliament to influence the position of the Government concerning EU affairs and thus to have an impact on decision-making in the EU) and the *a priori* subsidiarity procedure overlap in practice. The Committee of European Affairs, pursuant to the Standing Orders and through a conciliation procedure, has examined the issue of subsidiarity for more than 100 pieces of draft EU legislation since 2004. That there is not only a short timely, but also a strong practical overlap between the two types of procedure may be a result of the fact that before the Treaty of Lisbon subsidiarity examinations were carried out within the framework of conciliation procedures.[42]

According to Csaba Gergely Tamás, a member of the Parliamentary Committee for European Affairs, subsidiarity examinations in Hungary are carried out in a centralized and selective manner because, of the hundreds of pieces of draft legislation on the agenda of any six-month Presidency of the Council of the European Union, the Committee only selects a few for examination and the findings of the examination are only put in practice if considerable political support is available.[43]

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41 TAMÁS, Cs. G.: Új lehetőségek a nemzeti parlamentek előtt? A szubszidiaritás elvének uniós és hazai szabályozásáról [New opportunities for national parliaments? About the regulation of the subsidiarity principle in Hungary and abroad]. *Európai Tükör*, 2010, Vol. 7, p. 7.

42 TAMÁS, Cs. G.: Új lehetőségek [New opportunities], pp. 18–19.

43 TAMÁS, Cs. G.: Új lehetőségek [New opportunities], p. 21.

Tamás and Marcell Bíró (head of division at the State Secretary for Public Administration's Office at the Ministry of Public Administration and Justice) published a comprehensive and comparative paper on the practice of the conciliation procedure between 2006 and 2010. The two authors point out that in a conciliation procedure the primary task of the Government is to provide information to Parliament and that Parliament's resolution passed in the procedure concerns the Government's position and not the draft legislation. Since 2004, the information flow between these two parties has been more or less done in accordance with the relevant rules, but nonetheless few number of conciliation procedures were initiated in the past and also since November 2010, i.e. since the new Government took office. In some of these procedures, Parliament did adopt a position.[44]

Another characteristic of the legal regulation is that Parliament does not give a mandate for the negotiations, which means that it may not require the Government to vote one way or the other in the Council. Instead, the applicable rules simply presume that the two branches cooperate and exchange information continuously.[45] In mid-2012, Tamás believed, with regard to the amended rules and the lessons of the Hungarian Presidency, that the new rules had no substantial effect on the practice of the conciliation procedure.[46]

3. LEGAL HARMONISATION

It is necessary to discuss the issue of legal harmonisation in this paper because the possibility of constitutionality review of Hungarian law, according to the Constitutional Court's approach presented above, is fundamentally determined by the way EU law appears in Hungarian law.

The most recent relevant decision is Decision 32/2012 (VII. 4.) AB stating that when interpreting the content of the right to free choice of profession and employment, the Constitutional Court may not disregard EU legislation and the relevant case law of the European Court of Justice. The decision of the Constitutional Court cites Section E) paragraph (2) of the Fundamental Law and those decisions of the Constitutional Court in which the Court has taken into account the law of the EU.[47] The Constitutional Court points out that Act CXXX of 2010 on legislation [in Section 2 paragraph

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[44] TAMÁS, Cs. G.: Az egyeztetési eljárásról a módosult szabályozásra és a magyar EU elnökségi tapasztalatokra tekintettel [About the conciliation procedure with regard to the amended regulations and the lessons of the Hungarian presidency]. *Európai Jog*, 2012, Vol. 4, pp. 32–34.

[45] TAMÁS and BÍRÓ: p. 27. The Committee's website offers a summary of pending procedures and procedures closed during the time of past parliaments. Available at: http://www.parlament.hu/internet/plsql/ogy_biz.keret [cit. 2. 2. 2014].

[46] TAMÁS, Cs. G.: Az egyeztetési eljárásról a módosult szabályozásra és a magyar EU elnökségi tapasztalatokra tekintettel [About the conciliation procedure with regard to the amended regulations and the lessons of the Hungarian presidency]. *Európai Jog*, 2012, Vol. 4, p. 30.

[47] EU law was taken into account in the following decisions: Decision 1304/B/2007 AB on waiting lists (ABK 2010, 1778), Decision 94/B/2000 AB on damage caused by legislation (ABK 2002, 1098), Decision 942/B/2001. AB on the admission of attorneys to the bar association (ABH 2004, 1561). The fundamental freedoms of the EU were cited in Decision 84/B/2001 AB concerning the definition of economic activities (ABH 2008, 1804), in Decision 74/2006 (XII. 15.) AB concerning the requirements of the issue of paid leave (ABH 2006, 870), in Decision 37/2000 (X. 31.) AB and in Decision 23/2010 (III. 4.) AB concerning advertising as a service and advertising media as a product (ABH 2000, 293; ABH 2010, 101).

(4) item c), Section 18 paragraph (2) and Section 20], Government Decree 302/2010 (XII.23.) on the tasks of legislative preparation for the purpose of ensuring compliance with the law of the European Union, and Minister of Justice and Law Enforcement Decree no. 61/2009 (XII.14.) IRM on the drafting of legislation (Sections 88 to 97) require the legislator to check whether the drafted law is consistent with the law of the European Union. The harmonisation clause, a text verifying the above, must be included among the closing provisions of the enacted law. According to Section 88 paragraph (3) of Minister of Justice and Law Enforcement Decree 61/2009 (XII.14.) IRM, if multiple laws are adopted to ensure compliance with a piece of EU law, each affected law must include a separate harmonisation clause to verify compliance.[48]

In addition to the adoption and amendment of laws for the purpose of ensuring their consistency with EU law, in Hungarian legal history it even occurred once that the Constitution had to be amended as a result of a decision of the Constitutional Court to make sure Hungarian law would meet the agreed EU requirements even at its supreme constitutional level.[49]

Therefore the compliance of a law with EU requirements must be monitored throughout the entire legislative process, the commentary of the law must specify the EU origin of the legislative policy and, if it is required by EU law, the draft must be sent for preliminary consultation to the institutions and the other Member States of the EU. However, the Constitutional Court's practice after the effective date of the Fundamental Law confirmed that it does not fall within the scope of competence of the Constitutional Court to examine whether a given Hungarian law is consistent with EU law[50] and Parliament has no duty to monitor in an organised fashion the Government's work related to legal harmonisation. It is little wonder that legal literature heavily criticises the Government's practice that has evolved due to a lack of supervision. In the following part, I will briefly describe what options ordinary courts have if they, while applying the law, establish that a Hungarian law is against EU law.

III. THE ASSESSMENT OF LEGAL LITERATURE ANALYSING THE RELATIONSHIP BETWEEN HUNGARIAN LAW AND EU LAW

In the following part, I will show relevant legal literature's criticism concerning the extent of sovereignty transfer and, consequently, the criticism of the relationship of the two legal systems and the most important points of debate from the aspect of constitutional law. In addition, for information purposes only, I will describe how Hungarian courts solve the problem of applying EU law.

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48 Reasoning [43].

49 HOLLÁN, M.: *Abolition of Double Criminality and the Principle of Nullum Crimen Sine Lege.* To Imre A. Wiener (ed. Katalin Ligeti). Proceedings of the AIDP Regional Conference Celebrating 30 Years of Finnish-Hungarian Criminal Law Seminars, Gyarmatpuszta, (Hungary): 30 April 2009 – May 2009. "Nouvelles études pénales – No. 22". AIDP-Érès, Paris, 2010, pp. 99–105.

50 Order no. 3225/2012. (IX. 17.) AB of the Constitutional Court [12].

1. CRITICISM IN LEGAL LITERATURE OF THE RELATIONSHIP BETWEEN HUNGARIAN LAW AND EU LAW AND THE POSSIBLE TRANSFER OF SOVEREIGNTY

We know very little from a Hungarian viewpoint about the assessment of the accession clause of the Constitution and the Fundamental Law, the interpretation of these clauses, and thus about the extent of the transfer of competence and finally, *in abstracto*, about the relationship between Hungarian law and EU law. According to Sadurski, an important foreign analyst of Hungarian legal practice, the Hungarian Constitutional Court, similarly to the Federal Constitutional Court of Germany, appears to be adopting a stance of protecting the primacy of the constitution of the Member State. This stance, however, is more cautious than that of the Italian or German constitutional courts, but it still seems that the Hungarian court does not accept the supremacy of Community law in all cases and unconditionally.[51] According to András Jakab, such attempts are destined to fail. The paradox is that so far the Member States' constitutional courts have developed their position on the basis of an assumption that Member States are sovereign, the European Union requires sovereignty for itself through its *sui generis* legal system. (The European Union is working on improving democratic processes because it wishes to gain a power similar to the popular sovereignty of Member States.)

A recent piece of the relevant legal literature is the inaugural lecture of Imre Vörös, a former member of the Constitutional Court, and member of the Academy of Sciences. He provided a summary of the various positions in legal literature with a critical attitude. In addition, he made a proposal seeking to provide a complete and coherent solution to issues left open by the Constitutional Court. According to Vörös, the accession clause allows a separate body of law[52] to enter Hungarian law. (Author's note: it may lead to an interpretation contradicting this position if it is pointed out that the so-called EU clause allows the "joint exercising of powers", which emphasizes the limits on the transfer of powers and at the same time stresses the normative nature of cooperation – cooperation in the strict sense of the word.) This "influx" of EU law is controversial, however, as explained by the European Court of Justice in the Costa v. E.N.E.L. case and in its wake by the Hungarian Constitutional Court: EU law has become an integral part of the law of the Member States and EU law is part of national law. Rather, the legal systems define rules of conduct jointly and in a single coherent order: "EU law is (should be) a directly applicable law in the Republic of Hungary by virtue of an integration clause, a specific rule of the Constitution, and this clause should grant a precedence of application in the case of a conflict of substance."[53]

According to Vörös' assessment, the Constitutional Court's practice of refraining from reviewing EU law from the aspect of constitutionality is correct, and this opinion is shared by nearly all analysts of Constitutional Court practice. However, Vörös be-

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[51] SADURSKI, W.: *Rights Before Courts: A Study of Constitutional Courts in Central-Eastern Europe*. Dordrecht: Springer, 2005, p. 146.

[52] The term "body of law" seems more appropriate concerning EU law than legal system because, as shown by Imre Vörös in other parts of the paper, EU law is much more heterogeneous from the aspect of legal policy than any domestic law.

[53] VÖRÖS, I.: *op. cit.*, 2011, pp. 396–399.

lieves that for the purpose of doctrinal clarity the Constitutional Court should develop a sovereignty protection test that would define the inviolable core part of Hungarian constitutionality, which must be kept free from the legal effects of the EU.[54] This would set the ultimate boundaries of sovereignty and state power transfer, and it would also define the relationship between EU law and Hungarian law in specific issues.

Jakab notes that it is easier to define the essential, non-transferable core part of state sovereignty and thus the maximum extent of sovereignty transfer than to define the extent of state powers that may be jointly exercised with the European Union because it is well-known that in EU law the separation of powers between Member States and the European Union is not regulated by a single rule but instead there are countless rules scattered in the *acquis* determining what the institutions of the European Union are authorised to do. Therefore, neither the form nor the content of EU competence is fixed. Another problem is that, even if the extent of the transfer of powers on the EU is explicitly defined, it is still unknown which side should have the last word in certain areas. The European Union is authorised to take advantage of loopholes in the founding treaties (in particular by Article 352 TFEU, formerly Article 308 of the EC Treaty).[55]

In the course of its activities of developing the law, the European Court of Justice interprets Member States' authorisations broadly, which is intensified by the fact that the powers of the European Court of Justice were defined based on their objectives and not their subject-matter, with regard to the creation and further development of the common market. Therefore, ultimately, viewed from the side of the European Union, anything can be considered part of the EU's competence that promotes the reaching of the common objectives.[56] According to Jakab's train of thought, it is a conflict yet to be resolved that while the basic doctrine of the accession clause of the Fundamental Law is that the state will only yield power to the European Union "to the extent necessary" in connection with the rights and obligations conferred by the treaties on the foundation, EU law states that it is up to the European Court of Justice what this necessary extent means, because, to determine this, the objectives of Community law need to be interpreted.[57]

Pál Sonnevend and András Bragyova, in contrast with Jakab's opinion, argue that ultimately it is the task of the Constitutional Court to determine the boundaries of power transfer as it follows from Article 2/A (author's note: and, similarly, from Section E) of the Fundamental Law) that while exercising the powers of the EU, the Member States supposedly act "jointly", even if the decisions are made in reality by EU institutions independent from Member States. The obligation of acting jointly means that EU law may not separate itself from the law of the Member States; therefore, according to the democratic legitimation and the authorisation principles, the ultimate source of the EU *acquis* is the Member States' constitutions. For these reasons, the Member State's constitution must be relied on regarding regulatory issues that may not be given up to the European Union on the basis of the remaining core of sovereignty.[58]

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[54] VÖRÖS, I.: *op. cit.*, 2011, p. 399.
[55] JAKAB, A.: *op. cit.*, 2007, p. 236.
[56] *Ibid*.
[57] *Ibid.*, p. 249.
[58] SONNEVEND, P.: Alapvető jogaink a csatlakozás után. [Our fundamental rights after the accession]. *Fundamentum*, 2003, Vol. 2, pp. 27–37.

The Constitutional Court's practice left the issue open whether sovereignty transfer is carried out by the Constitution or the Fundamental Law or it is automatically transferred by Hungary's accession to the European Union. The founding treaties determine what powers may be exercised by the European Union, i.e. *de facto* by the Member States collectively. According to some opinions, Parliament defined the extent of sovereignty transfer at the time Hungary acceded to the founding treaties. For these reasons, Hungary could not participate for instance in an amendment of the founding treaties if the amendment granted discretionary powers to the institutions of the EU to deprive Member States of their powers.[59]

Also, Tamás Kende believes that the Constitution only allows such powers to be transferred that the Hungarian state actually has (*nemo plus iuris* principle), therefore it is not possible to authorise the EU to adopt unconstitutional legislation. Such a move would mean that the EU has exceeded its competence, and would be unacceptable for the Hungarian state. If this interpretation is accepted, it seems problematic that the Hungarian Constitutional Court has no power to review the constitutionality of directly applicable legal acts of the EU (through *ultra vires* tests focusing on whether competence has been exceeded).

Ernő Várnay proposes that in the case of a rule implementing EU law the Constitutional Court could examine whether the disputed Hungarian law actually transposes the content of a Directive of Community law (in this case, no constitutionality review would be possible) or includes rules that the Directive intentionally allows the legislator of the Member State to determine. In the latter case, actual review of constitutionality would be allowed, but in addition to tests of fundamental rights or other tests, the interests of the European Union as an objective of regulation must also be taken into account.[60] In Várnay's opinion, it is possible in principle that the Constitutional Court does not find the level of fundamental right protection offered by the EU sufficient, and therefore chooses to review the implementing legislation. However, the test method may not be the same in this case either as the constitutionality/fundamental right test because the cooperation obligation imposed on Member States must be taken into account. This obligation may be fulfilled either by adopting the French solution that the Constitutional Court only offers remedies if the violation of a fundamental right is exceptionally serious, or by following the German way of only dealing with cases if it can be established that the protection of fundamental rights under Community law is reduced.[61]

The uncertainties of the practice of the Constitutional Court concerning the supremacy of Community law and the consequences of this are reflected in legal literature. Citing Fritz Rittner[62] and Peter Haberle,[63] Imre Vörös writes that the supremacy of Community law raises issues concerning Member States' constitutions primarily because the European Union is an intergovermental supranational entity that is evolving

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[59] See KENDE, T. – SZÜCS, T.: *op. cit*., 2006, pp. 771–772.
[60] VÁRNAY, E.: *op. cit*., p. 432.
[61] *Ibid*.
[62] RITTNER, F. Az Európai Unió útja a szövetségi állam felé. [The road of the European Union towards a federal state]. *Jogtudományi Közlöny*, 2006, p. 286.
[63] HABERLE, P.: Európa mint formálódó alkotmányos közösség [Europe as an emerging constitutional community]. *Jogtudományi Közlöny*, 2001, Vol. 10, p. 432.

constantly.[64] While some authors believe that Community law is clearly superior even to constitutions of Member States,[65] others have a more subtle approach and do not exclude the possibility of granting a supervisory role to the constitutional courts of Member States under the constitution, but only if rules on the transfer of power[66] or rules representing the essential core of the Constitution are violated.

László Kecskés uses the concept of sovereignty as a starting point and attempts to provide an overview of the relationship between Community law and the Hungarian Constitution. In his opinion, it would make the definition of sovereignty more accurate if Parliament resolved that the constitution needs to be amended for further transfer of powers. In addition, it should be defined in what areas the amendment of the constitution and thus the transfer of powers are forbidden.[67] In contrast, Jakab is of the opinion that the supremacy of Community law is particularly relevant for Hungary because at the time of accession Hungary accepted the *acquis communautaire* in its entirety, which includes the practice of the European Court of Justice and thus the principle of supremacy. In the hierarchy of the sources of law, decisions of constitutional courts – which possibly, following its Italian and German counterparts' practice, define the inviolable core of constitutional law that may not be transferred to the European Court – are legal acts on the same level as Acts of Parliament, which means that, according to the European Court of Justice, Community law is superior to them, too.

2. REFLECTIONS IN LEGAL LITERATURE ON THE APPLICATION OF EU LAW BY ORDINARY COURTS

Before Hungary's accession to the European Union, Zoltán Lomnici, now former President of the Supreme Court, outlined while still in office, how the supremacy of Community law may be ensured on the basis of the earlier court practice and what preparatory tasks need to be carried out. He noted that the job of Hungarian courts is made more difficult by the fact that they had to take into account the judicial practice of the European Court of Justice because, in the Europe Agreement, Hungary had agreed to carry out legal harmonisation by adopting both the law of the European Union and the decisions of the European Court of Justice.[68] In Lomnici's opinion, the changes were partly caused by the fact that the protection of human rights had to be given more attention of a different nature.[69]

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64 VÖRÖS, I.: *op. cit.*, 2003, p. 51.
65 JAKAB, A.: *op. cit.*, 2007.
66 CHRONOWSKI, N. – NEMESSÁNYI, Z.: Alkotmánybíróság-Európai Bíróság: felületi feszültség [Constitutional Court vs. the European Court of Justice: surface tension]. *Európai jog*, 2004, Vol. 3, p. 27.
67 KECSKÉS, L.: *A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben* [The Development of Civil Law in the Most Important Legal Systems of Continental Europe]. Budapest-Pécs: Dialóg-Campus, 2004, p. 1087. It is worth it to compare this thought with Kelsen's theses of sovereignty. According to the book, these may be the starting point for Kecskés: If something is sovereign, it means it must be considered total order, and it is expected have an answer to all life situations. A state may be recognized as sovereign if its legal system meets two criteria. One criterion is that nothing may be higher than the law of the sovereign state, not even international law. It follows from this that no two sovereigns may exist at the same time. See KELSEN, H.: *Az államelmélet alapvonalai* [The General Theory of State] (translated into Hungarian by Gyula Moór). Budapest, 1977, p. 50.
68 VÖRÖS, I.: *op. cit.*, 2003, p. 81.
69 *Ibid*.

In the first part of the paper, I discussed that Section E) of the effective Fundamental Law rather provides for a sovereignty transfer in connection with the accession, but by simple means of interpretation no real conclusions can be drawn about the disputed issues of the application of EU law in Hungary, and the decisions of the Constitutional Court provide very little guidance.[70] This shows that ordinary courts can primarily rely on the decisions of the European Court of Justice concerning precedence of application, direct effect and interpretation in conformity.[71]

Nevertheless, what must have become clear for ordinary courts on the basis of the relevant decisions of the Constitutional Courts that a Hungarian law violating EU law is not to be considered unconstitutional automatically. The task of resolving any conflict between a Hungarian rule and EU law will still be reserved for ordinary courts. The task of ensuring uniformity of the law in connection with this was carried out by the Supreme Court after accession through statements of position.

According to Flóra Fazekas' summary, ordinary courts have the following duties in connection with the application of EU law: efficient enforcement of claims made under Community law, *ex officio* application of Community law if necessary, the interpretation of national law in conformity with Community law, disregarding national law if it violates Community law, and requesting a preliminary ruling from the European Court of Justice. She believes these duties derive from the "loyalty clause" in Article 10 of the EC Treaty and the European Court of Justice's related case-law, the requirement of uniform and efficient application, and the primacy of Community law[72] and she concludes that despite the issues on a constitutional law level, ordinary courts apply the Community *acquis* more or less in line with this set of requirements.

IV. CONCLUSION

There are more than 50 procedures pending against Hungary before the European Court of Justice based on actions brought by the European Commission. Some of these affect the Fundamental Law of Hungary, the cardinal laws or other laws adopted on the basis of the Fundamental Law.[73] Although it is of little legal relevance,

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[70] Similarly to the German, French and Italian constitutional courts but unlike the Hungarian one, the Czech constitutional court also defined, in its "sugar quota ruling", the tasks of ordinary courts and the constitutional court concerning the enforcement of Community law. For a detailed analysis of the ruling, see FAZEKAS, F.: *A magyar Alkotmánybíróság viszony a közösségi jog elsőbbségéhez egyes tagállami alkotmánybírósági felfogások tükrében* [The Approach of the Hungarian Constitutional Court to the Supremacy of Community Law Compared to the Various Approaches of Other Member States' Constitutional Courts]. Doctoral dissertation, University of Debrecen, 2009 [cit. 31. 8. 2013], pp. 175–181, available at: http://jog.unideb.hu/media/documents/doktori_nyilvanosvita/fazekas-ertekezes.pdf.

[71] FAZEKAS, F.: *op. cit.*, p. 348.

[72] *Ibid.*, p. 349.

[73] Of the pending infringement procedures, one notable case is the media licensing case, which was initiated against Hungary by a foreign satellite television operator which had only been allowed to broadcast its programme through a registered site in Hungary and as a registered company operating in the country. The case of notaries public, the case of *pálinka* exempt from excise tax if made for own consumption, the case relating to environmental impact studies and the case about the late implementation of EU telecommunication rules are in more advanced phases. Procedures were brought before the Court through actions of the Commission in connection with subsidies for the purchase of land, the violation of directives concerning the independence of the data protection commissioner or the special telecommunications tax. Available

it is a sign of tension between Hungary and the EU that for instance in February 2013 a four-party draft resolution was passed by the plenary session of the European Parliament heavily criticising, with reference to the fundamental rights underpinned by the Treaty of Lisbon, the public law changes that had taken place in Hungary over the previous year. In addition, the European Court of Justice, following its own rules of procedure,[74] assessed the conformity of the legal rule ordering the compulsory retirement of judges at the age of 62 with EU law in spite of the fact that the Hungarian Constitutional Court had already annulled the rule.[75] Following the Fourth Amendment to the Fundamental Law, the dialogue with the EU shows that legal harmonisation should reflect clear tendencies on a constitutional level first. If Hungary's commitment to the European Union was reflected in the entire Fundamental Law and was not concentrated in a single article only and did not otherwise look controversial from the aspect of the entire document, it would definitely contribute to the acceptance of a definition for the non-transferable core part of sovereignty. This definition could be carried out in the cooperation of the Government and Parliament, perhaps supplemented by a Constitutional Court procedure.

About the role of the Constitutional Court in the cooperation processes: in contrast with international law, which has a unique treatment, the legislator has not developed special procedures for assessing the constitutionality of Hungarian laws of EU origin or *horribile dictu* EU law with direct effect in Hungary. It is a logical conclusion in my opinion – partly in line with many Hungarian authors – that the Constitutional Court should carry out a substantive constitutionality review in the case of a petition for constitutionality review of laws affecting EU law directly or indirectly. The Constitutional Court should establish unconstitutionality if necessary. This is so because in Hungary it is the Constitutional Court that has the right to examine the constitutionality of compulsory rules of conduct as the ultimate forum for this purpose. If the Constitutional Court finds, as a result of the review of a rule of conduct applying in Hungary, that this rule directly or indirectly regulates a regulatory issue within the competence of EU law or by the EU itself, the Constitutional Court should not annul the EU law or the Hungarian law that implements EU law whose content is very specific and does not grant any discretionary power to the Member State. Instead, it should turn to the European Court of Justice and request the annulment of the legal act by claiming that, with regard to the principle of *nemo plus juris,* the European Union should not have any power beyond what Member States have been granted by their constitutions. Therefore, if a rule of the European Union is unconstitutional by Hungarian law, it should be annulled by the European Court of Justice as under the Treaty of Lisbon the EU's powers are limited to those transferred to it by all Member States with regard to democratic legitimation.

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at: http://ec.europa.eu/magyarorszag/press_room/press_releases/20130124_januari_ketelezetsegszegesi_elarasok_hu.htm [cit. 31. 8. 2013].

[74] OSZTOVITS, A.: *Az Európai Unió joga* [The Law of the European Union]. Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2012, p. 279.

[75] Judgment in Case C-286/12, European Commission v. Hungary, 6 November 2012 [not published yet in the European Court Reports]. For an analysis of the case, see VINCZE, A.: Az Európai Unió Bírósága a bírói nyugdíjazásról [The Court of Justice of the European Union on the compulsory retirement of judges]. *JEMA*, 2012, Vol. 4, p. 65.

On the basis of the above, we can come to one conclusion: debates can hardly be resolved without constitutional tolerance. In Hungary, this concept is usually referred to as "cooperative constitutionalism". It essentially means that instead of disentangling the Gordian knots of theory, dogmatics or the application of law, such knots sometimes simply need to be cut and for this purpose two *sui generis* legal systems, EU law and the law of the Member State will have to resolve legal disputes in a coordinated manner, respecting the other and with regard to the common goals and values. And cooperation will not necessarily be always one forced by law but sometimes rather a result of understanding and discretion.[76]

ÚSTAVNÍ A ZÁKONNÝ RÁMEC APLIKACE EVROPSKÉHO PRÁVA V MAĎARSKU

Shrnutí

Tento článek popisuje, jak se maďarský ústavní soud při výkladu bývalé ústavy a nynějšího Základní zákona zdržel toho, aby přesně vymezil rozsah státních pravomocí, které mohou být přeneseny na Evropskou unii. Také proto ústavní soud upustil od stanovení přesných důsledků přistoupení k EU pokud jde o vztah mezi maďarským a evropským právem, a zejména pokud jde o právní postavení Základního zákona. Zatímco Lisabonská smlouva stanoví jasná pravidla pro zajištění harmonizace v oblasti práva, a tím i pravidla pro účast Maďarska na tomto procesu, orgány státní správy a soudy mají v Maďarsku v případě, že nastanou na tomto poli problémy, k dispozici pouze nezávazné stanovisko tohoto nejvyššího orgánu soudního typu. Akademici vůči této otázce zaujímají odlišné postoje, byť všichni zdůrazňují nutnost určit, co je jádrem suverenity státu. Cílem tohoto článku bylo podat především popis aktuální situace, nicméně v závěru je nabídnuto možné řešení případného sporu, kdy by bylo namítnuto, že předpis evropského práva je v rozporu se Základním zákonem.

Klíčová slova: maďarské ústavní právo, aplikace evropského práva v Maďarsku, Základní zákon a právo EU, spoluúčast členského státu na normotvorném procesu v EU

Key words: Hungarian constitutional law, application of EU law in Hungary, the Fundamental Law and EU law, national participation in EU legislation process

[76] VÁRNAY, E.: *op. cit*., p. 425.