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The Saga May Continue: On the Intricate Dialogue Between the Constitutional Court of Romania and the Court of Justice of the European Union

- **ABSTRACT:** *This study tracks the evolution of the jurisprudence of the Constitutional Court of Romania (CC) vis-à-vis the complex relationship between national law and European Union (EU) law. In this study, the decisions issued by the CC were identified, examined, and grouped chronologically, and based on how the Court related to EU law, its jurisprudential evolution was periodised. This relationship is reflected in the jurisprudence of the CC and of the Court of Justice of the European Union (CJEU). If this relationship was initially one of collaboration, subsequent jurisprudential tensions arose between the two courts, especially in terms of reconciling the principle of the supremacy of the Constitution with that of the priority of application of EU law. The doctrine of counter-limits, embraced by the CC, according to the German model, has a special role to play in this equation. This study brings to fore all these aspects in an exhaustive way and tries to provide a truthful picture of how the national legal order interacts with that of the EU through the lens of the jurisprudence of both, the CC and CJEU.*
- **KEYWORDS:** judicial dialogue, constitutional courts, constitutional review, supremacy of the Constitution, counter-limits doctrine, national constitutional identity, *ultra vires* review, national legal order, primacy of European Union law

1. Preliminary remarks

Member states of the European Union (EU) are experiencing an unprecedented jurisprudential evolution and witnessing developments carried out both by

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their national constitutional courts and the Court of Justice of the European Union (CJEU). This is a historical moment as new paradigms in the relationships between constitutional courts and the CJEU, and the national Constitution and EU law have been established. Every observer has tried to identify the seeds of dialogue between both courts in their decisions, searching not only the quantitative dimension, but also the qualitative one. Sometimes both courts fail to consider the qualitative dimension in their relationship as they forget that this dialogue is bidirectional and has to have two inseparable elements, even if one is dominant and the other one is recessive. The latter is the national level, whereas the former is the supranational one, whose guardian, the CJEU, protects the constituent treaties of the EU and guides national jurisprudence and changes its course if it questions the fundamental principles of the EU. The CJEU can prevent any deviation from the obligations imposed on Member States by the treaties. However, the national-supranational relationship cannot be characterized in terms of force. We appreciate that collaboration and the development of principles common to both legal orders are essential. The tensions that can arise in such a relationship can be ephemeral and are only meant to sound the alarm to open and strengthen formal and informal dialogue between both constitutional levels.

2. The Constitutional Court of Romania: A guarantor for the supremacy of the Constitution

The Constitutional Court of Romania (CC) was established by the 1991 Constitution and began its activity in June 1992, when it delivered its first six decisions. The main challenge of the CC was to bring the Romanian legal order in line with the new Constitution. To fulfil its mission, it had to interpret constitutional notions and concepts according to the treaties Romania is a party to. Some of the excellent decisions it passed applied the standard of the European Convention on Human Rights (ECtHR) in the constitutional review process.¹ However, the new challenges in the constitutional review appeared once the Copenhagen European Council decided on the accession of 10 new Member States and adopted a roadmap for

¹ See, for example, Decision No. 81/1994, published in the Official Gazette of Romania, Part I, No. 14 on 25 January 1995, concerning the unconstitutionality of the criminal offence regarding sexual relations between persons of the same sex; Decision No. 91/1996, published in the Official Gazette of Romania, Part I, No. 350 on 27 December 1996, that struck down a legal provision in labour law that barred the right of the sanctioned employee in some specific cases to file a petition to a tribunal established by law; and Decision No. 349/2001, published in the Official Gazette of Romania, Part I, No. 240 on 10 April 2001, in which the CC recognized the right of the mother and child born during the marriage to initiate an action to deny paternity.

Romania (11-12 December 2002) and the Romanian Parliament ratified the Treaty of Accession to the EU.²

The CC entered a new period in which it had to connect its case law to ECHR and CJEU case laws. Through its case law, the CC plays an instrumental role in structuring the relationship between the national and supranational levels. There is a history of 20 years of constitutional dialogue with the EU and CJEU, wherein cooperation alternated with jurisprudential tensions. By exploring the tendencies and orientation of the case law of the CC, we can periodise it. With this, five distinct timeframes were identified: (1) 2003-2006 was the pre-accession period in which the CC tried to create a jurisprudential connection with the EU/CJEU; (2) 2007-2008 was a period of adaptation characterised by amateur or contradictory decisions; (3) 2009-2018 was a period where the CC was discernibly more confident, open to direct dialogue with the CJEU, and had consolidated case laws; (4) 2018-2022 was a period of jurisprudential tension and failed dialogue; and (5) the period after 2022 marked a turn to a lenient approach towards the CJEU.

3. The CC approach to the CJEU case law before accession (2003–2006)

The CC dealt with the relationship between national and EU laws even before Romania's accession to the EU. Romania's aspirations to join the EU formed the backdrop for the first CC decision that tackled the issue of this relationship. To fulfil this goal, it was necessary to amend the Constitution. The CC has an instrumental role to play in the amendment process in that it exercises its competence to review the constitutionality of the amendment in itself.

In the decision delivered in the course of amending the Constitution, more precisely during the constitutional review of the amendment initiative,³ the CC emphasized that the act of accession has a double consequence, namely the transfer of some powers to EU institutions and the joint exercise, with other Member States, of the powers provided for in these treaties. For the first, the CC noted that by the mere membership of a state to an international treaty, its competences are diminished to remaining within the limits established by the international regulation and, consequently, there appears to be some limitation to the competence of state authority, that is, a relativisation of national sovereignty. However, this consequence must be correlated with the second one, namely Romania's integration into the EU. The CC noted that integration has the significance of sharing the exercise of these sovereign attributes with other Member States in the international arena. Therefore, it does not mean that the

2 Law No. 157/2005, published in the Official Gazette of Romania, Part I, No. 465 on 1 June 2005.

3 Decision No. 148/2003, published in the Official Gazette of Romania, Part I, No. 317 on 12 May 2003.

structures/bodies of the EU acquire, by endowment, “sovereignty” of their own by the acts of transfer of some state attributions. In reality, EU Member States have decided to jointly exercise certain powers that traditionally belong to the field of national sovereignty. Romania’s desire to join the Euro-Atlantic structures is legitimised by its interests and the question of sovereignty cannot be opposed to the goal of membership.

Through this decision, the CC addressed the integration of EU and domestic laws, and the determination of the relationship between normative EU and domestic laws. The Court appreciated that accession to the EU starts from the fact that EU Member States agreed to place the *acquis communautaire* – the constitutive treaties of the EU and other binding normative EU acts – on an intermediate position between the Constitution and other laws.⁴

The Parliament adopted Law No. 429/2003 on the amendment of the Constitution of Romania.⁵ In relation to the EU integration *sedes materiae*, Article 148 of

4 We consider that such a finding made back in 2003 goes against the very jurisprudence of the CJEU, which, in the case of *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen* (1963), established: ‘the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, although only for a limited number of domains, and its legal subjects are not only the states members, but also their nationals.’ In the case of *Flaminio Costa vs. ENEL* (1964) ruled that, ‘by creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.’ The CJEU pointed out that ‘the executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty [...] and giving rise to the discrimination [...]’. Moreover, the precedence of community law is confirmed by Art. 189, whereby a regulation “shall be binding” and ‘directly applicable in all member states.’ The CJEU ruling in *Costa v. ENEL* is thus appropriately considered a “legal revolution” because, while it did not create the principle of internal primacy of what is now EU law *ex nihilo*, it did constitute an essential step in the deepening of that doctrine, by empowering national courts to set aside domestic statutes at variance with EU law – See: Arena, 2019, pp. 1033–1034. The CJEU, in the *Internationale Handelsgesellschaft mbH vs. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970), established that ‘the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of its constitutional structure.’ Without any doubt, the CJEU recognizes the priority of community norms vis-à-vis national norms at any level, whether or not constitutional (see the Judgment dated 16 December 2000, delivered in Case C-446/98 *Fazenda Pública and Câmara Municipal do Porto*).

5 It was approved by the national referendum of 18–19 October 2003, and came into force on 29 October 2003, the date of the publication in the Official Gazette of Romania, Part I, No. 758 of 29 October 2003 of the Decision of the Constitutional Court No. 3 of 22 October 2003 for the confirmation of the result of the national referendum of 18-19 October 2003 concerning the Law on the Amendment of the Constitution of Romania.

the Constitution⁶ lays down the essential provisions for the application of EU law in Romania, granting it primacy/precedence over national law.

In the timeframe under analysis, the CC invoked a decision of the CJEU before Romania's accession to the EU.⁷ Thus, the CC was called to rule on the constitutionality of a text from Law No. 51/1995 for the organisation and practice of the lawyer's profession, which conditioned the acceptance into the profession on the formulation of such a request with at least five years before reaching the standard retirement age. The CC noted that although the Constitution regulates the principle of equality, it does not list age as a criterion for non-discrimination. Therefore, it interpreted the Constitution by making a reference to the ECtHR and mentioned that in the EU legal order, age is a criterion for non-discrimination. The CC relied on the decision delivered in C-144/04 *W. Mangold against R. Helm* on 22 November 2005.⁸

Both decisions concern the relationship between the national and supranational levels and are an expression of a friendly orientation towards EU law. The first decision contains a warning in that it places EU acts in a hierarchical key and grants them an intermediate position between laws and the Constitution, which means that in the conditions for a normative conflict with the Constitution, the latter, given its *supreme* position, prevails/has priority of application. In its early case law, the CC combines both legal orders in a hierarchical system and excludes the primacy of EU law vis-à-vis the national Constitution.

6 Art. 148 of the Constitution states thus: (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 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.

7 Decision No. 513/2006, published in the Official Gazette of Romania, Part I, No. 598 on 11 July 2006.

8 As for the establishment of an age criterion in the matter of concluding employment contracts, the CC assumed some of the CJEU's recitals: 'a [...] legislation, which considers the worker's age as the only criterion for applying a fixed-term employment contract, without having demonstrated that fixing an age threshold [...] is objectively necessary to achieve a goal of professional insertion [...], it must be considered as exceeding the appropriate and necessary framework to achieve the objective pursued.'

4. Contradictory evolution (2007-2008)

The next period was filled with contradictory developments (2007-2008) as the openness towards EU law alternated with a fear of referring to the CJEU requests for preliminary rulings, alongside some clumsiness in using the EU's mandatory norms as a reference standard within the framework of constitutional review.

In a decision delivered immediately after the accession,⁹ the CC considered itself competent to verify the compatibility of domestic law with Community law, establishing that if the provisions of the reviewed law, which instituted state aid in favour of small and medium-sized producers in the beer industry, will be correlated with those of the Economic Community Treaty, Romanian law may be compatible with Community law. The Court used cautious language and did not establish that state aid is compatible with Community law, but rather said that it can be compatible to the extent that the Commission authorizes the aid scheme. The decision is a lot like an opinion given to the responsible national authorities, showing them the procedures that have to be followed.

A contemporary issue in relation to the CC's activity concerns the possibility of reviewing the conformity of national laws with EU laws, invoking Article 148(2) of the Constitution. Tackling this,¹⁰ the Court established, in relation to the request of the author of the exception of unconstitutionality to carry out a review on the compliance of domestic law with EU law to standardise judicial practice in the matter, that the national general court of laws are the ones that are called in such situations to address the CJEU to ensure the effective and homogeneous application of Community legislation. Contradicting this, without motivating the reversal of the solution established by Decision No. 59/2007, the Court, by Decision No. 1031/2007,¹¹ ruled that it is competent to verify the compliance of the national regulation with EU law based on Article 148(2) of the Constitution. In a subsequent decision, the Court ruled that the review of the compliance of the national legislation with that of the Community does not represent a constitutional issue, but rather belongs to the application of the law by the court of law, so that such an aspect does not fall under the jurisdiction of the CC.¹²

An interesting issue arose in Decision No. 604/2008,¹³ where the CC did not question the conformity of the national text with EU law, but rather analyzed the margin of action left at the discretion of the Member State by EU law. The Court

9 Decision No. 59/2007, published in the Official Gazette of Romania, Part I, No. 98 on 8 February 2007.

10 Decision No. 558/2007, published in the Official Gazette of Romania, Part I, No. 464 on 10 July 2007.

11 Published in the Official Gazette of Romania, Part I, No. 10 on 7 January 2007.

12 Decision No. 413/2008, published in the Official Gazette of Romania, Part I, No. 386 on 21 May 2008.

13 Published in the Official Gazette of Romania, Part I, No. 469 on 25 June 2008.

correctly established the unconstitutionality of the national provision analyzed, the practical reason being that the national legislator violated the Constitution (the reference text) by not using all its available margin of appreciation.

In this timeframe, there is an inconstant jurisprudence of the CC vis-à-vis the relationship between national and EU laws; the CC considers itself competent to assess the conformity of national law with EU law and interprets the latter to exercise this control of conformity that seems to add some kind of constitutional value to EU law.

According to the legal literature of those times,¹⁴ the CC had the competence to declare the unconstitutionality of the national law only if it implicitly or explicitly contradicted the text of the Constitution. If the national law was constitutional, even if it was contrary to EU law, the national general court of laws would have to apply the latter and, eventually, the Parliament could modify or repeal the national legislative solution. The unconstitutionality of a national law could not result from simple non-conformity with EU law, but only from a breach of the Constitution.

As for the dialogue between the CCR and CJEU, in relation to the request for a preliminary ruling, we note that the CC denied such requests in two decisions during this period, 'because the legal conditions are not met.'¹⁵ CC did not offer other arguments. Thus, it is obvious that the refusal was not motivated. Such a situation is explicable while taking into consideration the novelty of this legal remedy, the lack of experience, the fear of the court in this respect and its reluctance to consider itself a court within the meaning of Article 267 of the TFEU.

5. Open cooperation within the framework of national constitutional identity (2009-2018)

In its case law, the CC established that Article 148(2) of the Constitution implicitly includes a clause for internal laws to comply with EU mandatory acts.¹⁶ However, the reader must be careful in scrutinizing this recital, as the Constitution makes a clear distinction between itself and other internal laws. It uses both notions either together or separately, so the CC follows the same matrix. A former decision of the CC proves that this is the correct meaning of the aforementioned recital. In this decision, the CC observed that an initiative for the amendment of the Constitution established that EU law applies without any distinction in the national legal

14 Trócsányi and Csink, 2008, p. 68.

15 Decision Nos. 392 and 394/2008, published in the Official Gazette of Romania, Part I, No. 309 on 21 April 2008.

16 Decision No. 64/2015, published in the Official Gazette of Romania, Part I, No. 286 on 28 April 2015, para. 32. The decision can be considered Euro-friendly, but with self-imposed limits on the aspects of national constitutional identity (expressly highlighted in the decision), a concept that is undefined and open to interpretation – see Pivniceru and Benke, 2015, p. 456.

order and that the same initiative did not distinguish between the Constitution and other internal laws.¹⁷ Under these conditions, the Court was dissatisfied by the initiative for the amendment of the Constitution as it placed the Constitution in the background of the legal order of the EU. Or, 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 in a situation where there appears to be a normative inconsistency between its own and European provisions. Joining the EU cannot affect the supremacy of the Constitution over the entire legal order.¹⁸ The CC referred to a decision of the Polish Constitutional Court and cited relevant recitals that tackle the issue of the relationship between Constitutional and EU laws.¹⁹

The CC felt that its competence to review the constitutionality of laws is threatened, considering that such a constitutional regulation reduces its competence only to the areas in which the Member State has exclusive competences and to the constitutional review of the primary normative acts adopted at the national level in the other areas. Such a matrix, in the CC's view would exempt from its review a large sphere of national normative acts and consequently the effects of its decisions would be considerably limited. Or, in the conception of the CC, regardless of the fields that the normative acts regulate, they must respect the supremacy of the Constitution and be subject to constitutional review, even with the consequence of the inapplicability of EU laws that do not fit the paradigm of the Romanian Constitution.

Despite the CC's fear of decreasing its powers in areas that are in the exclusive competence of the EU, the CC pointed out that in adhering to the legal order of the EU, Romania accepted that, in the fields in which the exclusive competence belongs to the EU, regardless of other international treaties concluded by the Romanian state, the implementation of the obligations that are incumbent in those specific fields should be subject to the rules of the EU. Otherwise, it would lead to an undesirable situation where, through the international obligations assumed bilaterally or multilaterally, the Member State would seriously affect the competence of the EU and practically substitute it in the mentioned fields. That is why, in the field of competition, any state aid falls under the purview of the European

17 The initiative for the amendment of the Constitution proposed to replace the text of Art. 148(2) of the Constitution in force, according to which, as a result of the accession, the provisions of the constituent treaties of the EU and other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act, with the following text: 'Romania ensures compliance, within the national legal order, with European Union law, in accordance with the obligations assumed by the act of accession and by the other treaties signed within the Union.'

18 Decision No. 80/2014, published in the Official Gazette of Romania, Part I, No. 246 on 7 April 2014, para. 455–456.

19 Judgement of 11 May 2005, delivered by the Polish Constitutional Court in case K 18/04 [Online]. Available at: https://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf (Accessed: 15 July 2023).

Commission and the procedures for contesting it belong to the jurisdiction of the EU. Therefore, in the application of Article 11(1) and Article 148(2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the act of accession, without interfering with the exclusive competence of the EU, and, as established in its jurisprudence, by virtue of the compliance clause included in the text of Article 148 of the Constitution, Romania generally cannot adopt a normative act contrary to the obligations it undertook as a Member State.²⁰

The CC – in its decisions delivered in the period of reference – emphasized that the essence of the EU is the conferral of powers made by the Member States – more and more in number – to achieve their common objectives, without undermining the national constitutional identity (*Verfassungsidetität*) by the transfer of competences. Therefore, Member States retain competences that are inherent in order to preserve their constitutional identity. The transfer of competences and the possibility to reconsider, increase or establish new guidelines within the competences already transferred fall within the constitutional discretion of the Member States. The EU can act only within the limits of the competences conferred upon it. Article 5(2) of the Treaty of the EU expressly states that:

under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

This proves that the EU, at the very moment, is still a union of states.²¹ The CC used for the first time in the aforementioned decision the concept of ‘national constitutional identity,’ a decision delivered by the CC within its attribution to solve legal conflicts of a constitutional nature, provided by Article 146 e) of the Constitution. In this decision, the CC had to identify the national authority – the President of the Republic or Prime Minister – that is competent to participate in the European Council reunions. Then, the CC used this concept when it performed *a posteriori* constitutional review, considering that each EU Member State has complete freedom in terms of establishing the normative framework relative to the status of the members of the national Parliament, including the legal regime of the patrimonial rights acquired in the exercise of these functions of public dignity.²² The CC emphasized in another decision that concerned a constitutional review of a

20 Decision No. 887/2015, published in the Official Gazette of Romania, Part I, No. 191 on 15 March 2015, para. 75.

21 Decision No. 683/2012, published in the Official Gazette of Romania, Part I, No. 479 on 12 July 2012.

22 Decision No. 964/2012, published in the Official Gazette of Romania, Part I, No. 23 on 11 January 2013.

law adopted in the exclusive sphere of competence of the EU that cooperation with the EU has a constitutional limit, namely the ‘national constitutional identity.’²³ No other developments were made on this subject throughout the reference period.

However, according to a legal scholar,²⁴ the content of the national constitutional identity of Romania can be assessed by making a reference to the identity,²⁵ eternity,²⁶ and integration clauses,²⁷ all in the Romanian Constitution and, the conclusion is that the identity and eternity clauses are part of the national constitutional identity, which means that the independence of justice, being part of the eternity clause, is a question of national constitutional identity. In another view,²⁸ the content of this concept cannot be established strictly and exhaustively. However, it can be shaped according to the constitutional values that define the state and its existence. The Christian values that structure and guide the system of rights and liberties that are set forth in the Constitution, the special protection of national minorities, and/or *jus cogens* principles are relevant here. Therefore, the national constitutional identity concerns the people’s profound roots. There is no constitutional provision that contains such an *expressis verbis* clause, as it is the task of the CC to interpret the Constitution to identify the values and principles inherent in such an identity.

The CC has a constant position²⁹ in that it is not within its competence to assess the conformity of a provision of national law with the texts of the constitutive treaties of the EU, through the content of Article 148 of the Constitution. The Court specified that such competence, to establish whether or not there is a contradiction between national laws and these treaties, belongs to the national general courts of law, in the context of the disputes they have to resolve. If the CC were to consider itself competent to rule on the conformity between national and

23 Decision No. 887/2015, para. 75.

24 Varga, 2019, pp. 20–28.

25 Arts. 1–14 of the Romanian Constitution, which concern the general principles of the state; Art. 61, which enshrines the bicameral parliament; the Articles describing the particularities of the executive branch; Art. 115, which lays down the legislative delegation; and Art. 114 which regulates the institution of Government accountability, or those provisions regulating the mode of organization and functioning of justice.

26 Art. 152 of the Romanian Constitution provides that ‘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’ cannot be the subject of Constitution amendments; ‘no revision shall be made if it results in the suppression of the citizens’ rights and freedoms, or of the safeguards thereof.’

27 Art. 148(2) of the Romanian Constitution provides for the compliance of internal laws with EU acts.

28 Puskás and Benke, 2017, pp. 432–433.

29 Decision No. 1596/2009, published in the Official Gazette of Romania, Part I, No. 37 on 18 January 2010, Decision No. 137/2010, published in the Official Gazette of Romania, Part I, No. 182 on 22 March 2010, Decision No. 1.249/2010, published in the Official Gazette of Romania, Part I, No. 764 on 16 November 2010, Decision No. 668/2011, published in the Official Gazette of Romania, Part I, No. 487 on 8 July 2011.

EU law, it would lead to a possible conflict of jurisdiction between the national constitutional court and the CJEU, which, at this level, is unacceptable. The aforementioned phrase is apodictically repeated in 31 decisions during the reference period and 4 decisions delivered between 2021 and 2023, an aspect that entitles us to consider this recital a jurisprudential landmark that defines the way in which the CC relates to EU law.

The CC neither has the authority to interpret the Community rules nor to clarify or establish their content, as this authority rests with the CJEU.³⁰ In another decision, the CC insisted on the fact that the interpretation of EU law engages the exclusive competence of the Luxembourg Court.³¹ To the extent that EU law has a clear and precise meaning, established by the jurisprudence of the CJEU, in other words it meets the CILFIT criteria, the question arises as to whether it can be capitalised in some way within the constitutional review of the national legal norms.

In this context, it can be revealed another jurisprudential landmark crystallized in this period, namely the one established by Decision No. 668/2011, which enshrines the paradigm of using EU law in the framework of constitutional review as a *norma interposta*³² to the reference rule. Such an operation – that involves the use of EU law within the constitutional review – implies, pursuant to Article 148(2) and (4) of the Romanian Constitution, a cumulative conditionality: The EU norm has to be sufficiently clear, precise and unequivocal by itself or its meaning must have been established in a clear, precise, and unambiguous manner by the CJEU and must be subject to a certain level of constitutional relevance, so that its normative content can support a possible violation of the Constitution by the national law, which is the only direct rule of reference for the review of constitutionality. In such cases, the CC's approach is distinct from the mere application and interpretation of the law, which lies with the courts and administrative authorities, or any legislative policy matters promoted by the Parliament or Government, as the case may be.

In light of such cumulative conditionality, it remains at the discretion of the CC to apply the decisions of the CJEU within the constitutional review or to formulate requests for preliminary ruling in order to establish the content of the EU norm. This is a matter of cooperation between the national constitutional court and CJEU and is part of the judicial dialogue between them, without calling

30 Decision No. 383/2011, published in the Official Gazette of Romania, Part I, No. 281 on 21 April 2011.

31 Decision No. 609/2014, published in the Official Gazette of Romania, Part I, No. 35 on 15 January 2015, para. 18.

32 The notion of *norma interposta* is inspired from the jurisprudence of the Italian Constitutional Court, that decided that European directives are “interposed norms,” and are part of the parameters for evaluating the conformity of laws with the Constitution [Decision Nos. 129/2006, 7/2004, 166/2004, 406/2005, and 348/2007 in Mezzetti, 2007, p. 1042].

into question aspects related to the establishment of hierarchies between these courts.³³

Within the framework of the constitutional review, the sole reference norm is the Constitution. The interposed norm can also be the binding act of the EU, but this means that it must first be applicable in the case,³⁴ have a precisely determined meaning, either from its wording or through jurisprudence, and have constitutional relevance; in other words, it is essential to find its expression in a constitutional provision that includes or targets its normative sphere.³⁵ The first condition operates with objective, comprehensible criteria, whereas the second is subjective, where the appreciation of the constitutional judge is decisive. Thus, the latter can be used to avoid a constitutional review of the national legal norm through the filter of the interposed mandatory European rule, especially in sensitive cases where constitutional judges are reluctant to strike down the national legal norm.

The CC signals the failure of the EU norm to meet the second condition (i.e. constitutional relevance) in order to be applied as *norma interposta* within the constitutional review if there is a question of the legislature's obligation to adopt norms in line with the decision of the CJEU³⁶ or if there are no fundamental constitutional principles and norms at stake, such as, for example, those that enshrine fundamental rights, freedoms, and duties or concern public authorities regulated by the Constitution.³⁷ The mere obligation of the state to inform the European Commission of normative projects that aim to establish or modify state aid has no constitutional relevance.³⁸

However, the Court has held in its case law that the provisions of the Charter of Fundamental Rights of the European Union have constitutional relevance and may be used in the context of the review of constitutionality.³⁹ The Court noted that

33 The preliminary ruling procedure is seen and promoted as a form of judicial dialogue to request a technical justification for solutions that the national judge pronounces, without affecting his competence or independence – see Toader and Safta, 2013, p. 154.

34 Decision No. 468/2012, published in the Official Gazette of Romania, Part I, No. 524 on 27 July 2012.

35 In Decision No. 553/2013, published in the Official Gazette of Romania, Part I, No. 97 on 7 February 2014, the CC noted that a certain directive has constitutional relevance as it is in a direct connection with the principle of equality. See, also, Decision No. 64/2015, para. 32, where EU acts invoked were in connection with the social protection of labour, or Decision No. 751/2016, published in the Official Gazette of Romania, Part I, No. 270 on 18 April 2016, para. 57, where the relevant provisions of the Charter of Fundamental Rights of the European Union tackle a constitutional right, namely economic freedom.

36 Decision No. 668/2011.

37 Decision No. 64/2018, published in the Official Gazette of Romania, Part I, No. 336 26 April 2018, para. 54.

38 Decision No. 157/2014, published in the Official Gazette of Romania, Part I, No. 296 on 23 April 2014, para. 65, 70, 71.

39 Decision No. 871/2010, published in the Official Gazette of Romania, Part I, No. 433 on 28 June 2010, Decision No. 1479/2011 published in the Official Gazette of Romania, Part I, No. 59 on 25 January 2012, or Decision No. 967/2012, published in the Official Gazette of Romania, Part I, No. 853 on 18 December 2012.

the Charter is a legal act with a distinctive nature and features in comparison with international treaties and its provisions are applicable to the review of constitutionality insofar as they ensure, guarantee, and develop constitutional provisions vis-à-vis fundamental rights, that is, insofar as their level of protection is at least equal to that of the constitutional human rights standards. Consequently, the CC noted that, according to Article 52(3) of the Charter, to the extent that it contains rights that correspond to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and extent are the same as those provided by this convention; in the CC case law, the ECHR and Charter provide the same level of protection of human rights, except where the CJEU provides an expressly higher standard of protection.⁴⁰ The Court has indicated that there is no reason to depart from this jurisprudence and to apply it *mutatis mutandis* vis-à-vis the requirements resulting from the constitutive treaties of the EU and its secondary acts.⁴¹

It has to be noted that, during the indicated period, the CC rejected as inadmissible a party's claim to address a request of preliminary ruling, since the question proposed by the author of the exception of unconstitutionality was not intended to determine the meaning of Article 49 of the Charter in the sense established by Decision No. 668 of May 18, 2011, but the verification of the compatibility of national legislation with that of the EU, which exceeds the competence of the CJEU, provided for by Article 267 TFEU. The request made has aimed at restructuring the sanctioning treatment of certain criminal offences and has no constitutional relevance from the perspective of constitutional review, but one that relates to possible issues of legislative policy.⁴²

In another case, the CC formulated a request for a preliminary ruling from the CJEU by a sentence rendered on 29 November 2016, without indicating its reasoning within the aforementioned sentence. Thus, that sentence includes only the questions addressed to the CJEU, but a separate document was drawn up, called 'request for preliminary ruling.' In this referral, the CC did not justify whether it has the competence to make preliminary requests, considering that the doctrinal issues regarding the qualification of the constitutional courts as courts within the meaning of Article 267 of the TFEU have already been overcome. However, the CC insisted on the doctrine of cumulative conditionality⁴³ resulting from his jurisprudence and argued the referral from the point of view of the relevance and novelty of the legal issue that is not circumscribed by the

40 Decision No. 46/2017, published in the Official Gazette of Romania, Part I, No. 404 on May 30, 2017, para. 38.

41 Decision No. 64/2015, para. 30.

42 Decision No. 790/2015, published in the Official Gazette of Romania, Part I, No. 6 on January 6, 2016, para. 5.

43 See page 10 of the request (unpublished).

CILFIT criteria.⁴⁴ The issue in this case was that a valid marriage concluded in a Member State of the EU by a Romanian citizen with a partner of the same sex, of American citizenship, had no legal effect in Romania and the spouses could not benefit from the guarantees circumscribed to the right to family life, enshrined equally by the constitutional norms, the European Convention of Human Rights, and the Charter of Fundamental Rights of the European Union. All these seemed to affect the exercise of the 'right to free movement' as regulated by the Charter of Fundamental Rights and Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004 regarding the right to free movement and residence on the territory of the Member States for Union citizens and their family members, rules to which Article 277(4) of the Civil Code contains an explicit link.

The CJEU decided that, within the meaning of Article 21(1) of the TFEU, a third-country national of the same sex as an EU 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 EU citizen is a national for more than three months. Following the pronouncement of this decision of the CJEU, the CC reopened the debates on the case *a quo* and established that the rules of European law contained in Article 21(1) of the TFEU and in Article 7(2) of Directive 2004/38, are interposed in the constitutional review to Article 148(4) of the Constitution, have both a precise and unequivocal meaning, clearly established by the CJEU, and constitutional relevance, as they refer to a fundamental right, namely the right to personal and family privacy. Consequently, the CC – with a mere 5-3 majority – found that the provisions of Article 277(2) and (4) of the Civil Code are constitutional insofar as they allow the granting of the right of residence on the territory of the Romanian state, under the conditions stipulated by European law, to spouses – citizens of the Member States of the EU and/or citizens of third states – from marriages between persons of the same sex, concluded or contracted in a Member State of the EU.⁴⁵ This decision illustrates the judicial dialogue between the CC and CJEU and proves that a *norma interposta* is value added content to the relevant right/liberty/principle provided by the national

44 The Court emphasized that the incidence of EU law and, therefore, the relevance of the preliminary questions in the case, is given by the fact that the effect of the marriage concluded in a member state of the EU that is requested to be recognized in Romania concerns the regime of granting the right of residence on Romanian territory for the same-sex spouse of a Romanian citizen. He can prevail like any EU citizen by the provisions relating to free movement on the territory of any state of the EU, provisions to which the specific norms criticized in the present case as being unconstitutional refer directly (Art. 277(4) of the Civil Code). However, it is unclear, from the perspective of the same rules, the situation of the other spouse of the same sex that is not an EU citizen (in this case, a citizen of the US), but who acquired this status following the valid conclusion of a married in a member state of the EU.

45 Decision No. 534/2018, published in the Official Gazette of Romania, Part I, No. 842 on 3 October 2018.

Constitution. To avoid a methodological fallacy, it must be noted that Article 21(1) of the TFEU is *norma interposta* to Article 26 of the Constitution, concerning personal and family privacy based on Article 148 of the Constitution.

Commission Decision No. 2006/928/EC of 13 December 2006, established 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.⁴⁶ With this, the representatives of the Commission paid documentary visits to Romania to assess the progress made in order to achieve objectives in the field of the reform of the judicial system and the fight against corruption, wherein they drew up evaluation reports. The objectives pursued by this act, especially through benchmark No. 1, tackled certain issues that are in the sphere of the constitutional provisions regarding the judicial authority/right to a fair trial, however, as its content is extremely variable and subjective, the question arose as to whether the respective EU act specifically addresses certain authorities or the Romanian state in general.

At the beginning of this timeframe of approximation of the jurisprudence of the CC to the normative requirements of the EU, the CC seemed to have considered itself bound by the obligations established by that decision. Thus, it used this act in the framework of the constitutional review as an independent one, however, as an *obiter dictum* independent argument. It worth to be mentioned Decision No. 1519/2011,⁴⁷ in which the Court was called to decide on the constitutionality of a ban concerning the exercise of the specific activities performed by the lawyers – they were banned to exercise their activity in courts/prosecution units where the lawyer’s husband or relative or his/her relative up to the third degree inclusive fulfils the function of judge or prosecutor. It has appreciated that the provisions of the civil and criminal procedure codes regarding abstention and recusal are likely to satisfy the requirements contained in Decision No. 2006/928/EC regarding the existence, in all Member States, of an impartial, independent and efficient judicial and administrative system, endowed with sufficient means, among other things, to fight against corruption. This referred to the fact that an additional procedural requirement on the conflict of interest was not compelled by Decision

46 Published in the Official Journal of the European Union series L No. 354 on 14 December 2006. The four specific benchmarks to be addressed by Romania are the following:

1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.
4. Take additional measures to prevent and fight against corruption, in particular within the local government.

47 Published in the Official Gazette of Romania, Part I, No. 67 on 27 January 2012.

No. 2006/928/EC, so it was up to the CC to declare the ban unconstitutional. This constitutional strategy was repeated immediately in 2012,⁴⁸ when the Court tried to identify in an evaluation report drawn up by the representatives of the European Commission in the basis of Decision No. 2006/928/EC a justification/a point of support in its analysis regarding the relationship between the independence and responsibility of the judge from the courts with general jurisdiction. The Court observed that

in the Report of the Commission to the European Parliament and the Council regarding the progress made by Romania within the cooperation and verification mechanism, dated July 20, 2011, it is noted that «Romania has not yet engaged in a process of in-depth reform of the disciplinary system». Or, the membership of the EU imposes on the Romanian state the obligation to apply this mechanism and follow the recommendations established in this framework. According to the statement of reasons, the criticized law gives expression to this obligation, by regulating the misconduct for which judges and prosecutors are subject to disciplinary action and including in this category acts that violate the duties specific to the position or affect the prestige of the position held. Also, the normative act gives effect to the recommendations to strengthen the capacity and organization of the Judicial Inspection, as well as to continue the process of its reform.

Thus, the CC considered the decision and its report a form of soft law that may have relevance in the assessment of the constitutionality of legal norms, but never recognized constitutional value. In the reference period, the use of Decision No. 2006/928/EC in the constitutional review has been ephemeral, the two mentioned decisions being delivered between December 2011 and February 2012. In the six years that followed, this EC decision was “forgotten” in the CC’s case law. As we’ll see, it appears a mere reference to it in a CC’s decision of 2018, but none could anticipate the storm that will break out in connection with this EC decision after 2019.

6. Jurisprudential tensions and failed dialogue (2018-2022)

Between 2018 and 2022, the CC tried to be more active in terms of establishing a relationship between domestic laws and the Constitution, and the binding acts of the EU, which led to the emergence of jurisprudential disputes with the CJEU. All these disputes are not isolated in the greater picture of the EU as the “younger”

48 Decision No. 51/2012, published in the Official Gazette of Romania, Part I, No. 90 on 3 February 2012.

Member States are studying the doctrinal model developed by the Constitutional Court of Germany.

According to Andreas Paulus,⁴⁹ in the context of the coexistence of two legal orders, the Federal Constitutional Court developed three doctrinal instruments, the counter-limits, regarding the binding nature of international treaties and integration into international institutions, namely the effective protection of human rights (Solange decisions), the constitutionality control of *ultra vires* acts, and the absolute protection of constitutional identity.

The first counter-limit (effective protection of human rights) concerns the fact that the supranational institution (EU) must ensure the effective protection of human rights equivalent to that provided by German Basic Law. “As long as” the international institution fulfils this constitutional requirement, the Federal Constitutional Court is willing to refrain from judicial review of the secondary legislation in question.

The second counter-limit (*ultra vires* control) starts from the premise that the legal order of integration can coexist with the domestic legal order only if both remain within the limits of their competence. If an international institution acts beyond the powers conferred upon it, it acts *ultra vires*. Before declaring an act of the EU *ultra vires*, the Federal Constitutional Court addresses a request for a preliminary ruling on the legal aspect underlying it to the CJEU pursuant to Article 267 of the TFEU. Thus, the CJEU will always have the possibility of self-correction. Before any action, a dialogue takes place between the national court and European Court.

The third counter-limit refers to substantive compliance with the fundamental constitutional provisions of the Member State. In principle, the invocation of constitutional identity regarding the non-application or denunciation of a treaty goes against the principles of international law. Therefore, identity control should be used with great caution. The case law of the CC indicates that only the latter “counter-limit” has been mentioned and developed to a certain extent, but the other two has no jurisprudential consecration.⁵⁰

The first jurisprudential dispute between the CC and CJEU – that raised the problem of national constitutional identity – concerned the legal nature and effects of Decision No. 2006/928, adopted by the European Commission. By an early decision – No. 104/2018,⁵¹ the CC established that, through the lens of the doctrine of cumulative conditionality, it can exercise its discretion to apply within the framework of the constitutional review the judgements of the CJEU – in terms

49 Paulus, 2019, pp. 34–35.

50 However, the three “counter limits” were mentioned in a dissenting opinion signed by judge Iulia Antoanella Motoc to Decision No. 1656/2010, published in the Official Gazette of Romania, Part I, No. 79 on 1 January 2010. It was a theoretical desire to lay down these “counter limits”, as the link between them and the case at stake is disputable.

51 Published in the Official Gazette of Romania, Part I, No. 446 on 29 May 2018.

of constitutional relevance – or to formulate requests for preliminary rulings to establish the content of the European norm. The CC noted that the meaning of Decision No. 2006/928/EC was not clarified by the CJEU in terms of its content, character, and temporal extent; thus, it cannot constitute a *norma interposta* in the framework of constitutional review in light of Article 148 of the Constitution. Even if Decision No. 2006/928/EC would be considered an indicator regarding the evaluation of the constitutionality of the norm, in other words if it passes the test of cumulative conditionality, it would not have an impact on the case, because its content recommends general aspects⁵² and not specific ones that could be valued in the case.⁵³ The CC has never tried to review the constitutionality of Decision No. 2006/928/EC – as it has no competence to carry out a review that concerns a normative act that is not part of the national legal order – but rather not to use it as *norma interposta* within the aforesaid review.

The CC, in a subsequent decision,⁵⁴ noted that the objectives pursued by Decision No. 928/2006/CE therefore fall under the principle of the rule of law and the right to a fair trial, expressly consecrated by Articles 1(3) and 21 of the Romanian Constitution. However, without diminishing the importance of regulating such objectives, the Court finds that EU law does not provide concrete obligations (except for the one concerning the establishment of an integrity agency) or effective guarantees that, together or separately, contribute to the accomplishment of the principle of the rule of law, but draws a series of guidelines of maximum generality and predominantly political value. However, such an act, even mandatory for the state to which it is addressed, cannot have constitutional relevance, as it neither develops a constitutional norm nor fills a gap in national fundamental law. The Court emphasized that the reports issued pursuant to Decision No. 2006/928 cannot have constitutional relevance. Thus, the reports, although are acts adopted on the basis of a decision, contain only provisions of a recommendation nature, following the evaluation carried out; or, through a recommendation, the institutions make their opinion known and suggest directions for action, without imposing any legal obligation on the recipients of the recommendation.⁵⁵ The CC concluded that even if these acts (Decision No. 2006/928/CE and the reports issued based on

52 The CC noted that benchmarks No. 1, 3, and 4 contain the general obligation, and only benchmark No. 2 has a specific normative aspect (to establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions based on which dissuasive sanctions can be taken).

53 See para. 82, 88, 89.

54 Decision No. 137/2019, paras. 72–78, published in the Official Gazette of Romania, Part I, No. 295 on 17 April 2019.

55 Decision No. 520/2022, published in the Official Gazette of Romania, Part I, No. 1100 on 15 November 2022, para. 295. The CC noted that the CVM recommendations cannot be analyzed within the framework of the constitutionality review of norms, however, they can be capitalized upon by the legislator in evaluating the opportunity of the various legislative solutions promoted.

it) respect the conditions of clarity, precision, and unequivocalness, they cannot have constitutional relevance to carry out the constitutional review.

The CJEU established that Decision No. 2006/928/CE is binding in its entirety on Romania, as long as it remains in force.⁵⁶ The benchmarks in the Annex to Decision No. 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 that Romania is required to take appropriate measures for the sake 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 based on that decision and the recommendations made in those reports.

The stake of these decisions was the establishment and the operation of the specialized section of the Public Prosecutor's Office attached to the High Court of Cassation and Justice with exclusive competence to conduct investigations into offences committed by judges and prosecutors (hereinafter – SIIJ). In this context, it has to be pointed out that the general court of laws, being dissatisfied by the establishment of the SIIJ, invoked Romania's obligations under Decision No. 2006/928 and made requests for preliminary rulings to the CJEU in order to annihilate its activity.

In the same judgement, the CJEU stated that Article 2 and the second subparagraph of Article 19(1) TEU and Decision No. 2006/928 must be interpreted as precluding national legislation providing for the establishment of SIIJ, 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. These findings of the operative part of the CJEU's judgement questioned Decision Nos. 33/2018⁵⁷ and 137/2019⁵⁸ delivered by the CC as in these two decisions it has maintained the presumption of constitutionality of the law that established the SIIJ⁵⁹ and the emergency ordinance that operationalized it.⁶⁰ The CJEU noted that Decision No. 2006/928 aimed to ensure that Romania complies with the value of the rule of law, whereas the CC considered that it had no constitutional relevance within the constitutional review of norms. Thus, the same law/ emergency ordinance was constitutional and contrary to EU law. Thus, Decision No. 2006/928, through the CJEU judgement, must have had at least a *norma interposta* value aspect denied by the CC but valued by the general courts of law and Romanian authorities.

56 Judgement of 18 May 2021, delivered in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, para. 165 and point No. 2 of the operative part of the judgement.

57 Published in the Official Gazette of Romania, Part I, No. 146 on 15 February 2018.

58 See note 49.

59 Law No. 207/2018, published in the Official Gazette of Romania, Part I, No. 636 on 20 July 2018.

60 Governmental Emergency Ordinance No. 90/2018, published in the Official Gazette of Romania, Part I, No. 862 on 10 October 2018.

According to CJEU case law, it was expressly re-affirmed in the analyzed judgement that 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 No. 2006/928, which it considers contrary to that decision (point 7 of the operative part of the CJEU decision).

The next move was made by the CC, which noted in its decision⁶¹ that although Article 267 of the TFEU does not enable the CJEU to apply the rules of EU law to a specific case, but only allows it to rule on the interpretation of treaties and acts adopted by the EU's institutions, leaving the referring court with the task of ruling on these aspects after having made the necessary assessments, the CJEU did more than 'provide the national court with the elements of interpretation of Union law that could be useful in assessing the effects of one of its provisions', as it established in its own case law. The CC found that the CJEU, declaring the binding character of Decision No. 2006/928, limited its effects because it pointed out that the Romanian authorities have to collaborate institutionally with the European Commission. However, the courts are not empowered to collaborate with a political institution of the EU, but only the national political institutions, such as the Parliament and Government of Romania. Even if Decision No. 2006/928 is binding on the Romanian state, the courts cannot give it precedence over national legislation in force as its content is too general – listing out only a series of objectives to be achieved by the Romanian state – and it is up to the national political institutions to implement or improve the national normative framework in question. Therefore, the CC found that Point 7 of the operative part of the CJEU decision has *no legal basis* in the Romanian Constitution.

According to the CC decision, the national judge cannot be put in a position to decide on the priority application of some recommendations to the detriment of national legislation, as the reports issued based on Decision No. 2006/928 are not regulations. Thus, so they are not likely to come in conflict with internal legislation. This conclusion is necessary in the hypothesis in which national legislation was declared in line with the Constitution by the national constitutional court through the lenses of Article 148 of the Constitution, which requires compliance with the principle of the priority of EU law. The CC found that the only act which, by virtue of its binding character, could have constituted a norm interposed to the constitutionality review carried out by reference to Article 148 of the Constitution – Decision No. 2006/928 – through the provisions and objectives it imposes, has no

61 Decision No. 390/2021, published in the Official Gazette of Romania, Part I, No. 612 on 22 June 2021 [Online]. Available at: https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf (Accessed: 11 October 2023).

constitutional relevance, as it neither fills a gap in the Constitution, nor develops its norms by establishing a higher standard of protection.

As a consequence of the CC's decision, the general courts of law could not set aside the legal norms on the establishment and operation of the SIIJ any longer, as the CC ruled that the aforementioned normative acts are in line with Article 148 of the Constitution.

The following step was taken by the CJEU⁶² after a general court of law requested a preliminary ruling. It decided that European law precludes 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.

The CJEU noted that Romanian general courts of law are, in principle, competent to assess compatibility with the rules of EU law of the national legislative provisions without referring to the CC with a request for this purpose. However, as a consequence of the CC's Decision No. 390/2021, they are deprived of this competence when the CC ruled that these legislative provisions are in accordance with a national constitutional provision that provides for the primacy of EU law, as these courts are obliged to comply with this decision. Such a national rule or practice would constitute an obstacle to the full effectiveness of the EU law rules in question, to the extent that it would prevent the common law court called to ensure the application of EU law from assessing the compatibility of these legislative provisions with this right. The application of such a rule or national practice would affect the effectiveness of the cooperation between the CJEU and national courts established through the preliminary referral mechanism, discouraging the common law court called to resolve the dispute to refer to the CJEU through a preliminary request, in order to comply with the decisions of the constitutional court of the Member State concerned. The CJEU emphasized that these findings are all the more necessary in a situation where a decision of the constitutional court of the Member State in question refuses to comply with a preliminary ruling by the CJEU, based, among other things, on the constitutional identity of this Member State and on the grounds that the Court exceeded its jurisdiction.

After this judgement of the CJEU, it became clear that the national courts of law retained the competence to assess the compatibility of national law with EU law, regardless of the findings of the CC. As an intermediate conclusion, the Decision of 18 May 2021, delivered by the CJEU, went too far with Recital 7 of the operative part, as it solved a hypothetical case that has not occurred thus far. In response, the CC delivered a questionable recital in Decision No. 390/2021 on the lack of competence of the general courts of law to disapply a national norm that

62 Judgment of 22 February 2022, delivered in case C-430/21, point 1 of the operative part.

was found constitutional vis-à-vis Article 148 of the Romanian Constitution, an aspect that was “rectified” by the CJEU.

Another debate between the two courts concerned the relationship between the national Constitution and EU law and the limits of EU law primacy vis-à-vis the national legal order. There is no divergence between both courts when it comes to EU law primacy in relation to infra-constitutional acts. However, if we add the national Constitution into this equation, it seems that an irreconcilable divergence will appear.

From the CC’s perspective,⁶³ the accession clause to the EU contains a clause of conformity with EU law, according to which all national bodies of the state are, in principle, obliged to implement and apply EU law. This also applies to the CC, which, by virtue of Article 148 of the Constitution prioritizes the application of EU law. However, this priority must not be perceived as removing or disregarding the national constitutional identity, which the CC considers a guarantee of a substantive core identity of the Romanian Constitution, which in turn, cannot be relativized in the process of European integration. By virtue of that constitutional identity, the CC is empowered to guarantee the supremacy of the Constitution in Romania. Taking into account that – according to the CC – Article 148 of the Constitution does not give EU law priority over the Romanian Constitution, it appears that the primacy of EU law applies only in relation to national legal acts that have no constitutional status and cannot be opposed to the Constitution itself.

In accordance with the settled case law of the CJEU, the effects of the principle of the primacy of EU law are binding on all bodies of a Member State and no provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, can prevent that.⁶⁴

Moreover, the CJEU has shown that Article 4(2) TEU⁶⁵ authorizes the CJEU to check whether an obligation of Union law violates the national identity of a Member State, but not a constitutional court of a Member State, which, if it considers that a provision of derivative Union law, as interpreted by the CJEU, violates the obligation to respect the national identity of this Member State, it must refer to the CJEU a request for a preliminary ruling to assess the validity of this provision in the light of Article 4(2) TEU. The CJEU emphasized that as it has exclusive competence to provide the definitive interpretation of EU law, the constitutional court of a Member State cannot, based on its own interpretation of some provisions of EU law, validly rule that the CJEU has issued a judgement that exceeds its scope of competence and therefore refuse to comply with its preliminary judgement.

63 CC Decision No. 390/2021, para. 81.

64 Judgement of 18 May 2021, delivered in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, para. 245.

65 Art. 4(2) TEU states: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. (...)’

To complicate things further, through a subsequent decision, the CC emphasized that the organization of the national justice system forms part of the constitutional identity of the Romanian state,⁶⁶ being the first and only decision in which a certain aspect/field is qualified by the CC as being part of the national constitutional identity. It seems that the two highest constitutional judicial bodies in Romania and EU have reached a deadlock in the question of priority of the national Constitution over EU law and vice versa.

We wonder whether the use of the concept of “national constitutional identity” was necessary in a case related to the establishment and operation of a prosecution unit, taking into consideration that such a unit has not existed in Romania’s constitutional history after 1991. Perhaps the CC overbid by using this concept in a relative trivial case, failing the opportunity to develop a dialogue-based relationship that began in 2016. The CJEU decision dated 18 May 2021, is far too blunt when compared to the jurisprudential reality generated by CC Decision No. 137/2019 and is based on some reports made pursuant to Decision No. 2006/928, decision that was repealed soon after the constitutional disputes had ceased – on the 15th of September 2023. The CJEU took into consideration unilateral and unverified information in drafting its judgement. It relied, in its reasoning, among other things, on outdated information provided by a Commission report from 2019 and generated its conclusion that the said prosecution unit can become an instrument of pressure and intimidation in the hands of judges. The CJEU failed to take into account subsequent case law *vis-à-vis* the aforementioned prosecution unit, as in 2020, a decision on unconstitutionality removed these fears in that the CC found the unconstitutionality of the legal provisions that excluded from the competence of the general prosecutor of Romania the capacity to control the activity of the chief prosecutor of the SIIJ. Thus, we appreciate that, although the decision of the CJEU dated 18 May 2021 intended to generate a chilling effect, in reality, it paved the way for the CC to deliver a bellicose decision that practically blocked the dialogue between both courts.

To prevent the courts from analyzing the compatibility between national legislation concerning the SIIJ and EU law, the CC established that once the constitutionality of this legislation was established *vis-à-vis* Article 148 of the Constitution, it follows that there is no contradiction between both legal orders, and thus, the courts can no longer carry out such an evaluation themselves. This recital was meant to prevent the national courts from disapplying national law considering that it contradicts EU law. Such a jurisprudential orientation – that contradicted the previous case law of the CJEU – caused dissatisfaction in the courts and it was only a question of time when such a court would decide to request a preliminary ruling in this respect. The CJEU answered in its Judgement of 22 February

66 Decision No. 88/2022, published in the Official Gazette of Romania, Part I, No. 243 on 11 March 2022, para. 79.

2022, according to which the primacy of the EU law precludes 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. We can conclude that the CJEU overruled the CC decision – even if not the operative part, at least the decisive recital.

Such a dispute between the CC and CJEU does not bode well. The CC cannot wage a dispute in connection with a case that does not concern a real national constitutional identity issue and with a decision wherein the recitals are often disputable, confusing, and difficult to understand.

The Constitution is supreme in the national legal order. However, although this is mentioned in Decision No. 390/2021 as an intrinsic part of the national constitutional identity, it cannot be invoked against the EU. Lenaerts' statement in 1990 that 'There is simply no nucleus of sovereignty that the Member States can invoke, as such, against the Community'⁶⁷ comes to fore. The identity substrate that can be opposed to the EU is a much finer one. It touches the very root of the state's existence, peculiarities of wider generally accepted principles, or the key, deep, and sensitive elements of fundamental rights and freedoms. It does not comprise generally applicable principles throughout the European constitutional space because this would prove that we are discussing a European society or identity aspect, and not a national one. The national/legal peculiarities of a state and the key, deep, and sensitive elements of fundamental rights and freedoms (often in direct relation to morality) are part of the concept of national identity and can only be successfully opposed to the EU.⁶⁸ Therefore, the problem raised in the very case must be one for which is worth to have a dispute, and the one who initiates or continues such a dispute must have sufficient arguments and tools; otherwise, in case of a sciolist jurisprudential dispute regarding the possible limits of the principle of priority of application of EU law, a CC or its members place themselves in a paradigm that has nothing in common with dialogue based on concepts, but on temperament, emotion, experience, personal context, ideology or on a so-called "objective" understanding of what would be the "best" legislative policy to address a problem.⁶⁹ A CC – and especially the Romanian one – must take

67 Lenaerts, 1990, p. 220. For further developments, see Iancu, 2023, pp. 279–281.

68 See, for example, the CJEU Judgement of 7 September 2022, delivered in case C-391/20, according to which 'Article 49 of the TFEU must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, in so far as such legislation is justified on grounds related to the protection of its national identity, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued.'

69 Posner, 2021, p. 187.

over in jurisprudential disputes what A. von Bogdandy called the Italian model of dialogue with the CJEU,⁷⁰ as an open confrontation is not desirable.

The fourth aspect addressed in this dialogue pertained to the application of some decisions of the CC in criminal procedural matters. Between 2016 and 2019, at least five decisions of the CC were issued, which found the unconstitutionality of some legal provisions concerning the methods of obtaining evidence⁷¹ and the *rationae materiae* competence of the prosecutors' offices,⁷² and established the existence of legal conflicts of a constitutional nature determined by the collaboration of the prosecutors' offices with the intelligence services of the state⁷³ and the unlawful composition of the trial panels of the High Court of Cassation and Justice.⁷⁴ According to Article 147(4) of the Constitution, the CC's decisions are generally binding; thus, the unconstitutionality of the provisions lead to their inapplicability in pending cases. The decision by which the existence of a legal conflict of a constitutional nature was ascertained is mandatory. The courts must obey the constitutional conduct established by the provision of the CC decision. As a combined effect of these decisions, the possibility of ceasing criminal trials owing to the elimination of evidence or expiry of the period of limitation has become the burning issue of the day. Having been notified, the CJEU had a rather reserved position on the courts' claims against the CC's decisions, considering that only one of the five decisions can lead to 'a systemic risk of impunity for acts that constitute serious fraud crimes that harm the financial interests of the Union or of corruption in general,' leaving the courts the discretion to evaluate the existence of such a risk. The CJEU turned into an arbiter of the conformity of CC decisions with EU law, conditioning its application by imposing requirements whose evaluation is given to national courts with general jurisdiction.

Thus, from the subtext of the CJEU decision, it can be understood that 4 of the 5 decisions invoked by the referring courts do not contain problems in terms of their compliance with EU law, they being binding for general courts of law, only

70 Bogdandy, 2022, pp. 13–15. According to Bogdandy, the Italian approach involves continuous dialogue, minimalistic moves, and never making the first step, as such behavior always keeps all options open for the CC.

71 Decision No. 51/2016, published in the Official Gazette of Romania, Part I, No. 190 on 14 March 2016.

72 Decision No. 302/2017, published in the Official Gazette of Romania, Part I, No. 566 on 17 July 2017.

73 Decision No. 26/2019, published in the Official Gazette of Romania, Part I, No. 193 on 12 March 2019 [Online]. Available at: https://www.ccr.ro/wp-content/uploads/2021/03/Decision-No-26_2019.pdf (Accessed: 11 October 2023).

74 Decision No. 685/2018, published in the Official Gazette of Romania, Part I, No. 1021 on 29 November 2018 [Online]. Available at: https://www.ccr.ro/wp-content/uploads/2021/03/Decision-No-685_2018.pdf (Accessed: 11 October 2023) and Decision No. 417/2019, published in the Official Gazette of Romania, Part I, No. 825 on 10 October 2019 [Online]. Available at: <https://www.ccr.ro/wp-content/uploads/2021/03/Decision-No-417-2019.pdf> (Accessed: 11 October 2023).

if the national law guarantees the independence of the said constitutional court especially towards the legislative and executive powers; it has to be stressed out that the condition imposed to be verified by the national courts – the independence of the constitutional court – is obviously fulfilled, being an objective one. In relation to the fifth decision of the CC,⁷⁵ the imposed condition is subjective and left to the discretion of the courts, which, in reality, do not have the means to assess when there is a systemic risk of impunity for criminal offences that make it necessary to not apply a CC decision. The decision of the CC – questionable *per se*⁷⁶ – can be applied only under a negative condition – as long as it does not create a systemic risk of impunity assessed by the general courts of law. The CJEU decision is a refined one as it does not annul/leave without effect a decision of the CC, but leaves it to the national court of the case to decide whether or not to apply the decision of the CC. The CJEU, being aware that the national courts do not have a sufficient means to determine the systemic risk of impunity, relies on the sense of justice of the judge *a quo*. The CJEU offers the constitutional courts a “Greek gift” – maintaining the illusion on the binding force of their decision – and the national courts of law an illusion of power that they and only they can evaluate a CC decision vis-à-vis EU law on a quantitative/qualitative criterion that does not belong to the interpretative competence of the justice system – the indicated criterion is rather a policy standard. Such a premise can only generate a non-unitary judicial practice, which is not in the interest of legal security.

In a nutshell, the solution of the CJEU is a Solomonic one: national constitutional courts’ decisions are mandatory as long as the CJEU does not relativize them. Consequently, the CC has to refrain from entering into jurisprudential clashes with the CJEU because, otherwise, there is a risk of non-application of its decisions by the national courts if the latter is dissatisfied by the CC’s stance. Thus, there is a two-step test on overruling a CC decision: The first is up to the CJEU to relativise it and the national court has the competence to disapply it.

The fifth debated aspect concerned the judge’s responsibility for non-compliance with CC decisions. This issue was not raised by any previous decision of the CC. However, in disputes concerning the legal regulations pertaining to the SIIJ, which were considered constitutional by the CC and to have contravened EU law, the question arose as to whether or not the judge committed a disciplinary offence amounting to non-compliance with CC decisions in the hypothesis that he/ she chooses to apply EU law and disapply the CC decisions.⁷⁷ According to the CJEU, the principle of primacy of EU law is to be interpreted as precluding national rules or practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without

75 Decision No. 417/2019.

76 For more details, see Iancu, 2022.

77 Art. 99 letter s) of Law No. 303/2004 provided that non-compliance with the decisions of the Constitutional Court constitutes a disciplinary offense.

committing a disciplinary offence, disapply, on their own authority, the case law established in those decisions, even though they are of the view, in light of a judgement of the CJEU, that that case law is contrary to EU law.⁷⁸ The CJEU pointed out that EU law must be interpreted as precluding national rules or 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, thus departing from the case law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.⁷⁹

Finally, in relation to the application of Article 267 of the TFEU in the procedure before the CC, in Decision No. 533/2018,⁸⁰ para. 40–41, the CC considered that a request for preliminary ruling is inadmissible in the *a priori* constitutional review. Such a review does not even *lato sensu* imply a pending case, that is, the existence of a legal relationship, as a law that is not in force cannot generate a case, unlike the hypothesis of the *a posteriori* constitutional review by way of the exception of unconstitutionality. However, in another decision,⁸¹ the CC departed from this point as it noted that it is not necessary to request a preliminary ruling on the interpretation of Decision No. 2006/928, which proves that even within the *a priori* norm control, such requests can be formulated if necessary, in order to deliver a judgement. In conclusion, taking into account this jurisprudential development, the CC considered itself competent to formulate requests for preliminary ruling in the *a posteriori* and *a priori* constitutional review.⁸²

7. The lenient phase (2022–)

After the judgements delivered by the CJEU in the field of disciplinary liability of the judges *vis-a-vis* the non-observance of the CC's decisions, the Parliament adopted a new law on the status of judges in which this disciplinary offence was eliminated.⁸³ This law was challenged at the CC within the *a priori* constitutional review and, among other aspects, criticized because it no longer regulates such a disciplinary offence. The CC observed that non-compliance with its decisions was no longer regulated as a distinct disciplinary offence under the law, but this does not mean that such conduct cannot engage the disciplinary liability of a judge to the extent that it is proven that he exercised his function with bad faith or gross

78 Judgement of 21 December 2021, delivered in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.

79 Judgment of 22 February 2022, delivered in case C-430/21.

80 Published in the Official Gazette of Romania, Part I, No. 673 on 2 August 2018.

81 See Decision No. 137/2019.

82 For more details, see Enache and Titirișcă, 2021, pp. 107–129.

83 See Law No. 304/2022, published in the Official Gazette of Romania, Part I, No. 1102 on 16 November 2022.

negligence.⁸⁴ Such non-adherence is considered a judicial error in Romanian law and according to Article 52(3), the state shall bear patrimony liability for prejudice caused by judicial errors. It was necessary to restrain the sphere of the disciplinary offence comprising non-adherence to the CC's decisions only to those that are made with bad faith or gross negligence in order to avoid a jurisprudential dispute with the CJEU and to guarantee the possibility of engaging the patrimonial liability of the state and securing the right of a person aggrieved by a public authority to obtain damages. However, this decision marks a new phase in the relations between the CC and CJEU. Thus, the CC indirectly took over the jurisprudence of the CJEU in matters concerning the disciplinary liability of judges for non-compliance with the decisions of the CC, even if it did not refer to it. Even in the absence of direct references, the subtext of the decision is clear. This is also a form of dialogue between the two courts, and a tacit one at that.

8. Conclusions

Anne-Marie Slaughter⁸⁵ identified five different categories of judicial interaction that result in the exchange of ideas and cooperation in cases involving national or international law, namely: relations between national courts and the CJEU; interaction between national courts and the ECtHR; judicial cooperation in dealing with transnational disputes or “judicial comity”; constitutional interactions or “constitutional cross-fertilisation”; and direct meetings among judges.

The interaction between national and international courts involves “vertical” relations, whereas that between the courts across national and regional borders involve “horizontal” relations. However, there has to be a “cooperative relationship” between national constitutional courts and the CJEU; this relationship is defined court-to-court and based explicitly on the competencies of both entities in domestic and EU law.⁸⁶ This cooperative relation has to be mutual, so both courts have to be willing to listen to each other's points of view. Compromise is always a solution.

In this paradigm, the only form of symbiosis among the 27 Member States and the European legal system within the framework of the current Treaties is an intensive and egalitarian dialogue between the CJEU and national constitutional court. Where the case in question relates to a matter of principle vis-à-vis the jurisdiction or the role of constitutional courts, this consultation procedure must be carried out with all constitutional courts in the EU.⁸⁷ If the CJEU faces a problem that calls into question the constitutional identity of the Member State,

84 Decision No. 520/2022, paras. 331–335.

85 Slaughter, 2000, p. 1104.

86 See, Slaughter, 2000, pp. 1107 et seq.

87 Sulyok and Dorneanu, 2022.

it is necessary to open a dialogue with the national constitutional court through a communication mechanism that makes it possible to acknowledge its position and the legal arguments that substantiate it. Between both jurisdictions, there cannot and should not be a relationship of opposition or legal hierarchy, but of complementarity. Possible jurisprudential tensions can be avoided by harmonizing decisions at the level of respect for the constitutive principles established at the EU and national levels, and which, in essence, make up the common heritage of the constitutional legal civilization.⁸⁸

It is also the case with the Romanian Constitutional Court. It seems that formal and informal dialogue is welcomed, especially when the relations between the national Constitution and EU law is at stake and the “counter-limits” doctrine comes to fore. A hierarchical approach is not the best way to flatten the differences of opinion between them. We have to admit that the competence-competence doctrine is eroded by the ever-expansive jurisdiction of the CJEU. This is why dialogue in every form has to characterize this relationship. In the future, the CC will be more cautious when it has to deliver decisions that can have a certain impact on the application of EU law and will adhere to the so-called Italian model of dialogue⁸⁹ shaped in *Taricco 1* and *2*.⁹⁰ It remains to be seen whether the CC will maintain its case law concerning the relationship between the national Constitution and EU law or will adapt it to suit the CJEU’s decisions. However, both courts have to “negotiate” to avoid such jurisprudential clashes.⁹¹

As for the CJEU approach to the CC, I would mention its recent Judgement of 24 July 2023, delivered in Case C-107/23 PPU, which is very similar to *Taricco 2* as it recognizes the *pro futuro* effects of a CC decision that concerns the unconstitutionality of the interruption cases of the period of limitation for criminal liability,⁹² even if, as a consequence, a considerable number of criminal cases, including those relating to offences of serious fraud affecting the financial interests of the EU, will be discontinued because of the expiry of the period of limitation for criminal liability. However, even if Romanian law concerning the interruption of the period of limitation for criminal liability fall within the scope of substantive criminal law, the CJEU denied its retroactive application based on *lex mitior* and, consequently, allowed the national courts to disapply a ruling delivered by the

88 Enache, 2021, p. 97.

89 The Romanian legal literature emphasizes that the preliminary reference procedure does not resolve all conflicts and sometimes creates conflicts if the courts on the two levels position themselves in an authoritarian manner – see Safta, 2022. This is why the Italian model of dialogue is more appropriate for the Romanian Constitutional Court. Otherwise, it would place itself in an irreconcilable position vis-à-vis the CJEU.

90 Amalfitano and Pollicio, 2018.

91 Toader and Safta, 2013, p. 161.

92 See Decision No. 297/2018, published in the Official Gazette of Romania, Part I, No. 518 on 25 June 2018, and Decision No. 358/2022, published in the Official Gazette of Romania, Part I, No. 565 of 9 June 2022.

High Court of Cassation and Justice for unifying the judicial practice according to which the normative text that has remained after the CC decisions is a more lenient law and has to be applied retroactively.⁹³

However, in the absence of a compromise, the question concerning counter-limits remains: Which Court is the best placed to assess such an issue? Is it a question of competence or of power? *Quis custodiet ipsos custodes?*

93 Decision no. 67/2022, published in the Official Gazette of Romania, Part I, No. 1141 on 28 November 2022.

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