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THE LAW OF THE EUROPEAN UNION IN THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT

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1. Introduction

The effective date of the provision inserting the "Europe clause" in the Hungarian Constitution was 23 December 2002. This rule states that "By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of 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 and by way of the institutions of the European Union." The Constitution also specifies a goal of the state, that is, "the Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe." Article E of the new Fundamental Law, effective from 1 January 2012, includes the same text with the addition that the law of the European Union may stipulate a generally binding rule of conduct subject to the rules of the Constitution on exercising powers. Therefore, the Fundamental Law has not made any substantial changes to the constitutional provisions related to the membership of Hungary in the European Union. In my view, a conclusion can be drawn from this that the findings of the Constitutional Court made in relation to the Europe clause and EU law will remain authoritative.

2. Analysis of decisions

2.1. Surplus stocks

After Hungary's accession to the European Union (1 May 2004), the first decision the Constitutional Court made in connection with the law of the European Union was in a case of surplus stocks of agricultural products for commercial purposes (the so-

called "sugar case"). The Act of Parliament examined by the Constitutional Court was about the rules applicable to sugar stocks and the accession to the European Union; the Constitutional Court's procedure was initiated by the President of the Republic under his power to request the preliminary review of constitutionality. According to the objections concerning the constitutionality of the law, the requirement of legal certainty was violated and it was claimed that the effective date of the law was problematic as an obligation was imposed with retroactive effect (for instance, the law stated that in the case of contracts concluded after 1 January 2004 it was presumed that the intention was to accumulate stocks for the purpose of taking advantage of refunds multiple times). The other objection concerning the constitutionality was related to the hierarchy of the sources of law as the Act of Parliament authorised an inferior source of law to define that market players have the obligation to count stock and make declarations and payments in spite of the rule of the Constitution that a payment obligation may only be imposed by an Act of Parliament.

Issues similar to this came up in connection with the accession of other countries (Spain and Portugal in 1985 and Austria, Finland and Sweden in 1994). At the request of national courts of Member States, the European Court of Justice issued a preliminary ruling regarding the validity of the relevant regulations of the European Commission.[1] In the preliminary ruling procedure, the Court established, among others, that the regulation in question had been adopted by the Commission within the scope of its competence, the measure on surplus stocks was not considered a disproportionate restriction of rights, and market players had been informed in time on the expected measures concerning the stocks through the published text of the accession treaties.

In its decision, the Constitutional Court's basic finding was that the provisions challenged in the petition concerned the constitutionality of the Hungarian legislation for the implementation of the EU regulations rather than the validity or the interpretation of these rules.[2] This means that the Constitutional Court in this (first) case decided to examine the Act of Parliament that becomes part of domestic law in spite of the fact that it established that EU law is "relevant". The Constitutional Court fully accepted the motion of the President and held that the challenged provisions of the Act of Parliament on measures related to the accumulation of commercial surplus stocks of agricultural products referred to preliminary review of constitutionality are unconstitutional [Decision 17/2004 (V. 25.) AB]. The Constitutional Court treated the legal certainty and source of law questions in this case like it does when it assesses the constitutionality of national law; it applied the tests applicable to Hungarian law and cited its earlier decisions about Hungarian law. These are regular items of Constitutional Court practice; the commentary of the decision includes nothing new

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1 S. C-30/00, *William Hinton & Sons LdS v. Fazenda Pública* [2001] ECR I-7511; C-179/00, *Gerald Weldacher (Thakis Vertriebs- und Handels GmbH) v. Bundesminister für Land- und Forstwirtschaft*, [2002] ECR I-501

2 Decision no. 17/04 (V. 25.) AB, ABH 2004, 297.

about the expected practice of the Constitutional Court of Hungary in connection with the laws of the European Union and the Constitution.

The decision triggered quite a few responses. The first analysis was written by András Sajó,[3] who asked all the questions the Constitutional Court utterly ignored. For instance, he asked questions as to whether the real subject-matter of the case before the Constitutional Court was Community law, or whether the Constitutional Court by its decision overrode a series of EU regulations, whether the Constitutional Court interpreted its role in the application of Community law correctly and whether a preliminary ruling procedure should have been initiated to interpret Community law.[4] The author did not (and did not wish to) answer these questions fully and unambiguously but wrote that the statutory rules challenged in the case were clearly "based on directly applicable Community law: the regulations themselves provide that that the fees must be determined by taking into account the stocks accumulated before their effective dates."[5] The author was of the opinion that in the "sugar case" the problem already solved in other Member States had come up quite quickly in Hungarian practice (that is, the problem of the relationship between the courts of Member States and constitutional courts on the one hand and the European Court of Justice on the other) but the Constitutional Court of Hungary's reaction was unusual as its decision on the motion for preliminary review failed to resolve a number of issues.

2.2. Firearms

The next issue of constitutionality in connection with the law of the European Union came up in the so-called "firearm case". While in the "sugar case" the Constitutional Court examined the constitutionality of an Act of Parliament for the implementation of an EU regulation, the "firearm case" was about the constitutionality of an Act of Parliament transposing a directive. Another key difference between the cases was that in the "sugar case" only legal certainty and source of law related issues were under scrutiny while the "firearm case" fundamental rights were affected. The question in the case was whether the rule in Act XXIV of 2004 on Firearms and Ammunitions requiring firearm dealers to record certain data violates the right to the privacy of personal data. This is because, by way of such records, firearms dealers could obtain such personal data the secure handling of which they could not guarantee. The Act of Parliament examined by the Constitutional Court, as noted in the decision, was based on Council Directive 91/477/EEC on control of the acquisition and possession of weapons. The rules of the Act of Parliament came into effect after 1 May 2004, that is, Hungary's accession to the European Union. The challenged rule of the Firearm Act and Article 4 of the Directive are almost identical: "(…) It is rather clear that

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3 András SAJÓ: Why is 'cooperative constitutionalism' a tough subject? *Fundamentum,* 2004/3. 89.

4 Ibid. 90.

5 Ibid.

the Hungarian Act of Parliament is a direct transposition of the specific rules of the Directive."[6] The decision of the Constitutional Court in the case was decision 744/B/2004 AB, which was not published in *Magyar Közlöny* (the Official Gazette).[7] Before examining the merits of the case, the Constitutional Court had to decide whether it had the power to examine the constitutionality of this Act of Parliament. The decision states that "[d]irectives, as the so-called secondary legislation of the Union, bind the Member States to adopt, in their own processes of legislation, rules of law complying with the contents of the respective directives." Moreover, in line with Article 3 of the Directive, the Member States may, in their national legislation, adopt stricter regulations than the provisions of the respective directives. (…) Also in the present case, the Constitutional Court performed the constitutional review of the Hungarian rule of law based on the Directive, without affecting the validity of the Directive or the adequacy of implementation."[8]

It can be concluded that on the basis of the above the Constitutional Court reviewed the challenged rule of the Firearm Act as if it was "purely domestic law", carried out the test of necessity and proportionality, which is to be carried out when the restriction of a basic right is examined, and found that the given rule of law does not violate the Constitution. Thus, the Constitutional Court examined the merits of the case. None of the judges of the Constitutional Court added a dissenting opinion to the decision.

In my view, the issues that should be analysed in connection with Decision 744/B/2004 AB are the issues that are actually not discussed in the decision. The Constitutional Court failed to take into account that the transposition of the Directive into national law is based on a duty and it promotes a goal of the Community (that is, the public security of the Community as a whole). The decision does not include the Constitutional Court's position on the possibility of constitutional review of secondary legislation of the Community. In connection with this, the Constitutional Court failed to address what should be done when an Act of Parliament (or another type of law) transposing a directive is found to be unconstitutional, what the limits of exercising its powers in this case are and what the differences, if any, are in the procedure as compared to the posterior abstract examination of constitutionality (for instance, whether it is still possible to annul the particular law). The decision does not offer the possibility of making assumptions about the relationship between the Constitutional Court and the European Court of Justice, although the examination of the legality of secondary legislation of the Community is, from the aspect of Community law, the examination of the conformity of secondary legislation with the treaties establishing the EU (which is the competence of the European Court of Justice). The controversial nature of the decision is reflected in this quote, which is from an article analysing the decision: "While the Constitutional Court's consistent practice of refusing to

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6 Ernő Várnay: The Constitutional Court and the law of the European Union. *Jogtudományi Közlöny (Gazette of Legal Science)*, 2007, issue 10,430.

7 ABH 2005, 1281.

8 ABH 2005, 1282 – 1283.

review the constitutionality of secondary Community legislation reflects a reliable monistic approach to EU law, the decisions on the constitutionality of domestic laws transposing or supporting the implementation of secondary legislation of the EU suggest quite the contrary."[9] And that is the case indeed. It is a seemingly irresolvable contradiction that, although the Constitutional Court does not even consider the possibility of examining the constitutionality of Community legislation, it examines the constitutionality of domestic law transposing secondary Community legislation without any restraint. This, of course, is no problem as long as the domestic law transposing Community law is not unconstitutional. However, if such domestic legislation is found unconstitutional, the Constitutional Court will have to "put its cards on the table" as such a decision would be, beyond doubt, criticism of the constitutionality of Community law.

However, it can be seen as an "excuse" in the decision in the "firearm case" that the Court mentioned that, according to the Directive, Member States may in their national legislation adopt stricter regulations than the provisions of the Directive,[10] which may lead to the conclusion that the Constitutional Court was only examining the part of the national legislation that is different from (stricter than) the provisions of the Directive. Such an opinion may be particularly relevant in a case that concerns fundamental rights, that is, when it is clear that the legislator has the power to give, with regard to the Constitution, stronger protection to certain rights.[11]

2.3. Gambling activities

The next time the question of constitutionality was examined was in the so-called "gambling case". The petitioner requested the review of the constitutionality of a rule in Act XXXIV of 1991 on Business Advertisements and of a rule in Act LVIII of 1997 on Organising Gambling Activities. According to the petitioner, these Acts of Parliament violated the Treaty of Rome (implemented by Act XXX of 2004, which implemented the so-called Treaty of Accession) and the duties placed by the Treaty of Rome on Member States. As a result, the petitioner believed the challenged rules violate the principle of rule of law and the Europe Clause. The petitioner requested the establishment of an unconstitutional omission of legislative duty on the basis of these provisions of the Constitution (but in reality on the basis of the Treaty of Rome). (According to the petitioner, the issue was that the legislator kept in effect the regulation applicable to the sale of gambling services organised abroad and to the related advertising activities beyond 1 May 2004 and made it even stricter, and this restricted the freedom to provide services guaranteed by Article 49 of the EC Treaty.)

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9 Várnay op. cit. 429.

10 ABH 2005,1283.

11 This notion is theoretically correct in spite of the fact that in the "firearm case", as noted above, the challenged provision of the Act of Parliament and the relevant rule of the Directive are quite similar.

The decision of the Constitutional Court in the case was decision 1053/B/2005 AB, which was also not published in the Official Gazette.[12] This decision has concurring reasoning and dissenting opinions. According to the first sentence of the commentary of the majority decision, "[t]he petitioner alleged that Articles 2(1) and 2/A of the Constitution had been violated due to an unconstitutional omission of a legislative duty specified by Community law. Therefore, the Constitutional Court examined the merits of the petition."[13] However, it did so very briefly. First, the Constitutional Court stated that "as there was no substantive unconstitutionality, it cannot be established on the basis of Article 2(1) of the Constitution alone that the legislator has not fulfilled a legislative duty and that this caused an unconstitutional situation", but it also declared that "[t]he so-called accession clause of Article 2/A of the Constitution defines the conditions applicable to and the framework of Hungary's membership of the European Union and the place of Community law in the system of the Hungarian sources of law." The Constitutional Court pointed out that this particular provision of the Constitution does not create a specific obligation to enact legislation.[14]

The only thing this proves is that the examination regarding the merits of the case was carried out, formally, on the basis of the Constitution and not the Treaty of Rome. However, the Constitutional Court does not say anything about its approach to Community law (this time, primary legislation), i.e. its powers to carry out examinations on the basis of Community law, but nevertheless appears to carry out such an examination. Although the decision itself is concise, it has some intriguing "asides". First, it indirectly expressed that the review of constitutionality (and annulment) does not extend to cases when Community law and national law contradict (i.e. it is not an issue of legal certainty) and substantive unconstitutionality must be presumed as a precondition of carrying out an examination.[15] Another factor that should be noted in connection with this decision is that, according to the Constitutional Court, the "Europe Clause" in itself does not create a duty to adopt legislation. Finally, the decision notably stated that the founding and amending treaties of the EC do not qualify as international treaties in the traditional sense under the Constitution (and this fact should be taken into account with regard to the content of the decision when the competence of the Constitution Court is defined).

It can be stated on the basis of the analysis of the decision that the "gambling case" did not offer a solution for the competence issues of the Constitutional Court's practice affecting Community law. It seems clear that the Constitutional Court did not give up all its possible powers related to this and it is not required by law to do so. The

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12 ABH 2006,1824.

13 ABH 2006, 1826.

14 Both citations are from ABH 2006,1827.

15 Várnay points out that the Slovenian Constitutional Court came to a similar conclusion (S. decision Up-328/04/U-I186/04, JT. 433). Nevertheless, it is a fact that this deduction of the Hungarian Constitutional Court reflects a so far unknown aspect of guaranteeing (or, better to say, not guaranteeing) legal certainty.

inclusion of the term 'substantive unconstitutionality' in the decision suggests that the Constitutional Court will not be inactive when a fundamental right is violated. Another conclusion is that it will not accept the violation of legal certainty alone as justification for a petition. Nevertheless, it may also be deduced from the decision that it is becoming more and more important to clarify the relationship between the European Court of Justice (for instance, in a preliminary ruling procedure) as the authentic interpretation of Community law is indispensable in such cases.

2.4. On-call duty fees

The regulation of the issue of on-call duty fees surfaced in Hungary, too. It is a well-known fact that this issue is carefully regulated by Community law in the form of a directive (Council Directive 93/104/EC and Directive 2003/88/EC). The European Court of Justice passed a number of judgements confirming that the Directive applies to such cases (e.g. in the Jaeger case) and the European Court of Justice later declared that the rules of the Directive are directly applicable (in the Pfeiffer case). There was even a Hungarian court judgement applying Directive 93/104/EC.[16] This was the background against which the Constitutional Court had to evaluate domestic law that partly contradicted the requirements of Community law. The petitioners challenged the national rules regulating on-call duty (that is, the fee doctors receive for such duty) with reference to the Constitution but there was a petitioner claiming that the Hungarian law violates Council Directive 2003/88/EC and requested the Constitutional Court to annul the relevant rules of domestic law with regard to this, too.

In its decision [72/2006 (XII. 15.) AB], the Constitutional Court primarily cited the rules of the Hungarian Constitution and did not discuss the relevance of Community law in detail. However, in this case, the Constitutional Court could elude this as the case was not about the constitutional assessment of domestic legislation transposing Community law (as analysed above) but, quite the reverse, (a part of) a piece of legislation passed by a sovereign legislative body violated the Constitution (and Community law). The Constitutional Court hardly mentioned the Community law connection in its decision. One of the conclusions of the decision was cited as reference and as consistent practice by later decisions. According to this particular decision, "[t]he founding and amending treaties of the European Communities do not qualify as international treaties for the purpose the Constitutional Court's competence as (...) these treaties are, as primary sources of law (...) parts of domestic law as Community law with regard to the Republic of Hungary's EU membership since 1 May 2004. From the aspect of the Constitutional Court's powers, Community law does not qualify as an international treaty within the meaning of Article 7(1) of the Constitution."[17]

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[16] S. BH 216/2006.; Supreme Court: Pf.X.24. 705/2005.

[17] ABH 2006, 819., 861.

In its decision, the Constitutional Court found the challenged rules unconstitutional with regard to the requirements specified in the Hungarian Constitution (and also violating Community law) and annulled them.

A concurring reasoning added to the decision includes some interesting ideas. It states that "in this case characteristics of the so-called direct applicability of certain rules of EU law can be identified. Both those who draft and who apply the law must be prepared to face the consequences of this. Another interesting point of the case is that the case-law of the European Court of Justice specifically cited by the petitioners has evolved since the petition was submitted and now only one interpretation is acceptable: the interpretation predicted by the petitioner." The petitioner pointed out that "the supreme forum for deciding the disputes concerning the fulfillment of duties related to European integration and the institutions of the European Union and the supreme forum for legal disputes is the European Court of Justice and not the Constitutional Court."[18] It was stated in the reasoning as a final note that the case will only stay "alive" regarding parts that are not affected by directly applicable provisions of EU law, that is, parts of the constitutionality must be reviewed."[19]

2.5. European arrest warrants

Probably the most significant constitutional issue related to the law of the European Union was the issue of the decision on the European arrest warrant. Even the Constitution was amended in connection with this case. The case was initiated by the President of the Republic, who requested the preliminary review of the constitutionality of the Act of Parliament implementing the "Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway" (the EUIN agreement).[20]

The background to the case is that the Council adopted a Framework Decision on 13 June 2002[21] on the European arrest warrant. Under European arrest warrants, if the judicial authorities of Member States, on the basis of a legal act issued by them, request the surrender of criminal suspects or sentenced persons, this legal act will be executed in the entire territory of the European Union and the person will be transferred within a short period of time. In this procedure, the relations between States are essentially replaced by relations between judicial authorities as the execution of the European arrest warrant is primarily a matter of the judicial authorities, meaning that the administrative and political levels of decision-making

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18 ABH 2006, 863.

19 ABH 2006, 866.

20 The case did not get significant press coverage when the petition was filled although, if read carefully (and it was available at that time on the website www.keh.hu), it is clear that a "strategy" can be built on this petition regarding (i) the relationship between the European Union (as a whole) and the Member States and (ii) the role of national Constitutional Courts within the European Union.

21 Framework Decision 2002/584/JHA (Official Journal L 190, 18/07/2002,0001– 0020)

in traditional extradition procedures are eliminated. The introduction of this regime in the European Union raised constitutional concerns in a number of Member States (but not in Hungary) regarding the extradition of the citizens of these Member States. Portugal and Slovenia amended their constitutions in advance and France reviewed its relevant constitutional provisions regarding the applicability of the European arrest warrant in March 2003. Constitutional issues came up later in three other Member States. In Germany, the law implementing the European arrest warrant was annulled by the Federal Constitutional Court on 27 April 2005. This decision blocked the extradition of German citizens (but not of foreigners) until a law changing this situation was passed on 20 July 2006 and took effect on 2 August. The Polish Constitutional Court partly annulled the law implementing the European arrest warrant on 27 April 2005. The Polish constitutional and legal solution for implementation has to be changed. As a result, Poland has agreed to extradite its citizens from 7 November 2006 on condition that the act due to which transfer is requested must be committed in the territory of Poland and the given act must be illegal under Polish law. Finally, on 7 November 2005, the Supreme Court of Cyprus found that the European search warrant violated the constitution of the country. The new law took effect on 28 July 2006, limiting the temporal effect of extraditing citizens: it is only possible if the crime was committed after Cyprus' access to the European Union (1 May 2004).[22]

These developments show that the applicability of the Framework Decision and in turn the European arrest warrant raised quite a few constitutional concerns in the Member States.

The heart of the constitutional issue is that the EUIN Agreement does not require that the elements of crime of the 32 crimes it lists must be the same for the laws of both the country issuing the warrant and the country executing it. This essentially eliminates the requirement of double criminality for similar cases as there might be different criminal acts in different countries behind the same crime name.[23] The similar name of the crime and the similarities between the elements of the crime do not exclude the possibility that a state is forced to extradite its own citizen for a crime that is not persecuted under criminal law in the transferring state. In this case, the President of the Republic claimed that Article 57(4) of the Constitution was violated; according to this provision, no one can be declared guilty and subjected to punishment for an offense that was not a criminal offense under Hungarian law at the

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[22] 22Second report evaluating the European arrest warrant and the surrender procedures between Member States, 11 July 2007 http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/288format=HTMLaged=1language=HuguiLanguage=en

[23] For instance, if the legal status of a foetus is recognized from conception, abortions may be considered homicide, while in the legal systems of other countries it would be "absurdity". Another example: the so-called 'age of consent' for sex crimes varies all around Europe; in some countries, it is a crime to have sexual intercourse with persons between the age of 16 and 18 while in other countries it is not illegal under criminal law and is not persecuted.

time when such an offense was committed.[24] This rule of the Constitution elevates the principles of *nullum crimen sine lege* and *nulla poena sine lege* to the level of fundamental rights and specifies them as a guarantee that also makes the principle of rule of law specific in the field of criminal justice.

The Constitutional Court's decision in the case was Decision 32/2008 (III. 12.) AB. Four judges added their own concurring reasoning and two judges added dissenting opinions about the decision. The operative part of the Decision stated that the President's application was admissible and that the Constitutional Court found each challenged provision of the Act of Parliament implementing the Agreement unconstitutional. The decision has a number of legal bases. First, the commentary of the decision reaffirms the Constitutional Court's earlier practice in connection with the application of the *nullum crimen sine lege* principle. The decision, however, points out that the rule concerning the trust in the other state's legal system – a key principle of the European cooperation in criminal and judicial matters – must also be taken into account. This trust naturally extends to the legal systems of Iceland and Norway. The decision also noted that the Hungarian text of the EUIN Agreement was different from the Framework Decision, allowing different interpretations and therefore violating Article 57(4) of the Constitution.[25] The decision also declared in connection with the comparison of the 32 crimes listed in the EUIN Agreement and the Hungarian Criminal Code that the crime of 'illicit trafficking in hormonal substances and other growth promoters' had no counterpart in Hungarian law (please note that this comparison did not involve a detailed comparison of all elements of the crimes). In this regard, unconstitutionality is based on Article 57(4) of the Constitution alone, as stated by the decision: "[r]egarding this point, the President's concern is substantiated as the Act of Parliament authorises the Hungarian authorities to declare legal subjects to whom the Constitution applies guilty and to impose penalties on them for acts that did not qualify as crimes under Hungarian law at the time they were committed."[26]

By declaring part of the EUIN Agreement unconstitutional, the Constitutional Court halted the "promulgation procedure", and this naturally affected the entire Act of Parliament as the President was not authorised to sign it into law and had to send it back to Parliament. By amending Article 57(4) of the Constitution, Parliament made it clear that it intended to eliminate unconstitutionality by modifying the provisions

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[24] The review of constitutionality initiated in Hungary is therefore different from the constitutional concerns raised in other Member States in connection with the implementation of the Framework Decision. It is because in other countries the European arrest warrant was not acceptable typically because it violated the general prohibition of extraditing the countries' own citizens. In Hungary, there is no such rule in the Constitution; Article 69(1) prohibits the expulsion of Hungarian citizens from the territory of the Republic of Hungary, but expulsion, of course, is not the same thing as extradition. It is, therefore, a novelty that the European arrest warrant is tested by the principles of *nullum crimen* and *nulla poena sine lege*, even if the issue is primarily not about implementation within the EU.

[25] ABH. commentary VII.

[26] ABH. commentary IX.

of the Constitution and not in connection with the EUIN Agreement. Parliament decided that this amendment to the Constitution (the one that relates to the *nullum crimen sine lege* rule) would take effect when the Treaty of Lisbon took effect.[27] The essence of this rule survives and will remain in effect from 1 January 2012 with the following text: "No person shall be found guilty or be punished for an act which, at the time when it was committed, was not an offence under the law of Hungary or of any other state by virtue of an international agreement or any legal act of the European Union."[28]

2.6. Ratification of the Treaty of Lisbon and 'constitutional identity'

Hungary was the first Member State of the European Union to ratify and implement the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Act CLXVIII of 2007). In Hungary (as opposed to other Member States of the EU) it was not required to amend the Constitution due to the implementation of the Treaty of Lisbon. The Treaty of Lisbon entered into force on 1 December 2009 but, until that date, the Constitutional Court was not in the position to express its opinion on the issue as no petition had been made.[29] In the particular case, the petitioner (a private individual) complained about the fact that the European Union had been granted new powers under the Treaty of Lisbon, and this violates the principle of independence included in the Constitution and the "constitutional identity" of the state. The petitioner also mentioned that the Europe Clause of the Constitution is insufficient as an authorisation for such a "transfer of sovereignty" as required by the Treaty of Lisbon. The Constitutional Court's decision in the case was Decision 143/2010 (VII. 14.) AB.

A precondition of making a decision was that the issue of competence had to be clarified, that is, it had to be determined whether the Constitutional Court had the power to examine the Treaty of Lisbon, which had already been promulgated and was in force. The majority of the judges believed that the Constitutional Court had such powers.[30] The majority was of the opinion that the Act of Parliament implementing

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[27] As László Trócsányi put it: „The effect of this Article of the Constitution depends on the ratification of the Treaty of Lisbon, which is a surprise considering that the directive on extradition has already been transposed". Cf. in: Professor János SÁRI National Sovereignty and European Integration *Book Honouring* on his 70th Birthday. Budapest, Rejtjel Kiadó, 2008, 403.

[28] S. Article XXVIII (4) of the Fundamental Law.

[29] As opposed to, for instance, the Federal Constitutional Court of Germany or the Constitutional Court of the Czech Republic. See for Germany: 2 BvE 2/08, dated 30th June 2009, for the Czech Republic: Pl. ÚS 19/08, dated 28th November 2008 and Pl. ÚS 29/09, dated 3rd November 2009.

[30] In contrast, according to the concurrent reasoning and dissenting opinions it was disputed whether the Constitutional Court had the competence to carry out the review of constitutionality. The dissenting judges were of the opinion that review of constitutionality was only possible before the effective date of the treaty but afterwards it was not allowed. One of them declared that "The dissenting judges were of the opinion that review of constitutionality was only possible before the effective date of the treaty but not afterwards. This is because this international treaty, affecting the fundamentals of

the Treaty of Lisbon qualified as an effective Act of Parliament which (as the Annexes constituted an integral part of the Treaty) have, in addition to the structural and institutional rules, normative and substantial elements. As a result, for the purposes of the review of constitutionality the Treaty of Lisbon still qualified as a law carrying substantial provisions in domestic law, and therefore the Constitutional Court had the power to review it after the effective date.[31]

The Constitutional Court analysed three key issues in its decision: (i) the issue of applying and interpreting the sources of EU law, (ii) the interpretation of the Constitution's Europe Clause (for the first time in the practice of the Constitutional Court) and (iii) the relationship between the objective of the European Union and the protection of fundamental rights in the Fundamental Rights Charter.

(i) It was established by the decision that the authentic interpretation of the founding and amending treaties, of the so-called secondary or delegated legislation, of regulations, directives and other legal acts of the European Union is within the competence of the European Court of Justice. Nevertheless, the Constitutional Court is allowed to refer to specific provisions of the founding and amending treaties of the European Union that relate to the case before the Constitutional Court without giving or requiring an independent interpretation of these provisions.

(ii) The Constitutional Court stated in connection with the interpretation of the Europe Clause that "Article 2/A of the Constitution includes, first and foremost, the constitutional authorisation creating a clear constitutional basis and framework for Hungary's membership of the European Union (legal literature usually refers to this as 'transfer of sovereignty' or 'transfer of powers'). This was adopted in the course of preparing Hungary for its accession in 2004. In Article 2/A(1), the phrase "by virtue of treaty" should be interpreted not only from the aspect of the so-called Treaty of Accession but it is actually a natural result of this phrase that, if the European Union further evolves and further powers included in the Constitution will be exercised together with the European Union or by the institutions of the European Union, it will be possible to transfer these powers in a constitutional manner, to the necessary extent and under a new international treaty. In this way, the legislative branch (by checking the government while the latter carries out the negotiations and during the ratification process) as the entity exercising national sovereignty may decide whether it can accept such a complex institutional reform on behalf of the Republic of Hungary. And Article 2/A(2) requires a two-thirds majority in Parliament as it is a cardinal issue."[32]

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the network of relationships between the European Union and its Member States, was *sui generis* in nature as (in contrast with other international treaties) after its effective date it affects Hungarian law in accordance with the autonomous environment of the legal regime of the EU. After the effective date, the treaty 'escapes' from the Act of Parliament that made it into domestic law and starts leading a life in domestic law that is independent from the Hungarian legislator." (ABH 2010, 711.)

31 ABH 2010, 701.

32 ABH 2010, 705.

(iii) Regarding the third issue, the Constitutional Court declared that participation is not a purpose in itself but it should promote human rights, welfare and security; the Government – in its role as a member of these organisations and during the adoption of possible reforms of the current structures and institutions – must negotiate and act with this end in view and Parliament must make a decision on the ratification of reform treaties with regard to this goal. The Treaty of Lisbon did not create a European Superstate: the Treaty of Lisbon was adopted and ratified by sovereign Member States that agreed to share a part of their sovereignty in the form of supranational cooperation. The Treaty of Lisbon does not change the European Union fundamentally; however, it introduces a few institutional reforms that will make the European Union stronger and its operation more efficient.

The decision points out that these goals are strongly related to the introduction of the so-called European Referendum or to the fact that the Charter of Fundamental Rights of the European Union has been elevated to the level of a treaty. However, the Treaty of Lisbon does not take away the independence of Hungary, it does not eliminate the rule of law and Hungary will continue in existence as a sovereign state.

Based on this reasoning, the petitions requesting the Constitutional Court to declare the Treaty of Lisbon unconstitutional were rejected by the Constitutional Court.

2.7. Integration of European Law

It is safe to claim that the law of the European Union has been integrated into Hungary's constitutional system without much difficulty. The earlier fears over lowering the level of protection for fundamental rights proved to be wrong; what is more, the level of protection improved. There were cases in the practice of the Constitutional Court when the law of the European Union helped overcome constitutional issues.

In one of these cases the Constitutional Court examined the statutory conditions of eligibility for maternity allowance.[33] The constitutionality issue was that if the mother was a foreign citizen but the father was a Hungarian citizen, no maternity allowance was paid, but if the mother was a Hungarian and the father a foreign citizen, the mother was eligible for maternity allowance. The problem was solved with reference to the law of the European Union as (i) citizens of any Member State of the European Union and of other states that are parties to the Agreement on the European Economic Area and (ii) also persons who have the same legal status for the purposes of the right of free movement and stay as the citizens of states that are parties to the Agreement on the European Economic Area by virtue of an international treaty between the European Community and its Member States and a state that is not a party to the Agreement on the European Economic Area are all eligible for this allowance. This means that the mother of foreign nationality may also receive this allowance and this fact (partly) solved the constitutionality issue.

[33] S. Decision 123/2010 (VII. 8.) AB, ABH 2010, 625.

In another similar case[34] the Constitutional Court examined the possibility of unconstitutional omission of legislative duty in connection with the family reunification rules of the Act on the entry of third-country nationals.[35] According to the petitioner, the state is responsible for the omission because in the relevant regulations life-partners do not qualify as family members (only spouses), and this means that the rules of migration-related family reunification are discriminatory on the basis of sexual orientation against same-sex partners (as they cannot get married). First, the Constitutional Court declared that the regulation of same-sex domestic partnerships and migration policy (which affects the entry of third-country nationals and is partly based on EU law) are two different issues. The procedure of the Constitutional Court concerns the latter issue. The Constitutional Court was of the opinion that the domestic legislation does not discriminate against same-sex couples but instead its objective was to avoid the loosening up of migration regulations to the extent that facilitated procedure for reunification would apply to life-partners. This legislative policy is not arbitrary especially as there is no requirement under EU law to regulate the issue differently.[36]

There was also the case in which the constitutionality issue was whether it was possible to appeal against the decision of a judge in suspending the procedure and turning to the Constitutional Court.[37] The same problem came up in connection with the possibility of appealing against a judge's decision of initiating a preliminary ruling procedure before the European Court of Justice. The European Court of Justice stated its opinion in the judgment of Case C-210/06; its findings became authoritative in deciding the constitutional issue in domestic law described above. The European Court of Justice interpreted Article 234 of the EC Treaty and found that the system of references for a preliminary ruling for uniform interpretation of Community law is based on a dialogue between one court and another (see section 91 of the Judgment) and each judge of the Member State has the right to initiate such proceedings. The autonomous jurisdiction of the court of first instance to make a reference to the Court would be called into question, if the appellate court could prevent the referring court from exercising the right to make a reference to the Court (section 95 of the Judgment).

The Constitutional Court used this as an analogy and stated that if the judge turns to the Constitutional Court and challenges the constitutionality of a law, it should be applied, no appeal should be allowed against the decision of referring the case to the Constitutional Court.

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34 Decision 68/E/2004 AB, ABK March 2011.

35 Act II of 2007.

36 Article 4(3) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification states in connection with unmarried partners that are bound to the sponsor by a registered partnership that the Member States have the right to decide if they treat such partners as spouses for the purposes of reunification. Therefore, when adopting migration regulations, the state is not bound by any rule under EU law according to which life-partners must be recognized as family members.

37 S. Decision 35/2011 (V.6.) AB, ABK 2011.

3. Closing thoughts

As noted above, the Constitutional Court has not rejected the possibility of reviewing the constitutionality neither the primary nor the secondary (i.e. requiring transposition) sources of EU law; instead, it specified certain conditions (see for instance the Treaty of Lisbon case, the "sugar case" and the "firearm case"). The Constitutional Court is citing EU law and case-law more and more often and in a number of cases it is a "point of reference" for deciding certain issues (for instance, in the case related to the prohibition of advertising tobacco products in addition to those mentioned above[38]). However, if the analysed problem is that Hungarian law contradicts a legal act of the European Union, the Constitutional Court consistently refuses to examine the case due to lack of competence. The first such decision was the one concerning the calculation of the period of on-call duty for doctors, however, the Constitutional Court also rejected petitions due to lack of competence when it was claimed that the termination of the employment of public servants and government officials[39] without explanation violated the Charter of Fundamental Rights of the European Union). It seems that the related powers and reference practice of the Constitutional Court are becoming more and more outlined.

The issues that have arisen so far show that the "fears" that EU law will lower the level of protection for fundamental rights in Hungary were unfounded. At this time it seems that the law of the European Union "weaves through" domestic law without serious concerns of constitutionality; what is more, in certain cases EU law can even be used to solve constitutionality problems.

[38] Decision 23/2010 (III. 4.) AB, ABH 2010, 101

[39] S. Decision 8/2011 (II. 8.) AB and Decision 29/2011 (IV. 7.) AB.