

# THE INFLUENCE OF THE EUROPEAN LAW AND OF THE CASE LAW DEVELOPED BY THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE CONSTITUTIONAL REVIEW IN ROMANIA

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## Abstract

*The paper intends to highlight the complex influences that are inherent to the interaction of the European law and domestic law, from the perspective of the constitutional review. Constitutional adjudication is one of the most effective instruments of the rule of law, but usually the reference norm is the national Basic Law. Nevertheless, as a Member State of the European Union, Romania has recognized the guiding principles developed by the Court of Justice of the European Union Democratic in its case law, namely the direct effect and the precedence of European law in case of inconsistency of domestic law. Thus, under certain conditions, the Constitutional Court of Romania had to extend the reference norms in order to take into consideration the European law, as well. Hence, one of the consequences of Romania's accession to the European Union was that certain norms of European Union law became a reference tool for exercising constitutional review through the glass of Article 148 of the Romanian Basic Law which enshrines the prevalence of the founding treaties of the European Union and of other binding Community (European) regulations over contrary provisions of national law. Furthermore, CJEU-s case law gained an important place in the reasoning of the Romanian Constitutional Court-s decisions. Last, but not least, the paper will present the interaction of the two fore mentioned courts in relation with the preliminary rulings rendered by CJEU in accordance with Article 267 of the Treaty on the Functioning of the European Union.*

**Keywords:** *Review of constitutionality, European law, binding European regulations, preliminary rulings procedure, CJUE case-law.*

## 1. Introduction

The paper is focused on the complex interactions between the national and European law. The interplay of the two normative systems leads to situations that are sometimes rather difficult to manage and rests to ordinary courts the delicate task to find the proper solution. Since the accession of Romania to the European Union, the Constitutional Court was also often asked to bring its contribution in this context. The issue was brought to the attention of the Constitutional Court even prior to this moment, in 2003, when it had to adjudicate over the constitutionality of amending the Romanian Basic Law, initiated with the declared intention to harmonize it with the European standards and values. After that, in numerous cases the review of constitutionality proved its importance in what concerns the process of accurate understanding and integrating the European law in the Romanian legal system. The purpose of this paper also consists in showing the influence of the case law developed by the Court of Justice the European Union which acquired a quasi-normative function, that redefined the position of domestic law in relation with the provisions of the founding treaties and other binding normative acts at the level of the European Union. The Constitutional

Court of Romania often invokes the assessments of the CJEU in the reasoning of its decisions. The paper will bring into light the relevant case law of the Constitutional Court and will use it in order to prove its contribution in implementing European law into the national legal system. Due to its impact on various fields of law, the issue was taken into consideration by certain scholars<sup>1</sup>, but the complexity of the topic offers a very wide range of approaches, including the one emerged from the present study.

## 2. The relationship between the constitutionality review exercised by the Romanian Constitutional Court and the European law

Accession to the European Union - international entity based on its own legal order, which is, in the same time, a specific and an integrative one - requires a constant effort to harmonize the national legislation of each Member State with the European standards and to adapt to the normative requirements of this supranational structure.

The purpose of this constant approach is the unification of national legal systems, the achievement of a single European order, as an implicit objective, negotiated by the Member States and enshrined in the

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<sup>1</sup> See, for instance, Marieta Safta, „Notă de jurisprudență a Curții Constituționale [18-22 noiembrie 2019]. Raporturile între dreptul național, internațional, european în cadrul controlului de constituționalitate (I)” published on [www.juridice.ro](http://www.juridice.ro) [https://www.juridice.ro/662254/nota-de-jurisprudenta-a-curtii-constitutionale-18-noiembrie-22-noiembrie-2019.html#\\_ftn5](https://www.juridice.ro/662254/nota-de-jurisprudenta-a-curtii-constitutionale-18-noiembrie-22-noiembrie-2019.html#_ftn5); Gabriela Zanfir Fortuna, „Curtea Constituțională a României și procedura întrebărilor preliminare. De ce nu?”, *Revista Română de Drept European* nr. 5/2011, pp. 82-97, Viorel Tatu, „Influența jurisprudenței Curții Europene de Justiție asupra dreptului românesc”, *Universul Juridic Premium* nr. 8/2017.

founding treaties<sup>2</sup>. During this process, the interplay of national and supranational law can sometimes be problematic, involving complex legal analyzes that should take into account both the supremacy of the Member States' Basic Laws and the specific effects of the European law over their national legal systems.

In what concerns Romania, its intention to acquire the status of full member of the European Union<sup>3</sup> required a multitude of changes in order to adapt its legal system at the values imposed by the European Union. The most significant change took place in 2003, when its Basic Law was amended at the end of a long process, concluded with the popular approval given by the Romanian citizens throughout a referendum<sup>4</sup>. On that occasion, the Basic Law was supplemented with numerous new provisions in order to elevate the standard of protection of fundamental human rights and to enforce the guarantees of the rule of law.

In the context of the topic approached in the present paper, Article 148 of the revised Basic Law has a particular significance because it clarifies the relationship between domestic law and the European Union's law. According to paragraph (2) of the said article, following accession, the provisions of the founding treaties of the European Union, as well as the other mandatory community [European]<sup>5</sup> regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

Due to its power provided by the Basic Law<sup>6</sup>, the Constitutional Court of Romania adjudicates *ex officio* on initiatives to revise the Constitution. Analyzing the initiative that led to the 2003 revision of the Basic Law, the Court stated<sup>7</sup> that accession to the European Union, once achieved, implies a series of consequences that could not occur without proper regulation, including those of constitutional rank. The Court stated that the first of these consequences requires the

integration into the domestic law of the *acquis communautaire*, as well as the precise determination of the relationship between European normative acts and domestic law. In this respect, the Romanian Constitutional Court noted that the solution proposed by the authors of the amending initiative took into account the implementation of European law in the national space and the establishment of the rule of prevalent application of European law over contrary provisions of domestic law, in accordance with the provisions of the act of accession.

The Court emphasized that the Member States of the European Union have decided to place the *acquis communautaire*, the founding treaties of the European Union and the regulations derived from them, on an intermediate level, right between the Constitution and other laws, when it comes to binding European normative acts. The Court considered that such a rule does not prejudice the constitutional provisions regarding the limits of revision, nor other provisions of the Fundamental Law, being a particular application of Article 11 Paragraph (2) of the Basic Law, according to which "Once ratified by Parliament, according to the law, treaties are part of domestic law".

The issue of the relationship between national and European law was again brought to the attention of the Constitutional Court in 2014, when a new proposal to revise the Basic Law was verified *ex officio*. According to the initiators, Article 148 paragraph (2) of the Constitution was to be amended and to provide that "Romania ensures the observance, within the national legal order, of the European Union's law, according to the obligations assumed by the act of accession and by the other treaties signed within the Union".

The Court found<sup>8</sup> that this new wording violates the constitutional limits on matters of revision<sup>9</sup>. Thus, establishing that European Union's law applies without any circumstances within the national legal order and not distinguishing, in this regard, between the

<sup>2</sup> Ioan Muraru, Simina Tănăsescu, (coordonatori), *Constituția României – Comentariu pe articole*, Editura C.H.Beck, București, 2008, p.1437.

<sup>3</sup> In 1995, Romania applied to join the European Union. Accession negotiations were launched in December 1999 and officially opened in February 2000. The Treaty of Accession to the European Union was signed by the President of Romania on April 25, 2005, in an official ceremony held at the Neumunster Abbey in Luxembourg. On January 1, 2007, Romania became a member state of the European Union

([https://ec.europa.eu/romania/about-us/eu\\_romania\\_ro](https://ec.europa.eu/romania/about-us/eu_romania_ro)).

<sup>4</sup> The law on the revision of the Romanian Constitution was approved by the national referendum of October 18-19, 2003 and entered into force on October 29, 2003, the date of publication in the Official Gazette of Romania of the Decision of the Constitutional Court no. 3 of October 22, 2003 for the confirmation of the result of the national referendum of October 18-19, 2003 regarding the Law on the revision of the Romanian Constitution.

<sup>5</sup> The institutional reform implemented by the Treaty of Lisbon, which entered into force on 1 December 2009, has changed the term "Community law" and replaced it with "European law". Prior to that Treaty, the term "Community law" was used due to the fact that the European Communities (European Economic Community - EEC, European Coal and Steel Community - ECSC and Euratom) were one of the three pillars of European construction, along with Member States' cooperation in common foreign and security policy (CFSP) and Member States' cooperation in areas such as justice and home affairs (JHA).

(see <https://op.europa.eu/webpub/com/abc-of-eu-law/ro/>).

<sup>6</sup> Article 144 letter a) of the Basic Law as it was before the revision. After the revision, the same provisions are contained in Article 146 letter a).

<sup>7</sup> Decision no. 148 of April 16, 2003, published in the Official Gazette of Romania no. 317 of May 12, 2003.

<sup>8</sup> Decision no. 80 of February 16, 2014, paragraphs 455, 456, published in the Official Gazette of Romania no. 246 of April 7, 2014.

<sup>9</sup> There are several fundamental values that are considered the "hard core" of the Fundamental Law of Romania. These values are provided by Article 152 according to which "(1) None of the provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms or of the safeguards thereof".

Constitution and other domestic laws, the new normative content of the provisions of Article 148 paragraph (2) of the Constitution is equivalent to placing the Basic Law on a secondary level toward the legal order of the European Union. From this perspective, the Court noted that the fundamental law of the state - the Constitution - is the expression of the sovereign will of the people, which means that it cannot lose its binding force only by the existence of an inconsistency between its provisions and those of the European law. In assessing this statement, one has to keep in mind the essential detail that the current Romanian Basic Law is already the result of a major amending process, concluded in 2003, which was focused on bringing it in accordance with the values enshrined in the European law. Also, the Court stated that the accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order.

Subsequently, the Court deepened and detailed the reasoning. Thus, it stressed<sup>10</sup> that the legislator has a constitutional obligation to guarantee, within the enacted normative acts, at least the same level of protection of rights as that provided by the binding acts of the European Union<sup>11</sup>, as well as to bring national legislation in line with the binding acts of the European Union, as a permanent and continuous concern regarding the content of legislative activity. This is the interpretation of Article 148 paragraph (4) of the Basic Law, according to which the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfillment of the obligations resulting from the accession act and from the principle of precedence of the European Union's constitutive treaties and other binding European regulations.

In order to properly present the subject matter of this paper, it is necessary to bear in mind that the European Union has developed its own, specific and special legal order both in relation with the internal legal orders of the Member States and in relation with the international legal order. Within it, several categories of sources of law governing the interplay between the European Union and the Member States and various other international organizations, as well as between natural and legal persons, nationals or foreigners, have been identified<sup>12</sup>. First of all, there are the norms with fundamental, constitutional value, which form the sources of primary European law. These are represented by the constitutive and amending

European treaties. Then, there is the secondary European law that consists of all unilateral acts issued by the institutions of the European Union. The scholars<sup>13</sup> noticed that one of the consequences of Romania's accession to the European Union consisted in the fact that the norms of European Union law became a reference tool for exercising constitutional review through the glass of Article 148 of the Romanian Basic Law.

The Constitutional Court has developed a rich case-law in this regard. Moreover, it was said<sup>14</sup> that it has built a genuine "doctrine" of the incidence / use of European law in constitutional review, which is necessary to be taken into account in motivating the decisions rendered with regard of the exceptions of unconstitutionality where Article 148 of the Fundamental law is invoked. The Court specified under what conditions European acts - others than constitutive treaties - may be invoked. These conditions were established for the first time in Decision no. 668 of May 18th 2011<sup>15</sup>. The Court specified that the use of a norm of European law within the review of constitutionality as a norm interposed to the reference one<sup>16</sup> implies, based on Article 148 paragraph (2) and (4) of the Constitution, a cumulative conditionality: on one hand, this rule must be sufficiently clear, precise and unequivocal in itself or its meaning has been clearly, precisely and unequivocally established by the Court of Justice of the European Union. On the other hand, the norm must be limited to a certain level of constitutional relevance, so that its normative content to sustain the check of a possible violation of the Constitution by the national law – keeping in mind the decisive fact that the national Basic Law is the only direct reference norm in the review of constitutionality<sup>17</sup>.

However, it has to be once again highlighted that these are not provisions contained in the founding or amending European treaties. The Romanian Constitutional Court firmly stated that it is not within its competence to analyze the consistency of a provision of national law with the texts of these treaties, in the light of Article 148 of the Romanian Basic Law. Such power rests with the regular courts, which, in order to reach an accurate conclusion as to the resolution of the dispute before it, may formulate - *ex officio* or at the request of one of the parties - a preliminary question within the scope of Article 267 of the Treaty on the Functioning of the European Union,

<sup>10</sup> See Decision no. 64 of February 24, 2015, published in the Official Gazette of Romania no. 286 of April 28, 2015, paragraph 33.

<sup>11</sup> That specific case adjudicated by the Constitutional Court concerned the right to social protection measures.

<sup>12</sup> Augustin Fuerea, *Manualul Uniunii Europene*, Ediția a IV-a, Editura Universul Juridic, București, 2010, p.122.

<sup>13</sup> M. Safta, „Notă de jurisprudență a Curții Constituționale [18-22 noiembrie 2019]. Raporturile între dreptul național, internațional, european în cadrul controlului de constituționalitate (I). Interpretarea art. 20 din Constituție – *Tratatele internaționale privind drepturile omului*. Interpretarea art. 148 din Constituție – *Integrarea în Uniunea Europeană. Condițiile cumulative în ceea ce privește folosirea unei norme de drept european în cadrul controlului de constituționalitate ca normă interpusă celei de referință*”, published on [www.juridice.ro](http://www.juridice.ro), (a se vedea [https://www.juridice.ro/662254/nota-de-jurisprudenta-a-curtii-constitucionale-18-noiembrie-22-noiembrie-2019.html#\\_ftn5](https://www.juridice.ro/662254/nota-de-jurisprudenta-a-curtii-constitucionale-18-noiembrie-22-noiembrie-2019.html#_ftn5) ).

<sup>14</sup> Ibidem.

<sup>15</sup> Published in the Official Gazette of Romania no. 487 of July 8, 2011.

<sup>16</sup> That is, the provisions and principles contained in the Romanian Constitution.

<sup>17</sup> See also Decision no. 64/2015, published in the Official Gazette no. 286 of April 28, 2015.

addressed to the Court of Justice of the European Union. If the Constitutional Court considers itself competent to rule on the consistency of national legislation with the European law, there would be a possible conflict of jurisdictions between the two courts, which, at this level, would be unacceptable<sup>18</sup>.

In this regard, the Court decided<sup>19</sup> that the exceptions of unconstitutionality where the argument of unconstitutionality is made with reference to the provisions of Article 148 paragraph (2) of the Constitution - which enshrines the primacy of the provisions of the founding treaties of the European Union and other binding Community (European) regulations over contrary provisions of national law - to be rejected as inadmissible, because they raise issues related to the application of the law, which does not fall within the scope of the Constitutional Court's power, but of the regular courts'.

The Constitutional Court also stated<sup>20</sup> that it does not have the power to interpret the European rules in order to clarify or establish their content, as that task rests with the Court of Justice of the European Union. However, taking into consideration the place that the Community (European) regulations occupy in relation to domestic law, according to Article 148 paragraph (2) of the Constitution, the Court has to invoke, in its reasoning, the binding acts of the European Union, whenever they are relevant to the case, as long as their content is not unequivocal and as long as they do not require any interpretation whatsoever.

Finally, with regard to the reference to European acts, the Court stated<sup>21</sup> that it has no jurisdiction to review the consistency of a national law transposing a directive and the respective directive. Moreover, a possible inconsistency of the national act with the European one does not implicitly attract the unconstitutionality of the national transposition act. Thus, there is nothing to prevent the national legislature from granting or providing a higher level of protection in national law than in the European law<sup>22</sup>.

From the perspective of constitutional review, an interesting aftermath of Romania's accession to the European Union is the arising of a new justification for the Government emergency ordinances, consisting in the intention to avoid sanctions imposed on Romania by the European Commission for not fulfilling its obligations at European level. Thus, the Court examined<sup>23</sup> the pleas of extrinsic constitutionality regarding a Government emergency ordinance, in view

of the alleged violation of the provisions of Article 115 paragraph (4) of the Romanian Constitution, according to which the emergency ordinances can only be adopted in extraordinary situations, the regulation of which cannot be postponed. The Constitutional Court held<sup>24</sup> that the criticized emergency ordinance was adopted in the context of the opening of the infringement procedure against Romania by the European Commission, pursuant to Article 226 of the Treaty establishing the European Community. The Government issued the said emergency ordinance in order to avoid a possible procedure before the Court of Justice of the European Union. In the explanatory memorandum, the extraordinary situation as well as the urgency of the regulation were motivated on the imperative need to take legal measures to ensure compliance with the applicable rules of Community (European) law, including the case-law of the Court of Justice of the European Communities (Union). The Court also found that, in accordance with the provisions of Article 148 paragraph (4) of the Constitution, the Romanian authorities have undertaken to guarantee the fulfillment of the obligations resulting from the founding treaties of the European Union, from the binding Community (European) regulations and from the act of accession. To this end, the Government is empowered, at a constitutional level, to guarantee the fulfillment of Romania's obligations towards the European Union. Accordingly, the Court considered fully constitutional the use of emergency ordinances when it is necessary to render the domestic legislation consistent with the European law, especially when there is the menace of imminent initiation of infringement proceedings before the Court of Justice of European Union.

A special mention should be made in what concerns the review of constitutionality in the Romanian legal system with reference to the provisions of the Charter of Fundamental Rights of the European Union, given the fact that there is an interference, from the point of view of human rights protection, between the European Union legal order and the legal framework established by the Convention for the Protection of Human Rights and Fundamental Freedoms, as essential normative document of the Council of Europe. Thus, regarding the incidence of the provisions of Article 47 of the Charter of Fundamental Rights of the European Union, comprising the right to an effective remedy and to a fair trial, the Constitutional

<sup>18</sup> See, in this regard, Decision no. 1249 of October 7, 2010, published in the Official Gazette of Romania, Part I, no. 764 of November 16, 2010, Decision no. 137 of February 25, 2010, published in the Official Gazette of Romania, Part I, no. 182 of March 22, 2010, Decision no. 1596 of November 26, 2009, published in the Official Gazette of Romania, Part I, no. 37 of January 18, 2010, Decision no. 668/2011, Official Gazette no. 487 of July 8, 2011.

<sup>19</sup> See, for example, Decision no. 1119/2010, published in the Official Gazette no. 745 of November 8, 2010.

<sup>20</sup> Decision no. 383/2011, published in the Official Gazette. no. 281 of April 21, 2011.

<sup>21</sup> Decision no. 137/2010, published in the Official Gazette. no. 182 of March 22, 2010 or Decision no. 646/2010, published in the Official Gazette. no. 368 of June 4, 2010.

<sup>22</sup> For a more complex and detailed analyze of a similar issue, see Solange I and II decisions of The German Federal Constitutional Court (Bundesverfassungsgericht).

<sup>23</sup> Government Emergency Ordinance no. 50/2008 for the establishment of the pollution tax for motor vehicles, published in the Official Gazette of Romania, Part I, no. 327 of April 25, 2008.

<sup>24</sup> Decision no. 1596 of November 26, 2009, cited above, Decision no. 802/2009, published in the Official Gazette no. 428 of June 23, 2009.

Court noticed<sup>25</sup> that in the case law of the Court of Justice of the European Union, for example, the Judgment of 22 December 2010 in Case C-279/09 - *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, paragraph 35, it was held that, according to Article 52 paragraph (3) of the Charter, insofar as it contains rights corresponding to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same as those provided for in the Convention.

The meaning and extent of the guaranteed rights are determined not only by the text of the Convention, but also, in particular, by the case law of the European Court of Human Rights. Article 52 paragraph (3) the second sentence of the Charter provides that the first sentence of the same paragraph shall not preclude Union law from conferring wider protection. Therefore, regarding the content of the right to an effective appeal and to a fair trial provided by Article 47 of the Charter, the Court from Luxembourg held in its Judgment of 26 February 2013 rendered in Case C-311/11 - *Stefano Melloni v. Prosecutor's Office*, paragraph 50, that it corresponds to the content that the case law of the European Court of Human Rights recognizes to the rights guaranteed by art. 6 paragraphs 1 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see the judgments of the European Court of Human Rights of 14 June 2001, 1 March 2006 and 24 April 2012 in *Medenica v. Switzerland*, paragraphs 56-59, *Sejdovic v. Italy*, paragraphs 84, 86 and 98, and *Haralampiev v. Bulgaria*, paragraphs 32 and 33).

In the same time, the Constitutional Court held<sup>26</sup> that, as a principle, the provisions of the Charter of Fundamental Rights of the European Union are applicable in constitutional review insofar as they ensure, guarantee and develop constitutional provisions on fundamental rights, in other words, insofar as their level of protection is at least at the level of constitutional norms in the field of human rights<sup>27</sup>. This view corresponds to that outlined in the practice of the most representative authorities of constitutional jurisdiction in Europe<sup>28</sup>, which, in view of the principle of the supremacy of the Constitution, considered that, in the field of the human rights, European law cannot take precedence if the level of protection granted by the national fundamental laws is superior to that offered by European legislation<sup>29</sup>.

### 3. Relationship between the case law of the Court of Justice of the European Union and the review of constitutionality exercised by the Constitutional Court of Romania

Within the legal order of the European Union, the judgments of the Court of Luxembourg are an essential element in explaining the rules and measures ordered by the European institutions. Due to the interpretations included in the reasoning of its judgments, the Court of Justice has a major influence on the whole European law. Although it is not a source of law in the sense that the judicial precedent has got in the common law system, due to the fact that its solutions do not have *erga omnes* effects, its decisions are mandatory in terms of interpretation of the provisions of European law. Nevertheless, the case law of the Court of Justice the European Union has acquired a quasi-normative function, by clarifying and specifying the provisions of the treaties and other normative acts at the level of the Union.

Moreover, the fundamental principles of European law are the creation of the Court of Justice. The ideas comprised in the reasoning of some certain cases that represent historical jurisprudential landmarks have been transformed into general principles of European law, creating the structure of resistance of the European legal edifice. Thus, thanks to the case law of the Court from Luxembourg, have emerged two legal mechanisms, essential for the efficient functioning of the European Union, namely, the direct applicability of the European law (direct effect) and the precedence of the European norms in conflict with the domestic ones. The latter rule has been taken over explicitly also by Article 148 paragraph (2) of the Romanian Constitution, with reference to the provisions of the founding treaties of the European Union, as well as the other binding community (European) regulations.

The judgment in the case *Van Gend and Loos v. Nederlandse Administratis*<sup>30</sup> is one of the most important decisions for the development of the European legal order, thus establishing the fundamental **principle of the direct effect of Community / European law**. According to the Court of Justice, the European Community is a new legal order of international law, in favor of which Member States have limited their sovereign rights and to which not only States but also their nationals are subject, as Community / European law creates directly rights and obligations not only to the institutions of the European

<sup>25</sup> Decision no. 216/2019, published in the Official Gazette no. 548 of July 3, 2019, paragraph 24.

<sup>26</sup> Decision no. 216/2019, cited above, paragraph 25, Decision no. 339/2013, M.Of. 704 of November 18, 2013 or Decision no. 1237/2010, M.Of. 785 of November 24, 2010.

<sup>27</sup> See, in this regard, Decisions no. 872 and 874 of June 25, 2010, published in the Official Gazette of Romania, Part I, no. 433 of June 28, 2010, and Decision no. 4 of January 18, 2011, published in the Official Gazette of Romania, Part I, no. 194 of March 21, 2011.

<sup>28</sup> These are famous cases, such as the "Frotini" Judgment of the Italian Constitutional Court, the "Solange I", "Solange II" Decisions and the "Maastricht" Decision of the Federal Constitutional Court of Germany.

<sup>29</sup> See, for details, I. Muraru, S.E. Tănăsescu, op.cit., p.1440.

<sup>30</sup> NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen, Judgment of 5 February 1963 in Case 26/62.

Union and the Member States, but also to their nationals.

Of particular significance is the judgment in *Flaminio Costa v. Enel* case<sup>31</sup>, which enshrined the **principle of the precedence of Community / European law**, which complements its direct effect, in the sense that, where, by a Community / European provision, citizens of the European Union are granted rights or obligations through European acts whose content is contrary to national law, the application of European law over domestic law will be the one that prevails.

The European legal order is autonomous from the law of the Member States, but at the same time it is integrated into national legal systems, so that European law can only be achieved if it is perceived and integrated in the domestic legal order of each Member State<sup>32</sup>. It has been shown that, in this way, a complex report of complementarity is outlined, the law of the European Union needing the support of the systems of national law, but it equally is imposing itself on them. It is essential that, whenever there are inconsistencies, elements of contradiction or conflicts between the Union legal order and the legal order of the Member States, they must be resolved in the light of the principle of the priority/precedence of European law.

The courts of each EU Member States have the responsibility to ensure the accurate application of European law on their territories. But there is a risk that courts in different states would interpret the same European provisions differently. In order to prevent such situations, when a matter of European law is at stake, there can be used the procedure for pronouncing preliminary solutions. When a domestic court has doubts about the interpretation or validity of a provision of European law, it may, and sometimes is even obliged<sup>33</sup> to seek the advice of the Court of Justice of the European Union in the form of a preliminary ruling.

The preliminary rulings procedure<sup>34</sup> is based on the basic principles of European law, namely its validity in the national law of the Member States (direct effect) and the precedence of its application over the domestic legislation of the Member States. Due to this procedure, the CJEU plays a particularly important role in the development and improvement of European law, thanks to its explanations and clarifications on the Union Treaties. Through this type of procedure, a mechanism of collaboration between the Court of Justice and the national courts is developed, without, however, any hierarchical subordination relationship

between these two types of jurisdictions. This is also the reason why the Court in Luxembourg cannot be challenged in a preliminary ruling which seeks to clarify issues relating to the extent to which domestic legislation is compatible with European law. Such jurisdiction rests with national courts, in the sense that the national judge is said to be the "ordinary judge" in the European legal system. This aspect was also taken into account in the case law of the Romanian Constitutional Court<sup>35</sup>, which noted that the CJEU does not have the competence to issue a decision aimed to establish the validity or invalidity of the national law. But the CJEU is the one that interprets the founding Treaties provisions and the aftermath of this power may be that a provision of national law appears to be inconsistent with European law.

The effects of preliminary rulings have been specified by the CJEU itself in its settled case-law, namely that "the interpretation which, in exercising the jurisdiction conferred by Article 177 (now Article 267 of the Treaty on the Functioning of the European Union), the Court of Justice shall give to a rule of Community (European) law, clarifies and defines, where necessary, the meaning and the scope of that rule, as it is or should be understood and applied from the time of its entry into force" (Judgment of 27 March 1980, Case 61/79 *Denkavit italiana v Amministrazione delle finanze dello Stato*, paragraph 16, judgment of 2 February 1988, Case 24/86 *Blaizot v University of Liege and Others*, paragraph 27, judgment of 15 December 1995, in Case C-415/93 *Bosman and Others v Union royale belge des sociétés de football association and Others*, paragraph 141).

The conditions for referral to the Court of Justice of the European Union have been developed in its settled case-law. In this regard, by its Judgment of 6 October 1982 in Case C-283/81, *SRL CILFIT and Lanificio di Gavardo SpA*, the CJEU ruled that Article 177 (now Article 267 TFEU) "is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the community provision in question has already been interpreted by the Court or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt; the existence of such a possibility must be assessed in the light of the specific

<sup>31</sup> Judgment of 15 July 1964 in Case 6/64 on the reference for a preliminary ruling from the Giudice Conciliatore in Milan in the case of *Flaminio Costa v. Enel*.

<sup>32</sup> Vasile Pătulea, "Principiul primordialității dreptului comunitar față de sistemele de drept naționale ale statelor membre ale Uniunii Europene", in *Dreptul* nr. 7/2005, p. 235.

<sup>33</sup> The national judge has the duty to address such a question to the CJEU when the decision to be given in the pending dispute is not open to any ordinary appeal. In addition, the assistance of the ECJ must be sought when the interpretation given by the European court is likely to have a significant effect on the resolution of the dispute, being decisive for pronouncing a fair solution.

<sup>34</sup> In accordance with Article 267 of the Treaty on the Functioning of the European Union (formerly Article 243 TEC), the CJEU may issue preliminary rulings on the interpretation of the Treaties, as well as on the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the European Union.

<sup>35</sup> See, for example, Decision no. 921/2011, published in the Official Gazette no.673 of September 21, 2011.

characteristics of community law, the particular difficulties to which its interpretation rises and the risk of divergences in judicial decisions within the community". Also, in its Judgment of 9 September 2015 in Case C-160/14, *Joao Filipe Ferreira da Silva e Brito and Others*, paragraph 40, the Court of Justice of the European Union ruled that "the national court or tribunal has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it"<sup>36</sup>.

In the light of this case-law of the Court of Justice of the European Union, it is for the Constitutional Court to determine whether or not the questions in the request for referral to the CJEU are relevant and necessary to the *a quo* case. The Constitutional Court of Romania has referred a question to the Court from Luxembourg<sup>37</sup>, considering that the interpretation given by the European Court is imperative for resolving a certain exception of unconstitutionality. The Constitutional Court of Romania thus entered among the European constitutional contentious jurisdictions that used such a procedure to refer to the Luxembourg Court.

Therefore, as it was said<sup>38</sup>, the Constitutional Court of Romania is one of the main factors in the process of Europeanization of the domestic legal system, respecting the national constitutional identity. This is the conclusion drawn of the many cases in which the Court ruled on the obligations of national authorities from the perspective of Article 148 of the Constitution and the manner of fulfilling these obligations.

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<sup>36</sup> See Decision of the Constitutional Court of Romania No 362 of 28 May 2019, published in the Official Gazette of Romania, Part I, No 568 of 10 July 2019, para. 26 and Decision No 601 of 16 July 2020, published in the Official Gazette of Romania, Part I, No 88 of 27 January 2021.

<sup>37</sup> Decision no. 534/2018 regarding the exception of unconstitutionality of the provisions of Article 277 para. (2) and (4) of the Civil Code, according to which same-sex marriages concluded or contracted abroad by either Romanian citizens or by foreign citizens are not recognized in Romania (published in the Official Gazette no. 842 of October 3, 2018).

<sup>38</sup> National Report of the Constitutional Court of Romania for the 16th Congress of the Conference of the European Constitutional Courts, held in Vienna, May 12–14, 2014, <https://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/KF-Roumanie-MS.pdf>.

#### 4. Conclusions

Apparently an intricate weaving, the interaction between the European law and the domestic law was and still is a pretty challenging task for the Romanian authorities, regardless of the field they activate in. However, the Romanian Basic Law provides an accurate grid to clear up the interplay of the two normative systems. Thus, Article 148 paragraph (2) of the Constitution enshrines the primacy of the provisions of the founding treaties of the European Union and other binding Community (European) regulations over contrary provisions of national law. Looking through the glass of this principle, the judges from the ordinary courts have the power to adjudicate over the inconsistency of the domestic legislation. The constitutional review had to adapt as well to this interference. The main reference is obviously the Romanian Basic Law. But the Constitutional Court also stated that, under certain conditions, it may refer, in the reasoning of its decisions, to the binding acts of the European Union, whenever they are relevant to the case and as long as their content is not unequivocal. The present paper tried to depict the significant case law of the Constitutional Court in what concerns the interaction of the two normative systems, the European and the Romanian one and to underline its contribution in counteracting the difficulties engendered by this operation. The analyzed topic opens the door for further researches concerning especially the view of the Constitutional Court of Romania regarding the referral of requests for preliminary rulings to the Court of Justice of the European Union on the interpretation of European Union law, if it is necessary for the review of constitutionality of the Romanian legislation.

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