

# A COMPARATIVE ANALYSIS OF ACHIEVING ACCESS TO CONSTITUTIONAL JUSTICE WITH THE MECHANISM OF NOTIFYING THE COURT OF JUSTICE OF THE EUROPEAN UNION

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## Abstract

*As a comparative analysis regarding the holders of the notification to the Constitutional Court and the holders of the notification to the Court of Justice of the European Union, we mention the fact that in both situations, the national court is the main promoter and the one that has the role of filtering the request for addressing the superior courts. We specify that other procedural subjects can invest the court either with an exception of unconstitutionality or with a request for a preliminary decision, for example the prosecutor or the parties in the pending case.*

*In order for the referral with an exception to the constitutional court to be admissible, a series of cumulative conditions must be met. If one of these conditions is not met, the exception of unconstitutionality cannot pass the admissibility test, so the national judge will no longer proceed to the stage of analyzing the merits of the formulated exception. On the other hand, the request for a preliminary ruling must refer to the interpretation or validity of Union law, and not to the interpretation of the rules of national law or to factual issues invoked in the main litigation. Furthermore, the Court can rule on the request for a preliminary ruling only if Union law is applicable to the main case. From another perspective, the attribute of determining whether there is a contradiction between the national law and the treaty of the union belongs to the national court.*

*From a distinct perspective, the Constitutional Court showed, among other things, that to the extent that the priority recognized to Union law is limited, in the Romanian legal order, by the requirement to respect the national constitutional identity, that it has the task of ensuring the supremacy of the Romanian Constitution on its territory.*

*The effectiveness of the cooperation between the court and the national courts established through the preliminary reference mechanism would be compromised if the result of an exception of unconstitutionality before the Constitutional Court of a member state could have the effect of discouraging the national court, seized with a dispute governed by this law, to use the possibility or as the case may be to fulfill the obligation resulting from article 267 TFEU to address to the court*

*the questions regarding the interpretation or validity of certain acts of the said law.*

**Keywords:** *the exception of unconstitutionality, the request for a preliminary decision, the conditions of admissibility, the filter performed by the national judge, specific relationships between the normative acts, ways of communication between the national courts and the Constitutional Court, respectively the Court of Justice of the European Union.*

### The headquarters of the matter

Regarding the exception of unconstitutionality, we note that it is regulated both by means of the provisions of art. 146 letter d) of the Romanian Constitution, as well as through the contents of articles 29-33 of Law no. 47/1992<sup>1</sup>. Regarding the referral to the Court of Justice of the European Union with the request for a preliminary ruling, there are a number of relevant provisions, namely Article 19, paragraph 3, letter b of the Treaty on European Union (TEU) and Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Thus, according to art. 146 letter d of the Romanian Constitution, the Constitutional Court has the following powers: „decides on the exceptions of unconstitutionality regarding the laws and ordinances, raised before the courts or commercial arbitration; the exception of unconstitutionality can also be raised directly by the People's Advocate". At the same time according to the provisions of art. 29 para. 1 of Law no. 47/1992, "The Constitutional Court decides on the exceptions raised before the courts or commercial arbitration regarding the unconstitutionality of a law or ordinance or a provision of a law or an ordinance in force, which is related to the settlement of the case in any phase of the litigation and whatever its object may be".

On the other hand, from the provisions of paragraph 3 of article 19 of the Treaty on the European Union (TEU), the following emerges: "The Court of Justice of the European Union decides in accordance with the treaties... on a preliminary basis, at the request of the national courts, regarding to the interpretation of Union law or to the validity of acts adopted by the institutions"<sup>2</sup>. At the same time, according to the provisions of art. 267 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union is competent to rule, with a preliminary title, on: (a) the interpretation of treaties; (b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union"<sup>3</sup>.

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<sup>1</sup> Law no. 47/1992 published in the Official Gazette no. 187 of August 7, 1997 and republished in the Official Gazette no. 643 of July 16, 2004.

<sup>2</sup> Letter b) from the content of paragraph 3 of art. 19 of the Treaty on the European Union (TEU).

<sup>3</sup> Text of art. 267 of the Treaty on European Union (TEU).

From a *prima facie* analysis of the legal provisions regarding the referral to the Constitutional Court of Romania and respectively to the Court of Justice of the European Union, it emerges that the role of their referral, from a terminological point of view, appears to be of major differences. However, both the constitutional review carried out by the constitutional court, as well as the pronouncement by the Court of Justice of the European Union of some judgments whose object is the interpretation of the law of the European Union or the control over the validity of the acts adopted by the institutions, are limited to the role of checking the legislative compatibility between legislative acts with lower power and, on the one hand, the state constitution, and on the other hand, the fundamental charter of Romania, respectively the fundamental treaties of the European Union.

### **Cumulative conditions for referral to the constitutional court or the European Court**

As far as the authors of the notification are concerned, with reference to the exception of unconstitutionality, the provisions of paragraph 2 of art. 29 of Law no. 47/1992. We therefore note that "the exception can be raised at the request of one of the parties or, ex officio, by the court or commercial arbitration<sup>4</sup>. Also, this "can be raised by the prosecutor before the court, in the cases in which he participates". Therefore, it emerges from all of the aforementioned provisions that this instrument can be used by the parties in a litigation, by the prosecutor in the cases in which he participates before the court, by the court ex officio. For example, the plaintiff or the defendant in a civil case have active procedural legitimacy for invoking the exception of unconstitutionality. At the same time, the exception of unconstitutionality can be invoked directly by the People's Advocate<sup>5</sup>, based on a special provision in this regard.

On the other hand, in relation to the referral to the Court of Justice of the European Union, we note that only the national courts referred to adjudicating a dispute have the prerogative to refer the Court, even if the parties to the dispute request, or on the contrary, oppose the referral to the Court. These aspects emerge from the interpretation of art. 267 of the Treaty on the Functioning of the European Union (TFEU) and of the Recommendations for the attention of national courts, regarding the making of preliminary references<sup>6</sup>.

Thus, according to the mentioned recommendations, preliminary references regarding the interpretation or validity of Union law are initiated exclusively by national

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<sup>4</sup> The last hypothesis mentioned by the text of art. 29 paragraph 2 of Law no. 47/1992 refers to arbitration courts.

<sup>5</sup> This is a central state institution whose role is to protect the rights and freedoms of citizens against abuses by public authorities.

<sup>6</sup> Recommendations for the attention of national courts regarding the making of preliminary referrals (2019/C 380/01) published in the Official Journal of the European Union C 380/1 on 8.11.2019.

courts<sup>7</sup>, they decide on the need to refer the Court of Justice of the European Union with a request for a preliminary decision, depending on the particularities the case, the national court also ruling on the questions addressed by the CJEU.

Consequently, the national court assumes full responsibility in assessing the need to request a preliminary decision, as the sender of the referral.

The procedure becomes useful in the event that, in a case before a national court, a question of interpretation is raised characterized by the fact that it presents a general interest regarding the uniform application of European Union law, or the necessary clarifications do not emerge from the jurisprudence approaching a new legal situation.

Therefore, as a comparative analysis regarding the holders of the referral to the Constitutional Court and the holders of the referral to the Court of Justice of the European Union, we mention the fact that in both situations, the national court is the main promoter and the one that has the role of filtering the request for referral. We specify that other procedural subjects can invest the court either with an exception of unconstitutionality or with a request for a preliminary decision, for example the prosecutor or the parties in the pending case. And in these cases, the court is the one that decides on the admissibility of the request, in reference to a series of cumulative conditions expressly stated by the legal norms representing the seat of each individual matter. As a particularity, we point out that the referral to the constitutional court can also be made by the People's Advocate, directly, that is, without litigation.

In the continuation of the analysis, we consider the objective conditions of admissibility regarding the object of the exception of unconstitutionality, respectively the cumulative requirements that must be met for the national court to draw up a request for a preliminary decision.

In relation to the admissibility conditions of the exception of unconstitutionality, the provisions of paragraph 1 of the content of art. 29 of Law no. 47/1992, which states the following: "The Constitutional Court decides on the exceptions raised before the courts or commercial arbitration regarding the unconstitutionality of a law or ordinance or a provision of a law or an ordinance in force, which is related to the settlement of the case in any phase of the litigation and whatever its object may be. At the same time, according to paragraph 3 of the mentioned article<sup>8</sup>, the provisions found to be unconstitutional by a previous decision of the Constitutional Court cannot be the object of the exception.

By reference to the mentioned provisions, in order to be admissible to refer to the constitutional court with an exception, it is necessary to meet a series of cumulative

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<sup>7</sup> In the interpretation of the CJEU, the notion of the court is an autonomous one and is appreciated by the Court considering several criteria, among which are mentioned the legal origin of the body, its permanent nature, its application of the rules of law, the mandatory nature of its jurisdiction, the contradictory nature of the procedure, its independence.

<sup>8</sup> Art. 29 of Law no. 47/1992, law republished in the Official Gazette no. 643 of July 16, 2004.

conditions. If one of these conditions is not met, the exception of unconstitutionality cannot pass the admissibility test, so the national judge will no longer proceed to the stage of analyzing the merits of the formulated exception.

A first condition is that the rule is to have a trial in front of the national courts, in which the court is invested with the referral to the Constitutional Court of the exception.

At the same time, regarding the object of this legal instrument, it is that the notification concerns a law of the Romanian Parliament or an ordinance of the Romanian Government or a provision of these normative acts

From the provisions of paragraph 1 of art. 29 1 of Law no. 47/1992 explicitly and limitingly states the object of the constitutionality control, namely the legislative acts from the primary legislation, laws and ordinances of the Government, so the constitutionality control cannot be the legislative acts inferior to them, nor the acts of administrative. Next, the rule is that the law of the Parliament of Romania or the ordinance of the Government of Romania be in force

Regarding the quality of the act referred to, according to paragraph 1 of art. 29 of Law no. 47/1992, to be admissible, the exception of unconstitutionality must concern a normative act part of the body of primary legislation in force at the time the exception is raised.

Although the term "in force" naturally refers to the period of time in which a legislative norm is enforceable and produces effects, there are also general and special provisions regarding the entry into force and termination of the laws and ordinances of the Government of Romania, however, by Decision no. 766/2011 of the Constitutional Court of Romania was expressly ruled in the context of resolving the exception of unconstitutionality raised regarding the phrase "in force" contained in paragraph 1 of art. 29 para. 1 and paragraph 3 of art. 31 of Law no. 47/1992, the fact that "the phrase in force from the provisions of art. 29 para. (1) and of art. 31 para. (1) from Law no. 47/1992 regarding the organization and functioning of the Constitutional Court<sup>9</sup>, is constitutional to the extent that it is interpreted in the sense that laws or ordinances or provisions from laws or ordinances whose legal effects continue to be produced even after their exit from force."

In order to rule in this way, the Court retained, in the considerations of Decision no. 766/2011<sup>10</sup> a legal norm acts in time from the moment it enters into force until the moment it comes into force and enjoys the presumption of constitutionality. There are also exceptions to this general principle, such as the retroactivity and overactivation of the more favorable criminal and contravention law or the overactivation of the temporary criminal law.

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<sup>9</sup> Republished in the Official Gazette no. 643 of July 16, 2004.

<sup>10</sup> Decision published in Official Gazette no. 549 of August 3, 2011.

Therefore, the constitutional review covers only the provisions applicable to the case, even if they are no longer in force."<sup>11</sup>

Another main condition requested by the legislator is that the law of the Romanian Parliament or the ordinance of the Romanian Government is related to the settlement of the case. This connection is always analyzed concretely, and not in the abstract, and aims at the effects it would produce on the merits of the case or in relation to certain procedural rules that affect the way the trial is conducted and resolved. By way of example, we offer the provisions that regulate the term of recommendation regarding the duration during which requests and exceptions can be made at the stage of the preliminary chamber, in a criminal trial. These are rules that concern the procedure itself, and not the substance of the case or the rights deduced from the judgment.

At the same time, by referring to the provisions of paragraph 1 of the content of art. 29 of Law no. 47/1992, in order to be admissible, the exception of unconstitutionality must be related to the settlement of the case, in any phase of the litigation and whatever its object may be.

It is important to understand what is the meaning of the relevance of the exception of unconstitutionality illustrated by the phrase the text of the criticized law should be related to the resolution of the case. The reason for this control is justified exclusively in the hypothesis that the constitutionality issue thus resolved has practical effects in resolving the pending litigation. We mention the aspect that it is not imperative that the lifting of the exception of unconstitutionality has a direct impact on the dissolution of the fund, which can also be targeted incidents during the resolution of the trial. Also, because an exception invoked either prematurely or late does not meet the criterion of relevance, it will be rejected as inadmissible by the national court, which acts as a filter.

The fourth requirement regarding admissibility is that the law or the Government ordinance or the criticized provision has not been found to be unconstitutional by a previous decision of the Constitutional Court, as regulated by paragraph 3 of art. 29 of Law no. 47/1992. This mentioned norm therefore establishes a negative condition of admissibility, establishing that the provisions found to be unconstitutional by a previous decision of the Constitutional Court cannot be the object of the exception.

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<sup>11</sup> Even the civil law can be overactive in some situations, according to the "*tempus regit actum*" principle. Thus, a subsequent law cannot affect the right born under the empire of the previous law, which will govern that right, including the settlement of the dispute related to the realization of that right, even after its coming into force. The new law - rule of substantive law, which expressly abrogates the previous law, even if it contains provisions similar to the abrogated ones, cannot govern the existing legal relationship between the parties, not being applicable to the case brought to trial; the constitutionality check on these new provisions would not present any kind of relevance to the settlement of the dispute, carrying out such a check is equivalent to the Constitutional Court ex officio lifting the exception of unconstitutionality with respect to texts other than those criticized by the author of the exception, which is inadmissible, being contrary to the provisions of art. 146 lit. d) from the Constitution and art. 29 para. (1) from Law no. 47/1992 (...).

Therefore, the provisions of art. 29 of Law no. 47/1992 establishes an obligation for the court in front of which the exception of unconstitutionality was raised to analyze the exception in terms of admissibility, requiring it to check whether the exception of unconstitutionality was raised before a court of law or commercial arbitration, if it concerns the unconstitutionality of a law or ordinance or a provision of a law or ordinance in force, which is related to the settlement of the case in any phase of the litigation and whatever its object may be. In addition, the rule requires that the exception be raised at the request of one of the parties or, ex officio, by the court, or by the prosecutor before the court, in the cases in which he participates. The mentioned norm also establishes a negative condition of admissibility, establishing that the provisions found to be unconstitutional by a previous decision of the Constitutional Court cannot be the object of the exception.

In continuation of the analysis carried out, we refer to the provisions of paragraph 4 of art. 29 of Law no. 47/1992 regarding the organization and functioning of the Constitutional Court, according to which the referral to the Constitutional Court is ordered by the court before which the exception of unconstitutionality was raised, through a conclusion. This will include the points of view of the parties, the court's opinion on the exception, and will be accompanied by the evidence submitted by the parties.

The court's opinion on the formulated exception concerns exclusively its validity, meaning if the court considers that rule in any way contravenes the constitutional provisions or on the contrary, the opinion of the judge *a quo* is that the legal provisions referred to by the parties or the prosecutor are in full accordance with the principles and articles of the fundamental law.

In addition, if the exception was raised ex officio, by the court, the conclusion must be motivated, including the arguments of the parties, as well as the necessary evidence. This aspect has as its legal foundation the principle of adversariality, any matter being put in the adversarial debate of the parties. In this hypothesis, it is necessary for the reasoning to be detailed, including the arguments on which the validity of the exception of unconstitutionality is supported, since the initiative of the referral belongs to the court, as the holder.

Also, the legislator establishes that "if the exception is inadmissible, being contrary to the provisions of para. (1), (2) or (3), the court rejects with a reasoned conclusion the request for referral to the Constitutional Court"<sup>12</sup>, this being the procedural act by which the judge of the substance decides on the exception of unconstitutionality, both in the case where he decides to refer the court constitutional, as well as in the situation where they find that the admissibility conditions are not met.

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<sup>12</sup> Paragraph 3 of art. 29 of Law no. 47/1992, Law no. 47/1992 published in the Official Gazette no. 187 of August 7, 1997 and republished in the Official Gazette no. 643 of July 16, 2004.

Moreover, the exception of unconstitutionality cannot be the subject of a main action in any situation, neither before the constitutional court, nor before the courts, where it always constitutes a means of defense in a pending trial. We mention the fact that through a whole series of decisions, the Constitutional Court rejected, as inadmissible, exceptions of unconstitutionality raised in cases with administrative litigation, which concerned exclusively the finding of the unconstitutionality of certain provisions of certain ordinances.

At the same time, the Constitutional Court held that "the interpretation of laws is a rational operation, used by any subject of law, in order to apply and respect the law." Courts interpret the law, necessarily, in the process of solving the cases with which they have been entrusted. In this sense, interpretation is the indispensable phase of the law enforcement process<sup>13</sup>. The exception of unconstitutionality that aims at the direct interpretation by the Constitutional Court of certain legal provisions will always be rejected as inadmissible. As a derogatory hypothesis from the general rule, the Court declared that it is competent to carry out a constitutionality check in the situation where a certain text of law has been diverted from its legitimate purpose through an erroneous application by the courts. Thus, "the court has the competence to remove the whip of unconstitutionality created by the interpretation and application of the law, essential in such situations being the assurance of respect for the rights and freedom of individuals, as well as the supremacy of the Constitution." An example in this regard is Decision no. 336 of April 30, 2015 of the Constitutional Court<sup>14</sup>, by which it was emphasized that in the case, the constitutionality of the interpretation that a legal text, respectively art. 235 paragraph 1 of the Criminal Procedure Code received it in practice.<sup>15</sup>

Therefore, the court has the role of first filter, but we note that in certain cases even the Court can find the inadmissibility of invoking a certain exception of unconstitutionality.

On the other hand, regarding the cumulative conditions regarding the referral to the Court of Justice of the European Union in order to issue a preliminary decision, we note that they emerge from the content of the provisions of art. 267 of the Treaty on the Functioning of the European Union (TFEU), which states that the subject of the referral made by the national judge can concern either "the interpretation of the Union Treaties, or the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union".

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<sup>13</sup> Decision no. 771 of November 18, 2021 regarding the exception of unconstitutionality of the provisions of art. 253 para. (1) and (2) of the Criminal Code, published in Official Gazette no. 244 of March 11, 2022.

<sup>14</sup> Decision regarding the exception of unconstitutionality of the provisions of art. 235 para. (1) of the Criminal Procedure Code published in the Official Gazette no. 342 of May 19, 2015.

<sup>15</sup> Paragraph 29: "Considering all this and taking into account the fact that the author of the exception criticizes the provisions of art. 235 para. (1) of the Code of Criminal Procedure, "to the extent that it would be interpreted that the term of 5 days is a term of recommendation, and not an imperative one", the Court finds that, in the present case, the very constitutionality is put into question the interpretation that this legal text has received in practice, specifically, the legal nature of the term regulated by the aforementioned criminal procedural rules".



Thus, the request for a preliminary ruling must refer to the interpretation or validity of Union law, and not to the interpretation of the rules of national law or to factual issues invoked in the main litigation. Moreover, the Court can rule on the request for a preliminary ruling only if Union law is applicable to the main case<sup>16</sup>. Regarding the preliminary references that refer to the interpretation of the charter of fundamental rights of the European Union, we note that the provisions of the charter are addressed to the member states only in the event that they implement Union law. Therefore, in the latter case, it is imperative that the request for a preliminary ruling clearly shows that a different rule of Union law than the charter is applicable to the main case.

Requirements regarding the admissibility of the referral are also the aspect that the legal issue invoked is pertinent, in the sense that the decision of the Court of Justice of the European Union is necessary for the correct resolution of the case, and the provision whose interpretation is requested has not been the subject of another examination of the CJEU. These two conditions that refer to the relevance of the referral, as the connection with the merits of the case and the respective, that that provision has not previously been the subject of the Court's analysis, are the same that we also find in relation to the admissibility of formulating an exception of unconstitutionality in the dialogue between the judge national and the constitutional court. Therefore, the condition attached to the object of the referral request is that the texts in question are applicable in the case referred to the judgment, as the rules incident to the resolution of the case are not strictly internal, which implies the establishment of the determining character for the resolution of the case of the given interpretation by the CJEU of the European Union acts, from the perspective of the questions formulated<sup>17</sup>.

Finally, in order to verify the fulfillment of all the mentioned conditions, it was shown in the doctrine that, once a request to refer the CJEU to the national court, it must pass it through a series of filters, in relation to which it will finally be considered, as the case may be, admissible/inadmissible or founded/unfounded.<sup>18</sup>

As a next step, the Court will refer to the legal and *de facto* framework of the main dispute, as it was set out by the referring court in its request for a preliminary ruling. In situations where the basic requirements regarding the content of the request are not met, namely: a summary statement of the subject of the dispute and the relevant facts, the content of the national provisions that could be applied in the case and the statement of the reasons that lead the referring court to have doubts about the interpretation or the validity of certain provisions of Union law and the connection

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<sup>16</sup> Point 8 of the Recommendations.

<sup>17</sup> Considerations regarding the (in)admissibility of referral requests to the CJEU for a preliminary ruling on the interpretation of some community provisions in relation to the prescription of criminal liability, as well as requests for suspension of judgment based on the provisions of art. 413 para. (1) point 11 Civil Procedure Code", Dan Lupaşcu, [www.juridice.ro](http://www.juridice.ro).

<sup>18</sup> B. Andreşan-Grigoriu, Andreşan-Grigoriu, Procedure of preliminary rulings, Ed. Hamangiu, 2010, p. 228.

that the national judge establishes between these provisions and the national legislation applicable to the main dispute, the European court will initially request the completion of the request, and finally if it is not considered clarified, it will issue an inadmissibility order. The admissibility filter concerns all requirements related not only to the form and content of the preliminary request, but also to its object.

We note that, unlike the hypothesis of the procedure in which the exception of unconstitutionality is analyzed by the national court, in the situation of the request for a preliminary decision, the national judge is not expressly regulated by the court's obligation to rule on its admissibility. However, if the substantive court considers that the conditions regarding the object of the referral or other essential conditions have not been met and it has been vested with the request for a preliminary referral either by the parties in the litigation or by the prosecutor, it may reject the request made, as inadmissible, with the justification of the solution by referring to the unfulfilled condition or conditions.

As a rule, if such a question is raised before a court of a Member State, that court may, if it considers that a decision on the matter is necessary for it to give judgment, ask the Court to rule with regarding this matter.

If such a question is raised in a case pending before a national court whose decisions are not subject to any appeal under domestic law, that court is bound to refer the matter to the Court. A first exceptional hypothesis is outlined, in which the referral to the European court is no longer left to the discretion of the national judge. Thus, if one of the circumstances mentioned as the subject of the referral is invoked before a national court that pronounces a decision in the respective case that can no longer be appealed to any higher court, according to domestic law, the request for the opinion of the European Court is transformed from a faculty, in an obligation. This aspect is natural in relation to the effects produced by a decision given in the last instance, which remains final, so that the legally established factual reality will no longer be able to be modified, and the binding effects will be produced.

Also, the regulation considered an exceptional situation in which "such a matter is invoked in a case pending before a national court regarding a person subject to a measure depriving of liberty, the Court decides in the shortest possible time."<sup>19</sup> In this hypothesis, we should not infer that the task of the national judge would be an imperative to refer the matter to the European court. However, if such an investment has been made, the Court has the obligation to rule on the request in an urgent procedure<sup>20</sup>, justified by the nature of the preventive measure ordered in the national process pending before the court.

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<sup>19</sup> The final thesis of art. 267 of the Treaty on the Functioning of the European Union.

<sup>20</sup> There are therefore two types of special procedures compared to the usual one, namely the urgent procedure, the situation in which the referring court must prove the situation that justifies the urgent solution of the preliminary referral, or the accelerated procedure, in which the deadlines granted are shorter.

We believe that the normative acts expressly provided for by the constitution are not strictly subject to analysis, but all the acts that constitute a source of law and produce binding effects on the national level. Our position is supported by the relevant jurisprudence of the Court of Justice of the European Union. Thus, through the Decision in the related cases Euro Box Promotion and others<sup>21</sup>, DNA-Oradea Territorial Service<sup>22</sup>, Association "Forum of Judges from Romania"<sup>23</sup>, FQ and others<sup>24</sup> and NC<sup>25</sup>, the Court of Justice of the European Union ruled that "Union law opposes the application of a jurisprudence of the Constitutional Court, which leads to the annulment of judgments pronounced by illegally composed panels of judges, to the extent that this, in conjunction with the national provisions in the matter of prescription, creates a systemic risk of impunity for acts that constitute serious crimes of fraud that harm financial interests of the Union or of corruption".<sup>26</sup>

The preliminary question regulated by the provisions of art 267 of the TFEU<sup>27</sup> supports the communication between the national judge and that of the European Union, the purpose being that of the uniform application of Union law, thus, the national judge requests the European court to control the characteristic of the validity of an act of Union law. Of high importance is the aspect that the judgment pronounced by the Court of Justice of the European Union is characterized by the attribute of *res judicata* authority and is binding not only for the national court that initiated the preliminary question, but also for all other national courts in the member states. At the same time, we note that the European Court is vested only with regard to the interpretation of Union law, as it is not competent to assess or interpret in direct connection with the merits of the respective case. In an opinion, it was mentioned that following this process, the European court actually achieves a constitutionalisation, ensuring the accessibility of treaties to all national courts in the member states.<sup>28</sup>

The Court indicated that "although the organization of justice in the member states falls under the competence of the latter, in the exercise of this competence, the states are required to respect the obligations arising from Union law". Thus, the European Court mentioned that "although it does not have the competence, in a preliminary procedure, to pronounce on the compatibility of some provisions or a national practice with the rules of Union law, the fact that it facilitates national courts

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<sup>21</sup> C-357/19.

<sup>22</sup> C379/19.

<sup>23</sup> C-547/19.

<sup>24</sup> C-811/19.

<sup>25</sup> C-840/19.

<sup>26</sup> The preamble of the decision in the related cases Euro Box Promotion and others, DNA- Oradea Territorial Service, Association "Forum of Judges from Romania", FQ and others and NC.

<sup>27</sup> Treaty on the Functioning of the European Union.

<sup>28</sup> Report of the Court of Justice on certain aspects of the Treaty on European Union, Annual Report of the Court of 1995, europa.eu.

to pronounces in the litigation with which it was referred necessary to achieve a fair interpretation"<sup>29</sup>, elements related to Union law and which provide the referring court with sufficient information to pronounce a solution on the merits of the case.

### The relationship between the constitutional and the European order

In our opinion, a constitutional court can control the validity of a national provision implementing a European norm without referring to a provision of the Union, as long as the considerations drawn up by the constitutional court are in agreement with those found in the jurisprudence of the European Court, considering that there is a form of judicial communication between the two institutions. In the context of numerous decisions pronounced, such as Decision number 1596 of November 26, 2009<sup>30</sup>, the Constitutional Court emphasized that it is not within its competence to analyze the conformity of a provision of national law with the text of the treaty on the functioning of the European Union through the prism of art. 148 of the Constitution. This competence, namely that of determining whether there is a contradiction between the national law and the treaty of the union, belongs to the court of law".

On the other hand, with reference to the powers of the Court of Justice of the European Union, the Constitutional Court showed that through the answers to the preliminary questions, the role of the European court is to interpret the relevant provisions of the treaty and not to check whether the domestic legal acts are or not compatible with the provisions of the treaty.

As for the national judge of the case, he has a series of tasks that originate from the constitutional provisions, respectively from the content of art. 148 of the Constitution<sup>31</sup>. One of these is the initiation of a dialogue between the judge in order to pronounce not only a fair legal and thorough solution, but also to have the conviction that the legal provisions applicable in the pending case are in accordance with both the constitutional provisions and those contained in the treaty regarding the functioning of the European Union.

Highly criticized by the international doctrine was the majority opinion expressed in the considerations of Decision no. 390 of 2021 of the Constitutional Court<sup>32</sup>, regarding on the one hand the interpretation given to the provisions of art. 148 of the Constitution by the constitutional court and on the other hand, the overthrow by the

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<sup>29</sup> The judgment of the Grand Chamber issued by the Court of Justice of the European Union on 21 December 2021, paragraphs 133-135.

<sup>30</sup> Published in Official Gazette no. 37 of January 18, 2010.

<sup>31</sup> The text states that "following the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations, have priority over the contrary provisions of the internal laws, in compliance with the provisions of the act of accession".

<sup>32</sup> Published in Official Gazette Part I no. 612 of June 22, 2021.

Romanian constitutional judge of the jurisprudence that makes it possible, in other European member states, to reconcile the claims expressed by the national legal orders simultaneously with the European order.

It is true that the provisions of article 148 of the Constitution regulate the relationship between national law and European Union law, but there are countless arguments that can combat the dualistic perspective according to which European Union law and national law, which includes constitutional law, would have an independent and sealed character compared to the other. Coming from an autonomous source and given its original specific nature, the right born from the treaty cannot be judicially opposed by an internal text, whatever it may be, without thereby losing its community character and without being reinstated in discussion the very legal basis of the community.

Instead, the doctrine of the supremacy of EU law as it emerges from the *Costa v./ENEL Decision*<sup>33</sup> and reconfirmed by subsequent jurisprudence is defined by four main elements: supremacy is an existential condition of EU law. The achievement of common objectives requires the uniform application of EU law, without which the concept of integration would be meaningless. The source of supremacy resides in the very nature of the rules of the EU legal order to be common and is based on the specific, own, original nature of EU law and is in no way dependent on the constitutional law of the member states. Thus, it cannot depend on the divergent rules applicable in one state or another. The legal order of the EU is superior, as a whole, to the national legal orders and is imposed on all the norms that make up the national legal order, whether they are of a constitutional nature. Thus, the Court of Justice states that internal constitutional provisions cannot be used to prevent the application of EU law, such an action being "contrary to community public order". Supremacy is therefore imposed in relation to the fundamental rights as formulated by the national constitution as well as in relation to the principles of a national constitutional structure.<sup>34</sup>

From a distinct perspective, the Constitutional Court showed, among other things, that to the extent that the priority recognized to Union law is limited, in the Romanian legal order, by the requirement to respect the national constitutional identity, it had the task of ensuring the supremacy of the Romanian Constitution on its territory.<sup>35</sup> Accordingly, the court considers that, although a court of common law has the ability to analyze the conformity with Union law of a provision of national law, such a court does not have the ability to examine the conformity with Union law of a national provision whose conformity with article 148 from the Constitution was confirmed by the Constitutional Court. Moreover, the Court specified that if some courts would

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<sup>33</sup> Decision of the Court of Justice of the European Union of July 15, 1964, C6-64.

<sup>34</sup> CJEU and CCR. Identities in dialogue, *Universul Juridic*, Bucharest, 2022, p. 313.

<sup>35</sup> Decision no. 390 of June 8, 2021 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 612 of June 22, 2021.

leave unapplied, ex officio, national provisions that they consider contrary to Union law, while others would apply the same provisions considering them to be in line with this law, there would be an infringement serious to legal security, which would cause the violation of the principle of the rule of law.

However, according to a consistent jurisprudence<sup>36</sup>, the preliminary reference mechanism established by article 267 TFEU aims to ensure, in all situations, that Union law has the same effect in all member states and to prevent the emergence of divergences in the interpretation of this law that national courts must apply and aim to ensure this application. Thus, national courts have the widest possibility and even the obligation to refer the Court, when they consider that a pending case raises questions involving an interpretation or an assessment of the validity of the provisions of Union law that require a decision by the Court. Therefore, the effectiveness of the cooperation between the court and the national courts established through the preliminary reference mechanism would be compromised if the outcome of an objection of unconstitutionality before the Constitutional Court of a Member State could have the effect of discouraging the national court, seized with a dispute governed by this law, to use the possibility or, as the case may be, to fulfill its obligation resulting from Article 267 TFEU<sup>37</sup> to address to the court the questions regarding the interpretation or validity of certain acts of the said right, to allow it to rule whether or not a national norm is compatible with it.<sup>38</sup>

This observation is all the more necessary in a situation where a decision of the constitutional court of the member state refuses to comply with a decision issued with the preliminary title of the court based, among other things, on the Constitutional identity of the member state in question and on the reasoning according to which the court would have exceeded its jurisdiction. We remind you that if a constitutional court considers that a provision of derivative law of the Union as interpreted by the European Court, violates the obligation to respect the national identity of the member state, that Constitutional court must suspend the trial of the case and refer the European court with a request for a preliminary decision to assess the validity of this provision in the light of Article 4 paragraph 2 of the TEU<sup>39</sup>, the Court being the only competent to determine the invalidity of an act of the Union.

This is related to the fact that the provisions of art. 267 TFEU constitute the keystone of the judicial system and establishes a dialogue from court to court applicable also in the relationship between the European constitutional courts and the Court of Justice of the European Union.

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<sup>36</sup> E.g.: Court judgment of 16 December 2021, AB and others, C/203/20, point 49.

<sup>37</sup> Treaty on the Functioning of the European Union, 26.10.2012, consolidated version.

<sup>38</sup> See in this regard the Judgment of 22 June 2010, Melki and Abdeli, C-188/10 and C-189/10.

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