

The Romanian Constitutional Court and the Principle of Primacy:¹ To Refer or Not to Refer?

By Viorica Viță*

A. Introduction

This Article aims to constructively analyze the emerging constitutional dialogue between the Constitutional Court of Romania (the CCR or the Court) and the Court of Justice of the European Union (CJEU).² It focuses, in particular, on the lack of a reference for a preliminary ruling from the first court, and aims to unveil the possible motives underlying this passive behavior.

As more and more European constitutional jurisdictions have broken the silence in the dialogue with the CJEU,³ the lack of a preliminary reference from the CCR has stirred at least the interest of academic observers in what has lately been a highly vocal and vivid

¹ The term “supremacy” is used by the Constitutional Court of Romania in reference only to the national Constitution, pursuant to Articles 1(5) and 146(1) thereof. For the purpose of this Article, we shall use the term “primacy” when referring to EU law and ‘supremacy’ when referring to the constitutional system of Romania, without however attaching a particular meaning to the term “primacy” as opposed to “supremacy.” When referring to the EU legal order, the terms “supremacy” and “primacy” are used interchangeably in the literature. Scholars such as Rosas and Armati have suggested distinguishing between the terms. See ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW: AN INTRODUCTION* 55–56 (2012).

* PhD researcher, European University Institute. The author expresses her gratitude to Cristina Fasone, Giuseppe Martinico, and Irene Spigno for valuable comments on earlier versions of the article. The views expressed in the article as well as any possible errors rest under the exclusive responsibility of the author.

² The author holds the view that the CJEU, whilst not a specialized constitutional court of the EU, has important features of a constitutional jurisdiction, including the assessment of the consistency of acts of the EU and Member States with the letter and spirit of the constituent Treaties, the general principles of EU law, the compliance with fundamental rights, and the observance of the inter-institutional balance of power. In taking this stance, the article joins the scholarly work supporting the constitutional character of the CJEU. On the constitutional features of the CJEU. See Antoine Vauchez, *Brokering EuropeEuro-Lawyers and the Making of a Transnational Polity*, 19 *LSE LAW SOCIETY AND ECONOMY WORKING PAPERS*, 8 (2013); Grainne De Búrca, *The ECJ and the international legal order: a re-evaluation*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM*, 105-150 (Joseph H.H. Weiler and Grainne De Búrca eds., 2011).

³ See, e.g., Spanish Constitutional Tribunal referral in *Melloni*, Sentence 26/2014; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 2728/13, Order of 14 January 2014; French Conseil Constitutionnel referral in *Jeremy F*, Decision No 2013–314P of 4 April 2013.

field of scholarly inquiry.⁴ If one assumes that referral to the CJEU is a deliberate rational choice on the part of the national constitutional courts, rather than an obligation,⁵ then the question that arises is: Why do constitutional courts refer to the CJEU? And, if they do not, why not?

A close reading of the CCR's jurisprudence shows that like other constitutional courts of EU Member States, its general discomfort lies with the principle of primacy and the preliminary reference procedure.⁶ Here again we find it useful to ask: what could be the appropriate theoretical benchmarks for assessing the Court's behavior?

Purely legal arguments may fall short in explaining the complexity of the subject-matter. Therefore, beyond the legal constitutional literature, we have appealed to political science, which can prove particularly helpful when inquiring on the issue. We first chose to test the CCR's behavior against Burley and Mattli's theory of legal integration, which argues that the actors most likely to drive the process of European legal integration are the ones pursuing their self-interest in the European sphere.⁷ Secondly, we look at Alter's judicial competition theory, which claims that national courts' interaction with the CJEU, including through the preliminary reference procedure, is determined by competitive strategic considerations in the attempt to advance one court's power in the judicial landscape.⁸ According to the theory, higher courts and constitutional jurisdictions would be the last to initiate the reference dialogue and only if interested in advancing their line of reasoning at the EU level.⁹ We shall return to these theories in the last section of this article.

⁴ See L'OBLIGATION DE RENVOI PREJUDICIEL À LA COUR DE JUSTICE UNE OBLIGATION SANCTIONNEE? (Laurent Coutron ed., 2014); Matthias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It*, 15 GERMAN L. J. (2014); see also DARINKA PIQANI, SUPREMACY OF EU LAW AND THE JURISPRUDENCE OF CONSTITUTIONAL RESERVATIONS IN CENTRAL EASTERN EUROPE AND THE WESTERN BALKANS: TOWARDS A 'HOLISTIC' CONSTITUTIONALISM (2010).

⁵ In line with Art. 267(3) TFEU and CJEU's *CILFIT* doctrine, Case C-283/81, *CILFIT v. Ministero della Sanità*, 1982 E.C.R. I-03415.

⁶ See Maria Dicosola, Cristina Fasone & Irene Spigno, *Foreword—Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, in this *Special Issue*.

⁷ Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 43 (1993).

⁸ Karen J. Alter, *The European Court's political power*, 19 W. EUR. POLS. 458–87(1996); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2002).

⁹ Lisa Conant, *Compliance and What EU Member States Make of It*, in COMPLIANCE AND THE ENFORCEMENT OF EU LAW 1, 26 (Marise Cremona ed., 2012).

The aim of the present contribution is to go beyond the surface. It attempts to explore the unexplored dialogue between the CCR and CJEU by way of the preliminary reference procedure and to unveil the CCR's holistic attitude towards the EU legal order.

To this end, the Article first introduces the Romanian constitutional architecture, contextualizing the constitutional review tradition, the role of the CCR, and the peculiar constitutional *locus standi* of EU law (Section B).

Then, the Article engages in a close reading of the CCR's pre-accession and post-accession line of reasoning towards EU law (Section C). Particular attention shall be paid to the decisions of the Court where the principle of primacy has been discussed.

Building on the findings, the Article will finally try to draw together the conclusions on the CCR's attitude towards the preliminary reference dialogue, aiming to unveil the possible inner sensibilities of the Court, to explore the underlying causal factors, and to advance a possible hypothesis as to the future dialogue avenues opened by means of the preliminary reference procedure (Section D).

B. The Romanian Constitutional Tradition: Preliminary Remarks

Pierre Pescatore stated that, “[b]efore one can talk of the substance of legal norms, one must see what the structure is into which these norms are integrated.”¹⁰ This section aims at precisely that. It introduces the essential constitutional shapes and structures within which the future discussion on the CCR and the preliminary reference mechanism will be integrated. At the same time, it sets an overarching conceptual framework in support of our further attempt to understand the position of the CCR within this complex architecture. Following a presentation of the Romanian constitutional review system and the Constitutional Court (I), the *locus standi* of EU law as compared to international and national law sources will be identified through the lenses of constitutional hierarchy (II).

I. An “Old” Constitutional Review Tradition and a “Young” Constitutional Court

The constitutional review tradition of Romania goes back to 1912, when the High Court (now, *Înalta Curte de Casație și Justiție*) confirmed in the famous ‘Case of Trams’ (*Procesul tamvaielor*) the competence of the ordinary courts to review the compatibility of ordinary laws with the Constitution in cases pending before them.¹¹ The constitutionality review was further centralized by the Constitution of 1923 under the

¹⁰ Interview with Pierre Pescatore: Composition and working methods of the Legal Group, Luxembourg, 10 September 2003, available at www.cvce.eu.

¹¹ High Court, Decision of 16 March 1912.

competence of the High Court judging in full court (the “United Chambers”).¹² The provisions were also preserved in the 1938 Constitution.¹³ According to the 1923 and 1938 Constitutions, when confronted with a question of unconstitutionality (called ‘*excepție de neconstituționalitate*’—exception of unconstitutionality), national courts could refer the question to the United Chambers of the High Court, competent to review the constitutionality of the challenged norms and declare them inapplicable if contrary to the Constitution. The constitutional review lacked a general binding nature. Thus, its legal effects were limited *inter partes* in the specific case pending before the referring court.

During the post-bellum period, a time of unrest followed for Romania’s constitutional values. Until the violent overthrow of the communist regime in 1989, constitutional review was maintained on a fictive level. Its true notion and scope was long-forgotten in the legal vocabulary, as incompatible with and even inconceivable within the structure and aims of the totalitarian regime.¹⁴

The 1989 Revolution marked a ‘momentum zero’ in the Romanian constitutional tradition. Like most post-communist states (except Hungary and Latvia), Romania adopted a completely new Constitution.¹⁵ It is only with the 1991 Constitution that a specialized constitutional review was formally established, for the first time, under the exclusive jurisdiction of a Constitutional Court.¹⁶

Guardian of the supremacy of the Constitution,¹⁷ the CCR was first established and fully functioning as of 1992.¹⁸ As a post-Cold War institutional edifice, the CCR is a relatively young constitutional jurisdiction, both within the national legal tradition and within the EU constitutional family.

¹² Constitution of Romania 1923, Art. 103.

¹³ Constitution of Romania 1938, Art. 75.

¹⁴ The 1952 Constitution made no reference to the constitutional review, whereas Article 53 of the 1965 Constitution delegated the constitutional control to the legislator, namely the Constitutional and Legal Committee of the Popular Assembly.

¹⁵ For a short constitutional history of Romania, see Association Pro-democracy, *The Constitutional Reform in Romania*, 17–22 (2008), available at <http://legislatie.resurse-pentru-democratie.org/constitutie/reforma-constitutionala-in-romania.pdf>.

¹⁶ Constitution of Romania 1991, Title V, Arts. 140–45.

¹⁷ Constitution of Romania 1991, revised in 2003, Official Monitor Part I, No. 758 of 20 October 2003, available in English at <http://www.cdep.ro/pls/dic/site.page?id=371&idl=2>. Article 1(5) thereof reads, “In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory.” Art. 142(1) states, “The Constitutional Court shall be the guarantor for the supremacy of the Constitution.”

¹⁸ Law 47/1992 on the organization and functioning of the Constitutional Court of Romania, Official Monitor of Romania Part I, No. 101 of 22 May 1992, as republished in 2010, available in English at <http://www.ccr.ro/en/Legea-nr-471992> [hereinafter Law 47/1992].

Since its creation, the CCR has been in a continuous struggle to find and consolidate its standing within the national judicial spectrum. It has often had to reaffirm its authority in front of the judiciary, especially in its relationship with the High Court that previously enjoyed the constitutional review competence. Some commentators even speak of an open “rivalry” between the two jurisdictions.¹⁹ The rivalry is particularly fuelled by a special procedure at the disposal of the High Court—the recourse in the interest of the law (*‘recurs in interesul legii’*), which allows the High Court to issue a decision on the unitary interpretation and application of law in case of dissenting national jurisprudence.²⁰ The interpretation given by the High Court on a legal matter is compulsory for all the courts. The procedure has often raised tensions between the High Court, on the one hand, and the Constitutional Court, on the other. The latter had to reaffirm in several instances that its decisions are compulsory on all the judiciary, including the High Court.²¹ This context put pressure on the CCR to search and assert its genuine line of reasoning on substantive law matters. This holds true also for the CCR’s position on EU law matters, where the court sought to adopt a stance distinctive from the rest of the judiciary, reserving to itself only several EU law prerogatives, as we shall see below.

As to the institutional architecture, the Constitutional Court of Romania was much inspired by its French counterpart, borrowing substantial composition and competence features.²²

The CCR is composed of nine judges, invested with a nine-year, non-extendable mandate. Three judges are named in function by the President, three by the Chamber of Deputies,

¹⁹ Renate Weber, *The Romanian Constitutional Court: in search of its own identity*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 283 (Wojciech Sadurski ed., 2003).

²⁰ Constitution of Romania, Art. 126(3) (“The High Court of Cassation and Justice shall provide a unitary interpretation and application of the law by the other courts of law, according to its competence.”). Rules are detailed in Articles 514–18 Romanian Code of Civil Procedure, Article 471 Romanian Code of Criminal Procedure. The legal standing in the procedure is limited to the General Prosecutor’s Office attached to the High Court of Cassation and Justice, acting ex officio or at the request of the Minister of Justice, the College Board of High Court of Cassation and Justice, leading boards of the courts of appeal, and the Ombudsman, which have the duty to ask the High Court of Cassation and Justice to rule on questions of law which have been solved differently by the courts. The solution and interpretation of the High Court is compulsory on all the other Courts from the day of its publication in the Official Monitor of Romania.

²¹ One could mention with the title of example the decriminalization of insult and calumny clash between the two courts. The decriminalization of the offences was declared unconstitutional by the CCR based on human dignity concerns by Decision No. 62/2007, Official Monitor No.104 of 12 February 2007; solution overturned by the High Court by Decision No. 8/2010, Official Monitor No. 416 of 14 June 2011. Finally, the CCR intervened again and declared the interpretation of the High Court unconstitutional, explaining at the same time that the recourse in the interest of law procedure may not be turned into a constitutionality review in Decision 206/2013, Official Monitor No. 350 of 13 June 2013.

²² For a comparison see the structure and function of the CCR as provided by the Constitution of Romania (note 17), Title V, Arts. 142–47 as compared to the Constitution of French Republic of 1958, Title VII, Arts. 56–63.

and three by the Senate.²³ The composition of the CCR is renewed every three years by three judges, according to the provisions of the special law on the functioning and organization of the Court.²⁴

The competences of the CCR are both jurisdictional and consultative. The jurisdictional competences concern: the constitutionality review of normative acts, monitoring and result confirmation of electoral scrutiny and referenda, and solving the inter-institutional constitutional conflicts. The Court also decides on the conditions that justify the interim exercise of the President function, the constitutionality of political parties and checks the conditions for the exercise of the citizens' legislative initiative. With a consultative title the advice of the Court must be sought on a President's suspension proposal.²⁵

From a temporal point of view, the constitutional review of normative acts of general application is exercised *a priori* and *a posteriori*.

A priori, the CCR is empowered to undertake the constitutional review of laws at the request of the President, the Speakers of the two Parliament Chambers, the High Court of Cassation, the Government, the Ombudsperson, fifty members of the Chamber of Deputies, or twenty-five Senators. The Court may also review *a priori* the constitutionality of international treaties and agreements before their ratification, at the request of the Speakers of the two Parliament Chambers or a number of at least fifty Deputies or twenty-five Senators.²⁶ In addition, the CCR may review *ex officio* legislative initiatives on constitutional amendments, as a supplementary guarantee of the supremacy of the Constitution and its limits of revision.²⁷

A posteriori, the CCR may review the constitutionality of laws and government ordinances²⁸ by way of a decision on "exception of unconstitutionality" raised by the Ombudsperson, or during the proceedings *pendente* by the parties, the prosecutor, or *ex officio* by the court hearing the case.²⁹ The procedure is the expression of the ante-bellum

²³ Constitution of Romania, Art. 142(2)-(3).

²⁴ *Id.* at Art. 142(5); Law 47/1992.

²⁵ Constitution of Romania, Art. 146.

²⁶ Constitution of Romania, Art. 146 b). Once the constitutionality of the international treaty has been established *a priori* it may not be the object of an *a posteriori* constitutionality claim. The international treaty declared unconstitutional cannot be ratified by the Parliament or the Government.

²⁷ *Id.* at Art. 146 a).

²⁸ Understood as both Government Ordinances and the Emergency Ordinances, which are forms of delegated legislative acts adopted by the Government, pursuant to Article 115 of the Constitution.

²⁹ Weber, *supra* note 19, at 283

“exception of unconstitutionality” tradition, decided at the time by the United Chambers of the High Court.

Under the present constitutional framework, the CCR is conceived as being the sole constitutional jurisdiction, distinct from the rest of the judiciary, with explicitly designed powers and competences.³⁰ As such, from the point of view of national constitutional law, the CCR is not part of the judiciary.³¹ The Court is the sole constitutional jurisdiction, with its main task being that of guaranteeing the supremacy of the Constitution. The specific position of the CCR within the national institutional framework also has an effect on the Court’s attitude towards the EU legal order, as we shall further observe.

As a general rule, the acts of the CCR are adopted by its members—nine judges—acting by majority.³² By derogation, the decisions on the proposals of the revision of the Constitution and rulings on validation of referenda results are taken by two-thirds of its members.³³ The EU accession did not include any reference to cooperation with the CJEU in the law on the functioning of the CCR. Therefore, according to the current provisions, a decision on a referral to the CJEU would need to be adopted according to the general procedure, thus by absolute majority of five out of nine judges of the Court.

Regarding the legal effects of the CCR’s decisions, these are of general application and produce effects only for the future—*ex nunc*.³⁴ The laws, government ordinances, and Parliament’s rules of procedure, as well as the specific normative provisions declared unconstitutional in an *a posteriori* review, are legally suspended from the publication of the CCR decision, and, if not amended within forty-five days by the Parliament or the Government, cease to produce any legal effect.³⁵ Acts found to be unconstitutional *a priori* have to be re-examined by the Parliament before their adoption.³⁶

³⁰ Constitution of Romania, Title V, “Constitutional Court.”

³¹ *Id.* at Title III, Chapter VI ‘Judicial Authority’.

³² Law 47/1992, Art. 6.

³³ *Id.* at Arts. 21, 47.

³⁴ Constitution of Romania, Art. 147(4).

³⁵ *Id.* at Art. 147(1). In addition, according to Article 147(3), where an international treaty is found incompatible with the Constitution it cannot be ratified by the Parliament, unless the Constitution is revised. At the same time, the international treaty may not be subject to an *a posteriori* constitutional review once its constitutionality is confirmed *a priori* by the CCR.

³⁶ *Id.* at Art. 147 (2).

II. Hierarchy of Norms: What Place for EU Law?

Having regard to the above, several additional points have to be highlighted in order to understand the Romanian constitutional architecture and its relationship with EU law.

First, as a matter of principle, the Constitution of Romania establishes a dualist system of reception of international law.³⁷ Pursuant to Article 11 of the Constitution, treaties—*lato sensu*, including declarations, memoranda, and protocols—are part of the national legal order from the moment of ratification by Parliament, taking the same position in the national legal hierarchy as the act of ratification. Consequently, the legal effects of an international norm depend on the nature and legal force of the national reception norm—the ratification act.

However, as scholars have argued, the traditional monist-dualist doctrine is no longer apt at explaining the present day legal realities of international law reception, and it surely falls short in explaining the EU model of legal integration.³⁸ This is the case for both international human rights treaties and EU law under the Romanian constitutional system. Both normative systems derogate from the principle dualist model and have been assigned specifically adapted positions in the constitutional realm.

As such, international human rights treaties occupy a twilight area between the classical monist-dualist divide, holding a privileged position in the legal hierarchy. These are part of the so-called “constitutionality block.” According to Article 20 of the Romanian Constitution, constitutional fundamental rights and freedoms are to be interpreted and applied in the light of the Universal Declaration of Human Rights and other human rights treaties. In practice, the European Convention on Human Rights (ECHR) is the primary inspiration for the CCR on fundamental rights matters. In case of a conflict between national law or the Constitution on the one hand, and international human rights treaties on the other, the latter shall have “priority,” unless the national law or the Constitution guarantees a higher standard of protection.³⁹ Therefore, where the Constitution provides for a lower standard of human rights protection, international human rights treaties have priority over the Constitution itself.

This complex, yet highly interesting, doctrine of constitutionality block responds to the need to accommodate a new source of international law – human rights treaties – distinct

³⁷ *Id.* at Art. 11(2) (“The treaties ratified by the Parliament, pursuant to the legal provisions, are part of the national law.”).

³⁸ Niel MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1–18 (1993).

³⁹ Constitution of Romania, Art. 20(2) (“Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall have priority [*‘prioritate’*], unless the Constitution or national laws comprise more favorable provisions.”).

from prior arrangements, which demand priority over lower national standards of human rights protection, including constitutional ones. The constitutionality block doctrine is a fascinating legal construct which allows a harmonious and soft 'co-habitation' between the supremacy of the national Constitution and the priority of higher international human rights standards of protection (*de facto* primacy). Its essential trait is that, as part of constitutionality block, international human rights treaties do not have a pre-defined and definitive position in the national legal hierarchy. They are neither positioned higher, nor lower, than the Constitution. They are embedded in the "spirit" of the fundamental law, constituting its inner, indissoluble *alter ego*. As such, the provisions of the Constitution are to be applied and interpreted so as not to affect these underlying principles. If, however, the constitutional text goes contrary to the higher international standard of human rights protection, the latter necessarily prevails.

EU law, including its principle of primacy, does not fall within the above-described constitutionality block doctrine. It enjoys a separate, carefully tailored, *locus standi* and a peculiar *status quo* in the Romanian constitutional architecture.⁴⁰ As such, binding EU norms make their way into the Constitution *via* Article 148, introduced by the 2003 reform preparing the EU accession. De Witte pointed out that EU membership clauses are usually seen as the constitutional basis of legitimizing the acceptance of the principle of primacy into the national discourse.⁴¹ This is also the case for the Romanian Constitution. Article 148 constitutes in fact the "accession clause." It allows for the transfer of national competences to the EU level and guarantees the 'priority' of EU law over the conflicting national provisions, without distinguishing between national law and the Constitution, as Article 20 does. It also adds that the President, the Government, the Parliament, and the judiciary shall all be bound to ensure the "priority" of EU law.⁴² The conclusion which

⁴⁰ Constitution of Romania, Title VI: Euro-Atlantic Integration, Art. 148 "Integration into the European Union."

⁴¹ Bruno de Witte, *Direct Effect, Primacy and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW* 346, 353 (Paul Craig & Gráinne de Búrca eds., 2011).

⁴² Constitution of Romania, Art. 148 reads:

(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall have priority ['prioritate'] over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(3) The provisions of paragraphs (1) and (2) shall also apply

would follow from a pure textual interpretation of the Constitution would be that it is only for the ordinary judiciary and not for the Constitutional Court to observe Romania's obligations under EU law, including the "primacy" of binding EU rules.⁴³ Nevertheless, the Constitutional Court sees itself as an important actor in the EU legal process and has never employed such a narrow and formalistic legal interpretation. At the same time, as we shall see below, the CCR has been sure to demarcate a separation line regarding its competence on the matter.

It is interesting to note, moreover, that the accession clause is also seen by the CCR as the basis for the reception of the Charter of Fundamental Rights of the EU (the Charter) into the national legal order. The Court analyzes the Charter as EU primary law, rather than as an international human rights treaty (Article 20). In practice however, the CCR's line of interpretation on the Charter is suspended somewhere in between the two constitutional provisions.⁴⁴ On the one hand, the Charter is seen as an emanation of the Article 148 accession clause, being assimilated to EU law. On the other hand, the Court has appreciated, in the spirit of Article 20(2) on the priority of human rights treaties, that the Charter might apply the constitutionality review when it ensures a higher standard of fundamental rights protection or at least guarantees the same standard as the Constitution.⁴⁵

Lastly, one should note that the Constitution of Romania uses the term "supremacy" only when referring to the Constitution itself.⁴⁶ When referring to EU law or human rights treaties, the term "priority" ("*prioritate*") is employed.⁴⁷ This wording has played an important role in the interpretation of the CCR. Even if both the Constitution and the CCR

accordingly for the accession to the acts revising the constituent treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

⁴³ Based on the textual interpretation of Articles 148(4) and 148(2), corroborated with the provisions of Title V "Constitutional Court" and Title III, Chapter VI "Judicial Authority."

⁴⁴ CCR, Decision 871 of 25 June 2010, Official Monitor of Romania No. 433 of 28 June 2010.

⁴⁵ *Id.*

⁴⁶ Constitution of Romania, Arts. 1(5) and 142(1).

⁴⁷ *Id.* at Art. 20 (2), Art. 148 (2).

use the term “priority,” in fact the term refers to primacy of application of EU law over national law.

With these central concepts of the Romanian constitutional system in mind, the next section embarks on an analysis of the CCR’s struggle to define its line of reasoning with regards to the EU legal order. The section presents the relevant case law from an evolutionary-comparative perspective, running through the pre-accession and post accession periods, and up to the most recent decisions. The findings highlight the CCR’s evolving discourse and its maturing line of reasoning towards the “new [EU] legal order,” as well as the challenges encountered alongside this evolutionary road.

C. The CCR and the CJEU: An Emerging Dialogue

This section engages in a close reading of the CCR’s EU line of reasoning. The approach departs from the presumption of a close link between the principle of direct effect, the principle of primacy, and the preliminary reference procedure.⁴⁸ It assumes that once a constitutional jurisdiction is reticent towards the reception of one of the three elements, the effectiveness of the other two might be hampered. Thus far, the CCR has not made use of the referral mechanism. As for the other two elements, while the CCR has never questioned direct effect, the acceptance of the principle of primacy has been problematic, especially with regard to the Constitution itself. This preliminary point leads us towards a necessarily deeper investigation into the CCR’s degree of acceptance of the principle of primacy, which might provide valuable insights on the unemployed referral procedure.

The decisions discussed below correspond to the country’s EU integration timeline and are linked to the important moments thereof, such as: the start of EU accession negotiations (1999),⁴⁹ the signature and ratification of the accession treaty (2005),⁵⁰ the entry into force of the treaty of accession (1 January 2007),⁵¹ and the post-accession developments (post-2007).

Analyzing the benchmark decisions of the CCR in which EU law discourse was employed, its overall attitude towards the EU legal order can be seen and assessed as generally fluctuant

⁴⁸ G. Federico Mancini & David T. Keeling, *From CILFIT to ERT: the Constitutional Challenge facing the European Court*, 11 Y.B. EUR. L. 1–13, (1991).

⁴⁹ Proposal for a Council Decision on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Romania, COM (99) 0530 final, 13 October 1999, endorsed by the Council Decision 1999/852/EC of 6 December 1999, O.J. 1999 L 335/15.

⁵⁰ Treaty of Accession of Romania and Bulgaria to the EU, signed in Luxemburg on 25 April 2005, O.J. L157/11, 2005.

⁵¹ *Id.* at Notice on the entry in force (“Subject to the ratification procedure, the Treaty of Accession will enter into force on 1 January 2007 . . .”).

and cautious, although progressively gaining in confidence. The decisions show that the CCR has largely reserved to itself the authority to define the relationship between EU law and national constitutional law, adopting what Alter has called the “‘don’t ask and [CJEU] can’t tell’ policy.”⁵² Given the CCR’s fluctuant position on EU law matters, as well as the diversity of areas covered, the decisions shall be largely presented separately. In as much as is possible, the analysis will cluster the arguments and draw a holistic picture from the conclusions.

I. Approaching EU law: First Pre-Accession Steps

The CCR was one of the active voices during the EU integration process of the country. Already during the pre-accession period the CCR illustrated a promising interest in the EU “new legal order.” The trend was gradually emphasized under the imminence and proximity of accession.⁵³ Compared to its Bulgarian counterpart, the CCR did not hesitate to refer repeatedly to the CJEU case law, to invoke questions of European values,⁵⁴ and to cite EU secondary legislation, even though the latter did not yet constitute binding law.⁵⁵

In 2000, shortly after the launch of the accession negotiations, the CCR referred to the EEC Copyright Directive,⁵⁶ citing comprehensive parts of the EU act in support of its reasoning.⁵⁷ The challenged national law provisions were in fact transposing the relevant provisions of the directive as part of the EU pre-accession *acquis*. When asked to review the constitutionality of the correlative national provisions, the Court went directly to their EU source, even though the latter did not yet have binding effect. In this way, the CCR adopted a broader view and did not consider the non-binding nature of the Directive to be an obstacle. Instead, it gave effect to the duty of consistent interpretation of national law with EU law to support its findings. In this respect, the CCR appreciated that the directive constituted an important source of reference, prescribing “internationally recognized standards,” relevant to the constitutional review.⁵⁸

⁵² Alter, *supra* note 8, at 465–66.

⁵³ Kathleen Barrett, *Pre-Accession Influence of the European Court of Justice: Do Constitutional Courts Use the European Court of Justice?*, GEORGIA STATE UNIVERSITY, 19–22 (2007), available at http://citation.allacademic.com//meta/p_mla_apa_research_citation/1/7/8/4/7/pages178478/p178478-2.php.

⁵⁴ *Id.* According to Barrett, the CCR referred to the CJEU case law in seven decisions and to European values in more than twenty decisions; Barrett also shows that the overall activity of the Court and its judges showed an increasing openness towards the European legal system.

⁵⁵ CCR, Decision no 253/2000, Official Monitor of Romania No 261 of 22 May 2000 [hereinafter CCR Decision no 253/2000].

⁵⁶ Council Directive 93/83/EEC of 27 September 1993 O. J. 1993 L 248.

⁵⁷ CCR, Decision no 253/2000.

⁵⁸ *Id.*

A second EU-friendly decision found its way into the CCR jurisprudence immediately following the ratification of the EU accession treaty on 17 May 2005.⁵⁹ By Decision 408/2005, the CCR upheld its prior practice and reviewed a national norm in the light of its EU secondary law source.⁶⁰ Departing from the text of the Eurovignette Directive,⁶¹ the CCR found that national provisions excepting certain vehicles from the tax on access to the public roads network were consistent with the constitutional principle of equality before the law. The decision was supported by two arguments: First, the Court found that derogations were allowed by the text of the directive “subject to the [European] Commission’s agreement,” and second, the measures were in line with the ECtHR case law and the Constitution.⁶²

On the cusp of the 2007 accession,⁶³ the Court continued its proactive attitude and, beyond the references to EU secondary legislation highlighted above, referred to the CJEU’s case law.

As such, the CCR found, based on the CJEU’s ruling in *Mangold*,⁶⁴ that the age limit conditioning access to the exercise of the profession of lawyer was unconstitutional as it discriminated on grounds of age.⁶⁵ In making this finding, the CCR engaged in a twofold argument. First, it held that even if “age” is not expressly mentioned as a ground of discrimination in the Constitution, the constitutional provisions could not be interpreted as prescribing an exhaustive enumeration of grounds of discrimination. Second, and in order to reinforce its findings,⁶⁶ the CCR referred to the similar solution adopted by the CJEU in *Mangold*.⁶⁷

⁵⁹ Parliament of Romania, Law 154/2005 on the Ratification of the Treaty of Accession of Romania and Bulgaria to the EU signed in Luxemburg on 25 April 2005, adopted in the joint session of the Chamber of Senate and Chamber of Deputies of 17 May 2005, available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=6308. The treaty entered into force on 1 January 2007.

⁶⁰ CCR, Decision 408/2005, Official Journal of Romania No. 706 of 4 August 2005 [hereinafter CCR Decision 408/2005].

⁶¹ EC Directive 1999/62 of 17 June 1999, O.J. 1999 L 187, Article 6(2) b).

⁶² CCR Decision 408/2005.

⁶³ CCR, Decision no 513 of 20 June 2006 Official Monitor of Romania no 598 of 11 July 2006, para. 1.

⁶⁴ Case C-144/04, Werner Mangold v. Rüdiger Helm, 2005 E.C.R. I-09981.

⁶⁵ Law 51/1995 on the organization and exercise of the profession of a lawyer. The provision declared unconstitutional reads, “[t]he person who fulfills the legal requirements to access the profession of a lawyer may require that at least 5 years before the normal retirement age”

⁶⁶ Decision no 513 of 20 June 2006 Official Monitor of Romania No 598 of 11 July 2006.

⁶⁷ *Mangold*, Case C-144/04.

The decision is remarkable from several points of view. First, it should be noted that the CCR refers to the case law of the CJEU, not only in an incidental manner, but as a core argument of the legitimacy of its decision. Second, in so doing, the Court advances the reception of the non-discrimination *acquis* prior to accession, upholding “age” as an explicit ground of discrimination. Third, the example is telling, as by referring to *Mangold*, the Court adopts a cooperative attitude towards the CJEU and gives effect to the principle of loyal cooperation and uniform interpretation of EU law.⁶⁸ Lastly, it proves that the Court was closely following the CJEU.

Beyond the reference to EU law and CJEU case law, the 2003 Constitutional reform, preparing the accession, offered the CCR the chance to ‘speak’ on the principle of the primacy of EU law. Upon the *ex officio* review of the legislative initiative on the revision of the Constitution, the CCR expressed for the first time its view on the principle of primacy.⁶⁹ In the CCR’s view: “[...] Member States of the European Union agreed to situate the *acquis communautaire*—Treaties establishing the European Union and regulations derived from them - on an intermediate position between the Constitution and other laws, when it comes to European binding legislative acts.”⁷⁰ This formulation exposes a still fragile understanding of the primacy principle.⁷¹ However, the decision is helpful in as much as it hints at the CCR’s first comprehension of the new EU legal order, which it perceives as being a special international source of law, supra legislative, yet subordinated to the Constitution.

In the light of the above decisions, what does the pre-accession period show? On the one hand, the Court is open to invoking EU law sources and interpreting national law consistently with EU law in support of its constitutionality analysis. On the other hand, the CCR refuses to limit the privileged position of the Constitution in the national legal order, and thus excludes it from the scope of application of the principle of primacy.

⁶⁸ Case C-28/62, *Da Costa en Schaake NV and others v. Administratie der Belastingen*, 1963, E.C.R. 1963.

⁶⁹ CCR, Decision 148/2003, Official Monitor of Romania No 317 of 12 May 2003.

⁷⁰ *Id.* Author’s translation from Romanian.

⁷¹ The formulation may be contested from several points of view. First, the genesis of the principle of primacy may not be attributed to the Member States’ agreement; quite on the contrary, it has known a jurisprudential inception following the CJEU’s *Costa v. ENEL* judgment. Second, the limitation of EU *acquis* to EU treaties and binding regulations is an overly narrow definition of the term. Third, the claim that the EU law enjoys generally an infra-constitutional position in all the Member States is false.

II. Post-Accession Developments: In Search of an EU Reasoning Stance

As we shall see in the set of decisions presented below, the Court did not take the same EU-open approach in the post-accession period.

This general observation has, however, known one exception.⁷² The exception refers to Decision 59/2007 pronounced on 17 January 2007, immediately after the entry into force of the treaty of accession on 1 January 2007.⁷³ One may refer to the Decision as a ‘post-accession inertia’ following a pre-accession driven movement, announcing the stop of the EU-open constitutional reasoning machinery.

1. The “Inertial” Move

Decision 59/2007 is quite an EU law delight. It is an outstanding example of where the Court is generous with EU law arguments, going from the analysis of the founding treaties and EU regulations to the articulation of the principle of direct effect and primacy. Even if one might praise the CCR for its attempt to engage with an in-depth and EU-open argument, the Decision is an outstanding example of “when the CCR got it wrong.”⁷⁴

In fact, when asked whether a national law prescribing a state-aid scheme was compatible with the Constitution,⁷⁵ via the accession clause,⁷⁶ the CCR embarked on a veritable EU law journey. In assessing the constitutionality of the state aid measure, it adopted its pre-accession practice and went directly to the EU law source. As such, the CCR assessed the constitutionality of the national law in the light of the EU law state aid provisions through the lenses of the Article 148 accession clause, which enshrines the ‘priority’ of EU law over conflicting national provisions. In doing so, the CCR first noted that all national provisions on state aid were void as of the date of accession and that the Treaty provisions together with other relevant secondary EU law sources were directly applicable. Second, as the national law was adopted in the state aid area, the Court examined whether the scheme conflicted with the EU law and whether there was a need to enforce the principle of primacy *in casu*. Finally, the CCR concluded that the contested state aid law was

⁷² CCR, Decision 59/ 2007, Official Monitor of Romania No 98 of 08 February 2007 [hereinafter CCR Decision 59/2007].

⁷³ Treaty of Accession of Romania and Bulgaria to the EU, signed in Luxemburg on 25 April 2005, O.J. L157/11, 2005.

⁷⁴ We adapted the metaphor of Joseph H.H. Weiler, The 2013 European Constitutional Law Network Conference: “When the ECJ gets it wrong,” Florence, 18–19 November 2013.

⁷⁵ Constitution of Romania, Art. 135(2) on the obligation of the state to ensure a loyal market competition.

⁷⁶ *Id.* at Art. 148.

compatible with EU law—thus constitutional—and that the state’s obligation to give full effect to EU law under the accession clause was fulfilled.

The decision shows a confident court, which undertakes the task of checking the conformity of national law with the corresponding EU law provisions. In doing so, the CCR does not see any problem of competence either with respect to the national judiciary or the CJEU. Moreover, the CCR does not see any overlap with the competences of the European Commission—the competent authority to authorize the state aid scheme, as of accession. In this sense, even if the CCR acknowledged the competence of the European Commission, it nevertheless undertook itself the analysis of the state aid’s compatibility with the single market. The Court was equally not dissuaded by the highly complex and technical field of EU state aid law. Thus, following a brief analysis of the pertinent EU legal sources, the CCR “appreciate[d]” that the state-aid scheme was compatible with both the national and the EU market.⁷⁷ Moreover, the CCR appreciated that the measure was capable of fostering competition.

The dissenting opinion of two of the nine judges did not stop there. The opinion found the state aid scheme to be contrary to EU law and argued for its unconstitutionality, in application of the principle of the primacy of EU law *via* the accession clause.⁷⁸

Whereas the Decision exemplified a highly open stance towards EU law, it is important to stress that it remains an isolated post-accession case and, moreover, a highly criticized one.⁷⁹ In the rest of the cases we find the CCR to be quite hesitant, if not reticent, about referring to the EU legal order on its own motion. When confronted with a question of EU law, the court approaches it with extreme caution so that the result does not backfire in future constitutionality reviews. In the most recent decisions, the CCR seems to regain a relative confidence. However, it does so by setting clear limits and rules concerning the relationship between the national constitutional order and the EU legal order.

2. From “Chilling Effect” to a Gradual Constitutional Warming

The post-accession case law shall be considered by drawing on three case studies: (2.1) the European Arrest Warrant, (2.2) the Pollution tax, and (2.3) the Data Retention Directive. The examples put forward are particularly interesting, for several reasons. First, the European Arrest Warrant (EAW) cluster of decisions illustrates stagnation in reasoning

⁷⁷ CCR Decision 59/2007.

⁷⁸ *Id.* (dissenting Opinion of Judges Vida and Cochinescu).

⁷⁹ Elena Simina Tănăsescu, *Tendances dans la jurisprudence de la Cour Constitutionnelle après l’adhésion de la Roumanie à l’UE*, in *LE ROLE ET LA PLACE DES COURS CONSTITUTIONNELLES DANS LE SYSTEME DES AUTORITES PUBLIQUES* 159–62 (Genoveva Vrabie ed., 2010).

when it comes to EU law matters, as compared with Decision 59/2007 analyzed above.⁸⁰ Second, the Pollution tax cases depict a continuous reconceptualization of the EU law argument under the constant pressure of numerous constitutionality challenges. Finally, the Data retention duplet bridges the previous two case studies. It illustrates the contrast in the CCR's reasoning between its 2009 inwards-looking Decision and the 2014 Decision, where it closely following the CJEU.⁸¹ The section concludes with a very recent decision of the CCR in which the court expressed a radical position on the primacy of EU law over the Constitution, seeing it as impinging upon the core constitutional guarantees and limiting substantially its own competence (2.4).

1.1 European Arrest Warrant

Shortly after accession, as the Framework Decision on the EAW gained binding force at national level,⁸² the CCR was asked to review its constitutionality. In all instances it found the EU judicial cooperation mechanism to be compatible with the Constitution, showing, nevertheless, a rather scarce EU law rhetoric.

In the first Decision 400/2007, the CCR found the EAW to be constitutional, based on the respect of "pre-eminence of international law, notably the international judicial cooperation in criminal matters."⁸³ Any reference to the EAW Framework Decision was lacking. If one looks at the decisional timeline of the CCR, notably at the previous 'inertial' Decision 59/2007 issued three months before, the contrast is quite dramatic. Not only did the court not refer to the EU source of the national provisions, but it presented the EAW exclusively as an international - rather than an EU - form of judicial cooperation in criminal matters.

In Decision 419/2007, the CCR relaxed its stand. It mentioned the EU source of the national EAW implementing provisions, reasoning on their logic and mentioning the principle of mutual recognition.⁸⁴ As an additional argument supporting the constitutionality finding, it underlined that "the Romanian legislator has implemented exactly the provisions of the

⁸⁰ CCR Decision 59/2007.

⁸¹ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General*, (Apr. 8, 2014), <http://curia.europa.eu/>.

⁸² Council Framework Decision 2002/584/JAI of 13 June 2002, O.J. 2002 L 190, implemented by Law 302/2004 on international judicial cooperation in criminal matters as amended by Law 224/2006, Official Monitor of Romania No. 594 of 1 July 2004.

⁸³ CCR, Decision 400/2007, Official Monitor of Romania No.296 of 4 May 2007.

⁸⁴ CCR, Decision 419/2007, Official Monitor No 330 of 16 May 2007 [hereinafter CCR Decision 419/2007].

[EAW] Framework Decision, adopting the principles and directing lines thereof.”⁸⁵ Even if this reasoning left more space for EU law arguments, the position was not replicated. In subsequent decisions, while consistently supporting the constitutionality of the EAW, the CCR preferred to refer exclusively to its first Decision 440/2007, in which it had avoided any EU law discussion.⁸⁶

It is also important to stress that by Decision 1127/2007⁸⁷ the CCR informs the public that it is largely aware of the constitutional contestations on the EAW Framework Decision in other Member States.⁸⁸ As an expression of constitutional judicial dialogue, the CCR refers to the prior decisions of the Polish and German Constitutional Courts. It is interesting to note that the Court uses the Polish and German examples in support of the EAW’s constitutionality rather than in the opposite sense, as one might have expected. First, the CCR states that, given the importance of the EAW instrument, the Polish Constitution has been amended to allow the operation of the judicial cooperation tool. Second, it underlines that the unconstitutionality finding of the German Constitutional Court was based on fundamental rights concerns, which was not the case in the Romanian implementing measures.⁸⁹

The EAW case study shows that while respectful to EU law judicial cooperation instruments and closely following the European legal discourse, the CCR seeks to distance itself from EU law remarks and avoids referring other than incidentally to EU law issues. However, this statement may not be held generally valid, as the CCR has chosen to break the EU law silence, as shown by Decision 419/2007.⁹⁰ Additionally, one may notice that, in the EAW case law, the CCR did not review the constitutionality of national provisions in the light of EU law through the Article 148 “accession clause,” as it had done before.⁹¹

⁸⁵ *Id.* Author’s translation from Romanian.

⁸⁶ With a title of example, in Decision 443/2007, Official Monitor No 318 of 11 May 2007, CCR cites the EAW Framework Decision to confirm that the national implementing norms are consistent on the language of correspondence on EAW issues. As well, by Decision 583/2007 Official Monitor no 422 of 25 June 2007, the CCR sends exclusively to its first precedent Decision 400/2007 see, *supra* note 83, and does not engage in any further argument of EU law.

⁸⁷ CCR, Decision 1127/2007, Official Monitor No 2 of 03 January 2008 [hereinafter CCR Decision 1127/2007].

⁸⁸ For a comprehensive study on the European Arrest Warrant and the decisions of the Constitutional Courts, see O. Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, 29 Y.B. EUR. L. 65–111 (2010).

⁸⁹ CCR Decision 1127/2007.

⁹⁰ CCR Decision 419/2007.

⁹¹ CCR Decision 59/2007.

1.2 The pollution tax

The pollution tax was introduced in 2006 as a special environmental tax levied on used motor vehicles upon their first registration on the territory of Romania.⁹² After the accession, the European Commission initiated infringement proceedings against Romania, asking it to amend the taxation legislation in accordance with the provisions of the Treaties (Article 90 EC, now Article 110 TFEU), as the tax was capable of discriminating against vehicles imported from other Member States.⁹³ In 2008, the amendment took the form of a Government Emergency Ordinance.⁹⁴ As the Commission did not find the amendments satisfactory, it issued another letter of formal notice in 2009.⁹⁵

The CCR, as we shall see below, refused to give effect to EU law and rejected all the constitutionality claims. As to the national ordinary courts, these adopted a highly dissenting jurisprudence on the issue. Several chose to give effect to the principle of the primacy of EU law and set aside the national conflicting provisions. Others appreciated that the tax was neither discriminating nor discouraging free movement of vehicles originating from other Member States and consequently gave effect to the national provisions. Ultimately, it was for the High Court to harmonize the diverging case law. It gave effect to the principle of the primacy of EU law over national law, ordering lower courts to set aside the conflicting national provisions as of 2011.⁹⁶ It did so by means of the '*recurs în interesul legii*' extraordinary procedure, described above.⁹⁷ Following the decision of the High Court, in 2012, the tax was finally abrogated.⁹⁸

The period from 2009 until 2012 may generally be described as a period of absolute legal confusion. Its results can be summarized in: more than 3 years of general legal uncertainty and dissenting national jurisprudence with regards to the nature of the tax and the primacy of Article 110 TFEU; more than 122 unconstitutionality challenges rejected by the

⁹² Law 343/2006, Official Monitor of Romania No. 662 of 1 August 2006, Art. 1.

⁹³ Letter of Formal Notice IP/07/372, Brussels, 21 March 2007. According to the letter, "[s]imilar infringement procedures regarding discriminatory car taxation had been opened against Cyprus, Poland and Hungary upon their entry to the EU."

⁹⁴ Emergency Ordinance 50/2008, Official Monitor of Romania No 327 of 25.04.2008.

⁹⁵ Letter of Formal Notice, IP/09/1012, Brussels, 25 June 2009.

⁹⁶ Decision of the High Court of Cassation and Justice no. 24/2011 of 14 November 2011 regarding the uniform interpretation and application of the legal provisions regulating the pollution tax, Official Monitor No. 1 of 3 January 2012.

⁹⁷ See, *supra* note 20.

⁹⁸ Law 9/2012, Official Monitor of Romania No 17 of 10 January 2012.

Constitutional Court;⁹⁹ hundreds of thousands of petitions addressed to the European Commission, to the national and European Parliaments; twelve applications for a preliminary ruling from lower ordinary courts;¹⁰⁰ and two judgments of the CJEU finding the pollution tax to be in breach of the treaty.¹⁰¹

The pollution tax jurisprudence is an incredibly telling example of the CCR's position towards the CJEU and the EU legal order. It depicts the overall tensions and interactions between the two constitutional systems. Most importantly, the case law illustrates the evolution under pressure of the CCR's EU law discourse and suggests some thoughts as to its direction.

When first asked to review the constitutionality of the pollution tax, having regard to the constitutional accession clause (Article 148),¹⁰² the CCR introduced a novel 'lack of competence' argument.¹⁰³ In other words, it made it clear that the review of conformity of national laws with EU Treaties exceeded its competence.¹⁰⁴ The court invited national ordinary courts to undertake such a review and, as the case may be, to use the preliminary reference mechanism. It further stated that if it were to adopt the opposite approach—of

⁹⁹ According to CCR database search results by keyword "Ordonanța 50/2008", during the 2008-2011 period, 122 *a posteriori* exceptions of unconstitutionality were brought in front of the CCR, challenging the constitutionality of the Government Emergency Ordinance 50/2008 establishing the tax, available at <http://www.ccr.ro>.

¹⁰⁰ Joined Cases C-29/11 and C-30/11, Aurora Elena Sfichi v Direcția Generală a Finanțelor Publice Suceava and Others, 2011 E.C.R. I-00059; Case C-573/10, Sergiu Alexandru Micșa v. Administrația Finanțelor Publice Lugo, 2011 E.C.R. I-00101; Case C-441/10, Ioan Anghel împotriva Direcția Generală a Finanțelor Publice Bacău, 2010 E.C.R. I-00164; Case C-440/10, SC SEMTEX SRL împotriva Direcția Generală a Finanțelor Publice Bacău, 2010 E.C.R. I-00163; Case C-439/10, SC DRA SPEED SRL v. Direcția Generală a Finanțelor Publice Bacău, 2010 E.C.R. I-00162; Case C-438/10, Direcția Generală a Finanțelor Publice Bacău and Administrația Finanțelor Publice Bacău v. Lilia Druțu, 2011 E.C.R. I-00100; Case C-335/10, Administrația Finanțelor Publice a Municipiului Târgu-Jiu și Administrația Fondului pentru Mediu v. Claudia Norica Vijulan, 2011 E.C.R. I-00099; Case C-336/10, Administrația Finanțelor Publice a Municipiului Târgu-Jiu și Administrația Fondului pentru Mediu împotriva Victor Vinel Ijac, 2011 E.C.R. I-00058; Joined Cases C-136/10 and C-178/10, Daniel Ionel Obreja v. Ministerul Economiei, 2011 E.C.R. I-00057; Case C-402/2009, Ioan Tatu v. Statul Român prin Ministerul Finanțelor și Economiei and Others, 2011 E.C.R. I-02711; Case C-263/10, Iulian Nisipeanu v. Directia Generala a Finantelor Publice Gorj, 2011 E.C.R. I-00097.

¹⁰¹ Cases *Tatu*, Case 402/2009; *Nisipeanu*, Case C-263/10.

¹⁰² See, *supra* note 42.

¹⁰³ CCR, Decision 1596/2009, Official Monitor of Romania No. 37 of 18 January 2010.

¹⁰⁴ *Id.* at para. 4. The CCR seems to have adopted a similar reasoning to its Polish and Hungarian counterparts, confronted with the same case of car pollution tax conflicting with the Treaty. See PIQANI, *supra* note 4, at 246-47. See, for the same line of reasoning, the Constitutional Courts of Hungary and Poland, ALLAN F. TATHAM, CENTRAL EUROPEAN CONSTITUTIONAL COURTS IN THE FACE OF EU MEMBERSHIP: THE INFLUENCE OF THE GERMAN MODEL IN HUNGARY AND POLAND 164 (2013).

reviewing the conformity of national law with EU law—it would generate a “possible conflict of jurisdictions [with the CJEU],” which would be inadmissible “at this level.”¹⁰⁵

Not managing to get itself heard, at a later stage, the CCR went further and suggested that in addition to the national ordinary courts, it is also the obligation of the national Parliament to give “priority” to EU law, pursuant to the Article 148 accession clause.¹⁰⁶ This position made it clear that the CCR distanced itself categorically from the principle of primacy, adopting a strict interpretation of the accession clause. As mentioned above,¹⁰⁷ the Romanian Constitutional system reserves a special place for the CCR, separate from the three branches of the state, including the judiciary.¹⁰⁸ From this point of view, the CCR suggests a separation of tasks, meaning that the application and enforcement of EU law is to be undertaken by the judiciary, executive, and legislature; whereas the CCR is to observe the fulfillment of this obligation pursuant to the Constitution. In any case, the Court denied its own competence on the matter.

The subsequent cases upheld this line of reasoning and further elaborated on the subject. By Decision 137/2010, the CCR held that the duty to set aside the conflicting national norm and to apply, with “priority,” the EU legislation, is to be borne by the national ordinary courts.

This excludes, in the view of the court, the competence of the Constitutional Court, as it is not a matter of constitutionality but of the application of law.¹⁰⁹ Again the Court stated, this time without any doubt, that if it were to review the validity of national law with the EU Treaties, then it would “evidently” breach the competences of the CJEU, as only the CJEU has the power to interpret the Treaties.¹¹⁰

Further on, in Decision 1249/2010, the CCR approached, albeit briefly, the question of balance between national and EU law. It held that: “[i]t is a question of application of law, not of constitutionality. [...] in the relationship of the EU and national legislation (except

¹⁰⁵ CCR, Decision 1596/2009, (note 103), para. 4 (Author’s translation from Romanian).

¹⁰⁶ CCR, Decision 668/2011, Official Monitor of Romania No. 487 of 08 July 2011. [hereinafter CCR Decision No. 668/2011].

¹⁰⁷ See, *supra* note 30.

¹⁰⁸ According to the Constitution of Romania, “Judicial Authority” is enshrined at Title III, Chapter VI, pursuant to which justice is realized through the High Court of Cassation of Justice and other courts as established by law. The Constitutional Court enjoys a separate Title V.

¹⁰⁹ Decision no. 137/2010, Official Monitor of Romania no. 182 of 22 March 2010.

¹¹⁰ *Id.*

the Constitution) we can talk only about priority in application of the former, which falls into the competence of national ordinary courts.”¹¹¹

The decision is important, as the CCR starts to form its EU law standing. Unfortunately, the Court is not specific enough. Its one-phrase formulation and incidental reference to the Constitution leaves the door open to several interpretations. It seems that the CCR deliberately avoided addressing the unanswered question of the relationship between EU law and the Constitution.

The timidity was not, however, longstanding. In one of its last decisions on the pollution tax, prior to the harmonizing judgment of the High Court, the CCR continued to clarify its standing on EU law matters and, most importantly, it also talked about the possibility of referral.¹¹²

As such, by Decision 668/2011, while repeatedly denying its competence, the CCR referred to the CJEU’s judgments in *Tatu*¹¹³ and *Nisipeanu*,¹¹⁴ stressing the CJEU’s position on the interpretation of the treaty. In doing so, the CCR implicitly led the national judiciary to follow the CJEU and, consequently, to disapply the conflicting national provisions.

Moreover, the CCR elaborated on the use of EU law arguments during a constitutionality review. In this sense, the CCR held that when reviewing the constitutionality of a national norm, an EU law norm could be referred to only as subsidiary to the Constitutional norm (the only norm of direct reference in the constitutionality review) subject to two cumulative conditions.

The first condition is objective and refers to the character of the EU norm, which must be “clear, precise and unequivocal,” and thus capable of direct effect.

The second condition implies the substantive appreciation of the CCR of the constitutional relevance of an EU norm. As such, it is for the CCR alone to assess whether an EU norm is constitutionally relevant, meaning that it is “able to support” a possible violation of the Constitution by the national law.¹¹⁵

¹¹¹ Decision no. 1249/2010, Official Monitor of Romania 764 of 16 November 2010 (Author’s translation from Romanian).

¹¹² CCR Decision No. 668/2011.

¹¹³ See, *supra* note 100.

¹¹⁴ *Id.*

¹¹⁵ Decision no. 668/2011, at point 3.

As to the referral, for the first time the CCR recognizes expressly, in the light of the above-mentioned conditions, the possibility of addressing a request for a preliminary ruling. In other words, a reference to the CJEU would be considered by the CCR when the constitutionality review implies the interpretation of a clear, precise, and unequivocal EU law norm; and, at the same time, the CCR appreciates that the EU norm at hand is constitutionally relevant, thus that the interpretation of the CJEU is “able to support” the CCR in deciding on the constitutionality of the challenged national provisions.

Lastly, the Court finds it necessary to underline that the possibility of referring a question to the CJEU is based on judicial cooperation between the EU courts and national constitutional courts and “does not, in any case, imply any hierarchical order between the two jurisdictions.”¹¹⁶ This specification is telling, as it indicates that the CCR does not understand the relationship between the national constitutional courts and the CJEU in terms of a hierarchical vertical scale, but rather in terms of a horizontal cooperation between equal courts with different jurisdictions.

Drawing together the findings of the Pollution tax case study, what are the preliminary remarks that we can make about the CCR’s attitude towards EU law and the referral procedure?

Firstly, one may notice a stance of clear lack of competence coming out from the above-analyzed decisions. The CCR has repeatedly stated that it is for the national judiciary to apply the law, including EU law, and, as the case may be, to address the CJEU with a preliminary reference or give effect to the principle of the primacy of EU law. The CCR appreciates that the legislature is also held to ensure the primacy of EU law. Nevertheless, it does not see its own role here. The Court holds the view that were it to engage in an exercise of EU law interpretation, then a clear conflict of competence with the CJEU would arise. Even if one accepts the CCR lack of competence argument, it should be stressed that the court does not examine the possibility of addressing the CJEU with a preliminary question to avoid an eventual breach of the CJEU’s competence over Treaty interpretation. Nor does it analyze the possibility of an *acte claire* or *acte éclairé* doctrine in the area.

Secondly, the CCR insisted that it was not confronted with a question of constitutionality but rather of application of EU law, which falls under the responsibility of the judiciary. As such, the CCR did not find the present dispute to be caught under the constitutional provisions, not even under the accession clause.¹¹⁷

¹¹⁶ *Id.* (Author’s translation from Romanian).

¹¹⁷ *Contra* CCR Decision No. 59/2007. It must be additionally stressed that in the dissenting opinion, Judge Moțoc found the matter to be precisely a constitutionality one, in view of the Article 148 accession clause, corroborated with Art. 135 (The Economy) on the obligation of the state to secure “the free trade, protection of fair competition, provision of a favorable framework in order to stimulate and capitalize every factor of production.”

Third, when a question of constitutionality arises, the CCR accepts that it may appeal to an EU norm as an “interposed norm” between the national law and the constitution, based on the Article 148 accession clause. It subjects this possibility to two cumulative conditions. The first is the clear, precise, and unequivocal character of the EU law norm. The second is subjective, implying the CCR’s value judgment on the constitutional relevance of the norm, meaning that the norm is able to support the court in reaching a solution in the case at hand.

Fourthly, it appears that the CCR does not recognize the primacy of EU law over the constitution, departing from its incidental – “(except the Constitution)” – formulation.¹¹⁸

Fifth, the CCR is not excluding the possibility of addressing a question for a preliminary ruling. This means that it admits *in abstracto* the eventuality of a direct dialogue with CJEU. The issue may arise when the constitutionality review brings into discussion a clear, precise, and unconditional EU law norm, the interpretation of which could support the CCR in solving the constitutionality challenge.

On this last point, one may have doubts as to whether, by accepting the abstract possibility of referring to the CJEU under the above-enumerated conditions, the CCR is not in fact denying the possibility entirely. The rationale behind a reference to the CJEU is to clarify a question of EU law. When the norm is clear, precise, and unconditional, one could wonder what scope for clarification remains. In principle, such a clear norm could be directly applied *in casu*, application that—according to the Court—is under the exclusive competence of the ordinary courts. Nevertheless, the scenario cannot be completely discarded.

a) From Normative to Structural Primacy

In line with the CJEU’s case law, the primacy doctrine implies that national law provides for efficient remedies in case of breach of EU law.¹¹⁹ De Witte has called it ‘structural primacy’.¹²⁰ This extension of the principle of primacy goes beyond the obligation to set aside the conflicting national law. It entails positive measures in order to ensure appropriate relief able to make good the damage resulting from a breach of EU law.

¹¹⁸ CCR Decision No. 668/2011.

¹¹⁹ Joined Cases C–46/93 and C–48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others*, 1996 E.C.R. I–01029.

¹²⁰ De Witte, *supra* note 41, at 343.

As mentioned earlier, in January 2012 the High Court enforced the principle of primacy and gave full effect to the EU Treaty provisions over the conflicting national pollution tax ones, putting an end to a long legal controversy.¹²¹ However, the constitutional challenges did not stop there.

In the pollution tax case, the problem was that by the time the High Court enforced the principle of primacy, the individuals who had been subject to an unlawful tax had exhausted all the national judicial remedies. Moreover, in the meantime, the national Parliament had abrogated the domestic provisions allowing for an extraordinary appeal against an irrevocable decision breaching EU law.¹²² Thus, contrary to the CJEU case law,¹²³ the principle of *res judicata* prevented the claimants from challenging the irrevocable tax imposition decisions.

Called to assess the constitutionality of the Parliament's measure, the CCR, by Decision 1039/2012, held that the national law abrogating the remedy for breach of EU law was unconstitutional.¹²⁴ It found that this was so on the basis of the EU accession clause (Article 148), which requires *all* national authorities to ensure the "priority" of EU law. Moreover, the Court found that by granting no remedy for the breach of EU law, the principle of loyal cooperation enshrined in Article 4(3) TEU would be disregarded and the constitutional obligations of Article 148 accession clause would be rendered merely illusory. At the same time, the CCR found that the very essence of the principle of 'priority' (primacy) would be hampered.¹²⁵ In support of its reasoning, the CCR referred to the benchmark cases of the CJEU: *Van Gend en Loos*¹²⁶ and *Costa v ENEL*.¹²⁷ Furthermore, it stated that the lack of a judicial remedy would entail the denial of the principle of "priority application of Union law," which would be contrary to the Constitution and the obligations undertaken by the EU acceding Treaties.

It is interesting to observe that, this time, the CCR found that it was examining a case of constitutionality rather than application of law. Consequently, the CCR was willing to

¹²¹ See *supra* note 96.

¹²² Law 299/2011, Official Monitor of Romania No 916 of 22 December 2011.

¹²³ Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA.*, 2007 E.C.R. I-06199, para. 63.

¹²⁴ CCR, Decision 1039/2012, Official Monitor of Romania no 61 of 20.01.2013.

¹²⁵ *Id.* at point II.

¹²⁶ Case C-26/62, *Van Gend en Loos v. Administratie der Belastingen*, 1963 E.C.R. 1.

¹²⁷ Case C-6/64, *Costa v. ENEL*, 1964 E.C.R. 1251, 1269.

scrutinize the national law in the light of the Article 148 accession clause, whereas it repeatedly refused to do so in its prior decisions considered above.

One could still wonder to what extent the decision overrules the previous case law or, on the contrary, supports it. What is clear is that, from several points of view, the decision is inconsistent with the CCR's precedents. First, the Court relies on the accession clause to give primacy to EU law and to strike down a conflicting national norm. Second, the Court departs from its previously set conditions on the applicability of an EU law norm in a constitutionality review. As seen above, the court invoked in support of its unconstitutionality findings two EU law principles: the principle of loyal cooperation and the principle of primacy. Recalling the clear, precise, unconditional and constitutionally relevant conditions, one may wonder to what extent the CCR is consistent in applying these. Whereas, indeed, this time the CCR found the EU law norms to be constitutionally relevant, one cannot be so sure about the extent to which the EU law principles relied upon are clear, precise, and unconditional.

Finally, we should stress that this case, whilst bringing more clarity to the CCR's position *vis-à-vis* the principle of primacy, also adds to the confusion over the relationship between EU law and the Constitution itself. We shall consider this in the decisions analyzed below.

1.3 Data Retention Directive

Directive 2006/24/EC on data retention (the Data Retention Directive) was transposed into the national legal order by law no. 298/2008.¹²⁸ Shortly after its enforcement, the law was declared unconstitutional in its entirety,¹²⁹ for going beyond a justified and proportionate limitation of the rights to privacy,¹³⁰ secrecy of correspondence¹³¹ freedom of expression,¹³² and presumption of innocence,¹³³ as guaranteed by the Constitution.

¹²⁸ Law 298/2008 Official Monitor of Romania no 780 of 21 November 2008.

¹²⁹ CCR, Decision 1258/2009, Official Monitor of Romania No 798 of 23 November 2009 [hereinafter CCR Decision 1258/2009].

¹³⁰ Constitution of Romania, Art. 26(1) ("The public authorities shall respect and protect the intimate, family and private life.").

¹³¹ *Id.* at Art. 28 ("Secrecy of the letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable.").

¹³² *Id.* at Art. 30(1) ("Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable.").

¹³³ *Id.* at Art. 23(11) ("Any person shall be presumed innocent till found guilty by a final decision of the court.").

What is interesting to note for the purpose of our inquiry is that the CCR, confronted with a national law transposing a piece of EU secondary legislation allegedly violating human rights, adopted a completely EU-blind attitude.¹³⁴ The Court simply nationalized the EU source of the national law. Aside from mentioning, incidentally, when citing the arguments of the parties, that the national law transposed the Data Retention Directive and that directives generally leave a large scope of maneuver to Member States in attaining the result prescribed therein, no other consideration was paid to the EU legal act.¹³⁵

In these conditions, our analysis of the CCR's decision looks at what the CCR did not say, rather than what it did.

First, the CCR did not investigate the exact source of the criticized provisions. It avoided making the EU source explicit.

Second, the CCR did not inquire into whether *in concreto* the Parliament had (or not) exercised a large margin of discretion when implementing the Directive. That is to say, the court did not try to establish explicitly whether the challenged provisions emanated from the national or EU legislator, as for instance the German Constitutional Court did when later confronted with the same question.¹³⁶

Third, the CCR failed to consider the possibility of addressing a reference for a preliminary ruling to the CJEU before striking down a source of EU secondary law.¹³⁷ Neither did the Court inquire into whether the CJEU has already clarified the question pursuant to the "*acte éclairé*" doctrine.

Finally, from the human rights angle, reference was made to the right to privacy and family life as enshrined in the Universal Declaration of Human Rights, International Convention on Civil and Political Rights, European Convention on Human Rights (ECHR), and the Romanian Constitution. No attribution was made either to the EU treaty provisions or to fundamental rights as general principles of EU law.¹³⁸ Equally, there was no mention of the Charter,

¹³⁴ CCR Decision 1258/2009. For comparison the pre-accession, see CCR Decision 253/2000.

¹³⁵ *Id.*; Cian C. Murphy, *Romanian Constitutional Court, Decision No 1258 of 8 October 2009*, 47 COMMON MKT. L. REV. 933–41 (2010).

¹³⁶ Press release no. 11/2010 of 2 March 2010, Judgment of 2 March 2010 – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, available at <http://www.bverfg.de/pressemitteilungen/bvg10-011en.html>.

¹³⁷ For contrast, see the subsequent approaches of the Austrian Constitutional Court and the Irish High Court who chose both to address a reference for a preliminary ruling to the CJEU. *Digital Rights Ireland*, Case C–293/12.

¹³⁸ See in this sense the referral of the Austrian High Court of 11 June 2012 in Case C–293/12, where the Court does not limit the referral to the Charter provisions, but goes far beyond referring to the treaty articles and general principles of EU law.

which was about to enter into force in two months time (1 December 2009). The simple lack of binding force of the Charter explanation does not seem to be plausible here. As shown above, the lack of binding force did not constitute a dissuasive factor for the Court in the pre-accession case law.¹³⁹ Moreover, fundamental rights protection at the EU level already enjoyed a well-established position in EU law and in the CJEU case law, especially with regards to protection of personal data and privacy. The Charter could, consequently, have been invoked as the expression of the EU *acquis* in the area.¹⁴⁰

As the CCR declared a national law transposing an EU Directive unconstitutional, it has been argued that the CCR *de facto* disregarded the *Foto-Frost* case law, which establishes the lack of jurisdiction of national courts to declare an EU act void.¹⁴¹ Weiler has suggested that, in principle, the competence in deciding on the invalidation of any community measure on any ground would have to stay with the CJEU and not with the national higher courts.¹⁴² However, from the point of view of the national Constitutional Courts, this opinion has encountered—and apparently still encounters—strong resistance.

The CCR decision has also stirred strong reactions from the European Commission, which called on the Romanian Parliament to comply with the obligations under the Directive, notwithstanding the decision of the CCR.¹⁴³

Given the imminence of infringement proceedings, the Romanian Parliament again transposed the Directive by Law 82/2012, arguably having regard to the CCR's critiques. The second transposition of the Data Retention Directive put the Parliament in a difficult position. The legislator struggled, on the one hand, to respect the authority of the CCR decisions and, on the other hand, the EU law obligations of correctly transposing a

¹³⁹ CCR Decision 253/2000, (note 55).

¹⁴⁰ See CCR, Decision 871/2010, Official Monitor of Romania No. 433 of 28 June 2010, para. II.3; Decision 1.479/2011, Official Monitor of Romania No. 59 of 25 January 2012. See also THE EUROPEAN COURT AND NATIONAL COURTS- DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 77–142 (Anne Marie Slaughter, Alec Stone Sweet & Joseph H.H. Weiler eds., 1998).

¹⁴¹ Case C–314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 04199, paras. 15–20.

¹⁴² Joseph H.H. Weiler & Ulrich R. Haltern, *Constitutional or International? The Foundations of The Community Legal Order and the Question of Kompetenz-Kompetenz*, in THE EUROPEAN COURT AND NATIONAL COURTS- DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 333 (Anne Marie Slaughter, Alec Stone Sweet & Joseph H.H. Weiler eds., 1998).

¹⁴³ European Commission, press release - IP/11/1248, 27 October 2011, *Data retention: Commission requests Germany and Romania fully transpose EU rules*, available at http://europa.eu/rapid/press-release_IP-11-1248_en.htm.

directive.¹⁴⁴ Ultimately, the adopted law has been able to address only to a limited extent the concerns of the CCR.¹⁴⁵

Between 2012 and 2014, a general silence veiled the Data Retention issue. In the attempt to avoid a new clash between the EU and national constitutional legal orders, the transposition law was not again brought under constitutional scrutiny. This silence, however, was broken by the CJEU's ruling in the *Digital Rights Ireland* case.¹⁴⁶

Several months after the Data Retention Directive was declared invalid by the CJEU, the CCR was once again asked to review the constitutionality of the second transposition law.¹⁴⁷ Following closely the CJEU's judgment, the CCR struck down, for the second time, the national law on data retention by Decision 440/2014.¹⁴⁸ In support of its finding of unconstitutionality, the CCR found that the arguments developed by the CJEU were in principle applicable by analogy to the national transposition law. Additionally, when compared to the vices identified in 2009, the CCR found that those still persisted and thus that the same unconstitutionality solution was imminent in the case at hand. Ultimately, the CCR cited the precedents of the German,¹⁴⁹ Czech,¹⁵⁰ and Bulgarian¹⁵¹ Constitutional Courts that adopted a similar position on data retention matters.

The CCR's Data Retention duplet is a telling example which brings a special emphasis to the conclusions of the above-discussed EAW and Pollution tax case studies. Even if the two decisions reach the same solution – the unconstitutionality of the domestic data retention law—the way in which the CCR reaches the same response is fundamentally different in each case. From this point of view, the emphasis does not lie on what the Court ultimately said, but rather on how the Court said it.

¹⁴⁴ See Simona Sandru, *Noul act normativ privind reținerea datelor—între constituționalitate și europenitate*, 8 CURIERUL JUDICIAR (2012). The author argues that the new legal text does not insert substantive differences in terms of human rights protection and that ultimately has adopted a border stance between constitutionality and the need to conform to EU obligations.

¹⁴⁵ Law 82/2012, Official Monitor of Romania No 406 of 18 June 2012.

¹⁴⁶ *Digital Rights Ireland*, Case C-293/12.

¹⁴⁷ CCR, Decision 440/2014, published in Official Monitor No 653 of 4 September 2014, http://www.ccr.ro/files/products/Decizie_440_2014_reviz.pdf.

¹⁴⁸ *Id.*

¹⁴⁹ Bundesverfassungsgericht [BVERFG] [Constitutional Court], 2 Mar. 2010, 1 BvR 256/08, http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html.

¹⁵⁰ Constitutional Court of the Czech Republic, Pl. ÚS 24/10 of 22 March 2011.

¹⁵¹ Supreme Administrative Court of Bulgaria, Decision No.13.627 of 11 December 2008.

When compared with the first 2009 Decision, in 2014 the CCR not only makes it clear from the very beginning what is the source of the contested national law, but it actively refers to the Directive throughout the judgment, mentioning it more than fifty times. However, it does so indirectly, referring to the substantive provisions of the Directive only when citing the CJEU. Thus, the Court does not engage directly in an analysis of the Directive.

Moreover, given that in 2014 the CJEU's point of view on the matter largely responded to the CCR's 2009 concerns, the CCR heavily relied on the CJEU's arguments in defining its own reasoning on the issue. As such, it started by citing comprehensive parts of the CJEU's judgment, referring to sixteen paragraphs therein. Subsequently, it found that both its 2009 precedent and the CJEU's judgment were equally applicable *in casu*. Having regard to the CJEU findings, as well as to its own 2009 congruent precedent, the CCR ultimately declared the law to be unconstitutional.

The 2014 decision reveals a higher level of confidence on the part of the CCR towards EU law rhetoric. This time, the CCR did not simply avoid EU law reasoning, but properly acknowledged the EU law source of the national law, reviewed the CJEU's position regarding the Directive, and—having regards to the arguments developed by the CJEU—proceeded to the constitutionality review of the national law based solely on the constitutional provisions. From this point of view, the decision shows that the Court draws a clear demarcation line between the two jurisdictions.

It is important to stress that, similar to the 2009 Decision, the CCR continues to avoid referring to the Charter. The CCR's 2014 Decision mentions the Charter only twice and exclusively when referring to the CJEU's findings.

In the light of the above observations, one may argue that we witness a novel position on the part of the CCR towards EU law and the CJEU: a cooperative separation stance. The Court attributes both the Directive and the Charter exclusively to the CJEU, while keeping national law and the Constitution for itself. Whilst one must welcome the CCR's increased confidence and its maturing line of reasoning towards EU law, we believe that the separation position adopted is too rigid, at least in so far as the Charter is involved.

1.4 What Place for Primacy? The Clarification

The above case law presented a puzzled and highly fluctuating position of the CCR towards EU law and an even more confusing one when it comes to the primacy of EU law over constitutional provisions. Even if the reluctance of the CCR towards primacy could have been inferred from the CCR's case law as of 2003,¹⁵² a direct answer was for a long time kept in the shadows.

¹⁵² CCR Decision 148/2003.

Recently, the silence was broken and the CCR expressed its position in Decision 80/2014 on the 2013 legislative project concerning the revision of the Constitution.¹⁵³ The law on the revision of the Constitution has not yet been adopted and is still pending in the Parliament, subject to new amendments. Nevertheless, the reasoning of the CCR on the matter is highly revealing for our research question.

The revision project proposed a rewording of the accession clause in a membership one. Upon an *ex officio* constitutional review, the Court found the proposed amendment of Article 148(2) dealing with primacy to be highly problematic with regards to its own competence and the limits of revision of the Constitution.¹⁵⁴ As a result, the proposed change was found *a priori* unconstitutional by unanimity.

Two core changes coming out from the membership clause reform proposal entail that: first, the exhaustive reference to executive, legislature, and judiciary would be replaced by “Romania” as a sole subject mandated to observe EU law obligations; second, the precedence of EU law over “national laws” would be replaced by “national legal order.”

The consequences implied by the newly proposed wording are also twofold.

First, the CCR, even if not formally part of the judiciary, would also be held expressly, together with the executive, legislature, and judiciary, to ensure the respect of EU law obligations, including the respect of the primacy principle.

Second, accepting the proposed wording would mean that EU law would take precedence not only over “national law” (interpreted by the Court to comprise only Parliament’s legislative acts and Government Ordinances), but also over the whole “national legal order,” including the Constitution.

The first consequence was not contested by the CCR, which confirmed once again that it sees itself as an important EU actor and is committed together with other state authorities to ensuring the obligations undertaken by Romania under the accession and founding treaties. The second consequence, however, was seen in highly problematic terms. This proves that the sensibilities of the CCR genuinely lie in the concern of allowing the primacy

¹⁵³ For more details on the 2013 Constitutional reform, see Viorica Vita, Country Report Romania, Constitutional Change through Euro Crisis Law, Section III, *available at* <http://eurocrisislaw.eui.eu>. See also: Venice Commission, Opinion 731/2013, On the Draft Law on the Review of the Constitution of Romania, *available at* [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)010-e).

¹⁵⁴ Decision 80/2014, paras. 461–62, Official Monitor of Romania No 246 of 7 April 2014, *available in Romanian at* http://www.ccr.ro/files/products/Decizie_80_2014_opinii2.pdf.

of EU law to impinge on the national constitution and affect in any way its own competences.

The Court found that allowing ‘priority’ over the whole national legal order, including the Constitution, would necessarily put the Constitution in a lower hierarchical position to EU law,¹⁵⁵ and by consequence, limit its own jurisdiction in favor of the CJEU, including in the areas of shared competence.¹⁵⁶ Moreover, the Court went as far as saying that this would go against the permissible limits of constitutional review, as it would be capable of restricting the individual’s right of access to constitutional justice, thus risking restricting either the individual’s fundamental rights and liberties or their correlative guarantees as enshrined in the Constitution.¹⁵⁷ The CCR then stressed, citing the precedent of the Polish Constitutional Tribunal,¹⁵⁸ that the accession to the EU could not imply the supremacy of EU law over all the national legal order.¹⁵⁹ Moreover, it asserted that the Constitution is the expression of the will of the people, which cannot lose its binding force solely because a legal conflict may arise between the latter and a provision of EU law.¹⁶⁰

The position adopted by the CCR is particularly strong and telling. It reflects a protectionist stance, first with regards to the Constitution, and second with regards to the Court’s own jurisdiction.

The jurisdiction argument is a new and curious one. As such, the CCR departs from the presumption that if EU law were to have primacy over the Constitution the CCR would always have to refer the constitutionality questions on EU normative acts to the CJEU, and by consequence, limit its jurisdiction to the areas of national competence.

¹⁵⁵ *Id.* at para. 458.

¹⁵⁶ *Id.* at para. 461 (“ . . . accepting the new wording proposed at Article 148 (2) would amount to creation of necessary premises allowing the limitation of the jurisdiction of the Constitutional Court, in the sense that only the normative acts adopted in the areas not subject to the transfer of competences to the European Union would still be subject to constitutional review, whereas the normative acts [...] adopted in the areas of shared competence, would be subject exclusively to the legal order of the European Union, being excluded from constitutional control. However, irrespective of the area of the legal acts, these must respect the supremacy of the Romanian Constitution, according to Article 1 para. 5 thereof.”) (Author’s translation from Romanian).

¹⁵⁷ *Id.* at para. 462 (“Therefore, the Court finds that such a change would constitute a restriction of the citizens right to constitutional justice, to defend certain constitutional values, rules and principles, namely the suppression of a guarantee of these constitutional values, rules and principles, which also include the sphere of fundamental rights and freedoms.”) (Author’s translation from Romanian).

¹⁵⁸ Constitutional Tribunal of Poland, Decision no K 18/04 of 11 May 2005.

¹⁵⁹ CCR Decision 80/2014 at para. 459.

¹⁶⁰ *Id.*

This presumption, however, seems to confuse the EU competence as defined in the treaties and the jurisdiction of the two courts. It is first for the national courts, including the constitutional ones, to give effect to an EU law provision in cases pending before them irrespective of their EU legal basis. When a question of EU law arises in the proceedings, in line with the *CILFIT* doctrine the national courts may—the last instance courts must—refer a preliminary question to the CJEU. Again, the national courts are to do so without distinguishing whether the legal act was adopted in the area of shared or exclusive competence.

Departing from the technicalities of the reasoning, the overall message sent by the decision is clear: no primacy over the Constitution. The CCR adopts a radical in block position and takes away the whole Constitution from the principle of primacy. The second message sent by the Court is: no limitation of its jurisdiction and constitutional review prerogative.

The position brings transparency to a long line of fluctuating reasoning of the CCR on EU law matters. However, it does not shed clarity on the sensibilities behind. It is clear that the Court denies by unanimity any primacy of EU law over the Constitution and does not make any circumstantiations on the prohibition. However, the legal reasoning behind this falls short in explaining the position. It remains to be seen whether the Court will further keep up with its restrictive stand or, similarly to the case studies analyzed above, gradually reshape its position.

D. The Dialogue Between the CCR and the CJEU: What Avenue for Referral?

Having regards to the CCR case law, the question that arises is first: what place for primacy? And second: how open is the Court to a direct dialogue by means of the preliminary reference procedure?

I. Primacy Under Condition

There is no doubt that the CCR has generally accepted the principle of the primacy of EU law. However, it has not recognized an absolute primacy as requested by the CJEU. The examined case law shows that the CCR subjects primacy to several limitations.

First, the CCR limits the applicability of primacy to ordinary national law and does not recognize any primacy of EU law over the Constitution, contrary to the CJEU interpretation in *Internationale Handelsgesellschaft*.¹⁶¹ As the CCR has repeatedly stated, the Constitution

¹⁶¹ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (hereafter *Internationale Handelsgesellschaft* case).

guarantees the “priority” of EU law over national law, “(except the constitution).”¹⁶² De Witte has seen this extension of the “old” constitutional courts’ line of reasoning to the “new” Central-Eastern European courts as a “domino effect.”¹⁶³ The incidental reference to the relationship between EU law and the Constitution clearly underlines a cautious attitude. In this sense, it is useful to recall a recent Report of the CCR, where it was argued that the degree of acceptance of the principle of the primacy of EU law in the national constitutional hierarchy results from the corroborative interpretation of Articles 20 and 148 of the Constitution.¹⁶⁴ More precisely, EU law is to have primacy over all national laws (supra-legislative), except the Constitution (infra-constitutional).¹⁶⁵ This position seems rather constant, being endorsed by the Court’s case law as of 2003¹⁶⁶ and culminating with its most recent decision of 2014.¹⁶⁷

Second, as a result of the first limitation, the CCR explicitly delegated the application of primacy only to the ordinary courts, as, on the one hand, only the ordinary courts are competent to apply *in concreto* the law, and, on the other hand, EU law has no primacy over the Constitution, meaning that consequently there is no scope for the CCR to apply the principle. In this case, however, no general principle rule can be inferred, as Decisions 59/2007 and 1039/2012 show.¹⁶⁸ There the CCR nevertheless found the EU law issue to be constitutionally relevant¹⁶⁹ and, by declaring the national law unconstitutional, *de facto* gave primacy to the EU provisions over the conflicting national law.¹⁷⁰

Third, the CCR held that it is competent to apply the Constitution as the only norm of direct reference in a constitutionality review. At the same time, the CCR stated that it could interpret the Constitution in the light of EU law, subject to a two-fold conditionality. On the one hand, the EU norm would have to be directly applicable, and, on the other hand, the court would need to find it relevant to the constitutional review. This reasoning was

¹⁶² CCR Decision 668/2011.

¹⁶³ De Witte, *supra* note 41, at 354–55.

¹⁶⁴ CCR, *National Report Romania*, Congress of the Conference of the European Constitutional Courts, May 2014, available at <http://www.confueconstco.org/reports/rep-xvi/LB-Roumanie-EN.pdf> [hereinafter CCR *National Report Romania*].

¹⁶⁵ *Id.*

¹⁶⁶ CCR Decision 148/2003.

¹⁶⁷ CCR Decision 80/2014.

¹⁶⁸ See CCR Decision 59/2007 at 124.

¹⁶⁹ CCR Decision 59/2007.

¹⁷⁰ CCR Decision 1039/2012.

adapted in Decision 1039/2012, where the enumerated conditions of a clear, precise, and unconditional norm were not rigidly observed.¹⁷¹

Finally, the fourth limitation addresses the level of human rights protection. Consequently, EU law on fundamental rights, including the Charter, is to have primacy over all national laws, unless the latter prescribes higher standards of human rights protection.¹⁷² In the view of the CCR, the Charter is to apply with priority only insofar as it “ensures, guarantees and develops”¹⁷³ the constitutional fundamental rights or at least prescribes a similar protection.¹⁷⁴ In this respect, it might be argued that the CCR adopts a “*Solange*” type reasoning in line with the German Constitutional Court.¹⁷⁵ Even if lately the Charter has been increasingly relied upon in front of the Court, it has scarcely been upheld in its reasoning so far. From this point of view, the CCR still sees the ECtHR as its main cooperation partner and the ECHR as its main reference. The court even stated that in case of a clash between the two human rights systems—EU and ECHR—it would be inclined to “*tip the balance*” towards the Strasbourg Court.¹⁷⁶ This is not surprising, as according to Article 20 of the Constitution, international human rights treaties, thus including the ECHR, are to be applied with ‘priority’ even as against the Constitution, when they ensure a higher standard of human rights protection.

In trying to bring together the puzzling picture of the CCR’s jurisprudence, it is worth noticing that dealing with EU law arguments has not been an easy task for the CCR. The CCR has itself held that reconstructing its case law with regards to EU law has been a rather “complex process.”¹⁷⁷ The CCR added that it was especially so given the specificity of EU law and its “autonomy with regards to the national legal systems, which makes its reception in the national law very difficult.”¹⁷⁸ When it comes to the primacy of EU law, the CCR’s attitude could be generally characterized as resilient. This trend has been underlined in the literature as a common one in the Central Eastern European Member States.¹⁷⁹ Although we lately see a Constitutional Court gaining in confidence when engaging with

¹⁷¹ *Id.*

¹⁷² CCR National Report Romania.

¹⁷³ Decision 871 of 25 June 2010, Official Journal of Romania no. 433 of 28 June 2010, para. II.3.

¹⁷⁴ *Id.*

¹⁷⁵ On the phenomenon, see TATHAM, *supra* note 104, at 164.

¹⁷⁶ CCR National Report Romania.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Wojciech Sadurski, “*Solange, chapter 3*”: *Constitutional Courts in Central Europe – Democracy – European Union*, European University Institute Working Papers, (2006).

the EU legal order, it chooses to do so by clearly isolating EU law from national transposition provisions, a separation which might be seen as excessive, if not artificial.¹⁸⁰

II. The Pending Case of Referral: Setting the Scene

Returning to the case of referral, in the light of the above analysis, we notice the following developments.

Initially, we have a hesitant Court, extremely silent on EU law matters, and unwilling to address the EU law nature of the norms under constitutional review.¹⁸¹ The most recent case law illustrated a progressive, but still nuanced, acceptance of EU law arguments. In fact, we notice a primacy “under condition,” which further on translated into a referral “under condition.”¹⁸²

The Court recognized, for the first time, the possibility of addressing a referral for a preliminary ruling to the CJEU in 2011,¹⁸³ but nevertheless it leaves the dialogue tool unused. Instead, it clearly marks the limits and holds that the referral question would be subject to the same conditionality as the use of an EU norm in the constitutionality review. Namely, the norm would have to be “clear, precise, unequivocal” and “constitutionally relevant.”¹⁸⁴ It is for the CCR only to assess the constitutional relevance of the EU norm. Having fulfilled these criteria, it is to be subsequently to the “appreciation” of the Court—not the duty—to refer for a preliminary ruling to the CJEU. It is also worth noting that the Court did not indicate any benchmarks that might influence its margin of appreciation. From this point of view, the CCR chose to preserve a full discretion as to the possibility of referral.

Even if the CCR has never addressed a preliminary ruling request to the CJEU, it has set out important positive grounds for a future reference.

In this sense, the CCR has already expressly accepted that it is a jurisdiction for the purpose of Article 267 TFEU, and it has admitted its competence to refer a question for a preliminary ruling. Moreover, the CCR has set the explicit “rules” in case that possibility occurs. Finally, the CCR has consistently held that it is not entitled to interpret any EU law

¹⁸⁰ CCR Decision 440/2014.

¹⁸¹ CCR Decision 1258/2009.

¹⁸² Decision 668/2011.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

matter, given the risk of a “conflict of jurisdiction between the two courts,” qualified by the Court as “inadmissible.”¹⁸⁵

Therefore, when confronted with a future question of interpretation of EU law, the CCR might find it appropriate to address the question to the CJEU.

II. Beyond the Legal Argument

The dialogue between the CJEU and the CCR is at an incipient stage. Thus far, the CJEU has mostly been the speaker, and the CCR has only started to pay attention to its rhetoric. In fact, one could argue that the CCR has started to give a shy reply.

Given the Court’s multiple inconsistencies and variables in its line of reasoning towards EU law, it is difficult to draw a conclusion based solely on a legal analysis. In an attempt to fill this gap in legal reasoning, let us now turn to the possible motives behind the fluctuating legal arguments and reiterate the two theories brought forward in the preliminary stages of our analysis.

As mentioned above, Burley and Mattli argue that the actors most likely to drive the process of European legal integration are the ones pursuing their self-interest in the European sphere.¹⁸⁶ If one extends this theory to the CCR as a national actor, the theory could explain the Court’s attitude towards the EU legal order pre- and post-accession. Whereas during the pre-accession period the CCR was pursuing the national interest of EU accession,¹⁸⁷ in the aftermath of the accession it found itself in an uncomfortable position. On the contrary, lower courts empowered by the new competences have been the drivers of post-accession integration, being more open to directly enforcing EU law and to giving it primacy over conflicting national law. In this context, the CCR tried to reconsolidate its position as the sole guarantor of the supremacy of the Constitution, avoiding in as much as possible EU law questions unless these were congruent with its own findings or strictly necessary.

On the other hand, Alter has argued from the point of view of judicial competition theory that “[c]ourts act strategically *vis-à-vis* other courts [...] so as to avoid provoking a response which will close access, remove jurisdictional authority, or reverse their decisions.”¹⁸⁸ Alter

¹⁸⁵ *Id.*

¹⁸⁶ Burley & Mattli, *supra* note 7, at 43.

¹⁸⁷ The pro-European attitude and the enthusiasm towards EU accession are most visible in the CCR’s “inertial” Decision 59/2007. The Decision mentions repeatedly the moment of accession of 1 January 2007 and the duty to respect the EU accession treaty commitments.

¹⁸⁸ ALTER, *supra* note 8, at 45–46.

adds that whereas the lower courts would in principle be more open to judicial dialogue,¹⁸⁹ higher and constitutional courts would find it more difficult to bear EU supremacy.¹⁹⁰ Scholars like Conant have taken the theory further and have appreciated that “national supreme courts will begin to send references in an effort to influence the direction of the ECJ’s legal interpretation in ways that are more deferential to national legal traditions.”¹⁹¹

This judicial competition theory is also helpful when studying the behavior of the CCR towards the preliminary reference procedure.

The judiciary of Romania¹⁹² launched the direct dialogue with the CJEU during the first month of EU membership—January 2007.¹⁹³ It was a lower court—the Tribunal of Ilfov County—that addressed the first question for a preliminary ruling to the CJEU in the famous *Jipa* case.¹⁹⁴ According to the 2013 Annual Report of the CJEU, the Romanian courts have, since accession, addressed sixty-three questions for a preliminary ruling, out of which six originate from the High Court.¹⁹⁵

Having regard to Alter’s theory, one might expect the CCR to come next in line. As we have seen, in the early post-accession period, the CCR attempted to distance itself from EU law arguments. However, the isolation attempt was not feasible.

Subsequently, under the competitive pressure of the rest of the judiciary and notably of the High Court, the CCR felt the need to adapt to the new realities. As such, it had generally

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 34.

¹⁹¹ Conant, *supra* note 9, at 1–30. The statement is endorsed by the most referrals of the Constitutional Courts. For instance, in the *M. Jeremy F.* referral, the French Conseil Constitutionnel formulates the questions strategically so as to clearly suggest its views on the legal issue and implicitly the preferred answer it would like to hear from the CJEU. Conseil Constitutionnel, Decision n° 2013-314P of 4 April 2013. See on this point: EUI, Centre for Judicial Cooperation, Database, *M. Jeremy F.*, case note (“[t]he Constitutional Council included in the preliminary reference addressed to the CJEU its own interpretation of the balance between the principle of mutual recognition of criminal judgments and the right to effective remedy, seemingly in favor of higher guarantees for the right to an effective remedy, making a strategic attempt to influence the CJEU.”), available at <http://judcoop.eui.eu/data/?p=data&fold=10&subfold=10.3>.

¹⁹² Constitution of Romania, Arts. 126(1) & Art. 2(2) Law 304/2004 on judicial organization (“Justice shall be administered by the following courts: a) High Court of Cassation and Justice; b) courts of appeal; c) tribunals; d) specialized tribunals; e) military courts; f) district courts.”).

¹⁹³ Case C–33/07, *Directia Generala de Pasapoarte Bucuresti v. Jipa*, 2008 E.C.R I–0515.

¹⁹⁴ *Id.* The case concerned the free movement of citizens and the prohibition imposed on a Romanian citizen to enter the territory of another Member State following a decision for expulsion based on public security reasons.

¹⁹⁵ CJEU, *Annual Report 2013*, 109 (2013).

abandoned the EU-blind stance and started to reintegrate the EU law arguments in order to avoid being left outside the legal discourse. Nevertheless, the CCR started to engage with EU law arguments in so far as these did not encroach on its own authority and competences, an attitude strongly confirmed by Decision 80/2014.¹⁹⁶

As to the possibility of referral, one might notice that the CCR has not yet been persuaded by a strong enough argument to break the silence. The Data Retention case was, without doubt, a good opportunity to initiate the referral dialogue. However, one must stress that whereas in the 2009 period the Court adopted a general “splendid isolation” stance towards EU law, when asked for the second time in 2014 to re-examine the issue, the CJEU had already dealt with the question. Therefore, a reference did not find its *raison d’être*. The CCR instead, guided by the *acte éclairé* doctrine, interpreted the national law in the light of the CJEU *dictum* and gave it full effect.

In the light of this context, one might expect the CCR to consider the opportunity of referral when a question of EU law of constitutional relevance arises during a future constitutional review, given that the question has not yet been addressed by the CJEU and that the CCR itself appreciates that the answer of the CJEU could support its (un)constitutionality findings.

Finally, if one would translate the CCR’s case law into an address to the CJEU, what would the CCR say?

The message ultimately would send a general note of “uncertainty and lack of confidence”¹⁹⁷ towards the EU legal order, recently coupled with a threat to its own competence and human rights guarantees. There is still a lack of trust towards the new dialogue partner. The CCR seems to admit the idea, since by giving preference to the ECtHR over the CJEU in human rights matters its core argument relies on the existence of more “ancient” ties with the former.¹⁹⁸ With regards to the CJEU, the ties are rather recent and mainly indirect. The CCR even found it necessary to underline that no “hierarchy” between the two jurisdictions could be brought into discussion.¹⁹⁹ What the CCR has perhaps not yet heard is that the EU legal order should be read in the language of “constitutional

¹⁹⁶ See, *supra* note 154.

¹⁹⁷ Dragos Efrim, Gabriela Zanfir & Madalina Moraru, *The Hesitating Steps of the Romanian Courts Towards Judicial Dialogue on EU Law Matters*, Social Science Research Network, 27 (2013), available at <http://papers.ssrn.com/abstract=2261915>.

¹⁹⁸ See, *supra* note 164.

¹⁹⁹ CCR, Decision 668/2011.

tolerance,” where the national constitutional actors are “invited” to cooperate on their own will, without any subordination.²⁰⁰

E. Conclusion

This Article presents the puzzling picture of the CCR’s position towards the EU legal order. This is perhaps because one of the most consistent patterns in the CCR’s EU law line of reasoning is precisely its inconsistency. The Court adopts different stances depending on the case in question, and includes the EU law rationale only in so far as the latter does not infringe on its own prerogatives.

In this Article, we tried to adopt a positive approach. We looked at the steps that have been taken during the eight post-accession years. The CCR has defined its position, has recognized the possibility of addressing a reference for a preliminary ruling, and has established clear conditions to initiate the procedure. It could be argued that the right prerequisites are now in place for a future preliminary reference momentum.

²⁰⁰ Joseph H.H. Weiler, *In Defence of the European Status quo: Europe’s constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7–23 (Joseph H.H. Weiler & Wind Marlene eds., 2003).