THE CONSTITUTIONAL COURT OF ROMANIA AND EUROPEAN UNION LAW

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Abstract: The Constitutional Court of Romania has subjected the introduction of a norm of European Union law into the constitutionality control, as an interposed norm to the standard norm. On the one hand, the norm should be sufficiently clear, precise and unequivocal in itself, or its meaning should have been clearly, precisely and unequivocally established by the Court of Justice of the European Union, and on the other hand it should be circumscribed by a certain level of constitutional relevance, so that its normative content could support the possible breach of the Constitution – the only direct standard norm within the constitutionality control – by national law. However, the experience of the Constitutional Court of Romania over the eight years (2007–2014) since the EU accession, does not seem to be very convincing, irrespective of the way in which European Union law, including the case law of the CJUE has been used: as justifying or circumstantial argument, as a mere reference or in an inadequate context.

Keywords: European Union Law; constitutional courts; constitutional control; interposed norm; transposition of directives: Court of Justice of the European Union

1. Introductory remarks. Reference to CJUE decisions in the case law of the Constitutional Court of Romania

The first contact of the *Constitutional Court of Romania* with the European Union and its law already goes back to time immemorial, with the so-called ‘Euro-friendship’ notable during the pre-accession time, in which the call on the European Union law envisaged rather the creation of authoritative arguments, or sometimes merely circumstantial ones. Historically speaking, the first reference dates as far back as 2000, when the Constitutional Court noted in Decision No. 253 of 28 November 2000, that ‘the provisions of the Law No. 8/1996 on

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Copyright and Neighbouring Rights have taken over the mechanism existing on international level'. It also noted the relevance of 'some of the provisions of the Council Directive No. 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (a legal act which, even though it does not have legal effects in Romania, contains internationally acknowledged demands)'.²

Only six years later does the Constitutional Court of Romania timidly reopen its gates to European Union law, stating in Decision No. 205 of 7 March 2006, that 'Romania is being strictly monitored by the European Commission in matters of *Competition*, and the infringement of these provisions in the Accession Treaty is capable of triggering the safeguard clause, with the consequence of postponing Romania's accession to the European Union'.³ Moreover, 'with reference to the criticism regarding the existence in the law of some regulations applicable to the structures on the European level, [...] the Court finds that taking over some regulations adopted by the fora of the European Union does not mean exceeding their powers, but implementing the Community law in the internal law'.⁴

At the same time, the first reference to the ECJ case law appears and the Constitutional Court notes that 'by the *Santex* Decision of 27 February 2003,⁵ the

2 *The Constitutional Court of Romania*, Decision No. 253 of 28 November 2000 on the unconstitutionality exception of the provisions of Art.131, par.(3), par.(4) and par.(5) of the Law No. 8/1996 on copyright and neighbouring rights, published in the Official Gazette, Part I, No. 261, of 22 May 2001. At the time, President of the Constitutional Court was prof. Lucian Mihai, who was at the same time professor of intellectual property law at the Law School of the University of Bucharest, which can explain, in relation to his whole case law at the time, the 'bizarre' reference to the text of a Directive of the Constitutional Court.

3 *The Constitutional Court of Romania*, Decision No. 205 of 7 March 2006 on the unconstitutionality exception of the provisions of Art.III of the Government Emergency Ordinance No. 43/2005 amending and supplementing the Government Emergency Ordinance No. 119/2001 on some measures for the privatisation of the "Sidex" Galați Steel Works (S.C. Combinatul Siderurgic 'Sidex' - S.A. Galați) and of the Government Emergency Ordinance No. 51/1998 on the realisation of some state assets, as well as of the Government Emergency Ordinance No. 43/2005 in its entirety, published in the Official Gazette, Part I, No. 340 of 14 April 2006. Of course, previously, by the Decision No. 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Constitution of Romania, published in the Official Gazette, Part I, No. 317 of 12 May 2003, the Constitutional Court had established that 'the Member States of the European Union have decided to perform jointly some duties which traditionally are matters for the national sovereignty of each Member State. The accession of Romania to the European Union presupposes the observation of the provisions of the *acquis* regarding the free movement of capital, and the rights of the European citizens to invest and acquire goods under conditions of equality with Romanian citizens.'

4 *The Constitutional Court of Romania*, Decision No. 298 of 29 March 2006 on the unconstitutionality of the Law regarding the reform of the health system, published in the Official Gazette, Part I, No. 372 of 28 April 2006.

5 Reference is made to the case C-327/00, *Santex*, Judgement of the Court of 27 February

Court in Luxemburg has decided about the establishment of limitation periods for some public procurement procedures, that the definition of the conditions in which these limitation periods operate is subject of the legal system of the Member States and is, in principle, in subject to the requirement of the application of the principle of legal certainty.⁶ Also by the same token, in relation to the establishment of legal requirements for the admission into the profession of lawyer which cannot discriminate against people already retired on the age criterion or who have less than 5 years until retirement age, 'the Court of Justice of the European communities, by the Decision of 22 November 2005, given in the case *W. Mangold v R. Helm*,⁷ regarding the establishment of an age criterion in the matter of conclusion of employment contracts, has decided that a [...] legislation which retains the age of the worker as sole criterion for the application of a fixed-term employment contract, without having demonstrated that the establishment of an age threshold [...] is objectively necessary to achieve an employability objective [...], must be considered as outside the appropriate and necessary framework to attain the envisaged objective.'⁸

The reticence mentioned above (or maybe the insufficient professional approach at that time) also led to a first confusion between the norms of the Council of Europe and those of the European Union. Thus, the Constitutional Court held by Decision No. 568 of 19 September 2006, that '[a] further criticism consists in maintaining the infringement of the Recommendation (2002)2 regarding the access to official documents, adopted by the Committee of Ministers of the Council of Europe, as well as the infringement of Ch. 2 (in reality Title I – Article II-71) of the Charter of Fundamental Rights of the European Union on freedom of information. The Constitutional Court finds that these statements are without merit. In order to implement the provisions of Art.148 of the Constitution, the process of accession of Romania to the European Union must be completed, which means that at the date when this decision is made, there can be no analysis of the possible contradiction between the criticised legal texts and

2003, ECLI:EU:C:2003:109; the citation from the text of the Judgement is incomplete.

- 6 *The Constitutional Court of Romania*, Decision No. 308 of 6 April 2006 on the unconstitutionality exception of the provisions of Art.45 par.(5) of the Law No.10/2001 regarding the legal regime of some immovable property abusively taken over during 6 March 1945–22 December 1989, published in the Official Gazette, Part I, No. 390 of 5 May 2006.
- 7 Case C-144/04, *Mangold*, Judgement of the Court of 22 November 2005, ECLI:EU:C:2005:709.
- 8 *The Constitutional Court of Romania*, Decision No. 513 of 20 June 2006 on the unconstitutionality exception of the provisions of Art.16¹ of the Law No.51/1995 for the organisation and practice of the profession of lawyer, published in the Official Gazette, Part I, No.598 of 11 June 2006. This last resolution is cited also by K. Benke in *Challenges of the Constitutionality Control: Past and Future*, a material which was published in the Anniversary Volume "20 Years of Existence and 100 Years of Constitutionality Control. The Constitutionality Control – Tradition and Perspectives", coordinated by A. Zegrean and M.-S. Costinescu, Universul Juridic Press, Bucharest, 2013, p.123.

the provisions of the international documents mentioned.⁹ The error is rightfully considered in doctrine to be ‘inadmissible’,¹⁰ the provisions of Art.148 of the Constitution referring exclusively to European Union law. Surprisingly enough, the same error was repeated even worse, after the accession, in the text of a decision from 2007.¹¹ The Constitutional Court established by Decision No. 588 of 19 June 2007, that ‘this kind of Community acts’¹² represent legal measures which allow the institutions of the European Union to present their points of view to the Member States, without the obligation of the Member States to comply with the decision made by the Community administration. Recommendations, as opposed to opinions, can be made on its own initiative, thus representing only the position of the issuing institution, their real meaning being of a moral or political nature.¹³

The number of judgments of the Court of Justice of the European Union and of the Court of European Union invoked in the statement of reasons of the *Constitutional Court of Romania* was a small one (only 62 until 31 December 2014 out of a total number of 10207 decisions, judgements and opinions adopted in the period 2007–2014¹⁴), irrespective of the way in which they were used.¹⁵

9 *The Constitutional Court of Romania*, Decision No. 568 of 19 September 2006 on the unconstitutionality exception of the provisions of Art.12, Art.13 and Art.22 of the Law No.544/2001 regarding the free access to public interest information, and of the Art.32 and Art. 33 of the Law No.182/2002 regarding the protection of classified information, published in the Official Gazette, Part I, No.890 of 1 November 2006.

10 See C.-L. Popescu, *Constitutionality Control. Community Law. Fundamental Rights* in *Curierul Judiciar* (Judicial Courier) No. 11/2006, p.1–3.

11 *The Constitutional Court of Romania*, Decision No. 588 of 19 June 2007 on the unconstitutionality exception of the provisions of Art.I item.228 and Art.II par.(3) of the Law No.356/2006 amending and supplementing the Code of Criminal Procedure, as well as amending other laws, published in the Official Gazette, Part I, No.581 of 23 August 2007.

12 Recommendation No.(94)12 of the Committee of Ministers of the Council of Europe, adopted on 13 October 1994 at the 516th meeting of the state secretaries.

13 Also a general laugh raises Decision No. 1636 of 10 December 2009 on the unconstitutionality of the Law amending and supplementing the Law on the Chambers of Commerce in Romania No.335/2007 and of the Law No.26/1990 on the Commercial Registry, published in the Official Gazette, Part I, No.45 of 20 January 2010, where the Constitutional Court increases *ante factum*, the number of Member States of the European Union: ‘taking into consideration that the Commercial Registry delivers a public service of particular importance for the operation of the internal market throughout the European Union, most of the Member States have placed the organisation of the Commercial Registry under public control, in various ways. Thus, in 33 *Member States* (italics added) the Commercial Registry is organised under the authority of a ministry and only in *two Member States* (italics added) is it kept by the Chambers of Commerce, but these either have the status of public institutions within the local public administration, or are under the control of a minister’. At the date when the decision was adopted there were 27 Member States within the European Union...

14 The statistic data are the official data, published on the website of the Constitutional Court of Romania and updated at the beginning of the year 2015, see http://www.ccr.ro/uploads/Statistica/Sin_dec_14.pdf [last accessed on 31.01.2015].

15 As we stated on a previous occasion, ‘the fact seems excusable from a historical point of

For example, in the statement of reasons for the Decision No. 1166 of 17 September 2009, the ECJ case law in the cases 61/65, *G. Vaassen-Göbbels v. Management of the Beambtenfonds voor het Mijnbedrijf* and *C-17/00 François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort* is considered a model for the interpretation of the concept of ‘court of law’ competent to make a reference for a preliminary ruling, but the criteria are not subject to internal law.¹⁶ The same applies to the ECJ Judgement of 11 March 1980, made in the case *Foglia v Novello*, finding that it is not competent in the case in which it would be obliged to make decisions in fictive cases, ‘which would endanger the whole system of means of redress available to private persons which allow them to defend themselves.’¹⁷ Also in Decision No. 1 of 10 January 2014, the case law of the Court of Justice of the European Union was referred to, which ‘implicitly acknowledged the necessity to respect the legitimate expectations of the citizens to whom a legal regulation is addressed, for example, in the Judgement of 15 July 2004, passed in the case *C-459/02*¹⁸ - *Willy Gerekens and the Procol Agricultural Association for the promotion of the marketing of dairy products v the Grand Duchy of Luxemburg*, par. 23 and 24, or the Judgement of 29 June 2010, passed in the case *C-550/09 – Criminal case against E. and F.*, par. 59.’¹⁹

In Decision No. 917 of 6 July 2010 simple reference is made to the judgement of 19 February 2002, passed in the case *Wouters and Others*, by the Court of Justice of the European the role of the lawyer, who, by the practice of their profession, performs an economic activity which ‘consists in offering goods or services

view, as the Constitutional Court was literally suffocated until 2012 by the abusive invocation of the unconstitutionality exception, precisely with a view to protracting passing judgement in certain cases, especially criminal ones involving corruption’, see *Curtea Constituțională a României și dreptul Uniunii Europene. Culegere de jurisprudență (The Constitutional Court of Romania and the European Union Law. Case Law Collection)*, Editura Universitară, Bucharest, 2014, a selection by D. Călin, p.6.

16 *The Constitutional Court of Romania*, Decision No. 1166 of 17 September 2009 on the unconstitutionality of the provisions of Art.37 par.(1) and (2) of the Law No.31/1990 on companies, published in the Official Gazette, Part I, No.706 of 21 October 2009.

17 *The Constitutional Court of Romania*, Decision No. 137 of 1 February 2011 on the unconstitutionality exception of the provisions of Art.86 par.(1) and (3) and of the Art.88 of the Law No.84/1998 on trade marks and geographical indications, as well as of the item 17, letter a) of the Annex No.4 to the Government Ordinance No.41/1998 on taxes for industrial property protection, and their use, published in the Official Gazette, Part I, No.320 of 10 May 2011.

18 ECLI:EU:C:2004:454.

19 *The Constitutional Court of Romania*, Decision No. 1 of 10 January 2014 on the unconstitutionality of the Law regarding the establishment of some decentralisation measures for some competencies held by some ministries and specialised bodies of the public central administration, as well as of some reform measures regarding the public administration, published in the Official Gazette, Part I, no. 123 of 19 February 2014.

on a free market'.²⁰ By the same token we also mention Decision No. 1344 of 13 October 2011, where the case law of the Court of Justice of the European Union is taken into consideration in the field of freedom to provide services, stipulated by Art.49 EC (Art. 56 TFEU now). Thus, 'by the Judgement of 3 June 2010, passed in the case C-258/08,²¹ *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator*, CJEU reconfirmed its case law according to which, in the field of gambling regulation, the Member States have a large margin of discretion'.²² Similarly, we mention Decision No. 490 of 21 November 2013, in which the Constitutional Court makes reference to the CJEU judgement of 11 June 2009, passed in the case C-429/07,²³ the judgement of 27 September 2006, passed in the case T-59/02,²⁴ by the Court of the European Union and the judgement of the Court of the European Union of 16 September 2013 passed in the case T-386/10.²⁵

At the same time, in reference to the role of the woman within the family, citing as *authoritative argument* for the principle of equal pay for equal work men and women, the judgment Judgement of 13 November 2008 made in the case *Commission of the European Communities v Italy*, C-46/07²⁶, and the judgment of 26 March 2009, made in the case *Commission of the European Communities v Greece*, C-559/07²⁷, by the Court of Justice of the European Communities, the Constitutional Court has brought about a change of perspective regarding the matter of equalisation of the retiring age for men and women. 'Without being in a position to decide the opportunity of the matter, the opposition to this solution, however, would signify at present opposing a social current of international dimensions, to which Romania is called to live up. Of course, the existing discrepancies between the current social standards in Romania and those standards

20 *The Constitutional Court of Romania*, Decision No. 917 of 6 July 2010 on the unconstitutionality exception of the provisions of Art.274 par.3 of the Code of Civil Procedure, published in the Official Gazette, Part I, No.524 of 28 July 2010.

21 ECLI:EU:C:2010:308.

22 *The Constitutional Court of Romania*, Decision No. 1344 of 13 October 2011 on the unconstitutionality exception of the provisions of the Government Emergency Ordinance No.77/2009 on the organisation and exploitation of gambling, in its entirety, and of the provision Art.1 par.(1), Art.12 par.(5), Art.14, Art.15 par.(1) letter a) item (ii), par.(4) and (6), Art.17 par.(1), (7) and (9), Art.20, Art.22 par.(2), Art.27 par.(1), (3) and (4), Art.28 par.(3) and (4) and Art.29 of it, in particular, as well as of the provisions of Art.77 par.(2) of the Law No.571/2003 on the Tax Code, published in the Official Gazette, Part I, No.32 of 16 January 2012.

23 ECLI:EU:C:2009:359.

24 ECLI:EU:T:2006:272.

25 ECLI:EU:T:2013:450. *The Constitutional Court of Romania*, Decision No. 490 of 21 November 2013 on the unconstitutionality exception of the provisions of Art. 51 par. (1) letter a) of the Competition Law No. 21/1996, published in the Official Gazette, Part I, No. 92 of 6 February 2014.

26 ECLI:EU:C:2008:618.

27 ECLI:EU:C:2009:198.

cannot be denied. Therefore the Court considers that the solution adopted by the lawmaker by the Law on the unitary pension system, in the sense of a gradual increase of the retiring age for women over a period of 15 years, is the only one capable to ensure the suitability of this measure for the social reality and the constitutionality of the law.²⁸ Decision No. 1591 of 13 December 2011 again retains as an authoritative argument, that 'the Court of Justice of the European Union decided in the same sense, too, by the judgement of 3 September 2009, in the case *Pia Messner/Stefan Kruger Company*, in order to reject as groundless the idea of 'causing irretrievable damage to the trader, by the exercise of the right to unilateral termination of the contract by the consumer'.²⁹

More recently, without any mention of the name of the cases, the Constitutional Court of Romania makes reference to the case law of the CJEU, 'which reminded the importance which the principle of the matter already judged both within the legal system of the Union, and within the national legal systems (Judgement of 29 June 2010 passed in the case C-526/08,³⁰ par. 26). This principle is the expression of the principle of legal security (judgement of 1 June 1999, passed in the case C-126/97,³¹ par. 46). Thus, in order to guarantee both the stability of the law and of the legal relations, and a good administration of justice, it is necessary that the judgements which are final after the exhaustion of all available remedies or after the expiry of the deadlines for these legal procedures, should not be contested (judgement of 3 September 2009 passed in the case C-2/08,³² par. 22).³³

2. The delimitation of competencies between the Constitutional Court of Romania and the CJEU

Initially, the Constitutional Court of Romania appreciated that it has the power to control the compatibility of internal law with European Union law.

28 *The Constitutional Court of Romania*, Decision No. 1237 of 6 October 2010 on the unconstitutionality of the provisions of Art.6 par.(1) item I letter c) and item IV letter e), of the Art.53 par.(1), Art.54, Art.65 par.(4), Art.102 par.(1) and (2) and of the Art.196 letters b), e), g), r) and s) of the Law on the unitary public pension system, as well as of the Law as a whole, published in the Official Gazette, Part I, No.785 of 24 November 2010.

29 *The Constitutional Court of Romania*, Decision No. 1591 of 13 December 2011 on the unconstitutionality exception of the provisions of Art.7 par.(1) of the Government Ordinance No.130/2000 on customer protection when on conclusion and execution of distance contracts, published in the Official Gazette, Part I, No.80 of 1 February 2012.

30 ECLI:EU:C:2010:379.

31 ECLI:EU:C:1999:269.

32 ECLI:EU:C:2009:506.

33 *The Constitutional Court of Romania*, Decision No. 365 of 25 June 2014 on the unconstitutionality exception of the provisions of Art. 4 of the Law No. 187/2012 on the implementation of Law No. 286/2009 on the Criminal Code, published in the Official Gazette, Part I, No. 587 of 6 August 2014.

Thus, in a language considered in doctrine as ‘very prudent’,³⁴ by Decision No. 59 of 17 January 2007, the Court has found that ‘the provisions of the criticised law must be brought in line firstly with the provisions of Government Emergency Ordinance No.117/2006 on national procedures regarding state aid, which annulled the relevant internal legislation, and secondly the must be correlated with the provisions of Art.87–89 of the EC Treaty’.³⁵ However, a few months later, the case law of the Constitutional Court changed by Decision No. 558 of 7 June 2007, as it considered ‘that the courts of law are the ones called to address the Court of Justice of the European Communities, with a view to ensuring the effective and uniform application of the Community legislation’.³⁶ By the same vein, towards the end of the year 2007, by the Decision No. 1031 of 13 November 2007, the Constitutional Court reconsidered it, without indicating the reasons, and decided that ‘it will examine the compatibility of the internal legislation in the field of ensuring the observance of the intellectual property rights within the clearance procedures, with the relevant European Union legislation, [...] under the Art.148 par. (2) of the Constitution [...]’.³⁷

It is clear that these case law fluctuations,³⁸ reminding maybe of the Gaussian bell curve, define a period of disorder regarding the perception and use of

34 See K. Benke, in *Challenges of the Constitutionality Control: Past and Future*, a material which was published in the Anniversary Volume “20 Years of Existence and 100 Years of Constitutionality Control. The Constitutionality Control – Tradition and Perspectives”, coordinated by A. Zegrean and M. – S. Costinescu, Universul Juridic Press, Bucharest, 2013, p.123.

35 *The Constitutional Court of Romania*, Decision No. 59 of 17 January 2007 on the unconstitutionality of the provisions of Art.1 and Art.3 of the Law on the approval of some financial measures for the small and medium-sized enterprises in the brewing industry, published in the Official Gazette, Part I, no. 98 of 8 February 2007. Also see Decision No. 547 of 15 May 2008 on the unconstitutionality exception of the provisions of Art.9 par.(1) of the Government Ordinance No.37/2007 on the establishment of the application framework for the rules regarding the driving periods, breaks and rest periods of the drivers, as well as the use of the technology recording their activity, published in the Official Gazette, Part I, No.430 of 9 June 2008, in which it was stated that ‘the texts criticised do not contravene the Regulations No.581/2008 of the European Parliament and of the Council of the European Union, invoked by the authors of the exception. On the contrary, they give it substance, and shaping in the spirit of the will of the Community legislature the more general provisions comprised in these Regulations.’

36 *The Constitutional Court of Romania*, Decision No.558 of 7 June 2007 on the unconstitutionality exception of the provisions of Art.38 and Art.52 of the Law No.248/2005 on the free movement of the Romanian citizens abroad, published in the Official Gazette, Part I, No.464 of 10 July 2007.

37 *The Constitutional Court of Romania*, Decision No.1031 of 13 November 2007 on the unconstitutionality exception of the provisions of Art.9 and Art.10 par.(1) and (2) of the Law No.344/2005 on some measures for the insurance of the observation of intellectual property rights within the clearance procedures, published in the Official Gazette, Part I, No. 9 of 7 January 2008.

38 See E.S. Tănăsescu, La primauté du droit communautaire dans la jurisprudence de la Cour Constitutionnelle roumaine, in *Analele Universității din București* (the Annals of the Uni-

the norms of the European Union law by the Constitutional Court of Romania. Moreover, Decision No. 604/2008, analysed precisely the area of action left to Member States by European Union legislation, retaining that '[t]he Regulation of the Council of the European Union No.343/2003, published in the Official Journal of the European Communities L 199, 31/07/2007, p.0023–0029, establishing the criteria and mechanisms for the determination of the Member States responsible for the examination of the applications submitted in one of the Member States by a citizen of a third country, stipulates under Art.19 par.2, that the implementation of transfer is not suspended in case of the introduction of a remedy, namely the complaint. But this is not an imperative rule, it allows either the internal legislation, or the national courts to appreciate the necessity of suspending the execution of the provision to transfer to another state, as the case may be'³⁹.

However, the case law has crystallised in the sense of the statement that *it is not within the power of the Constitutional Court to analyse the conformity of a provision of the national law with the test of the Treaty on the Functioning of the European Union* under the Art.148 of the Constitution,⁴⁰ as 'in the relations between the Community and the national law (with the exception of the Constitution), one can speak only of the priority of application of the former over the latter, which is within the power of the courts of law'.⁴¹ The source of inspiration for Decision No. 137 of 25 February 2010 was, according to the lay judge who participated in handling the unconstitutionality exception,⁴² the Ordinance of 19 December 2006 of the Constitutional Court of Poland.⁴³ Previously, it had been decided that 'in the situation in which the Constitutional Court considered itself competent to decide in the matter of conformity of the national law with the European law, it could lead to a possible conflict of powers between the two

versity of Bucharest), Law Series, No. 3/2009, p. 120.

39 *The Constitutional Court of Romania*, Decision No. 604 of 20 May 2008 on the unconstitutionality exception of the provisions of Art.121 of the Law No.122/2006 on asylum in Romania, published in the Official Gazette, Part I, No.469 of 25 June 2008.

40 *The Constitutional Court of Romania*, Decision No. 498 of 10 May 2012 on the unconstitutionality exception of the provisions of Art.1 letter g) of the Law No.12/1990 on the protection of the population against some illegal commercial activities, published in the Official Gazette, Part I, No.428 of 28 June 2012.

41 *The Constitutional Court of Romania*, Decision No. 137 of 25 February 2010 on the unconstitutionality exception of the provisions of Art.4 letter a) of the Government Emergency Ordinance No.50/2008 for the establishment of a pollution tax for vehicles, published in the Official Gazette, Part I, No. 182 of 22 March 2010. See also Decision No. 468 of 8 May 2012 on the unconstitutionality exception of the provisions of Art.274 par.1, 2 and 3 of the Code of Civil Procedure, published in the Official Gazette, Part I, No.524 of 27 July 2012.

42 See *K. Benke*, p.127.

43 *Trybunał Konstytucyjny*, Ordinance of 19 December 2006, case P 37/05, available online on the web page http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2006/P_37_05.pdf [last accessed on 14.01.2015].

courts, which, at this level, is unacceptable.’⁴⁴ Doctrine shows that ‘the unconstitutionality of an internal law cannot result simply from its nonconformity with the European one, and the Court can determine the unconstitutionality of the

44 *The Constitutional Court of Romania*, Decision No. 1596 of 26 November 2009 on the unconstitutionality exception of the provisions of Art.4 letter a) and Art.11 of the Government Emergency Ordinance No.50/2008 for the establishment of a pollution tax for vehicles, published in the Official Gazette, Part I, No.37 of 18 January 2010. In the Decision No. 1197 of 30 September 2010 on the unconstitutionality exception of the provisions of Art. 147 par.2 and Art.255 par.1 of the Criminal Code, published in the Official Gazette, Part I, No.732 of 3 November 2010, The Constitutional Court found that it does not fall within its powers to ‘analyse the compliance of a provision of the national law with the text of the Lisbon Treaty in the light of the Art.148 of the Constitution. Such power, namely to establish whether there is a contradiction between the national law and the Lisbon Treaty, which entered into force on the 1 December 2009, rests with the court’. See also Decision No. 1249 of 7 October 2010 on the unconstitutionality exception of the provisions of Art.4 letter a) of the Government Emergency Ordinance No.50/2008 for the establishment of a pollution tax for vehicles, published in the Official Gazette, Part I, No.764 of 16 November 2010, by which it was stated that ‘if the point of view were accepted that the constitutional court has the power to establish the constitutionality of a legal text in reference to a Community act, the powers of the Court of Justice of the European Union would be obviously affected, since the interpretation of the fundamental treaties falls within the power of the latter’. By the same token we mention the Decision No.1574 of 7 December 2010 on the unconstitutionality exception of the provisions of the Art.94 par.(1) letter m) with respect to Art.54 letter h) of the Law No.188/1999 on the status of the civil servants, published in the Official Gazette, Part I, No.110 of 11 February 2011; Decision No. 903 of 30 June 2011 on the unconstitutionality exception of the provisions of Art.4 letter a) of the Government Emergency Ordinance No.50/2008 for the establishment of a pollution tax for vehicles, published in the Official Gazette, Part I, No.673 of 21 September 2011; Decision No. 498 of 10 May 2012 on the unconstitutionality exception of the provisions of Art.1 letter g) of the Law No.12/1990 on the protection of the population against some illegal commercial activities, published in the Official Gazette, Part I, No.428 of 28 June 2012; Decision No. 354 of 24 September 2013 on the unconstitutionality exception of the provisions of the Government Emergency Ordinance No.34/2009 on the budgetary amendment for 2009 and the adoption of some tax and financial measures, as well as of the Art.1451 of the Law No.571/2003 on the Tax Code in the form introduced by the Government Emergency Ordinance No.34/2009, published in the Official Gazette Part I, No.764 of 9 December 2013; Decision No. 101 of 27 February 2014 on the unconstitutionality exception of the provisions of Art. 2 of the Law no. 514/2003 on the organisation and practice of the profession of legal adviser, published in the Official Gazette, Part I, No. 346 of 12 May 2014; Decision No. 53 of 5 February 2014 on the unconstitutionality exception of the provisions of Art. 10 par. (2) letter f) of the Energy and Natural Gas Law No. 123/2012, published in the Official Gazette, Part I, No. 341 of 9 May 2014; Decision No. 293 of 22 May 2014 on the unconstitutionality exception of the provisions of Art. 124 par. (2) of the Government Ordinance No. 92/2003 on the Fiscal Procedure Code, published in the Official Gazette, Part I, No. 573 of 31 July 2014; Decision No. 350 of 24 June 2014 on the unconstitutionality exception of the provisions of the Government Emergency Ordinance No. 71/2012 on the appointment of the Ministry of Health as a centralised unit for public procurement, published in the Official Gazette, Part I, No. 571 of 31 July 2014.

national law only if it is implicitly or explicitly contrary to any constitutional text.⁴⁵

Constitutional identity and respectively *national identity* are not notions further analysed by the Constitutional Court of Romania. A general reference mentions the fact that ‘each Member State, by virtue of the principle of national constitutional identity, has full freedom to establish the legislative framework relating to the statute of the members of Parliament who activate in the national legislative forum, including the legal regime of the property rights related to the exercise of these publicly appointed offices’.⁴⁶ At the same time, citing the *Bundesverfassungsgericht of Germany* (Decision of 30 June 2009 on the Lisbon Treaty), the Constitutional Court of Romania seems to develop the notion of ‘national constitutional identity’, showing that ‘member states maintain powers which are inherent to keeping their constitutional identity, as giving up powers, as well as reconsidering, accentuating and stressing new guidelines within the powers already given up, is up to the constitutional area of assessment of the Member States’.⁴⁷ Even so, as a principle, constitutional provisions offer at most a hint to the notion of national identity, for each Member State.⁴⁸

3. The possibility to use a law of the European Union within the constitutionality control form the perspective of the Constitutional Court of Romania

The Decision No. 668 of 18 May 2011 of the Constitutional Court of Romania⁴⁹ is of utmost importance regarding the possibility of the use of the provisions

45 K. Benke, *The Powers of the Constitutional Courts in Relation to the Power of the Court of Justice of the European Communities, in the Light of Their Case Law*, in *Dreptul* (Law) No. 11/2008, p. 138.

46 *The Constitutional Court of Romania*, Decision No. 964 of 20 November 2012 on the unconstitutionality exception of the provisions of Art.1 letter f) of the Law No.119/2010 on the adoption of some rules in the field of pensions, published in the Official Gazette, Part I, no.23 of 11 January 2013.

47 *The Constitutional Court of Romania*, Decision No. 683 of 27 June 2012 on the legal conflict of a constitutional nature between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette, Part I, no.479 of 12 July 2012.

48 See also M. Duțu, in *The Constitutionality Control of Laws – an instrument for promoting constitutional identity*, material published in the Anniversary Volume “20 Years of Existence and 100 Years of Constitutionality Control. The Constitutionality Control – Tradition and Perspectives”, coordinated by A. Zegrean and M.-S. Costinescu, Universul Juridic Press, Bucharest, 2013, p.106–114.

49 *The Constitutional Court of Romania*, Decision No. 668 of 18 May 2011 on the unconstitutionality exception of the provisions of Art.4 letter a) of the Government Emergency Ordinance No.50/2008 for the establishment of a pollution tax for vehicles, of the annexes No.1–4 to this Emergency Ordinance, as well as of the Government Emergency Ordinance No.50/2008, in its entirety, published in the Official Gazette, Part I, No.487 of 8 July 2011. See also Decision No. 676 of 13 November 2014 on the unconstitutionality exception of the provisions Art. XV of the Government Emergency Ordinance No. 8/2014 amending

of European Union law within the constitutionality control. The Constitutional Court has established that 'the use of a law of the European Union within the constitutionality control as an interposed norm to the standard norm implies, under the Art.148 par.(2) and (4) of the Constitution of Romania, cumulative conditionality: on the one hand this law seems sufficiently clear, precise and unequivocal in itself, or that its meaning should have been clearly, precisely and unequivocally established by the Court of Justice of the European Union⁵⁰ and on the other hand it should be circumscribed by a certain level of constitutional relevance, so that its normative content could support the possible breach of the Constitution – the only direct standard norm within the constitutionality control – by the national law. In such a hypothesis, the approach of the Constitutional Court is different than the mere application and interpretation of the law, which is a power of the courts of law and of the administrative authorities, or than the possible matters which are part of the legal policy promoted by the Parliament or the Government, as the case may be. By virtue of the cumulative conditionality stated above, it is up to the Constitutional Court to apply within the constitutionality control the decisions of the Court of Justice of the European Union or to ask itself preliminary questions in order to establish the content of the European law. Such approach is part of the national and European institutional cooperation, as well as of the judicial dialogue between them, without bringing into discussion aspects which have to do with establishing hierarchies between these jurisdictions. In this case, even though the meaning of the European law was decoded by the Court of Justice of the European Union, the requirements resulting from this decision do not have constitutional relevance, having to do more with the obligation of the lawmaker to pass laws in keeping with the decisions

and supplementing some legal acts, and other budget and tax measures, publishes in the Official Gazette, Part I, No. 93 of 4 February 2015, adopted in a case in which in parallel reference for a preliminary ruling to the Court of Justice of the European Union, case C-288/14, Ciup, has been made, a case which is still open. This is the preliminary question: 'Can the principle of equivalence and effectiveness of remedies in relation to infringements of the European Union law, set out in the case law of the Court of Justice of the European Union, as well as the right to property, set out by the Art. 17 of the Charter of Fundamental Rights of the European Union, be interpreted as contravening some provisions of the internal law which postpone, by a staging of 5 years, the refund of the taxes levied as an infringement of the Community Law, and of the respective interest, decided by an enforceable judgement until 31 December 2015?.'

- 50 Considered to be a 'condition of cognoscibility by which the constitutional court, to ensure the observation of the principle of separation of powers, declares itself competent to enforce the interposed norms within the constitutional law, only if these do not pose difficulties as to their meaning.' See M. Mazilu-Babel, *Conditions To Be Met When Using A Norm of the European Union Law Within the Constitutionality Control*, in Dreptul (Law) No. 11/2013, p.182–191. The author also shows that 'any provision of the Community law which can produce an indirect effect of interpretation, according to the case law of the Court of Justice, will meet *a fortiori* also the first condition of existence as an interposed norm.'

of the Court of Justice of the European Union, otherwise, Art.148 par. (2) of the Constitution of Romania being applicable.⁵¹

Moreover, it was decided that 'taking into consideration the place occupied by the Community regulations, according to Art. 148 par. (2) of the Constitution, in relation to the internal laws, the Constitutional Court is called to invoke in its case law the obligatory acts of the European Union whenever they are relevant to the cause, as long as their content is clear and no specific interpretation is necessary.'⁵²

This has happened several times, including in the case law solutions with reference to the Cooperation and Verification Mechanism of the progress made by Romania with a view to attaining certain specific reference objectives in the field of reform of the judicial system and of the fight against corruption, the obligatory European legislation being a particularly important indicator for the Constitutional Court⁵³

Thus, by Decision No. 1519 of 15 November 2011,⁵⁴ the Constitutional Court established that 'the provisions mentioned in the Codes of Civil and Criminal Procedure referring to abstention and objection can also satisfy the demands comprised in the Decision 2006/928/EC of the Commission of 13 December 2006 [...], referring to the existence, in all Member States, of an impartial, inde-

51 By the same token, see also Decision No. 921 of 7 July 2011 on the unconstitutionality exception of the provisions of Art.4 letter a) and letter b) of the Government Emergency Ordinance No.50/2008 for the establishment of a pollution tax for vehicles, published in the Official Gazette, Part I, No.673 of 21 September 2011, as well as Decision No. 283 of 21 May 2014 on the unconstitutionality of the provisions of Art. 39 par. (6), Art. 42 par. (1) and (10), Art. 43 par. (2), Art. 48 par. (1) and (8), Art. 51 par. (6), Art. 57 par. (6), Art. 59 par. (6), Art. 62 par. (2), Art. 75 par. (4), Art. 77 par. (4), Art. 111 par. (2) and Art. 160 par. (5) of the Law on insolvency and insolvency prevention procedures, as well as of the Law in its entirety, published in the Official Gazette, Part I, No. 454 of 20 June 2014.

52 *The Constitutional Court of Romania*, Decision No. 383 of 23 March 2011 on the unconstitutionality of the provisions of Art. I item 2 with reference to Art. 16 par. (1), item 9 with reference to Art. 31 par. (1), item 25, item 37 with reference to Art. 72 par. (5), item 40 with reference to Art. 79 par. (4), item 51 with reference to Art. 94 par. (2), items 52, 66, 70, 75, 78, 84 and Art. II par. (1) of the Law amending and supplementing the Law No. 53/2003 – Labour Code, as well as the law in its entirety, published in the Official Gazette, Part I, No. 281 of 21 April 2011.

53 See K. Benke, in *Challenges of the Constitutionality Control: Past and Future*, a material which was published in the Anniversary Volume "20 Years of Existence and 100 Years of Constitutionality Control. The Constitutionality Control – Tradition and Perspectives", coordinated by A. Zegrean and M.-S. Costinescu, Universul Juridic Press, Bucharest, 2013, p.p.128.

54 *The Constitutional Court of Romania*, Decision No. 1519 of 15 November 2011 on the unconstitutionality of the provisions of Art.21 par.(1) of the Law No.51/1995 for the organisation and profession of lawyer, published in the Official Gazette, Part I, No.67 of 27 January 2012.

pendent and efficient judicial and administrative system, endowed with sufficient means, among other things to fight against corruption.’ At the same time, Decision No. 2 of 11 January 2012 draws the conclusion that the quality of a Member State of the European Union ‘imposes on the Romanian state the obligation to apply the mechanism and observe the recommendations established within this framework, according to the provisions of Art.148 par.(4) of the Constitution.’⁵⁵

Doctrine however considered it was about an ‘act of reception *sui generis*, taking over through a specific source – the constitutional provision – certain norms of the European law’, and ‘any norm of the European law which has the quality to produce direct effect will automatically fulfil the first requirement as well, in order to be able to function as an interposed norm. As far as the other requirement is concerned, the criterion which has to be met allows the Court to opt, arbitrarily, either for the application *in concreto* of the interposed norm, of for ignoring it, turning the obligation imposed by Art. 148 par. (4) of the Constitution into a simple act of option.’⁵⁶ The supporters of this doctrine show that even the notion of *norme interposte* was initially used by the *Constitutional Court of Italy*, in the motivation of Decision No. 7/2004, from where it was borrowed by the Constitutional Court of Romania.⁵⁷

Still, a practical application worth mentioning as far as using a norm of the European law within the constitutionality control is concerned, as an interposed norm to the standard norm, is *Decision No. 157 of 19 March 2014*.⁵⁸ The interposed norm within the constitutionality control to the standard norm under Art. 148 par. (4) of the Constitution was Art. 108 par. (3) of the Treaty on the Functioning of the European Union,⁵⁹ which had to undergo the test of double conditionality previously indicated.

55 *The Constitutional Court of Romania*, Decision No. 2 of 11 January 2012 on the unconstitutionality of the provisions of the Law amending and supplementing the Law No.303/2004 on the statute of judges and attorneys and of the Law No.317/2004 on the Superior Council of Magistracy, published in the Official Gazette, Part I, No.131 of 23 February 2012.

56 *M. Mazilu-Babel, Conditions To Be Met When Using A Norm of the European Union Law Within the Constitutionality Control*, in Dreptul (Law) No. 11/2013, p.191.

57 See *G. Martinico, O. Pollicino*, (coord.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, Europa Law Publishing, Groningen, 2010, p. 274.

58 *The Constitutional Court of Romania*, Decision No. 157 of 19 March 2014 on the unconstitutionality of the provisions of the Law on passing the Government Emergency Ordinance No. 57/2013 amending and supplementing the Law No. 220/2008 on the establishment of the system for the promotion of renewable energy, published in the Official Gazette, Part I, No. 296 of 23 April 2014. For a confirmation of the same approach, see also Decision No. 609/2014 on the rejection of unconstitutionality exception of the provisions of Art. 23 and of the Art. 28 of the Energy and Natural Gas Law No. 123/2012, published in the Official Gazette Part I, No. 35 of 15 January 2015.

59 ‘The Commission is informed in due time so that they can present their observations regarding the projects which envisage the establishment or amendment of the aids. If a project is not considered compatible with the internal market, in keeping with the provi-

The Constitutional Court of Romania has retained 'that the norm meets the requirements of clarity and precision. Thus it unequivocally establishes the field of application – the matter of state aid, the legal entity which it addresses – the Member State of the European Union, the obligation incumbent on it – informing in due time the European Commission on the lawmaking project which envisage the institution or the amendment of the legal framework on state aid, as well as the consequence of the failure to comply with the obligation stipulated by the Treaty – dismantling or amending the aid by the respective Member State within the time established by the Commission, and the referral to the Court of Justice of the European Union with a complaint against the respective Member State.'

Regarding the second condition (the norm should be circumscribed by a certain level of constitutional relevance, so that its normative content could support the possible breach of the Constitution – the only direct standard norm within the constitutionality control – by national law) the Constitutional Court has found that 'this exigence is not met by the norm of European law [...]. 66. The provisions of the Art. 108 par. (3) of the Treaty on the Functioning of the European Union constitute procedural norms applicable in the matter of competition within the internal market, respectively in the field of state aid. According to Art. 107 par. (1) of the Treaty on the Functioning of the European Union, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the common market. In order to prevent or remove any measures which could affect free competition within the internal market, according to Art. 108 par. (1) of the Treaty on the Functioning of the European Union, the Commission, together with the Member States, permanently checks the legal frameworks of the existing aids in these states. The Commission suggests them the useful measures required by the gradual development or the functioning of the internal market. The activity of monitoring the national measures adopted in the field of state aid is performed according to the procedure laid down in the Art. 108 (2) and (3) of the Treaty on the Functioning of the European Union, as well as the provisions of the Regulations (EC) No. 794/2004 of the Commission of 21 April 2004 for the application of the Regulation (EC) No. 659/1999 of the Council for the establishment of the application norms of the Art. 93 of the EC Treaty.⁶⁰ 67. According to the preamble of the Regulation (EC) No. 659/1999 of the Council of 22 March 1999 for the establishment of the application norms of Art. 93 of the CE Treaty, in keeping with Art. 77 of the Treaty

sions of the Art. 107, the Commission initiates without delay the procedure stipulated in the previous paragraph. Before adopting a final decision, the Member State cannot implement the envisaged measures.'

60 Article 93 EEC corresponds to Article 108 TFEU and Article 92 EEC to Article 107 TFEU (ex Article 97 EC).

(now Art. 97 of TFEU) and 92 (now Art. 112 of TFEU), the Commission has, in keeping with the Art. 93 of the Treaty (now Art. 113 of TFEU), the specific power to decide the compatibility of state aid and the internal market, when it examines the existing state aids, when it adopts new decisions on new or amended aid, and when it takes measures in the case of failure to comply with its decisions or the obligations regarding notification. The Regulation constitutes the codification and consolidation of a constant practice of the Commission regarding the application of Art. 93 of the Treaty (now Art. 113 of TFEU) and establishes certain principles and procedural rules in a series of Communications, in order to ensure the effectiveness and efficiency of the procedures under Art. 93 of the Treaty (now Art. 113 of TFEU), in keeping with the case law of the Court of Justice of the European Communities.⁶¹ [...] 69. Within such a procedure, characterised by transparency and legal certainty, the rights of the interested parties and best protected, the examination end with a decision by the Commission, adopted on the basis of the available information, and, in the event of noncompliance with suspension or recovery injunctions, the Commission can refer the matter to the Court of Justice directly, in accordance with Art. 93 par. (2) the second paragraph of the Treaty (now Art. 113 of TFEU).'

As a result, the conclusion has been drawn that 'in the case, even if the meaning of the European law is clear and predictable, the requirements resulting from the interpretation and application of Art. 108 par. (3) of the Treaty on the Functioning of the European Union, as they have been developed by the secondary legislation adopted on the basis of the Treaty, do not have constitutional relevance, as they regulate only the obligation of the Romanian lawmaker, the Parliament or the Government, as the case may be, to adopt measures in the field of state aid, in compliance with the procedures stipulated by the European law. The noncompliance with the obligations assumed by the Treaty will have exclusively the legal consequences established by the European laws, namely dismantling or amending the aid within the time established by the Commission, in the case in which it establishes the incompatibility of the measures with the internal market, and respectively the referral to the Court of Justice of the European Union with a complaint against Romania, if the latter refuses to comply with a decision by

61 The Constitutional Court of Romania has shown that, when adopting the Regulation, the circumstance was taken into consideration, that in the cases in which, following the preliminary examination, the Commission cannot decide whether the aid is compatible with the internal market, an official investigation procedure must be opened, in order to enable them to obtain all the necessary information for the assessment of the aid compatibility and to allow the interested parties to present their observations. Thus, the Regulation (EC) No. 659/1999 of the Council of 22 March 1999 on the establishment of the application rules of Art. 93 of the EC Treaty (currently, Art. 113 of TFEU) contains provisions regarding the procedure of the notified aid, the procedure regarding the illegal aid, the procedure regarding the abusive use of aid, the rights of the parties involved, monitoring the aid systems, as well as provisions regarding referrals to the Court of Justice of the European Union in case of infringement of the decisions by the European Commission.

the Commission.’ So, ‘the interposed norm of European law within the constitutionality control to the standard one, established under Art. 148 par. (4) of the Constitution cannot constitute the merit of the constitutionality control or of censuring the internal law din, from the point of view of infringement against the Constitution.’

4. Case law of the Constitutional Court of Romania on the transposition of directives and framework-decisions in the case law of the Constitutional Court of Romania

As far as the transposition of directives into internal law is concerned, in general the Constitutional Court of Romania has limited itself to merely taking note of this fact. Thus the establishment of certain rules referring to the requirement to wear seat-belts or another similar safety equipment while driving on public roads is considered to be in keeping with the demands of the Directive 91/671/EEC, on the approximation of the laws of the Member States regarding the mandatory use of seat-belt in the vehicles with a capacity of less than 3,5 tonnes;⁶² Government Ordinance No.15/2002 transposes the Directive of the European Parliament and of the Council of the European Union No. 62/1999/EC of 17 June 1999, on the charging of heavy goods vehicles for the use of certain infrastructures;⁶³ Law No.122/2006 on asylum in Romania is ‘the result of harmonising the national legislation with the provisions of the Community acquis in the field of asylum and [...] the criticised legal text only transposes the provisions of Art.12 par.(2) of the Directive of the Council of the European Union 2004/83/EC of 29 April 2004’⁶⁴, the elements enumerated in the Art.63 of the Government Emergency Ordinance No.194/2002 were entirely taken over from the Resolution of the Council of the European Union of 4 December 1997 on measures which can be adopted to fight marriages of convenience (97/C 382/01), with reference to Art.35 of the Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004⁶⁵, ‘the criticised legal text only transposes in

62 *The Constitutional Court of Romania*, Decision No. 689 of 11 September 2007 on the unconstitutionality exception of the provisions of Art.36 par.(1) of the Government Emergency Ordinance No.195/2002 regarding circulation on public roads, published in the Official Gazette, Part I, No.717 of 23 October 2007.

63 *The Constitutional Court of Romania*, Decision No. 489 of 21 November 2013 on the unconstitutionality exception of the provisions of Art. 99 par. (1) item 8 and par. (2) and Art. 108 par. (1) letter a) item 3 and 4 of the Government Emergency Ordinance No. 195/2002 regarding circulation on public roads, published in the Official Gazette, Part I, No. 50 of 21 January 2014.

64 *The Constitutional Court of Romania*, Decision No. 1033 of 9 October 2008 on the unconstitutionality exception of the provisions of Art.23, Art.25 par.(1), Art.26 par.(1) and (2) item 2 and 3 and Art.63 of the Law No.122/2006 on asylum in Romania, published in the Official Gazette, Part I, No.757 of 10 November 2008.

65 *The Constitutional Court of Romania*, Decision No. 432 of 15 April 2010 on the unconstitutionality exception of the provisions of Art.62 par.(1) letter a) item (iii), Art.63 and 84 of the Government Emergency Ordinance No.194/2002 on the legislation regarding aliens in

the national law the provisions of Art.16 par.(1) of the Directive of the Council of the European Union 2004/83/EC of 29 April 2004 on the minimal standards regarding the requirements which third country nationals and stateless persons must meet in order to be acquire the status of refugee⁶⁶, 'the legal provisions subject to the constitutionality control transpose in the internal law the provisions of Art.5 on the trade mark rights, comprised in the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 on the approximation of the laws of the Member States regarding trade marks (Codified version),⁶⁷ 'these provisions have been adopted in order to bring the Romanian law in line with the standards imposed by the Community acquis in the matter of companies, the obligation to make public the financial situations being stipulated under Art.2 par.(1) letter f) of the First Council Directive No.68/151/EEC of 9 March 1968⁶⁸, and 'the obligation established for the drivers to use daytime running lights [...] is in keeping with the demands of the European Union laid down in the provisions of the Directive 2008/89/EC of the Commission of 24 September 2008 amending for the purpose of adapting it to the technical progress the Directive 76/756/EEC of the Council on the installation of lighting and light-signalling on motor vehicles and their trailers⁶⁹.

At the same time, the provisions of Art.139 par.(6) and (11) of Law No.8/1996 transpose the provisions of Art.7 par.(1) of the Directive 2004/48/EC of the European Parliament and of the Council,⁷⁰ and the transposition in the internal law of a secondary regulation of the European Union, namely a directive, 'an obligatory act which establishes for the Member States an obligation to achieve a certain result regarding the transposition, which however does not prevent the national lawmaker to make more ample, rigorous or detailed regulations in the envisaged field. The national lawmaker however has the obligation to carry

Romania, published in the Official Gazette, Part I, No.361 of 2 June 2010.

66 *The Constitutional Court of Romania*, Decision No. 631 of 12 May 2011 on the unconstitutionality exception of the provisions of Art.99 of the Law No.122/2006 on asylum in Romania, published in the official Gazette, Part I, No.536 of 29 July 2011.

67 *The Constitutional Court of Romania*, Decision No. 688 of 31 May 2011 on the unconstitutionality exception of the provisions of Art.36 of the Law No.84/1998 on trademarks and geographical indications, published in the Official Gazette, Part I, No.537 of 29 July 2011.

68 *The Constitutional Court of Romania*, Decision No. 879 of 30 June 2011 on the unconstitutionality exception of the provisions of Art.237 par.(1) letter b) of the Company Law No.31/1990, published in the Official Gazette, Part I, No.673 of 21 September 2011.

69 *The Constitutional Court of Romania*, Decision No. 932 of 7 July 2011 on the unconstitutionality exception of the provisions of Art.44 par.(2), Art.99 par.(2) and Art.108 par.(1) letter a) item 7 of the Government Emergency Ordinance No.195/2002 regarding circulation on public roads, published in the Official Gazette, Part I, No.525 of 26 July 2011.

70 *The Constitutional Court of Romania*, Decision No. 960 of 12 July 2011 on the unconstitutionality exception of the provisions of Art.139 par.(6) and (11) of the Law No.8/1996 on copyright and neighbouring rights, as well as the provisions of Art.9 of the Government Emergency Ordinance No.100/2005 on ensuring the observation of industrial property rights, published in the Official Gazette, Part I, No.668 of 20 September 2011.

out this operation in a correct manner, in accordance with the objective and the spirit of the transposed European directive, which in this case, envisages more efficient consumer protection.⁷¹

It is also specified that ‘the Law No. 40/2011 amending and supplementing the Law No. 53/2003 – Labour Code – the legal act by which the criticised regulation was introduced – makes reference in accompanying the statement of reasons to the Directive 98/59/EC of the Council of 20 July 1998 on the approximation of the laws of the Member States regarding collective redundancies, which regulates increased protection measures for the workers, in case of collective redundancies;⁷² but also that ‘Romania had the obligation to transpose the Directive of the Council of the European union 2003/8/EC on the improvement of the access to justice in the case of cross-border litigations, by establishing minimal common rules regarding legal aid in the case of this category of cases.⁷³

Moreover, by Decision No. 37 of 24 January 2012, the Constitutional Court has even made appreciations regarding the scope of the transposition obligation, noting that ‘the Directive 79/7/EEC of the Council of 19 December 1978 on the gradual application of equality of treatment for men and women in the field of social security the Directive 86/378/EEC of the Council of 24 July 1986 on the application of the principle of equality of treatment for men and women within the occupational social security schemes or the Directive 2004/113/EC of the Council of 13 December 2004 for the application of the principle of equality of treatment for men and women regarding the access to goods and services and the delivery of goods and services, published in the Official Journal of the European Union, series L, No.373 of 21 December 2004, do not impose on the Member States the obligation to foresee service pensions to the detriment of the general ones, this being just an option of theirs.⁷⁴ At the same time, by Decision

71 *The Constitutional Court of Romania*, Decision No. 1540 of 6 December 2011 on the unconstitutionality exception of the provisions of Art.2, Art.13 par.(2), Art.14 par.(1) letter t) and par.(2), Art.35 par.(1) and (2), Art.36, Art.38 par.(1), Art.46 par.(2), Art.55 par.(3), Art.88 par.(1) letter b) and d) and par.(2) and (3), Art.89, Art.91, Art.92 and Art.95 of the Government Emergency Ordinance No.50/2010 on the providing credit agreements for consumers, published in the Official Gazette, Part I, No.151 of 7 March 2012.

72 *The Constitutional Court of Romania*, Decision No. 308 of 5 June 2014 on the unconstitutionality exception of the provisions of Art. 74 par. (5) of the Law No. 53/2003 – the Labour Code, published in the Official Gazette, Part I, No. 562 of 29 July 2014.

73 *The Constitutional Court of Romania*, Decision No. 502 of 7 October 2014 on the unconstitutionality exception of the provisions of Art. 6 letters c) and d) a Art. 53 of the Government Emergency Ordinance No. 51/2008 on the judicial public aid in civil matters, with regard to the provisions of the Art. 45 and Art. 49 of the Government Emergency Ordinance No. 51/2008 and item C3 letter e) of the annex to the Government Emergency Ordinance No. 51/2008 and Art. 54 of the Government Emergency Ordinance No. 51/2008, published in the Official Gazette, Part I, No. 941 of 22 December 2014.

74 *The Constitutional Court of Romania*, Decision No. 37 of 24 January 2012 on the unconstitutionality exception of the provisions of Art.1 letter c) and Art.3 of the Law No.119/2010 on the establishment of some rules in the field of pensions, published in the Official

No. 266 of 7 May 2014 it was noted that 'even if the national law, respectively the Law No. 192/2006 and the Code for Civil Procedure [Art. 227 par. (2) final sentence], as well as the Directive 2008/52/EC of the European Parliament and of the Council establish mediation as an optional, alternative and informal procedure, Art. 2 par. (1) of Law No. 192/2006 stipulates that the parties have the obligation to participate in the briefing regarding the advantages of mediation, or they will be sanctioned with the nonadmittance of the writ established under par. (1 ind. 2) of the same article. This being so, mediation is optional, but the briefing on the advantages of the mediation is obligatory.'⁷⁵

Moreover, the lawmaker did not fulfil his obligation to indicate in the criticised law, the acts of the European Union which are transposed by it, which is inadmissible. Irrespective of the applicable Directive (Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts or Directive 2014/24/EU of the European parliament and of the Council of 26 February 2014 on public procurement and repealing the Directive 2004/18/EC), the Court notes that both of them comprise conditions which coincide almost down to detail with regard to unilateral amending or withdrawal from the contract, while the text of the Art. 38 par. (1) of the law contains a regulatory solution which tends to circumvent these conditions. As a result, the Court notes that the legal solution comprised in the criticised text represents an infringement by the Parliament of the provisions of Art. 148 par. (4) of the Constitution, which regulates its role as a guarantor of the compliance with the obligations resulting from the accession act.⁷⁶

More recently,⁷⁷ it was noted that 'on 20 February 2014, the European Commission decided to give Romania a formal notice for the incorrect transposition of the Directive 2003/88/EC on certain aspects of working time management, as the national law raises compatibility problems with the Art. 7 of the mentioned directive, and 'the regulatory content of the criticised text [...] is but the regulation of the principle of equal treatment with respect to payment, which answers the objective of the Directive 2008/104/EC as it is stipulated under Art.

Gazette, Part I, No.155 of 8 March 2012.

75 *The Constitutional Court of Romania*, Decision No. 266 of 7 May 2014 on the unconstitutionality exception of the provisions of Art. 200 of the Code of Civil Procedure, as well as of the Art. 2 par. (1) and (1 ind.2), Art. 60 ind.1 of the Law No. 192/2006 on mediation and the organisation of the profession of mediator, published in the Official Gazette, Part I, No. 464 of 25 June 2014.

76 *The Constitutional Court of Romania*, Decision No. 390 of 2 July 2014 on the unconstitutionality exception of the provisions of Art. 38 par. (1) and Art. 42 of the Law on public-private partnership, published in the Official Gazette, Part I, No. 532 of 17 July 2014.

77 *The Constitutional Court of Romania*, Decision No. 760 of 17 December 2014 on the rejection of unconstitutionality objection of the provisions of Art. I item 3 with reference to Art. 92 par. (3) and (4), Art. I item 4 with reference to Art. 145 par. (2) and Art. I item 5 with reference to Art. 145 par. (4) of the Law amending and supplementing Law No. 53/2003 – the Labour Code, published in the Official Gazette, Part I, No. 91 of 3 February 2015.

2, namely ensuring the protection of temporary workers and improving the working conditions for temporary agency work by the application of the principle of equal treatment, as it is stipulated under Art. 5. [...] the Court cannot note the infringement of the Art. 148 par. (4) of the Constitution, according to which the Parliament guarantees the fulfilment of the obligation resulting from the accession act and the provisions of par. (2), which establish the principle of application with priority of the obligatory acts of the European Union. The criticised legal amendment takes into account the provisions of Art. 7 par. (1) of the Directive 2003/88/ CE of the European Parliament and of the Council on certain aspects of working time management [...].'

Everything culminated with Decision No. 1258 of 8 October 2009, which was a solution considered by me more than circumstantial,⁷⁸ in a situation in which the reference for a preliminary ruling to the Court of Justice of the European Union would have been appropriate,⁷⁹ by which the unconstitutionality of an internal law was established, respectively of the Law No.298/2008, transposing the Directive 2006/24/EC of the European Parliament, and of the Council of 15 March 2006 on the retention of the data generated or processed by the providers of electronic communication services destined for the wide public or by the public communication networks, amending the Directive 2002/58/CE⁸⁰, not-

78 Not long ago, the doctrine stated that 'while other constitutional courts in Eastern Europe turn into protectors of the national sovereignty, which resides, culturally speaking, in their own concept of democracy, the Constitutional Court of Romania turns into a protector of the European concept of democracy, while timidly explaining, by elementary political-judicial logic, why national sovereignty must be limited in the context of the current European integration.' For details, see *M. Guțan*, Forms of a different substance: the Community legal transplantation and the Romanian legal culture, in *Pandectele Române* (Romanian Pandects) No. 5/2008, p.37.

79 The Supreme Court in Ireland and the Constitutional Court of Austria have asked the CJUE preliminary questions in this respect.

80 *The Constitutional Court of Romania*, Decision No.1258 of 8 October 2009 on the unconstitutionality exception of the provisions of the Law No.298/2008 on the retention of the data generated or processed by the providers of electronic communication services destined for the wide public or by the public communication networks, as well as for the amendment of Law No.506/2004 on personal data processing and the protection of the private life in the electronic communications sector, published in the Official Gazette, Part I, No.798 of 23 November 2009. For comments see *C.C. Murphy*, Romanian Constitutional Court, Decision No. 1258 of 8 October 2009 regarding the unconstitutionality exception of the provisions of Law No. 298/2008 regarding the retention of the data generated or processed by the public electronic communications service providers or public network providers, as well as for the modification of Law No. 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area, in *CMLRev* 47, 2010, p.933–941, and also *I. Pelin-Răducu*, Deferential Dialogues between the Court of Justice and domestic courts regarding the compatibility of the EU Data Retention Directive with (Higher?) National Fundamental Rights Standards, article which is available online on the web page: <http://www.on-federalism.eu/index.php/component/content/article/166-deferential-dialogues-between-the-court-of-justice-and-domestic-courts-regarding-the-compatibility-of-the-eu-data-retention-directive-with-higher-national->

ing that ‘individual rights cannot be exercised *in absurdum*, but can constitute the object of certain limitations which are justified according to the objective envisaged. The limitation of the exercise of certain collective rights and public interests which envisage national security, public order or criminal prevention has permanently been a sensitive operation as to its regulation, so that the right balance should be reached between individual rights and interests, on the one hand, and those of the society, on the other hand. [...] Limiting the exercise of the right to private life, secrecy of correspondence and freedom of speech [...] must be made in a clear, predictable, and unequivocal way, so that the risk of arbitrariness of abuse of the authorities in this matter should be removed as much as possible.’⁸¹

Also, by the Decision No. 440 of 8 July 2014,⁸² the unconstitutionality of Law No. 82/2012, was established, transposing the same Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006, being adopted by the Parliament as a result of the Constitutional Court adopting the Decision No. 1258 of 8 October 2009, but in the meantime, this had been declared null and void by the Judgement of the CJEU of 8 April 2014,⁸³ passed in the Joined Cases C-293/12 - *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others* - and C-594/12 - *Karntner Landesregierung and Others*, infringing the provisions of the Art. 7, Art. 8 and Art. 52 par. (1) of the Charter of Fundamental Rights of the European Union. The Constitutional Court of Romania has made extensive reference to this solution, including to the lack of previous authorisations by certain courts of law, amounting to ‘insufficiency of legal guarantees necessary for the protection of the right to private life and of the other rights established by Art. 7 of the Charter of Fundamental Rights and Freedoms and of the right to the protection of personal data, estab-

fundamental-rights-standards [last accessed on 29.11.2014].

81 *Bundesverfassungsgericht*, the Federal Constitutional Court of Germany has determined in its turn the unconstitutionality of the provisions for the transposition of the Directive 2006/24/EC, by the Decision of 2 March 2010, but for reasons of unconstitutionality other than those presented previously, like the Supreme Court of Cyprus has determined by the Decision of 1 February 2011 the unconstitutionality of some provisions of the Law No. 183 (I)/2007 on the retention of telecommunication data with the view to investigating serious crime, which has transposed the Directive No. 2006/24/EC, and the *Constitutional Court of the Czech Republic* has declared null and void section 97 par. 3 and 4 of the Law No. 127/2005 on electronic communications and the amendment of related acts, by the Decision of 22 March 2011.

82 *The Constitutional Court of Romania*, Decision No. 440 of 8 July 2014 on the unconstitutionality exception of the provisions of Law No. 82/2012 on the retention of the data generated or processed by the providers of electronic communication services destined for the wide public or by the public communication networks, as well as for the amendment of Law No.506/2004 on personal data processing and the protection of the private life in the electronic communications sector, as well as of the Art. 152 of the Code of Criminal Procedure, published in the Official Gazette, Part I, No.653 of 4 September 2014.

83 ECLI:EU:C:2014:23.

lished by Art. 8 of the Charter', but also the decisions of the Federal Constitutional Court of Germany, the Constitutional Court of the Czech Republic and the Supreme Administrative Court of Bulgaria.⁸⁴

In the same context, Decision No. 461 of 16 September 2014 established the unconstitutionality of the provisions of the Law amending and supplementing the Government Emergency Ordinance No. 111/2011 on electronic communications⁸⁵, referring to the registration of the users of pre-paid cards, collecting and saving the data of the users of communication services, the conditions of performing the specific operations and the corresponding responsibilities which are incumbent on electronic communication service providers, again as a consequence of declaring null and void Directive 2006/24/EC by the Judgement of 8 April 2014 of the Court of Justice of the European Union. Very recently, a similar solution was given to the unconstitutionality of the provisions of the Law on the cyber security of Romania, by the Decision No. 17 of 21 January 2015.⁸⁶

5. The application of the provisions of the Charter of Fundamental Rights of the European Union by the Constitutional Court of Romania

Initially, it was established by the Decision No. 871 of 25 June 2010, that the provisions invoked from the Charter of Fundamental Rights of the European Union 'are in principle applicable within the constitutionality control, to the extent to which they ensure, guarantee and develop the constitutional provisions in the matter of fundamental rights, in other words, to the extent to which their level of protection is at least at the level of constitutional norms in the field of human rights'.⁸⁷ And the norms, such as they are established in the Charter of

84 *In its turn, the Administrative Supreme Court of Bulgaria* (Върховен административен съд), by the Decision No. 13627 of 11 December 2008, has annulled an article in the national law on the retention of data, which allowed the Ministry of Interior the access to retaining data in computer terminals, and also the provision of access to security services and other law enforcement institutions to these data, without the authorisation of a judicial body, showing that 'the annulled legal provision did not offer any guarantee for the protection of the right to private life, and that there was no mechanism which should guarantee this protection against illegal interference, so as to avoid affecting the honour, dignity and reputation of a person'.

85 *The Constitutional Court of Romania*, Decision No. 461 of 16 September 2014 on the unconstitutionality of the provisions of the Law amending and supplementing the Government Emergency Ordinance No. 111/2011 on electronic publications, published in the Official Gazette, Part I, No. 775 of 24 October 2014.

86 *The Constitutional Court of Romania*, Decision No. 17 of 21 January 2015 on the unconstitutionality of the provisions of the Law on the cyber security of Romania, published in the Official Gazette, Part I, No. 79 of 30 January 2015.

87 *The Constitutional Court of Romania*, Decision No. 871 of 25 June 2010 on the unconstitutionality of the provisions of the Law on establishing some measures in the field of pensions, published in the Official Gazette, Part I, No.433 of 28 June 2010. See also Decision No. 1479 of 8 November 2011 on the unconstitutionality exception of the provisions of Art.24 par.(2) of the Contentious Administrative Law No.554/2004, published in the Official Gazette, Part I, No.59 of 25 January 2012, and also Decision No. 244 of 29 April

Fundamental Rights of the European Union, 'are equally applicable to central authorities and regional or local instances, as well as to public bodies, in the case in which the implement the European Union law. As a result, the Member States must apply these norms as much as possible according to these requirements (Judgement of the CJEC of 24 March 1994 given in the case C-2/92,⁸⁸ *The Queen and Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*, par. 16).'⁸⁹

Later, by the Decision No. 967 of 20 November 2012, the Constitutional Court of Romania established that the provisions of the Charter of Fundamental Rights of the European Union, an act with the same legal force as the treaties establishing the European Union, 'must be related to the provisions of the Art.148 of the Constitution, and not to the ones in the Art. 20 of the same, which refer to the international treaties on human rights.'⁹⁰ However, without being consistent, in the Decision No. 352 of 24 June 2014, the Constitutional Court cites Art. 5 par. (2) of the Charter of Fundamental Rights of the European Union, applying the provisions of the Art. 20 par. (1) of the Constitution and interpreting the syntagma 'forced labour' in accordance with the relevant international covenants and treaties of which Romania is a part, respectively the Convention No. 29 of 18 June 1930 on forced or obligatory labour, adopted by the International Labour Organisation, ratified by Decree No. 213/1957, published in the

2014 on the unconstitutionality exception of the provisions of Art. 9 of the Government Emergency Ordinance No. 84/2012 on the establishment of salaries for the personnel in the budgetary sector in 2013, the prorogation of some deadlines from legal acts, as well as some tax and budget measures with reference to Art. II Art. 18 of the Government Emergency Ordinance No. 80/2010 supplementing Art. 11 of the Government Emergency Ordinance No. 37/2008 on the regulation of some financial measures in the budgetary sector, as well as for the adoption of other financial measures in the budgetary sector, approved with amendments and supplementations by the Law No. 283/2011, published in the Official Gazette, Part I, No. 467 of 25 June 2014.

88 ECLI:EU:C:1994:116.

89 *The Constitutional Court of Romania*, Decision No. 53 of 25 January 2012 on the unconstitutionality exception of the provisions of Art.30 par.3 of the Code of Criminal Procedure, as well as of the provisions of the Art.244–246, Art.248 and 279 of the Law No.297/2004 with relation to Art.244 par.(5) letter a) item 2 and letter b) and par.(7) letter a) with the application of Art.276 letter c) of the Capital Market Law No. 297/2004, published in the Official Gazette, Part I, No.234 of 6 June 2012.

90 *The Constitutional Court of Romania*, Decision No. 967 of 20 November 2012 on the unconstitutionality exception of the provisions of Art.1 item 1¹ and Art.299 par.1¹ of the Code for Civil Procedure, published in the Official Gazette, Part I, No.853 of 18 December 2012. By the same token, Decision No. 390 of 2 July 2014 on the unconstitutionality of the provisions of Art. 38 par. (1) and Art. 42 of the Law on public-private partnership, published in the Official Gazette, Part I, No. 532 of 17 July 2014, and also Decision No. 553 of 17 December 2013 on the unconstitutionality exception of the provisions of Art. 1 letters a) and b), Art. 3, Art. 4 par. (1) letter a) and par. (2), Art. 5, Art. 7 par. (1) and Art. 12 of the Law No. 119/2010 on the establishment of some measures in the field of pensions, published in the Official Gazette, Part I, no. 97 of 7 February 2014.

Official Gazette No. 4 of 18 January 1958, the International Covenant on Civil and Political Rights of 16 December 1966, ratified by Decree No. 212/1974, published in Official Gazette No. 146 of 20 November 1974, and even the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of the Fundamental Rights of the European Union.⁹¹

6. Other case law solutions related to the European Union law

Regarding the legal remedies in the case of infringement of the European Union law, by the Decision No. 1039 of 5 December 2012, the *Constitutional Court of Romania* established that 'the provisions of Art.21 par.(2) first sentence of the Law of Administrative Litigation No.554/2004 are unconstitutional to the extent to which they are interpreted in the sense that the decisions which remain final and irrevocable cannot be revised, with the breach of the principle of priority of the European Union law, when it does not refer to the substance of the case. These provisions, in terms of regulating the reason to revise referring to the infringement of the European Union law by an irrevocable judgment, reflect the very obligation assumed by the authorities of the Romanian state, including the judicial one, to guarantee the fulfilment of the obligations resulting from the accession act and the application of the principle of priority of the European Union law. The lack of such a reason to revise would amount to the denial of the legal force of the decisions of the Court of Justice of the European Union over the courts in the Member States, would deprive the litigants of the obligatory effects of these decisions and would mean the breach of the principle of the application with priority of the European Union law. By virtue of its quality of Member State of the European Union, Romania has the obligation to make available to the courts, and implicitly to the litigants, an efficient legal instrument which should ensure the application of the European Union laws, as they have precedence over the contrary provisions of the internal laws.'⁹²

91 *The Constitutional Court of Romania*, Decision No. 352 of 24 June 2014 on the unconstitutionality exception of the provisions of Art. 67 par. (2) of the Law No. 272/2004 on the protection and promotion of children's rights, published in the Official Gazette, Part I, No. 585 of 5 August 2014. By the Decision No. 586 of 21 October 2014 on the unconstitutionality exception of the provisions of Art. 4 of the Law No. 187/2012 for the implementation of the Law No. 286/2009 on the Criminal Code, published in the Official Gazette, Part I, No. 4 of 5 January 2015, the Constitutional Court has found that the 'provisions of the Art. 4 of the Law No. 187/2012 do not contravene the provisions of the Art. 6, par. 1 of the Convention on the right to a fair trial or the provisions of Art. 14 of the Convention, and the Art. 21 of the Charter of Fundamental Rights of the European Union, which prohibits discrimination.'

92 *The Constitutional Court of Romania*, Decision No. 1039 of 5 December 2012 on the unconstitutionality exception of the provisions of the Law No.299/2011 repealing par.(2) of Art.21 of the Contentious Administrative Law No.554/2004 and of the Art.21 par.(2) first sentence of the Contentious Administrative Law No.554/2004, published in the Official Gazette Monitor Official, Part I, No.61 of 29 January 2013.

By the Decision No. 683 of 27 June 2012, the *Constitutional Court of Romania* noted that ‘the President of Romania has not only the right but also the obligation assumed in the accession act to participate in the meetings of the European Council; otherwise, he would infringe the commitments Romania had made through it.’⁹³ The Government ‘can establish the content of the mandate or of the general mandates in a single meeting of the Government, in which the President of Romania can participate. Under these circumstances, it appears to be up to the President of Romania to participate in these Government meetings, and if he does participate, then there are consultation and cooperation procedures between the heads of the executive powers. Also, through its configurations, the Council of the European Union implements the decisions made by the European Council; all this proves, of course, the necessity of the existence of a close connection between the mode of action of the European Council and of the Council of the European Union, without amounting to the obligation of the President of Romania to participate in the finalisation of his mandate or of the general mandate, as the case may be, in the Council of the European Union.’⁹⁴

7. Conclusions

In a recent interview, *Peter Kovacs*⁹⁵ a former judge of the Constitutional Court of Hungary, stated that constitutional courts ‘are in general very reluctant when obligations or extra-constitutional requirements are mentioned with relation to their own case law. Even if they follow the case law of the CJEU (or that of the European Court of Human Rights), they do not wish to speak about an obligation, but *take note* of the case law decision (decisions), they *study* the relevant case law and often come to the same, even *literally* identical legal solution, but without using inverted commas or referring to the respective decisions of the CJEU.’

93 *The Constitutional Court of Romania*, Decision No. 683 of 27 June 2012 on the legal conflict of a constitutional nature between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette, No.479 of 12 July 2012. See also Decision No. 784 of 26 September 2012 on the unconstitutionality of the provisions of Art.2 letter e), Art.3, Art.18 and Art.19 of the Law on the cooperation between the Parliament and the Government in the field of European affairs, published in the Official Gazette, Part I, No.701 of 12 October 2012, and also Decision No. 441 of 9 July 2014 on the request to solve the constitutional conflict between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, Published in the Official Gazette, Part I, No. 657 of 5 September 2014.

94 *The Constitutional Court of Romania*, Decision No. 449 of 6 November 2013 on the unconstitutionality of the provisions of Art.2, 3 and 18 of the Law on the cooperation between the Parliament and the Government in the field of European affairs, published in the Official Gazette, Part I, No.784 of 14 December 2013.

95 Interview taken by *D. Călin* in January 2015, RRDE No. 1/2015, p.13–17.

Maybe for this reason as well, the number of the Decisions of the Court of Justice of the European Union and of the Court of European Union invoked in the statement of reasons of the *Constitutional Court of Romania* was a small one (only 56 until 31 December 2014), irrespective of the way in which they were used: as justifying or circumstantial argument, as a mere reference or in an inadequate context.

The Constitutional Court has subjected the introduction of a norm of European law into the constitutionality control, as an interposed norm to the standard norm, to the fact that the norm should be sufficiently clear, precise and unequivocal in itself, or that its meaning should have been clearly, precisely and unequivocally established by the Court of Justice of the European Union, and to the fact that it should be circumscribed by a certain level of constitutional relevance, so that its normative content could support the possible breach of the Constitution – the only direct standard norm within the constitutionality control – by the national law.

As far as the transposition of the Directives into internal law is concerned, in general the Constitutional Court of Romania has limited itself to merely taking note of this fact, culminating in the Decision No. 1258 of 8 October 2009, in which the unconstitutionality of an internal law was established, respectively the Law No.298/2008, which transposed the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of the data generated or processed by the providers of electronic communication services destined for the wide public or by the public communication networks, as well as for the amendment of the Directive 2002/58/EC, the first solution of this kind of the constitutional courts of the Member States of the European Union. Similar decisions, but with partly different statements of reasons, were given by *Bundesverfassungsgericht*, with the Decision of 2 March 2010, by the Supreme Court of Cyprus, with the Decision of 1 February 2011, and by the *Constitutional Court of the Czech Republic*, with the Decision of 22 March 2011.