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ON THE CONSTITUTIONAL REGULATION OF THE ACCESSION CLAUSE OF HUNGARY TO THE EUROPEAN UNION

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Summary

The accession of Hungary to the European Union brought unprecedented challenges from the viewpoint of constitutional law. The level of regulation and the possible content of the Europe clause gave rise to interesting debates. This article aims to shed light on the constitutional legal background of the accession of Hungary to the European Union, as well as the actual steps that were necessary to make the accession happen in accordance with the stipulations of the Constitution at the time. The emergence of the necessity of the accession clause, as well as the necessary constitutional amendment are described. One of the most crucial issues at the accession was the question of delegation of powers. In order for Hungary to take part in European integration, it was essential to give constitutional authorisation for the partial delegation of powers that are strongly associated with state sovereignty, and for the joint exercise thereof with other member states and institutions of the European Union. The article analyses and dogmatically evaluates the Europe Article of the current Fundamental Law of Hungary. This is done by way of a sentence-by-sentence interpretation of Article E) Paragraph (2) of the Fundamental Law. Due to the abstract nature of constitutional stipulations, the importance of the interpretations of the Constitutional Court is unquestionable. Relevant Constitutional Court decisions are also examined throughout. The article confirms the necessity of the integration of the Europe clause into the constitution, in order to ensure that the accession to the European Union and the application of EU law in Hungary conform with constitutional legal regulations, as well as to have normative authorisation for the delegation of powers.

Key words: accession, Europe clause, European Union, Hungary, delegation of powers.

1. Introduction

From a constitutional legal perspective,¹ the primary question arising from the accession to the European Union is whether it is necessary to regulate the clause giving authorisation to the accession to the European Union (the so-called Europe clause) on the constitutional level, and if so, what the content of this regulation

should be. Answering the first question is fairly easy, depending on the constitution of the given state: whether and how the constitution regulates the relation between international and national law; and whether and how it gives possibility to fully or partly delegate the sovereign powers of the state (such as legislative, executive and judicial powers²) (Vincze & Chronowski,

¹ The conditions of accession to the European Union are laid down in Article 49 of the Treaty on European Union: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.” As we can see, the provision requires applicant states to be European, as well as outlines other criteria by referring to Article 2. From the viewpoint of member states, conditions may be laid down in the constitution of the given member state. (Vincze & Chronowski, 2018, p. 92-93). (For a historic perception on the accession to the EU, see also Hillion, 2011, p. 187–216).

² Functionally, the powers may be legislative, executive and judicial – so practically any kind of state competence.

2018, p. 72) to international or supranational organisations.³ In case the legislation in force does not grant such possibility, it is necessary to lay down regulations and guarantees in order to prevent and solve the emerging problems. This is to be done in accordance with the constitutional regulation of the state.

Answering the second question seems to be more difficult. In this case, not only do we have to find answers to questions pertaining to constitutional dogmatic, there is also a need to reach certain political consensus (necessary to amend the constitution) in order to incorporate those answers into the constitution. During the preparation of the constitutional amendment in Hungary, numerous ideas emerged as to the content of the accession clause. The official stance regarding the matter changed several times, as well as renowned representatives of legal literature formed an opinion.⁴ However, outlining the content of the clause is not only a legal professional or technical question. The interests and aspirations of political powers, as well as their stance on the limitations of the sovereignty of the accessing state are also important factors. These political powers are also the ones determining the timing and political environment of the accession, and also the constitutional content thereof. The constitutional regulation of the accession does not only apply to the moment of the accession itself, but also defines the future limits and possibilities of the given state as a member state. Therefore, constitutional regulation does not only grant possibilities, but also sets boundaries.

2. The emergence of the necessity of the accession clause in Hungary

The accession of Hungary to the European Union⁵ made it necessary to lay down the accession clause (the

so-called entry provision) on the constitutional level. This was not only necessary at the time of accession, but it is also an essential constitutional requirement of the membership to the Union, even to this day. European integration has numerous peculiarities that require a specific constitutional authorisation, separate from classic international law. Decision 30/1998. (VI. 25.) of the Hungarian Constitutional Court made it clear that the membership of Hungary to the European Union was not possible without an amendment to the Constitution.⁶ The decision “declared with no doubt that the accession of Hungary to the European Union makes it absolutely necessary to amend the national constitution in order to regulate the relation between EU law and the Hungarian legal system.”⁷ (Kecskés, 2005, p. 862)

From a constitutional legal perspective, the accession clause ensured at the accession,⁸ and has been ensuring to this day,⁹ the participation of the Hungarian State in the activities of the European Union (as a supranational organisation).¹⁰ The clause regulates the relation between Union and national institutions and legal systems, as well as determines the constitutional foundation of the contribution and partake of Hungary as a member state in EU decision making. The main issue is not the implementation of the obligation of legal harmonisation. From the EU law perspective, it is absolutely indifferent how a member state integrates its membership with its constitution. By obtaining membership to the European Union, member states become obliged to fulfil their obligations laid down in the treaties of the Union (as international treaties), regardless of their harmonisation process (Somogyvári, 2001, p. 22). The only means for member states to gain legal basis for the delegation of powers is from their constitution, hence the need for this constitutional author-

³ We must agree with the statement that “the existence of the integration clause depends on the constitutional traditions. The content thereof may be judged upon the national constitutional framework for international co-operation.” (Vincze & Chronowski, 2018, p. 57). “The independent Europe, integration or accession clause is not absolutely necessary, many countries are able to exercise their membership rights even without those. A part of these countries regulate their membership by rules pertaining to the relation of international and internal laws, while others by a general clause allowing the accession to international organisations. The third part of the countries do have a separate integration clause, however, the function thereof varies: either their aim to clear obstacles to EU law deriving from the hierarchy of national laws, or they outline requests towards the Union, as well as towards the national government regarding its engagement to the European Union. In each case, the aim is to fill the clause with meaningful content.” (Vincze & Chronowski, 2018, p. 56-57).

⁴ “The final text of the clause is shorter and less precise compared to the draft versions and proposals, which has caused disappointment amongst economists.” (Fazekas, 2015, p. 42).

⁵ The accession of the Republic of Hungary to the European Union (along with other states) was realised by signing the Treaty of Accession in Athens on 16 April 2003, and by promulgation thereof in Act XXX of 2004.

⁶ The Constitutional Court was to make a statement whether the public law norms of another international entity may be directly applicable, even without implementing those in the Hungarian laws (Decision of the Constitutional Court 30/1998. (VI. 25.), Part III Point I of Reasoning). According to the Constitutional Court, the Union is an independent entity, completely separate from the Republic of Hungary. As Hungary was not a member state to the Union, it had no influence whatsoever on the lawmaking thereof. Therefore, applying its laws directly, without constitutional authorisation, would lead to the infringement of the sovereignty of Hungary. (Points 3 and 4, Part V of Reasoning).

⁷ This interpretation by the Constitutional Court has been criticised in legal literature. (See especially Kecskés, 2003a, p. 21-30; Kecskés, 2003b, p. 22-33; Vincze & Chronowski, 2018, p. 37-52).

⁸ The constitution in force at the time was Act XX of 1949 on The Constitution of the Republic of Hungary (hereinafter referred to as Constitution). An amendment to the Constitution introduced the Europe Article for the first time in 2002.

⁹ Article 2/A of the Constitution was replaced by Article E) of the Fundamental Law, entering into force on 1 January 2012.

¹⁰ A supranational organisation is a particular form of state relations, founded by international treaties. As opposed to traditional international organisations, its implementing body is able to execute its tasks solely with regard to the common interest of the community, regardless of the separate interests of individual member states. (Jaenicke, 1962, p. 423-428; Weiler, 1991, p. 2405; Vincze & Chronowski, 2018, p. 49).

isation. From the perspective of autonomous EU law, the internal regulation of the delegation of powers is irrelevant. However, in most states it is the constitution that gives authorisation for such actions (Somogyvári, 2001, p. 23).

In order to partake in European integration, it was also essential to formulate a stipulation in the Constitution that gives general authorisation (within the boundaries of the Constitution) to partly delegate powers concretising state sovereignty, and to exercise such powers jointly with other member states and European Union institutions.

3. The constitutional amendment related to the accession

Officially, Hungary submitted its request for accession to the European Union on 1 April 1994. The accession negotiations started on 31 March 1998, and were concluded on 13 December 2002. Four days after the conclusion of the negotiations, on 17 December, the National Assembly adopted (with 361 votes in favour, no votes against and no abstentions) Act LXI of 2002 on the Amendment of the Constitution of the Republic of Hungary. As a legal prerequisite for the accession of the Republic of Hungary to the EU, the amendment introduced Article 2/A to the Constitution – the so-called integration clause. The integration clause entered into force on 23 December 2002 (Csuhány & Sonnevend, 2009, p. 239).

This constitutional amendment was necessary because the ratification and promulgation of the accession treaty was only possible if the treaty was in accordance with the stipulations of the Constitution (General Reasoning of Act LXI of 2002; Kecskés, 2005, p. 864–882). Two issues had particular relevance in relation to the accession (General Reasoning, Act LXI of 2002). First, the question of exercise of powers (as one of the main components of state sovereignty), as the authority to take decisions significantly transforms due to the accession. This is because the founding treaties authorise EU institutions to exercise legislative power, thus restricting the legislative power of member states to an extent that shall be specifically regulated on the constitutional level. Therefore, special authorisation had to be given in the Constitution for such restriction of jurisdiction. Second, the accession treaty partly affected rights and obligations regulated on the constitutional level, hence

it was not possible to prescribe rules in a source of law that is placed lower in the hierarchy of laws.

The integration clause fulfilled its function both towards the European Union and the constitutional system of Hungary as a member state: it created a “bridge” in order to make it possible to delegate powers between the Union and Hungary, as well as defined a particular, supranational exercise of power as a specific form of exercise of powers.

4. The Europe Article of the Fundamental Law

The new Fundamental Law, entering into force in 2012, has not introduced significant changes to the content of the Europe Article (Fundamental Law Article E). Although the modification merged two provisions, i.e. the State goal to establish European unity (Fundamental Law Article E) (1), formerly included in Article 6 (4) of the Constitution) and the integration clause (Article 2/A. of the former Constitution), the content of those provisions remained almost untouched until the seventh amendment to the Fundamental Law. The amendment introduced a completely new provision,¹¹ containing restrictions regarding the delegation of powers. According to the Reasoning to the amendment, this was necessary in order to concretise the wording “as required” of former Paragraph (2), which essentially means a clear clarification of the exercise of EU powers.”

The text of the current regulation outlines four general aims. First, it sets a state goal as a legal obligation of the state to participate in European development, as well as stipulates the general and constitutional framework for the contribution in the creation of European unity. The compliance with such a state goal creates concrete tasks to the state, which tasks are usually more exact and include more defined obligations.

Second, it creates the constitutional legal conditions of the membership to the European Union by establishing a legal basis thereof.¹² In order for the Hungarian state to possess the constitutional authorisation to delegate powers regarding certain aspects of its sovereignty, it gives authorisation on the level of Fundamental Law to conclude such international treaties, thus allowing the exercise of legislative and decision making powers of Hungarian state organs by a supranational organisation. (This is the case even if the Hungarian state, by means of its own state organs, also takes part in the exercise of such power.)

¹¹ Article 2 of the seventh amendment to the Fundamental Law of Hungary (28 June 2018) complemented Article E) (2) with the following sentence: “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.” The amendment contained further additions. For instance, it added the following sentence to the National avowal (the Preamble of the Fundamental Law): “We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.” Article R) was complemented with the following sentence: “The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.” (For further information on the previous proposal of a similar amendment to the Fundamental Law, see Chronowski & Vincze, 2017, p. 120–129)/

¹² According to the Constitutional Court, Article E) of the Fundamental Law contains the constitutional foundation by which Hungary acts as a member of the European Union, and which constitutes a continuous legal basis for the direct implementation of EU law. (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [14]).

Third, it legitimates certain powers of the Union, exercised by the organs of the Union on the territory of Hungary, against Hungarian citizens. This is done on a democratic, constitutional level, by guaranteeing the acknowledgement of the international treaty by the National Assembly, hence consenting to the limitation of national exercise of powers.

Fourth, it defines on the constitutional level those conditions and limitations that are to be considered by the Hungarian state when concluding an international treaty delegating powers, as well as when exercising such powers. Should these provisions not prevail, the international treaty is against the Fundamental Law.

While interpreting the Europe Article of the Fundamental Law, it is worth studying the paragraphs separately (even though they are strongly related to one another), as they regulate different topics. A paragraph clearly standing out is Paragraph (2), regulating the delegation of powers and the relation between the powers of the European Union and Hungary as a member state. Hence, the present article focuses on this Paragraph.

5. The Europe Article as an authorisation clause – the question of delegation of powers

The Europe Article of the Fundamental Law lays down the constitutional foundation and framework for the participation of Hungary as a member state in the European Union.¹³ The European Union is not a state, nor a sovereign institution, but a supranational organisation with autonomous legal order and international legal entity, formed by the member states by way of treaties (Consolidated versions of the Treaty on European Union [TEU] and the Treaty on the Functioning of the European Union [TFEU], Article 1). In order to achieve common goals, the member states have delegated a part of their powers to the Union, as the common exercise of such powers are more efficient than exercising those individually. The powers may be exclusive¹⁴ or shared with member states¹⁵ – different rules apply to each category. The Union, as a supranational organisation, acquires powers by way of treaties,¹⁶ however, this does not mean that it has sovereign power.¹⁷ The European Union is a community of law, authorised to make laws

independently (within the boundaries set by member states), as well as to conclude international treaties in its own name. It is also a community of values (TEU, Article 2), based on solidarity between the member states (TEU, Article 3 (1)), as well as the territory of law: an area with no internal borders, based on freedom, security and the enforcement of rights (TEU, Article 3 (2)). The Union achieves its goals within the boundaries set by the treaties (TEU, Article 3 Paragraph (6)): it acts according to the powers delegated by the member states (Blutman, 2019, p. 475). All powers that are not delegated to the Union remain with the member states (see also TEU, Article 5 Paragraph (2)). As the delegation of powers pertain to sovereign powers of the state (such as legislative, executive and judicial powers), its conditions shall be laid down in the Fundamental Law (see also Petrétei, 2009, p. 175–193). However, by its accession to the European Union, Hungary has not given up its sovereignty,¹⁸ it only enabled the common exercise of state powers (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [60]). Therefore, in accordance with the concept of suspended sovereignty, membership to the Union does not mean the renouncement of sovereignty, but the exercise of powers jointly with the international community (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [23]; Blutman, 2019, p. 469–478).

According to the Fundamental Law, the source of public power in Hungary is the people, who exercise this power by their elected representatives, (or, in exceptional cases, directly). Hence, the principle of popular sovereignty prevails, *i.e.* the supreme power of the people is the basis and source of the constitution. However, after the creation of the constitution, the power of the people may only be exercised within the framework of the Fundamental Law, indirectly (by the parliament, a body consisting of elected representatives), or directly (in exceptional cases, such as in the form of a referendum).¹⁹ The Fundamental Law, based on popular sovereignty, constitutes the state in a legal sense,²⁰ including the sovereignty of the state, as well as the individual state organs of high importance. It establishes their most important purpose, structure, tasks and powers, the most characteristic features of their op-

¹³ Reasoning to Article E) of the Fundamental Law states that it is necessary for the Fundamental Law to give explicit authorisation for the exercise of powers within the European Union.

¹⁴ The categories of Union competences are laid down in Article 3 of the TFEU.

¹⁵ The shared competences of the Union and member states are laid down in Article 4 of the TFEU.

¹⁶ According to Article 5 Paragraph (1) of the TEU, “The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.” (Blanke & Mangiameli, 2013, p. 261–267)/

¹⁷ “The European Union remains an international organisation without sovereignty as long as it ceases to exist or transforms into a federal state.” (Blutman, 2019, p. 670).

¹⁸ There have been numerous attempts to define sovereignty. Hence, the possible definitions are also numerous, depending on discipline, particular historical and concrete political environment. This is because sovereignty is not absolute, it is a functional concept dependent on historical development, which is formed in a particular historical environment in order to reach a specified goal. (Prodrornos, 1966, p. 2321).

¹⁹ Popular sovereignty incorporates both the decision on the constitutional power (government) and its legitimation. Thereafter, popular will is not unlimited, but bound by the constitution. (Stern, 1980, p. 23).

²⁰ The sovereignty of the state, as well as the powers concretising the sovereignty and the division thereof, is dependent on the regulation laid down in the actual constitution of the time. This statement applies only to constitutional democracies, as it is only in those cases where the constitution creates, legitimates and limits state sovereignty.

eration, as well as their relationship with each other. In a constitutional state, state power, as a legally ordered form of political rule, can only be legally constituted, structured, rationalised and organised by the constitution. Hence, the constitution establishes, shapes, stabilises and limits the possibilities of action of state power. This is therefore carried out by defining tasks and powers, exercised by specified organs.²¹ Consequently, state power is not unlimited power, as the legal definition and categorisation of the sovereign power of the state is done with all the public law powers (more precisely, the powers established for individual state organs in the Fundamental Law) that enable the enforcement of the sovereign power of the state, the declaration of state decisions and serve to enforce these decisions. The sovereign power of the state is indivisible, however, the totality of the sovereign rights expressing the sovereign power are concretised in the form of the powers of individual state organs. The exercise thereof may and should be divided,²² which is reflected in the delegation of certain powers to different organs. Also the Parliament, functioning as the representative body of the people (Article 1 Paragraph (1) of the Fundamental Law: HUNGARY's supreme organ of popular representation shall be the National Assembly), may act only within the framework of the Fundamental Law, the limits of its power are determined by the provisions of the Fundamental Law (Decision of the Constitutional Court 2/1993 (I. 22.), ABH 1993, 33, 36; Decision of Constitutional Court 22/2016 (XII. 5.), Reasoning [59]). The subject of sovereignty is therefore the people, so the representative body itself does not possess the popular sovereignty, nor the state sovereignty as a whole. (State sovereignty is a benchmark of state entirety and the essence of statehood. No state organ incorporates state sovereignty on its own.) It is merely a means of exercising the power (Somogyvári, 2001, p. 24), and may only exercise the powers established in the Fundamental Law. (Undoubtedly, the National Assembly holds the most significant powers, but not all of them.)

Sovereignty was therefore not laid down in the Fundamental Law as powers, but as the ultimate source of

powers. As a result of the delegation of the exercise of certain powers resulting from sovereignty, the way of their exercise may change (Somogyvári, 2001, p. 24). However, even the joint exercise of powers cannot result in the people losing their possibility to final decision-making and continuous control over²³ the exercise of public power (whether joint or individual, carried out in the form of member states) (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [59, 60]).²⁴

According to the Decision containing the interpretative decision of the Constitutional Court, Article E) Paragraph (2) of the Fundamental Law allows Hungary to exercise some of its powers as a member state of the European Union, through the institutions of the European Union. However, this joint exercise of powers is not unlimited, as Article E) Paragraph (2) of the Fundamental Law ensures both the validity of EU law in relation to Hungary, and at the same time represents the limitation of delegated and jointly exercised powers (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [53]). The Constitutional Court defined two main limits to the joint exercise of powers. "On one hand, the joint exercise of powers shall not violate the sovereignty of Hungary (sovereignty control), and on the other hand, it shall not harm the constitutional self-identity (identity control) (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [54])." The Constitutional Court stated that the joint exercise of powers is made possible by the Fundamental Law, consequently, even in the case of jointly exercised powers, the framework set by the Fundamental Law shall be respected. This primarily means the protection of fundamental rights (Article I Paragraph (1) of the Fundamental Law, "primary obligation of the state"), as well as the inalienable elements of sovereignty, as laid down in the last sentence of Article E) Paragraph (2) of the Fundamental Law (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [23]).²⁵ However, it shall be noted here that the Fundamental Law only enables the organs of the Hungarian state (not the Union or other member states) to exercise

²¹ In constitutional democracies, powers laid down in the constitution define the framework of possible actions of individuals. A system that does not comply with such criteria may not be regarded as constitutional democracy.

²² This derives from Article C) Paragraph (1) of the Fundamental Law: The functioning of the Hungarian State shall be based on the principle of the division of powers.

²³ On one hand, the possibility of final decision-making means the constitution-making power of the people, and on the other hand, the establishment and operation of the representative body of the people that indirectly implements popular sovereignty through democratic elections (within the existing constitutional framework). The possibility of continuous control is achieved through periodically recurring elections, through the exercise of parliamentary control rights, and through the functioning of the public as a mediating system.

²⁴ As long as Article B) of the Fundamental Law lays down the principle of independent, sovereign statehood, and stipulates that the source of public power shall be the people, the Union clause based on Article E) shall not empty out these provisions. Blutman states that even though member states do have the possibility to influence certain Union decisions, they do not have the actual possibility to exercise control as they are unable to prevent decisions that are not to their liking. In a legal sense, member states have lost control over the exercise of powers by the state. However, they have not lost the ultimate control, as there is a possibility for withdrawal from the European Union (Article 50 of the TEU). Therefore, the sovereignty of the member state is ultimately granted: the state takes back its powers by withdrawing from the Union. The "ultimate control" is therefore granted by the guarantees for the delegation of powers (two-third majority in the National Assembly, referendum) and by the legal possibility for withdrawal. Blutman at 476.

²⁵ Confirming its previous interpretation, this requirement was formulated by the Constitutional Court in Decision 32/2021. (XII. 20.) as follows: Paragraph 2 of Article E) of the Fundamental Law (taking into account other provisions of the Fundamental Law) provides the Constitutional Court with three types of control options. „The Constitutional Court may, within its own authority, on the basis of a motion, in exceptional cases and as an ultima ratio, *i.e.* while respecting the constitutional dialogue between the member states, examine whether the essential content of a fundamental right is violated as a result of joint exercise of powers based on Paragraph (2) of Article E) of the Fundamental Law (fundamental rights control), or the sovereignty of Hungary (including the extent of the delegated powers - sovereignty and ultra vires control), or its constitutional self-identity (identity control).” (Justification [24]).

their powers jointly. Therefore, it is their responsibility to make sure that decisions made during the joint exercise of powers are in compliance with the stipulations of the Fundamental Law.

6. Dogmatic analysis and evaluation of Article E) Paragraph (2) of the Fundamental Law

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

6.1. Interpretation of Article E) Paragraph (2), sentence 1

This provision of the Fundamental Law substantially defines the purpose of the exercise of powers (which is done for the sake of the participation of the member states in the exercise of EU powers), its extent (determined by the modifier “necessary”), as well as its means and form (which is only possible by way of an international treaty, in the form specified for this purpose, and finally the way of exercising powers (which may be done jointly with the other member states, through the institutions of the Union).²⁶ Based on a more detailed interpretation of certain elements of this provision, the following meaning is to be established.

– It clearly follows from the formulation “*with a view to participating in the European Union as a Member State*” that this clause was phrased with the aim of enabling the Hungarian state to participate in the EU. The limitation of the exercise of powers contained in this paragraph may only and exclusively take place in favour of the European Union, as a member of the European Union. Therefore, it does not give a general authorisation, but establishes a specific “purpose lim-

itation”, enabling the Hungarian state to exercise its power in a specific way.²⁷ On one hand, participation in the Union as a member state may not be transferred to participation in other international or supranational organisations.²⁸ On the other hand, it may only mean participation in the Union in the capacity of a member state, no other kind of contribution opportunity is provided. The additional provisions of the Fundamental Law were formulated only for the sake of the participation of the Hungarian state as a member of the European Union. At the same time, this also expresses that in case the participation is not carried out as a member state, the conclusion of an international treaty may be considered unconstitutional according to this provision. The explicit statement of the participation of Hungary in the operation of the Union as a member state clarifies the scope of application of the provision. Furthermore, it also means that it is not constitutionally possible for the European Union to evolve into a different entity that is more than a special form of cooperation between member states (Somogyvári, 2001, p. 24).²⁹

The addressee of this provision is specifically the Hungarian state, therefore it receives a general constitutional authorisation to jointly exercise the powers under certain conditions. The decision regarding this matter should not be made by any other entity, as it would require a new constitutional provision. Hence, a referendum on this matter may not be held without amending the Fundamental Law, *i.e.* the right to decision making may not be taken away from the representative body of the people in this way.³⁰

– The text “*on the basis of an international treaty*” requires that the form of the decision to exercise powers as a result of accession is to be an international treaty. At the same time, it gives the constitutional authority for the Hungarian state to conclude an international treaty on the basis whereof certain powers (derived from the Fundamental Law) are shared with the other member states and may be exercised through the institutions of the European Union. The precise rules thereof shall be contained in the international treaty in question, not in other legal documents (*i.e.* a mere statutory provision or other methods not meeting the requirements of the international treaty).

The concept of “international treaty” is not defined in the Fundamental Law, therefore giving relatively

²⁶ According to the Reasoning, Article E) creates the possibility for Hungary to exercise its powers through the institutions of the European Union, as a member state. The specific powers shall be determined by international treaties. Exercising powers via European Union institutions shall not exceed the extent necessary based on the international treaty, nor shall it mean a power broader than the one outlined in the Fundamental Law.

²⁷ This stipulation is an authorisation that may be regarded as a peculiar level of exercise of power. (Chronowski, 2009, p. 345).

²⁸ The constitutional foundation of possible participation in other international and supranational organisations are laid down in Article E) Paragraph (1) and Article Q) of the Fundamental Law.

²⁹ Therefore, the clause may not be a basis of federal operation, the Union is composed of different member states. This is based on the theoretical thesis that the legitimate basis of integration is the member state, despite the high level integration of the Union.

³⁰ No referendum shall be held, as the decision on European Union membership would mean the amendment of the Fundamental Law, and holding a referendum regarding such matter is forbidden by Article 8 Paragraph (3) Point (a) of the Fundamental Law. Also, European Union membership is considered an obligation arising from an international treaty. Holding a referendum regarding such matter is forbidden by Article 8 Paragraph (3) Point (d) of the Fundamental Law.

wide scope for legal regulation. According to the wording of Act L of 2005 on the procedures regarding international treaties, an international treaty (as a legal definition in the application of this law)³¹ is “a treaty concluded with another state or another subject of international law with the capacity to enter into a treaty, establishing, modifying or terminating international legal rights and obligations for Hungary, regulated by international law, any written agreement by any name or title, regardless of whether it is contained in one, two or more documents related to one another (Point 2. § a) of Act L of 2005 on the procedures regarding international treaties).”³² This law also regulates the issues of international contract conclusion procedure.

An international treaty enabling the joint exercise of powers may only be created constitutionally in accordance with the legal regulations. Provisions of the Fundamental Law (specified partly in Article E) Paragraph (4))³³ are to be taken into account, as well as legal regulations pertaining to the preparation and creation of the international treaty, the final determination of its text, the authorisation to recognise its binding effect and the recognition of its binding effect.³⁴

– The wording “*to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties*” sets up a material limitation. It states that the joint exercise of powers may take place in order to exercise rights and fulfil obligations arising from the treaties establishing the European Union. Hence, it establishes a limitation according to the subject of the given powers to the extent that not any, but only such powers may be considered that concern rights and duties arising from the founding treaties.³⁵ Furthermore, the Fundamental Law also states that the joint exercise of certain specific powers may only take place in such a way that it cannot exceed the “necessary extent”. It follows from the concept of “necessary extent” that only the exercise of the power is transferred, not the power as a whole. The extent thereof may be established in accordance with the scope stipulated in the EU treaties.

– The wording of “*exercise some of its competences arising from the Fundamental Law*” refers to the fact that these powers³⁶ are to be the ones assigned for the Hungarian state (more precisely, for its organs) in the Fundamental Law, or by other means that may be derived from the Fundamental Law. The exercise of delegated powers must have a constitutional foundation, only those powers may be exercised that are based on the Fundamental Law. This also indicates the obvious consequence that only the exercise of those powers may be delegated over which the Hungarian state has a right to disposal (Somogyvári, 2001, p. 24). Given that this provision authorises the joint exercise of certain powers arising from the Fundamental Law, this power may only be one that a Hungarian state organ may otherwise constitutionally exercise based on the Fundamental Law. The clause “some of its competences” also indicates that it is not a delegation of the general exercise of powers, not a general authorisation, but rather the act of granting the exercise of powers specifically of constitutional origin, precisely identified and therefore limited in terms of content (Decision of the Constitutional Court 2/2019. (III. 5.). Reasoning [22]). The Fundamental Law does not specify these powers, as the exact list of powers shall be contained by the international treaty upon which the Hungarian state transfers the exercise of powers to the Union (Somogyvári, 2001, p. 25). On other hand, it follows that the joint exercise of powers may only take place in a precisely defined form, extent and manner. The Fundamental Law does not grant the possibility for the general delegation of powers, only the granting of limited, specific powers is possible. As a constitutional program and limitation, this also applies to subsequent delegations of powers.³⁷

– The formulation “*jointly with other Member States, through the institutions of the European Union*” makes it clear that the state may delegate the exercise of its powers in such a way that it will exercise those powers in the future together with other states (possessing the status of a member state) jointly, through the institutions of the Union. This definition also sets a limitation:

³¹ According to Article 2 Point (a) of the Vienna Convention on the Law of Treaties (concluded on 23 May 1969, in Vienna), “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. This is a more general definition compared to that of Hungarian laws. As the international treaty in this case is concluded by Hungary, and thus the conclusion is to be done based on the Act L of 2005, the Hungarian regulation is applicable.

³² According to the dominant part of legal literature, European Union treaties may be regarded as international treaties. (Szabó, 2012, p. 193; Mohay, 2014, p. 273).

³³ According to Article E) Paragraph (4), for the authorisation to express consent to be bound by an international treaty referred to in paragraph (2), the votes of two thirds of the Members of the National Assembly shall be required. Therefore, no legal rules shall leave the National Assembly out of the conclusion of such an international treaty.

³⁴ Article 1 of the Act L of 2005 on the procedures regarding international treaties stipulates the scope of the Act, listing the phases of the conclusion of bi- and multilateral treaties concluded by Hungary, as well as the elements thereof.

³⁵ On one hand, this means the rights and obligations already applicable before the accession. On the other hand, the content of the treaties may obviously change, however, changes may only take place on the basis of Article E) Paragraph (4) of the Fundamental Law.

³⁶ From the viewpoint of constitutional law, power is clearly regulated by laws. (For detailed description of powers see: Petrétei, 2014, p. 9).

³⁷ On the other hand, this is absolutely consistent with the concept of limited powers of European Union law. See Article 4 Paragraph (1) and Article 5 Paragraph (2) of TEU.

powers may be delegated only and exclusively for this purpose, namely in such a way that the Hungarian state (more precisely, one of its organs) continues to participate in their exercise, in the form and to the extent defined by EU law.³⁸ Therefore, the exercise of powers is to be joint, otherwise the condition for the joint exercise of powers is missing. Consequently, it is not possible to exercise powers in which Hungary could not otherwise participate, or which would not be exercised jointly with the other member states. Furthermore, the joint exercise of powers shall be carried out “through the institutions of the European Union”, *i.e.* the actual way of jointly exercising powers is through the institutions of the Union. Hence, the exercise of powers also has an organisational limitation: the joint exercise of powers with the other member states takes place within the EU institutions, *i.e.* not by the Union in general, but by its specific institutions. Thus, delegating the exercise of a power to the Union means that the Hungarian state must continue to participate in this activity, and must do so together with other member states, through the institutions of the Union (Somogyvári, 2001, p. 24). The Fundamental Law therefore allows the Hungarian state and its organs to jointly exercise their powers in this way and to this extent.³⁹

On the other hand, it follows from the term “may exercise” that it is merely a question of the joint exercise of the power, not the transfer of the power itself, which indicates the reversible nature of the process.⁴⁰ The wording of the Fundamental Law (as a constitutional authorisation) does not actually enable the delegation of the exercise of powers, much less the delegation of the powers themselves, but merely the exercise of certain powers jointly, together with other member states, through the institutions of the Union. However, the joint exercise of powers also means that in these cases the Hungarian state, more precisely its individual organs, do not exercise their powers granted by the Fundamental Law exclusively by themselves. At the same time, through the joint exercise of powers, the Hungarian state receives cooperation opportunities in certain EU areas, *i.e.* affairs that it manages jointly with the other member states.

6.2. Interpretation of Article E) Paragraph (2), sentence 2

Before interpreting the aforementioned provision of the Fundamental Law, it is reasonable to point out that the Treaty on the European Union refers to the national identity of the member states (Article 4 Paragraph (2)

of the TEU). Accordingly, “*the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*”

In this context, the Hungarian Constitutional Court ruled that the concept of constitutional identity “means the constitutional self-identity of Hungary, and specifies its content case by case, on the basis of the Fundamental Law as a whole and some of its provisions, in accordance with Article R) Paragraph (3) of the Fundamental Law, the National Avowal and the achievements of the historical constitution.” According to the Constitutional Court, “the constitutional identity of Hungary is not a list of static and closed values, but at the same time several important components may be highlighted as examples, which are identical to the constitutional values generally accepted today: freedoms, division of powers, form of state, respect for public law autonomies, freedom of religion, the legal exercise of power, parliamentarism, equality of law, the recognition of judicial power, the protection of the nationalities. Among others, these are the achievements of our historical constitution, on which the Fundamental Law and the Hungarian legal system rest (Decision of the Constitutional Court 22/2016. (XII. 5.). Reasoning [65]).” According to the Constitutional Court, “the constitutional self-identity of Hungary is a fundamental value that is not created by the Fundamental Law, it is only recognised by it. Therefore, the constitutional self-identity cannot be renounced even by an international treaty, only the final termination of sovereignty and independent statehood can deprive Hungary of it. Accordingly, the protection of constitutional identity remains the task of the Constitutional Court as long as Hungary has sovereignty. As a result, sovereignty and constitutional self-identity come into contact with each other at many points, so the two relevant controls shall be carried out in some cases with regard to each other (Decision of the Constitutional Court 22/2016. (XII. 5.). Reasoning [67]).” The question was also raised whether the Constitutional Court has the authority to examine whether, as a result of the exercise of powers based on Article E) Paragraph (2) of the Fundamental Law, there is an infringement of human dignity and the

³⁸ European Union law has priority at implementation, as the delegation of the execution of powers is exercised in order to comply with the stipulations of the TEU.

³⁹ The exercise of powers within the European Union is barely “common”, as there are European Union institutions independent from member states, such as the European Commission and the Court of Justice of the European Union (Blutman, 2019, p. 476). Nevertheless, these organs may also be regarded as common Union organs, as their powers and composition of personnel are determined by member states.

⁴⁰ Even the complete delegation of a power does not mean the full transfer thereof, as the power remains at the organ stipulated by the Fundamental Law (even though the power is partly or fully exercised by other organs).

essential content of other fundamental rights, as well as the sovereignty and constitutional identity of Hungary. After reviewing the practice of the highest courts performing constitutional court duties and constitutional courts of the member states, the Constitutional Court found that it may examine these issues within its own authority, upon motion, in exceptional cases and as an *ultima ratio*, *i.e.* while respecting the constitutional dialogue between the member states (Decision of the Constitutional Court 22/2016. (XII. 5.). Reasoning [46]).⁴¹ In accordance with the decision of the Constitutional Court, and also as a consequence thereof, the amendment to the Fundamental Law was adopted, adding a new provision to Article E) Paragraph (2).⁴²

According to Article E) Paragraph (2) sentence 2, “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.”⁴³

The second sentence of Article E) Paragraph (2) therefore formulates further constitutional-level requirements and content limitations in relation to the joint exercise of powers within the framework of the Union, *i.e.* it only allows the delegation of the exercise of powers under certain conditions, subject to the enforcement of certain provisions. These requirements and limitations obviously do not apply to the European Union or its member states, but to the Hungarian state, more specifically to state organs and officials participating in the exercise of EU powers. The Fundamental Law of Hungary is not binding on either the Union or other member states, as neither its territorial nor its personal scope extends to them. At the same time, it is the duty of the Hungarian state to bear in mind these requirements of the Fundamental Law when exercising its powers within the European Union, to act in accord-

ance with the constitutional provisions, to comply with those, because the framework set by the Fundamental Law must also be respected in the case of jointly exercised powers (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [23]).

This general definition does not clarify the situation when the exercise of EU powers (jointly with the other member states, through Union institutions) conflicts with the requirements laid down in the Fundamental Law. It is clear that in case the joint exercise of powers is not consistent with the fundamental rights and freedoms laid down in the Hungarian constitution, or in case it limits the inalienable right of Hungary to make decisions related to its territorial unit, population, form of government and state structure, then a violation of the Fundamental Law will occur. According to Article R) Paragraph (4) of the Fundamental Law, “the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.”⁴⁴ This constitutional order makes it clear for the Hungarian state organs that they may no longer participate in the joint exercise of powers in violation of the prescribed constitutional conditions, otherwise they must bear the constitutional responsibility. The Constitutional Court made it clear that the respect and protection of the constitutional identity of Hungary is mandatory for everyone (including the Parliament, participating in the decision-making mechanism of the European Union, as well as the Government, directly participating therein). According to Article 24 Paragraph (1), the principal organ for the protection of the Fundamental Law is the Constitutional Court (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [55]).⁴⁵ Therefore, when jointly exercising powers within the Union, the organs of the Hungarian state are to act in such a way that no EU decision could be made that violates the provisions of the Fundamental Law of Hungary. They must create a situation where the ob-

⁴¹ However, the Constitutional Court also underlined that the subject of sovereignty and identity control is not directly the legal act and its interpretation. Thus, the Court does not make a statement about the validity, nor about the priority of application thereof (Reasoning [56]). According to Article 19 Paragraph (3) of the TEU, the Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties the law is observed. It also gives preliminary rulings, on the interpretation of Union law or the validity of acts adopted by the institutions. (For further details on the Decision see: Blutman, 2017, p. 1-10.; Chronowski & Vincze, 2017, p. 117-132.; Drinóczi, 2017. From the viewpoint of the European Union see Mohay & Tóth, 2017, p. 468-475).

⁴² According to the Reasoning of Article 2 of the seventh amendment to the Fundamental Law of Hungary, the definition of national identity of a member state is the fundamental right of the given state, laid down primarily (but not exclusively) in the constitution. Therefore, it is appropriate to lay down the elements of national identity on the constitutional level. The interpretation of the relation between national and Union law pertaining to constitutional identity is constantly on the agenda of the constitutional courts of European states. According to Union law, the values of national and political identity, laid down in the constitutions of the member states shall not be questioned.

⁴³ According to the Constitutional Court, the seventh amendment to Article E) lays down constitutional control in the first phrase; and sovereignty and identity control in the second phrase. This is done on the level of Fundamental Law. (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [25]).

⁴⁴ The seventh amendment to the Fundamental Law of Hungary added the following sentence to the National Avowal: “We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.” Article 3 of the amendment added the following paragraph to Article R) of the Fundamental Law: “(4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.”

⁴⁵ In case there is a probability that human dignity, other fundamental rights, the sovereignty of Hungary or its identity based on its historical constitution are infringed due to the exercise of powers based on Article E) Paragraph (2), the Constitutional Court may examine whether the presumed infringement is real (Reasoning [69]).

ligations of the European Union may be completely fulfilled without violating the Fundamental Law. This means a constitutional command and standard for the participation of Hungary as a member state in the EU decision-making process. On one hand, it has an impact on the activities of state organs as a mandatory norm of conduct and a standard of action. On the other hand, it also serves as a restriction and a point of reference whereby the participation of Hungary in the exercise of EU powers may be controlled. It should be noted, however, that the term “state structure” in Article E) Paragraph 2, sentence 2 of the Fundamental Law, and especially the concept of constitutional identity established by the practice of the Constitutional Court (such as the constitutional self-identity of Hungary), allows for a fairly broad interpretation of whether the joint exercise of powers through the institutions of the European Union meets the aforementioned requirements. Nevertheless, from the point of view of clarifying the concept of “necessary measure”, this provision may mean a more specific normative content and thus a more precise point of reference, since the aspects formulated here form part of the “necessary measure”.

The Constitutional Court also examined whether the incomplete enforcement of jointly exercised powers based on Article E) Paragraph (2) could lead to the loss of sovereignty and constitutional identity of Hungary, or to the infringement of the fundamental rights and freedoms laid down in the Fundamental Law (with special regard to human dignity, bearing special relevance in the context of constitutional identity) (Decision of the Constitutional Court 32/2021. (XII. 20.)).⁴⁶

First of all, the Constitutional Court examined whether the joint exercise of powers, or its incomplete enforcement, could violate the fundamental rights and freedoms laid down in the Fundamental Law – the protection whereof is the primary obligation of the state. The Constitutional Court established that the joint exercise of powers through the institutions of the European Union, according to the authorisation given in Article E) of the Fundamental Law, may neither directly nor indirectly lead to the enforcement of a lower level of fundamental rights protection than that required by the Fundamental Law. The same applies to those cases

where an EU norm binding the member states meets the fundamental rights protection requirements of the Fundamental Law, but its implementation is insufficient (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [47]).⁴⁷ Therefore, if the incomplete enforcement of the joint exercise of powers may lead to consequences causing the infringement of the right to self-identity of persons living in the territory of Hungary, the Hungarian state is obliged to ensure the protection of this right (Decision of the Constitutional Court 32/2021. (XII. 20.), Operative part Point 2, as well as Reasoning [60]). As part of its obligation of institutional protection, the state “must ensure that, as a result of an international commitment of the state, no act of another institution outside of the Hungarian state organ may carry out an interference from which the state itself is obliged to refrain (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [38]).” However, the decision does not specify the form, nor the means and method thereof.⁴⁸

The Constitutional Court also examined the impact of the shortcomings of joint exercise of powers on the sovereignty of Hungary and the joint exercise of powers itself (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [61]). The Constitutional Court stated that “the presumption of reserved sovereignty excludes all competences that are not classified as competences by the Treaty on the Functioning of the European Union (TFEU). In these cases, not only the Fundamental Law, but also the TFEU itself stipulates that member states are entitled to exercise the specified scope of powers even after the termination of the TFEU (Decision of the Constitutional Court 2/2021. (XII. 20.). Reasoning [66]).” The European Union and its institutions do not only exercise the delegated powers in accordance with the purpose set by the EU treaties if they constitute secondary sources of law. The condition for the exercise of the powers is also to ensure the effective enforcement of the secondary legal sources.⁴⁹ Article E) Paragraph 2 of the Fundamental Law may not be interpreted to mean that Hungary has definitively delegated the right to exercise the certain power to the institutions of the European Union in case the institutions of the European Union manifestly ignore their obligation to exercise

⁴⁶ Regarding this Decision, Blutman states that it reserves the possibility of acting unilaterally in case of insufficient implementation of European Union law. However, this reservation is made on the concerning ground that the insufficiently implemented Union act is an *ultra vires* act, as the execution of power in such case is not appropriate. Therefore, the Hungarian delegation of powers is not applicable based on Article E) Paragraph (2) (Blutman, 2022, p. 5).

⁴⁷ “If, as a result of the incomplete enforcement of the joint exercise of powers defined in Article E) Paragraph (2) of the Fundamental Law, a foreign population remains permanently and *en masse* in the territory of Hungary without democratic authorisation, it may violate the right to self-identity and self-determination of the people living in Hungary, which derives from their human dignity. This is because, as a result of the incomplete enforcement of the exercise of powers, the traditional social environment of persons living in the state territory of Hungary may change without democratic authorisation, without any influence of the concerned, and without state control mechanisms.” (Reasoning [51]).

⁴⁸ According to the Constitutional Court, the obligation of institutional protection is to be regarded as a state function pertaining to the public order of Hungary, and thus shall be respected by the European Union according to Article 4 Paragraph (2) of the TEU. (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [43]).

⁴⁹ According to the Constitutional Court, only in this case the exercise of power complies with the conditions laid down in Article E) Paragraph (2) of the Fundamental Law. (Decision of Constitutional Court 32/2021. (XII. 20.), Reasoning [78]).

the delegated power, as well as this joint exercise of power is carried out in a way that it obviously does not ensure the requirement for the effective enforcement of EU law (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [79]). However, the Constitutional Court also emphasised that the presumption of reserved sovereignty may only be applied exceptionally and only in the event when the lack of exercise of the relevant joint powers, or incomplete exercise thereof, obviously does not ensure the requirement of effective enforcement of EU law, and leads to the infringement of fundamental rights, or may lead to restrictions on the fulfilment of state obligations. Even in this case, Hungary will only be entitled to solely exercise a jointly exercised power as long as the European Union and its institutions create guarantees for the effective enforcement of EU law (Decision of the Constitutional Court 32/2021. (XII. 20.), Operative part Point 1). The exercise of powers is to be carried out in accordance with the EU treaties, with the aim to promote those (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [80]).⁵⁰ The Constitutional Court also stated that an obstacle of the enforceability of mandatory European acts may be the inefficient enforcement of powers exercised jointly with the European Union (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [84]). According to the Constitutional Court, in case the enforcement of the joint exercise is incomplete, Hungary may (in accordance with the presumption of reserved sovereignty) exercise its specific, non-exclusive powers as long as the institutions of the European Union do not take the necessary measures for the effective enforcement of the joint exercise of powers (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [85]). It should be noted that this statement only applies to Hungarian state organs, as EU organs are not bound by the decision of the Hungarian Constitutional Court, nor by the Fundamental Law of Hungary.

Finally, the Constitutional Court examined how the consequences of the possible incomplete enforcement of joint exercise of powers are related to the constitutional identity of Hungary. As already discussed, in the interpretation of the Constitutional Court, constitutional identity and sovereignty are not complementary, but interrelated concepts in several aspects. On one hand, the preservation of the constitutional identity of Hungary (as a member state of the European Union) is made possible by its sovereignty and the preservation thereof.

On the other hand, constitutional identity is primarily manifested through a sovereign act. Thirdly, taking into account the historical struggles of Hungary, the effort to preserve its sovereign decision-making powers is itself a part of national identity and of its constitutional identity (through constitutional recognition). Fourthly, due to the historical conditions of the country, the main criteria of state sovereignty recognised in international law are closely connected with the constitutional identity of Hungary (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [99]). The Constitutional Court also noted that the issues covered by Article E) Paragraph (2) of the Fundamental Law regarding the inalienable right of disposal show a close connection with several criteria of statehood itself.⁵¹ “The values that make up the constitutional self-identity of Hungary evolved during the historical development of the constitution. They are considered to be legal facts that could not be renounced neither by an international treaty, nor by amending the Fundamental Law, as legal facts may not be changed by means of legislation (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [101]).”⁵² In this regard, the Constitutional Court established that the protection of the inalienable right of Hungary to dispose of its territorial unity, population, form of government and state organisation is part of the constitutional self-identity (Decision of the Constitutional Court 32/2021. (XII. 20.), Operative part Point 3, Reasoning [110]).

The interpretation of Article E) Paragraph (2) of the Fundamental Law by the Constitutional Court therefore came to the conclusion that in case “the enforcement of the joint exercise is incomplete, Hungary may, in accordance with the presumption of reserved sovereignty, exercise its specific, non-exclusive powers as long as the institutions of the European Union do not take the necessary measures for the effective enforcement of the joint exercise of powers.” In this decision, however, the Constitutional Court did not examine whether the incomplete enforcement of the joint exercise of powers is realised in the specific case. The Court stated that this abstract constitutional interpretation may not become a position applicable to the specific case under motion, nor it is possible to draw up a sufficiently abstract solution to the problem that could serve as a precedent in subsequent cases (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [21]). Consequently, the incomplete enforcement of the joint exercise of pow-

⁵⁰ According to Blutman, in the event of incomplete enforcement of EU regulations adopted under non-exclusive powers, the state becomes entitled to unilateral action. In this case, such European Union regulation may be interpreted unilaterally, its execution may be suspended, or even a differing national regulation may be adopted (Blutman, 2022, p. 5-6).

⁵¹ The Constitutional Court stated that according to Article 1 of the convention on the rights and obligations of the member states (signed on 26 December 1933, in Montevideo), “states as subjects of international law must bear the following attributes: (a) permanent population; (b) defined territory; (c) government; and the ability to contact other states. The disposal right regarding these issues and the ability to effectively exercise such right is undoubtedly a fundamental state function. This is also reflected in Article 4 Paragraph (2) of the TEU.” (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [100]).

⁵² The achievements of the historical constitution are listed in Points [102]-[105] of the Reasoning.

ers, requiring a case-by-case interpretation, may only be investigated in specific cases. Nevertheless, this raises several problems. On one hand, the determination (by the Constitutional Court) of whether the joint exercise of powers is incompletely implemented in a specific case has consequences only for the organs of the Hungarian state, as the interpretation of the Hungarian Constitutional Court does not apply to the organs of the Union. On the other hand, the decision of the Constitutional Court binds the Hungarian state organs participating in the joint exercise of powers, as well as the organs implementing the decisions made in this context. For them, the provision of the Fundamental Law prescribes the protection of the sovereignty and constitutional self-identity of Hungary, as well as the fundamental rights and freedoms contained in the Fundamental Law, which may be infringed in case of insufficient enforcement of joint powers.

In such a case, Hungarian state organs shall take the steps that they are entitled to under EU law. This may result in a dispute between the EU bodies and the Hungarian state organs regarding the assessment of the effectiveness of the joint exercise of powers. Ultimately, the dispute may only be resolved by the Court of Justice of the European Union, given that the power in question is that of the EU. Another source of problems may be if the organs of the Hungarian state participating in the exercise of joint EU powers may exercise the joint powers, then such decisions may be made that alter from the decisions made by the EU or by other member states. This may result in the reduced effectiveness of EU decision-making and EU law, possibly causing further conflicts. The Constitutional Court also established that the enforceability of EU acts recognised as mandatory may be hindered by the inefficient enforcement of powers exercised jointly with the European Union, thus creating an opportunity to postpone the implementation of mandatory EU acts. Since the final decision in this case is also with the Court of Justice of the European Union, this solution may only gain time corresponding to the duration of the court proceedings.

7. Conclusion

According to the majority of Hungarian constitutional legal scholars, the integration of the Europe clause into the constitution was indeed necessary. Without that, the accession to the European Union and the application of EU law in Hungary would not have been constitutional. Also, there would have been a lack of normative authorisation for the delegation of powers. The interpretation of the accession clause of the Fundamental Law of Hungary points out that these stipulations prescribe and concretise the conditions and limitations of the delegation of powers between the European Union and the Hungarian state. It attempts to define the boundaries of the integration process, *i.e.* to set the “necessary extent” to which Hungarian state or-

gans may delegate their powers, and what are the powers that may not be delegated. Despite their concretisation, these constitutional stipulations are rather abstract, hence the interpretations of the Constitutional Court are of great importance. It should be noted that political practices have a fairly great room to manoeuvre within constitutional legal boundaries. Therefore, the question of the actual transfer of powers largely depends on the current political considerations of the governing body.

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ЩОДО КОНСТИТУЦІЙНОГО РЕГУЛЮВАННЯ ПОЛОЖЕННЯ ПРО ВСТУП УГОРЩИНИ ДО ЄВРОПЕЙСЬКОГО СОЮЗУ

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Анотація

Вступ Угорщини до Європейського Союзу приніс безпрецедентні виклики з точки зору конституційного права. Цікаві дискусії викликали відповідний рівень регулювання та можливий зміст європейського положення. Ця стаття має на меті висвітлити конституційно-правове підґрунтя вступу Угорщини до Європейського Союзу, а також фактичні кроки, які були необхідні для того, щоб вступ відбувся відповідно до положень тогочасної Конституції. У статті розкривається необхідність положення про приєднання, а також необхідні конституційні правки. Одним із найгостріших питань при вступі було питання делегування повноважень. Для того, щоб Угорщина взяла участь у європейській інтеграції, необхідно було надати конституційний дозвіл на часткове делегування повноважень, які тісно пов'язані з державним суверенітетом, а також на їх спільне виконання з іншими державами-членами та інституціями Європейського Союзу. У статті аналізується та догматично оцінюється Європейська стаття чинного Основного закону Угорщини. Це робиться шляхом покрокового тлумачення пункту (2) статті E Основного закону. Через абстрактний характер конституційних положень важливість тлумачень Конституційного Суду не викликає сумнівів. Відповідні рішення Конституційного Суду також розглядаються. Стаття підтверджує необхідність інтеграції Європейського положення до конституції, щоб забезпечити відповідність вступу до Європейського Союзу та застосування права ЄС в Угорщині, таким що відповідають конституційним правовим нормам, а також мати нормативний дозвіл для делегування повноважень.

Ключові слова: приєднання, європейське положення, Європейський Союз, Угорщина, делегування повноважень.