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THE ENFORCEMENT OF THE PRIMACY OF THE EUROPEAN UNION LAW: LEGAL DOCTRINE AND PRACTICE

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Abstract. *The main subject of the present research is the enforcement of the European Union law in the domestic legal order. This topic was chosen considering the Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community and especially its declaration No. 17 on primacy of EU law. This article will explain the meaning of primacy of the European Union law and the resulting problems in some EU Member States, as well as possible solutions to tackle the problems. The primacy of the European Union law over the national law was recognised as one of the constitutive principles of the European Union. The article includes relevant provisions of the Lisbon Treaty that deal with the rules concerning the legal requirements of the primacy of the European Union law in the EU primary law. The European Court of Justice has developed the meaning of the principle of primacy, which means that the European Union law should take precedence over national law (even over constitutional provisions) and should there be any conflicts between EU law and national law, every national court is obliged to apply the law of the European Union. The main issue of this article is analysing the principle of primacy of the European Union law over the Lithuanian law. The actual discussion of the relationship between the EU law and domestic law in the Lithuanian law science should give an answer to the correct*

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way of finding a solution as to the law that will have a prerogative in case of contradictions. Consequently, the author evaluated the impact of the jurisprudence of the courts of EU Member States on the praxis of Lithuanian courts based on comparative methods of legal research. The purpose of the article is to prove that different developments arose at the level of EU law and at the one of domestic law. Finally, the author makes proposals on possible measures to avoid situations of legal conflict. The article includes some relevant examples of application of the European Union law in the praxis of the Lithuanian Constitutional Court and Lithuanian courts of general and special competence.

Keywords: *Primacy of the European Union law, Constitutional Guaranty, Competences of the European Union and the Member States, Judicial Control of the Court of Justice of the European Union and the Courts of the Republic of Lithuania.*

Introduction

The enforcement of the primacy of the European Union law (hereinafter – EU) belongs to one of the most prevalent issues related to relationship between EU law and Lithuanian domestic law. It seems that such issues were not definitely settled even when the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (hereinafter – the Lisbon Treaty) came into force. It is not a secret that during that period significant changes were made in EU Member States regarding the domestic application of the principle of primacy of the European Union law. The Lithuanian law has undergone the development in this sphere too. The main purpose of the article is to analyse recent developments in the judgments of the Court of Justice of the European Union (hereinafter – the European Court of Justice or ECJ) in cases brought before the Lithuanian courts. The comparative analysis of the jurisprudence of the constitutional courts of different Member States shows counter development to the jurisprudence of the European Court of Justice, which may cause the jurisdictional collision of setting aside the EU law based on constitutional grounds. In the European legal context, the position of the Lithuanian Constitutional Court is not an exceptional one. However, from the point of view of the EU law it is rather questionable. Lithuania's membership in the European Union inevitably had an impact on its domestic legal order. The legal integration between the EU and the Member State characterised the process of fusion of the two different legal orders. Taking into account the subject matter of the research, the present article has the following structure. The first part of the article analyses the issue of transfer of powers, which could have an impact on the actions undertaken by EU Institutions after the Treaty of Lisbon, from the Lithuanian authorities to the European Union institutions. Under the constitutional rules, there is a difference between sovereignty of nationals and the sovereignty of State. Constitutional legitimisation of transfer of competences was enacted through the Constitutional Act of the Republic of Lithuania on the Membership of Lithuania in the European Union. The

second part of the article deals with the legal issue of primacy of the European Union law in the primary law of European Union. The primacy principle in the Declaration No. 17 of the Lisbon Treaty should bring new points for the enforcement of the European Union law. The subsequent parts of the article analyse the cooperation issues between the Court of Justice of the European Union and national courts. The main cause of such cooperation is avoiding collisions between national and EU law and recognition of the primacy of EU law. This issue was particularly elaborated in jurisprudence of the Lithuanian Constitutional Court, as in the relationship with the EU law it gives priority to the constitutional guarantees. Such position of the Lithuanian Constitutional Court may cause contradictions between the EU law and Lithuanian law. The current article intends to propose ways of avoiding such possible contradictions. Recent developments of the judgments arising from preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union are particularly analysed in this article to stress the practical points of the enforcement of the primacy of EU law.

1. The Relationship between the Competences of the EU and its Member States

For the first time in the history of the development of the EU law, the Lisbon Treaty explicitly stipulated the catalogue of competences that belong to the European Union. According to Article 2 of the Treaty on Functioning of the European Union (hereinafter - TFEU), the relationship between the EU and its Member States is based on the principles of exclusive competence, shared competence and competence of coordination.[1] Article 5 of the Treaty of the European Union (hereinafter – TEU) states that all kinds of competences of the European Union are governed by the principle of conferral of competence.[2] The previous rules coming from the judgment of European Court of Justice and praxis of the EU institutions were replaced and in many points changed by the Treaty of Lisbon. The introduction of a catalogue of competences in the TFEU had a clear purpose of elimination of the overlap between the lawmaking powers of the European Union and its Member States. Nevertheless, some potential collisions may still arise, because many areas of the EU activities belong to the non-exclusive competence of the European Union. EU Institutions apply the rules of competence in their activities and that may have an impact on the provisions of the Constitution of the Republic of Lithuania. The issue concerning the legislative powers of the EU comes together with the issue concerning the relationship between the EU and constitutional law. The diversity of situations where collision may arise and changes in the legal, political, and economic context have been known since 1957, the time of introducing

1 Treaty on Functioning of the European Union. *Official Journal of the European Union* C 83/47, 30 March 2010.

2 Treaty of the European Union. *Official Journal of the European Union* C 83/13, 30 March 2010.

the single market in the European Community.[3] On numerous occasions, the European Court of Justice checked national legal rules related to the competence issues of the European Union, because each time there was a potential contradiction between the EU legal rule and national legal rule. The identification of current needs of the European integration should solve the problem of the pre-emption of competences between the EU and its Member States.[4] The euro financial crisis allows remembering the provisions of the *Costa v. E.N.E.L.* judgment, where the European Court of Justice stated that the powers had been transferred from the States to the Community in such a way that 'the Member States have limited their sovereign rights'[5]. It is remarkable that the Declaration No. 17 concerning primacy[6] of the Lisbon Treaty indicates the *Costa v. E.N.E.L.* judgment as the leading case for the recognition of the primacy of EU law and requires the EU Member States to recognise the jurisprudence of the European Court of Justice stemming from the *Costa v. E.N.E.L.* judgment. However, as a matter of fact, the development of the EU law demonstrated how sensible the issues of transfer of the sovereign powers to the EU are. Nowadays, the officials of EU institutions require that the Greek Government fulfills the obligations as the guarantee for financial support and as a condition of membership of the euro zone.[7] Article 28 of the Greek Constitution prescribes the superior force of international law over national law. The limitation of national sovereignty is allowed as long as it does not contradict the human rights and foundations of the democratic system.[8] After the judgments of the European Court of Justice in the *Costa v. E.N.E.L.* and *Van Gend en Loos* cases the European institutions started enforcing the primacy of EU law, even over the national constitutions of every EU Member State. It is questionable whether it comes as the result of opposite development in the national legal orders of the Member States of the EU.

The Constitution of the Republic of Lithuania distinguishes between sovereignty of nationals and sovereignty of the State. Sovereignty of the State is to be understood as powers of the institutions of the government of Lithuania. It is important to take this difference into account. According to the jurisprudence of the Lithuanian Constitutional

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3 Dougan, M. Enforcing the Single Market: The Judicial Harmonisation of National Remedies and Procedural Rules. In: Barnard, C.; Scott, J. *The Law of the Single European Market: Unpacking the Premises*. Hart Publishing, 2002, p. 157.

4 Arena, A. The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen [interactive]. *Jean Monnet Working Paper*. 2010, 03/10: 4 [accessed 15-07-2011]. <http://centers.law.nyu.edu/jeanmonnet/papers/10/100301.pdf>.

5 Case 6-64, *Flaminio Costa v. E.N.E.L.* reference for a preliminary ruling: Giudice conciliatore di Milano – Italy, ECJ, 15 July 1964, p. 5 ff.

6 Declaration No. 17 concerning primacy; Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260). *Official Journal of the European Union* C 83/344, 30. March 2010.

7 von Hagen, J.; Pisani-Ferry, J.; Sapir, A.; Gianviti, F.; Krueger, A. O. A European Mechanism for Sovereign Debt Crisis Resolution: A Proposal [interactive]. Bruegel, 2010 [accessed 01-07-2011]. <http://www.bruegel.org/publications/publication>; Burbat, D. *Staatsbankrott als Rechtsfrage*. LKV, 2011, p. 218; Holger, G. Staatsbankrott als Rechtsfrage. *EuZW*. 2011, 10: 367.

8 Lenaerts, K.; Van Nuffel, P. *Constitutional Law of the European Union*. Thomson / Sweet & Maxwell, 2005, p. 691.

Court, any limitation of sovereignty cannot be allowed.[9] Article 2 of the Lithuanian Constitution prescribes that sovereignty shall belong to the Nation. Article 3 of the Constitution explicitly states that no one may limit or restrict the sovereignty of the Nation or make claims to the sovereign powers of the Nation. Consequently, Article 1 of the Constitutional Act On the Membership of the Republic of Lithuania in the European Union (hereinafter - the Constitutional Act) stipulates that the Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union and to the extent that, together with the other Member States of the European Union. It would, together with other Member States of the European Union, meet its membership commitments in those areas as well as enjoy the membership rights.[10] The analysis of the Constitutional Act allows making a conclusion that the rules of the Constitutional Act accept and allow the application of the principle of limitation of EU powers.

The current practice of the European Court of Justice tries to avoid any specific contradictions with the issues of national sovereignty. In such cases the European Court of Justice usually applies the legal principle of subsidiarity, as a rule for delimitation of extensional powers of the European Union. Such a trend was clearly manifested in the recent jurisprudence of European Court of Justice.[11]

The effects of the pre-emption of EU legislative powers are hard to determine in advance. The application of shared competences in Article 2(2) TFEU and in Protocol No. 25 only illuminated existing contradictions between constitutional law of the Member States and the EU principle of pre-emption, as well as in policy connected with the euro currency. The national legislator may act in many fields claiming that it belongs to the level of constitutional guarantees which precludes a prerogative of application of the EU law in the domestic legal order. Under some circumstances it could stop the application of the EU law altogether.[12]

2. Primacy of the European Union Law in the Legislation of the European Union

At the time of accession of Lithuania into the European Union, the legal rules in the Treaty of European Union and the Treaty of European Community did not contain

9 Constitutional Court of the Republic of Lithuania, judgment of 22 June 2009 on the legal act of territorial planning No 16/07-17/07-20/08.

10 Law on Supplementing the Constitution of the Republic of Lithuania with the Constitutional Act on Membership of the Republic of Lithuania in the European Union and Supplementing Article 150 of the Constitution of the Republic of Lithuania No. IX-2343. *Official Gazette*. 2004, No. 111-4123.

11 Case C-176/09, *Grand Duchy of Luxembourg v. European Commission*, Judgment of the Court, 12 May 2011, p. 82; Case C-58/08, *Vodafone Ltd and others*, Judgment of the Court, 8 June 2010, p. 72; Chalmers, D.; Davies, G.; Monti, G. *European Union Law*. Cambridge, 2010, p. 523.

12 Kumm, M. The jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty. *European Law Journal*. 2005, 11(3): 262.

any provisions on the primacy of the EU law over domestic law of the EU Member States. Moreover, the Treaty of Association and the Treaty of Accession of Lithuania to the European Union did not include any special provisions on the precedence of the European Union law over Lithuanian law. The accession countries have not negotiated the issue of the primacy and direct applicability of the EU law in relation to national laws (especially their constitutions). This issue was not a matter of negotiations, because according to the *acquis communautaire* the primacy of the EU law belonged to the point of view of the EU institutions upon the basic condition of accession of every country to the European Union. Each EU Member State has an obligation to implement it and enforce the principle of primacy of the EU law. If the EU Member State fails to do so, this could be treated as a violation of the EU law. The recognition of that fact does not require adoption of additional legislative act. Nevertheless, some efforts to change the level of regulation in the area of primacy of EU law could be noticed. In 1996 the draft Amsterdam Treaty constituted the first effort to introduce the regulation on the primacy of EU law in the primary law of the European Union. Article I.1.6 of the Cambridge Draft Amsterdam Treaty stipulated the principle of the primacy of EU law as the following rule '(3) In the event of conflict between provisions applicable under the legal orders of the Member States (hereinafter referred to as 'national provisions') and directly effective Community provisions, the latter shall prevail. To that end, a court or tribunal of a Member State shall refrain, if necessary of its own motion, from applying national provisions in all cases in so far as these conflict with any Community provisions applicable to matters of which the court or tribunal is seized.'[13] Paragraph (3) was a codification of the case-law that the European Court of Justice had developed at the time. The Member States had the duty to apply Community law. However, the Cambridge Draft Amsterdam Treaty was not successful. The EU Member States did not agree to have that rule in the final version of the Amsterdam Treaty.[14]

The second effort to enact a legal rule concerning the primacy of EU law in EU primary law was in 2004, when the provisions of the Treaty establishing a Constitution for Europe were under consideration. Article I-6 of the Constitutional Treaty, entitled 'Union law', stated that the constitution and the law adopted by the institutions of the European Union in exercising competences conferred on it should have the primacy over the law of the Member States.[15] Under the wording of this Article, national legal orders of the Member States should have recognised the primacy of EU law without any exceptions. Due to such an unsuccessful ratification of the Constitutional Treaty this reform was left to the history of recent development of the EU law.

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13 Cambridge Draft of the Amsterdam Treaty. *European Law Review*. 1997, 22: 393.

14 Schmid, Ch. U. Ways Out of the Maquis Communautaire on Simplification and Consolidation and the Need for a Restatement of European Primary Law [interactive]. *European University Institute, Working Paper RSC*. 1999, 99/6 [accessed 27-06-2011]. <http://www.eui.eu/RSCAS/WP-Texts/99_6t.html>; *Hasselbach, K.* Der Vorrang des Gemeinschaftsrechts vor dem nationalen Verfassungsrecht nach dem Vertrag von Amsterdam. *JZ.* 1997, p. 942.

15 *Official Journal of the European Union* C 310/12, 16 December 2004.

The successful attempt over this issue was achieved in the Lisbon Treaty in 2009, which included a separate Declaration No. 17 concerning primacy of the EU law. Pursuant to this declaration, the primacy of EU law should be recognized as a cornerstone principle of EU law. The very text of the Declaration No. 17 characterised the specific nature of the EU law.

The legal definition of the principle of primacy is based on the opinion of the Council Legal Service of 22 June 2007 on the jurisprudence of the European Court of Justice. This opinion of the Council Legal Service is oriented towards the case *Costa v. ENEL* of 15 July 1964, Case No. 6/641. According to the statement, the rule formulated in that judgment is still valid today. The fact that the principle of primacy will not be included in the treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.[16]

The comparative analysis of the primacy clause in the Lisbon Treaty, as well as the proposal in the Amsterdam Treaty and the Treaty establishing a Constitution for Europe shows at first sight that the declaration No 17 on primacy has less on enforcement power. It might be speculated that due to that fact the Lisbon Treaty has been finally adopted by the EU Member States and is currently applicable as the binding rule of the European Union law. The inclusion of the primacy principle in the Declaration No. 17 of the Lisbon Treaty constitutes a kind of revision of the existing legal system of the European Union. The author is of an opinion that the biggest influence may result not from the EU legislation but from the jurisprudence of the European Court of Justice as well as from application of the EU rules in the national law of the EU Member States. Nevertheless, the Lisbon Treaty is a step forward towards the enforcement of the primacy of the European Union law and fulfils its purpose to require the responsibility from the EU Member States. The primacy of the European Union law is based on international treaties and common principles of international law. The transformation of the international law usually depends on the provisions of the constitutional law or the state that allows direct applicability of the international norms and its priority over domestic law. It is a matter of transformation into national law and cannot influence the international obligation of the state to fulfill the concluded international treaties.

3. Primacy of EU Law in the Jurisprudence of the ECJ

3.1 Analysis of General Developments in the Jurisprudence of the ECJ

Today, it is often forgotten that the primary purpose of the jurisprudence of the European Court of Justice was to control the legal actions of EU institutions (especially the European Commission). In the beginning, the primacy of EU law was not a relevant issue in the jurisprudence of the European Court of Justice.[17] The situation changed

16 Declaration No. 17 concerning primacy; Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260).

17 Alter, K. J. Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe. Oxford: University Press, 2001, p. 5.

when different application of the EU basic freedoms revealed the necessity of unified enforcement of EU legal rules in different EU Member States. It was clear that clashes between the European Union law and national law could not be avoided. The task of the European Court of Justice was to develop the rules of collision between the European Union law and national law through its case law. Consequently, it should be recognised as a common principle for enforcement of the European Union law in the EU Member States. A characteristic point may be noted that the European Court of Justice used different terms in its practice. In various judgments of the ECJ it is possible to find the following terms describing the issues of 'supremacy', 'priority', 'primacy', 'precedence'. It is worth mentioning that those terms have different meaning in the official languages of the European Union. The word 'supremacy' is used in English, together with the word 'primacy', which corresponds more to the French legal term 'primaute' and Italian 'primate'[18]. The word 'primacy' was used in the ECJ judgment *Costa v. ENEL*, which influenced the choice of the term 'primacy'. German language applies a similar term 'Vorrang', which stresses the priority in the application and corresponds to the French expression of 'preeminence' and the Italian word 'preminenza'.[19] The supremacy and primacy of the EU law can have a different meaning. Supremacy deals with the application of valid regulations and deciding on hierarchy of the legal rule in the law system. Primacy is based on priorities by the application of legal rule, that not necessary has something in common with the hierarchical issues.[20] In the opinion of Mr. Amato, in principle supremacy does always imply the primacy, unless the same supreme regulation sets its own displacement or non-application.[21] Remarkably enough, the European Court of Justice has not completely clarified this topic yet. In particular, such terms as 'supremacy', 'precedence' and 'primacy' are often used together in the Court's jurisprudence. Different usage of the terms took place at the very beginning of this kind of jurisprudence and such practice still exists. However, all such cases have a common point of finding a solution in instances of collision between the rules of EU and domestic law. The earliest term appeared in the European Court of Justice *Van Gend En Loos* judgment of 1963, concerned with a conflict between the Dutch law and EU rules in the area of free movement of goods.[22] In fact, the term 'primacy' of the European law was not used in that judgment. The interpretation of the principle of primacy was connected with the principle of direct applicability of EU law and its justifiability in national courts. Before the *Van Gend En Loos* judgment it was not clear, whether such principle existed at all and how such principle of EU law should be applied altogether. The principle of primacy was articulated in the European Court of Justice case of *Costa v.*

18 Craig, P.; De Búrca, G. *EU Law: Text, Cases, and Materials*. Oxford: Oxford University Press, 2008, p. 344 ff.

19 Amato, G.; Ziller, J. *The European Constitution. Cases and Materials in EU and Member States Law*. Cheltenham: Edward Elgar Publishing, 2007, p. 90.

20 Reestman, J. H. Primacy of Union Law. *European Constitutional Law Review*. 2005, 1: 104–107.

21 Amato, G.; Ziller, J., *supra* note 19, p. 99.

22 Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Reference for a preliminary ruling: Tarifcommissie – Pays – Bas, ECJ, 5 February 1963, p. 7.

E.N.E.L.[23] According to the opinion of Mr. Hilf, the European Court of Justice judgment in *Costa v. E.N.E.L.* elucidates the legal basis of the as yet not legally limited primacy of EU law over the national law, and in a number of different arguments the European Court of Justice emphasized the fundamental requirement of a uniform applicability of the EU law and, hence, its primacy.[24] In case *Internationale Handelsgesellschaft* the European Court of Justice used the term 'precedence', claiming that the EU secondary law has priority against national constitution.[25] The ECJ judgment in Roquette Freres provides another example of development. The European Court of Justice recognised the national autonomy in the legislation and decided that the EU Member States might still apply their own rules while deciding on payment of interest.[26]

EU law had to develop the doctrines on the prerogative of validity and the prerogative of application of EU legal acts, because EU law could not influence the enforceability of the national law, instead it could only demand the application of requirements of EU law in the national legal order.[27] The period of increase of the European Union legislation brought several decisions of the European Court of Justice with the main idea that the individual should be compensated for the losses arising from the breach of their rights protected by EU law. Consequently, the European Court of Justice developed the principles of state liability and protection of individual rights.[28]

The European Court of Justice continues to support the collision doctrine in its latest development of jurisprudence; however, the Court adds some additional points. In case C-484/07, the European Court of Justice stated that when a dispute concerns different regulations of the national law, the application of EU law is required. The Court emphasized that the EU Member State could not undermine the legal status of the national expressly conferred by EU law.[29] In the case C-147/08 the European Court of Justice reasserted its previous practice concerning the disregard for the domestic law that contradicted EU law and primary application of EU legal rule. The European Court of Justice explicitly stated that taking into account the primacy of the EU law every national court, which had to apply any provisions of the European Union law, was under a duty to give the full effect to EU legal provisions, notwithstanding the fact that under its own motion the national court had to apply the conflicting provision of national legislation (setting aside such a provision by legislative or other constitutional

23 Case 6-64, *Flaminio Costa v. E.N.E.L.* reference for a preliminary ruling: Giudice conciliatore di Milano – Italy, ECJ, 15 July 1964, p. 4.

24 Hilf, M. *Costa v. ENEL Case* [interactive]. *Max Planck Encyclopedia of Public International Law* [accessed 21-06-2011]. <www.mpepil.com>.

25 Case 11-70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany, ECJ, 17 December 1970, p. 20.

26 Case 26/74, *Société Roquette Frères v. Commission of the European Communities*, ECJ, 21 May 1976, p. 12; Case 6/60, *Jean – E. Humblet v. Belgian State*, ECJ, 16. December 1960, p. 5.

27 Streinz, R. *Europarecht*. CF Müller Verlag, 2007, p. 91.

28 Niedobitek, M. *Kollisionen zwischen EG – Recht und nationalem Recht*. VerwArch, 2001, p. 58.

29 Case C-484/07, EEC-Turkey Association Agreement / National law calling into question, on that ground, the residence permit of the person concerned, ECJ, 16 June 2011, p. 56.

means).[30] Such a rule was ascertained in the latest judgment of the European Court of Justice concerning the salary rights of judges and equal treatment, by deciding that the principle of primacy of EU law required, that a rule of domestic law, which had a constitutional status and transposed the provisions of the European Union law, should not be applied and its interpretation should be disregarded.[31] Additionally, the analysis of the jurisprudence of European Court of Justice allows making the conclusion that the Court often uses interchangeably the terms of 'primacy', 'precedence' and 'supremacy'.

3.2. Analysis of the Jurisprudence of the ECJ in Cases Involving the Republic of Lithuania

The practice of the European Court of Justice in cases involving the Republic of Lithuania demonstrates the possible variety of different rules concerning the enforcement of EU legal requirements.

In case C-391/09 the European Court of Justice had to decide on the primacy of the EU law, whether the rules concerning the state language could influence the freedom of movement. This issue has a direct relationship with the Lithuanian Constitution, Article 14 of which prescribes that Lithuanian is a State language. The European Court of Justice decided that the rules on state language are in the domestic domain, which belonged to the competence of each individual EU Member State. Nevertheless, the European Court of Justice noted that the existing competence of the EU Member state should comply with the European Union law, and, in particular, with the Treaty provisions on freedom of every citizen of the Union to move and reside in the territory of the Member States.[32] According to the European Court of Justice, the State language constituted a constitutional asset, which preserved the nation's identity, contributed to the integration of citizens, and ensured the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities.[33] The following onerous examples of enforcement of the primacy of EU law can be extracted from the practice of the European Court of Justice. In case C-63/06 the European Court of Justice decided that Lithuania failed to fulfill its obligation to implement the Directive because the requirements of the directive were translated incorrectly.[34] In case C-350/08 the European Court of Justice decided that the applicability of the Treaty of Accession on the Lithuanian domestic law was misunderstood because it had influenced the updated authorization of medicinal product.[35] Typical points in the infringement proceedings

30 Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg,* reference for a preliminary ruling from the Arbeitsgericht Hamburg – Germany, ECJ, 10 May 2011, p. 54.

31 Case C-310/10, Salary rights of judges – Discrimination on grounds of membership of a socio-professional category or place of work, ECJ, 7 July 2011, p. 46/47.

32 Case C-391/09, Freedom to move and reside in the Member States, Malgožata Runevič-Vardyn / Łukasz Paweł Wardyn, ECJ, 12 May 2011, p. 63.

33 *Ibid.*, p. 84.

34 Case C-63/06, *UAB Profisa v. Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos*, ECJ, 3 February 2006, p. 15.

35 Case C-350/08, European Commission/Republic of Lithuania 'National marketing authorisation granted before accession', ECJ, 28 October 2010, p. 52.

against Lithuania were remarkably stressed in case C-274/07 and the Commission criticised the Republic of Lithuania not for having incorrectly or insufficiently transposed the provision of the EU directive, but for failure to implement the requirements of the directive.[36] This case of the European Court of Justice provides an example of failure to timely implement the requirements of the Directive. The European Court of Justice also reviewed some rules of the Criminal Code of the Republic of Lithuania. The Court decided that the Lithuanian criminal law violated the requirement of Regulation No. 1782/2003 because under Lithuanian criminal law the production of 'Cannabis Sativa L' was penalized, although under Regulation No. 1782/2003 such activity was legal. Such collision was solved in favor of the Regulation No. 1782/2003 and the relevant rules of the Lithuanian Criminal Code were revoked.[37] The European Court of Justice sets aside every rule of national law that contradicts the EU law. The Lithuanian praxis of enforcement shows that the Lithuanian law has a tendency to avoid conflict with the EU law requirements. According to the statement of the European Court of Justice, as a result the number of infringement proceedings against the Republic of Lithuania fell.[38] This means that the enforcement of the EU law in the Lithuanian law improved.

4. EU Law Primacy Principle in the Jurisprudence of Lithuanian Courts and Comparative Analysis of Influence

The analysis of the praxis of Lithuanian courts could not be complete without taking into account the comparative influences of law doctrine and judgment of courts from different EU Member States. It should not be forgotten that the principle of the primacy of EU law on the issue in the main proceedings was developed by the European Court of Justice in response to references made by national courts in the European Union. Remarkably, but after the adoption by the EU of the Lisbon Treaty the German Constitutional Court was one of the first to state that the Federal Republic of Germany would not recognise absolute primacy of application of the European Union law.[39] In its 'Lisbon decision' the Constitutional Court developed the so-called doctrine of 'ultra vires control' of the breach of competence by the EU institutions, if such breach was sufficiently qualified. As one of the conditions it was recognised that the European Court of Justice should start preliminary ruling proceedings concerning the legality of the EU legal act, if it has not been already clarified in the judgment of the European Court of Justice.[40] After the famous 'Maastricht Decision' of the German Constitutional Court

36 Case C-274/07, Commission of the European Communities/Republic of Lithuania, Single European emergency call number, ECJ, 11 September 2008, p. 14.

37 Case C-207/08, Order of the Court (reference for a preliminary ruling from Panevėžio apygardos teismas – Republic of Lithuania) – Criminal proceedings against Edgar Babanov, ECJ, 11 July 2008, p. 35.

38 Annual report of the ECJ [interactive]. 2010, p. 87 [accessed 24-07-2011]. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010version_integrale_lt.pdf>.

39 BVerfG, 2 BvE 2/08, Lisbon Judgment of 30 June 2009.

40 Tomuschat, Ch. Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009. *ZaöRV*. 2010, 70: 251.

in 1993 a huge discussion started in Europe about the EU law in domestic law.[41] For the first time, the Constitutional Court developed specific criteria for non-applicability of the EU law. The judge at the German Constitutional Court, Mr. Paul Kirchhof, who was actually a judge rapporteur in the 'Maastricht' case, officially represented the opinion on the necessity of cooperation between the European Court of Justice and the Constitutional Court. Additionally, he noted that the EU law would lose its roots and its power to grow by being made autonomous and separate from the EU Member States.[42] At the same time, the judgments of the German Federal Constitutional Court in previous cases of Solange I[43] and Solange II[44] concerning the relationship between German law and EU law was analysed. As a result, every EU Member State again undertook the revision of the relationship between the EU law and domestic law. Judgments of the German Constitutional Court had a 'cunami effect' on the jurisprudence of the constitutional courts of the EU Member States. The Lithuanian law was not an exception to the European legal context. Nowadays the primacy of EU law is a controversial and discussable issue in the Lithuanian law and requires the analysis of Lithuanian law and its application. This issue together with the reform of the Constitution of the Republic of Lithuania was discussed during the process of accession to the European Union. During the reform, the main question was to choose between the necessity of change of the Constitution and no change to the Lithuanian law.[45] Finally, the Lithuanian legislator adopted the Constitutional Act on the Membership in the EU, which came into force on 13 July 2004. According to Article 2 of the Constitutional Act, the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, and in the event of collision of legal norms, they shall have primacy over the laws and other legal acts of the Republic of Lithuania. This rule contained in Article 2 of the Constitutional Act should solve the questions related to the recognition of the principle of primacy of the EU law in the Lithuanian legal order. Nevertheless, the jurisprudence of the Lithuanian courts is based on the primary role of the national Constitution.[46] According to Article 7 of the national Constitution, no legal act may violate the constitutional requirements. The consequence of such a violation is invalidity of the legal requirements.

The Constitutional Court judged that the EU law could not contradict with the national Constitution. The approach of the Lithuanian Constitutional Court has been affected by their monist perspective with regard to the relationship between national and

41 BVerfGE 89, 155, Maastricht Judgment of 12 October 1993.

42 Kirchhof, P. The Balance of Powers between National and European Institutions. *ELJ*. 1999, 5: 241.

43 BVerfGE 37, 271, Solange I Judgment of 29 May 1974.

44 BVerfGE 73, 339, Solange II Judgment of 22 October 1986.

45 Jarašiūnas, E. Kelios mintys apie Lietuvos dalyvavimo tarptautiniuose santykiuose konstitucinius pagrindus [Some remarks about the constitutional basics of participation of the Republic of Lithuania in international relations]. In: Teisė besikeičiančioje Europoje. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2008, p. 628.

46 Constitutional Court of the Republic of Lithuania, Judgment of 22 June 2009 concerning the legal act of territorial planning, No 16/07-17/07-20/08.

EU law. The EU law is automatically transformed into the Lithuanian law through the ratification of the Accession Treaty. However, the Constitutional Court has limitations as to the acceptance of primacy of the EU law. The question of recognition of primacy of the EU law could pose particular problems for the Lithuanian legal order. It is possible to find a similar judgment in the jurisprudence of the Spanish Constitutional Court. As the Lithuanian Constitutional Court, it has also recognised the primacy of EU law in the domestic legal order, however, it did not recognise the hierarchical supremacy of EU law against the Constitution.[47]

The Lithuanian point of view was also underlined in the German legal doctrine. Mr. Hilf has clearly notified that the Lithuanian constitutional provisions expressly stated the primacy of the EU law, and it was applicable to the non-constitutional law.[48] This point of view needs additional explanation. According to the Lithuanian Constitutional Court, the membership of Lithuania in the EU is based on the constitutional requirements and it should be followed. The constitutionality of the membership could be the legal consequence, if the constitutional requirements were not fulfilled through the membership in the EU. Advocate General at the European Court of Justice Ms. Kokott has clarified such a situation with national constitutions and its relationship with the EU law as a 'taboo' in the judgments of the European Court of Justice, stating that the Court would not participate by the breaking it.[49]

According to the opinion of the former judge of the Lithuanian Constitutional Court, Mr. Kūris, the European Union could not be developed into supranational structure with the novelty of the constitutional traditions. According to him, the relationship between the Lithuanian constitutional law and the EU law shifts the solution from the field of 'competing supremacies' to the field of application of the law. In that way, it is irrelevant which law could have supremacy because the only relevant issue is which law has to be applied.[50] In the opinion of Mr. Jarašiūnas, it should be developed between the constitutional courts and the European Court of Justice as a friendly dialogue, taking into account the respect for both legal systems (mutual amicability).[51] The recognition of common interest in the EU is the basic point of recognition of the primacy of EU law against national law. The Lithuanian Constitution should act under the presumption of applying EU Law. By recognising the fact that the membership of Lithuania is based on an international obligation, arising from the Accession Treaty, Lithuania should in every case, as the EU Member State, follow the law of the European Union. In case of conflict, Lithuanian courts should use the preliminary ruling procedure. It is a typical way for solving collisions between two different legal systems. According to the Constitutional

47 Decision No. 1/2004 of 13 December 2004 of the Spanish Constitutional Court.

48 Hilf, M., *supra* note 24.

49 Kokott, J.; Ost, H. Europäische Grundfreiheiten und nationales Steuerrecht. *EuZW*. 2011, p. 496.

50 Kūris, E. Europos Sąjungos teisė Lietuvos Respublikos konstitucinio teismo jurisprudencijoje: sambūvio algoritmo paieškos [The EU Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania: Search for the Algorithm of Coexistence]. In: Teisė besikeičiančioje Europoje. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2008, p. 673, 707.

51 Jarašiūnas, E., *supra* note 45, p. 618, 620.

Court, the jurisprudence of the European Court of Justice belongs to the legal source of interpretation of the Lithuanian law. The Lithuanian Constitutional Court applied the judgments of the European Court of Justice prior to the membership of Lithuania in the EU. The jurisprudence of the Constitutional Court shows that its judgments were based on the European Union rules, were in accordance with the European Union law and the Lithuanian Association Treaty requirements. When Lithuania's membership came into force, the Lithuanian courts started applying the jurisprudence of the European Court of Justice directly. However, according to the opinion of Mr. Kūris, it does not change the issue of the binding nature of the ECJ judgments for the Lithuanian Constitutional Court, because they are still a legal source for interpretation of the law and not for the decision making in the jurisprudence of the Constitutional Court.[52] The Constitutional Court has already applied to the European Court of Justice for a preliminary ruling. During the control of constitutionality of the national rules, the Constitutional Court started the preliminary ruling procedure and applied to the European Court of Justice. It is remarkable, because in the praxis of the European Court of Justice it is a rare example that the constitutional court uses the preliminary ruling procedure for the purposes of constitutional control.[53] One should agree with the opinion of Mr. Hilf, that in such situations, it is necessary to analyse the relevant national jurisprudence for finding out whether the principle of primacy has been accepted by national courts and whether it has been applied in particular cases of conflicts. The national courts have an obligation to rule on existing conflicts between the EU and national law.[54] The praxis of Lithuanian ordinary courts has nothing in common with any confrontation with the principle of primacy of the EU law. Ordinary courts constantly apply the preliminary ruling procedure. According to the yearly overview of the jurisprudence of the Lithuanian Supreme Administrative Court, has been developed into more complexities about the application of the EU law.[55] New points arose in cases concerning EU financial support. In administrative case No. A556 – 647/2010 *V. Č. v. the National Payments Agency under the Ministry of Agriculture*, that Court directly applied the general principle of EU law concerning legal expectations.[56] That Court interpreted the rules of the Commission Regulation (EC) No. 800/2008 and Council Regulation (EC) No. 1083/2006 and stated that the attorney at law office could not be treated as a beneficiary of the financial support from the EU in the programme for the development of electronic business 'E-Verslas LT'.[57] In another judgment, that Court annulled the decision of the National Payments

52 Kūris, E., *supra* note 50, p. 680.

53 Decision of the Constitutional Court of the Republic of Lithuania on the reference for a preliminary ruling to the European Court of Justice, 8 May 2007, Case Nr. 47/04.

54 Hilf, M., *supra* note 24.

55 Overview of activity of the Lithuanian Supreme Administrative Court for the year 2010 [interactive]. [accessed 27-06-2011]. <http://www.lvat.lt/media/53264/lvat_metinis_2010.pdf>.

56 Judgment of the Supreme Administrative Court of Lithuania of 15 April 2010 in the administrative case No A556–647/2010.

57 Judgment of the Supreme Administrative Court of Lithuania of 14 October 2010 in the administrative case No A822–1296/2010.

Agency to refuse assigning the status of the beneficiary of financial support. The application of the EU law was deciding for the Court judgment.[58] Remarkably enough, the Lithuanian Supreme Administrative Court was the first to apply to the European Court of Justice by means of a preliminary ruling procedure.[59] In the jurisprudence of the Lithuanian Supreme Administrative Court, the EU law is applicable in the areas of freedom of movement (extradition of EU citizens), competition law, taxation law, telecommunications law, environmental law, interpretation of the EU law. Those issues have a special character of administrative law as actions of the State. As the court of last instance, the Lithuanian Supreme Court constantly applies the EU law. If a relevant issue of EU law arises, the Lithuanian Supreme Court is always applying to the European Court of Justice for a preliminary ruling under Article 267 of Treaty on the Functioning of the European Union. The issue of application of the EU law arises in cases of free movement of goods, freedom of establishment, consumer law protection, public procurement, interpretation and validity of the EU legal acts. Application of the EU law is often overviewed in the specific court judgment called the Overview of Legal Regulation and Court Praxis, what, in the praxis of ordinary courts, is understood as the guideline for leading cases.[60]

The Lithuanian Supreme Court and the Supreme Administrative Court of Lithuania are the most active in the preliminary ruling procedure, as they are the courts of last instance, and, according to Article 267 of the TFEU, they have an obligation to initiate the preliminary rulings procedure and to eliminate any contradictions between the EU law and national law. Furthermore, the courts of first instance give examples of correct application of preliminary ruling procedure by the European Court of Justice. In particular, the abovementioned judgment of the ECJ in case No. 391/09 related to the freedom of movement should be noted. The reference for a preliminary ruling was submitted by Vilnius City 1 District Court.[61] The judgment of the European Court of Justice in the area of free movement of goods was initiated by the County Court of Panevezys during the investigation of the criminal case against Mr. Babanov.[62] These examples allow making a conclusion on the effective application of the EU law in domestic law. The analysis shows that any kind of contradiction between the EU law and national law is avoided in the jurisprudence of the ordinary Lithuanian courts.

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58 Judgment of the Supreme Administrative Court of Lithuania of 26 November 2010 in the administrative case No A756–1486/2010.

59 ECJ, 3 February 2006, *supra* note 34, p. 1.

60 The following judgments are relevant for the application of the EU law: 19 November 2010, No AC-33-1, Overview of legal regulation and court praxis concerning consumer protection in contractual relations, part 2; 24. March 2009, No AC-1, Overview concerning consumer protection in contractual relations, part 1; 29 July 2009, No A-3, Overview of legal regulation concerning public procurement and court praxis.

61 ECJ, 12 May 2011, *supra* note 32, p. 1.

62 ECJ, 11 July 2008, *supra* note 37, p. 1.

Conclusions

The Lisbon Treaty was the first to regulate the primacy of the EU law at the level of the EU Treaties. Previous attempts of the Amsterdam Treaty and the Treaty establishing a Constitution for Europe were unsuccessful.

Therefore, the Declaration No 17 of the Lisbon Treaty contains specific provisions on the primacy of the EU law and Articles 2 to 4 of the Treaty on the Functioning of the European Union contains a catalogue of competences and rules for avoiding collision of competence.

Consequently, the European Court of Justice developed its own rules for the primacy of the EU law by requiring the precedence of the EU law over conflicting national law. It should be noted that the specific term of 'primacy' of the EU legal rule is not finally clarified in the jurisprudence of the European Court of Justice. It differs in terms of describing the same legal issue. In particular, it affects such terms like 'primacy', 'precedence' and 'supremacy'.

The position of the Lithuanian Constitutional Court concerning the recognition of the primacy of EU law is affected, in many points, by the jurisprudence of the German Federal Constitutional Court and the Spanish Constitutional Court.

In its latest judgments the European Court of Justice refused to deal with the particularly sensitive questions of limitation of sovereignty and transfer of these powers to the EU. However, the detailed analysis of the jurisprudence of the European Court of Justice and the constitutional courts shows a kind of 'staying online' by answering to the question as to which law should be set aside in case of collision – the EU law or the constitutional law. Nevertheless, the basic point is clear: both sides would not surrender. It is a characteristic situation after entry into force of the Lisbon Treaty.

According to the Lithuanian Constitutional Court, the EU law has a presumption of application in the Lithuanian law, nevertheless, the limitation of the sovereign powers of the Republic of Lithuania and contradictions of the EU legal rule with the legal rule of the Constitution would not be recognisable in domestic law.

The Lithuanian ordinary courts are influenced by the jurisprudence of the European Court of Justice and of the Constitutional Court. Lithuanian ordinary courts apply the preliminary ruling procedure made by the European Court of Justice that characterizes this process as the 'integration through law', and it could solve the conflict between the EU and domestic law systems by legal means.

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EUROPOS SĄJUNGOS TEISĖS VIRŠENYBĖS ĮGYVENDINIMAS: TEISĖS DOKTRINA IR PRAKTIKA

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Santrauka. *Šiame straipsnyje nagrinėjamas Europos Sąjungos teisės viršenybės principo įgyvendinimas, pateikiant Europos Sąjungos Teisingumo Teismo ir Lietuvos teismų praktikos tendencijų analizę. Įsigaliojus Lisabonos sutarčiai deklaracijoje Nr. 17 atsirado teisinis reglamentavimas dėl Europos Sąjungos teisės viršenybės nacionalinės teisės atžvilgiu. Taip pat sutartyje dėl Europos Sąjungos veikimo 4 ir 5 straipsniuose buvo numatytas Europos Sąjungos kompetencijos katalogas ir jos atskyrimo būdai, esant kolizijai tarp ES ir valstybių narių kompetencijos. Tai pirmi tokio pobūdžio teisiniai reguliavimai, priimti Europos Sąjungos pirminėje teisėje. Iki tol buvo nesėkmingi bandymai reglamentuoti nurodytus klausimus Amsterdamo sutartyje ir Sutartyje dėl Konstitucijos Europai. Lietuvos Respublikos narystė Europos Sąjungoje turi neginčijamą poveikį Lietuvos teisinei sistemai. Pastaruoju metu itin aktualus tapo Lietuvos nacionalinės teisės ir Europos Sąjungos teisės santykio klausimas. Pagrindinis šio straipsnio tikslas – išanalizuoti galimas Europos Sąjungos teisės taikymo problemas Lietuvos teisėje. Straipsnyje nagrinėjamas Lietuvos valstybinių institucijų kompetencijos perleidimas Europos Sąjungai. Šie klausimai dažnai siejami su tautos ir valstybės suvereniteto santykio problematika. Tai svarbus klausimas, nes Europos Sąjungos teisės viršenybės principas taikomas tose srityse, kurios yra priskiriamos Europos Sąjungos ir ES valstybių narių kompetencijai. Lietuvos konstitucinė teisė nepripažįsta suverenių teisių apribojimų, Europos Sąjungos teisė reikalauja būti taikoma visais atvejais, net jei ir prieštarauja ES*

valstybės narės konstitucijai. Lietuvos Respublika, būdama Europos Sąjungos valstybė narė, privalo perimti „aqui communitaire“. Europos Teisingumo Teismo praktikoje nacionalinės ir Europos Sąjungos teisės santykio kolizijos klausimai sprendžiami ES teisės naudai. Lietuvos konstitucinis aktas „Dėl narystės Europos Sąjungoje“ vadovaujasi būtent šiais principais. Lietuvos Respublikos Konstitucinis Teismas pripažįsta Europos Sąjungos teisės viršenybės principą, tačiau daro tam tikras išlygas nacionalinės konstitucijos atžvilgiu. Lietuvos Konstitucinio Teismo požiūris, siekiant apsaugoti nacionalinę konstituciją, yra panašus į kitų Europos Sąjungos konstitucinių teismų. Ypač jaučiama Vokietijos Federalinio Konstitucinio Teismo jurisprudencijos įtaka. Pabrėžtina, kad dabartinėje Europos Teisingumo Teismo, kaip ir nacionalinių konstitucinių teismų, praktikoje ryškėja tendencijos susilaikyti nuo kolizijų su nacionalinėmis konstitucijomis, nepaisant skirtingų oficialių pozicijų. Lietuvos Konstitucinis Teismas ir Lietuvos bendrosios bei specialiosios kompetencijos teismai, susidurdami su ES teisės taikymu, taiko sutarties dėl Europos Sąjungos veikimo 267 straipsnyje numatytą prejudicinio sprendimo procedūrą. Ši procedūra padeda išspręsti ES ir nacionalinės teisės viršenybės klausimą ir teisės normų taikymą kolizijos atveju.

Reikšminiai žodžiai: *Europos Sąjungos teisės viršenybė, konstitucinė garantija, Europos Sąjungos ir valstybių narių kompetencija, Europos Teisingumo Teismo ir nacionalinių teismų kontrolė.*

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