COMMENTS ON THE REPRESENTATION OF ROMANIA IN THE EUROPEAN COUNCIL AND ON ITS CONSEQUENCES FOR DEMOCRATIC ACCOUNTABILITY

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Abstract: The article approaches issues concerning the representation of Romania in the European Council, question that has received significant attention in recent years. Several decisions handed down by the Constitutional Court of Romania were meant to clear up to a certain degree the division of roles between the President of Romania and the Prime Minister in representation in the European Council meetings, while other matters are still waiting for a clearer answer. These developments occurred with parliamentary debates on what is today the Act no 373 of 18 December 2013 on cooperation between the Parliament and the Government in the field of European affairs. The article aims to assess this case-law of the Constitutional Court in the broader framework of EU affairs.

Keywords: EU affairs; Constitution of Romania; Constitutional Court of Romania; Act on cooperation in European affairs; European Council; President of Romania; Prime Minister; Parliament

Preliminary remarks

After almost two years of parliamentary debates and two challenges of constitutionality, on 18 December 2013, the bill on cooperation between the Parliament and the Government in the field of European affairs² was finally enacted

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- 2 Published in *Monitorul Oficial* no 820 of 21 December 2013. The bill, which was a public bill (having the Government as sponsor), was lodged at the Parliament in February 2012 (PL-x no 3/2012 – in the database of the Chamber of Deputies; the file of the Act is available at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=12520). An English translation of the law is available at http://www.cdep.ro/pdfs/LG_373_2013.pdf. It should be added that legislative workings concerning another proposal (a private bill) lodged in

and became law. The Romanian Act no 373/2013 (“the Act on cooperation”) aims to govern the framework of cooperation “in the decision-making process within the European Union and also [in what concerns] monitoring the harmonisation of national legislation with European legislation” (Article 1).

This act establishes as a rule an autonomous participation of each Chamber of the Parliament (the Senate and the Chamber of Deputies) in EU affairs, but certain provisions meant to reach a consistent position of these two are also included. The act regulates, *inter alia*, in matters concerning duties of the Government to provide information to the Chambers concerning EU legislative proposals and documents (but also related to other issues – like reports on participation in the European Council and in the EU Council, reports on transposition acts of the European Union law in the national legislation, information concerning persons appointed or named by the Government to hold offices in EU institutions), the working procedure between the Chambers and the Government, the parliamentary scrutiny over EU legislative proposals and the parliamentary scrutiny reserve, the procedure for monitoring the subsidiarity principle and the subsidiarity action before the Court of Justice of the European Union and so forth.

In parallel with parliamentary debates concerning the bill on cooperation, the most heated (political) issue was the question of representation of Romania in the European Council: who has the constitutional power to participate in these meetings – the President of Romania or the Prime Minister? Therefore, the Constitutional Court of Romania was called four times to state over the matter: two challenges had their basis on the request to solve a legal conflict of constitutional nature occurred within the executive branch of government (between the President of Romania and the Prime Minister), and two other challenges were lodged in connection to successive versions of provisions of the bill on cooperation. Most recently, on 24 June 2014, a new request to solve a legal conflict of constitutional nature within the executive was lodged by the Prime Minister. The latter application was rejected, but the decision reached on 9 July 2014 is not yet published at the time of writing (August 2014). After exposing the main arguments of the parties and of the Constitutional Court, a discussion is made concerning the broader issue of scrutiny in European affairs from the Romanian perspective. Even if the Act on cooperation does not provide for as such in what concerns rules for participation in the European Council meetings, it has some clauses that bear certain relevance for the issue of democratic accountability in EU affairs.

Another very important topic related to the Act on cooperation, touched upon by this case law of the Constitutional Court (so it became a “collateral victim”), concerned the types of act the Parliament or of its Chambers were able to

2008 (Pl-x no 594/2008) in the same field and with the same title were discontinued in the same year.

adopt in the course of participation in European affairs. This issue has unfortunately received little attention in the public sphere. It was puzzling that the Constitutional Court held that the Parliament or one of its two Chambers should adopt (only) resolutions (i.e. legal acts), even if the Parliament intended at some point to legislate the possibility of issuing political acts (namely “opinions”) in European affairs. Therefore, the Parliament was under a constitutional duty to adjust the law to the decision of the Constitutional Court. By that, the decision-making process seems to be wholly shifted from the Committee on European Affairs of each of the Chambers to the plenary sitting, thus leading to inflexibility. Such resolutions are to be adopted not only in what concerns the parliamentary control over the Government in EU affairs, but also regarding the (direct) relationship with EU institutions, for example regarding the subsidiarity control mechanism (under Protocol no 2 on the application of the principles of subsidiarity and proportionality).³

The paper is divided as follows: section I briefly sets the scene in which the constitutional litigation concerning the representation of Romania in the European Council took place, while sections II-V describe the decisions rendered by the Constitutional Court in what may be called a constitutional epic; section VI sums-up and critically discusses the main arguments of these decisions. The final section (VII) examines the issue of constitutional responsibility for European integration: the main question concerns who holds this responsibility?

I. Setting the scene

Prior to year 2012, as a rule, the President of Romania participated in the European Council meetings, having also the power to approve the mandate for these meetings, approval understood as the final stage in establishing the mandate of Romania. In other instances, the President and the Prime Minister participated in the European Council meetings. Prior to this constitutional epic we are going to present and discuss, Frederic Eggermont noticed in his doctoral dissertation on the European Council⁴ that a potential blockage might occur when the President and the Prime Minister are not “in the same boat”:

“In most cases the President chooses to participate, in which case, he headed the delegation. In fact, the participation of the Romanian delegation at European Council meetings was affected *par ricochet* by the failures of the Romanian Constitution which were not fixed by the revision in 2003. In the Constitution, the delimitation of competences between the President and the Prime Minister is not clearly stated, including in the field of foreign policy. The system works

3 The topic of acts of the Parliament of Romania in EU affairs will be discussed in detail somewhere else.

4 Frederic Eggermont, *The Changing Role of the European Council in the Institutional Framework of the European Union. Consequences for the European Integration Process*, Intersentia, 2012.

when the President and the Prime Minister are in the same boat (and row in the same direction). When they are at odds, the constitutional mechanism is blocked. Until now [i.e. 1 September 2011, date at which the book was completed], Romania has spoken with a single voice in the European Council, although the Romanian delegation was in reality fractured”.⁵

Then, following changes in parliamentary majority and the appointment of a new Government, that took place in May 2012, the new Prime Minister expressed the will to participate in the European Council meetings. Concurrently, the Parliament (in joint session of the Chambers) passed the Declaration no 1 of 12 June 2012 concerning the current issues on the agenda of the European Union and the corresponding obligations incumbent upon Romania⁶ – political act which supported a division of respective roles for the Government (i.e. the Prime Minister) and the President in representing Romania in the European Council meetings, depending on the issues on the agenda.

Three major points were made in that Declaration. Firstly, the Parliament asked to be informed prior to and after any European Council meeting and claimed also the power to establish in principle the mandate concerning the positions expressed by the representative of Romania. Secondly, it supported a division of the roles of the President and of the Prime Minister in participating in the European Council meetings: the President should gain precedence in matters of European defence and security policy and in European Union common foreign policy, while the Prime Minister should play the main role in policies like those economic, social, budgetary, European funds, Schengen and on any other executive issues. Thirdly, referring to the agenda of the European Council meeting of 28 June 2012, the declaration emphasised that the Prime Minister should have taken part in that meetings, taking into account that the agenda concerned issues like the economic situation in the European Union, adoption of economic and social measures and continuing negotiations for the Multiannual Financial Framework 2014–2020.

That is broadly the context in which the first act in this constitutional epic arose. It is not of course the aim of this paper to explain political reasons, so it looks exclusively at legal arguments of this epic.

II. Act one: a conflict of constitutional nature within the executive branch of government (in foreign relations) – the Decision no 683 of 27 June 2012

On 22 June 2012, the Constitutional Court of Romania was called to hear a complaint lodged by the President of Romania concerning a legal conflict with constitutional nature between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other. By its Decision

⁵ *Ibid.*, 39.

⁶ Published in *Monitorul Oficial* no 392 of 12 June 2012.

no 683 of 27 June 2012,⁷ the Constitutional Court established that constitutional conflict, which was caused by the action taken by the Government and its Prime Minister in order to exclude the President of Romania from the delegation that was to participate in the European Council of 28-29 June 2012; the operative part of that decision stated that “[i]n carrying out his constitutional powers, the President of Romania shall take part in the European Council meetings in his capacity as Head of State. That power may be expressly delegated by the President of Romania to the Prime Minister.”

The President relied in his complaint on Articles 102 and 80(1) of the Constitution of Romania. According to Article 102 of the Constitution, “[t]he Government shall be responsible for carrying out (i.e. implementing) the home and foreign policy of the country”. Article 80(1) reads as follows: “The President of Romania shall represent the Romanian State and is the safeguard of the national independence, unity and territorial integrity of the country”. Therefore, the Government would lack the capacity to represent the state in the European Council, power which was incumbent to the President. Also, concerning the Declaration no 1/2012 of the Parliament, the complaint stated that it had only political nature and was not legally binding. On the other hand, relying on Article 80(1) of the Constitution and on Article 10(2)(2) of the Treaty on European Union (“TEU”) and by taking into account that States are represented in the European Council, the President asserted the power to represent Romania in the latter, while the Prime Minister and the government had the authority participate in the EU Council.

The Government stated that, according to Article 15(2) TEU, the Treaty does not provide for a certain level of representation the Member States in the European Council, but it leaves that issue to each Member State, which may appoint a representative, be it the Head of State or of Government. It is the Member State that has the power to decide on that matter, taking into account the national constitutional system and the division of powers at national level. Bearing in mind that at various EU Council configurations only ministers take part, yet by denying the ability of the Prime Minister to participate in the European Council meetings, the latter would be deprived of his ability to take part in decision-making process at European level.

Conflicting grounds were put forward by each party in proceedings in what concerns the subjects on agenda of the European Council meeting of 28-29 June 2012, in order to substantiate an own right to participate in this EU institution: the President emphasised the foreign policy issues on the agenda, while the Prime Minister stated that economic topics and others alike were prevalent.

The Government mentioned also types of form of government of the Member States of the European Union, in order to show that out of the 20 Member

7 Published in *Monitorul Oficial* no 479 of 12 July 2012.

States (at that time) with a President of Republic, and 11 of them having a directly elected President, only 3 presidents (of Cyprus, France and Lithuania) take part in the European Council meetings. Another reason put forward by the Government was drafted as follows: “[t]he reason to establish for the Prime Minister or the President the option to participate [in the European Council meetings] was that the holder of the executive branch in Member States should participate in this European body, because the majority of European legislation enjoys direct applicability, and the Executive is responsible for its implementation. Therefore, depending of the form of government of each State, in regimes having a bicephalous Executive, that one that has the primary responsibility in carrying out the Executive shall be entitled to participate [in the European Council]”.

On the substance of the case, the reasoning of the Constitutional Court was of great extent and rich in references to legal literature. The perspective followed by the Court was twofold: European and national.

At the outset, the Court mentioned the principle of conferral and categories of competence, according to the Treaty of Lisbon, and then powers and role of the European Council were pointed out (according to Article 15 TEU). Two statements are especially significant in that regard. Then again, the Court noted that “[t]he operation of the Union is not possible without a high level institution like the European Council, institution that played and still plays a fundamental role in European integration”. On the other hand, the Court supported the unitary nature of the mandate to represent the State, because “according to its practices, there is no formal and strict division within the agenda of the European Council concerning certain topics, so that during a European Council meeting topics related to various fields may be discussed and the participation in the same European Council meeting of more representatives of a Member State is impossible and not usual”. The consequence of this latter statement is that “the representatives of the State are not able to succeed each other during the same European Council meeting depending on topics included on agenda, as the mandate to represent the State has a permanent nature, and is not divided between two public authorities”.

Thirdly, mentioning Articles 10(2)(2) and 15(2) TEU, the Court held that it is the Member State which is responsible to determine its representation in the European Council – by the Head of State or Government, and in case of a Member State having a bicephalous Executive, in order to establish that representative, a purposive reading of those two articles should be employed. The objective that should be taken into account is that of the need to ensure the representation of the Member State at its highest political level.

Fourthly, the Constitutional Court reminded the fact that three States have the President as representative in the European Council: France, Lithuania and Cyprus, while for the rest of States the Prime Minister is responsible: “The rea-

son for that is either the constitutional provisions concerning the form of government in those States (France, Cyprus), or an agreement between political actors (Lithuania).” Next, quoting from the French Professor Maurice Duverger,⁸ the three elements that are able to establish a form of government as being a semi-presidential one were listed: the President is elected by universal suffrage; the President possesses considerable powers; the President has opposite him a Prime Minister and Ministers who possess executive and governmental power and can stay in office only if the Parliament does not show its opposition to them. The Court established that the first condition and the third one were fulfilled, and mentioned that the second condition was the one “problematic”, as it requires establishing the fact that the President holds considerable powers; in that regard, an extremely important element is his role in the State’s foreign policy. The Court listed powers enjoyed by the President, as provided for in the Constitution, and concluded that the form of government in Romania amounts to a semi-presidential regime. Moreover, several previous decisions of the Court were referred in order to show the considerable nature of Presidential powers in various fields. The Constitutional Court relied on reasoning by analogy from Article 5 of the French Constitution,⁹ provision that was source of inspiration at the time when the Constitution of Romania was drafted and that establishes a semi-presidential form of government. Yet, by its wording, Article 80(2) of the Constitution of Romania establishes *a fortiori* that the President of Romania represents the Romanian State and guarantees the national independence, and the unity and territorial integrity of the country. The President of Romania shall also ensure the compliance with the Constitution and the well-functioning of public authorities.

Fifthly, the Court established the capacity of the President as “Head of State”. Apparently, that need was felt as the Constitution of Romania does not provide expressly for this concept. The Court mentioned its previous decisions, in which the President of Romania was described implicitly and then explicitly as Head of State. That capacity was derived from Article 80(1) read in conjunction with Articles 91 and 148(4) of the Constitution¹⁰ and also from Article 102(1) of the Constitution. Worthy of note here is the opposition clearly defined by the Court between the respective powers in foreign relations of President of Romania and Prime Minister, according to the Constitution:

8 *Échec au roi*, Paris: Albin Michel, 1978; *A new political system model: semi-presidential Government*. *European Journal of Political Research*, 8 (1980) 165–187.

9 “The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties”. (The translation is taken from the website of the French *Conseil constitutionnel*: <http://www.conseil-constitutionnel.fr/>).

10 For a discussion on this provision, see sections VI–VII below.

“Under Article 80(1) of the Constitution, the President of Romania shall represent the Romanian State, so that in foreign policy he runs and commits the State. That constitutional provision allows him to draft future guidelines that the State will follow in its foreign policy, meaning that he is able to establish its track in foreign relations, obviously by taking into account the national interest. Such concept is legitimated by the representative nature of his office, as the President of Romania is elected by citizens by universal, equal, direct, secret and free suffrage.

In the field of foreign policy, the Prime Minister has the constitutional power to ensure that the country’s foreign policy is carried out [Article 102(1) of the Constitution], meaning that, depending on the track established by the State’s representative in the foreign relations, that is the President of the State, the Government, by its representative, shall duly implement the measures to which the State commits itself. Accordingly, the Court finds that the role of Government in foreign policy is one rather technical, as it is obliged to follow and put into practice the duties to which Romania committed at the State level. Therefore, the role played by the Government is rather one derived, and not primary, unlike that of the President of Romania; that being so, as it is not a delegated power, but one inherent to the President of Romania, he may delegate the representation of State by an express act of will, when he deems appropriate”.

Apparently, this *locus* is the central place in the reasoning of the Court: as the President has the primary (or original) power to represent the State in foreign relations, he may delegate that power to Prime Minister by an express act of will. Nevertheless, this statement is unclear from several points of view. Is the President of Romania completely free to draft and present a position in Romania’s name? Are there any requirements that the President have to fulfil in drafting and presenting his mandate? Is there any (functional) division between defining and presenting such mandate? Is there any role that government (*lato sensu*) may be called to play in that regard? Is there any role also for the Parliament? At some of these questions the Court answered in following decisions of this epic.

Sixthly, the Constitutional Court discussed the Declaration of Parliament no 1/2012. It was noted that division of powers between the President and the Prime Minister made according to the topics on the agenda of the European Council was one “horizontal”, and not “vertical”, issue that is contrary to the Constitution, as the guidelines of the foreign policy of the State are established and defined by its representative, the President, while their precise implementation and carrying out is a matter for the Government. Yet, an act (be it legal or political in nature) may not add to the Constitution and alter powers as provided for in the Constitution: “The political will is subordinated to constitutional principles, values and requirements, independent of the relationship between public authorities, even if they are in a state of tension”.

Concerning also the above-mentioned Declaration, the Court drew a functional argument from the composite nature of agendas of the European Council: “[t]he division envisaged in the declaration is impossible in practice, taking into account that any European Council meeting does not exclusively approach issues of economic, social, budgetary policy in the way mentioned by that declaration. Moreover, even supposing such topics are under discussion, taking into account that these entail conclusion of treaties on behalf of Romania, the participation of the Head of State, which has the power to conclude treaties in this field, is needed”.

Yet the final part of this latter statement of the Court is thought-provoking, as it raises certain important questions to address. Does the European Council “table” treaties or (international) acts that the representatives of Member States conclude or sign them? Are acts adopted by the European Council “international treaties”? And also, even supposing that on the occasion of a European Council meeting a treaty is signed by the States’ representatives, as a certain practice shows indeed, that act is not an act of the European Council (and even not of the Union itself). Significant examples are international agreements concluded by eurozone members. On the other hand, acts adopted by the European Council under simplified revision procedures (Article 48 TEU) are by no means (classic) international acts. These issues will be discussed in section VI.2 below.

The general conclusion of the decision was that “[...] in the European Council, the Member States are represented at their highest level, meaning by the institution which is able to commit the State in foreign relations, and not by the institution which ensure that goals already established are carried out”. Consequently, “the President of Romania does not only have the right, but he is also under an obligation taken on by the Accession Act to participate in the European Council meetings; otherwise, commitments already taken by Romania would be disregarded”. By placing great emphasis on the site of foreign relations, this argument raises another question: what is “domestic” and what is “foreign” in workings of the European Council?

The final words in the decision emphasized the constitutional duty of cooperation between state bodies, in pursuing their powers, in order to ensure a well-functioning rule of law.

The decision was reached by majority of votes; out of the nine members of the Court, four voted against. Two dissent opinions (one supported by three judges of the Constitutional Court, and the other drafted by one judge) and a concurring opinion (originating from another judge) were also written.

In sum, the first act in this constitutional litigation may be summarized as follows: from a national perspective, under the Romanian form of government (which is a semi-presidential regime), the President has the primary (original) power to participate in the European Council meetings, power that he may del-

egate, by an express act of will, to the Prime Minister. The President has also (exclusive) power to establish his mandate. The second decision rendered by the Constitutional Court refined these arguments. From a European perspective, the European Council is deemed by the Constitutional Court as rather similar to a classic international law body. Whether the latter perspective is grounded shall be briefly discussed in section VI.

III. Act two: the Decision no 784 of 26 September 2012 – who empowers whom?

A second Decision – no 784 of 26 September 2012¹¹ – soon followed; it originated from a constitutional challenge against certain provisions of the Act on cooperation between the Parliament and the Government in the field of European affairs, in their wording at that time; the action was brought by a political group in the Senate. The concerned provisions were Articles 2(e),¹² 3,¹³ 18 and 19 of the Act. The reasoning concerning the last two of them is exposed and discussed here.

Ten grounds were put forward in the action, and their common feature concerns the original (or primary) nature of the mandate held by the President, in his capacity as “Head of State”, to represent Romania in the European Council; neither the Parliament nor the Government would have the power to establish or (even) influence such mandate.

Several pleas concerned Article 18 of the bill.

On the one hand, it was alleged that Article 18(2) and (3) was contrary to Article 80(1) of the Constitution and Article 15 TEU because Article 18 stated that, when an agreement between the Government and the President of Romania concerning the head of delegation of Romania to the European Council was not reached at least in 20 working days prior to the date of meeting, the Parlia-

11 Published in *Monitorul Oficial* no 701 of 12 October 2012.

12 This provision concerned the concept of mandate, defined there as “negotiation position of Romania for the issues on the Council’s agenda, including draft legislative acts of the European Union”. In its decision, the Constitutional Court briefly noted that the issue of mandate concerned the Council of the EU, not the European Council, so the plea of unconstitutionality was rejected. It should also be mentioned that the definition retained this wording in the version of the Act in force.

13 Article 3 concerned acts (opinions) of the Parliament or of one of its Chambers; the Court held: “Apart from the pleas of unconstitutionality put forward, the Court notes that provisions of Article 3 of the law breach provisions of Articles 1(5) and 67 first sentence of the Fundamental Law [i.e. the Constitution]. That is so because the Parliament, in pursuing its powers provided for by the Act on cooperation between the Parliament and the Government, shall adopt “opinions”. Yet, according to provisions of Article 67 first sentence of the Fundamental Law, “the Chamber of Deputies and the Senate shall adopt laws, resolutions and motions [...]”. Therefore, the bill has to be amended, in order to replace “opinion” with “resolution”.

ment, in joint session, should appoint the head of delegation. On the other hand, concerning Article 18(1), according to which the head of delegation of Romania to the European Council could be either the President or the Prime Minister, the applicants stated that, even if that provision would be consistent with Article 15(2) TEU, in that the Member States were represented by their Heads of State or Government, the controversial issue was which one of those could represent Romania in the European Council. The applicants claimed also that neither the Parliament, nor the Government may delegate the function to represent, because that belonged to the Head of State.

Other grounds were directed against Article 19 of the bill.

It was claimed that article 19(1) and (2) was contrary to the Constitution, because it provided for in what concerns the consequences for approval by the Parliament of the head of delegation of Romania to the European Council; the applicants supported the view that prior to the European Council meeting the mandate of the Romanian delegation should be approved by the President of Romania, and not by the Parliament (as it was provided for in Article 19(2)). On the other hand, it was also maintained that Article 19(3) of the bill was not in compliance with the Constitution because the Government might not have a position different from that included in a mandate approved by the President of Romania.

In what concerns Article 18 of the bill, the Constitutional Court referred extensively to its previous Decision no 683 of 27 June 2012. A first reference concerned the fundamental statement that the President participate in the European Council meetings in his capacity as Head of State, and that power may be delegated to the Prime Minister by an express act of will. Then the Court referred to arguments pertaining the features of the Romanian form of government a semi-presidential regime, so that the President of Romania represent the Romanian State and commits the State (according to Article 80(1) of the Constitution), while the Prime Minister has the constitutional power to ensure the foreign policy is carried out (Article 102(1) of the Constitution) and the role played by the Government in the field of foreign policy is one rather technical, executive in nature, and consequently it is a derived (not primary) role. Taking into account the general nature of Article 80(1) of the Constitution, this article has to receive an extensive reading in conjunction with Articles 91 and 148(4) of the Constitution, and the conclusion is that the President is under a constitutional duty to represent the State. The contrary reading would deprive Article 148(4) of its substance.

The Constitutional Court held that also Article 19 of the bill was not in compliance with the Constitution: it was judged as contrary to Articles 1(5) and 80(1), the latter read in conjunction with Articles 91 and 148(4) of the Constitution, because Article 19 did not provide for in what concerns the powers that

the President should carry out when drafting and adopting the mandate. In the words of the Court, that state of affairs – i.e. a legislative lacuna – did have constitutional relevance.

The decision was issued with a majority, and four members of the Court joined a dissenting opinion.

Certain conclusions may be drawn from the decision of the Court: the President of Romania has always the right to head the delegation to the European Council and the Parliament does not have any power in that regard, as the latter cannot “pick” one of the heads of the executive branch to participate in the European Council meetings; then, the President of Romania – in his capacity as Head of State – should have the main role in establishing and approving the mandate to the European Council meeting, while the role of the Government is only a derived (secondary) one. The duties under Article 148(4) of the Constitution were also highlighted. At least two fundamental questions can be raised here. One question concerns conditions in which the President may delegate the Prime Minister. In other words, are there any requirements that the former has to fulfil? The next decision of the Court offers a partial answer to this question. The other question is one of democratic accountability: taking into account that the President of Romania is the only authority able to draft and approve the mandate to the European Council, what is the role of the Parliament then? Yet, who bears the constitutional duty to direct the course of the European integration of Romania? Certain clarifications in that direction were also brought by the next decision of the Constitutional Court.

IV. Act three: the Decision no 449 of 6 November 2013 – should the winner take it all?

As a result of this second decision, the Parliament was required to rephrase the provisions of Articles 18 and 19 of the bill. And it did so: the former provision was removed from the bill, while the latter article (which became Article 18 – in the current version of the Law) was altered. Then the bill was sent to the President for promulgation, yet he asked the Parliament to consider anew the disputed provisions of the bill.

The Parliament declined to alter the new version of Article 18 as requested by the President. This article reads as follows:

- “(1) Within a time-limit of 10 working days prior to the European Council meeting, the Government shall deliver to the two Chambers of Parliament the proposal for mandate which the delegation of Romania aims to put forward.
- (2) Prior to European Council meeting, the Parliament may adopt proposals concerning the mandate.

- (3) The proposals adopted according to paragraph (2) shall be taken into account in the mandate drafted by the Government.
- (4) The President of Romania may address the Parliament in order to present his mandate”.

As a result, on 9 October 2013, the President of Romania decided to address to the Constitutional Court, holding that the Parliament did not rephrase those provisions of the bill in order to comply with the previous decision of the Constitutional Court (no 784 of 26 September 2012) and that these provisions ran also against the first decision of the Court (no 683 of 27 June 2012).

This new action to the Constitutional Court contained a distinctive feature: it raised the issue that the President of Romania should have the ability to determine the mandate both for the European Council and the Council of the EU, for reasons derived from the need for unity of representation in foreign affairs.

At the outset, the action reprised the ground concerning the legislative lacuna on the role of the President in drafting and approval of the mandate to the European Council. Then, it was claimed that Article 18(4) of the bill was liable to lead to two unrelated mandates, one of the Government, which was subject to Parliamentary supervision and the other of the President, mandate which was “entrusted to the Government”. Such a state of affairs was liable to create confusion and lead to another constitutional stalemate. Therefore, the action supported the indivisibility of the two mandates, as Romania had to express a common position within those two institutions. The participation of the Executive branch in the European decision-making procedures might be not separated. Another ground concerned the fact that the activity carried out by Government in the EU Council would be executive and secondary in nature, yet not one original, like that of the President in the European Council.

More specifically, the action claimed that the definitions in Article 2(e) and (f) of the bill breached Article 80(1) read in conjunction with Articles 91 and 148(4) of the Constitution because those failed to mention the powers of the President in what concerns drafting and approval of the mandates for the European Council and the EU Council and also because an arbitrary division between those two institutions was made from the point of view of mandating, and that was liable to encroach on the powers of the President.

As a preliminary point, the Constitutional Court established that the action concerned Articles 2, 3 and 18 of the bill on cooperation. The wording of those provisions is the same as in the Act in force.

The constitutional provisions relied on in the action were Articles 1(5) concerning the compliance with the Constitution, Article 80(1) concerning the role of the President, Article 91 on powers of the President in the field of foreign policy, Article 147(2) and (4) on effects of decisions of the Constitutional Court and Article 148(4) on the duties derived from Romania membership to the European Union.

The Constitutional Court rendered its Decision (no 449) of 6 November 2013.¹⁴ It reminded its previous two decisions and then it went to establish that Article 18 of the bill provides for in what concerns the procedure that should be followed in case the President delegates the power to participate in the European Council. That was the first issue made clear in decision.

To put it differently, what was at stake in the action was not as such the right to participate, but its (potential) exercise, and by implication (procedural) consequences on the part of the Parliament.

The Court mentioned the Opinion no 685 of 17 December 2012 delivered by the European Commission for Democracy through Law (the Venice Commission) on the compatibility with constitutional principles and of the rule of law of actions taken by the Government and the Parliament in respect of other institutions of the State during 2012,¹⁵ opinion which emphasised that, with a view to revision of the Constitution, a clearer division of powers between the President and the Prime Minister, especially in the field of foreign policy and relationship with the European Union, is required.

The Court reminded its previous statement that the representation of the State may be expressly delegated by the President when he deems as necessary, and it emphasised “that such discretion of the President of Romania is not unfettered or arbitrary, but the appraisal *in concreto* has to take into account certain objective criteria, like: (1) the public authority which is the best placed in relation with the subjects discussed in the European Council; (2) the position of the President of Romania or of the Prime Minister concerning those subjects should be legitimized by a congruent point of view of the Parliament or (3) the difficulties generated by the task of implementing the position reached within the European Council. The political decision of delegating the power to participate in the European Council meetings has to take into account the above-mentioned criteria, in order to reach a consensus between the public authorities involved: the President of Romania and the Prime Minister respectively, and the decision reached should take into account also the constitutional principle of loyal cooperation”.

Obviously, this statement of the Court brings out an important innovation in the constitutional epic; these three (apparently) illustrative examples aim to rationalize the procedural division of powers within the Romanian executive in what concerns the representation in the European Council (this discussion is extended in the next point of this section). They also aim to a greater flexibility in “foreign” representation in the European Council.

¹⁴ Published in *Monitorul Oficial* no 784 of 13 December 2013.

¹⁵ CDL-AD(2012)026, adopted by the Venice Commission at its 93rd Plenary Session (14-15 December 2012), available at: <http://www.ccr.ro/uploads/opinion.pdf>.

The second issue concerned drafting, establishing and finalising the mandate for representation to the European Council. The Court mentioned Article 10(2)(2) TEU and reminded that it is the Member State which has to establish, according to its constitutional provisions, the representation in the European Council and to establish, “as the case may be, a national legislative framework on relationship between national authorities meant to ensure a democratic and in the same time effective representation”. This latter point was fulfilled by adopting the Act on cooperation, the Court acknowledged. After quoting Article 1 of it, which lays out the scope of the law, the Court made an interesting reference to the Act no 24/2000 on legislative drafting rules,¹⁶ whose rules provide the need for correspondence between the title of a law and its contents, so that to infer that the Act on cooperation concern only rules aimed to regulate relationship between the Government and the Parliament (in the procedure to establish the mandate to participate in the European Council meetings), and it does not comprise regulations concerning relationship between these two authorities and the President of Romania. In other words, the procedural issues concerning the way the mandate of the President is drafted and established, yet not the issue of political accountability, are left out by this Law.

The Court established that Article 18(1)-(3) of the Law concerns the case when powers of the President to participate in the European Council meetings would be delegated to the Prime Minister, case in which the parliamentary scrutiny is carried out only in what concerns the mandate, while Article 18(4) of the Law relates to the faculty of the President to inform the Parliament regarding the content of the mandate which was established by the President, when it decides not to delegate the powers to participate in the European Council meetings. Therefore, the Court found two different cases:

“(a) when the President of Romania decides to take part himself in the European Council meetings, he has the faculty to present the mandate to the Parliament, the content of the mandate being established exclusively by the President of Romania;

(b) when he delegates the power to participate in the European Council meetings, the President of Romania is not able to devise/establish the content of the mandate, and the Prime Minister is under a duty to address the Parliament with a “proposal of mandate”, so that the latter can approve it.

Therefore, the parliamentary scrutiny over Romania’s representation in the European Council meetings takes form in the first case of information, while in the second case the Parliament gains a decision-making power in establishing the content of the mandate, as a consequence of the specific relationship it has with the Government (Article 111 of the Constitution).

16 Republished in *Monitorul Oficial* no 260 of 21 April 2010.

The parliamentary scrutiny over the representation of Romania in the European Council meetings takes form of debates, information and co-workings between Government, Prime Minister and President. For that matter, the existence of the parliamentary control, irrespective of its form, over establishing content of mandate for the head of delegation to European Council meetings is already an element provided for in all Member States of the European Union. The absence of any information on the part of Parliament by the President would make Romania the only European State in which the mandate to represent [the state] in the European Council is established by a single institution”.

Yet, this statement seems to be the fundamental argument in this decision. Nonetheless, certain doubts remain. The only means to avoid a constitutional stalemate concerning representation in the European Council seems to be the constitutional duty of cooperation. To put it differently: notwithstanding the three conditions to delegate his mandate, the President is largely left out of the checks and balances system. This state of affairs has a certain correspondence in the relationship between the President and the Parliament, according to the Constitution of Romania. These issues will be discussed in section V below.

Subsequently, the Court relied on comparative law, quoting extensively from a study drawn in 2013 under the aegis of the European Parliament¹⁷ by a team led by Wolfgang Wessels and Olivier Rozenberg – “Democratic control in the Member States of the European Council and the Euro zone summits”. The Court lists several types of parliamentary control over the representation in the European Council, and then concludes: “Consequently, the Court finds that the Romanian semi-presidential regime may not exclude the parliamentary control over the representation of Romania in the European Council meetings, that being carried out in form mentioned [above¹⁸], provided that the political decision to delegate the powers to participate in the European Council meetings takes into account the mentioned criteria¹⁹”.

Therefore, the claim of infringing the above-mentioned Constitutional provisions by Article 18 of the Act on cooperation was rejected.

17 And not by the European Commission, as the Court mentioned in its decision; the study is available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO_ET%282013%29474392_EN.pdf.

18 i.e. when the President decides to take part himself in the meetings of the European Council, or when the President delegates the Prime Minister to participate in those meetings.

19 The three criteria listed in the same decision, i.e. “(1) the public authority which is the best placed in relation with the subjects discussed in the European Council; (2) the position of the President of Romania or of the Prime Minister concerning those subjects should be legitimized by a harmonious point of view of the Parliament or (3) the difficulties generated by the task of implementing the position reached within the European Council”.

The Court went to assess the claim of non-severability of the two mandates (in the European Council and the Council of the EU), and that ground was also dismissed.

Reference was made to Article 16(2) and (6) TEU in what concerns the Council of the EU, in order to emphasise that the power to take part in Council meetings belongs to ministerial representatives of each Member State. Then, the Court quoted Article 3(2) and (5) of the Act on cooperation, holding that it is the Government who has the final word in what concerns the content of mandate or of general mandate for the EU Council, power that has to be carried out during a Government meeting, in which the President of Romania is able to take part in. "That being so, the President of Romania has the faculty to participate in these Government meetings, and that would lead to participation, consultation and cooperation among the peaks of the executive branch of government.

The Court finds also that by its configurations, the Council of the European Union puts into practice the issues established by the European Council; all these establish of course the need for a close link between workings of the European Council and the European Union Council, without that to amount to a duty of the President of Romania to take part in finalising the mandate or the general mandate, as the case may be, to the Council of the European Union, according to Article (e) and (f) of the Act".

In the end, the Court reminded the duty of loyal cooperation which is incumbent to the concerned public authorities.

The Court rejected the action as unfounded, and it established that Articles 2, 3 and 18 of the Law are constitutional. This decision also was reached by majority of votes; out of the nine members of the Court, three judges joined a dissenting opinion.

V. A sequel? The need for consistency in representation and clear division of powers according to the decision of the Constitutional Court on the revision of the Constitution

More recently, in the framework of debates concerning the revision of the Constitution of Romania carried out during 2013,²⁰ two amendments concerning the issue of participation in the European Council meetings were adopted.

One aimed to add a new paragraph - (1¹) - to Article 91 (after paragraph (1)), which provides for: "The President shall represent Romania to European Union meetings with an agenda concerning foreign relations, common security policy

20 In that regard, the debates have been carried out in a joint committee – the Joint Committee for drawing up the legislative proposal for revision of the Constitution of Romania – set up by the Resolution of Parliament no 17 of 13 February 2013, published in *Monitorul Oficial* no 95 of 15 February 2013. Details are available at: <http://senat.ro/Comisie.aspx?Zi&ComisieID=bb175b74-8e6b-4603-8589-d27a014a2dc0>.

of the European Union, amending or supplementing the founding Treaties of the European Union”.

The other provision was meant to add a new paragraph to Article 102 (3¹) (after paragraph (3)): “The Government shall ensure the representation of Romania to meetings of the European Union institutions, with the exception of those provided for in Article 91(1¹)”.

The Constitutional Court has a constitutional duty to assess *ex officio* the compatibility of any proposal for a revision of the Constitution,²¹ so it rendered the Decision no 80 of 16 February 2014²² – in which it asked unanimously that Articles 91(1¹) and 102(3¹) should be rephrased.

Concerning Article 91(1¹) of the proposal,²³ the Court referred to Articles 10(2)(2) and 15(2) TEU, stating that the rule concerning composition of the European Council is a general one, and it does not require that the Member States with a bicephalous Executive to ensure a representation both by the Head of State and the Head of Government, but rather, by employing a purposive reading of the Treaty, it can be established that it aims to ensure the representation of the Member State at its highest political level. This is of course a memento of a pronouncement from the first decision of the Court in this epic (Decision no 683 of 27 June 2012), yet the Court did not quote it explicitly.

Then the Court went to hold that the wording of the new paragraph “amounts to a great degree of generality, likely to cause confusion concerning the powers of the presidential institutions in this field”. Therefore, the Court recommended rephrasing the provision in order to delimit the duty to represent Romania by the Head of State in the European Council meetings.

The Court did not elaborate on final part of the proposed text – that related to the revision of Treaties. In fact, this possibility is included at any rate in the realm of the European Council (according to Article 48 TEU).

Regarding the proposed new paragraph in Article 102, the Court²⁴ held that it was liable to affect the smooth functioning of the state institutions. While the proposed Article 91(1¹) concerned “European Union meetings”, the new Article 102(3¹) mentioned “meetings of the European Union institutions”. Regarding also the powers of the Government to take part in meetings of the European Council and the EU Council, the reasoning followed the previous case law of the Constitutional Court (mainly the first Decision – no 683 of 27 June 2012). Reminding that the agenda of the European Council is likely to include various

21 According to Article 146(a) of the Constitution: “The Constitutional Court shall have the following powers: (a) it shall give a ruling [...] *ex officio* on any initiative to review the Constitution”.

22 Published in *Monitorul Oficial*, no 246 of 7 April 2014.

23 See paras 294-297 of the decision.

24 *Ibid.*, paras 302-312.

issues and fields (ranging from domestic policy²⁵ to foreign policy of the European Union) and that in the meetings of other European institutions (EU Council), independent of the issues under discussion (foreign relations, security), only the Government representatives take part, the Court emphasised the need for unitary representation:

“Accepting the rationale of the proposed provisions, with the ability of both the Prime Minister and the President of Romania to take part in its meetings, would lead to a parallel and divided representation of Romania in the European Council. Moreover, if a specific meeting concerns issues which, according to the initiative to review the Constitution, belong to the powers of the President of Romania and of the Prime Minister, that situation will lead to a fragmented representation of Romania, as in some issue would participate the President, while in others it would take part the Prime Minister. Such an approach on powers of the two institutions runs against the provisions of the Treaty on European Union, which states that a representative of each Member State will participate in a meeting”.

The Court emphasised also that the Government representatives have the power to participate in the various EU Council configurations, and then it observed:

“[...] the Court holds that Romania’s representation in the European Council has to be unitary, on the one hand, and that the Government cannot be denied its full power to ensure the Romania’s representation in the Council of the European Union, irrespective of issues on the agenda of its configurations, on the other”.

The proposed Article 102(3¹) should be put in conformity with the requirements set in Article 10 TEU in order to ensure the said unitary representation in the European Council, so that the Court sent to its prior Decision no 449 of 6 November 2013; in addition to that, the Court seems to place an obligation on the President to mandate the Prime Minister to take part in the meetings of the European Council when “certain objective conditions are met” – meaning those three conditions mentioned in the Decision no 449 of 6 November 2013.

From the point of view of the Court, the proposed paragraph has a limited scope, liable to lead to deadlocks concerning respective constitutional powers of the two authorities involved, and also to an infringement of the Treaty on European Union (!).

In sum, even if nowadays the revision of the Constitution was (temporarily) put on hold, the conclusions emphasised by the Constitutional Court in its Decision of February 2014 are significant, as they show once again the importance of the division of respective roles within the Executive. They show also a certain

25 The Constitutional Court was not clear on this point whether it referred to “domestic policy” of the Member States or of the European Union.

degree of constitutional acceptance concerning the division of these roles. Therefore, the question likely to be risen here is whether the Prime Minister could assume a certain degree of representation in the European Council meetings? And if so, what might be the consequences for the checks and balances Romanian system?

The present epic continues with another act. On 24 June 2014 the Prime Minister addressed the Constitutional Court with a request to solve (another) legal conflict of constitutional nature having as subject-matter the issue of representation in the European Council.²⁶ The Prime Minister supported the view that the President claimed powers that belong to the Government under the Constitution. Interestingly, besides the fact that the President of Romania did not delegate the power to represent Romania to Prime Minister, choosing instead to take part in the European Council meeting of 26 June 2014, the main arguments were the following: the agenda of that meeting of the European Council dealt with issues that fell within the realm of the Government; the President of Romania did not ask the government to provide him with elements of a mandate; neither the Government nor the Parliament was informed or consulted in what concerns the position that was to be presented to that meeting; the conduct breached the constitutional duty of cooperation between authorities, and the three authorities (the President of Romania, the Prime Minister and the Parliament), acting together, carry out the sovereignty of the people. As previously stated, by decision of 9 July 2014, the Constitutional Court rejected the action.²⁷ The decision is not yet published (in *Monitorul Oficial*) at the time of writing.

It is time to discuss briefly certain conclusions drawn from all these decisions of the Court in the broader European context.

VI. In praise of cooperation: A broader perspective on the case-law of the Constitutional Court of Romania in the relevant field

1. Preliminary issues – some directions

The issue of establishing the responsible institution of the Executive branch of government to participate in the European Council meetings is not specific only to Romania, but similar constitutional developments took place in other Member States. Among others,²⁸ the case of Poland,²⁹ but also that of Croatia,

26 The request is available at: http://gov.ro/fisiere/stiri_fisiere/scrisoare_CCR.pdf.

27 See press release of the Constitutional Court of Romania of 9 July 2014, available at: <http://www.ccr.ro/noutati/COMUNICAT-DE-PRES-100>.

28 For an in-depth discussion, see F Eggermont, above n 4, 34–40.

29 In Poland, a dispute between the President and the Prime Minister arose concerning the participation in the European Council meetings; the Prime Minister lodged an application to the Constitutional Tribunal of 17 October 2008, and the latter court delivered its decision on 20 May 2009 (Ref. no Kpt 2/08), available at: http://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf.

as the most recent country to join the European Union,³⁰ should be reminded here.

In Romanian legal literature, the issue of representation to the European Council meetings is discussed by Professor Ion M. Anghel,³¹ but for the most part in a context of international relations, emphasizing various issues belonging to (classic) public international law. The European Union is described as “international organisation”³² or “supranational organisation”.³³ Professor Anghel discusses extensively various instruments of international law and then the Romanian constitutional and legislative framework in order to establish the capacity to represent the State in international relations: the scope of State’s representation on international scene depends on the legislation of each State.³⁴ He supports a systematic and combined reading of provisions both of Romanian legislation and those of the European Union. The conclusion from reading the Romanian framework is that the role of the President in concluding treaties is all but minor,³⁵ and in that regard reference is made to Act no 590 of 22 December 2003 on treaties.³⁶ According to Article 19(1) of this law, the vast majority of international treaties are concluded by the government. The issue of concluding treaties in the framework of the European Council is approached in the next section. An important conclusion of this article is that it is the Parliament, not the President, which determines the foreign policy of Romania, when approves the government programme; the main actor in foreign policy is the Government (having full jurisdiction), while the President holds certain powers in that regard, so that the concept of *representation* has to get a narrow reading.³⁷ In what concerns the European Council, Professor Anghel concedes that this EU institution adopts very important decisions that are “definitive and binding acts, because it is not provided for [in the Treaties] their approval at national level”.³⁸ It is not clear the reason why he supports the view that the decisions of the European Council have the nature of a “multilateral treaty” (or agreement).³⁹ Instead, the division he made between acts (or workings) of the European Council in order to establish the representative is meaningful: “[...] we should also take into account the topic

30 Article 144(5) of the Constitution of the Republic of Croatia establishes that: “The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers”.

31 Ion M. Anghel, *Reprezentarea României în viața internațională (o problemă cu aspecte controversate)* [The representation of Romania in international arena (a disputed issue)], in *Studii și cercetări juridice* [Legal studies and research], 1(57), Issue 4/2012, 561–586.

32 *Ibid.*, 576.

33 *Ibid.*, 583.

34 *Ibid.*, 579.

35 *Ibid.*, 578.

36 Published in *Monitorul Oficial*, no 23 of 12 January 2004.

37 I M Anghel, above n 31, 581.

38 *Ibid.*, 584.

39 *Ibid.* See also: The work within the European Council “[i]t is [...] about negotiating in a multilateral framework – a meeting of States – and it is about concluding, according to specific procedure of the EU, of an international treaty”. (*ibid.*, 585).

under discussion [in the European Council]. When general issues are under discussion, within guidelines of the EU – like goals [of the Union], directions and so forth,⁴⁰ that lack binding commitments, then the President will participate; when specific issues are under examination, which implies taking certain measures (legislative,⁴¹ organisational and so on), then the State organ who has competence on that, meaning the Government, shall take part”.⁴² Such a division, which seems to be well founded, is worth discussing in more detail. Moreover, “[w]hen decisions taken in the Council involves amending or supplementing the process of governance in Romania, a preliminary mandate from the part of the Parliament is needed; the President is not able to participate in the European Council without such mandate”.⁴³ This conclusion seems also well founded.

The following part of this section will approach possible meaning of a division of business inside the European Council for the representation of Romania. Even if the division has certain relevance in this regard, it should not be overlooked the other finding of the first decision of the Constitutional Court: Romania needs to be represented in the European Council meetings at its highest (political) level, according to Article 80(1) of the Constitution. Yet, this statement diminishes the weight of this division of business.

2. What is “foreign” and what is “domestic” in the working of the European Council?

In the same direction that emphasises the international law dimension of workings of the European Council, as is apparent from article authored by Professor Anghel, the first decision of the Constitutional Court (Decision no 683 of 27 June 2012) also stresses the foreign relations dimension of this EU institution. Among the decisions rendered by the Constitutional Court in this epic, it is this former decision that emphasised the foreign affairs dimension of European Council meetings.

It must not be overlooked one of the main innovations brought by the Treaty of Lisbon: the European Council is expressly listed as institution of the European Union (Article 13(1)(2) TEU), and that means it has to act within the EU checks and balances system: “Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation” (Article 13(2) TEU). Therefore, irrespective of the recurrent

40 i.e. future directions in developing the Union.

41 Yet, compare this legislative nature with the proviso of Article 15(1) final phrase TEU. Professor Anghel mentions later the same provision of Article 15 TEU (*ibid*, 585). Perhaps, the reference made to legislation should be read as meaning to future legislative works of the EU legislator according to a program adopted by the European Council (an example is the EU legislation adopted under a 5-year plan for Justice and Home Affairs, the latter being adopted by European Council under Article 68 TFEU).

42 *Ibid.*, 584.

43 *Ibid.*, 585.

tendency of the European Council to rely on means outside the Treaties in order to attain goals related to the aims of the EU, the reference made in Article 10(2) (2) TEU to the fact that “Member States are represented in the European Council” does not bear a significance able to lead to the conclusion that the latter institution is an “international organisation” or that its meetings belong to “external affairs”. That provision stresses the intergovernmental nature of this institution of the European Union. Article 10 TEU is included in Title II of the TFEU – “Provisions on democratic principles” applicable to the European Union. Two fundamental statements concerning the EU legal order should be reminded here. Is the EU a (classic) international organisation,⁴⁴ taking into account that “the [Union] constitutes a *new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the *subjects of which comprise not only Member States but also their nationals*”?⁴⁵ Also, what about the founding Treaty (CEE) and the subsequent Treaties? “By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply”.⁴⁶ Along the Member States, the Union resorts also on “its” citizens, on governments of the Member States, but also on national Parliaments, and on political parties at European level (Article 10 TEU).

Coming to the issue of a division in representation in the European Council according to issues on the agenda, reference should be made to Article 15 TEU: “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof”. It should be “domestic” any issue that is included in the (institutional and procedural) system of Treaties. It has to be “foreign” any issue decided outside the EU system, but also any amendment of the Treaties that has to be ratified by Member States. According to this division, the simplified revision procedures of EU Treaties – under Article 48(6) TEU – should be included in the “domestic” issues, while (to a certain degree) ordinary revision procedure and international agreements concluded by representatives of Member States outside the context of the EU institutional framework should be treated as “foreign”.

Firstly, regarding the simplified revision procedures provided for in Article 48(6) TEU, the decisions adopted by the European Council are subject to the institutional system of the European Union,⁴⁷ so that Treaty amendments con-

44 See for example Robert Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), 48, that rejects the account “*sui generis*” for explaining the European Union.

45 Judgment in *van Gend*, 26/62, EU:C:1963:1 (emphasis added).

46 Judgment in *Costa v ENEL*, 6/64, EU:C:1964:66.

47 This is the case with the European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p.

tained in such decisions are not subject to (unanimous) ratification by Member States in order to come into force. Secondly, the ordinary revision procedure (Article 48(2)-(5) TEU) exposes the dual nature of the EU Treaties:⁴⁸ while the Member States are “masters of the Treaties”⁴⁹, and “[t]he amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements”, the European Council plays a very important role both in initiating the procedure, and also in overcoming any deadlock in reaching unanimity in ratification. Therefore, the conclusion of a new EU Treaty has to comply with the Romanian legislation concerning negotiation and conclusion of international treaties. Thirdly, international agreements concluded by representatives of Member States outside the context of the EU institutional framework should be treated as classic type of international treaties. Among these, are listed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (“TSCG”, also called the “Fiscal Compact”) of 2 March 2012, and the Treaty establishing the European Stability Mechanism (the “ESM Treaty”) of 2 February 2012. As Professor Deirdre Curtin writes, these treaties are concluded “extramurally”, *en marge* of a European Council meeting.⁵⁰ This latter class of treaties comes under the “foreign relations” heading and they should be treated according to relevant constitutional provisions and Romanian legislation concerning negotiation and conclusion of international treaties the Act no 590 of 22 December 2003 on treaties.

Therefore, when an international treaty is concluded *en marge* of European Council meetings, then Article 91 of the Constitution is applicable, and its conclusion on the part of Romania should be performed by the President. This should be perhaps the meaning of the Constitutional Court statement in Decision no 683 of 27 June 2012.

In addition, in what concerns the problem of democratic accountability related to such international acts, comparative insights are useful in this regard. From example, the Act on cooperation between the Federal Government and the German Bundestag in matters concerning the European Union⁵¹ was supplemented in 2013 in order to cover any international agreements and intergovernmental arrangements if they supplement, or are otherwise closely related to the law of

1), whose validity was challenged by means of a reference for a preliminary ruling at the European Court of Justice; the latter gave (in Full Court) its judgment on 27 November 2012 in case C-370/12, *Pringle v Government of Ireland and Others*, EU:C:2012:2493.

48 For a discussion, see R Schütze, *European Constitutional Law*, above n 44, 61–2.

49 R Schütze (*European Constitutional Law*, above n 44, 4, note 26) emphasises the view that EU Treaties is not “primary EU law”.

50 Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, (2014) 77(1) *The Modern Law Review* 1–32, 7 ff.

51 The English version is available at: http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/euzbbg/248870.

the European Union. These acts are now subject to ordinary rules of participation of the Bundestag in EU affairs.

3. The representation in the European Council meetings between the President and the Prime Minister – some practical conclusions

The second decision of the Constitutional Court (no 784 of 26 September 2012) clearly excludes a Romanian legislative provision that would place the President and the Prime Minister on an equal footing in what concerns reaching an agreement for representation in the European Council. That conclusion stems from the emphasis put in decision on the primary nature of the mandate held by the President. From that decision it may be inferred also that the Parliament does not play a role in arbitrating such a potential conflict within the Executive branch.

On the other hand, this second decision of the Court stresses that the President himself has to draft and adopt the mandate, in case he decides to take part in a European Council meeting; moreover, by reading together the second and the third decision concerning what is today Article 18 of the Act on cooperation, it seems clear that the Government may submit only its mandate to the Parliament, yet not that of the President. As it will be discussed in the next point of the present section, this is a consequence of the relationship between the President and the Parliament according to the Constitution.

As mentioned already, the third decision of the Court (Decision no 449 of 6 November 2013) holds that the power of representation in the European Council enjoyed by the President is not discretionary, but it has limits. It is not clear where the source of those three criteria⁵² is. Also, by pointing out that the Act on cooperation should limit itself to regulate the relationship between the Government and the Parliament, the potential consequences on drafting and adopting the mandate by the President are left out from legislation. The only provision in this regard is that of Article 18(4) of the Act on cooperation, which will be discussed later on. Nonetheless, the analysis carried out by the Court on the correspondence between the title of the Act and its content should not be construed as meaning that a future law would not regulate the relationship within the Executive branch in what concerns the representation in the European Council.

All these decisions of the Court discussed here do not elaborate any division between drafting and approving (adopting) a mandate for a European Council meeting: the first decision of the Court was even more assertive in holding that only the President has the power to draft and approve the mandate. That conclusion is at variance with the practice of negotiating and concluding international treaties. These procedures are mentioned in Article 91(1) of the Constitution

52 i.e.: the particular position of the authority in relation with the agenda of the European Council; the need to legitimate the Executive position to the European Council by the Parliament; practical issues in enforcing the “decisions” taken by the European Council.

and regulated in detail by Act no 590 of 22 December 2003 on treaties. Under the former provision, “[t]he President shall, in the name of Romania, *conclude international treaties negotiated by the Government*, and then submit them to the Parliament for ratification [...]” (emphasis added). According to the division in the Act no 590 of 22 December 2003, it is of interest here the class of treaties concluded at State level (on behalf of Romania). The procedures for negotiating and conclusion of such treaties involve the Ministry of Foreign Affairs, the Government and the President of Romania. Yet, *a fortiori*, taking into account that acts adopted at the European Union level do not need to be ratified by Member States in order to produce legal effects, the procedure concerning a mandate in the European Council should involve not only the President, but also the government (*lato sensu*) and the Parliament.

In this series of decisions, the only place regarding the cooperation between the heads of the Executive branch in establishing a mandate is that concerning the mandate in EU Council: in its third decision (no 449 of 6 November 2013), the Court supported a certain degree of prevalence of the President over the Government in establishing such a mandate. Even if the Court did not expressly refer to it, it is obvious that the pronouncement finds its basis in Article 87 of the Constitution that gives the President the right to “participate in the meetings of the Government debating upon matters of national interest with regard to foreign policy, the defence of the country, upholding public order, and, at the Prime Minister’s request, in other instances as well”, and in that regard “[t]he President of Romania shall preside over the Government meetings he participates in”. Unfortunately, in that decision, the Court did not elaborate on a potential “participation, consultation and cooperation among the peaks of the executive branch of government” in what concerns the mandate for European Council meetings.

The Treaties themselves establish certain principles on working of the European Council, relevant for this division of roles. Under Article 16(6)(2) TEU, the General Affairs Council is responsible to prepare and to ensure the follow-up to meetings of the European Council.⁵³ This rule also supposes that the heads of the Executive branch of the Romanian government have to cooperate in drafting and approving the mandate.

4. The Parliament and the mandate for the European Council – certain paradoxes

Article 18 of the Act on cooperation reveals a paradoxical logic: depending on the will of the President, the degree of parliamentary involvement in draft-

⁵³ Detailed rules are provided for in the European Council Decision 2009/882/EU of 1 December 2009 adopting its Rules of Procedure (OJ L 315 of 2.12.2009, p. 51), and also in the Council Decision 2009/937/EU of 1 December 2009 adopting the Council’s Rules of Procedure (OJ L 325 of 11.12.2009, p.35), amended.

ing (establishing) the mandate to a European Council meeting may vary. If the President decides to take part in a meeting, he has the faculty of addressing the Parliament, while the latter does not have any power to influence that mandate. It is true that this limit flows from the constitutional provisions, according to which the Parliament does not have a power to control the President, unlike the relationship provided for between the Parliament and the Government (according to Article 111 of the Constitution). In other words, under the current provisions of the Constitution, it is the President who decides to “address Parliament by messages on the main political issues of the nation” (according to Article 88 of the Constitution). Contrary, if the President decides to mandate the Prime Minister to participate in a meeting, then the Parliament would be able to perform a scrutiny over the proposal for mandate. The Parliament may adopt proposals concerning that mandate, and these shall be taken into account in the mandate drafted by the Government. Yet, when the Prime Minister takes part in a European Council meeting, the Government has the final word on drafting the said mandate. Unlike the previous version of Article 18 of the Act (former Article 19 of the bill), the current text does not foresee any power of the Parliament to establish the mandate, and it also does not provide for a duty on the part of representative to explain reasons the position in the meeting of the European Council was at variance with the initial mandate. That Article which was judged as being contrary to the Constitution would have given the Parliament the main role in arbitrating the Romanian representation to the European Council and also on the version agreed of the position expressed in that meeting.

On the other hand, it is not clear the scope of Article 8 of the Act on cooperation. Under this article, “[t]he Government shall regularly deliver to the two Chambers of Parliament the following documents: (a) reports concerning the results of participation to the European Council [...]”. A narrow reading of this provision (meaning that these reports concern only the case when the Prime Minister participates in a European Council meeting) would mean that the Parliament is deprived of its right to information. A systematic interpretation of Article 8 of the law implies that the Parliament should be informed about the entire policy cycle of the decision-making process in the European Union, from the general political directions and priorities established by the European Council to the fulfilling by Romania of the transposition duties of the European Union law in the national legislation. That cycle should not be broken according to the institution involved in a certain point and the cooperation should prevail.

In its third decision (no 449 of 6 November 2013) in this epic, the Constitutional Court seized the paradox of Romania being the only State of the European Union in which the mandate to European Council originates from a single authority – in this case, the President. Yet, would the future revision of the Constitution improve the division of powers within the Executive in that matter?

In that regard, perhaps it would be needed also to remedy the paradox of the President's discretion in involving the Parliament.

VII. Concluding remarks: Who bears the constitutional responsibility for European integration? Is the Romanian case (so) different?

The first question mentioned in the title of this section is not unusual, but it is widespread within Member States of the European Union. Perhaps, in that regard, the most emblematic place is the decision rendered by the German Federal Constitutional Court on 30 June 2009 concerning the Treaty of Lisbon:⁵⁴

“The integration programme of the European Union must be sufficiently precise. In so far as the people itself are not directly called upon to decide, democratic legitimation can only be achieved by means of parliamentary responsibility [...]. A blanket empowerment for the exercise of public authority, in particular one which has a direct binding effect on the national legal system, may not be granted by the German constitutional bodies [...]. In so far as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure solely or mainly by the institutions of the Union, albeit under the requirement of unanimity, whilst preserving the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany, has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court”.⁵⁵

Hitherto, the Constitutional Court of Romania did not approach explicitly this question. For example, in its decision rendered on the occasion of the last revision of the Constitution (2003), which included a new Article 145¹ (now Article 148 of the Constitution) – the Decision no 148 of 16 April 2003⁵⁶ – while the Constitutional Court discussed the transfer of powers to the European Union and emphasised the fact that the institutions of the latter do not have a competence of their own, the Court also noted that the “accession through a law is meant to make known to the supreme representative body of the nation not only the significance of accession to the European Union, but also the responsibility which is incumbent on the Romanian state, as consequence of acquiring the membership of the European Union”. While that statement emphasised the role played by the Parliament (under Article 61 of the Constitution), the decision did not elaborate on paragraph (4) of that Article. That provision reads as follows:

54 Federal Constitutional Court, Judgment of the Second Senate of 30 June 2009, case 2 BvE 2/08 et al., English translation available at: https://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html.

55 *Ibid.*, para. 236.

56 Published in *Monitorul Oficial* no 317 of 12 May 2003.

“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) [i.e. founding treaties of the European Union and binding secondary law] are observed”.

The Court noted that “Article 145¹(4) establishes the competence of the President of Romania, of the Parliament and of the Government to guarantee fulfilment of obligations resulted by the Act of accession and of the putting into practice of the founding provisions of the European Union and binding regulations [i.e. secondary legislation] derived from these”.

The Court judged Article 145¹(5) (now Article 148(5) of the Constitution – according to which: “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”) as a “correct and necessary provision taking into account that the national Parliament is a partner of the decision-making bodies of the European Union, in that manner the role held by the national legislative authority being enhanced”. At that time, that was the place assigned to the Parliament in EU affairs.^{57 58}

Nonetheless, decisions discussed in this article shed some light on the matter. On a careful reading of these decisions, it came out that Article 148 of the Constitution concerns not only the *ex post* side of Romania’s membership to the European Union. The Romanian legal literature has already emphasised this conclusion: by reference to provisions used in the Constitutions of the newer Member States of the European Union, it was noted that these Constitutions do not only provide for in what concerns limits places on the national sovereignty, but they also include institutional guarantees placed on all three branches of government; these guarantees concern effective participation in a ever growing and irreversible European integration, active participation in the institutional and legal European building-up process, and also concerning the obligations resulted from the European legal order.⁵⁹

57 Not to mention that this provision was meanwhile rendered nugatory by the so-called “Barroso initiative”, under which proposal of EU acts are send directly by the European Commission to national Parliaments.

58 For the sake of completeness it should be pointed out that the duties of the Parliament under Article 148 of the Constitution concern also the *ex post* participation in European affairs, more precisely the case of (not) transposing (or the case when the Parliament failed adequately to transpose) EU directives into national law. See recently the Decision no 390 of 2 July 2014 of the Constitutional Court of Romania, published in *Monitorul Oficial* no 532 of 17 July 2014.

59 Simina Tănăsescu and Mihai Constantinescu, in: Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită – Comentarii și explicații* [The revised Constitution of Romania – Comments and explanations], ALL Beck, 2004, 334; see also Elena Simina Tănăsescu, *Articolul 148*, in: Ioan Muraru and Elena Simina Tănăsescu (eds.), *Constituția României. Comentariu pe articole* [The Constitution of Romania. Comments on articles], CH Beck, 2008, 1425 (“on effective legal guarantees

From the point of view of the Constitutional Court, expressed mainly in the first two decisions in this constitutional epic, Article 148(4) of the Constitution was seen as imposing a duty on the President of Romania to represent the Romanian State in the European Council. Similar duties under that constitutional provision should have the other institutions listed in that provision: The Parliament and the Government.⁶⁰ Would be disregarded the commitments already taken by Romania as a member of the European Union depending on which of the heads of the Executive branch of the government is participating in the European Council meetings? In other words (also words of the Court), would a divided representation in those meetings (depending on issues on the agenda) break the Treaty on European Union? More important in what concerns establishing the course of European integration is the fact that the Parliament is understood as the “supreme representative body of the nation” (Article 61 of the Constitution), that meaning the Parliament approves the government programme (Article 102(1) of the Constitution) and more generally controls over the government (*lato sensu*). The fact that the Parliament lacks the power to control over the President should not preclude the pursuing a scrutiny over the integration programme of the European Union. The Executive and the Legislative should cooperate on that, and that seems to be the main lesson of this constitutional epic. A future constitutional revision would have to make clear the respective roles of these branches of government in respect of EU affairs.

concerning taking on and effective fulfilling of all effects of [Romania's] accession”).

- 60 Interestingly, the Romanian legal literature expresses the view that the place in the list of Article 148(4) of the Constitution (“The Parliament, the President of Romania, the Government”) is given according to the degree in representativeness, as the Parliament is called to enact legislation, while the President and the Government have to put into practice that legislation: Ștefan Deaconu, *Articolul 80*, in: Ioan Muraru and Elena Simina Tănăsescu (eds.), *Constituția României. Comentariu pe articole*, above n 59, 758–9.