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Stronger Member States for a Stronger European Union

ABSTRACT: *When discussing topics such as national sovereignty and the primacy of European Union (EU) law, the main question boils down to the distribution of competences. We must acknowledge both the historical context of the EU and the current trends in its role in the world's geopolitical structure. This study focuses on identifying the extent of the limitations surrounding the EU's power in the Hungarian legislature, how sovereignty is defined, and what aspects of constitutional identity are raised in conversations around this issue. Furthermore, the study aims to present relevant national case law related to the principle of the primacy of EU law and its relationship with Hungary's national sovereignty and compare it with the position of other Member States' national courts. This is a vital part of the discussion at hand, which will hopefully lead to an open conversation regarding the future of the EU, the possible outcome of a Convent, and what the continent will look like in the future. The study hypothesises that Member States will follow the trend of attempting to maintain as much sovereignty as possible via the decisions of their Constitutional Courts, in addition to contradicting some EU measures and resisting certain aspirations. Despite this phenomenon, integration is undoubtedly necessary; therefore, this conflict requires an urgent resolution, which will hopefully draw a line in the sand and ensure that the EU can continue, with stronger Member States working together towards a common goal.*

KEYWORDS: *national sovereignty, case law, European Union, Member States, essential State functions, primacy of EU law*

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1. Introduction

One of the most pressing discourses today revolves around the issue of national sovereignty, particularly in the context of the future of the European Union (EU).¹ The EU started off as an economic integration, with the hope of providing a better life for the citizens of the Member States.² However, over time, the cooperation developed different goals, reaching its current form. The process of integration is headed in different directions: on the one hand, striving towards greater autonomy and less cooperation,³ with Great Britain even leaving the EU,⁴ and on the other hand, going in the direction of possibly becoming a federal EU.⁵ These issues will be discussed in-depth at the upcoming Convent as well, which will include 49 proposals and 326 measures,⁶ as well as new policy objectives and, in some cases, proposals for amendments to the EU's primary legal sources, the Treaties.⁷ In these trying times, we must decide the direction in which we wish to take the integration: are we going to become a stronger EU through stronger Member States or perhaps through a confederation, even a federal State? As the title of this article suggests, I believe that taking a stance on the side of stronger Member States will help ensure a smooth and effective cooperation in the EU during the coming decades. However, what will become of the primacy of EU law? How did the different opinions shape the Member States' view on this matter? The main aim of this study was to present the legislation on the limitations of power in Hungary and the resolution to possible conflicts between the countries' legislations and the acts and legislations of EU institutions. I believe that stronger nations might work together better, keeping their constitutional identity and essential State functions⁸ at the forefront. With this opinion in mind, I shall attempt to provide a balanced view on the current struggles around this issue.

1 Conference on the Future of Europe, 2022.

2 Horváth, 2022, pp. 170–178.

3 Some argue that Article 4(2) of The Treaty on European Union (TEU) provides the possibility for national constitutional courts in occasional situations to set aside EU law on constitutional identity grounds (Capeta, 2021). This previously happened in the PSPP decision, after which more national constitutional court decisions echoed this sentiment (Türstehar, 2022).

4 Kiss, 2020, pp. 30–45.

5 Federal Alliance of European Federalists, 2022.

6 Parliament activates the process to change EU Treaties, 2022.

7 The Commission has published the first analysis of the proposals resulting from the conference on the future of Europe, 2022.

8 Article 4(2) of the Treaty on European Union encloses provisions surrounding these concepts when it states: „*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*”

2. What Is Sovereignty?

The question of sovereignty is of utmost importance when we discuss topics such as this one. There are two differing opinions about whether the concept of sovereignty is a good thing for States.

For Realists, sovereignty involves the territorial inviolability of the State from external interference.⁹ This understanding of the concept is related to broader Realist claims of the centrality of the State in international relations and the reliance on self-help as a means of preserving sovereignty.¹⁰ Therefore, we can say that preserving sovereignty is a vital part of Realist theory, even if classical and structural Realism differ in their opinion of why, with the former emphasising the social contract between citizens and the State.¹¹ John Mearsheimer, a Realist scholar, explicitly related State survival with the maintenance of sovereignty to the point of conflating survival and sovereignty,¹² which Jack Donnelly describes as common among Realist scholars.¹³

In contrast, Critical Security theorists believe that sovereignty constitutes an obstacle to the realisation of security. This directly contradicts Realist claims that security is best achieved through the sovereign power of the State. In reality, Critical Security studies reject the belief that the State is and should be the key guardian of people's security.¹⁴ Some scholars believe that the majority of States create insecurity rather than foster an atmosphere within which stability can be attained and prosperity created.¹⁵ Many believe that the maintenance of internal and external sovereignty obfuscates the possibility for victims of insecurity to be empowered. However, it is interesting that Critical Security shares with Realism a perception that sovereignty will win over competing norms.¹⁶

According to our general understanding today, a sovereign State is one that governs itself independently of any foreign power,¹⁷ and sovereignty itself is defined as a State having inviolable territorial integrity and political independence, the right to freely choose and shape its political, social, and cultural system, and the

9 Makinda, 1998, pp. 101–116.

10 Buzan, 1983, p. 5. Of course, positive sovereignty is also important for Realists as the basis for allowing an escape from the Hobbesian state of nature. It is important to note that negative sovereignty is particularly important in terms of the prioritisation of the State over individuals within it regarding debates concerning human rights and intervention.

11 Weber, 1994, pp. 8–20.

12 Mearsheimer, 1994, pp. 5–49.

13 Donnelly, 2000, p. 54.

14 Booth, 1991, p. 106.

15 Jones, 1995, p. 310.

16 Krause and Williams, 1996, pp. 242–243.

17 Bouvier, 1856.

obligation to fulfil its international obligations in good faith and to live in peace with other States.¹⁸ The internal side of State sovereignty encompasses the ability of the State to create and apply its own legal order, as well as to exercise supreme authority over the persons and things within its territory.¹⁹ The essence of external sovereignty is that the State is an independent actor in international life, there is no other authority above it, and its decisions do not depend on the approval or agreement of others.²⁰ The closeness of the relationship between security, sovereignty, and identity is such that security discourses are partially constructed by actors' conceptions of sovereignty. Those who reject State centrism as a foundation for thinking about security, also, as a corollary, embrace some notion of common security, which conceptualises security as being with rather than against the other.²¹

Giving up some of a State's sovereignty is possible, and even required if they wish to enter into an international treaty.²² Member States gave up some of their sovereignty when they joined the EU.²³ However, this does not mean that the entirety of a country's sovereignty can be at stake due to its participation in the EU.

According to the Hungarian doctrine, State sovereignty, as an essential characteristic of Statehood, is a single concept; however, two sides of it are usually distinguished according to the nature of the sovereignty that is related to the decisions and activities of the State. The internal side of sovereignty, as mentioned before, refers to the capacity of the State to determine and maintain its internal State-legal order autonomously and to exercise sovereignty over natural and legal persons and things within its territory. The external aspect of sovereignty means that the State is independent, that is, it is free and autonomous from any foreign power, and that it participates in international life equally with any other State, irrespective of its actual economic or military power or position. The distinction between the external and internal aspects of State sovereignty is conceptually possible and appropriate, but the two aspects are inextricably linked and form a single entity. The State, as a sovereign power, is the supreme power, not subject to any other external power,

18 Back, 2002, p. 3.

19 Chronowski and Petrétai, 2020, pp. 1–34.

20 Kiss, 2014, pp. 313–322.

21 Jones, 1996, p. 208.

22 Chronowski and Petrétai, 2020, pp. 1–34.

23 For example, the Fundamental Law of Hungary, Article E)(2) states: „With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.”

State, or otherwise, which would limit it inwardly in the exercise of its functions. However, it should be noted that this concept is no longer associated with the idea of an unlimited supreme power. State power, although superior to all other powers in the State, is limited: inwardly by constitutional law and partly by international law, and outwardly primarily by international law and partly by constitutional law. In constitutional democracies, the supreme power of the State can be understood as a power constituted by the community of citizens and cannot be considered unlimited: the supreme power of the State is derived from the constitution and limited by the constitution. Therefore, the sovereignty of the State is understood today as a supreme power bound by law. Accordingly, the State is autonomous in its organisation and legal system; however, this is only in accordance with the rules of the constitution and international law.²⁴

Instead of the denial of sovereignty, in today's context, many States are expressing a pronounced defence of sovereignty, which is increasingly being transformed at the European level into a defence of constitutional identity,²⁵ which twists the meaning of sovereignty.²⁶ However, the Fundamental Law of Hungary recognises the primacy of EU law. This, of course, is another facet of the country giving up part of its sovereignty.

In the interpretation of the Constitutional Court, this is linked to the principle of popular sovereignty: sovereignty is enshrined in the Fundamental Law as the ultimate source of powers and not as a competence. Therefore, the joint exercise of powers cannot result in people losing their ultimate control over the exercise of public power (whether joint or individual, in the form of a Member State).²⁷

3. What Does the Primacy of EU Law Mean?

The principle of the primacy of EU law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law shall prevail. If this were not the case, Member States could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable. This principle is not enshrined in the EU treaties, although there is a brief declaration annexed to the Treaty of Lisbon regarding the principle.

However, this principle emerged in several cases. In *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62), it was declared that the laws

²⁴ Chronowski and Petrétai, 2020, pp. 13–14.

²⁵ Faraguna, 2017, pp. 1617–1640.

²⁶ Bayer, 2015, pp. 15–17.

²⁷ CCH Decision 22/2016 (XII. 5.), Reasoning [60].

adopted by EU institutions were capable of creating legal rights that could be enforced by both natural and legal persons before the courts of Member States, causing EU law to have a direct effect. In *Costa v ENEL* (Case 6/64), the Court built on this direct effect and introduced the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law.²⁸ As the Member States transferred certain powers to the EU, they limited their sovereign rights; thus, for EU norms to be effective, they must take precedence over any provision of national law, including constitutions. In the relevant cases, the Court clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. Where EU law takes precedence over conflicting national law, the national provisions are not automatically annulled or invalidated. However, national authorities and courts must refuse to apply those provisions as long as the overriding EU norms are in force. It should be noted that the primacy of EU law only applies where Member States have ceded sovereignty to the EU (in fields such as the single market, environment, transport, etc.). However, it does not apply in areas such as education, culture, or tourism.²⁹

The key issue posed by the primacy of EU law was identified with particular clarity by Advocate General Lagrange in his opinion of 25 June 1964 in the *Costa v E.N.E.L.* case:

„the problem which results from the coexistence within each Member State of two systems of law, domestic and Community, each operating in its own sphere of competence, nor can we avoid the question of what sanction should follow the encroachment by one into the sphere of competence reserved to the other.“

The number of requests for a preliminary ruling in which a court has asked the Court of Justice of the European Union (CJEU) whether an EU legal rule prohibits the application of a national rule in a specific case clearly shows significant deference: since the *Costa v E.N.E.L.* judgment of 15 July 1964, there have been only a very small number of cases in which a court has refused to draw the consequences of a judgment, bearing in mind the thousands of requests for a preliminary ruling, numbering between 200 and 400 per year in recent years. Moreover, in the most significant case, namely the PSCP (Secondary Markets Public Sector Asset Purchase Programme) judgment of 5 May 2020, the German Constitutional Court was keen to stress its

28 Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies of the Union: The primacy of European Union law, 2022, p. 16.

29 <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html>.

respect for primacy, while basing its refusal to apply the CJEU judgment on the argument that the CJEU had exceeded its jurisdiction.³⁰

The Solange legal theory of the German Federal Constitutional Court (Bundesverfassungsgericht) has developed a framework regarding what it considers may override the application of the consequences of primacy. In a judgment of 29 May 1974, referred to as Solange I, the Constitutional Court accepted jurisdiction to rule on a conflict between Community law and the German Constitution. It was then stated that the German Basic Law should take precedence as long as a level of protection of fundamental rights equivalent to the level offered by German constitutional law was not guaranteed by EU law. In a second judgment of 22 October 1986, referred to as Solange II, the Court refused to carry out a review as long as the applicant failed to prove that the protection of fundamental rights under EU law did not correspond to the protection guaranteed by the Constitution. Afterwards, in its judgment of 12 October 1993 on the law ratifying the Maastricht Treaty, the Constitutional Court added that any review could also include the issue of an extension of the competences of the Union, which was not the case before 2009. In summary, according to this case-law theory, the Constitutional Court accepts the principle of primacy asserted in the *Costa v E.N.E.L.* judgment and considers that there is a presumption of compatibility between EU law and the German Constitution as long as it is not proven that an EU rule is contrary to the fundamental rights protected by the Constitution of 1949, or Article 79(3), which particularly prohibits any threat to the division of the Federation into Länder and the participation of the latter in federal legislation. The Constitutional Court has gradually extended the scope of the constitutional principles that may override the consequences of primacy beyond Article 79 of the Fundamental Law and has started to use the concept of the “constitutional identity” of Germany, which is echoed in Article 4(2) TEU as worded in the Treaty of Lisbon.³¹

According to the European discourse about primacy of EU law and pluralism, the concept of national constitutional identity in Article 4(2) TEU means that the Member States can define its own national identity, but the decision about the compatibility of the national identity with EU obligations since the Treaty of Lisbon is always vested in the CJEU. Under the revised identity clause of Article 4(2) TEU, Member State constitutions can specify matters of constitutional identity, and constitutional courts can apply identity control tests to EU acts. Under certain limited circumstances, Member States are also permitted to invoke constitutional limits on the primacy of EU law. The boundaries of these constitutional limits are embedded in the principle of sincere cooperation (contained in Article 4(3) TEU). However, national constitutional courts

30 Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies of the Union: The primacy of European Union law, 2022, p. 29.

31 Casey, 2023, p. 4.

have different approaches. They allow for the primacy of EU law over national law (including constitutional law) in general, but not over the core of the constitution, which they specify as matters of constitutional identity. As the German Federal Constitutional Court puts it, these constitutional courts retain the authority for ‘safeguarding the inviolable constitutional identity’ of their States. This means that they all reserve the right to review EU law, but only in exceptional cases, and will involve the European Court of Justice (ECJ) via the preliminary reference procedure. So far, they have been reluctant to exercise the review powers that they have claimed for themselves.³²

The relationship between essential State functions and constitutional identity is also a vital question. The former is an inherent part of the latter. While constitutional identity and national identity are often viewed as tools of Euroscepticism,³³ many believe that the word “eurorealism”³⁴ better describes how conservative thinkers view the integration situation. Originally, the EU was supposed to be an economic entity³⁵; however, it has become decidedly political,³⁶ with the possibility of a European Constitution. While the Constitution never came into existence,³⁷ there are still quite a few Federalists who wish to see the EU become a State.³⁸

Constitutional identity as a vital concept related to these issues can be found among the “four corners of the constitution,” meaning that we must start by interpreting the text itself.³⁹ The two components of the concept of constitutional identity, namely the constitution⁴⁰ and identity,⁴¹ should be examined separately. Attempts have already been made to create a constitution for the EU,⁴² which would have provided an actual, written constitutional framework; however, the attempts did not succeed.⁴³

The process of identity formation is brought into existence by the constitution, which serves as the basis of the constitutional system and also embodies it.⁴⁴ This is inseparable from the socio-political community, which is the driving force behind

32 Halmai, 2018, p. 1.

33 Dúró, 2017, pp. 195–210.

34 Steven and Szczerbiak, 2022.

35 Horváth, 2022, pp. 170–178.

36 Pintér, 2017, pp. 341–364.

37 Angyal, 2007, pp. 175–190.

38 Federal Alliance of European Federalists, 2022.

39 Sulyok, 2014, pp. 44–62.

40 According to some views, the constitution creates a new form of sovereignty that is limited from the beginning by the rights of the individual. See: Möllers, 2009, pp. 169–204.

41 The constitution has a core that gives it its identity, which consists of immutable principles, See: Schmitt, 2013, p. 348.

42 Treaty establishing a Constitution for Europe, 2004.

43 Arató and Lux, 2012, pp. 177–200.

44 Tribl, 2020, p. 34.

a constitution.⁴⁵ The constitution, as a concept embodying national sovereignty, is always linked to a specific State.⁴⁶ After the Parliament adopted the 7th amendment of the Fundamental Law on June 20, 2018, Hungary's constitutional identity as a constitutional value to be protected became part of our constitution. Accordingly, the protection of Hungary's constitutional self-identity and Christian culture is now the duty of all bodies of the State.⁴⁷

As stated in Article 4(2) of the Treaty on European Union (TEU), examples of essential State functions are 'ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'. Interestingly, territorial integrity was also a part of what sovereignty means. While the two concepts are also strongly related, essential State functions embody powers derived from sovereignty. One example of essential State functions playing an important role in curbing the growing powers of the EU, as well as a Member State using them as a defence against fulfilling an obligation imposed by the EU, can be found in one of the decisions made by the Conseil d'État (CdE) in December 2020. This body of State has established that the national constitution is the highest norm of the national legal order.⁴⁸ In the view of the CdE, they can "clarify" situations in which EU law does not include guarantees according to national constitutional requirements. In the case mentioned earlier, a gendarmerie non-commissioned officer applied in the CdE procedure to set aside the decision of the Minister of the Interior, based on which Article 6 of Directive 2003/88/EC was not implemented for the operation of the department-level gendarmerie (*gendarmerie départementale*). The aforementioned provision establishes a maximum working time of 48 hours per week. On 17 December 2021, the CdE rejected this motion, basing its decision on the fact that the question of whether the application of the directive not implemented does not endanger the constitutional principle of free disposal of the armed forces, which stems from the consistent practice of the CdE, must be examined. The decision entails that the armed forces must be available at all times and everywhere to protect the fundamental interests of the nation, among which national independence and territorial integrity are prioritised. This is a direct usage of essential State functions to oppose EU law. This shows how important the essential State functions that are laid out specifically have become. I fully believe that the importance of these functions will only grow after the Convent⁴⁹ about to take place in the EU. These concepts are noteworthy in terms of exploring the intricacies of the primacy of EU law.

45 Csink, 2015, p. 137.

46 Trócsányi, 2014. pp. 473–482.

47 Fundamental Law of Hungary, Article R(4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.

48 Decision n° 393099, 2021.

49 Parliament activates process to change EU Treaties, 2022.

4. The Position of National Courts

In Hungary, the question of the primacy of EU law has been of utmost importance for some time. Therefore, many relevant cases can be found. The Constitutional Court of Hungary (CCH), in connection with the judgment of the CJEU on the status of foreign nationals staying in the territory of the Hungarian State illegally, based on its interpretation of the Fundamental Law, held that if the exercise of joint competences with the EU is incomplete, Hungary is entitled to exercise non-exclusive competences of the Union in accordance with the presumption of sovereignty, until the institutions of the Union take the necessary measures to ensure the effective exercise of joint competences. However, the Constitutional Court could not examine whether there was a lack of effective exercise of shared competence in the specific case. The Constitutional Court also emphasised that the abstract interpretation of the Constitution cannot be the subject of a review of the CJEU judgment, nor does the procedure in the present case extend to the examination of the primacy of EU law.⁵⁰

The primacy of EU law is an application primacy; however, Hungarian legislation that is contrary to EU law remains in force until it is repealed by the legislator or annulled by the Constitutional Court. Article E(2) and (3) of the Fundamental Law does not even exceptionally provide for the constitutional possibility of extending the scope of EU law to cases that are not affected by EU law (so-called purely national situations). Accordingly, it cannot be excluded that the scope of applicable law in two cases with otherwise similar facts differs merely on the basis of the existence or absence of EU law involvement, and that a different judicial decision is therefore rendered. However, even such a possible difference does not entitle the courts to set aside the Hungarian law in force and replace it with a rule of EU law that is not otherwise applicable to the case in question. A judicial decision that disregards the applicable law without justification is arbitrary, cannot be conceptually fair and is incompatible with the fundamental principle of the rule of law (CCH Decision, Reasoning [60]). In such cases, the Constitutional Court shall annul the challenged judicial decision in view of the manifest violation of Article XXVIII(1) of the Fundamental Law.⁵¹

In 2020 and 2021, four Constitutional Court rulings in EU Member States marked a new era in the relationship between EU law and national constitutions. This era has brought with it an open limitation of the primacy of EU law. The highly controversial PSPP decision of the German Federal Constitutional Court (5 May 2020) ruled on the exclusion of the legal effects of an EU Court judgment considered *ultra vires*.⁵² Romanian Constitutional Court Decision 390/2021 (8 June 2021) explicitly excluded

⁵⁰ CCH Decision 32/2021 (XII. 20).

⁵¹ CCH Decision 16/2021 (V. 13), Reasoning [33] 4.

⁵² PSPP, BVerfG 2 BvR 859/15.

the application of EU law on the basis of constitutional self-identity against constitutional norms, ensuring constitutional self-identity and the delegation of powers to the EU.⁵³

The four decisions are a clear sign that the third era of the increasingly turbulent relationship between EU law and national constitutions has arrived. The first period was that of prospective protection in principle of fundamental constitutional rights from the *Internationale Handelsgesellschaft* case (1970) to the creation of the Union. The second period was that of the prospective protection in principle of national sovereignty (and to some extent constitutional identity), from the German Maastricht decision (1993)⁵⁴ to the Czech Constitutional Court's "Slovak pensions" decision (2012). The latter already marked a period of practical sovereignty protection, with the Czech body considering the CJEU *Landtová* judgment (C-399/09) as an *ultra vires* act.⁵⁵ It was unclear whether the Czech decision would be a turning point or simply an extraordinary development. The decisions highlighted here indicate that a period of practical sovereignty protection by some constitutional courts has indeed begun, in which the principle of limited and conditional primacy has been explicitly substituted for the unconditional primacy of EU law (the possibility of protecting constitutional self-identity, while increasingly emphasised, remains in principle).⁵⁶

In the context of the primacy of EU law, a particular challenge is to determine when a partial, implicit or explicit denial of primacy violates EU law. The reaction to such a decision is one question, but whether it constitutes an EU infringement is another. In weighing this, it should not be overlooked that the primacy of EU law is part of a more general principle of EU law and one of its cornerstones. It is a requirement for the effective enforcement of EU law. The essence of this requirement is – to put it a little more simply – that a Member State must ensure that an EU act can produce in its legal system all the effects that EU law confers on it.⁵⁷ Ensuring that this requirement is fulfilled is one of the main tasks of the CJEU, and in the second subparagraph of Article 19(1) TEU, Member States have expressly undertaken to ensure the effective enforcement of EU law, which is supported by the loyalty clause in Article 4(3) TEU. It is not by chance that the specific provisions of Polish Decision K 3/21 revolved around the interpretation of Article 19(1) TEU. These provisions of the founding Treaties are a necessary counterpoint to the concept of limited and conditional priority.

It is also noteworthy how EU acts are transposed directly into the country's national legislation. In the case of Hungary, the Fundamental Law recognises the

53 The Romanian Constitutional Court's Decision No. 390 of 8 June 2021.

54 Maastricht, BVerfG 2 BvR 2134/92 and 2159/92; BVerfGE 89, 155.

55 Czech Republic's Supreme Courts's Case Pl. ÚS 5/12 (31/01/2012).

56 Orbán, 2020, pp. 174–179.

57 Pl. 9/70 *Grad v Finanzamt Traunstein*, EU:C:1970:78, 5.

source of law of the EU when it states that the EU may, within certain limits (in the context of Hungary's participation as a Member State and within the limits of its membership), lay down a generally binding rule of conduct. However, it does not provide for the primacy of the application of EU law or its place in the hierarchy of sources of law. It merely contains a procedural rule for primary law (founding treaties): the authorisation to recognise the binding force of such an international treaty requires a two-thirds majority of the votes of the members of Parliament. However, the majority requirement for authorisation does not imply a hierarchy between EU law and domestic law, and in Hungary, there is no hierarchical relationship between laws on the basis of the majority required for adoption. It is another matter that there is no reason to subdivide EU law into a hierarchical system of internal sources of law, because conflicts between internal law and EU law can be resolved not on the basis of hierarchy, but on the basis of the primacy of EU law and the scope of the Member States' authorisation as conflict-of-law rules.⁵⁸

The Constitutional Court has excluded EU (Community) law from the rule of the Constitution on international law (Article 7(1)), as it treats it as part of domestic law. It is worth mentioning that the explanatory memorandum to the proposed Constitution confirmed this practice by stressing that EU law is not covered by Article Q of the Fundamental Law of Hungary. In CCH Decision 1053/E/2005, the Constitutional Court stated that 'despite their treaty origin, it does not intend to treat the founding and amending treaties of the European Union as international treaties'. However, this statement does not clarify how it treats EU (Community) law. The idea was only completed in paragraph III/11 of AB 72/2006 (15.12.2006):

*these Treaties, as primary sources of law, and the Directive, as a secondary source of law, are part of internal law as Community law, since the Republic of Hungary has been a member of the European Union since 1 May 2004. From the point of view of the jurisdiction of the Constitutional Court, Community law does not constitute international law within the meaning of Article 7(1) of the Constitution.*⁵⁹

The Constitutional Court has thus created a two-tier system, where Community (EU) law is part of domestic law in the constitutional sense, and international law is

⁵⁸ Vincze and Chronowski, 2018, p. 189.

⁵⁹ In CCH Decision 61/2008 (29.04.2008) (ABH 2008, 546), the Constitutional Court stated: „[u]ntil the conditions for entry into force required by the treaty itself are fulfilled, the Constitutional Court can only assess a new treaty amending the founding and amending treaties of the European Communities as primary sources of law, but which has not yet entered into force, in the light of its international legal origin, and therefore apply the rules of the Constitution and the Abtv. concerning international treaties.“

a side issue, which is subject to a different constitutional assessment.⁶⁰ In contrast, in a tripartite system, Community law is distinct from both internal law and international law and is a separate, autonomous source of law in constitutional terms (e.g. the German Federal Constitutional Court's decision in *Internationale Handelsgesellschaft* (Solange I)⁶¹). This is recognised by the Constitutional Court, which has reclassified them solely in terms of the "exercise of its powers." The Constitutional Court's aim was to remove conflicts of norms between internal law and EU (Community) law from the scope of constitutional questions, whereas paradoxically, the phrase "part of internal law," in its grammatical sense, would imply a very broad power of review. However, the emphasis was that Community law is not international law; therefore, the Constitutional Court did not intend to exercise its power to resolve conflicts between international law and internal law.⁶² According to the Constitutional Court, in the case of conflicts of law under the Fundamental Law, the conflict of Hungarian legislation with EU (Community) law, the adequacy of the implementation of secondary EU legislation and the failure to fulfil a legislative task under EU law are not constitutional issues.

The main issue in terms of harmonising legislation across the EU is that the texts of the directives are equally official in different languages, so that the transposition process requires a comparison of different versions. Where there is consistency between texts in different languages, there may be a problem of terminological differences between the text of the directive and the law of the Member State. This could be resolved by creating terminological consistency between directives. The provisions of directives should be interpreted within their context, bearing in mind the directive as a whole. The interpretation of the general terminology is particularly difficult. The legislation transposing the directives into national law, and national law rules in general, must be interpreted by the courts of the Member State in light of EU legislation.⁶³

Pursuant to Article 82(8)(c) of Government Decree No.152/2014 (VI. 6.) on the Duties and Powers of the Members of the Government (Statute Decree), the Minister of Justice shall coordinate the harmonisation activities for the purpose of compliance with the law of the EU. Within this framework, the Minister shall develop the legal harmonisation programming, organise the legal harmonisation tasks in a legal harmonisation database, and monitor and promote the fulfilment of the legal harmonisation tasks. While the harmonisation obligation typically arises in the case of directives, which explicitly require the adoption of national legislation, it is important to note that other EU acts also require, or may require, legislation

60 CCH Decision 9/2018 (VII.9), Reasoning [31] and CCH Decision 2/2019 (III.5), Reasoning [19]–[20].

61 *Internationale Handelsgesellschaft* (Solange I) 2 BvL 52/71, BverfG 37, 271; (29.05.1974).

62 Vörös, 2011, p. 373.

63 Menyhárd, 2000, p. 24–25.

or implementation at the national level. In particular, EU regulations may require deregulation tasks due to their direct applicability, or additional legislative implementation tasks at the national level. These deserve particular attention because it is often more difficult to detect a legislative task than in the case of directives; however, failure to do so may also lead to infringement proceedings. International treaties concluded by the Union and so-called mixed international treaties concluded jointly by the EU and the Member States may also require legislation at the national level. Finally, the obligation of continuous harmonisation – a kind of passive harmonisation – is also permanent in the sense that all domestic legislations must be drafted with due regard to the obligation to ensure consistency with existing EU law. Failure to comply with the harmonisation obligations in time and in substance may lead to proceedings against the Member State, ultimately resulting in a finding of failure to fulfil its obligations and an order to comply with EU law, or, if the failure persists, to pay a substantial fine. The order of programming of the legislative harmonisation tasks is regulated by Government Decree 302/2010 (XII. 23) on the performance of the legislative preparatory tasks necessary to comply with EU law. The essence of the programming order is that the internal legislative actions resulting from certain EU legal acts are defined and scheduled at the government level within a short period after the adoption of the respective act, from the date of its promulgation.

For each EU act, the harmonisation process will be completed once all the necessary transposing and implementing legislation has been adopted and published. For directives and framework decisions, this also requires the so-called notification obligation to be fulfilled, that is, the European Commission must be notified about the national transposing legislation, along with the text of the legislation. It must be stressed that failure to notify the Commission may give rise to infringement proceedings; therefore, it is necessary to ensure that the Commission is notified about the national legislation within the time limits laid down once it has been adopted. In addition to the continuous monitoring of harmonisation activities by the government, the European Commission, as the “guardian of the Treaties,” also monitors compliance with EU law and regularly publishes information on the transposition of directives on its website and summarises the performance of Member States.

Recently, the Hungarian government set up a Ministry for European Union Affairs,⁶⁴ which will take many competences away from the Ministry of Justice.

64 János Bóka tapped as minister for EU affairs, 2023.

5. Conclusion

The primacy of EU law has been a point of contention for some time now because numerous Member States feel that their sovereignty, constitutional identity, and essential State functions are at risk due to the increasing emphasis on integration. Naturally, the closeness of the EU is vital in terms of implementing policies and ensuring successful cooperation. However, the direction in which the EU is heading also creates questions that must be discussed for successful future cooperation. Issues of harmonisation, the changing status of Constitutional Courts' practice in terms of the primacy of EU law and, in general, the current situation of the EU all make it necessary to start an in-depth discourse about these matters.

In my opinion, the approaching Convent will have an enormous impact on the future landscape of the EU. It is a necessity to stick together in these trying times and coexist as strong Member States, which can all work together towards our common goal of becoming a strong EU.

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