Chapter VIII

Constitutional Identity and Relations Between EU Law and Romanian Law

Tudorel Toader – Marieta Safta

Abstract

This study addresses the issue of constitutional identity with reference to theoretical and practical developments in Romania, especially from the perspective of jurisprudence and the dialogue, sometimes with more tense moments, between the Romanian Constitutional Court and the Court of Justice of the European Union. In order to paint the most complete, 'photographic' image of the issues involved, this study presents the constitutional basis of the incorporation of EU acts into national law, the concrete method used for the incorporation, and the evolution of the jurisprudence of the Constitutional Court of Romania both in defence of national law and EU law; also presented are the development of the concept of the rule of law and the concept of constitutional identity in the Romanian doctrine and jurisprudence, highlighting the opinions expressed and the existing trends. Since the central theme of the research is dialogue as a form of shaping the concept of constitutional identity, the study ends with the fundamental milestones of this dialogue in various forms by way of preliminary references (vertically, between national courts, including constitutional ones and the CJEU); within international structures, namely associations of constitutional courts, the Venice Commission and the collaborating networks established at the level of the ECHR and the CJEU; within the various forms of bilateral cooperation. It is concluded that these forms of constitutional dialogue are well developed in Romania. However, the issue of authority relations remains latent, as shown by the recent turbulence emphasized in the study. The main conclusion is that judicial dialogue, in all its forms, represents, for now, the most appropriate solution for a balanced institutional approach to constitutional identity.

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1. Incorporation of EU legal acts into Romanian law: Constitutional framework

Romania became a Member State of the European Union (hereinafter EU) on 1 January 2007, thus completing a process[1] initiated shortly after Romania's transition to a new political regime as a result of the 1989 Revolution.

An essential stage in this process was the revision of the Romanian Constitution,[2] in 2003.[3] In the section dedicated to the Constitution of Romania on the website of the Chamber of Deputies,[4] the central values of the revision are written down as follows: the creation of the appropriate constitutional framework, as well as the legal basis for the Euro-Atlantic integration of the country; the alignment of the framework's provisions with the regulations of the European Union; regulating the right of Romanian citizens to vote and to be elected to the European Parliament: '*by voting for the revision law, the Romanian citizens expressed their support for joining NATO and integration into the European Union*'.

The law for the revision of the Constitution established the way in which EU legal acts were incorporated into national law.[5] Thus, a new Title – *Euro-Atlantic integration* – was introduced into the Constitution, and comprised two articles: *Integration into the European Union* (Article 148) and *Accession to the North-Atlantic Treaty* (Article 149). Likewise, there was an amending of the provisions laid down in Article 11 – *International Law and National Law* – as well as those in Article 20 – *International Treaties on Human Rights*, establishing the relationships between international and national legal orders.

1 On 1 February 1993, Romania signed the European Agreement, establishing an association between Romania, on the one hand, and the European Communities and their Member States, on the other, and submitted its application for EU membership in June 1995, see online https://romania.representation.ec.europa.eu/despre-noi/scurt-istoric-al-relatiilor-dintre-romania-si-uniunea-europeana_ro.

2 In its initial wording, the Constitution was adopted at the meeting of the Constituent Assembly on 21 November 1991 and entered into force following its approval by the national referendum on 8 December 1991.

3 Law for the revision of the Romanian Constitution No. 429/2003, approved by the national referendum of 18-19 October 2003 and entered into force on 29 October 2003, the date of publication in the Official Gazette of Romania of the Ruling of the Constitutional Court No. 3/2003 for the confirmation of the result of the national referendum of 18-19 October 2003 regarding the Law for the revision of the Romanian Constitution.

4 Available at: http://www.cdep.ro/pls/dic/site.page?id=333 (Accessed 1 February 2023).

5 [s] See Safta, 2021a, pp. 244–248; see also Toader and Safta, 2015, pp. 206–255.

Therefore, to answer the question regarding the incorporation of EU acts into national law, there is the need for a systematic interpretation of the aforementioned constitutional provisions, namely those in Article 11, Article 20, and Article 148 of the revised Constitution, with Article 148 representing the 'accession/integration clause'.

The above-mentioned constitutional texts have the following wording:

> Article 11
> International law and national law
> (1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.
> (2) Treaties ratified by Parliament, according to the law, are part of national law.
> (3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.
> Article 20
> International treaties on human rights
> (1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.
> (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.
> Article 148
> Integration into the European Union
> (1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.
> (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence ('au prioritate'[6]) over the opposite provisions of the national laws, in compliance with the provisions of the accession act.
> (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.
> (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.
> (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

6 Romanian language.

Analysing Article 148 of the Constitution, as concerns the incorporation of EU acts into national law, we distinguish between the primary regulatory acts (*the constituent treaties of the European Union* and the *acts revising the constituent treaties of the European Union*) – which require ratification (sense in which we return to the basic rules laid down in Article 11 of the Constitution) – and the secondary laws (the Constitution expressly specifies *mandatory community regulations*, other than the treaties), the latter of which are applied in the national legal order according to the rules applicable in EU law to each category of the acts.

The rule on the ratification of international treaties (regardless of the sphere/field) is established in Article 11 paragraph (2) of the Constitution, according to which '*Treaties ratified by Parliament, according to the law, are part of national law*'. The ratification procedure is provided by Law No 590/2003 on treaties,[7] which distinguishes between treaties at the State level, at the governmental level, and at the departmental level, concluded and endorsed by different acts, in line with their level (Article 2 of Law No 590/2003, Section – *Categories of treaties*). Article 11 paragraph (2) of the Constitution refers to treaties at the State level, as they are ratified by the Parliament. The constituent treaties of the European Union and the acts revising the constituent treaties of the European Union fall into the category of the treaties ratified by the Parliament, except they have a distinctive legal regime in terms of the procedure for adopting the ratification law and the effects/relationships with national law.

From a procedural point of view, the specificity is given by the provisions of Article 148 paragraphs (1) and (3) of the Constitution, which establish, as regards the laws on the ratification of the founding treaties of the EU, that they '*are adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators'* and, specifically, that '*the provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the founding treaties of the European Union*'. It turns out that, although from a material point of view they do not fall into the category of constitutional laws (namely the revision of the Constitution), the ratification laws of EU Treaties shall be adopted by a qualified majority of votes, laid down in the Romanian Constitution only for constitutional laws, and not for organic laws (whose field is established in the Constitution and which are adopted by a simple majority of votes)[8] or ordinary laws (the other laws, which can cover any field and are adopted by a simple majority of votes).[9] These peculiarities have determined debates regarding the qualification of those laws. It was argued, for example, that

> if we also add the material criterion of the importance of regulated social relationships to the formal one, it is abundantly clear that the transfer of certain powers

7 Published in the Official Gazette, No. 23 of 12 January 2004.

8 Arts. 73 and 76 of the Romanian Constitution, available at https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 1 February 2023).

9 Art. 76 of the Romanian Constitution, https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 1 February 2023).

> specific to the State sovereignty or the joint exercise with other States of their own jurisdiction of the State power shall prevail over the regulatory field of organic or ordinary laws and may have constitutional relevance.[10]

As will be seen in the next chapters, the Law on the Ratification of the Treaty of Lisbon was qualified, by both the Legislative Council and the Parliament, as an organic law.

In terms of the effects of incorporation/relationships with national law, the specificity is given by the provisions of Article 148 paragraphs (2) and (3) of the Constitution, which establish their prevalence/priority ('prioritatea'[11]) over the contrary provisions of the national laws.

As regards the secondary laws of the EU, they are applied in the national legal order according to the rules established in EU law, in which sense the Constitutional Court of Romania[12] (hereinafter CCR) held, for example, by Decision No 887/2015,[13] that

> The regulations, as secondary regulatory acts adopted at the level of the European Union, shall directly be applicable in the legal order of the Member State. Therefore, the Member State is not expressly liable to transpose the regulation, a valid requirement in view of other secondary acts, as is the case, for example, of the directive. Therefore, the Member State is bound to fulfil those established by the regulations, a requirement that is characterized either by taking the necessary administrative measures, or by drafting normative acts able to create the necessary framework for public administration authorities to bring to fulfilment the requirement which lies with the State. Even if the regulation is directly applicable, it provides a set of rules with general applicability at the level of the European Union, the European legislator, in line with the object of the regulation, being able to provide the Member States a certain room for manoeuvre to a lesser or greater extent in order to achieve the goal outlined by its provisions.

Again referring to the effects of incorporation/relationships with national law, the same specificity of priority over the contrary provisions of national laws, laid down in Article 148 paragraph (2) of the Constitution, is also applicable for the '*other binding community regulations*', meaning, according to the CCR, that

> the regulations (a legislative act that must be applied in its entirety, in all Member States), the directives (a legislative act that set an objective that all Member States

10 Tănăsescu, 2022, p. 1328.

11 Romanian language.

12 The Romanian Constitution enshrines the European model of constitutional review, see arts. 142–146 of the Constitution, available at https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 1 February 2023)

13 Published in the Official Gazette No. 191 of 15 March 2016.

> must achieve, each of them having the freedom to decide upon the ways regarding the achievement of the established objective) and the decisions (a legislative act directly applicable and binding for all those to whom it is addressed; its beneficiaries can be Member States or even companies).[14]

The drafting of Article 148 paragraph (2) of the Romanian Constitution, which enshrines the priority of the *constituent treaties of the European*, *acts revising the constituent treaties of the European Union* and *other binding community regulations* over *national laws* ('legile interne') contrary to them, raised the issue of interpreting the concept of '*national laws*' ('legi interne'[15]). The interpretation is particularly relevant, as it establishes the place of EU law in relation to the Romanian constitutional order.

In this regard, there is the case law of the CCR, consisting of the decision on the initiative for the revision of the Constitution (2003) and the subsequent decisions, by which the Court held '*an intermediate position between the Constitution and the other laws when it comes to the binding European normative acts*'. It therefore follows that, in the CCR's opinion, the concept of '*internal laws*' refers to the other normative acts in the legal system, and not to the Constitution itself, the latter of which is the supreme law in Romania.

Thus, by Decision No 148/2003[16] on the initiative for the revision of the Constitution, the Court ruled as follows:

> The accession to the European Union, once achieved, entails a series of consequences that could not occur without an appropriate regulation, of constitutional rank. The first of these consequences requires the integration of the community acquis into national law, as well as the determination of the relationship between the community normative acts and the national law. The solution proposed by the authors of the initiative for revision aims to implement community law in the national space and establish the rule of priority application of community law over the contrary provisions of national laws, in compliance with the provisions of the act of accession. The consequence of the accession is based on the fact that the Member States of the European Union understood to place the acquis Communautaire – the founding treaties of the European Union and the regulations derived from them – on an intermediate position between the Constitution and the other laws, when it comes to binding European normative acts. The Constitutional Court finds that this provision, laid down in Article 145,[1] does not violate the constitutional provisions regarding the limits of the revision nor other provisions of the Fundamental Law, being a particular enforcement of the provisions of the current Article 11 (2) of the Constitution, according to which 'Treaties ratified by Parliament, according to the law, are part of

14 Decision No. 390/2021, published in the Official Gazette No. 612 of 22 June 2021.
15 Romanian language.
16 Published in the Official Gazette No. 317 of 12 May 2003.

> national law.' Furthermore, the Court notes that, in order to integrate this European concept into the Romanian Constitution, it deems necessary to supplement the provisions of Article 11 with a new paragraph, for which purpose it is expressly provided in the legislative proposal for revision that, 'If a treaty Romania is to become a party comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.' In order to ensure this constitutional provision an operational character, the introduction of another provision is proposed, contained in Article 144 a1), according to which the Constitutional Court 'shall decide upon the constitutionality of treaties or other international covenants, upon referral to one of the presidents of the two Chambers, of a number of at least 50 deputies or at least 25 senators'.

Subsequently, consistent with those was ruled even from the year 2003, the CCR reasserted the principle of supremacy of the Constitution over the entire national legal order, at the time when it ruled upon another initiative for revision of the Basic Law (Decision No 80/2014).[17] The Court held that the establishment, through the proposal for the revision of the Constitution, of the rule according to which EU law is applied without any circumstances within the national legal order, therefore without distinguishing between the Constitution and the other national laws, is tantamount to positioning the Basic Law in a background to the EU legal order. As a result, the Court found the unconstitutionality of the proposed amendment in relation to the provisions of Article 152 paragraph (2) of the Constitution, regarding the limits of the revision of the Constitution.

Likewise, in Decision No 104/2018,[18] the CCR noted that:

> The Constitution provides that the provisions of the founding treaties of the European Union and other binding Community rules shall take precedence over provisions to the contrary in national laws, in compliance with the provisions of the Act of Accession. However, in connection with the concept of 'national law', by Decision No 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Romanian Constitution, the Court distinguished between the Constitution and the other laws (see Decision No 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014, paragraph 452). Likewise, the same distinction is made at the level of the Basic Law in Article 20 (2) final sentence, which provides for international rules to be applied as a matter of priority, unless the Constitution or national laws contain more favourable provisions and Article 11 (3) states that if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, ratification can take place only after revision of the Constitution (paragraph 91).

17 Published in the Official Gazette No. 246 of 7 April 2014.
18 Published in the Official Gazette No. 446 of 29 May 2018.

This assertion of the Court has remained constant over time, reiterated in a more recent decision, which placed the CCR in the middle of the debates raising the issue of a dispute with the Court of Justice of the European Union (hereinafter CJEU) on the legal interpretation of the relationship between national and European legal order. Thus, by Decision No 390/2021,[19] the CCR reasserted the principle of the supremacy of the Constitution, with reference also to the case law cited above and noted, *inter alia*, that

> the Basic Law of the State — the Constitution is the expression of the will of the people, which means that it cannot lose its binding force merely by the existence of a discrepancy between its provisions and those of European laws, the membership to the European Union not being able to affect the supremacy ('supremația') of the national Constitution on the entire judicial order (paragraph 29).

In the same context, the Court also found that

> the relationship between national and international law is established in the Romanian Constitution in Articles 11 and 20. The corroborated interpretation of the two constitutional norms emphasizes the following principles: (i) the commitment of the Romanian state to fulfil exactly and in good faith its obligations under the treaties to which it is a party; (ii) through the ratification of international acts or treaties by the Romanian Parliament, they become national norms; (iii) the supremacy of the Romanian Constitution in relation to international law: Romania may not ratify an international treaty containing provisions contrary to the Constitution until after the prior revision of the National Fundamental Law; (iv) the interpretation and application of the constitutional provisions on the rights and freedoms of citizens shall be carried out in accordance with the Universal Declaration of Human Rights, the Covenants and the other treaties to which Romania is a party; (v) in the field of human rights, the dispute between an international treaty to which Romania is a party and national law shall be settled in favour of the international treaty only if it contains more favourable rules. (…) The Court finds that, through the notions of 'domestic legal acts' and 'domestic law', the Constitution has exclusively envisaged infraconstitutional legislation, the Basic Law preserving its hierarchically superior position by virtue of Article 11 paragraph (3) of the Basic Law. (…) The Romanian legal system comprises all the legal norms adopted by the Romania and which must be in line with the principle of the supremacy of the Constitution and the principle of legality, which are the essence of the requirements of the rule of law, principles enshrined in Article 1 (5) of the Constitution (paras. (79)-(83).[20]

19 Published in the Official Gazette No. 612 of 22 June 2021.

20 With the dissenting opinion of the Judges L.D. Stanciu, E.S. Tănăsescu, published in the Official Gazette No. 612 of 22 June 2021.

This being, the systematic interpretation of Articles 11, 20 and 148 of the Romanian Constitution leads to the following conclusions:

- the treaties ratified by Parliament are part of national law; as a rule, they acquire in national law the legal force and the position in the hierarchy of normative acts given by the act of ratification, with the appropriate consequences;
- the treaties on human rights to which Romania is a party belong to a specific category: they are part of the 'constitutionality block', having constitutional interpretative value (in the sense that the constitutional provisions must be interpreted and enforced in accordance with the provisions of the international treaties to which Romania is a party) and priority of application in case of inconsistency with national laws, except when the Constitution or national laws comprise more favourable provisions; it has been rightly noted that this doctrine of constitutionality block responds to the need to accommodate a new source of international law – human rights treaties – distinct from prior arrangements, which demands priority over lower national standards of human rights protection, including constitutional ones: '*the constitutionality block doctrine is a fascinating legal construct which allows a harmonious and soft 'co-habitation' between the supremacy of the national Constitution and the priority of higher international human rights standards of protection (de facto primacy)*'[21];
- the *constituent treaties of the European Union, acts revising the constituent treaties of the European Union* and *other binding community regulations* also provide a category of international acts with a specific legal regime, in the sense that they have priority over the contrary provisions of national laws; according to the CCR, they have a supra-legislative but infraconstitutional position as noted,[22]

> the accession clause is also seen by the CCR as the basis for the reception of the Charter of Fundamental Rights of the EU into the national legal order. The Court analyzes the Charter as EU primary law, rather than as an international human rights treaty.

As a specific dimension of incorporation, we should mention the use of EU law within the constitutional review by the CCR, and the application of EU law by the courts of law. Thus, according to established case law of the CCR,

> the use of a norm of European law within the framework of constitutional review as a norm interposed to that of reference [A/N the Constitution] implies, based on Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by

21 Viță, 2019, pp. 1623–1662.
22 Ibid.

> itself or its meaning must have been established clearly, precisely and unequivocally by the Court of Justice of the European Union and, on the other hand, the norm must be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation of the Constitution by the national law – the only direct norm of reference within the constitutional review. In such a hypothesis, the approach of the Constitutional Court is different from the simple enforcement and interpretation of the law, a power that lies with the courts and administrative authorities, or from the possible issues related to the legislative policy promoted by Parliament or the Government, as the case may be. In view of the stated cumulative conditionality, it falls within the discretion of the Constitutional Court to apply within the constitutional review the decisions of the Court of Justice of the European Union or to formulate preliminary rulings by itself in order to establish the content of the European norm. Such an attitude is related to the cooperation between the national and the European constitutional court, as well as to the judicial dialogue between them, without bringing into discussion issues related to the establishment of hierarchies between these courts.[23]

Regarding the Charter of Fundamental Rights of the European Union, the CCR expressly ruled that it is, in principle, applicable within the constitutional review

> to the extent that it ensures, guarantees and develops the constitutional provisions in the matter of fundamental rights, in other words, to the extent that their level of protection is at least at the level of the constitutional norms in the matter of human rights.[24]

As for the case law of the CJEU and its effects, the CCR held, for example, that

> The Court of Justice of the European Union does not have the jurisdiction to issue a judgment aimed at establishing the validity or invalidity of the national law. The consequence of a certain interpretation given to the Treaty may be that a provision of a national law is not in line with European law. The effects of this preliminary ruling are those stated in the established case-law of the Court of Justice of the European Union, namely that 'the interpretation given by the Court of Justice, in carrying out the power conferred by Article 177 (became Article 267 of the Treaty on the functioning of the European Union), to a rule of community law, clarifies and defines, when necessary, the meaning and scope of this rule, as it must or should be understood and enforced from the moment of its entry into force.[25]

23 Decision No. 668/2011, published in the Official Gazette No. 487 of 8 July 2011, see also Decision No. 414/2019, published in the Official Gazette No. 922 of 15 November 2019; see also Safta, 2017.
24 For example, Decision No. 1.237/2010, published in the Official Gazette No. 785 of 24 November 2010, or Decision No. 339/ 2013, published in the Oficial Gazette No. 704 of 18 November 2013.
25 Decision No. 921/2011, published in the Official Gazette No. 673 of 21 September 2011.

2. The transfer of additional powers compared to those conferred at the time of accession to the EU: Constitutional and legal framework

In the first chapter, we explained the method used to incorporate international acts in general, and EU acts in particular, into the national legal order. The connecting 'keys' of the different legal orders are Article 11, Article 20 and Article 148 of the Constitution, amongst which Article 11 provides the general framework regulating the ratification of international treaties, whilst Articles 20 and 148 contain special norms, applicable to international treaties on human rights (Article 20) and EU acts (Article 148).

With reference to the aforementioned constitutional framework, as long as the granting of new powers to the EU would mean the amendment of the constituent treaties of the EU, it follows that the amendment ('*acts revising the constituent treaties of the European Union*') requires the adoption of a national law for the ratification. This conclusion also arises from the case law of the CCR, where it was held, for example, that the Member States maintain powers that are inherent in order to preserve their constitutional identity, and '*the transfer of powers, as well as rethinking, emphasizing or establishing new guidelines within the powers already transferred belongs to the constitutional margin of appreciation of the Member States*'.[26]

It should be noted that the international treaties which are contrary to the Constitution are prohibited from entering the internal legal order, as long as, according to Article 147 paragraph (3) – the final sentence of the Constitution – '*the treaty or international agreement found to be unconstitutional shall not be ratified*'. The constitutional review of the treaty before ratification can be carried out by the Constitutional Court, upon referral, pursuant to Article 146b of the Constitution, according to which the CCR '*shall adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators*'. To the extent that, within the framework of the *a priori* constitutional review, the CCR would find that such a Treaty violates the Constitution, its ratification could only be undertaken after the revision of the Constitution, as long as, according to Article 11 paragraph (3), '*if a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution*'.

The revision procedure[27] is enshrined in a separate chapter (Title VII) of the Romanian Constitution. Thus, according to Article 150 of the Constitution, the initiative of revision may be started by: the president of Romania on the proposal of the government; by at least one quarter of the number of deputies or senators, as well as by at least 500,000 citizens with the right to vote (who must belong to at least half the

26 Decision No. 683/2012, published in the Official Gazette No. 479 of 12 July 2012.
27 See Safta, 2021a, pp. 244–248.

number of the counties in the country), and in each of those counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative. According to Article 151, the draft or proposal of the revision must be adopted by the Chamber of Deputies and the Senate, in separate sittings, by a majority of at least two thirds of the members of each Chamber. If the two Chambers adopt different wordings, then the mediation procedure is carried out. If no agreement can be reached by a mediation procedure, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three quarters of the number of deputies and senators. The revision is considered to be final if it is approved by a referendum held at least 30 days from the date of adoption of the revision law in the Parliament. Consequently, the last word in the revision procedure falls with the people – the holders of national sovereignty – under the conditions of Article 2 of the Constitution. To this effect, the Constitution of Romania provides three situations in which a national referendum can be held, two in which the referendum is binding on decision-making (for the revision of the Constitution and, respectively, for the dismissal of the President), and one in which the referendum is optional and advisory (the referendum on issues of national interest, upon the initiative of the president of Romania). The Constitution revision law enters into force on the date of the publication, in the Official Gazette of Romania, of the CCR decision confirming the results of the referendum.

The limits of the revision are provided by Article 152 of the Constitution of Romania in three paragraphs, which are classified by Professor D.C. Dănișor[28] as follows: material limits (paragraph 1), meaning those values considered intangible by the constituent power ('*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 not be subject to revision), teleological limits (paragraph 2), in the sense of '*result of the procedure that is not desirable*' (no revision shall be made if it results in '*the suppression of the citizens' fundamental rights and freedoms or of the safeguards thereof*'), and limits regarding exceptional situations ('*The Constitution shall not be revised during a state of siege or emergency or in wartime*').

Within the revision procedure, an essential role belongs to the CCR, which carries out the constitutional review on the initiatives for the revision of the Constitution and the revision laws of the Constitution adopted by the Parliament. The review undertaken by the CCR aims to comply with the revision procedure and the revision limits. Likewise, the CCR ensures compliance with the procedure for organizing and holding the referendum and confirms the latter's ballot returns. It is worth noting that these are the only powers for the accomplishment of which the CCR acts *ex officio*. The *ex officio* referral means that, in carrying out the constitutional review, the Court is not bound by the limits of any referral. The only limits are those provided by the Constitution. Within these limits, the Court practically carries out a systematic

28 Dănișor, 2018, pp. 11–31.

constitutional review of the initiative for the revision of the Constitution and of the law on the revision of the Constitution adopted by the Parliament.

Once ratified by the Parliament, the treaty enjoys the presumption of complying with the Romanian Constitution. However, this is not an absolute presumption, as it results from the *per a contrario* interpretation of the provisions laid out in the first sentence of Article 147 paragraph (3) of the Constitution, according to which '*if the constitutionality of a treaty or international agreement has been found according to Article 146 b), it cannot be the subject of an exception of unconstitutionality*'. Likewise, once ratified, the treaty binds the Romanian State. According to Article 11 paragraph (1) of the Constitution, '*it shall pledge to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to*'.

3. The ratification of the Lisbon Treaty: Procedural stages and authorities involved

The procedural stages of the adoption of Law No. 13/2008 for the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007[29] (hereinafter the Law for the ratification of the Treaty of Lisbon) will be presented further, with reference also to the acts of the authorities involved, as it results from the ratification law report, published on the website of the Chamber of Deputies[30] and the transcripts of the debates and adoption of the law.[31]

On 19 December 2007, the Government of Romania submitted, to the president of Romania, the bill for the ratification of the Treaty of Lisbon, for adoption[32] '*according to the emergency procedure provided for by Article 76 paragraph (3) of the Constitution*'.[33]

The bill, containing a sole article, was accompanied by an Explanatory Memorandum[34] in which, in the *Socio-economic Impact Section of the draft normative act*, under the headings *Macro-economic Impact*, *Impact on the business environment*, *Social impact*, *and Impact on the environment*, the following is stated: '*not applicable*'. The section dedicated to the socio-economic impact includes only a mention under the

29 Published in the Official Gazette, No. 107 of 12 February 2008.

30 Available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=9041&cam=2 (Accessed: 1 February, 2023).

31 Available at http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed: 1 February, 2023).

32 Available at http://www.cdep.ro/proiecte/2008/000/00/1/gv1.pdf (Accessed: 1 February, 2023).

33 According to Art. 76 para. (3) of the Constitution, '*At the request of the Government or on its own initiative, Parliament may pass bills or legislative proposals under an emergency procedure, established in accordance with the Standing Order of each Chamber*'.

34 Available at http://www.cdep.ro/proiecte/2008/000/00/1/em1.pdf (Accessed: 1 February, 2023).

Other information column, as follows: '*The Reform Treaty represents progress in the reform process of the European institutional framework, the decision-making mechanism at the European Union and community policies level, whose positive effects at the EU level will indirectly have a positive impact on the internal level*'. In the section entitled *Consultations carried out in order to develop the draft normative act*, there is mentioned the involvement of the European Institute of Romania, '*which has expertise in the translation of the acquis Communautaire*', making the mention '*not applicable*' in the other headings referring to the consultations organized with the local public administration authorities or inter-ministerial committees. Under the heading *Information regarding approval*, contained in the same section, it is stated that the project '*was favorably approved by the Legislative Council*',[35] and that *'no approval from the Supreme Council of National Defense, the Economic and Social Council, the Competition Council, the Court of Accounts is required*'. The Opinion[36] of the Legislative Council was requested by the Government on 18 December 2007 and given on 19 December 2007; it is quite laconic, comprising the following content:

> It approves the bill favorably. Due to the content of the Treaty proposed for ratification, the bill belongs to the category of organic laws. In the enforcement of Article148 para. (1) and (3) of the Constitution of Romania, republished, the bill shall be submitted for adoption in the joint sitting of the Chamber of Deputies and the Senate, to be voted on by a majority of two-thirds of the number of deputies and senators. The text of the Treaty shall bear the mention that it is a certified copy, as provided by the rules of legislative technique for drafting the normative acts.

As regards the content of the *Explanatory Memorandum*, under the section *Expected changes* it was mentioned that

> just like the founding treaties of the European Community and the amending treaties (Amsterdam and Nice), the Reform Treaty will constitute a primary European law. Thus, in accordance with Article 148 (2) and (3) of the Constitution of Romania, the Reform Treaty shall have priority over the contrary provisions of the internal laws.

The section also showed that

> the reform treaty resumes in a significant proportion the innovations brought by the Treaty establishing a Constitution for Europe, signed in Rome by the Heads of State and the Government on 29 October 2004.

35 According to Art. 79 para. (1) of the Constitution, '*The Legislative Council shall be an advisory expert body of Parliament, that advises draft normative acts for the purpose of a systematic unification and co-ordination of the whole body of laws*'.

36 Available at http://www.cdep.ro/proiecte/2008/000/00/1/cl1.pdf (Accessed: 1 February, 2023).

The president of Romania signed the Decree for submitting the Treaty of Lisbon to Parliament, so that it could be ratified on 8 January 2008,[37] and communicated it to the two Chambers of the Romanian Parliament on the same date.[38] On 10 January 2008, the Bill was sent to the Committee for Legal Matters, Disciplinary and Immunities for a report. On 31 January 2008, a favourable Report was received, and the Bill was entered into the agenda of the joint sittings of the two Chambers of Parliament.

Examining the Joint Report on the Bill for the Ratification of the Treaty of Lisbon[39] drawn up by the Committee for Legal Matters, Discipline and Immunities of the Chamber of Deputies and the Committee for Legal Matters Appointments, Discipline, Immunities and Validations, we note its summary nature. Thus, after mentioning the applicable constitutional norms, the favourable opinion of the Legislative Council, and the title of the Project, the following are noted:

The Treaty of Lisbon of 13 December 2007 does not replace the current treaties; it only amends them. Thus, it includes two provisions amending both the Treaty on the European Union and the Treaty establishing the European Community, which will be renamed 'The Treaty on the Functioning of the European Union';

The two treaties, as amended, will have equal legal value;

Among the most important amendments made by the Treaty of Lisbon are:

- the express enshrinement of the legal personality of the European Union;
- giving mandatory legal value to the Charter of Fundamental Rights;
- establishing a clear division of powers between the Union and the Member States;
- a series of institutional changes;
- strengthening the role of national parliaments;
- the extension of qualified majority voting to several fields;
- the introduction of the double majority system for adopting decisions within the Council starting in 2014;
- the solidarity provision in the energy field and in case of terrorist attacks.

Following the debates and the opinions expressed by the members of the two committees, it was decided, with an unanimous vote of those present, to submit the Bill for the ratification of the Treaty to the plenary of the assembled Chambers, for debate and adoption.

According to the content of the Treaty, the bill belongs to the category of organic laws.

On 4 February 2008, the debate regarding, and approval of, the Bill for the ratification of the Treaty of Lisbon took place in the joint sitting of the Chamber of

37 Available at http://www.cdep.ro/proiecte/2008/000/00/1/decret1.pdf (Accessed 1 February 2023).
38 Available at http://www.cdep.ro/proiecte/2008/000/00/1/ap1.pdf (Accessed 1 February 2023).
39 Available at http://www.cdep.ro/comisii/juridica/pdf/2008/rp001.pdf (Accessed 1 February 2023).

Deputies and Senate. With 387 votes for, one vote against and one abstention, the Parliament of Romania adopted the Law.[40]

Analysing the transcript of the parliamentary debates, it is found that they started with the presentation of the project by the prime minister, who began by emphasising the historic nature of the vote and the fact that it is '*the first treaty signed by Romania, as a Member State of the European Union*'; he also further exposed the instruments and mechanisms created by the Treaty, concluding with elements on '*the pride of participating in this exercise*', '*the consistency of the role assumed in the Union*', '*the qualities to be an influential and dynamic actor in the Union*', and the proposal to ratify the Treaty, which '*will allow us to enter a stage of progress which will lead to the benefit of both Romanians and other European citizens*'. The report of the Committees was presented and other interventions followed from deputies and senators, who in turn emphasised the historic moment and the fact that Romania is among the first States to ratify the Treaty. However, it was also underlined, in more or less virulent tones (also determined by the position in Parliament of the political parties whose representatives spoke), that: one year after accession, '*Romania's profile as a new member of Europe is still not sufficiently structured*'[41]; Romania is under the monitoring of the Cooperation and Verification Mechanism[42]; '*a reform of the Constitution of Romania*'[43] is required; the present and future responsibilities were invoked.[44] Likewise, an attitude was expressed, according to which, '*although we have certain objections to the Treaty of Lisbon (…) we will vote in good conscience*'.[45] Additionally, it was emphasised that the case law of the CJEU is codified, which '*means the primacy of Community law over internal law*',[46] whilst a further opinion was also expressed, i.e. that '*what we are discussing today is the transition to a confederation project and even if we do not say these things very directly, we will have to think about all the consequences*'.[47]

As for the concept of identity, it can be found in the intervention of the representative of the Party România Mare. Speaking of the interests of Romanians in this context, he mentions '*their identity as a people*', with the emphasis on the fact that '*Romania is in Europe*' and the discussions are only about the entry into the European structures. Moreover, the concept of identity appeared in one of the speeches, but in a generic reference to '*the new identity of the European Union*'.[48]

40 Available at: http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed 1 February 2023).

41 The Parliamentary Groups of the Social Democratic Party, available at http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed 1 February 2023).

42 The Parliamentary Groups of the Liberal Democratic Party.

43 The Parliamentary Groups of the Social Democratic Party, available at http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed 1 February 2023).

44 All spechees.

45 The Parliamentary Groups of the Greater Romania Party.

46 The Parliamentary Groups of the Hungarian Democratic Union from Romania.

47 The Parliamentary Groups of the Social Democratic Party.

48 The Parliamentary Groups of the Liberal Democratic Party.

The law was enacted by the Decree of the President of Romania No 250/2008 and was published under the number 13 in the Official Gazette of Romania no. 107 of 12 February 2008.

To sum up, the ratification of the Treaty of Lisbon was carried out in an emergency parliamentary procedure; no constitutionality issues were raised, and no limits related to national or constitutional identity were opposed. The Constitutional Court was not asked to rule upon the constitutionality of the Treaty of Lisbon.

4. Competencies of the CCR and the courts of law in the new legal framework determined by the accession to the EU: The *constitutional relevance* of EU law and the contribution of the CCR in the *Europeanisation* of the national regulatory system

We will further develop the distinction between the competence of the CCR and that of the courts of law based on the interpretation and application of paragraphs (2) and (4) of Article 148 of the Romanian Constitution, following the evolution of the CCR jurisprudence in the matter. Indeed, within these paragraphs it is possible to identify several stages corresponding to the adaptation to the new legal reality determined by the accession to the EU, also influenced by the judicial borrowing (the case law of other Constitutional Courts).

Thus, soon after the accession to the EU, there was a period in which the CCR seemed to assume control of the conformity of national rules to those of the EU.[49] In one of the few cases dealing with EU law, the Court stated the following:

> Given that, as of January 1, 2007, Romania joined the European Union, the Court has to examine the domestic legislation in the field of state aid and its compatibility with the European Union legislation in the field, because, under Article 148 paragraph (2) of the Constitution, 'As a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations, have priority over the contrary provisions of the internal laws, respecting the provisions of the act of accession.

Shortly after, starting in 2009, the CCR interpreted Article 148 of the Constitution in the sense that it does not fall under its competence to pronounce on the

49 Decision No 59/2007, published in the Official Gazette No. 98 of 8 February 2007; Decision No 558/2007 published in the Official Gazette No. 464 of 10 July 2007; Decision No 1031/2007, published in the Official Gazette of Romania no 10 of 7 January 2008.

aspects related to the application of EU law. In this regard, there can be found in the legal literature a detailed description of relevant case law on the topic of the pollution tax.[50] Thus, when asked to review the constitutionality of the legal provisions by reference to the constitutional accession clause (Article 148), the CCR used the so-called 'lack of competence' argument.[51] The CCR noted[52] that it does not have the power to examine whether a provision of national law complies with the text of the Treaty establishing the European Community (A/N now the Treaty on the Functioning of the European Union) in terms of Article 148 of the Constitution. According to the CCR,

> Such power, namely to establish whether there is a contrariety between national law and the EC Treaty, belongs to the court of law, which, in order to reach a fair and lawful conclusion, ex officio or upon request of the party, may submit a preliminary question in the meaning of Article 234[53] of the Treaty establishing the European Community before the Court of Justice of the European Communities. If the Constitutional Court would be deemed competent to adjudicate on the conformity of national legislation with the European legislation, we would face a possible legal dispute between the two courts, which, at this level, is unacceptable.

The CCR went further, stating that it is also the obligation of the national Parliament to give 'priority' to EU law, pursuant to the Article 148 accession clause. Similarly, the Court also held[54] that the power of priority application of the binding Community (A/N now EU) rules in relation to the provisions of the national legislation belongs to the court of law, because '*it is a matter of the enforcement of law, not of constitutionality*', and '*within the relations between the Community and the national law (except the Constitution), we can only refer to priority application of the former in*

50 For the case law of the CJEU on this topic, please see Joined Cases C-29/11 and C-30/11, *Aurora Elena Sfichi v. Directia Generala a Finantelor Publice Suceava and Others*, 2011 E.C.R. 1-00059; Case C-573/10, *Sergiu Alexandru Mica v. Administratia Finantelor Publice Lugo*, 2011 E.C.R. 1-00101; Case C-441/10, *loan Anghel v. Directia Generala a Finantelor Publice Bachu*, 2010 E.C.R. 1-00164; Case C-440/10, *SC SEMTEX SRL v. Directia Generala a Finantelor Publice Bachu*, 2010 E.C.R. 1-00163; Case C-439/10, *SC DRA SPEED SRL v. Directia Generala a Finantelor Publice Bachu*, 2010 E.C.R. I00162; Case C-438/10, *Directia Generala a Finantelor Publice Bachu and Administratia Finantelor Publice Bachu v. Lilia Drutu*, 2011 E.C.R. 1-00100; Case C-335/10, *Administratia Finantelor Publice a Municipiului Thrgu-Jiu gi Administratia Fondului pentru Mediu v. Claudia Norica Vijulan*, 2011 E.C.R. 1-00099; Case C-336/10, *Administratia Finantelor Publice a Municipiului Thrgu-Jiu gi Administratia Fondului pentru Mediu impotriva Victor Vinel Ijac*, 2011 E.C.R. 1-00058; Joined Cases C-136/10 and C-178/10, *Daniel lonel Obreja v. Ministerul Economiei*, 2011 E.C.R. 1-00057; Case C-402/2009, *loan Tatu v. Statul Roman prin Ministerul Finantelor gi Economiei and Others*, 2011 E.C.R. 1-02711; Case C-263/10, *lulian Nisipeanu v. Directia Generala a Finantelor Publice Gorj*, 2011 E.C.R. I00097.

51 Decision No. 1596/2009, published in the Official Gazette No. 37 of 18 January 2010.

52 Decision No 1596/2009 cited or Decision no 1289/2011, published in the Official Gazette No. 830 of 23 November 2011.

53 Art. 267 TFUE.

54 Decision No 137/2010, published in the Official Gazette No. 182 of 22 March 2010.

relation to the latter and such a matter falls within the competence of the courts'. As noted in the doctrine, the CCR suggests a separation of tasks,

> meaning that the application and enforcement of EU law is to be undertaken by the judiciary, executive, and legislature; whereas the CCR is to observe the fulfilment of this obligation pursuant to the Constitution. In any case, the Court denied its own competence on the matter.[55]

In the next stage, starting from 2011, a new jurisprudential orientation was outlined. Gradually, the CCR built the so-called '*doctrine of interposed norms*'[56] (for this concept see Prof. S. Deaconu[57]), which allowed the use of the EU law in the constitutional review. Thus, the CCR held, in one particular case, that

> considering the place that community regulations, according to Article 148 para (2) of the Constitution, in relation to internal laws, the Court is called to invoke in its jurisprudence the mandatory acts of the European Union every time they are relevant to the case, as long as their content is not equivocal and an own interpretation is not requested.[58]

Moreover, it was further stated that '*it is neither positive legislature nor a court with jurisdiction to interpret and apply EU law in disputes involving rights of citizens'*. Simply put, the CCR allows the use of a rule of European law within the constitutional review as a rule interposed to that of reference (Constitution), subject to certain conditions:

> this rule must be sufficiently clear, precise and unambiguous in itself or its meaning must have been clearly, precisely and unequivocally established by the European Court of Justice (..), the rule must be circumscribed to a certain level of constitutional relevance, so that its legal content might support the possible infringement by the national law of the Constitution – the only direct reference standard in its constitutional review. In such a case the approach of the Constitutional Court is distinct from the simple application and interpretation of law, jurisdiction belonging to courts and administrative authorities, or from any issues of legislative policy promoted by Parliament or the Government, as appropriate.

The Court explicitly stated that

> in the light of cumulative set of conditionality, it is up to the Constitutional Court to apply or not in its constitutional review the judgments of the European Court of

55 Viță, 2019, pp. 1623–1662.
56 Deaconu, 2022, p. 243.
57 Ibid.
58 Decision No. 383/2011, published in the Official Gazette No. 281 of 21 April 2011.

> Justice or to formulate itself of preliminary questions to establish the content of the European rule.[59]

The distinction, in terms of competence, between the CCR and courts of law is given by the '*constitutional relevance of EU law norms'*, as clearly results from Decision No 64/2015,[60] where the Court found the unconstitutionality of Article 86 paragraph (6) of Law no 85/2006 on the insolvency procedure, with reference, *inter alia*, to Article 148 paragraph (2) of the Constitution. Recalling its jurisprudence, in which it held that the use of a rule of European law in the framework of the constitutionality control *'as a rule interposed to the reference one implies, pursuant to Article 148 para.(2) and (4) of the Romanian Constitution, a cumulative conditionality (…)*', the CCR further held that

> Related to the present case, (…) the first conditionality is fulfilled, Article 153 para. (1) letter e) of the Treaty on the Functioning of the European Union, Article 27 of the Charter of Fundamental Rights of the European Union and Article 2 and 3 of the directive having a sufficiently clear, precise and unequivocal content, especially in light of the interpretation given by the Court of Justice of the European Union through the previously mentioned decision. Regarding the second conditionality, the Court finds that, through their normative content, the acts of the European Union protect the right to 'information and consultation of workers', supporting and complementing the action of the member states, therefore, directly targeting the fundamental right to the social protection of work provided by Article 41 paragraph (2) of the Constitution as interpreted by this decision, a constitutional text that ensures a standard of protection equal to that resulting from the acts of the European Union. It follows, therefore, that the previously mentioned acts of the European Union obviously have a constitutional relevance, which means, on the one hand, that they circumscribe and subsume Article 41 paragraph (2) of the Constitution, by fulfilling the double conditionality previously mentioned, without violating the national constitutional identity (Decision no. 683 of June 27, 2012, published in the Official Gazette of Romania, Part I, no. 479 of July 12, 2012), and, on the other hand, that it is within the competence of the Court's constitutional finding of the existence of this normative inconsistency between the previously mentioned European Union acts and the national ones, respectively Article86 para.(6) first sentence of Law no. 85/2006. With regard to the latter aspect, the Court notes that the normative inconsistency cannot be resolved only by resorting to the constitutional principle of the priority of application of the acts of the European Union, but by finding the violation of Article148 paragraph (2)

59 Decision No. 668/2011, published in the Official Gazette No. 487 of 8 July 2011; see also Decision No. 1088/2011, published in the Official Gazette No. 668 of 20 September 2011; Decision No. 921/2011, published in the Official Gazette no. 673 of 21 September 2011; Decision No. 903/2011, published in the Official Gazette No. 673 of 21 September 2011.

60 Published in the Official Gazette No. 286 of 28 April 2015.

> of the Constitution, text that includes, by default, a clause for compliance of internal laws with European Union acts (with the distinctions mentioned in Decision no. 80 of February 16, 2014, published in the Official Gazette of Romania, Part I, no. 246 of April 7, 2014, paragraph 455), and its violation, in the case of European Union acts with constitutional relevance, must be sanctioned as such by the Constitutional Court. Of course, regarding European Union acts that do not have constitutional relevance, the competence to remedy the normative inconsistency belongs to the legislator or the courts, as the case may be (see Decision no. 668 of May 18, 2011, previously cited).

Perhaps the most representative case where the CCR found the *constitutional relevance* of EU law and applied it in a constitutional review was that settled by Decision No 534/2018.[61] The CCR held that the case relates to the recognition of the effects of a marriage legally concluded abroad between a citizen of the EU and his same-sex spouse – a national of a third country – in relation to the right to family life and to the right to freedom of movement, from the perspective of the prohibition of discrimination on the basis of sexual orientation. The 'interposed' norm (with *constitutional relevance*) was Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE(2). The CCR held that there was uncertainty regarding the interpretation of some concepts used by this Directive, in conjunction with the Charter of Fundamental Rights of the EU and with the recent case law of the CJEU and the ECHR, concerning the right to family life; it thus decided to refer the case to the CJEU. Consequently, within the constitutional review of the provisions of Article 277 paras. (2) and (4) of the Civil Code, the CCR applied (as interposed to the Romanian Constitution) the provisions of European law, as interpreted by the CJEU (Grand Chamber) in the Judgment of 5 June 2018, pronounced in Case C-673/16.[62] Invoking its jurisprudence regarding the doctrine of interposed norms, the CCR held the following[63]:

> The rules of European law contained in Article 21 paragraph (1) TFEU and in Article 7 paragraph (2) of Directive 2004/38, interposed within the constitutionality control of the reference established by Article 148 paragraph (4) of the Constitution, have both a precise and unequivocal meaning, clearly established by the Court of Justice of the European Union, as well as constitutional relevance, as they concern

61 Published in the Official Gazette No. 842 of 3 October 2018.

62 C-673/16 – *Coman and Others*, https://curia.europa.eu/juris/liste.jsf?num=C-673/16, the only case in which the CCR has referred preliminary questions to the CJEU so far, available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=228B64B67CC671C4AEFDFFDAF7A01202?text=&docid=202542&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=86360 (Accessed: 1 February 2023).

63 Paras. (40) and (41).

> a fundamental right, namely the right to intimate, family and private life. In this light, applying the provisions of the European court in the interpretation of European norms, the Constitutional Court found that the relationship of a same-sex couple falls within the scope of the notion of 'private life', as well as the notion of 'family life', like the relationship established in a heterosexual couple, a fact that determines the incidence of the protection of the fundamental right to private and family life, guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, by Article 8 of the European Convention on the defense of human rights and fundamental freedoms and Article 26 of the Romanian Constitution.

The CCR upheld the exception of unconstitutionality and found that the provisions of Article 277 paragraph (2) and (4) of the Civil Code are constitutional in so far as they permit the granting of the right of residence on the territory of the Romanian State, under the conditions laid down in European law, to the spouses – citizens of the Member States of the European Union and/or citizens of non-member countries – of marriages between persons of the same sex concluded or contracted in a Member State of the EU.[64]

In other cases, applying the same test of constitutional relevance, the CCR decided not to use EU law as a norm interposed to the reference one. Some of the most debated cases in the Romanian legal literature in this regard concern Decision 2006/928/CE – Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (M.C.V.)[65] and the M.C.V. Reports. Thus, for example, in the case settled by Decision No 137/2019,[66] the Court ruled that

> Decision 2006/928/EC, an act of European law with a binding nature for Romania, is also devoid of constitutional relevance. The Court concluded that, even if these acts (Decision 2006/928/CE and the M.C.V. reports) would comply with the conditions of clarity, precision and unequivocalness, their meaning being established by the CJEU, those acts do not constitute norms that fall within the scope of the necessary level of constitutional relevance carrying out the constitutional review by reference to them. Not having met the cumulative conditionality laid down in the established case-law of the constitutional court, the Court held that they cannot form the basis for a possible violation of the Constitution by the national law, as the only direct norm of reference within the constitutional review.

Another recent example concerns the referral to unconstitutionality of the provisions of Article 1 paras. (4), (6), and (7) and Article 19 of the law on the protection

64 Decision No. 534/2018, published in the Official Gazette No. 842 of 3 October 2018.
65 Available at https://eur-lex.europa.eu/eli/dec/2006/928/oj (Accessed: 1 February 2023).
66 Published in the Official Gazette No. 295 of 17 April 2019.

of whistle-blowers in the public interest, as well as of the law as a whole.[67] Indeed, the CCR claimed that

> It does not fall within its role and competence to interpret Article 346 of the TFEU and to extract from its content the requirements resulting from the interpretative way of the case-law of the Court of Justice of the European Union to be written into the analyzed law. Any issues in the interpretation of the analyzed text determined by the reference to Article 346 of the TFEU can be settled by the competent national courts of law, even by formulating a preliminary question according to Article 267 of the TFEU.

The Court also held that

> The issues raised by the authors of the objection of unconstitutionality have no constitutional relevance, being confined to the sphere of compliance of national law with a directive, without anticipating any substantial violations of the constitutional norm. Moreover, even a possible incorrect transposition of a directive does not result ab initio in the unconstitutionality of the law on such grounds [see also Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015, paragraph 32].

However, the lack of a definition of the concept 'constitutional relevance', which at this moment is at the discretion of the CCR, raised questions and criticism, showing that clear criteria should be established by the Court.[68]

Here could also be mentioned the cases in which, applying paragraphs (2) and (4) of Article 148, providing the obligations of national authorities in the context of EU accession, the CCR found the unconstitutionality of national legislation contrary to these obligations. Thus, for example, considering that the Parliament had repealed the domestic provisions allowing for an extraordinary appeal against an irrevocable decision breaching EU law, the CCR held the unconstitutionality of this provision. The aforementioned move referred to Law No 299/2011 for the repeal of Article 21 paragraph (2) of the Administrative Litigation Law No 554/2004, as a whole, and the provisions of Article 21 paragraph (2)'s first sentence of Law No 554/2004, insofar as they are interpreted to the effect that they cannot be subject to review of final and irrevocable decisions pronounced by courts of appeal, in breach of the priority principle of EU law, when it does not reveal the merits of the case. The CCR invoked the EU accession clause, which requires all national authorities to ensure the priority of EU law. Moreover, the Court found that '*by granting no remedy for the breach of EU law, the principle of loyal cooperation enshrined in Article4(3) TEU would be disregarded, and the constitutional obligations of Article 148 accession's clause would*

67 Decision No. 390/2022, published in the Official Gazette No. 746 of 25 July 2022.
68 See Deaconu, 2022, p. 245, also with reference to Zanfir-Fortuna, 2011.

be rendered merely illusory'. At the same time, the CCR found that the very essence of the principle of 'priority' would be hampered. In support of its reasoning, the CCR referred to the benchmark cases of the CJEU: *Van Gend en Loos and Costa v. ENEL*.[69] The Court also ruled that

> by accessing to the legal order of the European Union, Romania accepted that, in the fields where the exclusive jurisdiction belongs to the European Union, regardless of the international treaties it signed, the implementation of the requirements resulting from them should be subject to the rules of the European Union. If not, it would lead to the undesirable situation that, through the international obligations undertaken bilaterally or multilaterally, the Member State would seriously affect the jurisdiction of the Union and, practically, substitute it in the mentioned fields. (…). Therefore, in the application of Article 11 paragraph (1) and Article 148 paragraph (2) and (4) of the Constitution, Romania fulfils in good faith the obligations resulting from the act of accession, not interfering with the exclusive jurisdiction of the European Union and, as established in its case-law, by virtue of the compliance clause contained by Article148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State.[70]

There can be noted, in this regard, the contribution of the CCR to the *Europeanisation* of the national regulatory system, highlighting the responsibilities of the public authorities arising from the act of accession (the courts of law and the legislator) and sanctioning their violation.

5. The role of the CCR in defending of national law and competence

It could be argued that the very way in which the CCR interprets and applies Article 148 of the Constitution (the so-called accession/integration/compliance clauses) serves to protect the national legal order based on the supremacy of the Constitution, which is the fundamental law of the country. Starting with Decision No 148/2003, pronounced on the initiative for the revision of the Constitution and, until now, in various tones, more or less cautious and more or less explicit,[71] the Court has promoted the same hierarchy of the legal system: the intermediate position of the

69 Decision No. 1039/2012, published in the Official Gazette No. 61 of 29 January 2013.

70 See Decision No. 683/2012, published in the Official Gazette No. 479 of 12 July 2012, Decision No. 64/2015, published in the Official Gazette No. 286 of 28 April 2015, Decision No. 887/2015, published in the Official Gazette No. 191 of 15 March 2016.

71 For an analysis of the CCR case law up to the time of the first and only preliminary reference to the CJEU, see Viță, 2019, pp. 1623–1662.

founding treaties of the EU and the mandatory regulations derived from them, between the Constitution and the other internal laws.

As we have already mentioned, pronouncing on the initiative to review the Constitution, in 2003, the Court held that the consequence of the accession is that the Member States of the European Union '*have understood to place the acquis communautaire – the treaties establishing the European Union and the regulations derived from them – on an interim position between the Constitution and the other laws, when it comes to binding European regulatory acts*'.[72]

The supremacy of the Basic Law was strongly reaffirmed after more than a decade, in 2014, when the CCR found the unconstitutionality of an initiative for the revision of the Constitution that aimed to change the relationship between the Constitution and EU law.[73] At that moment, by the Sole Article points 121 and 122 of the initiative for a revision of that Constitution, there was proposed the amendment of the marginal name of Title VI, becoming *'Romania's membership to the European Union and the North Atlantic Treaty Organisation'*; also put forth was an amendment of the normative content of Article 148 paragraphs (1) and (2), as follows:

> (1) The ratification of the treaties amending or supplementing the European Union's founding Treaties, as well as treaties amending or supplementing the North Atlantic Treaty is made through a law adopted in the joint session of the Senate and the Chamber of Deputies, with the vote of two-thirds of the number of Senators and Deputies.(2) Romania shall ensure observance, within its national legal order, of the European Union law, according to the obligations undertaken through the accession document and the other treaties signed within the Union.

Examining the proposed amendment, the Court found the unconstitutionality of Article 148 paragraph (2) in the new wording.[74] The ground invoked by the Court was Article 152 paragraph (2) of the Constitution, which enshrines the limits of revision. Thus, the Court noted that the current wording of the Constitution establishes that the provisions of the founding treaties of the EU, as well as the other binding community regulations, have priority over the contrary provisions of the national laws, complying with the provisions of the act of accession. With reference to the concept of 'national laws', the Court referred to its Decision No 148/2003, where it made a distinction between the Constitution and the other laws, noting that the same distinction is made at the level of the Fundamental Law '*by Art. 20 para. (2) final sentence which stipulates the priority application of international regulations, unless the Constitution or national laws comprise more favourable provisions*'; the court likewise referred to its Decision No 668/2011, where it ruled that the binding acts of the EU are norms interposed within the constitutional review. Therefore, according

72 Decision No. 148/2003, published in the Official Gazette No. 317 of 12 May 2003.
73 Decision No. 80/2014, published in the Official Gazette No. 246 of 7 April 2014.
74 Ibid.

to the CCR, establishing, through the proposed new wording, the thesis that EU law shall be applied without any circumstances within the national legal order, not distinguishing between the Constitution and the other national laws, '*is tantamount to placing the Fundamental Law in the background compared to the legal order of the European Union'.* In this light, the Court held that

> The Fundamental Law of the State – the Constitution – is the expression of the will of the people, which means that it cannot lose its binding force just by the existence of an inconsistency between its provisions and the European ones. Likewise, accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order (see in the same sense the Judgment of 11 May 2005, K 18/04, pronounced by the Constitutional Court of the Republic of Poland).

Furthermore, the Court found that the constitutional courts have full jurisdiction regarding the powers established by the legislator, and '*the CCR shall obey only the Constitution and its organic Law of organization and functioning No 47/1992, its powers being established by Ar. 146 of the Fundamental Law and Law No 47/1992*'.[75]

Therefore,

> Accepting the new wording proposed in Article 148 (2) would be tantamount to creating the premises necessary to limit the powers of the Constitutional Court, meaning that only normative acts that are adopted in fields that are not subject to the transfer of jurisdiction to the EU could still be subject to constitutional review, while normative acts that regulate in shared fields, from a material point of view, would be subject exclusively to the legal order of the EU, the constitutional review over them being excluded. Or, irrespective of the field in which the normative acts regulate, they must observe the supremacy of the Romanian Constitution, according to Article1 para.(5). Such an amendment would constitute a limitation of the right of citizens to refer to constitutional justice in order to protect certain constitutional values, rules and principles, meaning the suppression of a guarantee of these values, rules and principles, which also comprise the sphere of fundamental rights and freedoms.

Likewise, the Court protected the guarantees enshrined in the Constitution when the initiatives of the revision of the Constitution called into question (even indirectly) the compatibility of such guarantees with the EU law, and also emphasised the perfect compatibility of such guarantees with the EU law. This is the case, for example, with the presumption of lawful acquirement of property, enshrined in Article 44 paragraph (8) of the Constitution[76] ('*Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed*'). Over time, there have been several attempts (1996, 2003, 2011) to eliminate (through initiatives of revision of the Constitution) this

75 See in this regard Decision No. 302/2012, published in the Official Gazette, No. 361 of 29 May 2012.
76 See Toader and Safta, 2015.

presumption – the last one motivated by, and making reference to, the European normative framework. The CCR remained consistent in its role as guardian of the limits of the revision of the Constitution, offering, at the same time, the 'key' (in terms of legal reasoning) of the compatibility of constitutional norms with European ones. We will further point out the 'saga' of the presumption of lawful acquirement of property.

Thus, by Decision No. 85/1996,[77] the CCR held that '*the presumption of lawful acquirement of property is one of the constitutional guarantees of the right to property*' and '*this presumption is also based on the general principle that any legal act or deed is lawful until proven otherwise, requiring, as concerns the wealth of a person, that unlawful acquirement be proven*'. Referring to the debates that accompanied the adoption of the 1991 Constitution theses, the Court also held that

> the legal certainty of the right to property on the assets that make up one's wealth is [...] inextricably linked to the presumption of lawful acquirement of property. Therefore removal of this presumption is tantamount to a suppression of a constitutional guarantee of the right to property.

By Decision No. 148/2003,[78] adjudicating on the proposed text to be introduced in the Constitution which stated that the presumption does not apply in the case of '*property obtained from criminal conduct*', the Court held that this wording implies that it is meant to reverse the burden of proof on lawful acquirement, being provided the unlawfulness of wealth acquired from criminal conduct. The Court found unconstitutional the proposal for revision that was aimed, in essence, at the same objective, namely removal of the presumption of lawful acquirement of wealth, because it is tantamount to a suppression of a constitutional guarantee of the right to property.

By Decision No. 799/2011,[79] the CCR resumed the grounds set forth in the aforementioned decisions, also declaring that

> in the absence of such presumption, the owner of property would be subject to continuing uncertainty because, whenever someone would invoke the unlawful acquirement of the property, the burden of proof lays not with the one who makes the allegation, but with the owner of the property.

In addition to the above, the Court held that

> the regulation of this presumption does not prevent the delegated or primary legislature to adopt, pursuant to Article 148 of the Constitution – Integration into the European Union, regulations to enable full compliance with EU legislation in the fight against crime. Moreover, this objective was also considered by the initiator of the

77 Published in the Official Gazette, Part I, no. 211 of 6 September 1996.
78 Published in the Official Gazette Part I, no. 317 of 16 April 2003.
79 Published in the Official Gazette, No. 440 of 23 June 2022.

> proposed revision, especially with regard to Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union no. L 68 of 15 March, which requires taking all measures necessary to comply with its provisions, particularly mitigating the reduction of the burden of proof regarding the source of goods held by a person convicted of a crime related to organized crime.

As we have mentioned, in relation to a study on this topic,[80] the novelty amongst the initiatives to revise the Constitution concerning the presumption of lawful acquirement of property was the adoption of the Council Framework Decision 2005/212/JHA on confiscation of Crime-Related Proceeds, Instrumentalities and Property.[81] The aim of the framework-decision is to ensure that all Member States have effective rules on confiscation of crime-related proceeds, *inter alia*, in terms of burden of proof regarding the source of assets held by a person convicted of an offence relating to organised crime;

> each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

As a consequence, keeping the reasons which characterise the presumption provided for in Article 44 paragraph (8) of the Constitution as a guarantee of the right to property, in Decision No. 799/2011 the CCR also offers an answer to the Romanian legislature's concern, determined by the adoption of the above-mentioned framework-decision and the obligations undertaken by Romania as a Member State of the EU. One year after the CCR delivered the said decision, a safety measure on extended confiscation was introduced into Romanian law by Law no. 63/2012 amending and supplementing the Criminal Code of Romania, and by Law no. 286/2009 on the Criminal Code,[82] being a law transposing the Council Framework Decision No 2005/212/JHA of the European Union.

Over time, the CCR has developed, attached to the value of supremacy of the Constitution, the concept of constitutional identity. The CCR identifies it as being enshrined in Article 11 paragraph (3), in conjunction with Article 152 of the Fundamental Law (the limits of revision of the Constitution), as a guarantee of *a core identity* of the Romanian Constitution, which '*should not be relativized in the process of European integration*' (paragraph (81) of Decision No 390/2021[83]). However, from

80 Toader and Safta, 2015.

81 Published in the Official Journal of the European Union L 68 of 15 March 2005, pp. 49–51.

82 Published in the Official Gazette, Part I, no. 258 of 19 April 2012.

83 Available at https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf (Accessed: 1 February 2023).

the analysis of the CCR case law, it can be noted that Article 152 of the Constitution, which enshrines the limits of the revision, represents only a '*core identity*'. There are also other aspects that the CCR deemed, following assessment, to belong to the constitutional identity: the status of parliamentarians'[84]; the regulation of incompatibilities[85]; the retirement of magistrates[86]; and the judicial organization.[87] The CCR noted that '*the way of organizing the national justice system is part of the constitutional identity of the Romanian State*'.[88] We will detail this topic in Chapter 7.

It might be also qualified as an act in defence of the values enshrined in the Romanian Constitution the Decision by which the CCR found the unconstitutionality of a national law transposing an EU Directive (Law no. 298/2008 on the retention of data generated or processed by the providers of publicly available electronic communications services or public communications networks and amending Law no. 506/2004 on the processing of personal data and privacy protection in the electronic communications sector).[89] In essence, the CCR held that

> the restriction on the exercise of the right to private life, secrecy of correspondence and freedom of expression, (…) must occur in a clear, predictable and unequivocal manner as to remove, if possible, the occurrence of arbitrariness or abuse of authorities in this area.

In the reasoning part of the Court's decision, the shortcomings of the drafting of the impugned normative act are thoroughly specified, including in relation to the standards required by the European Court of Human Rights in its case law.[90] With regard to this decision, it was noted, more or less critically,[91] that it was delivered without addressing any preliminary questions to the CJEU.

However, the assertion of the supremacy of the Constitution and the constitutional identity does not mean, and is not intended to lead de *plano* to, the idea of a conflict of jurisdiction. Over time, the CCR has affirmed a pluralistic conception and mutual respect between the courts belonging to legal orders, which are parties in a proceeding of interference. According to the Court, such an attitude is related to cooperation between the Domestic Constitutional Court and the European Court, as well as to the judicial dialogue between them without raising issues related to establishing hierarchies. Even when the CCR found the unconstitutionality of a national law transposing an EU Directive[92] (mentioned above), the decision of the CCR did

84 Decision No. 964/2012, published in the Official Gazette No. 23 of 11 January 2013.
85 Decision No. 682/2018, published in the Official Gazette No. 1050 of 11 December 2018.
86 Decision No. 533/2018, published in the Official Gazette No. 673 of 2 August 2018.
87 For developments, see Chapter 7.
88 Decision No. 88/2022, published in the Official Gazette No. 243 of 11 March 2022.
89 Decision No 1258/2009, published in the Official Gazette No. 798 of 23 November 2009.
90 Sunday Times v. the United Kingdom, 1979; Rotaru v. Romania, 2000.
91 Efrim and Zanfir and Moraru, 2013.
92 Decision No. 1258/2009, published in the Official Gazette No. 798 of 23 November 2009.

not raise a conflict of jurisdictions in itself. The Court held that there had been a violation of the fundamental constitutional principles, as well as fundamental rights, due to the lack of clarity and precision of the national rules transposing the European Directive, resulting in the ascertainment of the unconstitutionality of the transposing law, without proceeding to the approach of any issues likely to produce collisions with the CJEU/conflicts of jurisdiction.

In this context, a more recent decision of the CCR (No 390/2021)[93] seemed quite atypical by its antagonistic positioning with the CJEU, and led to a wave of criticism and vivid debates. Even if the reasoning invoking the precedents related to the supremacy of the Constitution and the national constitutional identity can be viewed as ways in which the CCR defended the same values, in line with its case law, other reasoning of the decision (that led to criticism and the response of the CJEU in defence of the independence of national judges – case C-430/21 – RS[94]) expresses an approach which can be described as having a unique character in the landscape of CCR jurisprudence. We will refer to this decision in the next chapters.

6. The interpretation of Article 2 of the TEU (in particular with regard to the rule of law) in the practice of the Romanian courts of law: Tensions in constitutional justice

According to Article 1 paragraph (3) of the Romanian Constitution, '*Romania is governed by the rule of law*'. As a guarantor for the supremacy of the Constitution, the CCR has defined and applied this principle in its case law, and also in conjunction with the international treaties to which Romania is a party, through the appropriate enforcement of Articles 11, 20 and 148 of the Constitution[95] as well as the case law of the European Court of Human Rights (ECHR) and the CJEU. Likewise, the CCR invoked documents of the Venice Commission, in respect of which it pointed out, for example, in a case on electoral matters where it envisaged the Code of Good Practices in Electoral Matters,

> that indeed this act is not binding, but its recommendations establish the coordinates of a democratic election, in relation to which the States – which are characterized as belonging to this type of regime (A/N democratic) – can express their free choice in electoral matters, complying with the fundamental human rights, in general, and with the right to be elected and to elect, in particular.[96]

93 Published in the Official Gazette No. 612 of 22 June 2021.
94 Available at https://curia.europa.eu/juris/liste.jsf?num=C-430/21 (Accessed: 1 February 2023).
95 For the rules established by these Art., see Chapter 1.
96 Decision No. 51/2012, published in the Official Gazette No. 90 of 3 February 2012.

As for the implementation of Article 2 of the TEU within the constitutional review (as well as the CJEU's interpretation of this article), it is carried out by virtue of, and in accordance with, the rules laid down by Article 148 of the Constitution.[97]

As regards the reflection of Article 2 of the TEU in the practice of national courts, we consider noteworthy the so-called 'waves' of preliminary rulings of the Romanian courts,[98] starting with 2019, concerning provisions adopted by Romania in light of the effectiveness of the fight against corruption and the guarantee of the independence of the judiciary, especially the 'saga' determined by the regulation on the Section for the Investigation of Offences Committed within the Judiciary (SIOJ),[99] which led to referrals both to the CCR and the CJEU by the Romanian courts of law.

For a better understanding of the context, it must be mentioned that, in Romania, the theme of justice in general, the independence of the judiciary in particular as a dimension of the rule of law, and, in this context, the place and role of the Cooperation and Verification Mechanism (CVM) established on the occasion of accession to the EU, have been very present in the public space. Some 'hot spots' of debates, referrals, and challenges were the establishment of the aforementioned SIOJ and the value of the opinions and recommendations of various European forums on the national regulations, including on this structure. These issues have given rise to numerous referrals to the CCR, the request for opinions from the Venice Commission,[100] and the expression of recommendations by the European Commission under the Cooperation and Verification Mechanism,[101] by GRECO[102] within its jurisdiction. Likewise, courts of law notified the CJEU, which issued judgments highly debated in Romania, assigning diametrically-opposed meanings depending on the interest of proving one point of view or another.

This is one of the 'themes' of the recent judgments/decisions of the CJEU and the CCR that have led to legal debates and preliminary references of the national courts

97 Explained in Chapter 1.

98 Bercea, 2022, pp. 50–89.

99 Specialized section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors.

100 See CDL-AD(2021)019-e. Romania – Opinion on the draft Law for dismantling the Section for the Investigation of Offences Committed within the Judiciary, adopted by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021), available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)019-e. (Accessed 1 February 20230), CDL-AD(2019)014-e. Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019), CDL-AD(2018)017-e. Romania – Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, adopted by the Commission at its 116th Plenary Session (Venice, 19-20 October 2018), available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e. (Accessed: 1 February 2023).

101 Available at https://ec.europa.eu/info/files/progress-report-romania-com-2021-370-final_ro (Accessed: 1 February 2023).

102 Available at https://rm.coe.int/decision-87th-greco-plenary-meeting-strasbourg-kudo-online-22-25-march/1680a1ea78 (Accessed: 1 February 2023).

facing the dilemma of the concurrent enforcement of national and EU regulations. In this context, and in light of Article 2 of the TEU in conjunction with other provisions of the Treaties, the application of the CCR decisions and the disciplinary liability of judges for non-compliance with the CCR decisions were discussed, resulting from which was the obligation to remove this liability from the national legislation.

Thus, in the 'first wave' of cases (joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 – *Asociaţia 'Forumul Judecătorilor din România (AFJR Case*), the disputes in the main proceedings follow on

> a wide-ranging reform in the field of justice and the fight against corruption in Romania, a reform which has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 on the occasion of Romania's accession to the European Union ('the CVM')'; 'between 2017 and 2019 the Romanian legislature amended Laws No 303/2004, 304/2004 and 317/2004[103] on several occasions. The applicants in the main proceedings dispute the compatibility with EU law of some of those amendments, in particular the amendments concerning the organisation of the Judicial Inspectorate (Case C-83/19), the establishment of the SIIJ within the Public Prosecutor's Office (Cases C-127/19, C-195/19, C-291/19 and C-355/19) and the rules governing the personal liability of judges (Case C-397/19).[104]

In support of their actions, the applicants in the main proceedings refer to the reports from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, of 25 January 2017 (COM(2017) 44 final; 'the CVM Report of January 2017'), of 15 November 2017 (COM(2017) 751 final) and of 13 November 2018 (COM(2018) 851 final; 'the CVM Report of November 2018'); opinion No 924/2018 of the European Commission for Democracy through Law (Venice Commission) of 20 October 2018 on draft amendments to Law No 303/2004 on the statute of judges and prosecutors, Law No 304/2004 on judicial organisation and Law No 317/2004 on the Superior Council for Magistracy (CDL-AD(2018)017); the Group of States against Corruption (GRECO) report on Romania, adopted on 23 March 2018 (Greco-AdHocRep(2018)2); the opinion of the Consultative Council of European Judges (CCJE) of 25 April 2019 (CCJE-BU(2019)4); and the opinion of the Consultative Council of European Prosecutors of 16 May 2019 (CCPE-BU(2019)3). According to the applicants, those reports and opinions contain criticism of the provisions adopted by Romania in the years spanning 2017 to 2019 in light of the effectiveness of the fight against corruption and the guarantee of the independence of the judiciary, whilst the said reports and opinions also set out recommendations for amending, suspending or withdrawing the above-mentioned provisions.

103 So-called 'Justice laws'.

104 Para. (47), Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, available at https://curia.europa.eu/juris/liste.jsf?num=C-83/19&language=ro (Accessed: 1 February 2023).

The requests for a preliminary ruling under Article 267 of the TFEU of the Romanian courts raised, in essence, the interpretation of Article 2, Article 4(3), Article 9 and the second subparagraph of Article 19(1) of the TEU, Article 67(1) and Article 267 of the TFEU, Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56). As recorded by the CJEU in its ruling,

> the referring courts were uncertain, in that regard, as to the legal nature and effects of the CVM and the scope of the reports drawn up by the Commission under it. (…) According to those courts, the content, legal nature and duration of that mechanism should be regarded as falling within the scope of the Treaty of Accession, with the result that the requirements set out in those reports should be binding on Romania. In that context, the referring courts mention several judgments of the Curtea Constituțională (Constitutional Court, Romania) that have addressed those issues, including judgment No 104 of 6 March 2018. According to that judgment, EU law would not take precedence over the Romanian constitutional order, and Decision 2006/928 could not constitute a reference provision in the context of a review of constitutionality under Article 148 of the Constitution, since that decision was adopted before Romania's accession to the European Union and has not been interpreted by the Court in terms of whether its content, legal nature and duration fall within the scope of the Treaty of Accession.[105]

By the Judgment of 18 May 2021,[106] the CJEU (Grand Chamber) ruled as follows:

> 1. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, and the reports drawn up by the Commission on the basis of that decision, constitute acts of an EU institution, which are amenable to interpretation by the Court under Article 267 TFEU.
> 2. Articles 2, 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, read in conjunction with Articles 2 and 49 TEU, must be interpreted as meaning that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. That

105 Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3696 (Accessed: 1 February, 2023).
106 Ibid.

decision is binding in its entirety on Romania, as long as it has not been repealed. The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.

3. The legislation governing the organisation of justice in Romania, such as that relating to the interim appointment to the management positions of the Judicial Inspectorate and that relating to the establishment of a section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system, falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 TEU.

4. Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation adopted by the government of a Member State, which allows that government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, without following the ordinary appointment procedure laid down by national law, where that legislation is such as to give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.

5. Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section

– is not justified by objective and verifiable requirements relating to the sound administration of justice, and

– is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

6. Article 2 and the second subparagraph of Article 19(1) TEU must be interpreted as not precluding national legislation governing the financial liability of the State and the personal liability of judges for the damage caused by a judicial error, which defines the concept of 'judicial error' in general and abstract terms. By contrast, those same provisions must be interpreted as precluding such legislation where it provides that a finding of judicial error, made in proceedings to establish the State's

> financial liability and without the judge concerned having been heard, is binding in the subsequent proceedings relating to an action for indemnity to establish the personal liability of that judge, and where that legislation does not, in general, provide the necessary guarantees to prevent such an action for indemnity being used as an instrument of pressure on judicial activity and to ensure that the rights of defence of the judge concerned are respected, so as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the judges to external factors liable to have an effect on their decisions and so as to preclude a lack of appearance of independence or impartiality on the part of those judges likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.
> 7. The principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.

As noticed by Professor E.S. Tănăsescu[107] and Professor B. Sălăjan-Guțan,[108]

> The judgment of the CJEU on this specific question was awaited with great interest particularly against the case law of the Romanian Constitutional Court which, in Decisions no. 104/2018 and no 682/2018, ruled that 'since the meaning of Decision 2006/928/EC […] has not been clarified by the Court of Justice of the European Union as regards its content, character and temporal limit and whether all these are circumscribed to the provisions of the Treaty of accession […], that Decision cannot be considered as a reference norm for the judicial review'. As a result, the Romanian Constitutional Court refused to make any further reference to Decision 2006/928/EC and considered that the legislator is within its margin of appreciation, as provided by the 'constitutional identity' corroborated with national sovereignty, whenever it is making laws that regulate the substance matter of topics covered by the CVM.

Further, the CCR issued Decision No 390 of 8 June 2021[109] regarding the exception of unconstitutionality of the provisions of Arts. 88^1-88^9 of Law No 304/2004 on Judicial Organization, as well as the Government Emergency Ordinance No 90/2018 on certain measures for the operationalisation of the SIOJ, delivered by a majority of votes. The Court reiterated its case law on regulating the establishment of the SIOJ, the relationships between the national legal order and the European law,

107 Also judge of the CCR, appointed in 2019.
108 Tănăsescu and Sălăjan-Guțan, 2021.
109 Published in the Official Gazette No. 612 of 22 June 2021.

as well as the principle of the primacy of the Constitution and not of the EU law, also referring to the CJUE Judgment of 18 of May 2021.

Thus, the CCR stated that:

> 55. In the light of the three issues raised by the CJEU, which arise from EU law and, in particular, from the value of the rule of law provided in Article 2 TEU, the Constitutional Court has examined to what extent the rule of law, which is expressly enshrined in national law, in Article 1 (3) of the Constitution of Romania, is affected by the regulations governing the establishment of the SIOJ.
> 56. With regard to the first issue – the absence of objective and verifiable imperatives related to the good administration of justice that would justify the establishment of the SIOJ – the Constitutional Court reiterating the ruling in its case-law regarding the establishment of this section for the investigation of offences exclusively for the professional category of magistrates (see Decision No 33 of 23 January 2018 and Decision No 547 of 7 July 2020, cited above). (…) The Court finds that, in view of certain constitutional values and principles, the right to adopt norms that give content to the Fundamental Law lies with the ordinary legislator. (…)
> 57. Therefore, even if the explanatory memorandum accompanying the law establishing the SIOJ did not mention 'objective and verifiable imperatives' that required the adoption of this regulation, the Constitutional Court found that the normative content of the law shows the aspects aimed at 'good administration of justice': on the one hand, the creation of a specialized investigation structure to ensure a unitary practice regarding the execution of criminal prosecution acts for crimes committed by magistrates and, on the other hand, the regulation of an adequate form of protection of magistrates against pressure exerted on them by arbitrary notifications/denunciations.
> 58. Likewise, regarding the derogatory nature of the regulation (in terms of appointing the chief prosecutor, delegating or seconding prosecutors in this section) from the principle of career separation enshrined in the provisions of Law No. 303/2004 on the status of prosecutors, the Court mentioned that the legislator's option to regulate in the normative act by which the new prosecutorial structure is established those legal norms that have a specific character do not affect the constitutionality of the latter law, since the invoked principle is not enshrined in the constitution, and all other elements regarding the status of the prosecutor remain fully applicable to the SIOJ prosecutors. Thus, with regard to the regulation of the position of the Chief Prosecutor of the SIOJ in terms of compliance with the principle of hierarchical control, given that the SIOJ is a specialized structure within the POHCCJ, the Court has already noted that the Chief Prosecutor of this section is hierarchically subordinate to the Chief Prosecutor of the POHCCJ.
> 59. Regarding the second aspect, on which the CJEU noted that the SIOJ could be perceived as an instrument of pressure and intimidation of judges, which could lead to an apparent lack of independence or impartiality of these judges, the Constitutional Court analysed the four aspects on which the CJEU conclusion was based. (…).

> 70. Taking into account those ruled by the Constitutional Court by Decision No 547 of 7 July 2020, including by reference to the constitutional provisions laid down in Article 1 (3) regarding the rule of law, the legal provisions that established the competence of SIOJ prosecutors to exercise and withdraw appeals in the cases which lie with the section, including in the cases pending before the courts or definitively settled before its operationalization, have ceased their applicability, so that on the date of the pronouncement of the Judgment of 18 May 2021 by the CJUE they were no longer likely to take the legal effects held in the C.J.U.E. act, and the grounds of the European court appear to be without factual and legal support.

The CCR concluded that '*the legislation providing for the creation of SIOJ constitutes a choice by the national legislator*', in accordance with the constitutional provisions contained in Article 1 paragraph (3) on the rule of law and in Article 21 paras. (1) and (3) on free access to justice, the right to a fair trial, and the resolution of cases within a reasonable time '*and, implicit, in accordance with the provisions of Article 2 and 19 (1) TEU*' (paragraph 76).

It can be noted that the CCR has carried out its own analysis of the contested norms, by referring to the provisions of the Romanian Constitution that enshrine the rule of law, and also responding in its own way to the issues raised in the CJEU Judgment of 18 May 2021. Regarding this Judgment, delivered by the CJEU in Case C-355/19, the CCR held that '*this cannot be regarded as a factor which may lead to a jurisprudential reversal in terms of ascertaining the impact of Decision 2006/928 / EC*'.[110] Consequently,

> it upheld its previous case-law and found that the only act which, by virtue of its binding nature, could have constituted a rule applicable to constitutional review carried out in relation to Article 148 of the Constitution – Decision 2006/928 -, by its

110 We have to remind, in this regard, that in a previous case concerning the establishment of the SIOJ, where it had been requested to refer to the CJEU including with reference to Art. 2 of the TEU, in order to interpret the effects of the CVM, established according to Decision 2006/ 928/CE of the European Commission of 13 December 2006, the CCR rejected the application to submit some preliminary questions to the CJEU as inadmissible (Decision no 137/2019, published in Official Gazette No. 295 of 17 April 2019). The CCR held then, in essence, that '*even if these acts (Decision 2006/928/CE and the CVM reports) would comply with the conditions of clarity, precision and unequivocalness, their meaning being established by the CJEU, those acts do not constitute norms that limit to the level of constitutional relevance necessary to carry out the constitutional review by reference to them. Not having met the cumulative conditionality covered by the established case-law of the constitutional court, the Court notes that they cannot substantiate a possible infringement by the national law of the Constitution, as the only direct norm of reference within the constitutional review*' (para. (78)); '*The Court has a limited power, the constitutional review being a legality review aimed at the conformity of the primary regulatory act with the constitutional norms. In this light, the Court notes that the legal provisions by which the Section for the Investigation of offences committed with the Judiciary was established were subject to review, by Decision No. 33 of 23 January 2018, paragraphs 134—159, ascertaining their constitutionality. According to the provisions of Art. 147 para. (4) of the Constitution, the decision of the Court is generally binding*' (para. 81).

> provisions and the objectives it imposes, has no constitutional relevance, as it does not fill a gap in the Fundamental Law, nor does it enhance its rules by setting a higher standard of protection (paragraph 49).

Moreover, the CCR found that:

> the CJEU, in declaring Decision 2006/928 to be binding, has limited its effects from a twofold perspective: on the one hand, it has established that the obligations resulting from the Decision are a matter for the Romanian authorities competent to cooperate institutionally with the European Commission (paragraph 177 of the judgment), and thus for the political institutions, the Romanian Parliament and the Government of Romania, and, secondly, that the obligations are to be exercised in accordance with the principle of sincere cooperation laid down in Article 4 TEU. From both perspectives, the obligations cannot be binding on the courts, i.e. State bodies which are not empowered to collaborate with a political institution of the European Union (paragraph (84));

The CCR held also that

> the application of point 7 of the operative part of the judgment [A/N of the CJEU], according to which a court of law 'is permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19 (1) TEU' has no basis in the Constitution of Romania, since, as previously mentioned, Article 148 of the Constitution enshrines the priority of applying the European law towards the contrary provisions of the national law. However, the reports of the CVM, drawn up on the basis of Decision 2006/928, by their content and effects, as they were established by the Judgment of the CJEU of 18 May 2021, do not constitute norms of European law, which the court of law should apply as a matter of priority, removing the national norm. Therefore, the national judge cannot be put in a position to decide the priority application of certain recommendations to the detriment of the national legislation, as the reports of the CVM do not regulate, so they are not likely to enter into a dispute with the national law. This conclusion is all the more necessary in the event that the national law has been found in compliance with the Constitution by the national constitutional court in the light of the provisions of Article 148 of the Constitution (paragraph 85).

The CCR concluded, in this regard, that

> the principle of the rule of law entails legal certainty, that is to say, the legitimate expectation on the part of the addressees as to the effects of the legal provisions in force and the way in which they are applied, so that any subject of law may predictably determine his or her conduct. In so far as some courts disapply of their own motion

> the provisions of national law which they consider to be contrary to European law, whereas others apply the same national rules, considering them to be consistent with European law, the standard of foreseeability of the rule would be seriously undermined, which would give rise to serious legal uncertainty and, consequently, would lead to the infringement of the principle of the rule of law (paragraph 86).

As a consequence, the CCR rejected, as unfounded, the exception of unconstitutionality of the provisions of Article 88[1](1)-(5), Arts. 88[2]–88,[7] Article 88[8] paragraph (1) a)-c) and e) and paragraph (2), as well as those of Article 88[9] of Law No 304/2004 (with reference to the SIOJ).

Decision No 390/2021 raised criticism and debates. The main issues at stake[111] are contained within the idea that a national court does not have the power to examine the conformity of a provision of national law, which has already been found to be constitutional, with the provisions of EU law (expressed in paragraph (85) of Decision No 390/2021) and the jurisdictional interference – an aspect characterised in the dissenting opinion[112] as to Decision No 390/2021 as follows:

> 5. Beyond monist, dualist or pluralist positions regarding the system relationships between EU law and the national law of the Member States, as well as beyond the distinctions that can be made between the supremacy of the Constitution within any national normative system and the priority of application or the prevalence of EU law in relation to any normative provisions – including those of a constitutional nature – from the national law of the Member States, in the present case it should be noted that the CJEU analysis refers to EU law, and the CCR analysis refers to the Constitution of Romania. That is precisely why the Constitutional Court of Romania acted ultra vires when, not being notified by the court that correctly submitted the exception of unconstitutionality to the CCR and the preliminary questions to the CJEU, it launched into assessments regarding the power of the supranational jurisdiction (see also the Decision of the Constitutional Court No 137/2019, published in the Official Gazette of Romania Part I, no. 295 of 17 April 2019).

In the 'second wave' of preliminary rulings (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion SRL*), the disputes concern criminal proceedings in connection with which the referring courts ask whether they can, pursuant to EU law, disapply certain decisions delivered by the CCR between 2016 and 2019, namely Decisions No 51/2016 of 16 February 2016 (Case C-379/19), No 302/2017 of 4 May 2017 (Case C-379/19), No 685/2018 of 7 November 2018

111 As it resulted from subsequent meetings between the CCR and the president of the CJEU or conferences on this topic, for example the recent one organized by the Academy of European Law – see Congress 'European Sovereignty: The Legal Dimension – A Union in Control of its Own Destiny' – ERA (online), 13-14 October, 2022; see Safta, 2022d.

112 Signed by judges of the CCR prof. univ. dr Elena-Simina Tănăsescu and dr Livia Doina Stanciu.

(Cases C-357/19, C-547/19 and C-840/19), No 26/2019 of 16 January 2019 (Case C-379/19) and No 417/2019 of 3 July 2019 (Cases C-811/19 and C-840/19). According to the CJEU, the referring courts

> point out that, under national law, the decisions of the Curtea Constituțională (Constitutional Court) are generally binding and that failure by members of the judiciary to comply with those decisions constitutes, pursuant to Article 99(ş) of Law No 303/2004, a disciplinary offence. However, as is apparent from the Romanian Constitution, the Curtea Constituțională (Constitutional Court) is not part of the Romanian judicial system and is a politico-judicial body. In addition, in delivering the judgments at issue in the main proceedings, the referring courts state that the Curtea Constituțională (Constitutional Court) exceeded the powers afforded to it by the Romanian Constitution, encroached upon the powers of the ordinary courts and undermined the independence of the latter. Furthermore, in the view of the referring courts, Decisions No 685/2018 and No 417/2019 include a systemic risk of offences intended to counter corruption going unpunished.

By the Judgment of 21 December 2021,[113] the CJEU (Grand Chamber) ruled as follows:

> 1. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption is, as long as it has not been repealed, binding in its entirety on Romania. The benchmarks in the annex to that decision are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, to the effect that Romania is required to take the appropriate measures to meet those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.
> [As rectified by order of 15 March 2022] Article 325(1) TFEU, read in conjunction with Article 2 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995, and Decision 2006/928 are to be interpreted as precluding national rules or a national practice under which judgments in matters of corruption and value added tax (VAT) fraud, which were not delivered, at first instance, by panels specialised in such matters or, on appeal, by panels all the members of which were selected by drawing lots, are rendered absolutely null and void, such that the cases of corruption and VAT fraud concerned must, as the case may be further to an extraordinary appeal against final judgments, be re-examined at first

113 Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=251504&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12461 (Accessed: 1 Febraury 2023).

> and/or second instance, where the application of those national rules or that national practice is capable of giving rise to a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished. The obligation to ensure that such offences are subject to criminal penalties that are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, but does not allow that court to apply a national standard of protection of fundamental rights entailing such a systemic risk of impunity.
> 3. Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability.
> 4.The principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928'.

The CCR reacted in a press release, stating, *inter alia*, that none of its decisions mentioned in the Judgment of the CJEU concerned either the creation of impunity in respect of acts constituting serious fraud offences affecting the financial interests of the European Union or corruption offences or the removal of criminal liability for those offences. The CCR pointed out that

> According to Article 147 (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding', holding that 'moreover, in its judgment of 21 December 2021, the Court of Justice also recognised the binding nature of the decisions of the Constitutional Court. However, the conclusions of the CJEU ruling that the effects of the principle of the primacy of EU law apply to all organs of a Member State, without national provisions, including those of a constitutional nature, being capable of hindering this, and according to which national courts are obliged to disapply, of their own motion, any national legislation or practice contrary to a provision of EU law, requires revision of the Constitution in force. From a practical point of view, this judgment can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the

initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself.[114]

After the CCR issued Decision No 390/2021, and with reference to the way in which the CCR interpreted Article 148 of the Constitution in this decision, the Romanian ordinary courts addressed the CJEU with a new series of preliminary references (the so-called 'third wave'[115]) which called into question mainly the rule of law in connection with the independence of the judiciary.

Thus, Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) decided to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the [Charter], preclude a provision of national law, such as … Article 148(2) of the Romanian Constitution, as interpreted by the Curtea Constituțională (Constitutional Court …) in Decision No 390/2021 [of 8 June 2021], according to which national courts have no jurisdiction to examine the conformity with EU law of a provision of national law that has been found to be constitutional by a decision of the Curtea Constituțională (Constitutional Court)?

(2) Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the [Charter], preclude a provision of national law, such as … Article 99(ș) of [Law No 303/2004], which provides for the initiation of disciplinary proceedings and the application of disciplinary penalties in respect of a judge for failure to comply with a decision of the Curtea Constituțională (Constitutional Court), where that judge is called upon to [apply] the primacy of EU law over the grounds of a decision of the Curtea Constituțională (Constitutional Court), that provision of national law depriving him or her of the possibility of applying a judgment of the Court of Justice … which he or she regards as taking precedence?

(3) Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the [Charter], preclude a national judicial practice which precludes a judge, on pain of incurring disciplinary liability, from applying the case-law of the Court of Justice … in criminal proceedings in relation to a complaint regarding the reasonable duration of criminal proceedings [referred to] in Article 488[1] of the [Code of Criminal Procedure]?.

114 Available at https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/ (Accessed: 1 February 2023).

115 See Bercea, 2022, p. 58.

By the Judgment delivered in Case C-430/21-RS,[116] the CJEU (Grand Chamber) ruled as follows:

> 1. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.
> 2. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.

This sequence of decisions, the expression of a tense dialogue, and determined lively doctrinal debates in Romania can all be seen in conferences such as '*CJEU-CCR a necessary dialogue*',[117] or our own Forum proposal at the ICON S Conference (4-6 July 2022) – '*Tensions in constitutional justice. 'Courts against Courts', a recent debate in the EU. Key factors of effective dialogue between Courts at the global level*',[118] or presentations such as *'Courts against Courts? Or a way together? Developments of constitutional review in the European Union and worldwide*'.[119] We will refer to the doctrinal positions in the chapter concerning legal literature on the matter of who raised the problem of the relationship between national law, EU law, constitutional identity and the way in which these issues are interpreted by the CCR and CJEU.

Nevertheless, a significant component of the debate and the conflict between the courts refers to the value of 'soft law' norms in the defence of the rule of law, revealing '*major divergences in the understanding of the European legal framework and of its legal force*'.[120] This is, in the case of the aforementioned decisions, the MCV reports, namely the recommendations made by the European Commission in these

116 Available at https://curia.europa.eu/juris/document/document.jsf?docid=254384&doclang=ro&mode=req&occ=first&part=1&cid=2515584&fbclid=IwAR2tcN3E-WYEhLej1beZeiHQS1eCM2uKMuiAe-E4jsLPn6o4xYatklE-GZE (Accessed: 1 February 2023).

117 Available at https://evenimente.juridice.ro/cjue-ccr-un-dialog-necesar (Accessed: 1 February 2023).

118 Available at https://conference.icon-society.org/event/tensions-in-constitutional-justice-courts-against-courts-a-recent-debate-in-the-eu-key-factors-of-effective-dialogue-between-courts-at-the-global-level/ (Accessed: 1 February 2023).

119 See Safta, 2022e.

120 Ștefan, 2022.

reports. In the opinion of Dr. Oana Ștefan, the use of soft law tools – such as reports – to identify certain violations of the rule of law

> is insufficient and not adapted to the defense of some fundamental values of the Union, on which there should be no divergence of interpretation. Given the non-binding character of these instruments, their use in such areas is not likely to generate deliberations between the various levels of government, but rather to stop any communication.[121]

The case law of the CJEU concerning the disciplinary liability of the judges influenced the Romanian legislation. Recently, new laws of justice have been adopted in Romania, in which the disciplinary liability of judges for non-compliance with the CCR decisions is no longer found as a separate offence.[122] Called to rule on the constitutionality of the new laws, the CCR held that

> according to Article 52 para (3) of the Constitution, 'The State is patrimonially liable for damages caused by judicial errors. The liability of the state is established under the law and does not remove the liability of the magistrates who exercised their function in bad faith or gross negligence'. In other words, regarding the disciplinary misconduct of judges, the legislator correlated Article 126 paragraph (3) and Article 147 paragraph (4) of the Constitution with Article 52 para. (3) of the Constitution, resulting that, without being affected the binding character of the decisions of the Constitutional Court or the ÎCCJ, the liability of judges and prosecutors is engaged under the conditions of Article 52 para.(3) of the Constitution, conditions which also engage, in turn, the state's responsibility for judicial errors. Consequently, Article 271 of the law subject to control further stipulates that non-compliance with the decisions of the Constitutional Court or those of the ÎCCJ pronounced in the resolution of appeals in the interest of the law and requests for the pronouncement of a preliminary decision regarding the resolution of a legal issue constitutes a disciplinary offense when the judge/prosecutor performs his function in bad faith or with gross negligence. Therefore, Article 271 of the law does not violate Article 1 para. (5), Article 124 para. (3), Article 126 para. (3), Article 132 para. (1) and Article 147 para. (4) of the Constitution (para. (336)[123]).

121 Ibid, p. 453.

122 The disciplinary offence related to '*non-compliance with the decisions of the Constitutional Court and the decisions issued by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law*' was introduced by Art. I point 3 of Law No 24/2012 for the amendment and completion of Law No 303/2004 on the status of judges and prosecutors, and Law No 317/2004 on the Superior Council of Magistracy; Law No. 303/2004 was repealed by Law No. 303/2022, published in the Official Gazette no 1102 of 16 November 2022

123 Decision No. 520/2022, published in the Official Gazette no 1100, 15 November 2022.

We could say that there was found (with many controversies and debates) a way to comply with the general binding nature of the CCR decisions, the binding nature of the CJEU judgments, and the independence of judges in the current constitutional framework of the relationships between national and EU law. It remains to be seen how these provisions will be applied and the relationships will evolve.

7. The interpretation of Article 4 of TEU (in particular with regard to national identity) reflected in the practice of the CCR

Examining the case law of the CCR, we note that the concepts of 'constitutional identity' and 'national identity' are invoked in various contexts, whose shaping has a more pronounced dynamic in the Court's recent case law, where the interpretation of Article 4 of TEU is mentioned.

The first relevant jurisprudential landmark for the emergence of the concept of constitutional identity in the CCR practice dates from 2012, when the Court was called to establish the prerogatives of the president and the prime minister in the institutional representation of Romania in the European Council. On that occasion, the Court placed its analysis in a wider context, meaning the characterisation of the EU and its competencies. The CCR held that

> the essence of the Union is the assignment by the member states of certain powers – more numerous – for the achievement of their common objectives, of course, without affecting, in the end, through this transfer of powers, the national constitutional identity – Verfassungsidentitat (see the Decision of the German Constitutional Court of June 30, 2009, pronounced in Case 2 BvE 2/08, regarding the constitutionality of the Treaty of Lisbon). (….) Member States maintain powers that are inherent in order to preserve their constitutional identity, and the transfer of powers, as well as the rethinking, emphasis or establishment of new guidelines within the already transferred powers, belong to the constitutional margin of appreciation of Member States.[124]

In the same year, in a case regarding the status of parliamentarians, the CCR enunciated in the final considerations of the decision, but without defining it, the principle of constitutional identity. The CCR thus noted that

> each Member State, under the principle of national constitutional identity, has full freedom in terms of establishing the normative framework relative to the status of

124 Decision No. 683/2012, published in the Official Gazette No. 479 of 12 July 2012.

> parliamentarians active in the national legislative forum, including the legal regime of patrimonial rights related to the exercise of these functions of public dignity.[125]

A few years later, in 2015, applying the so-called 'doctrine of interposed norms',[126] the CCR used the norms of European law as interposed in the constitutionality review and the concept of constitutional identity as an element/limit in the very content of the said doctrine. The CCR held that

> the previously mentioned European Union acts have a constitutional relevance, which means, on the one hand, that they circumscribe and subsume Article 41 para. (2) of the Constitution, by fulfilling the double conditionality previously mentioned, without violating the national constitutional identity (Decision no. 683 of June 27, 2012, published in the Official Gazette of Romania, Part I, no. 479 of July 12, 2012), and, on the other hand, that it is within the competence of the Constitutional Court finding of the existence of this normative inconsistency between the previously mentioned European Union acts and the national ones, respectively Article 86 para.(6) first sentence of Law no. 85/2006.

In the same year, in a case concerning the regulation of state aid, the CCR held that

> in the application of Article 11 (1) and Article 148 (2) and (4) of the Constitution, Romania fulfils in good faith the obligations resulting from the act of accession, not interfering with the exclusive jurisdiction of the European Union and, as established in its case-law, by virtue of the compliance clause contained by Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State. Obviously, all those previously mentioned have a constitutional limit, expressed in what the Court qualified as 'national constitutional identity' (see Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015).[127]

The reference to constitutional identity also appears in subsequent decisions, but in the same enunciative manner, without explaining the content of the concept/principle asserted. Thus, the CCR held in a case concerning the regulation of state aid that

> By accessing to the legal order of the European Union, Romania accepted that, in the fields where the exclusive jurisdiction belongs to the European Union, regardless of the international treaties it signed, the implementation of the requirements resulting

125 Decision No. 964/2012, published in the Official Gazette No. 23 of 11 January 2013.
126 See Deaconu, 2022, pp. 233–258.
127 Decision No. 887/2015, published in the Official Gazette No. 191 of 15 March 2016.

> from them should be subject to the rules of the European Union. If not, it would lead to the undesirable situation that, through the international obligations undertaken bilaterally or multilaterally, the Member State would seriously affect the jurisdiction of the Union and, practically, substitute it in the mentioned fields. Hence, in the field of competition, any public aid falls under the purview of the European Commission, and its contesting procedures belong to the jurisdiction of the Union. By virtue of the provisions of Article148 para.(2) and (4) of the Constitution, Romania fulfils in good faith the obligations resulting from the act of accession, not interfering with the exclusive jurisdiction of the European Union and, as established in its case-law, by virtue of the compliance clause contained by Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State. Obviously, all those previously mentioned have a constitutional limit, expressed in what the Court qualified as 'national constitutional identity' (see Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015).[128]

Likewise, the CCR noted, in a case on the matter of integrity standards, that

> there is the right of the legislator to enjoy a margin of appreciation regarding the establishment of additional incompatibilities to those provided by the constitutional text for the offices and dignities expressly provided by the Constitution or by the infra-constitutional laws or, on the contrary, to renounce to some already established by infra-constitutional acts or to opt for an adaptation of the integrity standard, depending on certain circumstances, obviously not and for a removal of the integrity standard, in compliance with the obligations resulting from Romania's membership to the European Union, for example, regarding the establishment of an agency for integrity but, by no means, regarding the obligation of the legislator to establish certain incompatibilities, conflicts of interest or procedures to be followed; in this context, under Article 148 of the Constitution, the legislator is one of the entities that ensures the fulfilment of the obligations resulting from the accession, and the law making process in this matter falls within this margin of appreciation, in compliance with the constitutional limits regarding constitutional identity, read in conjunction with national sovereignty and with the constitutional obligations arising from Article 11 and 20 of the Constitution.[129]

From the analysis of this jurisprudence, it follows that jurisprudential borrowing played an essential role in the emergence of the concept of constitutional identity. It also follows that, more than a decade after the integration into the EU, the idea of constitutional identity did not know a notable development in Romania, except

128 Decision No. 259/2017, published in the Official Gazette No. 786 of 4 October 2017.
129 Decision No. 682/2018, published in the Official Gazette No. 1050 of 11 December 2018.

for its introduction, in 2015, as an element in the doctrine of interposed norms. Nevertheless, the responsibility and preoccupation of the CCR for identifying the content of the constitutional identity are demonstrated by a Conference entitled '*National Constitutional Identity in the context of European law*', organised by the Court in 2019.[130] In that framework, one of the judges of the Court emphasised that the CCR

> has not exploited the concept of national constitutional identify to its fullest so far. This was due, inter alia, to the fact that the Court was keen on proving that European law, i.e. the values and the principles enshrined in the European legal order, are unconditionally accepted.[131]

In the same context, other judges of the CCR showed that

> until now, the Constitutional Court of Romania was not placed in the situation of conducting its own identity control. The case-law established since 2003 and developed especially recently creates however, we could tell, a 'protection shield' of the supremacy of the Constitution, which can be activated in the event the core of constitutional identity would be affected.[132]

A significant development of the concept of constitutional identity, also in relation to Article 4 of TUE, can be found in Decision No 390/2021,[133] in which the CCR held the following:

> 81. A special regulation in the Constitution of Romania refers to the relationships between national law and European Union law, which is established in Article 148 paragrasph (2) and (4), (…) Thus, the accession clause to the European Union includes in the subsidiary a clause of compliance with EU law, according to which all national bodies are in principle obliged to implement and enforce EU law. This also applies to the Constitutional Court, which ensures, under Article 148 of the Constitution, the priority of the application of European law. However, this priority of application should not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Article 11 para. (3) in conjunction with Article 152 of the Fundamental Law, as a guarantee of a core identity of the Romanian Constitution and should not be relativized in the process of European integration. By

130 Available at https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf (Accessed: 1 February 2023).

131 Varga, 2019, available at https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf (Accessed: 1 February 2023).

132 Teodoroiu and Enache and Safta, 2019, available at https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf (Accessed: 1 February 2023).

133 Decision No. 390/2021, published in the Official Gazette No. 612 of 22 June 2021.

> virtue of this constitutional identity, the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law within Romania, (see mutatis mutandis the Judgment of 30 June 2009, 2 BvE 2/08 ş.a., pronounced by the Federal Constitutional Court of the Federal Republic of Germany). According to the clause of compliance contained in the very text of Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State (see Decision No 887 of 15 December 2015, published in the Official Gazette of Romania, Part I, no. 191 of 15 March 2016, para. 75), however, all those previously mentioned have a constitutional limit, established on the concept of 'national constitutional identity' (see Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015, Decision No 104 of 6 March 2018, published in the Official Gazette of Romania, Part I, no. 446 of 29 May 2018, para. 81).
> 82. On the other hand, even Article 4 para. (2) of the TEU, expressly establishing that the Union complies with 'the equality of Member States in relation to the treaties', 'their national identity' and 'the essential powers of the State', uses the concept of 'national identity', which is 'inherent to the fundamental political and constitutional structures' of the Member States and which means that the process of constitutional integration within the E.U. has as its limit precisely the fundamental, political and constitutional structures of the Member States.

With reference to the latter decision, Professor M. Guțan expressed[134] the idea that it would include the '*broadest and most relevant*' use of the concept of constitutional identity. It was shown that, on this occasion,

> the CCR developed the two types of constitutional review of European law that it more drafted in the previous decisions, i.e. ultra vires review[135] and the identity review, but without clearly stating if they are distinct, if the ultra vires review would be subordinated to the identity review or, on the contrary, the identity review would be subordinated to the ultra vires review.[136]

Also noted was the '*constitutional loan*', meaning the case law of the Federal Constitutional Court of Germany. Likewise, the same author commented that, in Decision 390/2021, the CCR established, for the first time, the content of the Romanian constitutional identity, by referring to the provisions of Article 152 of the Constitution of Romania (the so-called eternity clause) and

134 Guțan, 2022b, pp. 28–45.

135 This type of review was launched by the Federal Constitutional Court of Germany in Decision *Maastricht* of 12 October 1993 and was aimed at '*the right to examine whether the legal instruments of the European institutions manifest themselves within the limits of the sovereign powers granted to them*'.

136 See Kovacs, 2017, p. 1716.

> it is clearly about equating the Romanian constitutional identity with the identity of the constitution. On the other hand, it is incorrect to claim that the Romanian constitutional identity, understood as the identity of the constitution, is reduced to the content of the eternity clause. As the Court states, the latter only contains an 'identity core'. Therefore, we can accept a wider content of the Romanian constitutional identity.[137]

As regards other dimensions of the constitutional identity, which are not part of the 'eternity clause' provided by Article 152 of the Romanian Constitution, we have mentioned examples in the other chapters, such as the status of parliamentarians or the national justice system organisation.

Thus, in the context of the examination of certain provisions regarding the pensions of parliamentarians, the CCR held that

> regarding the members of the European Parliament, the Court notes that, according to the provisions of Article 223 para.(2) of the Treaty on the functioning of the European Union, published in the Official Journal of the European Union, series C no. 83 of 30 March 2010, it is the European Parliament that decides, by regulations, on its own initiative and in accordance with a special legislative procedure, on the status and general requirements regarding the exercise of the offices of its members, without being opposed to the similar rules corresponding to the legislation of each Member State. To the same extent, each Member State, by virtue of the principle of national constitutional identity, has full freedom in terms of establishing the normative framework regarding the status of parliamentarians active in the national legislative forum, including the legal regime of patrimonial rights regarding the exercise of these public offices.[138]

Likewise, more recently, in the context of the normative succession and the case law that was created with reference to the regulation of the Section for the Investigation of Criminal Justice (SIIJ), the Court also substantiated an element considered to belong to the constitutional identity, namely the *national justice system* organisation. Thus, the Court held that

> it falls within the exclusive competence of the Member State to establish the way of organization, functioning and the delimitation of powers between the different structures of the criminal investigation bodies, since, as the Court held in Decision No 80 of 16 February 2014, cited above, para. 456, the Fundamental Law of the State – the Constitution is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of an inconsistency between its provisions and the European ones. Likewise, the accession to the European Union

137 Ibid.
138 Decision No. 964/2012, published in the Official Gazette No. 23 of 11 January 2013.

> cannot affect the supremacy of the Constitution over the entire legal order (to the same effect, see Judgment of 11 May 2005, K 18/04, pronounced by the Constitutional Court of the Republic of Poland). Furthermore, by Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, the Constitutional Court stated that 'the essence of the Union is the assignment by Member States of certain powers – more and more in number – for the achievement of their common objectives, of course, without affecting, in the end, the national constitutional identity through this transfer of powers' and that, 'according to this thinking, Member States maintain powers that are inherent in order to preserve their constitutional identity, and the transfer of powers, as well as the rethinking, emphasis or establishment of new guidelines within the already transferred powers, belong to the constitutional margin of appreciation of Member States'.[139]

The same idea is supported by subsequent decisions, in which the CCR cited

> the consistent nature of its case-law regarding the legislator's competence to establish or abolish various prosecution structures. Thus, the legislator's option to establish a prosecutor's office structure corresponds to his constitutional power to legislate in the field of organizing the judicial system, and the fact that a pre-existing prosecutor's office structure loses part of its legal powers does not constitute a constitutional issue, as long as the said structure of the prosecutor's office does not have a constitutional enshrinement (Decision No 33 of 23 January 2018, published in the Official Gazette of Romania, Part I, no. 146 of 15 February 2018, para. 127, Decision No 547 of 7 July 2020, published in the Official Gazette of Romania, Part I, no. 753 of 19 August 2020, para. 50, Decision No 390 of 8 June 2021, published in the Official Gazette of Romania, Part I, no. 612 of 22 June 2021, para. 62). Moreover, the abolition of a prosecution structure also falls within the competence of the legislator, and not of the courts (Decision No. 390 of June 8, 2021, paragraphs 84 and 85). However, through the analyzed law, the legislator proceeded exactly to the effect of those established by the Constitutional Court, abolishing a prosecutor's office structure and having its competence taken over by another pre-existing prosecutor's office structure, in compliance with Article 61 para. (1) of the Constitution. The Court emphasizes that the way the national justice system is organized is part of the constitutional identity of Romania.[140]

It should also be noted that, in the case law of the CCR is being used the concept of '*national identity*', such as in a decision by which it ruled in the sense that '*evocation of history and national values are elements of the identity of a people*',[141] and that

139 Decision No. 137/2019, published in the Official Gazette No. 295 of 17 April 2019, in the same regard is also Decision No. 414/2019 published in the Official Gazette No. 922 of 15 November 2019.

140 Decision No. 88/2022, published in the Official Gazette No. 243 of 11 March 2022.

141 Decision No. 592/2020 regarding the objection of unconstitutionality of the Law for the declaration of 4 June as the Day of the Treaty of Trianon, published in the Official Gazette No. 824 of 8 September 2020.

'*Parliament has intervened numerous times and established, by law, days to mark the significance of a certain event for national identity*'.[142]

Based on the few benchmarks mentioned, we would argue that, when we refer to the constitutional perspective, identity can be viewed here and now in the context of the current Constitution, but also in a historical and evolutionary context. The two components complement each other because some aspects of the present Constitution can be better understood through an assessment in a socio-historical-political context since, as argued, a constitution acquires an identity as a result of specific experiences, and the current Constitution of Romania is the result of such an experience – of a set of political aspirations and commitments, illustrative of the nation's past, and options for a future.[143]

Taking a brief look[144] at the Romanian Constitutions, starting from 1866, we find that some of the 'sacrosanct core' elements of the current Constitution are also present there. According to Article 1 of the 1866 Constitution, '*The United Romanian Principalities were an indivisible State under the name of Romania*'. The 1923 Constitution proclaims, in Article 1, that '*The Kingdom of Romania is a national, unitary and indivisible State'* – a provision that is also enshrined in Article 1 of the 1938 Constitution, according to which '*The Kingdom of Romania is national, unitary and indivisible State*'. The Constitution of 1948 sets out, in Article 1, that '*The Romanian People's Republic is a popular, unitary, independent and sovereign State*', whilst the Constitution of 1952 enshrines, in Article 17, that '*The democratic-popular Romanian State – unitary, sovereign and independent State*' and the Constitution of 1965 covers, in Article 1, the characteristics of the State as '*sovereign, independent and unitary. Its territory is inalienable and indivisible*'. Therefore, it follows that, over time, irrespective of the form of government or the political regime, certain essential elements have remained unchanged in the Constitutions, which characterise the Romanian State and which can consequently fall under the concept of constitutional identity, meaning the State's characteristics of being unitary, indivisible, and sovereign. Beyond these 'permanencies', which either cross time or fix the constitutional present (through the 'sacrosanct core of the Constitution'), we found a content of constitutional identity which emerges from the case law of the Constitutional Court previously analysed.

To sum up, according to the jurisprudence of the CCR, the Constitution provides an identity core (the limits of the revision enshrined by Article 152). Still, according to the Court, other principles and values can also be circumscribed to the constitutional identity (without a clear boundary or definition). The CCR has mentioned Article 4 of TEU in its recent case law, but has not yet engaged in a dialogue with the CJEU to identify a commonly accepted meaning of constitutional identity.

142 Ibid.
143 See Enache, 2016.
144 For an extended study on the topic see Guțan, 2022a, pp. 109-129.

8. The academic position as regards the assessment of the impact of EU law on the Romanian legal system

Examining the Romanian legal literature on the matter of EU law, there can be identified, as a general rule, various works and articles sought over time to explain the legal order of the EU,[145] the analysis of the case law of the CJEU concerning the fields of interest for the authors, the studies concerning jurisprudential developments of the acts of the EU institutions and their effects,[146] the examination of the issue related to the preliminary references[147] or of the preliminary references formulated by the Romanian courts of law, the EU law in the case law of the CCR[148] or the developments of the constitutional review at the confluence of national-European levels.[149] The legal literature concerning this field has increased over time, correlative with the development of EU law and the phenomenon of European integration.

At various times and intensities, the CCR was under the spotlight, as the case law established regarding the interpretation and application of EU law and the relationships with the CJEU was the target of critical assessments. In the context of the polemics determined by the topic of priority vs. primacy of EU law, criticism was also directed towards the CJEU. One such moment that raised lively debates was the ascertainment of the unconstitutionality of Law No 298/2008 transposing, into national law, Directive 2006/24/EC on data retention (the Data Retention Directive). The CCR declared unconstitutional the law in its entirety,[150] for going beyond a justified and proportionate limitation of the rights to privacy, secrecy of correspondence, freedom of expression and presumption of innocence, as guaranteed by the Constitution.

The CCR was criticised because it, when '*confronted with a national law transposing a piece of EU secondary legislation allegedly violating human rights, adopted a completely EU-blind attitude. The Court simply nationalized the EU source of the national law*'.[151] The same author mentioned the reactions from the European Commission, '*which called on the Romanian Parliament to comply with the obligations under the Directive, notwithstanding the decision of the CCR*'.[152] Another work[153] provided commentaries on the same moment because

145 For example Sandru and Banu, 2013.
146 See, for example, Mazilu-Babel and Zanfir, 2013a; Mazilu-Babel and Zanfir, 2013b; Mazilu-Babel and Zanfir, 2013c; Sandru, 2015.
147 For example, Şandru and Banu and Călin, 2013.
148 For example, Safta, 2015.
149 Toader and Safta, 2016.
150 Decision No. 1258/2009, Official Gazette No. 798 of 23 November 2009.
151 Viță, 2019, pp. 1623–1662.
152 European Commission, press release – IP/11/1248, 27 October 2011, Data retention: Commission requests Germany and Romania fully transpose EU rules, available at http://europa.eu/rapid/press-release_1P-11- 1248 en.htm (Accessed: 1 February 2023).
153 Efrim and Zanfir-Fortuna and Moraru, 2013.

> even though the reviewed national law was merely a translation of Directive 2006/24/EC on Data Retention, the CCR did not address the relationship between the directive and national law, the margin of appreciation that Romania had for its transposition, or the possibility of addressing a preliminary reference to the CJEU.

These specific instances of criticism are placed in a general critical context of the attitude of the CCR at that moment, qualified as hesitating, to address preliminary references ('*the Hesitating Steps of the Romanian Courts Towards Judicial Dialogue on EU Law Matters*'), including also the interpretation of Article 148 of the Constitution, called, in the same specialised literature, '*the Achilles heel in the CCR's case law after 2007, in the sense that whenever it stumbled upon it, the Court avoided analysing its legal effects within the constitutional review of national legal provisions*'.[154]

The manner in which the CCR consistently ruled on the relationship between the Constitution and EU law was also not exempt from criticism. For example, Prof. V. Stoica and co-authors[155] held, *inter alia*, that the interpretation of the phrase 'internal laws' contained in Article 148 para. (2) of the Constitution, in the sense that it would refer only to ordinary and organic laws and not to constitutional ones,

> ignores the adage ubi lex non distinguit, nec nos distinguere debemus. In addition, when the Constitution was revised in 2003, the principle of the priority of European law over domestic law, including constitutional laws, was already outlined in the jurisprudence of the CJEU, starting with the judgment of July 15, 1964, pronounced in the Costa v Enel case.

However, the most heated forms of criticism and disputes were determined by the most recent Decision No 390/2021 of the CCR, which we referred to several times in our presentation. One of the most radical instances of criticism belongs to Professor V. Perju, in a study entitled 'Roexit through the decision 390/8 June 2021 of the CCR?'.[156] He noted that

> the decision of the CCR violates the basic structure of European law, not for the first time in the Court's case-law. Contrary to European law, the judges of the CCR limit the primacy of European law to the fields in which European institutions have exclusive powers. Contrary to European law, the judges of the CCR do not recognize the primacy of European law over national constitutional norms. Contrary to European law, the judges of the CCR constrain the application of European rules in Romanian law on the fulfillment of additional conditions contrary to European case law, such as the condition that European rules 'fill a gap in the Fundamental Law' (para. 49). Contrary

154 Efrim, Zanfir-Fortuna, and Moraru, 2013.
155 Stoca, 2022, see also the opinion expressed by Professor (2022), pp. 335–336.
156 Available at https://www.hotnews.ro/stiri-opinii-24865338-roexit-prin-decizia-ccr-390-8-iunie-2021.htm (Accessed: 1 February 2023).

> to European law, which has always made a clear distinction between EU law and international law, the judges of the CCR discuss the decision of the European Court in the context of the relationship between Romanian and international law. Contrary to European law, the CCR draws the attention of the referring court that it does not have powers of not applying the national legal norms contrary to European law. A large part of the reasoning of the CCR in Decision 390 deals with the judgment of the European Court as a test that the CCR applies to the amendments to the justice laws, summing up that they are consistent with European law. This method is questionable.

Likewise, the same author emphasized that

> probably realizing how questionable the constitutional analysis is, the CCR seeks to save itself by invoking the principle of national identity protection. According to this principle, the transfer of national sovereignty to the European level is impermissible when the effect of such transfer harms the national identity. A doctrinal invention of German origin, this principle does not help the reasoning of the CCR in the present case. National identity could have certain legitimacy when invoked, as the Karlsruhe Court did last summer, to protect mechanisms for democratizing decisions in fields such as fiscal ones. However, the CCR invokes national identity with a completely different goal, namely to justify a judicial organization that has the effect of limiting the independence of the judiciary.

Professor B. S. Guțan also expressed critical opinions, arguing that the CCR '*literally renders the CJEU judgment devoid of any effect in respect of national courts and practically forbids the latter to apply EU law and disregard contrary provisions of the national legislation*'.[157] The cited author concludes her 'trilogy' entitled 'A Tale of Primacy' regarding the manner in which the CCR relates to EU law by referring to positions of the same Court in public correspondence:

> The third act, but not the end, of this 'game of Courts' came on 9 November 2021, with a letter addressed by the Romanian Constitutional Court, under the signature of its president, to the acting minister of justice, as a response to a request to assist the ministry in preparing a 'reply to Mr. Didier Reynders on the issue of the principle of priority for the application of European law in the light of the Constitutional Court Decision no. 390 of 8 June 2021'.[158]

Carrying on the observations on the positions of the CCR, in the latest post in continuation of those mentioned, under the title Who's Afraid of the 'Big Bad Court'?[159] Professor B. Guțan argued that

157 Selejan-Gutan, 2021b.
158 Selejan-Gutan, 2021c.
159 Available at https://verfassungsblog.de/author/bianca-selejan-gutan/ (Accessed: 1 February 2023).

> the end of 2021 brought a new chapter in the saga of how should the primacy of the EU law be applied by Romanian courts. A press release of the Romanian Constitutional Court, issued on 23 December 2021, raised concerns about the conformity with the principles set forth in the case law of the CJEU regarding the primacy. The press release, albeit a non-legal document, might have a dissuasive effect upon the judges who would be, otherwise, willing to disapply some norms of internal law, according to the latest judgment of the CJEU on the matter. In Romania, the disregard of the decisions of the Constitutional Court can be a ground for disciplinary action against judges.

Critical opinions were also expressed regarding the judgments issued by the CJEU. Thus, Professor M. Voicu, in an analysis of the CJEU Judgment of 18 May 2021,[160] stated that

> The CJEU requires the national courts to check whether the SIOJ 'carries out its powers in compliance with the requirements laid down by the EU's Charter of fundamental rights', without expressly mentioning them or at least indicating the specific text of the Charter, which, in fact, does not exist, because there are no provisions relative to prosecutors in the TEU, TFEU, nor in the Charter, and the subject-matter of Article 47 is 'the right to an effective remedy and a fair trial', before an 'independent and impartial court, established by law' (?!)'; 'Although, repeatedly, he stated that in the matter of the organization and functioning of the courts and prosecutor's offices, the jurisdiction falls exclusively within the national authorities, by the same judgment, the CJEU arrogated to itself this prerogative, invoking the MCV Decision 2006/928, binding for Romania and justifying the fight and against the financial interests of the EU, which is unacceptable for the authority and prestige of such a European court'; 'Likewise, the introduction of an essential criterion to decide upon the establishment and functioning of the SIIJ, that it be 'imposed by objective needs and the good administration of justice', appears as an excess of power, but also as an unacceptable confusion, because, in the constitutional and legal status of the Public Ministry and prosecutors (Articles 131-132) there are no such prerogatives, since this jurisdiction falls exclusively within the courts, which 'carry out justice' according to Article 126 of the Constitution. Furthermore, the wording of the phrase in the analyzed paragraph is confusing, complicated, with unclear expressions and atypical terms, without reference to the relevant legal and constitutional provisions and, above all, to the incidental provisions of the TEU/TFEU, entered into force from 01.01.2009 (?!).

These strong opinions, as well as others, were expressed in the context of a significant polarisation of academic interest in the subject of the relationships between EU and national law, which took place in 2021-2022, after the decisions pronounced by certain Constitutional Courts (from Germany, Poland) on the same issues. Professor

160 Voicu, 2021.

M. Duțu discussed '*A major danger: the legal disintegration of the European Union!*',[161] pointing out, with reference to the case law of the German and Polish Constitutional Courts and recurrent disputes, that such 'breakdowns' in the perception, acceptance and application of the relationship between EU law and national law, as well as the actions and positions of the Luxembourg court and those of national jurisdictions

> are not new. The current 'war of the last word' between the jurisdictions undermines the authority of the CJEU, opens up the way for encouraging confrontations and brings back into debate the principle of the primacy of EU law over national rights.

According to Professor Duțu,

> in their activity and cooperation, the CJEU and national jurisdictions must follow the rules of mutual tolerance, moderation and adaptation whenever possible, forcing themselves to resolve the tensions between the respective legal orders based on the norms of international civility. The conflict between EU-European law and the inviolable elements of the constitutional orders of the member states does not find an express solution in the texts of the founding treaties of the Union; concerns of this kind that could be circumscribed in particular to the provisions of Article 4 and 6 of the TEU are not sufficiently clear and relevant to solve the problem.

In the article '*European constitutional justice. Too much constitutional law in the European Union?*',[162] we expressed that

> The dialogue of the judges – even through a fulfillment of its consistency, is not enough. Legal certainty and the preservation of both the constitutional status of the EU and the Member States, and a future of their integration, require the use of the same language of constitutional law. The generous 'hat' of the rule of law can be a wise premise for achieving this unity, as an integrating and unifying principle, if it is used in moderation and with the assurance of support from the Member States. In this way, the political factor would support European constitutional justice to achieve the objectives of European integration, correcting the excesses of one side or the other and supplementing the jurisdictional dialogue. Furthermore, it remains to be seen how this political mechanism will be embodied at the legal level – will it be followed by legislative amendments, at the supranational and/or national level? Maybe even constitutions/treaties? Otherwise, the risk – emphasized in the specialized literature – is of the erosion of the CJEU, involved in disputes on the authoritarian way in which it seeks to maintain the European construction. We exclude the hypothesis of a possible 'alliance' of the constitutional courts against the doctrine of primacy of EU

161 Duțu, 2021.
162 Safta, 2022b.

law,[163] as long as it would endanger the membership of the States to the EU, its own constitutional framework preventing de plano such an approach and imposing, in shaping the mentioned legal relationships, a nuanced approach. However, we believe that a focus/limitation of the discussions on the relationships between the courts diverts the attention from the real issue of the constitutional framework of the EU as a whole, which requires political and legislative regulation, perhaps even starting with the full acceptance of the idea of EU constitutionalism.

The vivacity of the debates and the importance of the topic determined the organization of a national Conference, at the beginning of 2022, under the title *CJEU-CCR. A necessary dialogue*.[164] The conference benefitted from a significant representation of academics and practitioners in the field. Its works led to a volume entitled *CJEU and CCR, Identities in dialogue*, published at the end of 2022.[165] The articles

163 We cited also the work of Rasmussen, 2021.

164 See https://evenimente.juridice.ro/cjue-ccr-un-dialog-necesar (Accessed: 1 February 2023).

165 Stoica, V. (ed) 2022; the volume collects the following articles: Stoica and Bogdan and Pintilie, 2022, Bercea R. – *Cântecul sirenelor, Curtea Constituțională a României ca Ulise dezvrăjit (Mermaids' song, the Constitutional Court of Romania as Ulysses bewitched)* (pp. 50–89); Bogdan D., Mihai L. *Între Constituții și dreptul UE: Abordări în alte state membre (Between Constitutions and EU law: Approaches in other Member States)* (pp. 89–140), Carp, 20 (pp. 140–149); Dănișor D.C. *Dreptul național(ist), democrația cosmopolică și starea de drepturi europeană (National(ist) law, cosmopolitan democracy and the European state of rights)* (pp. 149–233), Deaconu Ș.– *Relația dintre dreptul UE și Constituția României. Diverse abordări (The relationship between EU law and the Romanian Constitution. Various approaches)* (pp. 233–258); Gâlea I. *Cheia de boltă a sistemului jurisdicțional al Uniunii Europene: Scurtă privire asupra rațiunii importanței acordate dialogului dintre Curtea de Justiție a Uniunii Europene și instanțele naționale* (*The keystone of the European Union's judicial system: Brief look at the reason for the importance given to the dialogue between the Court of Justice of the European Union and national courts*) (pp. 258–291); Lupu A.R.– Identitatea constituțională națională și dreptul Uniunii Europene (*National constitutional identity and European Union law*) (pp. 291–313); Motoc I. *Dialogul dintre CJUE, CEDO și Curțile Constituționale europene: reflecții despre pluralismul constituțional și art.2 TUE* (*The dialogue between the CJEU, the ECHR and the European Constitutional Courts: reflections on constitutional pluralism and art.2 TEU)* (pp. 313–333); Perju V. *Nucleu Identitar, infraconstitutionalism și deriva conceptuală în spațiul juridic românesc și european (Core Identity, infraconstitutionalism and conceptual drift in the Romanian and European legal space)* (pp. 333–352); Pintilie C. Este posibil dialogul în lipsa revizuirii Constituției? (*Is dialogue possible in the absence of revision of the Constitution?)* (pp. 352–365); Predoiu C. –Poziția Ministrului Justiției cu privire la principiul supremației dreptului Uniunii Europene (*The position of the Minister of Justice regarding the principle of supremacy of European Union law*) (pp. 365–369); Safta M. *Independența judecătorilor- Condiție a integrității dialogului judiciar în Uniunea Europeană* (*The independence of judges – Condition of the integrity of the judicial dialogue in the European Union)* (pp. 369-390); Spineanu-Matei O. *Principiul supremației dreptului Uniunii Europene* (*The principle of supremacy of European Union law*) (pp. 390–414); Stancu M., Angevin F.- *Rolul judecătorului național în cadrul contenciosului european* (*The role of the national judge in European litigation*) (pp. 414–430), Ștefan O. *Apărarea statului de drept între noua guvernanță și guvernare, între autonomia dreptului european și suveranitatea națională* (*Defending the rule of law between the new governance and governance, between the autonomy of European law and national sovereignty*) (pp. 430–463), Toader C. Principiul cooperării loiale și rolul său în rezolvarea conflictelor (*The principle of loyal cooperation and its role in conflict resolution*) (pp. 463–475); Constantin V. *Paleosuveraniști vs activism fragil* (*Paleo Sovereigns vs Fragile Activism)* (pp. 475–495)

published in this volume are relevant for the opinions, in Romanian legal literature, on topics such as the relationship between EU law and national law, the relationship between Courts at the EU level, and the national constitutional identity. Examining these articles, we can say that, in the Romanian legal literature, convergent points of view on the mentioned topics have been outlined.

In the article that opens the volume, Professor V. Stoica and the co-authors emphasised an essential terminological clarification, showing that

> In constitutional law, the supremacy is the quality of the fundamental law, in relation to which the validity of the infraconstitutional norms is assessed. This quality explains the invalidation of legal norms inconsistent with the Basic Law through a priori or a posteriori control of unconstitutionality. Non-compliance with European law does not invalidate the domestic legal norm, but removes it from application in the case brought to trial, and European law is applicable with priority. This (priority/prevalence) is the term used in Article 148 para. (2) of the Constitution. The effect of the invalidation is general for the future, the priority application is particular, and limited to the case brought to trial before the domestic court.[166]

As far as the relationship between EU law and national law, and that between Courts at the EU level, are concerned, the priority (*prioritatea*) of EU law does not seem to raise problems of interpretation, being, as expressed by Professor V. Constantin, '*a functional fact, in the absence of which the effective integration projected by the Treaties would become impossible*'.[167]

Dr. O. Spineanu-Matei, Romanian judge of the CJEU, characterising the principle of supremacy (*supremației*), underlined that it is '*a fundamental principle of EU law that makes its very existence possible, without the observance of which the entire European construction would be in danger, if not to collapse, at least to seriously falter*'.[168] At the same time, judge O. Spineanu-Matei specified that the principle of supremacy '*was not formally enunciated by any of the original EU treaties, but its existence was inferred by the CJEU more than 50 years ago*'.[169] Further, in terms of the question regarding whether the principle of the supremacy of EU law also applies in relation to the Constitutions of the Member States, the above shows that, from the point of view of the CJEU, '*the answer is clearly affirmative*'.[170]

Prof. R. Carp concluded, in his article, that supremacy (supremația)

> is not an immutable principle, whose coordinates have been established once and for all by Costa v Enel jurisprudence. This principle is not part of the provisions of

166 Stoica, 2022, p. 9.
167 Constantin, 2022, p. 477.
168 Soineanu-Matei, 2022, p. 391.
169 Ibid., p. 392.
170 Ibid., p. 400.

> the treaties on the basis of which the EU operates, but doctrine and jurisprudence recognize its extremely important role for defining the legal order of the EU. Supremacy refers not only to national infraconstitutional norms but also to constitutional norms.[171]

Also referring to the principle of the supremacy of EU law, Dr. C. Predoiu, the Minister of Justice, showed that one of the main problems raised by the principle of supremacy over time

> consisted in the evolution of its limits including by reference to the national constitutions. (…) In this context, the institutional and judicial dialogue between the supreme courts and the constitutional courts of the EU member states, on the one hand, and the CJEU, on the other hand, can lead to the clarification of certain complex issues.[172]

Likewise, Professor C. Toader, former Romanian judge of the CJEU, emphasised the importance of loyal cooperation and its role in resolving conflicts,[173] advancing the concept of 'respectful dialogue', whose basic principle is the specific and autonomous understanding of the principle of loyal (sincere) cooperation between judicial authorities, based on Article 4 (3) of TEU. According to Professor C. Toader,

> this model of judicial deference overcomes the shortcomings of other classical constitutional theories, which attempt to settle once and for all the question of who decides who decides? Thus, the idea of judicial dialogue does not necessarily translate into conflicts between courts, nor does it invalidate the authority of any court. Deference implies more than an interpretive dialogue, it means a procedural way of judicial dialogue through the preliminary ruling procedure.

Professor V. Stoica and the co-authors concluded that the various divergent solutions pronounced by the CJEU and the constitutional courts '*represent the expression of a natural potential conflict that any institutional structure with parallel and/or overlapping levels contains*'. With legal dialogue, either formally through questions for the rendering of preliminary rulings, or informally through a network of mutual consultation of national and European courts,

> it is possible and necessary to remove these divergences, based on the principle of priority of European law. Of course, this dialogue does not replace the principle of the priority of European law, but removes the asperities that the dogmatic application of this principle has generated in the past and could generate in the future.[174]

171 Carp, 2022, p. 147.
172 Predoiu, 2022, p. 368.
173 Toader, 2022, p. 473., see also Pintilie, 2022, pp. 352–364.
174 Stoica, 2022, p. 21.

As regards the topic of national constitutional identity, Dr O. Spineanu-Matei, judge of the CJEU, showed that, together with the principle of supremacy, Union law contributes to defining

> the Union as a common space, which brings and harmonizes distinct identities, giving the Court of Justice the last word regarding the interpretation of the law of the union, including when this interpretation requires a balancing of the arguments based on the provisions of Article 4 para. (2) TEU.[175]

Professor I. A. Motoc, judge of the CtEDO, emphasised that national identity, provided for in Article 4 (2) of TEU,

> means that the member states can define their structures and fundamental, political, and constitutional principles. However, with the entry into force of the Treaty of Lisbon, the decision on the compatibility of national identity with EU obligations always belongs to the CJEU, which is the only one competent to rule on its competencies. Based on this national identity, as recognized by Article 4 para. (2) TEU, the constitutional courts verify the EU acts through the prism of the identity aspects enshrined in the constitutions of each member state. In certain exceptional circumstances, member states are even allowed to invoke constitutional limits regarding the supremacy of EU law, but the extent of these constitutional limits is bounded, controlled by the principle of loyal cooperation provided for in Article 4 para. (3) TEU.[176]

In the opinion of Professor V. Stoica and the co-authors,

> the dynamic balance between national identities and European identity is the most important objective of the European construction. Opposing this identity is counterproductive. They are complementary. Every national identity also includes the European dimension, and the European identity also includes the national dimensions. Those who thought, founded and successively refined the European institutions also took into account the idea of unity, and the desire of nations to preserve their identity.(…) The doctrine of constitutional identity and the doctrine of constitutional pluralism (…) they cannot and must not justify abandoning the principle of the primacy of European law, nor sacrificing the competence of the CJEU to have the last word in disagreements with constitutional and other national courts. After all, the notion of national identity and the subsequent notion of constitutional identity are not only notions of domestic law, but also autonomous notions of European law. This last interpretation prevails in relation to the domestic law interpretation of the two notions. It is therefore natural that the CJEU (…), which also has the role of guardian of the priority of European law, has the competence to decide in the last instance in

175 Spineanu-Matei, 2022, p. 412.
176 Motoc, 2022, p. 324.

> disputes in this category. (…) Although national identity and constitutional identity are autonomous notions of European law, the definition by the CJEU of the elements included in their content must also take into account their domestic law acceptance. Moderation is the crucial condition for exercising the role of the CJEU.[177]

Regarding the CCR jurisprudence, it should be emphasised that the criticism expressed by some of the cited authors does not call into question the independence of the CCR, but instead how it uses '*strategic concepts such as that of constitutional identity,*[178] *how the CCR evades the Constitution from the sphere of influence of EU norms*[179] *or the 'still variable use of the notion of national constitutional identity*".[180]

In addition to the articles published in the volume coordinated by Professor V. Stoica, there is a significant body of legal literature in Romania that analyses the concept of constitutional identity.

Thus, it is worth noting the conceptual distinction made by Professor M. Dutu, who showed that

> the affirmation of constitutional identity is a major factor in the affirmation of national identity, the achievement of unity in diversity, the responsibility of the requirement of capitalizing on traditions and continuous adaptation to new realities, of the imperative of mutual respect of individuals, nations and States.[181]

In this light, and with reference to '*the relationship between the national identity clause and the European integration clause*', Professor Duțu believes that '*the constitutional review of laws arises as the main means of affirming constitutional identity, and the constitutional judge as the first factor of its promotion, without deviation, of the letter, spirit and specificity of the Constitution as a normative reality*'.[182] In the same author's view,

> specifying the content, from a legal point of view, of the concept of national constitutional identity, remains difficult and imprecise. Two approaches are possible in this sense: a formal one and a material one. According to the first one, only constitutional norms that cannot be subject to revision would enter into the constitutional identity of a State. (…) In the second approach, it is necessary to establish the norms that are part of the constitutional identity. Thus, the doctrine proposed numerous solutions, the proposed lists being more or less extensive, but including, in most cases, fundamental rights, institutional organization and language.

177 Stoica, 2022, pp. 14–23.
178 Perju, 2022, pp. 333–351.
179 Ibid.
180 Lupu, 2022, p. 294.
181 Duțu, 2016, p. 111.
182 Ibid.

As for the issue of constitutional identity in Romania, the same author was of the opinion that,

> under the conditions of an absolute silence of the constitutional text, of the constitutional case-law and even of the doctrine, it is obvious that the sacrosanct core of the Romanian Constitution of 1991, which expresses, to a large extent, the constitutional identity, is composed primarily by the values whose achievement forms the limits of the review of the fundamental law, set out in Article 152 (1) and (2) thereof (…) For a Member State of an integration organization such as the EU, the intangibility of such values manifests itself, internally, by forbidding the possibility of amending the legal norms for their protection by the derived constituent power, and in the European Union context it establishes the absolute limits of integration. Thus, they represent the defining criteria of constitutional identity.[183]

On the same topic, we found the extensive analysis of Professor M. Guțan in the article 'Is the Constitutional Court of Romania a standard-bearer of the national constitutional identity?'.[184] According to Professor M. Gutan,

> the national (constitutional) identity was, subsequently, generously placed at the disposal of the EC/EU Member States[185] as a legal instrument aimed at creating the framework and facilitating the dialogue between the ECJ and the national constitutional courts, under no circumstances with the aim of erecting walls, 'arming' the Member States and jeopardizing the common European project. Most commonly, without having a previous theoretical concern for their own constitutional identity, the constitutional courts of the Member States undertook this punctual instrument, from more or less sovereigntist positions. Beyond facilitating or hindering the dialogue with the ECJ, this jurisprudential approach emphasized, on the one hand, the importance of the issue of national constitutional identity and, on the other hand, the need for a wider theoretical development thereof. After all, you cannot assert and protect, as a nation, your own (constitutional) identity without being aware of it, delimiting it and conceptualizing it. Since the constitutional courts had evasive or incomplete positions regarding the content of the national constitutional identity, despite their central role, it often fell to the doctrinaires the mission to deepen and finally provide an overall view. Thus, the national constitutional identity became not only a puzzle to be unveiled and put together piece by piece by the constitutional courts, but also the object of a systematic, anticipatory reflection, which would comprehensively give substance to any future national reservation towards European constitutional integration.

183 Ibid. p. 116.

184 Guțan, 2022b, pp. 28–45.

185 The first recording of the principle of national identity, together with the principle of subsidiarity, intended to delimit the EC's ability to 'excessively' expand their powers at the expense of national and regional powers, was in the Maastricht Treaty (1992). See Fromage and de Witte, 2021, p. 412.

As regards Romania's situation, Professor M. Guțan stated, in the article cited above, that

> the assumption by the CCR of the right to establish the content of the Romanian constitutional identity from the positions of the privileged one to establish the subjective coordinates of its own identity cannot lead to abuses or the fall into irrelevance. Related to this issue, a systematic, open, objective analysis of constitutional identity is deemed necessary, in a European context or not. If Article 152 represents the essence of the Romanian constitutional identity, any analytical approach should start from understanding why, how and under what conditions those values and principles became the hard identity core of the 1991 Constitution.

The points of view expressed, although they do not fully clarify the complex issue of constitutional identity, offer some perspectives to answer questions that remain relevant:

> What exactly is constitutional identity? What does 'identity' mean? Whose identity or the identity of what? Who is allowed or entitled – granted legitimacy – to identify or determine such constitutional identity, especially in light of disagreements? Can our constitutional identity evolve? Can it be legitimately transformed? And, if so, how it can?.[186]

We conclude with the opinion of Dr. A.R. Lupu,[187] which emphasised the importance of dialogue between constitutional judges:

> the most credible solution remains that of an increasingly close collaboration between the Court of Justice and the constitutional courts, in order to bring their jurisprudence closer to the concepts of national identity and, respectively, national constitutional identity. Of course, the decades since the establishment of European construction allow us to be skeptical about rapid progress in this regard. However, we cannot forget that the essential doctrines of the Luxembourg court have been internalized over time by national judges, be they constitutional, as long as various concessions have appeared over time from European judges. Such a future may also have the problem of national constitutional identity.

186 Martí, 2013, pp. 17–36.
187 Lupu, 2022, p. 312.

9. The dialogue of the judges as a way to establish the meaning of the constitutional identity and a 'key' of a harmonious European constitutional order

We dealt extensively with this issue in the work *The Dialogue of Constitutional Judges*,[188] in which we noted several dimensions of this dialogue: by way of preliminary references (vertically, between national courts, including constitutional ones and the CJEU); within international structures, namely associations of constitutional courts, the Venice Commission and the collaborating networks established at the level of the ECHR and the CJEU; and within the various forms of bilateral cooperation.

To the mentioned forms, which we would qualify as 'institutionalized', we feel there should be added the articles and studies written by judges, attorney generals, junior barristers, assistant magistrates, and clerks, all of whom can be academics and lawyers at the same time. As has been noted by other authors,[189] the members of the CJEU have been active, for example, in spreading the message of the autonomous nature of EU law, the constitutionalisation of treaties (through the case law of the CJEU established by them), and the development of the CJEU as a constitutional court. Likewise, the dialogue between the courts is carried out through their own staff, paying mutual visits (CJEU, ECHR, constitutional courts) or participating in academic meetings. An implicit form of dialogue is the invocation by constitutional courts and national judges of the case law belonging to the CJEU and the ECHR. These forms of cooperation support the one carried out by way of preliminary references, being noteworthy the rootedness of the practice of participation in conferences such as the Congress of the Conference of European Constitutional Courts, of the presidents of the ECHR and the CJEU, and the constant participation of the representatives of the Venice Commission in various meetings of the European constitutional courts.[190] The aforementioned cooperation does not settle, in itself, conflicts; however, the declarations and the resolutions adopted on such occasions mark common positions, often of mutual support, addressing issues of common interest, positive in the overall institutional dialogue.

Furthermore, we will refer briefly to each of the main forms/dimensions of dialogue which are entirely applicable in Romania.

Regarding the preliminary references, we have repeatedly emphasised[191] our opinion on the importance of this dialogue mechanism. The preliminary reference connects the courts of law of the Member States with the CJEU, regardless of their type, namely judicial ones or special ones. Its mechanism should ensure the use

188 Toader and Safta, 2016.
189 Claes and De Visser, 2012, pp. 100–114.
190 For information, see https://www.venice.coe.int/webforms/events/ (Accessed: 1 February 2023).
191 Safta, 2022b.

of the same 'language' in all EU constitutional systems, to the effect of uniform interpretation and application of EU law. In this light, the role of the CJEU in the development of the EU legal order is noteworthy, with a certain idea being generally accepted, namely that '*no other institution has carried out such a decisive action to define the main characteristics of the order, to impress an extraordinary acceleration of its volition and to guide, unequivocally, for the purpose of intensifying the integration process*'.[192]

Romanian courts of law launched the direct dialogue with the CJEU in the first year of EU membership, specifically in January 2007. It was a lower court, the Tribunal of Ilfov County, that addressed the first question for a preliminary ruling to the CJEU in the *Jipa Case* C 33/07.[193]

The CCR launched the dialogue by way of preliminary reference much later,[194] in a case having as its subject matter the exception of unconstitutionality of the provisions of Article 277 paragraphs (2) and (4) of the Civil Code,[195] text with the marginal title

> Prohibition or equalization of certain forms of cohabitation with marriage, having the following wording: '(2) Marriages between persons of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens shall not be recognized in Romania.[…] (4) The legal provisions regarding the free movement on the territory of Romania of any citizen belonging to the European Union countries and the European Economic Area shall remain applicable.

The exception was raised in the context of the Romanian authorities' refusal to grant a right of residence, as a family member, to the same-sex spouse (American citizen) of a Romanian citizen. The refusal was grounded by invoking the mentioned Civil Code norms. In examining the exception of unconstitutionality, the CCR presented its analysis, placing it in the centre of carrying out the right to free movement on the territory of the EU. The Court held that this case deals with the recognition of the effects of a marriage legally concluded abroad between an EU citizen and his/her same-sex spouse, a third-country national, with regard to the right to family life and the right to free movement, in terms of the prohibition of discrimination on grounds of sexual orientation. Consequently, the preliminary rulings that it formulated to the CJEU, upon the request of the authors of the exception of unconstitutionality, were determined by the lack of certainty regarding the interpretation of several concepts used by Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move

192 Tizzano, 2012, pp. 21–31.

193 https://curia.europa.eu/juris/liste.jsf?language=en&num=C-33/07 (Accessed: 1 February 2023).

194 For a presentation of the developments of the CCR up to the time of the formulation of this preliminary reference, see Vița, 2019, pp. 1623–1662.

195 Republished in the Official Gazette No. 505 of 15 July 2001.

and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194 / CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE(2), in conjunction with the Charter of Fundamental Rights of the European Union and with the recent case law of the CJEU and the European Court of Human Rights, concerning the right to a family life.

Thus, the Constitutional Court decided to suspend the trial on the exception of unconstitutionality and to address a series of preliminary rulings to the CJEU. By the Judgment of 5 June 2018, pronounced in Case C-673/16,[196] the CJEU (Grand Chamber) answered affirmatively to the first two questions, ruling that

> 1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
> 2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

Starting from these rulings, within the constitutional review of the provisions of Article 277(2) and (4) of the Civil Code, the CCR applied the norms of European law set forth in Article 21(1) of the TFEU and Article 7(2) of Directive 2004/38, upheld the exception of unconstitutionality, and found that the provisions of Article 277(2) and (4) of the Civil Code are constitutional in so far as they permit the granting of

196 Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=228B64B67CC671C4AEFDFFDAF7A01202?text=&docid=202542&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=863601 (Accessed: 1 February 2023).

the right of residence on the territory of the Romanian State, under the conditions laid down in European law, to the spouses – citizens of the Member States of the EU and/or citizens of non-member countries – of marriages between persons of the same sex concluded or contracted in a Member State of the EU.[197]

Regarding dialogue through the collaboration networks of the European courts, the most recent one is the Judicial Network of the European Union, which operates at the EU level[198] as an initiative that the CJEU and the Supreme and Constitutional courts of the Member States had at the Forum of Magistrates held by the CJEU in March 2017 in Luxembourg. The Judicial Network of the European Union is an *online* platform designed to promote and facilitate the flow of information between all of these courts. The new instrument is likely to increase mutual understanding between legal systems and between their own approaches regarding the settlement of legal issues – including constitutional issues – and thus increase coherence and convergence in the future development of the EU legal order. This is intended to serve as a partner network for the other European networks – a *website* that works on a collaborative basis, the supply being provided voluntarily by the CJEU and the participating courts. The CCR and the Romanian High Court of Cassation and Justice are members of the Network.

The SCN – Superior Court Network – operates within the ECHR,[199] and, according to the presentation made on the ECHR website, was established based on the idea of the importance of a more structured and effective dialogue for the implementation of the Convention, between the Court and the higher courts of the Member States (of the Council of Europe). The March 2015 Declaration following the Brussels Conference greeted '*the Court's dialogue with national higher courts and the establishment of a network in order to facilitate the exchange of information on its judgments and decisions with national courts*' and invited the court to deepen this dialogue further. The network was launched on 5 October 2015 and includes representatives of 102 courts from 44 States,[200] including the CCR and the Romanian High Court of Cassation and Justice.

The role of these networks as a dialogue instrument was suggestively characterised by the President of the ECHR, R. Spano, when he presented the SCN:

> Dialogue between the European Court of Human Rights and the national judicial systems is fundamental to the Convention system. The Superior Courts Network brings together a community of judges who have a central role to play, implementing

197 Decision No. 534/2018, published in the Official Gazette No. 842 of 3 October 2018.
198 Available at: https://curia.europa.eu/jcms/jcms/p1_2170125/ro/ (Accessed: 1 February 2023).
199 Available at https://echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c= (Accessed: 1 February 2023).
200 Available at https://www.echr.coe.int/Documents/SCN_Members_ENG.pdf (Accessed: 1 February 2023).

> the principles and values of the European Convention, which we have been sharing and defending for 70 years.[201]

Dialogue in bilateral and multilateral meetings is also important for the exchange of opinions in informal discussions between judges. As regards the CCR, we pointed out,[202] as a recent example, the meeting that took place on 30 September 2022 in Bucharest, on the occasion of the anniversary Conference '*Evolution of the European Union Law – Dialogue between the Court of Justice of the European Union and the Constitutional Courts*', organised by the National Institute of Magistracy on the occasion of the 30th anniversary, with the participation of the president of the CJEU and the president of the CCR. On the same day, the president of the CJEU and the Romanian judge to the CJEU held a meeting with the judges of the CCR at the headquarters of this court, in the Palace of the Parliament, where the mutual desire for dialogue was expressed, emphasising the CCR's openness to dialogue by way of preliminary references. These aspects are recorded in the press release of the CCR[203] of the same date, where the following were also noted, with reference to the discussions regarding the CJEU–constitutional courts relationships and the speech of President Lenaerts:

> The Court of Justice of the European Union does not rule on the EU law in a crystal ball, but interprets it in such a way that it is uniformly and equally applied in all the Member States of the European Union. The EU law has the same meaning in Romania, Belgium, Portugal, Estonia, Greece and all 27 Member States. But in order to do so, the Court of Justice needs the contributions of the national constitutional courts, which discover problems relating to the EU law, possible aspects of the interaction between the EU law and national law, including the national constitutional law, which refers questions to the Court of Justice for a preliminary ruling, and the Court of Justice seeks to interpret the European law in such a way as to harmonise the rich constitutional traditions common to the Member States.

As for the multilateral meetings, the XVIth Congress of the Conference of European Constitutional Courts '*Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives*', hosted by the Constitutional Court of Austria in 2014, is relevant in terms of the topic addressed. The sub-topics of the Congress were related to the constitutional courts between Constitutional law and European law, the interaction between constitutional courts and the interaction between European Courts. The discussions within the Congress and the references to the cooperation between the constitutional courts, specifically between them and the European courts, were sprinkled with metaphors. Words such as 'pyramid', 'mosaic' or 'puzzle'

201 Available at https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c.
202 Safta, 2022c.
203 Available at https://www.ccr.ro/comunicat-de-presa-30-septembrie-2022-2.

were used precisely to emphasise the lack of hierarchy of a pyramid-type structure. The works of the Congress have released an agreement on the idea that none of these actors can be regarded as a court of last authority and final decision-making power. Furthermore, the positive effect of cooperation and interaction between the constitutional courts, as well as between them and the European courts, was emphasised, as they result in an overall strengthening of the protection of fundamental rights and freedoms in Europe.[204]

Also noteworthy here is the XVIIIth Congress of the Conference of European Constitutional Courts, hosted by the Constitutional Court of the Czech Republic, with the theme '*Human Rights and Fundamental Freedoms: The relationships of the International, Supranational and National Catalogues in the 21st Century*'. The Congress was attended by delegates from European, International and Supranational Constitutional Courts, namely Robert Spano, President of the ECHR, and Koen Lenaerts, CJEU and also of the Venice Commission. All speeches essentially expressed the need to identify a *modus vivendi* in this European space so complicated by the multitude of sources and tools for the protection of fundamental rights. The very purpose of the Congress was to analyse and rationalise different catalogues of rights at the national, supranational and international level, and their relationship with each other. The message of collaboration and dialogue of the two presidents was complemented by that of the representatives of the constitutional courts present. Very suggestive was also the intervention of the president of the Constitutional Court of the Republic of Moldova – a court to which the Chairmanship of the Conference was granted for the next 3 years. Welcoming the participation of the president of the ECHR and the president of the CJEU in this Congress, he emphasised that these courts '*cannot be denied the status of constitutional courts*'. We believe that this is the key statement of the Congress, expressing a consensus on the role of the ECHR and the CJEU in the European judicial architecture.[205]

From the perspective of the topic of constitutional identity, we appreciate, as relevant, a conference (that we could qualify as historical) held by the Constitutional Court of the Republic of Latvia and the CJEU in 2021.[206] Judges from the constitutional courts and constitutional jurisdictions of 23 Member States, as well as the CJEU, met to discuss the EU's common legal traditions and how to ensure that they complied with the constitutional traditions and national identities of the Member States in order to establish a single and harmonious European area of justice. Concluding in the speech that prefaces the volume of the Conference, the president of the Constitutional Court of Latvia emphasised, *inter alia*, the two dimensions revealed in the works and speeches:

204 Safta, 2017.

205 For a detailed presentation see Safta, 2021b, pp. 1241–1265.

206 Between 2-3 September 2021 in Riga (Latvia); the conference 'EU United in Diversity: between common constitutional traditions and national identities', Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf (Accessed 1 February 2023).

> there are the common values of the European Union, the European constitutional tradition of democracy, human dignity, the rule of law, and there is the value and importance of each Member State in this area, characterized above all by its national constitutional identity, which the countries of the European Union are committed to safeguarding. The CJEU is prepared to respect this national constitutional identity; however, it is necessary to establish criteria for defining what constitutes a national constitutional identity. This is important because it cannot be contradictory with the European constitutional tradition. It is essential to draw figurative borders between the common constitutional traditions of Europe as a whole and the sacrosanct core of the constitutional identity of each Member State.[207]

The president also addressed an interesting call to the academic community, which '*are developing comparative constitutional law theory, thereby increasingly revealing the constitutional core of each country*', to '*undertake further research on these issues*'.

Significant, due to the consistency of the debates, is also the conference hosted by the CCR in 2019, entitled 'National constitutional identity in the context of European law'. The conference enjoyed the representation of the courts of constitutional jurisdiction from Austria, the Czech Republic, the Republic of Croatia, the Federal Republic of Germany, and the Republic of Hungary, as well as the participation of a delegation from the Federalist Society for Legal Studies and Public Policy in the United States of America. At the opening of the proceedings, the president of the CCR, Prof. Valer Dorneanu, emphasised the importance of analysing the national constitutional identity – a current topic in the context of the evolution of European law and the increasingly significant shaping of the concept of European constitutional identity. The dialogue of constitutional judges must be considered essential for better knowledge, a better definition of, and a better approach to, the multiple dimensions of the relationship between the two concepts.[208]

Likewise, it should be noted that the recent Congress of the World Conference on Constitutional Justice, held in October 2022 and hosted by the Constitutional Court of the Republic of Indonesia, meant in itself a global dialogue of constitutional courts and equivalents.[209] The conclusions of the Congress are especially relevant:

> There is a need for mutual respect between constitutional courts and other state powers, also to prevent discontinuity between constitutional adjudication and initiatives of the legislature (i.e. delayed enforcement of decisions of constitutional courts), which can also be detrimental to the trust placed in constitutional courts; Openness, accessibility, and transparency in communication, without losing sight of the need for self-restraint, fosters trust in constitutional courts and enhances their standing

207 Foreword by Osipova, 2022.
208 Available at https://www.ccr.ro/12-aprilie-2019/ (Accessed: 1 February 2023).
209 Available at https://wccj5.mkri.id/ (Accessed: 1 February 2023).

> as independent institutions; When faced with fierce and unfair criticism or undue pressure from the executive and legislative branches after having taken decisions that displeased other state powers or political actors or with misinformation campaigns by lobby and pressure groups, member courts of the World Conference can rely on the solidarity of counterpart courts, expressed through the regional groups and the World Conference, which can help a court to resist such pressures. The Bureau of the World Conference is ready to offer its good offices to courts under pressure, including through statements of support. The 5th Congress called upon judges of the member courts of the World Conference to resist pressures from other state powers and to make their decisions only on the basis of the Constitution and the principles enshrined therein.[210]

Another interesting perspective highlighted by this Congress concerns the dialogue between judges and the academic community:

> similarly to judges reaching out to academia (including via calls to share expertise in particular domains of law and practices of legal pluralism), academics should actively approach judges, particularly if they hope the results of their research to reach beyond the 'ivory towers'. The recognition of the value but also challenges of both professions might help generate mutual trust and the development of more nuanced ideas for enhancing constitutional court resilience vis-à-vis autocratization.[211]

Even if we are not literally talking about a dialogue, the references to the case law of the CJEU and the ECHR by national courts have the effects of a dialogue, in terms of institutionalising legal standards and approaches at the European level. Examining the issues regarding the relations between national and EU regulations emphasised such a dialogue between national constitutional courts. Even the theory of constitutional identity emerged in the CCR jurisprudence using precedents of other constitutional courts, especially Germany.

Moreover, the transposition into national law of European acts or the adoption of regulations to give effect to the obligations assumed at the European level resulted in situations where constitutional courts, vested with the constitutional review, took into account foreign precedents in the same matter (so, a kind of dialogue with other constitutional courts). We have already mentioned such an example, meaning the transposition into national law of Directive No. 2006/24 / EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly-available electronic communications services or of public communications networks and amending Directive

210 Available at https://wccj5.mkri.id/public/pdf/2022_10_06_WCCJ5_Bali_Communique-E.pdf (Accessed: 1 February 2023).

211 Steuer, 2022.

2002/58/EC. As we pointed out in our work on the dialogue of constitutional judges,[212] after the decision of the CCR on the unconstitutionality of the law transposing the mentioned directive,[213] other courts held similar conclusions. Further, after the first unsuccessful attempt to challenge the directive raised by Ireland and Slovakia,[214] the CJEU was vested by the Constitutional Court of Austria and the Supreme Court of Ireland[215] which required the Court of Justice to examine the validity of the directive, particularly in terms of two fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, namely the fundamental right to privacy and the fundamental right of personal data protection. By the Judgment of 8 April 2014, delivered in that case, the CJEU declared the invalidity of the directive. The CJEU held, in essence, that the data to be retained under the directive make it possible, amongst other things, to know the identity of the person with whom a subscriber or registered user has communicated and by what means; to identify the time of the communication as well as the place where that communication took place; and to know the frequency of the communications of the subscriber or registered user with certain persons during a given period. The court took the view that, by requiring the retention of such data and by allowing the competent national authorities to access those data, the directive represents a particularly serious interference with human rights. The fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate, in the minds of the persons concerned, the feeling that their private lives are the subject of constant surveillance.

However, with regard to all these forms of dialogue, we take the view that the distinction between dialogue – conversation and dialogue – and deliberation made in the specialised literature[216] is also important in the qualification of the judicial dialogue and its effects. This is a useful discussion when it comes to giving real meaning to *the dialogue*, as it results in legal consequences. Thus, it is argued, for good reason, that, as regards the 'conversation', by its nature, it does not result in direct consequences, and it does not engage,[217] whereas dialogue as deliberation is very different. Making this distinction, Luc B. Tremblay emphasises, in his work *The legitimacy of judicial review: The limits of dialogue between courts and legislatures*, the fact that the latter dialogue is characterised by the existence of a certain goal: reaching a common agreement, settling issues collectively and collectively

212 Toader and Safta, 2016.

213 Decision No. 1258/2010, cited.

214 We refer to the action of Ireland of 10 February 2009, supported by Slovakia, requesting the annulment of Directive 2006/24/CE of the European Parliament and of the Council of 15 March 2006 on the ground that it has not been adopted based on a proper legal reason.

215 Joint Cases C-293/12 and C-594/12 – *Digital Rights Ireland and Seitlinger and Others*, available at https://curia.europa.eu/juris/liste.jsf?num=C-293/12 (Accessed: 1 February 2023).

216 Tremblay, 2005, pp. 617–648.

217 Obviously, a 'conversation' between judges is also important in the general economy of dialogue/co-operation between institutions; it can entail ideas, trigger mechanisms of change, and shape/reshape certain beliefs that can later result in jurisdictional activity.

determining the most correct/best solution. The cited author identifies three conditions for the existence of dialogue: '*these three conditions could be called equality, rationality, and reasoned agreement*'.[218]

Starting from these criteria and observing the dynamics of the dialogue existing at the European level between the courts located on several levels, there was raised the question as to whether this dialogue is really conducted between equal partners. There was also expressed the idea[219] that, in theory, there is equality with a division of labour: the interpretation for the CJEU and the referral to the national courts, and that in practice a vertical relationship has developed between the two, the national courts being connected to the case law of the CJEU, the distinction between interpretation and implementation being blurred, and the CJEU developing itself as a *primus inter pares*. The international meetings of the constitutional courts in recent years have addressed this debate. We have emphasised that, for example, the XVI[th] Congress of the Conference of European Constitutional Courts, hosted by the Constitutional Court of Austria, was entirely dedicated to this issue (*Constitutional courts between Constitutional law and European law; Interaction between constitutional courts; Interaction between European courts*). The discussions on the cooperation between the constitutional courts, namely between them and European Courts, were sprinkled with metaphors; words such as 'pyramid', 'mosaic' or 'puzzle' were most frequently used to exemplify these relationships and the idea that none of these actors can be seen as a court of last authority and final decision-making power.[220] However, considering the numerous debates regarding the relationships between the CJEU and the constitutional courts, the aforementioned proves that the topic is as present as possible, sometimes acquiring accents of virulence.

As for the criteria of rationality and reasoned agreement, it was noted[221] that, although there is a traditional formal way of dialogue between national courts and the CJEU (the preliminary reference laid down in Article 267 of the TFEU), the 'dialogue' is debatable, as long as the national court addresses a question and then is practically eliminated from the procedure before the CJEU; there is no more conversation, even less deliberation and agreement. National courts intervene again only after the CJEU has answered the question. Few national courts make the effort of a new preliminary reference in cases where the CJEU's answer was not helpful or created other issues of interpretation. In other terms, these courts do not engage in a real dialogue with the CJEU. We can add, to this, the reluctance of certain courts, and we envisage especially the constitutional courts which, as can be seen in the same legal literature to which we refer, do not send preliminary rulings, but rather encourage the engagement of ordinary courts with the CJEU. The use of the

218 Tremblay, 2005, pp. 617–648.; Claes and De Visser, 2012, pp. 100–114.
219 Claes and De Visser, 2012.
220 https://www.juridice.ro/494896/marieta-safta-curtile-constitutionale-au-un-rol-de-translatori.html (Accessed: 1 February 2023).
221 Claes and De Visser, 2012.

CJEU case law examples in the decisions of the constitutional courts can be qualified as dialogue, but not in the above meaning (deliberation), but more in terms of accepting/following certain case-law guidelines, often without a clear methodology/line of argumentation.

To sum up, we believe that the constitutional dialogue (in the form of preliminary references, bilateral and multilateral meetings, international congresses and conferences) is well developed in Romania. However, the issue of authority relationships remained latent, as shown by the recent turbulence which we distinctly referred to in our answers. Such moments can be overcome, as demonstrated by the ascertainment by the CCR of the unconstitutionality of the law transposing Directive 006/24/CE of the European Parliament and of the Council of 15 March 2006 regarding the retention of data generated or processed in connection with the provision of electronic communications accessible to the public or public communications networks and amending Directive 2002/58/EC.[222] Although the lack of a dialogue with the CJEU in that case was criticised, the subsequent developments, the joint debates during the visit of the CJEU judges to Romania, and, over time, even by a decision of the CJEU by which the said directive was invalidated,[223] demonstrate that a critical moment was not only overcome, but also exploited through dialogue, resulting in convergent case law of the national constitutional courts and the CJEU.

Some 'turmoil' (and therefore the need for dialogue) also exists horizontally, at the national level, in the relationships between the constitutional courts and courts of law. The recent developments in Romania, namely the preliminary references addressed to the CJEU, regarding the effects of the CCR's decisions and the disciplinary liability of national judges for non-compliance with these decisions, constitute clear proof of the tense moments and the necessary institutional dialogue for the prevention and settlement of disputes.

222 Decision No. 1258/2009, published in the Official Gazette No. 798 of 23 November 2009.

223 Judgment of the Court (Grand Chamber) of 8 April 2014, '*Electronic communications – Directive 2006/24/EC – Publicly available electronic communications services or public communications networks services – Retention of data generated or processed in connection with the provisions of such services – Validity – Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union*' in Joined Cases C-293/12 și C-594/12, requests for a preliminary ruling under Art. 267 of the TFEU from the High Court (Irlanda) and the Verfassungsgerichtshof (Austria), made by decision of 27 January and 28 November 2012, respectively, received at the Court on 11 June and 19 December 2012, in the proceedings Available at https://curia.europa.eu/juris/document/document.jsf?docid=150642&doclang=EN (Accessed: 1 February 2023).

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