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I. Introduction

The establishment of the European Union was motivated by the strong desire for peace among the peoples of Europe, following the devastating events of the 20th century. It was deemed practical to maintain peace in the continent by controlling the use of raw materials as a shared resource to prevent any state from building up its military capabilities unnoticed. Additionally, the integration of national economies into a single market was believed to create a long-lasting interest in maintaining peace among Member States.

The idea behind the European Union was not novel in the sense that the League of Nations, founded in 1920, was the first intergovernmental organisation with the goal of maintaining peace among its members. The League of Nations, however, proved ineffective to achieve this aim, mostly owing to its intergovernmental nature, that merely relied on public international law. Recognizing this crucial shortcoming, in the Schuman Declaration of 1950, Jean Monnet proposed a system of institutions that would be partly supranational, capable of passing legislation that would be entirely binding on all participating states. Thus, the predecessor of the European Union, the European Coal and Steel Community was endowed with such an institutional framework that reached beyond the traditional organisational setup of international organisations.

As it originates in its institutional setup, the law of the European Union necessarily bears the unique features of its legislature. To understand the core features of European Union law, its drive for effectiveness should be borne in mind. Union law aims to differentiate itself from 'ordinary' public international law. It has done so by granting itself autonomy, direct effect, and supremacy. Being autonomous compared to national and international law, directly effective in the Member States and supreme over national law, the Union law constitutes a *sui generis* legal system. Uniquely, instead of originating from the Treaties, all these notions were developed in the case law of the Court of Justice of the European Union ("CJEU"), which naturally induced frictions between the Union institutions and those of Member States, most notably the national constitutional courts.

The legal conflicts between the CJEU and national constitutional courts continue to this day. Recent judgments by several constitutional courts have highlighted that some Member States are still reluctant to accept the CJEU's interpretation of Union law having unconditional primacy over their national law. This is happening during a sensitive period in the history of the integration, as the ongoing debate on the rule of law, the impacts of the COVID-19 pandemic, and the challenges posed by the Russo-Ukrainian war exacerbate the already existing tensions within the Union. The objective of this paper is to examine the concept and evolution of the primacy of Union law by comparing the perspective of the CJEU with that of the Hungarian Constitutional Court. Firstly, the CJEU's perspective will be introduced, followed by the presentation of the influential views of the German Federal Constitutional Court. Finally, the paper will comprehensively present the evolution of the Hungarian Constitutional Court's stance on the matter, culminating in the implications that can be inferred.

II. Union law versus public international law

First and foremost, it is important to set out that the European Union was also established as an international organisation: it was founded by sovereign states through 'classic' international treaties.[1] However, this observation only applies to the foundation of the Union, as its continuously evolving supranational features prevent it from being categorized as an ordinary international organisation. On the other hand, since the Union cannot be classified neither as a federation nor a sovereign state, the term *'sui generis'* supranational organisation is an accurate, yet relatively vague description for its unique structure.[2] This applies equally to the legal system of the Union, which the CJEU captures as an autonomous legal order distinct from international law.[3] This destiny of being unique to other international organisations, and the CJEU's views on the role of Union law is essential to understanding the concept of supremacy.[4]

Thus, to understand what Union law is, one should first examine what it distinguishes itself from: public international law. International law is often criticized for being ineffective and unenforceable, and it undoubtedly suffers from various shortcomings. Firstly, there is not a single global governance, no international organisation that can be seen as a centralised legislature entrusted with the adoption of international law. This is due to the fact that classic subjects of international law are sovereign political entities, i.e., the states.[5] Because of this feature, international law is also known as the 'Law of Nations', while others, such as Austin, questioned its classification as 'law' and suggested that it should be referred to as 'ethics' instead.[6] Additionally, since all sovereign states have equal say on the international stage, decisions are mostly made on a consensual basis in most international organisations. The requirement for unanimity undoubtedly slows down the decision-making process.

The decentralised nature of public international law leads to other handicaps as well. Besides the lack of a central legislature, there is not a single international court either with compulsory jurisdiction over all states. This is owing to a core principle of international law, namely that *par in parem non habet imperium*. Consequently, Article 36(1) of the Statute of the International Court of Justice ("ICJ") only provides for a voluntary jurisdiction: the ICJ is only entitled to proceed if all parties accepted its jurisdiction on the respective matter. If a concerned party does not submit to its jurisdiction, the ICJ cannot rule on the question referred.

In addition to the absence of a central court, the enforceability of international law is also quite insufficient. The problem arises once again from the fact that sovereign states should not interfere with one another in such a manner, and there is no international institutional framework that can act as an enforcement authority. This issue is closely related to the range of

[1] Pierre-Marie Dupuy, *L'unité de l'ordre juridique international* (M. Nijhoff 2003) 438
[2] William Phelan, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime.' (2012) 14(3) International Studies Review 367
[3] Anne Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 German Yearbook of International Law 9
[4] The terms 'primacy' and 'supremacy' of Union law will be used parallelly in this paper.
[5] Tamás Kende et al., *Nemzetközi jog* (Wolters Kluwer 2018) 52
[6] John Austin, 'Lectures on Jurisprudence: Or, The Philosophy of Positive Law' (The Lawbook Exchange 1885) vol 2, 593

possible sanctions, which is significantly less sophisticated in public international law compared to national legal systems. According to Weber's definition, a normative order can be considered a legal system *'if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about a compliance or avenge violation'*.[7] Since public international law does not seem to meet this definition, it may be inferred that it could be considered a conventional order rather than a legal one according to the Weberian terms. Scott explicitly stated that the lack of sanctions in international law leads to a system where '*the principle of right and justice cannot prevail'*.[8] Of course, there are certainly some sanctions that can be applied today in international disputes, but they are primarily of a political and diplomatic nature.

Without going into the further presentation of the basics of public international law, it is already apparent from the above that public international law can hardly be regarded as an effective and swift legal system. Its inherent nature simply prevents it from becoming similar to the national legal systems. In order to be an effective legal system, Union law wants to prevent these shortcomings and tried to differentiate itself from ordinary public international law from the early stages of the integration. Consequently, the CJEU thus developed three fundamental, interdependent concepts of Union law: autonomy, direct effect, and supremacy, which will be shortly presented below. Autonomy and direct effect will be discussed together, while the principle of supremacy will be addressed in a separate section.

[7] Max Weber, 'Economy and Society: An Outline of Interpretive Sociology' (Guenter Roth and Ckus Wittich eds, University of California Press 1978)
[8] James B. Scott, 'The Legal Nature of International Law' (1905) 5(2) Columbia Law Review, 148

III. The concepts of autonomy and direct effect

The three core features of Union law, namely autonomy, direct effect, and supremacy are all essential to establish its status as a genuine legal order. Autonomy, however, may be captured as the most fundamental among them, forming the basis of how Union law perceives itself. On the one hand, despite being a derived and constituted legal order, Union law claims complete autonomy from the laws of its creators – the Member States. It has been argued that even though the founding Treaties do not amount to a classic constitution, from the perspective of the Union, their conclusion can be seen as a *creatio ex nihilo*, equal to a creation of a constitution without precedents.[9] The question whether founding Member States possessed a constituent power of this degree is disputed, as will be illuminated by judgments of the German Federal Constitutional Court. As the founding Treaties do not spell out the autonomy of Union law, it was for the CJEU to develop such concept, and it did so in its early case law.

The principle of autonomy is rooted in the landmark *Van Gend en Loos* judgment, in which the claimant company wanted to invoke a provision of the Treaty of Rome against the increase of the customs duty by the Netherlands on a product from West Germany. Although this judgment is mostly known as the basis of direct effect – as explained below –, the CJEU also declared in *Van Gend en Loos* that Union (then Community) law constitutes *a 'new legal order of international law'*.[10] This was the first time that the CJEU differentiated Union law from public international law. It should be noted that although in the judgment the CJEU referred to Union law as a new legal order of international law, this terminology was subsequently refined in *Costa v E.N.E.L.*[11], which described Union law as an autonomous legal system.[12] This shift in language is quite significant, as it demonstrates that the principle of autonomy provides Union law with independence not only from international law, but also from national law. Therefore, the CJEU declared that Union law enjoys autonomy from both international and national law. Even decades later, in its Opinion on the provisional establishment of the European Economic Area, the CJEU specifically safeguarded the *'autonomy of the Community legal order'* against the potential negative effects on it of the proposed EEA Court.[13]

The CJEU remained consistent in its position on the principle of autonomy also in the new millennium. Reaffirming the wide scope of autonomy, it has held that *"an international agreement cannot affect the autonomy of the Community legal system"*.[14] This formulation accords Union law with supremacy over international agreements, compelling Member States to disapply the provisions of international agreements that contradict Union law. It is worth mentioning that the absolute autonomy claim of Union law might be overboard, as some argue that Union law can declare its own autonomy – and only within certain limits – on the basis of international law, therefore complete independence from it may delegitimise these

[9] Theodor Schilling, 'The autonomy of the community legal order: An analysis of possible foundations (1996) 37(2) Harvard International Law Journal 389
[10] Case 26/62 *van Gend & Loos v Netherlands Inland Revenue Administration* [1963] EU:C:1963:1
[11] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] EU:C:1964:66
[12] Paul Gragl and Violeta Moreno-Lax, 'Introduction: Beyond Monism, Dualism, Pluralism' (2016) 35(1) Yearbook of European Law 461
[13] Opinion 1/91 relating to the creation of the European Economic Area [1991] EU:C:1991:490
[14] Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] EU:C:2006:345, para 123

aspirations.[15] However, it is certain that the CJEU's claim of autonomy of Union law remains robust and is unlikely to change in the near future.

The principle of direct effect of Union law is of equal importance to autonomy. Similarly to the latter, the principle of direct effect was developed by the CJEU in its case law, often in tandem with autonomy. Besides the roots of autonomy, the concept of direct effect was also established in the *Van Gend en Loos* case, in which the CJEU found that articles of the Treaty of Rome could create individual rights for claimants that national courts were obliged to protect, making these provisions directly effective in the Member States. Since this landmark judgment, the broad definition of direct effect means that provisions of binding Union law that are sufficiently clear, precise, and unconditional can be invoked and relied on by individuals before national courts.[16]

It should be noted that there are various academic models that describe the relationship between direct effect and supremacy in Union law. Dougan distinguishes between two main models of primacy. The 'primacy' model asserts that supremacy of Union law, in and of itself, can order national courts to disregard national law that conflicts with EU law, regardless of whether it is directly applicable or not. Conversely, the 'trigger' model specifies the conditions of direct effect that must be met by the relevant provision of EU law to be accorded precedence over conflicting national law.[17] This conflict was resolved by the CJEU when it declared that *'reliance on a provision of a directive which is not sufficiently clear, precise and unconditional to confer on it direct effect may not, solely on the basis of EU law, lead to a provision of national law being disapplied by a court of a Member State".*[18] The CJEU, therefore, regarded direct effect of a respective provision of Union law a precondition to its supremacy over conflicting national law. As an exception to this finding, Lenaerts and Corthaut argue that there is no need for direct effect when a national provision is reviewed at Community level, neither if *'the validity of a norm of national law is assessed in light of a higher norm of EU law'*.[19] As a result, the effects of primacy at the national level seem to be generally dependent on the direct effect of the relevant piece of EU law. Nonetheless, this does not imply that EU law provisions lacking direct effect cannot benefit from their privileges stemming from the notion of supremacy, as will be discussed below.

It must be underlined that the supremacy of Union law is not just an abstract concept but has quite significant effect on the application of the laws of the Member States. Firstly, the CJEU established *inter alia* in *Popławski*, that the supremacy of Union law requires national courts to interpret national law in conformity with Union law to the greatest extent possible. As the CJEU found in *von Colson*, the duty of conform interpretation also means that a national courts should apply national law in light of the aims of directives that prescribe obligations on the Member

[15] Schilling (1996), 409
[16] Paul Craig and Gráinne De Búrca, *EU LAW. Text, Cases, and Materials* (7th edn, Oxford 2020) 217
[17] Michael Doughan, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy' (2007) 44(4) CMLRev 931
[18] Case C-573/17 *Popławski* [2019] EU:C:2019:530, para 67
[19] Koean Lenaerts and Tim Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law' (2006) 31(3) E.L. Rev, 287

States.[20] The implications of the duty of conform interpretation can be so far-reaching that it may even require courts to set aside conflicting national laws, that cannot be aligned with Union law.[21] This important implication of primacy is rooted in the *Simmenthal* judgment, where the CJEU held that the principle of primacy requires national courts to *'set aside any provision of national law which may conflict'* with Union law.[22] The CJEU added that this power lies with all national courts, including constitutional and administrative courts regardless of their level in the national hierarchy. The judgment openly challenged Member States that previously authorized only their higher or constitutional courts to set aside national provisions. Finally, it should be noted that ultimately it is the concept of supremacy that grants individuals the right to seek compensation in cases where they have suffered damages due to the violation of Union law by Member States.[23]

However, it is important to note that the effects of supremacy culminating in setting aside confliction national law are not without any limitations. Firstly, it should be emphasized that no institution of the Union, including the CJEU, has the power to annul or invalidate national laws. This was confirmed in the *IN.CO.GE'90* judgment, where the CJEU rejected the Commission's argument that national laws found to be incompatible with Union law would be rendered non-existent.[24] Secondly, the CJEU has recognized that final judicial decisions that have the power of *res judicata* constitute exceptions to the general obligation to be set aside in a possible conflict with Union law.[25]

[20] Case 14/83 *von Colson* [1984] EU:C:1984:153
[21] Case C-573/17 *Popławski* [2019] EU:C:2019:530, paras 72-78
[22] Case 106/77 *Simmenthal* [1978] EU:C:1978:49
[23] Case C-573/17 *Popławski* [2019] EU:C:2019:530, para 57
[24] Case C-10-22/97 *IN.CO.GE'90* [1998] EU:C:1998:498
[25] Case C- 234/04 *Kapferer* [2006] EU:C:2006:178

IV. Supremacy, but with certain limits - The jurisprudence of the German Federal Constitutional Court

The CJEU's case-law establishing the supremacy of Union law was heavily influenced by the decisions of the German Federal Constitutional Court ("BVerfG"). The basis for Germany's influence on the concept of the supremacy of Union law goes beyond its status as an original signatory to the Treaty of Rome and its significant economic influence in Europe. It is also supported by the clear, consistent, and precisely articulated judgments of the BVerfG. Legal scholars distinguish between three doctrines developed by the BVerfG to set limits on the ultimate supremacy claim of Union law: the fundamental rights lock, the competence lock, and the identity lock.[26] Each of these doctrines will be summarized below. It should be noted at the outset, however, that Germany generally recognizes the primacy of Union law within the mentioned boundaries, as affirmed by the *Lütticke* decision of the BVerfG.[27]

Just as with any other Member State, the key to understand Germany's relation to the Union law lies in its constitution, the Basic Law. Article 23(1) thereof constitutes the legal basis Germany's participation in the Union: '*With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat'*. This provision already makes Germany's participation in the Union subject to certain conditions. The conditions are the principles encapsulated in the cited provision, which should be guaranteed by the Union on level similar to that of the Basic Law. It is not surprising, therefore, that these principles are generally the ones that are scrutinized by the BVerfG in Union acts when the issue of primacy is at question. Apart from this Europe-clause of the Basic Law, Article 24(1) thereof expressly endows Germany with the capacity of transferring sovereign powers to international organisations.

Before moving on to the analysis of the decisions of the BVerfG on the relationship between Union law and German law, Article 79(3) of the Basic Law should also be cited. This so-called eternity clause states, that *'amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible'*. This practically entails that the referred parts of the Basic Law can only be modified if the whole Basic Law is repealed and a new one is adopted. Article 1 of the Basic Law concerns human dignity, while Article 20 thereof declares that Germany is a democratic and social federal state. These provisions, therefore, occupy a prominent, untouchable position in the German legal system, which will also be apparent from the decisions presented below.

[26] Craig and De Búrca (2020) 318
[27] BVerfG, - 2 BvR 225/69

IV.1. The fundamental rights lock: The *Solange*-saga

The commencement of the legal wrestle between the CJEU and the BVerfG dates to the 1970s. In the *Internationale Handelsgesellschaft* case before the CJEU,[28] the applicant argued that Community legislation went contrary to the fundamental freedoms flowing from the right to property enshrined in the German Basic Law. Responding to the claim, in its judgment the CJEU expressly stated that *'the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure'*.[29] In its reasoning, the CJEU argued that the effectiveness of Community law would be hampered if its validity depended on national legal provisions of the Member States, even if the respective piece of legislation is a constitution. The CJEU's decision to prioritize Community law over national constitutions prompted the German Administrative Court to seek guidance from the BVerfG in this matter. In response, the BVerfG issued its renowned *Solange I* decision in 1974.[30]

The BVerfG approached the issue from the perspective of the German Basic Law. It contended that the part of the Basic Law establishing fundamental rights is an '*inalienable essential feature'* of Germany, forming a part of its constitutional structure. The BVerfG also highlighted that back then the Community lacked a catalogue of fundamental rights which could have guaranteed a level of fundamental rights protection similar to that of the Basic Law. The BVerfG, therefore, found that *'in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism'.*[31] On this basis, the ruling concluded that *'as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the German Constitution, the Constitutional Court will rule on the applicability of the relevant rule of Community law, in so far as it conflicts with one of the fundamental rights in the Constitution'*.[32]

The BVerfG's strict limitation on the precedence of Community law in Germany led to a heightened recognition of the need to safeguard fundamental rights at the Community level. The *Internationale Handelsgesellschaft* judgment already stated that *'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'*, and the subsequent direction of the jurisprudence of the CJEU urged the BVerfG to reconsider its approach formulated in Solange I. Eventually, in *Solange II*, the BVerfG held that *'so long*

[28] Case 11/70 *Internationale Handelsgesellschaft* [1970] EU:C:1970:114
[29] ibid, para 3
[30] BVerfGE 37, 271 2 BvL 52/71
[31] ibid, para 24
[32] Rudolf Geiger, 'EU Constitutionalism and the German Basic Law' (2005) 5(1A) Jean Monnet/Robert Schuman Paper Series, 2

as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law[…]'.[33]

It is important to underline that by *Solange II* the BVerfG did not waive its powers established by *Solange I* to assess Community legislation in light of fundamental rights enshrined in the Basic Law. On the other hand, it decided not to exercise this power as long as the Union guarantees an adequate level of fundamental rights protection.

IV.2. The *ultra vires* lock: *Maastricht* and *Honeywell*

In order to understand the second, competence or *ultra vires* lock of the BVerfG, the principle of conferral, a key concept governing the European Union must shortly be presented. Article 5(2) of the Treaty on the European Union[34] ("TEU") defines this principle by stating that *'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'.* It follows that once the Union oversteps its competences in legislation, it infringes this principle by acting outside its mandate, constituting an *ultra vires* action. That situation was examined in the *Maastricht* decision.[35] In that case, the BVerfG was called upon to rule on the compatibility of the Maastricht Treaty with the Basic Law. Although it established the compatibility, the BVerfG noted that it has a competence to examine whether the Union institutions overstepped their mandate enshrined in the Treaties.[36] Should the Union institutions act outside their mandate, those acts would not be binding on Germany, thus the BVerfG set up another limit to primacy of the Union law: that of the *ultra vires* acts.

In *Honeywell,* this finding was further refined and elaborated.[37] The BVerfG stated that '*ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences'*.[38] Therefore, only those acts that pose sufficiently serious, manifest breaches of the Union competences would be examined by the BVerfG as *ultra vires* acts. Furthermore, in such cases, the BVerfG will call upon the CJEU '*to interpret the Treaties,*

[33] BVerfGE 73, 339 2 BvR 197/83
[34] Consolidated version of the Treaty on European Union [2012] OJ C326/13
[35] BVerfGE 89, 155, 2 BvR 2134, 2159/92
[36] ibid, paras 47-49
[37] BVerfGE 2 BvR 2661/06
[38] ibid, Headnotes 1a)

as well as to rule on the validity and interpretation of the acts in question'[39]. By these additions, the BVerfG made it clear that it is not willing to apply the *ultra vires* limit without prior referral to the CJEU, and the limit would apply only in those cases where the gravity of the respective act justifies the action.

IV.3. The identity lock: *Lisbon*

Following the *Maastricht* decision, the BVerfG was also called upon to assess the compatibility of the German act promulgating the Lisbon Treaty with the Basic Law. The *Lisbon* decision firmly builds upon the findings of *Maastricht*, but also formulates a new limit to the supremacy of Union law: the constitutional identity of Germany.[40] In *Lisbon*, the BVerfG admits that the Basic Law grants powers to the legislature to participate in the European integration by the transfer of sovereignty, *'however, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility'*.[41] The Basic Law, however, does not empower German state organs to abandon the right of '*self-determination of the German people in the form of Germany's sovereignty'* in the transfer of competences. [42] As the BVerfG points out, Member States are still the masters of the Treaties, not granting the *Kompetenz-Kompetenz* (i.e., the competence to create competences) to the Union.[43] The BVerfG added that since the European Union is a derived legal order constituted by the Member States (and ultimately the peoples thereof), Union law *'establishes a supranational autonomy which undoubtedly makes considerable inroads into everyday political life but is always limited factually'*.[44] This limited nature of the Union law, therefore, is due to its derived nature, also encapsulated by the principle of conferral.

The protection of the core elements of German statehood also traces back to the eternity clause of the Basic Law, which conserves Germany as a democratic state.[45] As democracy is a core element of the German statehood protected by the eternity clause, German legislation can neither change it internally, nor circumvent it externally by transferring certain competences to the Union. Some of these core elements of statehood, the basics of a state's constitutional identity are enumerated in the decision as an exemplificative list ad categorized as follows. *'Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia , by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for*

[39] ibid, Headnotes 1b)
[40] BVerfGE 2 BvE 2/08
[41] ibid, para 226
[42] ibid, para 228
[43] ibid, para 150
[44] ibid, para 231
[45] ibid, para 216

example on family law, the school and education system and on dealing with religious communities (5)'.[46]

In other words, the heart of the (constitutional) identity lock is that the Union is merely a derived legal order, a constituted, not a constituent one. The constituent power lies with the peoples of the Member States, who, in case of Germany, constituted the Basic Law involving the eternity clause. This eternity clause *inter alia* protects Germany as a democratic state. In order to ensure that Germany functions as such, certain core elements of democratic statehood should be preserved at the national level, being intact by both national and foreign (Union) legislation.

It should also be mentioned here, that based on the logic presented in the previous paragraph, virtually all Union acts that infringe the constitutional identity limit are, *per se, ultra vires* as they lead to exercise of competences that, according to the eternity clause, could not have been transferred. Similarly, all *ultra vires* acts of the Union legislator necessarily infringe constitutional identity by exercising power that was not conferred upon it by the German legislator, thus circumventing the requirement of democratic statehood protected by the eternity clause. The connection between the constitutional identity lock and the fundamental rights lock is also straightforward since fundamental rights are also protected by the eternity clause. Thus, it can be concluded that regardless of the specific lock which they violate, the lack of supremacy of the respective Union acts will always be connected to their contradiction to the eternity clause of the German Basic Law.

IV.4. Honeywell in practice: the *OMT* decision

The *Honeywell*-doctrine was first applied in the *OMT* (Outright Monetary Transactions) decision, where the BVerfG was called upon to assess whether the European Central Bank ("ECB") overstepped its mandate[47] by launching a bound purchase policy that was at the same time economic and monetary in nature.[48] Applying the qualifications established in *Honeywell*, the BVerfG referred the question to the CJEU. In the referral,[49] the BVerfG already assessed that it would constitute '*a manifest and structurally significant transgression'* if CJEU were to find that the ECB overstepped its mandate by the OMT programme[50], satisfying therefore the criterion of *Honeywell*. It was noted in the academia that the tone of the referral was already quite assertive, as the BVerfG considered that the establishment of the *ultra vires* nature of the OMT programme would be '*probably successful'*.[51]

[46] ibid, para 252
[47] Articles 119, 123 and 127 of the Treaty on the Functioning of the European Union and of Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank [2012] OJ C326/230
[48] ECB Press release, 'Technical features of outright monetary transactions', (6 September 2012) <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 27 February 2022
[49] BVerfGE 2 BvR 2728/13
[50] ibid, para 38
[51] Vestert Borger, 'Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler' (2016) 53(1) CLMRev 155

When answering the referral, however, the CJEU held that the ECB was permitted *'to adopt a programme for the purchase of government bonds on secondary markets'* thus rejecting the *ultra vires* claim.[52] It is important to underline, that despite the judgment of CJEU regarding the OMT programme, the BVerfG could still have found it to be *ultra vires* based on its own assessment.[53] However, the BVerfG held that *'as long as the Court of Justice applies recognised methodological principles and does not act in a way that is objectively arbitrary'*[54] it has to respect its judicial development of the law. Consequently, the BVerfG accepted the reasoning of the CJEU. Another takeaway from the *OMT* decision to be noted is that the *ultra vires* review of the BVerfG could not only be conducted if the respective Union act form basis of actions by Germany[55], but also in respect of the inactivity of state organs.[56] In this case, however, the BVerfG accepted the CJEU's reasoning and did not find the OMT to be *ultra vires*.

IV.5. The first *ultra vires* finding of Germany: the *PSPP* decision

The Public Sector Asset Purchase Programme (PSPP)[57] was a monetary policy programme of the ECB to assure price stability. Just like in the case of *OMT*, the BVerfG was called upon to assess whether by launching said programme, the ECB overstepped its mandate. Among others, the petitioners claimed that the German Bundestag and the German Federal Government – by their inaction – violated their right to vote enshrined in Article 38(1) of the Basic Law. The BVerfG, following the *Honeywell*-principle once again, referred the matter to the CJEU.[58] Answering the preliminary reference of the BVerfG, the CJEU upheld the validity of ECB's programme.[59]

The essence of the *PSPP* judgment lies in the methodology of the proportionality assessment conducted by the CJEU.[60] Unlike in *OMT*, in *PSPP* the BVerfG criticised the CJEU for not carrying out a proper assessment of proportionality of the PSPP, which – according to the BVerfG – should consist of *'suitability (Geeignetheit), necessity (Erforderlichkeit) and appropriateness (Angemessenheit)'.*[61] The BVerfG considered that only this proportionality assessment mechanism would have been sufficient to distinguish between the economic and monetary elements of the PSPP.[62] The BVerfG drew the consequence that without a suitable proportionality test, '*it is not ascertainable that the ECB Governing Council did in fact consider and balance the effects that are inherent in and direct consequences of the PSPP',* by which the ECB decisions violated the principle of conferral and exceeded the competences set out in

[52] Case C-62/14 *Gauweiler* [2015] EU:C:2015:400
[53] Borger (2016) 155
[54] BVerfGE 2 BvR 2728/13, para 161
[55] ibid, para 23
[56] ibid, paras 46-54
[57] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme [2015] OJ L121/20, as amended by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 [2017] OJ L16/51
[58] [2017] OJ C402/11
[59] Case C-493/17 *Weiss* [2018] EU:C:2018:1000
[60] BVerfGE 2 BvR 859/15, 2 BvR 859/15, 2 BvR 859/15, 2 BvR 980/16
[61] ibid, para 125
[62] ibid, para 126

Article 127(1) of the Treaty on the Functioning of the European Union[63] ("TFEU").[64] As the violation of proportionality is structurally significant, the BVerfG found that ECB's acts constituted *ultra vires* decisions.[65] Moreover, it held that the interpretation of the Treaties should be comprehensible; otherwise they must be considered arbitrary, and '*if the Court of Justice of the European Union crosses that limit, its decisions are no longer covered by Article 19(1)'* of the TFEU.[66] As it lead to a *'structurally significant shift in the order of competences to the detriment of the Member States',*[67] the BVerfG found that the judgment of the CJEU in itself also amounted to an *ultra vires* act, entailing that it was not binding on Germany.[68] In the view of the BVerfG, the *ultra vires* judgment also entailed that German state authorities (including the Bundesbank) must have refrained from their implementation.[69]

The *PSPP* decision was therefore the first case in which the BVerfG held a Union act *ultra vires*. The BVerfG also found that the German Bundestag and the German Federal Government, by failing to take steps in clarifying whether the PSPP have satisfied the principle of proportionality violated the right to vote enshrined in Article 38(1) in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law.[70] It is to be noted, however, that the BVerfG did not require German state organs to actively terminate the PSPP immediately.[71] On the contrary, the BVerfG left an escape route for the ECB by providing it with a transitional period of three months to adopt new decisions using the 'proper' proportionality test to substantiate that the PSPP is carried out within the limits of the TFEU.[72] Although the BVerfG did not have jurisdiction over the ECB, the latter still chose to comply with the prescribed requirements within the transitional period.[73]

When giving its ruling in *PSPP*, the BVerfG partly built its findings on the *Lisbon* judgment. As presented above, public expenditure was mentioned in *Lisbon* as a core element of the statehood, therefore it is not surprising that Germany closely examined both the OMT and the PSPP programmes, that concerned monetary and economic powers. Hence in *PSPP*, the BVerfG noted that '*with a view to the principle of democracy enshrined in Art. 20(1) and (2) GG, it must inter alia be ensured that the German Bundestag retain for itself functions and powers of substantial political significance [...] and that it remain capable of exercising its overall budgetary responsibility [...]'*.[74]

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[63] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47
[64] ibid, para 177
[65] ibid, para 178
[66] ibid, Headnotes 1
[67] ibid, para 154
[68] ibid, para 179
[69] ibid, para 234
[70] ibid, para 116
[71] ibid, para 179
[72] ibid, para 235
[73] Miguel Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (*VerfBlog*, 6 May 2020) <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/> accessed 1 February 2022
[74] BVerfGE 2 BvR 859/15, 2 BvR 859/15, 2 BvR 859/15, 2 BvR 980/16, para 115

However, the coherence of the *PSPP* decision is disputed, and it was also questioned if the proportionality test (in any form) is a suitable tool to distinguish between economic and monetary policy, thus deciding on the division of competences.[75] Had the ECB not been willing to comply with the requirements of the BVerfG, a legal deadlock would have arisen in the conflict of the obligation of the German state organs not to implement an *ultra vires* act, and the Union institutions not recognising the *ultra vires* claim of the BVerfG on the basis of the supremacy of Union law, undermining mutual respect between the parties.[76] It was also pointed out that the wide interpretation given to German citizens' right to vote could form a basis for the BVerfG to review the proportionality of virtually all Union acts in the future, thus continuously threatening the supremacy of Union law.[77]

To conclude the above, Germany generally accepts the primacy of Union law, but only within the three limits developed by the BVerfG: that of fundamental rights, *ultra vires,* and constitutional identity.[78] It was illustrative that after the *Lisbon* decision Joseph Weiler described the BVerfG as a '*dog that barks but does not bite'*.[79] This sentence was attempted to be rebutted in *OMT*[80], but it was not until *PSPP* in 2020 when the BVerfG in fact found a Union act *ultra vires,* where it finally bit, but also let the ECB go by according it time to comply with its terms. As of now, the *PSPP* is the instance where the BVerfG and the CJEU got really close to a legal deadlock on the primacy of Union law. Only time will tell how the stance of the BVerfG towards Union law will evolve in the future.

[75] Toni Marzal, 'Is the BVerfG PSPP decision "simply not comprehensible"?' (*VerfBlog*, 9 May 2020) <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/> accessed 1 February 2022
[76] Nóra Chronowski, 'Fordulópont az európai bírói párbeszédben: a német Szövetségi Alkotmánybíróság PSPP-döntése' (2020) 13(2) Közjogi Szemle 74
[77] Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 986
[78] Craig and De Búrca (2020) 328
[79] Joseph Weiler, 'The 'Lisbon Urteil' and the Fast Food Culture' (2009) 20 EJIL 505
[80] Neils Petersen, 'Karlsruhe not only Barks, But Finally Bites – Some Remarks on the OMT Decision of the German Constitutional Court' (2014) 15 German Law Review 321

V. From friendly to critical? – The jurisprudence of the Hungarian Constitutional Court

Hungary became a Member State of the European Union on 1 May 2004, following a referendum with the result of 83,76 percent of the votes cast in support of the accession.[81] In nearly twenty years of membership, the Hungarian Constitutional Court ("AB") ruled on the allocation of powers and competences between the Union and Hungary on several occasions. While the AB judgments generally did not directly address the question of primacy as extensively as the rulings of the BVerfG, they did touch on this subject in a more subtle manner.

The evolution of the AB's approach to Union law can be better understood by considering it in light of the findings of Decision 53/1993. (X. 13.) AB on the Geneva Conventions. In this early decision the AB held that in the event of a conflict between the Constitution and an international agreement, the provisions of the Constitution should prevail, unless the international provisions can be interpreted in a way that is compatible with the Constitution. Some highlight that this strict approach of the AB is due to the fact that it wished to defend the democratic transformation of Hungary dated to 1989-90.[82] It follows from the decision that in determining the relationship between Union and national law, key importance may be attributed to the AB's view on the relationship between Union law and international law.

V.1. The ambiguity of the early practice: autonomy

Hungary's accession to the Union was based on Article 2/A of Act XX of 1949 on the Constitution of the Republic of Hungary. The first paragraph of Article 2/A declared that Hungary *'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 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union'*. Article 6(4) adds that 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'*.

However, the Europe-clause of Article 2/A was added to the Constitution as a result of a case before the AB. In its Decision 30/1998. (VI. 25.) AB, the AB was called upon to decide on the compatibility of certain provisions of the law promulgating the Europe Agreement[83] signed in Brussels on 16 December 1991 establishing an association between the Republic of Hungary and the European Communities and their Member States ("Europe Agreement") and the respective provisions of a Government Decree[84] ("Implementing Decree") providing the

[81] Results of the Hungarian referendum on the Union Accession, <https://static.valasztas.hu/nepszav03/hu/index.html> accessed 18 February 2022
[82] Nóra Balogh-Békési, 'Szuverenitásféltés és alkotmány' (2014) 57 MTA Law Working Papers
[83] Article 62(2) of Act I of 1994
[84] Article 1, first and second paragraphs and Article 6 of the Annex to Government Decree 230/1996 (XII. 26.)

implementing rules of Hungarian-EC Association Council Decision 2/96.[85] Among others, Article 62(1) and (2) of the Europe Agreement contained reference to the Union (back then: Community) competition rules, that are clearly internal legal provisions of the Union law mostly developed by the jurisprudence of the CJEU. The petitioner argued that by the application of directly applicable Community competition law, the Hungarian legal system would open itself up to automatically apply norms of an external legal order, which amounts to the 'unconstitutional transfer of legislative power, as a sovereign right, to another sovereign'.[86] The petitioner also argued the unconstitutionality of the Implementing Decree, tasking the Hungarian competition authority with the application of such competition rules. The AB recognized at the outset, that the petitioner's question concerned the applicability of Community competition rules in the national legal system, and specifically, whether they can be applied without being part of the body of national law. The AB declared that the competition provisions in the Europe Agreement should be assessed in two respects, (i) whether they are directly effective, and (ii) whether they are directly applicable in Hungary without any promulgation.

The AB found no direct effect of Article 62(1) and (2) of the Europe Agreement, as it contained no reference to private individuals. On the other hand, the AB found that the Hungarian competition authority was specifically tasked with taking said Community competition rules into account by the Implementing Decree. This entails that through the procedures of the competition authority, private individuals will be indirectly affected by Community competition law. As regards the direct applicability of Community competition rules, the AB held that not the Europe Agreement, but the Implementing Decree could form a legal basis for the Hungarian competition authority to apply such rules.

Answering the petition, the AB held that basis of its assessment is that Hungary was not a Member State in the time of the judgment, therefore, the referred competition law provisions of the Europe Agreement must be regarded as external law. The AB held that public legal norms which constitute the internal law of another legal order – in this case Community law – and on which Hungary has no influence in the absence of membership, cannot be applied by Hungarian law enforcement bodies under the Constitution, without prejudice to sovereignty in the absence a specific constitutional authorization.[87] The directly applicable and effective competition law provisions contained in the Europe Agreement were not attributable to the legislation of the ultimate national legislator, the Hungarian National Assembly, thus their application would have penetrated the national legal system, infringing principles of sovereignty and territoriality enshrined in the Constitution. In the view of the AB, the Hungarian National Assembly could not – in the absence of a constitutional authorization – have adopted laws tasking national bodies to apply Community law principles capable of such effects, as it would circumvent the Constitution. Therefore, the provisions of the Implementing Decree tasking the Hungarian competition authority with the application of Community competition law (in their ever-changing stance) was declared unconstitutional. However, the AB made it clear that Hungary

[85] Decision No 2/96 of the Association Council [1996] OJ L295/29
[86] Decision 30/1998. (VI. 25.) AB, para I. 1
[87] ibid, para V. 4

was still bound by the Association Council Decision, therefore called upon the legislator to ensure the constitutionality of the promulgating legislation. Hence, the Constitution was amended by the Europe-clause in 2002, establishing a constitutional basis for Hungary's accession to the Union.[88]

Following Hungary's accession to the Union, the AB adopted a cautious, Europe-friendly approach, primarily by refraining from the evaluation of conformity of Union law with national legislation. The exact categorization of Union law, however, was not entirely clear in the early practice of the AB upon the accession. In Decision 1053/E/2005. AB, the petitioner asked the AB to assess Hungarian gambling laws considering their conformity with Union law, however, by referring to them as international law. The AB declared that – even though it had competence to assess the compatibility of national legislation in light of international agreements – it is not willing to regard the Treaties as they were international agreements despite their origins of international law. By this decision, the AB declared that Union law is different from international law, although not as directly as the CJEU did so in *Van Gend en Loos*. In a concurring opinion to the Decision, judge Péter Kovács held that despite its origin of international law, Community law must be regarded standing closer to national law rather than international law due to its *sui generis* nature consisting in the concepts of primacy and direct applicability. Kovács added that since only the CJEU has the competence to interpret the Treaties or secondary legislation, only an imminent threat to a constitutional right could justify the national assessment of whether the legislator has breached its obligations under Community law by the AB. Kovács concluded that as the CJEU has the sole jurisdiction to interpret Union law, the AB would act *ultra vires* if it were to interpret the obligations of Member States prescribed by Union law.

The approach of Decision 1053/E/2005. AB was reaffirmed in Decision 72/2006. (XII. 15.) AB where the AB wandered even further. It declared that in addition to the fact that Union law cannot be regarded as international law, as Community law, it forms part of the national body of law. Therefore, both Decision 1053/E/2005. AB and 72/2006. (XII. 15.) AB reaffirmed that the AB regarded Union law separate from public international law. However, by referring to it as part of the national law, the latter decision could contradict the ultimate autonomy claim of Union law stating that it is neither international nor national law. In his concurring opinion, judge Péter Kovács softened this approach by reiterating his former views that Union law is intertwined with national law and reaffirms that the final dispute settlement forum for under Union law is the CJEU, and not the national constitutional courts. Kovács also attempted to touch on the issue of primacy by stating that regulations (and certain directives) are sub-constitutional sources of law equal to national acts, however, they should be accorded precedence over national acts (let alone national decrees) in cases of conflict.

The above decisions demonstrate that already in its early practice, the AB accepted the concept that Union law enjoys autonomy from international law, and since it is in the CJEU's competence to interpret Union law, interpretation by the AB would constitute an *ultra vires* act. However, the AB does not deny the international legal origins of primary Union law, and as

[88] Act LXI of 2002

such, it held the supervision of their promulgating acts possible, adding that in case of a conflict, the legislator must ensure the constitutionality of the international law with internal law, therefore the unconstitutionality of the promulgating act does not affect Hungary's obligations under international law. Although the AB was mostly consistent in separating Union law from international law, on one occasion it confused the direct applicability of Union law with the monist principle, which produces a similar effect in connection with international law.[89] Mixed agreements, on the other hand, conducted jointly by the Union and its Member States were regarded as ordinary international agreements by the AB.[90] As regards primacy, on a theoretical level AB judges also declared the precedence of Union law in a possible conflict with national law.

V.2. Change in the tone: limitations on the transfer of competences

A gradual change of tone in the AB decisions are traceable staring from 2010. Decision 143/2010. (VII. 14.) AB already represents a modest confrontation with the spirit of the previous decisions. In the decision, the petitioner sought the annulment of the national act promulgating the Lisbon Treaty[91], as in his view, *inter alia* the Union's legal personality and the rules of terminating the membership would eliminate Hungary's independent statehood. The AB firstly reiterates it previous findings about Union law not being ordinary international law, and that the interpretation of Union law is the sole discretion of the CJEU. Although the AB cites certain provisions of the Lisbon Treaty in its decision to refute the petitioner's claims and establish that the provisions of the Lisbon Treaty do not endanger national sovereignty, it does not interpret the provisions.

Judge Péter Paczolay adds in his concurring opinion that the AB does have competence to examine the promulgating acts of Union Treaties, but it is limited in time, as it is only possible between the adoption of such acts and the entry into force of the Treaty itself. Upon its entry into force, the Treaty becomes independent of the promulgating act, becomes Union law of *sui generis* nature, and commences its autonomous application in national law, rendering it impossible to be subject to the AB's examination. Although this means that the AB retains the right to assess the conformity of Treaty promulgating acts in their entirety (therefore the provisions of soon-to-be Union law) until the entry into force of such Treaties, even if constitutional conflicts were found, the AB would merely call upon the National Assembly to remedy the contradiction. Nevertheless, Paczolay adds that the Constitution merely allows for the participation in the Union until its framework is laid down in international treaties based on intergovernmental cooperation.

As regards supremacy, in his concurring opinion judge László Trócsányi notes that by adding the Europe-clause to the Constitution, Hungary recognized the supremacy of Union law. This recognition, however, is not unlimited. Firstly, from the wording of the Constitution it is clear that (i) only *'certain constitutional powers'* could be exercised jointly with the other Member States, (ii) merely to the *'extent necessary'*. Thus, the transfer of sovereignty has two

[89] Decision 4/1997. (I. 22.) AB
[90] Decision 32/2008. (III. 12.) AB
[91] Act CLXVIII of 2007

constitutional limits: acts that do not have a legal basis in the Treaties, thus *ultra vires*, are prohibited, and the joint exercise of powers may only cover competences that the Hungarian public authorities are entitled to under the Constitution. As a third limit, Trócsányi notes that upon accession to the Union, Member States retained the fundamental principles of their constitutions, which are essential for the maintenance of statehood and constitutional identity. The fact that Hungary retains essential parts of their sovereignty is apparent from the wording of Article 2 of the Constitution, stating that Hungary is an *'independent, democratic constitutional state'*.

It is not the decision itself, but the contents of the concurring opinions where the slight change of the tone compared to the previous decisions can be traced. The judges of the AB undertook to emphasize the limits on the transfer of sovereignty to the Union set by the Constitution and indirectly describe an *ultra vires* lock. In addition, Trócsányi's reasoning about the notion of the essence of statehood – resembling that of the BVerfG – can also be seen as a step towards a constitutional identity lock as well.

V.3. (Re)Inventing the three locks

In 2011, Hungary replaced its Constitution with a new Fundamental Law, which entered into force in 2012. Article E) of the Fundamental Law took on the role of the former Article 2A of the Constitution, establishing the new Europe-clause. The wording of this clause closely resembles its predecessor, emphasizing that 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'*.[92] Paragraph (2) thereof states that '*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'*. In order to reflect the binding nature of Union acts, paragraph (3) of Article E) reaffirms that *'the law of the European Union may, within the framework set out in paragraph (2), lay down generally binding rules of conduct'*.

Despite the fact that the former AB decisions regarding the transfer of powers to the Union based under the former Constitution were held to continue to apply,[93] the adoption of the Fundamental Law induced a shift towards the position represented by Trócsányi's opinion in Decision 143/2010. (VII. 14.) AB. Inspired by the decisions of BVerfG and building on the legacy of Decision 143/2010. (VII. 14.) AB, in Decision 22/2016. (XII. 5.) AB, the AB expressly develops all three locks on the joint exercise of competences with the Union that the BVerfG developed in respect to the supremacy of Union law. The background to the decision was a Council Decision setting up the regime of allocation of asylum seekers between Member States.[94] The petitioner sought the compatibility of such collective resettlement of asylum seekers without prior individual control of their background with Article XIV(1) of the

[92] Paragraph (1) of Article E) of the Fundamental Law
[93] Decision 22/2012. (V. 11.) AB
[94] Council Decision (EU) 1601/2015 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80

Fundamental Law on the prohibition of collective expulsion. The petitioner also asked if the Hungarian authorities were obliged to execute Union decisions that go against fundamental rights enshrined in the Basic Law.

In the decision, the AB starts its reasoning by underlining the findings of the BVerfG, that irrespective of the autonomy and supremacy claims of Union law, as the contracting parties of the Treaties are the Member States, *'it is their national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State's own law'*.[95] Nevertheless, it also seems that the AB put an end to its unclear approach as regards autonomy as it acknowledged the CJEU's full autonomy claim of Union law.

After citing the relevant decisions of various European constitutional courts, the AB pointed out that since the protection of fundamental rights is the primary obligation of the state – as enshrined in Article I(1) of the Fundamental Law – all other state functions must be secondary to this obligation. It follows that the AB must ensure – as an *ultima ratio* – that the joint exercise of powers under Article E(2) of the Fundamental Law does not entail a violation of human dignity or the essential content of other fundamental rights. This forms the basis of the AB's power to assess the joint exercise of competences with the Union with respect to the protection of fundamental rights.[96] Based on Article E(2) of the Fundamental Law and Article 4(2) TEU, the AB identifies two other key limitations on the joint exercise of competences between the Union and Hungary: '*on the one hand the joint exercising of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)'*.[97] By these additions, the AB reinvented all three locks that the BVerfG had established before. The AB highlighted, however, that the subject of the sovereignty and identity controls are not directly the Union acts, but the joint exercise of competences itself, therefore proceeds to interpret Article E(2) of the Fundamental Law instead of Union law.

As regards the sovereignty lock, the AB pointed out that as long as Hungary is an independent, democratic state, where the source of the power comes from the people, Article E) of the Fundamental Law cannot infringe these core features. In this respect, the AB added that Hungary did not renounce its sovereignty by joining the European Union, however, it decided to exercise certain powers jointly with the other Member States. The joint exercise of powers, however, does not mean that the people of Hungary would renounce their ultimate control over public powers. It follows that Hungary retained all those competences that it does not share with the Union, thus in any further transfer of competences, the notion of retained sovereignty must be presumed (presumption of retained sovereignty).[98]

Concerning the constitutional identity, the AB underlines that certain values of the Fundamental Law (separation of powers, Hungary as a republic, fundamental rights etc.) are core principles on which the whole national legal system lies. The AB notes that constitutional identity is not

[95] Decision 22/2016. (XII. 5.) AB, para 32
[96] ibid, para 49
[97] ibid, para 54
[98] ibid, para 60

established, only acknowledged by the Fundamental Law. Therefore, constitutional identity cannot be renounced even by an international treaty; only the definitive cessation of sovereignty and independent statehood can deprive Hungary of it. The AB infers, that as long as Hungary has its sovereignty, the protection of constitutional identity remains the task of the AB. In the given case, the AB concluded that if it is likely that the joint exercise of powers based on Article E(2) of the Fundamental Law infringes (i) human dignity or other fundamental rights, (ii) the sovereignty of Hungary (including the scope of the powers conferred on it) or (iii) its constitutional identity, the AB may, in the exercise of its powers, examine whether the alleged infringement is in fact present.[99]

It is clear that this is a much bolder posture compared to the behaviour of the AB in the earlier cases concerning its competencies regarding Union acts. It is to be noted, however, that the AB only pronounced possible to examine the (i) jointly exercised competences, (ii) where they result in the violation of human dignity, the essential content of any other fundamental right or the sovereignty and the constitutional self-identity, and (iii) only as an *ultima ratio*, within a constitutional dialogue. Regarding the first criterion, Chronowski notes that the AB's competences are be narrowed down to the examination of the national side of the jointly exercised competences (for example the national execution or implementation of Union law).[100] Therefore, although the AB established possible limitations of the transfer of sovereignty, it rendered these locks to be applicable primarily to the national side of the joint exercise of competences, rather than considering them bases for review of certain Union acts in force. In addition, these locks do not call into question the primacy and applicability of Union law.

It is also worthy to mention, that as regards the petitioner's *ultra vires* claim, the AB made it clear that the examination of that question is the task of the National Assembly and the Government in the respective procedures laid down in the Treaties, not that of the AB.[101] It is reiterated in the AB's reasoning that it *'shall not comment on the validity, invalidity or the primacy of application'* of Union acts, as it is not the subject of its controls.[102] By these qualifications, the AB does not seem to claim such competences to itself as the BVerfG does.

Several concurring opinions were attached to this AB decision. Judge Egon Dienes-Ohm underlined that any assessment of *ultra vires* claims by the AB (aimed at the promulgating act) is limited to the time when the respective Union act has not entered into force. Upon their entry into force, any dispute over Union acts, including interpretations claiming that it exceeds the conferred competences, falls exclusively within the competence of the CJEU.[103] He added that the role of constitutional or apex courts in *ex-post ultra vires* control is narrowed down to their capacity to ask for a preliminary reference, or informal dialogues. He firmly stated that the AB cannot review acts adopted in the context of Union legislation. He also adds that in his view,

[99] ibid, para 69
[100] Nóra Chronowski, 'Az Európai Unió jogának viszonya a magyar joggal' (2019) Internetes Jogtudományi Enciklopédia
[101] Decision 22/2012. (V. 11.) AB, para 50
[102] ibid, para 56
[103] ibid, para 76

the sovereignty and identity locks established by the decision may merely be applicable upon transferring further competences to the Union.

The question may arise as to how serious the established limitations are, if they are not applicable to Union acts in force. Judge István Stumpf notes that if the AB's competence is truly limited to the examination of the joint exercise of competences based on Article E) of the Fundamental Law, an infringement is unlikely to be found, as the transfer of sovereignty is allowed by the very Article. In that regard Stumpf underlines that the AB should elaborate on the issue that the examination of the joint exercise of competencies may indirectly lead to a decision on the *ultra vires* nature of certain Union acts, in which case the AB should firstly call upon the CJEU for interpretation via a preliminary reference.[104]

Based on the findings of Decision 22/2016. (XII. 5.) AB, in 2018, Article E(2) of the Fundamental Law was amended as follows: *'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'*. This amendment codified the fundamental right lock, the constitutional identity lock and the sovereignty lock at the same time. The amendment was subject to an infringement procedure by the Commission, in relation to which the Hungarian justice minister filed a petition to the AB, that resulted in Decision 2/2019. (III. 5.) AB. In the Decision, the AB firstly noted that *'the exercising of powers through the institutions of the European Union shall not exceed the extent necessary that results from the international treaty and it shall not be aimed at more competence than Hungary otherwise possesses on the basis of the Fundamental Law'*.[105] Although the AB highlights the *sui generis* nature of Union law[106], especially that it enjoys primacy over national law, it also declares that *'the foundation of the applicability of Union law in Hungary is Article E) of the Fundamental Law'*.[107] In other words, the application of Union law – hence its inherent unique features – is based on the sovereignty-transfer clause of the Basic Fundamental in Hungary. This implies that the limits set out by Article E) of the Fundamental Law affect the applicability of Union law in Hungary. It is important to note that all these findings do not deny that the special features of Union law, they merely appoint the sovereignty-transfer clause of the Fundamental Law as the vehicle of applicability of Union law in Hungary.

V.4. Incomplete joint exercise of competences: Borrowing powers from the Union?

A considerable amount of tension preceded Decision 32/2021. (XII. 20.) AB, since it was published shortly after the contentious judgment of K 3/21 of the Polish Constitutional Tribunal, where Article 19(1) TEU was found to be in violation of the Polish constitution, resulting in the denial of the concept of primacy of Union law in Poland. The background of the subsequent Hungarian decision was a judgment of the CJEU regarding the establishment of

[104] ibid, para 103
[105] Decision 22/2016. (XII. 5.) AB, para 17
[106] ibid, para 19
[107] ibid, para 25

'transit zones' on the Hungarian border during the migrant crisis.[108] The Hungarian justice minister sought to determine whether the obligations imposed by that judgment – which may result in foreign nationals staying 'illegally' on the territory of Hungary for an indefinite period – are compatible with the Fundamental Law. In addition, the petitioner claimed that the given situation was a result of the 'incomplete joint exercise of competences' since the readmission agreements between the Union and third countries were not sufficiently executed.[109]

It is important to note that the AB did not assess the findings of the CJEU's judgment and choose to answer the petition by interpreting Article E) of the Fundamental Law. The AB also did not assess if the exercise of joint competences in this case was in fact incomplete. The AB reaffirmed its fundamental right lock by stating that the exercise of joint powers through the institutions of the Union, as authorized by Article E) of the Fundamental Law, must not lead, directly or indirectly, to a lower level of protection of fundamental rights than that required by the Fundamental Law.[110] In this respect, the AB found that in case of an incomplete exercise of joint competences as defined in Article E(2) of the Fundamental Law, the indefinite stay of foreign nationals on the territory of Hungary without democratic authorization may violate the right to self-identity and self-determination of the people living in Hungary, deriving from their human dignity.[111] According to the AB, in such a case, Hungary is obliged to ensure the protection of this fundamental right of its citizens. Therefore, in addition to the fact that the AB did not assess whether the fundamental rights were in fact endangered, it also did not render Union law – which application was submitted to be incomplete – inapplicable in such theoretic situation, merely called upon the State to remedy the issue.

Subsequently, the AB assessed the theoretic consequences of the incompleteness of the joint exercise of powers. The AB specifically examined whether the joint exercise of certain powers under Article E(2) of the Fundamental Law creates a competence or an obligation for Hungary to exercise such powers on its own under certain conditions.[112] The AB stated that the presumption of retained sovereignty also covers exceptional situations where, due to the deficiency of jointly exercising the competences, *'securing the fundamental rights affected by the relevant competence or competences as well as the performance of the obligations of the State are impaired'*.[113] The AB therefore ruled that '*where the exercise of joint competence with the European Union is incomplete, Hungary is entitled, in accordance with the presumption of retained sovereignty, to exercise the non-exclusive field of competence of the EU, until the institutions of the Union take the measures necessary to ensure the effective enforcement of the joint exercising of competences'*.[114] However, the AB established strict limits to the temporary national execution of joint competences. Firstly, that Hungary is only entitled to act within the incompletely exercised joint competence as long as the Union institutions do not put in place the necessary safeguards to ensure the effective application of

[108] Case C-808/18 *Commission v Hungary* [2020] EU:C:2020:1029
[109] Decision 32/2021. (XII. 20.) AB, para 46
[110] ibid, para 47
[111] ibid, 51
[112] ibid, 62
[113] ibid, 79
[114] ibid, 85

Union law. Secondly Hungary can only exercise the respective competence in light of the provisions of Treaties to ensure that they are fulfilled. Thirdly, before starting to exercise the respective competence, Hungary must call upon the Union institutions for action.[115]

In spite of this bold finding, the AB refused to answer the implied question on the primacy of the Fundamental Law over Union acts. It did declare, however, that '*Hungary's inalienable right to dispose of its territorial unity, population, form of government and state structure is part of its constitutional identity'*[116], thus constitute a limit to the joint exercise of competences under the constitutional identity lock developed in Decision 22/2016. (XII. 5.) AB. Nevertheless, the effects of the AB's finding that Hungary may – subject to the limits listed above – substitute the Union institutions in exercising incompletely executed shared competences are yet to be seen. Naturally, this bold concept should be used – if ever – with a great amount of caution, as it could equally develop into a method aimed at guaranteeing the effective application of Union law but could also be seen as grave detriment to principle of conferral.

V.5. A new power for the AB: decision on a preliminary European Union interpretation opinion

As of December 2023, the powers of the AB were extended by an additional competence: decision on a preliminary European Union interpretation opinion.[117] This procedure allows for the CJEU to turn to the AB for a preliminary opinion if the respective case pending before the CJEU concerns any of the following topics regarding Hungary: (i) constitutional system, including basic state functions; (ii) constitutional order, requirements, and traditions; (iii) national identity; (iv) sovereignty; (v) Hungary's unalienable right to decide over its population; and (vi) the protection of fundamental rights and liberties, and human dignity protected by the Fundamental Law.

The reasoning of the amendment underlines that within this power, the AB may only provide its opinion in an auxiliary and preparatory capacity, providing interpretation to the CJEU, where such an opinion is called for. It is noteworthy that such modification was part of the judiciary reform sought by the European Commission in respect of Hungary, and it may serve as a facilitator of the constitutional dialogue between the CJEU and the AB. Nevertheless, it is also pointed out that the amendment may equally serve as a possible excuse for non-compliance with certain future judgment of the CJEU. Uitz argues that the Hungarian Government may defend non-compliance with CJEU rulings falling under the above listed areas with the reasoning that the CJEU should have turned to the AB for a preliminary interpretation in the course of the proceedings, so that the AB could have told the CJEU that the judgment to be made violates Hungary's constitutional identity.[118]

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[115] ibid, 80
[116] Decision 32/2021. (XII. 20.) AB, para 110
[117] Section 38/A of Act CLI of 2011 on the Constitutional Court
[118] Renáta Uitz, 'Orbán's Veto Play – The Subsidiarity Card' (VerfBlog, 15 December 2023) <https://verfassungsblog.de/orbans-veto-play-the-subsidiarity-card/> accessed 1 May 2024

Of course, national acts cannot require the CJEU to make such referrals in a mandatory manner. This is not the case with the referral system presented above either, even if such system was requested or accepted by the European Commission. It follows that any reasoning blaming the CJEU for not making such referrals to justify non-compliance with its judgment falls short of a well-founded legal reasoning. Nevertheless, it may still serve as a comfortable political argument for non-compliance, building upon the interpretation of constitutional identity lock.

VI. Conclusions

This paper aimed to present the stance of the primacy of Union law from the perspective of the AB by comparing it to that of the CJEU and the BVerfG. Throughout two decades, the practice of the AB towards Union law can be seen as a journey from a flexible approach to a somewhat stricter stance. Initially, after Hungary's accession to the Union, the AB's practice on autonomy of Union law was unclear, particularly in terms of the exact categorization of Union law by the AB. While the AB clearly distinguished Union law from public international law, it initially did not fully adopt the CJEU's claim of full autonomy, considering Union law a part of the national body of law. However, over time, the AB refined its approach and eventually recognised the complete autonomy of Union law, granting it independence from both national and international law by acknowledging the CJEU's standpoint on the matter.

While the issue of direct effect was not significantly touched upon by the AB, it held that the direct applicability of Union law in Hungary stems from the sovereignty-transfer clause of the Fundamental Law. The AB constantly respected the CJEU's sole competence to interpret Union law and considered any interpretation of Union law by the AB an *ultra vires* action. Nevertheless, the AB was consistent about its competence to assess the promulgating acts of Union Treaties, and thus their provisions, however, only until the entry into force of the respective Union Treaty. From that point forward, the AB held that it loses competence to review the provisions of the Treaties as they would fall under the jurisdiction of the CJEU. Nevertheless, it is noted that the AB is yet to define its exact competences on the examination of secondary Union legislation that are claimed to infringe the limits set up by the Fundamental Law.[119]

Judges of the AB were of the view that the supremacy of Union law is recognized by the Europe-clause of the Fundamental Law. However, the provisions of the Fundamental Law themselves set limitations on the transfer of sovereignty, thus also define the borders of *ultra vires* Union acts. Over time, the AB established all three limits (fundamental rights, *ultra vires*, constitutional identity) that the BVerfG had found, however, with important differences. Unlike the BVerfG, the AB makes the joint exercise of competences the subject of these limits, instead of the respective Union act. Considering that the AB constantly reiterated that only the CJEU has competence to interpret Union law, it is of no surprise that the AB did not come out with *ultra vires* finding, in fact, it constantly refrained from the examination of such questions. The findings of the AB were gradually codified into the Fundamental Law over time.

On the other hand, the AB strongly focuses on the joint exercise of competence between Hungary and the Union. The established limits seem to apply to this concept, the national side of the jointly exercised competences. Although this may seem like a more lenient approach compared to that of the BVerfG, the AB simultaneously developed a special tool based on the presumption of retained sovereignty. The AB's finding that Hungary may temporarily 'borrow' those joint competences that are incompletely exercised by the Union institutions is

[119] Laura Gyenei and Marcell Szabó, 'A magyar alkotmányjog az Európai Unióban' in Lóránt Csink and Balázs Schanda and András Varga Zs (eds), *A magyar közjog alapintézményei* (Pázmány Press 2020) 1212

undoubtedly a powerful claim, that could both improve and impede the effectiveness of Union law depending on how it will be executed. The same stands for the application of decisions on a preliminary European Union interpretation opinion. The AB may use this power as a vehicle to strengthen the constitutional dialogue with the CJEU in delicate cases, while it may also serve as an excuse for non-compliance with non-referred CJEU judgments affecting the constitutional identity of Hungary. In Weiler's words, we may infer that the AB, although quietly, but also has begun to bark. It remains to be seen how the AB's approach will evolve over time, and particularly whether its barking will eventually ever escalate into a bite.

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A SZERZŐ BEMUTATÁSA:

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