THE HESITATING STEPS OF THE ROMANIAN COURTS TOWARDS JUDICIAL DIALOGUE ON EU LAW MATTERS

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- Working Paper -

> If the doctrines of direct effect and supremacy are the 'twin pillars of the Community's legal system', the preliminary reference procedure must surely be the keystone in the edifice; without it the roof would collapse and the two pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion—beautiful but not of much practical utility.[1]

Introduction

The topic of judicial dialogue between national and EU courts and application of EU law by national courts has been addressed by legal and political academics across the world,[2] so much so that few aspects have been left unexplored in this prolific field. The main reason why the topic has attracted such a high interest has been the crucial role played by the national courts of the Member States in shaping the EU legal order[3], an international legal order, whose integration and enforcement within domestic legal orders would have traditionally been the task of the executive, and not that of national courts.[4] However, the research of the judicial dialogue on EU law matters has so far mainly focused on those national courts from Member States up until the 2007 enlargement wave.

Recent scholarly articles focusing on the analysis of different aspects of the judicial dialogue on EU law in the Member States of the 2007 enlargement have only briefly touched few judgments

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[1] Judge Federico Mancini and Legal Clerk David Keeling of the European Court of Justice, From CILFIT to ERTA: The constitutional challenge facing the European Court, Yearbook of European Law, (1992), Vol. 11, 1-13.

[2] AM Slaughter, *A New World Order*, Princenton University Press, 2004; *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press, 2001; Slaughter, Anne-Marie, Alec Stone Sweet, and Joseph Weiler, eds. 1998, *The European Court and national courts-- doctrine and jurisprudence: legal change in its social context*, Evanston, Ill.: Northwestern University Press; Karen Alter, *Tipping the Balance: International Courts and the Construction of International and Domestic Politics*, Cmabridge Yearbook of European Legal Studies, (2010-2011), Vol. 13; and by the same author, *The European Court's Political Power*, Oxford University Press, 2009.

[3] The Court of Justice of the EU itself has expressed the crucial role played by the preliminary reference mechanism in ensuring the European integration project: '[t]he preliminary ruling procedure is the veritable cornerstone . . . since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union' cf Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, published in the European Court of Justice's 1995 Annual Report, at 6–7.

[4] AM Slaughter, *A New World Order*, Princention University Press, 2004, at 84-5.

of the Romanian Constitutional Court.[5] The much wider practice of the Romanian courts of different levels of jurisdiction and covering different areas of law has not yet been the subject of an exhaustive study researching whether and how Romanian courts, as one of the newest domestic courts entered into the EU legal system, engage in judicial dialogue on EU law matters. The purpose of this paper is precisely to identify what is the pattern followed by the Romanian courts involvement in judicial dialogue on EU law matters.[6]

During the five years that have passed since Romania's accession to the EU, the Romanian courts have addressed approximately 46[7] preliminary references on EU law, touching on diverse areas of law, such as: interpretation of the European Arrest Warrant and fundamental rights[8], copyright and related rights[9], consumer protection[10], VAT Directives[11], citizenship Directive[12],

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[5] G. Martinico and O. Pollicino, *The Interaction Between Europe's Legal Systems Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar, 2012; Sadurski, W, *Constitutional Courts of Central and Eastern Europe: Between Adolescence and Matur*ity (co-authored with Kasia Lach) (2008) 3(2) Journal of Comparative Law 212-233; Darinka Piqani, *Primacy of EU Law and the Jurisprudence of Constitutional Reservations in Central Eastern Europe and the Western Balkans: Towards a 'Holistic' Constitutionalism*, EUI Doctoral Thesis; A Anneli, *From the Banana saga to a Sugar Saga and Beyond: Could the Post-communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?* Common Market Law Review, 2010, 47 (3), p. 791-829; O. Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law*?, Yearbook of European Law, Vol 29, Issue 1, p. 65-111; M. Bobek, On the Application of European Law in (Not only) the Courts of the New Member States: 'Don't Do as I say'? Cambridge Yearbook of European Legal Studies, Vol.10, 2007-2008;

[6] Recently, in addition to the term "judicial dialogue" legal academics have started to use also other similar terms, such as "judicial intersection" and "judicial interaction" when referring to the preliminary reference procedure and also other forms of indirect interactions between the CJEU and national courts, or between national courts on the application of EU law, see G. de Vergottini, *Oltre il dialogo fra le Corti*, Il Mulino, 2010; L.B. Tremblay, "The legitimacy of judicial review: The limits of dialogue between courts and legislatures" 2005 *International Journal of Constitutional Law;* A. Torres Perez, *Conflicts of Rights in the European Union*, OUP, 2009. From the different legal terms used by academia ("judicial dialogue", "judicial intersection", "judicial interaction"), the present paper will use the term "judicial dialogue" as defined by A. Torres Perez (ibid., at 97), namely, when there is "argumentative communication based on the exchange of reasons" between cours, regardless of whether at vertical or horizontal level, and "judicial intersection" as a broader term encompassing all sorts of intersections between courts even outside court proceedings, which do not fall within the more strictly defined notion of "judicial dialogue".

[7] According to the information collected lastly on 23rd of November 2012.

[8] C-264/10 *Kita*, Order of 19 October 2010, nyr, preliminary reference sent by the High Court of Cassation and Justice (last instance court); C-396/11 *Radu*, preliminary reference sent by the Court of Appeal of Constanta (second instance court).

[9] C-283/10 *Circul Globus Bucureşti*, Judgment of 24 November 2011, nyr; preliminary reference sent by the High Court of Cassation and Justice (last instance court).

[10] C-602/10 *SC Volksbank România*, Judgment of 12 June 2012, nyr, preliminary reference sent by the Court of Calarasi (first instance court); C-47/11, *SC Volksbank România*, nyr, preliminary reference sent by Court of Appeal of Timisoara (last instance court); C-571/11, *SC Volksbank Romania*, pending, preliminary reference sent by the Tribunal of Cluj Napoca (second instance court); C-108/12 and C-123/12, *SC Volksbank România*, pending, preliminary reference sent by the Tribunals of Valcea and Girgiu (second instance court); C-236/12, *SC Volksbank România*, pending, preliminary reference sent by the Tribunal of Arges (second instance court).

[11] Case C-424/12, pending, preliminary reference sent by the Court of Appeal of Oradea, Case C-323/12, *E.On Energy Trading*, pending, preliminary reference sent by Court of Appeal of Bucharest; C-663/11, pending; Case C-79/12, *Mora*, pending, preliminary reference sent by Court of Appeal of Alba Iulia (first instance court); C-257/11, *Gran Via Moineşti, pending, preliminary reference sent by the Court of Appeal of Bucharest* concerning the deduction of VAT incurred on the purchase of buildings scheduled for demolition; C-249/12 *Tulica* joined with C-250/12 *Plavosin*, pending, preliminary references sent by the High Court of Cassation and Justice at the request of the applicant parties, concerning the interpretation of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in regard to immovable-property transactions carried out by natural persons. One wonders whether it was necessary to send also the second preliminary reference, taking into account that it asked

discriminatory taxation (Art. 110 TFEU)[13], civil liability in the field of motor vehicles insurance system[14], interpretation of the EU Charter and the ECHR provisions[15], Directives prohibiting discrimination[16], Directive 2003/88/EC on the organisation of working time[17], markets in financial instruments[18], and Council Regulation on Community support for pre-accession measures for agriculture and rural development from CEECs during the pre-accession period[19].

Only three weeks after Romania's accession to the EU, a lower domestic court showed a good understanding of the complex EU mechanism of the preliminary reference, and had the first preliminary reference sent by a Romanian court admitted by the CJEU without need of reformulating the preliminary questions on substance or procedure. This first successful exercise of vertical judicial dialogue indicated firstly, a very good understanding of both substantive and procedural EU law, and secondly, a possible future prosperous interaction between Romanian courts and the CJEU. However, the subsequent Romanian jurisprudence on the application of EU law did not necessarily follow this prediction. Three years of complete silence between the Romanian courts and the CJEU followed. Furthermore, once the judicial dialogue with the CJEU re-started, it cannot be argued that the subsequent preliminary references sent by Romanian courts

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for interpretation of same EU law provisions in very similar circumstances. The HCCJ could have suspended the proceedings in the second case while waiting for the judgment of the CJEU in the first preliminary reference it has addressed. The sending of preliminary questions by the High Court in the *Plavosin* case could be interpreted as a sign of the High Court positive approach towards the parties' request for preliminary reference, which the Court does not generally want to hinder when it identifies conflicts between national and EU law.

[12] Case C-33/07, *Jipa*, ECR 2008, p. I-5157, first preliminary reference sent by a Romanian court; preliminary reference sent by the Tribunal of Dambovita, first instance court.

[13] The pollution tax levied upon first registration of imported second-hand motor vehicles has given rise to numerous preliminary reference addressed by the Romanian courts in regard to two versions of the Romanian legislation imposing payment of the aforementioned pollution tax. First string of cases was related to the first version of GEO 50/2008: *Tatu (*C-402/09, Judgment of 7 April 2011, nyr, preliminary reference sent by Tribunal of Sibiu, second instance court); Case C- 336/10, nyr, preliminary reference sent by the Court of Appeal Craiova, last instance court; C-136/10 and C-178/10, *Obreja*, Order of 8 April 2011, nyr, preliminary reference sent by the Court of Appeal of Targu-Mures, last instance court; C-441/10, *Anghel*, Order of 7 December 2010, nyr; C-439/10, *DRA SPEED*, Order of 7 December 2010, nyr; C-440/10, *SEMTEX*, Order of 7 December 2010, nyr; C-377/10, *Băila*, Order of 6 December 2010, nyr;. Second string of cases on the pollution tax generated by an updated version of the GEO 50/2008: *Nisipeanu* (C-263/10 Judgment of 7 July 2011, nyr), C-335/10, *Vijulan*; C-573/10, *Micşa*, Order of 13 July 2011, nyr; C-336/10, *Ijac*, Order of 8 April 2011, nyr; C-29/11, *Şfichi* and C-30/11 *Ilaş*, Order of 8 April 2011, nyr; C-438/10, *Druţu*, Order of 13 July 2011, nyr ,. The questions referred after the referral of the questions in *Tatu* were decided by the Court based on the doctrine of *acte clair* (29, 30/11); Case 565/11 *Irimie*, pending.

[14] Case C-102/10, Bejan, nyr, preliminary reference sent by the Court of Focsani, first instance court.

[15] Several national courts of second instance have sent preliminary references to the CJEU, asking it to interpret provisions of the EU Charter and ECHR (right to property, equality before law, non-discrimination, the scope of application of the EU Charter) in regard to the validity of national legislation imposing salary reductions on a number of categories of civil servants, as a result of the financial crisis affecting the country. The CJEU has dismissed as inadmissible all of these preliminary references as clearly lacking the connection between the EU Charter and the scope of EU law: Court C-434/11, *Corpul Naţional al Poliţiştilor*, Order of 14 December 2011, nyr, preliminary reference sent by the Court of Appeal of Brasov; C-483/11, *Boncea and others*, and C-484/11, *Budan*, Order of 14 December 2011, nyr; C-462/11, *Cozman*, Order of 14 February 2012, nyr; C-134/12, *Corpul Naţional al Poliţiştilor*, Order of 10 May 2012; C- 369/12, Order of 15 November 2012.

[16] Application of Directive 2000/43 and Directive 2000/78: in regard to salary rights of judges (C-310/10, *Agafiţei and others*, Judgment of din 07 July 2011, nyr) and in regard to employment of football players (C-81/12, *Asociaţia ACCEPT*, pending).

[17] C-258/10, *Grigore*, Order of 4 March 2011, nyr.

[18] C-248/11, *Nilaş şi alţii*, Judgment of 22 March 2011.

[19] C-627/11, *Augustus*, pending.

show a thorough understanding of the functioning and role of the EU preliminary reference mechanism by all of the referring courts.

So far, the jurisprudence of the CJEU resulting from preliminary references has shown that it is first and second instance courts that usually refer preliminary questions to the CJEU, rather than courts of last instance, while references from Constitutional Courts are rare.[20] The jurisprudence analysed by the present paper will show that even if the majority of the preliminary references sent by Romanian courts come from lower courts, the Romanian Supreme Court (High Court of Cassation and Justice – hereinafter HCCJ) has also showed increased willingness to get involved in direct judicial dialogue with the CJEU.[21] The fact that in certain areas of law that have given rise to several preliminary references from Romanian lower courts, such as the pollution tax saga, the HCCJ has not intervened, is only due to the lack of substantive jurisdictional competence of the High Court. In the present case, the HCCJ has though intervened after being seized by the General Prosecutor with a request to establish a uniform interpretation of the procedural mechanisms which consumers have at their disposal to obtain reimbursement of the paid pollution tax held by the CJEU to be contrary to EU primary law in the *Tatu* and *Nisipeanu* judgments. The HCCJ has well exercised its role of coordinating the uniform application of Romanian law while giving due consideration to the application of EU law.

The case areas chosen for this paper showed that when the Romanian ordinary courts are faced with an influx of challenges of domestic measures, whether adopted by public or private bodies, on the basis of violation of EU law, they are not usually engaging in dialogue with each other, and in certain cases, the chambers of the same court have reached different decisions on the interpretation and application of the same EU law. The decisions reached by the ordinary courts have usually been either the result of an over-zealous disapplication of national law in favour of EU law not based on a thorough exercise of the proportionality test, or the result of a *qu'est-ce que c'est* approach[22] towards EU law. Once the Romanian ordinary courts have discovered the powerful tool of the preliminary reference mechanism to influence their relations with higher courts, including the Constitutional Court, and the other State powers, a new pattern of judiciary behaviour started to form, whereby repeated and unnecessary references were sent to the CJEU. In the midst of trends of the incoherent domestic jurisdiction adopting contradictory application of EU law[23], and of overburdening the CJEU with the same references or with clearly inadmissible references[24], the HCCJ has well exercised its coordinating role of ensuring the

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[20] T. Vandamme, *Prochain Arrêt: La Belgique! Explaining Recent Preliminary References of the Belgian Constitutional Court*, European Constitutional Law Review, 2008, 127–148, 128.

[21] The following preliminary references were sent so far by the HCCJ: C-249/12 *Tulica* joined with C-250/12 *Plavosin;* C-283/10 Circul Globus Bucureşti; C-264/10 Kita; C-431/12 SC Rafinăria Steaua Română.

[22] See in greater detail the Section *General Approach Towards EU Law: Qu'est-Ce Que C'est?.*

[23] See the Section *The Romanian ordinary courts' inconsistent approach towards the requirements for tax reimbursements* and *Questioning the existence of a dialogue between the Romanian courts on interpretation of EU law.*

[24] See the saga of the pollution tax levied upon first registration of imported second-hand motor vehicles: *Tatu (*C-402/09, Judgment of 7 April 2011, nyr, preliminary reference sent by Tribunal of Sibiu, second instance court); Case C- 336/10, nyr, preliminary reference sent by the Court of Appeal Craiova, last instance court; C-136/10 and C-178/10, *Obreja*, Order of 8 April 2011, nyr, preliminary reference sent by the Court of Appeal of Targu-Mures, last instance court; C-441/10, *Anghel*, Order of 7 December 2010, nyr; C-439/10, *DRA SPEED*, Order of 7 December 2010, nyr; C-440/10, *SEMTEX*, Order of 7 December 2010, nyr; C-377/10, *Băila*, Order of 6 December 2010, nyr;. Second string of cases on the pollution tax generated by an updated version of the GEO 50/2008: *Nisipeanu* (C-263/10 Judgment of 7 July 2011, nyr), C-335/10, *Vijulan*; C-573/10, *Micşa*, Order of 13 July 2011, nyr; C-336/10, *Ijac*, Order of 8 April 2011, nyr; C-29/11, *Şfichi* and C-30/11 *Ilaş*, Order of 8 April 2011, nyr; C-

coherent application of national and EU law. The HCCJ has first clarified for the Romanian judges what is their role as Union judges in the first line of cases discussed here – the restriction of free movement of Romanian citizens: 'before applying the EC law to the case the judge is bound to establish the facts specific to the case, to verify if the restrictive measure to the freedom of movement is applicable to the concrete and precise facts and to examine if the measure of restricting the freedom of movement of the person is proportional to the objective followed by the law.' In response to the domestic courts' practice of automatically applying the CJEU preliminary ruling in the *Jipa* case without exercising the proportionality test as recommended by the CJEU, the HCCJ reacted and asked the ordinary courts to show a balanced judicial attitude by adopting a case by case assessment of the interpretation and application of EU law instead of an automatic application of judgments of other national courts or the CJEU, only because an EU law matter is at issue. If the HCCJ found that the national court did not perform this analysis, the HCCJ used to send the case to the first instance court to be re-judged in light of the above considerations. The HCCJ showed awareness of the difficult complex situation of a newly entered Member State that has to ensure respect of both the rules of the new legal order in which it entered into and of the norms from pre-accession international treaties binding the Member State. Thus, instead of concentrating only on the principle of supremacy, direct effect and the *Simmenthal* responsibility of the national judiciary, the HCCJ has raised the attention of the Romanian judiciary on the duty of consistent interpretation as a more appropriate conflict solving tool for the legal situation of a new Member State.

In the second line of cases discussed here, the HCCJ exercised again its coordinating role in a similar way as in the *Jipa* line of cases, ensuring a balanced interpretation of national legislation with EU law.

In contrast with the High Court of Cassation and Justice, the Romanian Constitutional Court has made clear its 'isolationist' position. The Decisions of the Romanian Constitutional Court in the pollution tax saga reflect a prudent approach towards the application of EU law by considering the preliminary reference procedure to be primarily the prerogative of ordinary courts, and only recently it has accepted its exceptional jurisdiction to refer preliminary questions in so very limited circumstances that in practice it might never be fulfilled.[25] However, what is more concerning is not the refusal of the Romanian Constitutional Court (RCC) to refer preliminary questions on the interpretation of EU law, but its refusal to address preliminary references in cases where it assesses indirectly the validity of EU law.[26]

The Romanian lower courts seem to be more and more frustrated with the Constitutional Court refusal to take into serious consideration the application of EU law on a regular basis. The recent case of a preliminary reference addressed by a second level Romanian Court where it challenged, in addition to national provisions, the Decisions of the Romanian Constitutional Court which declared unconstitutional the said national provisions[27] suggests that this frustration transformed into a legitimate concern towards the effective application of EU law.

However, the attitude of the Romanian Constitutional Court is not new in the geographical context of CEE Member States. The first preliminary references submitted to the Court of Justice

438/10, *Druțu*, Order of 13 July 2011, nyr ,. The questions referred after the referral of the questions in *Tatu* were decided by the Court based on the doctrine of *acte clair* (29, 30/11); Case 565/11 *Irimie*, pending.

[25] See the discussion in greater detail in Section *The impact of the Tatu judgment on the case law of the Constitutional Court*.

[26] Constitutional Court of Romania, Decision No. 1258 of 8 October 2009, published in the Official Journal of Romania No. 798 of 23 November 2009.

[27] Case C-310/10, Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others, para. 14.

from the Member States of the 2004 enlargement were similarly a result of prior negative decisions of their respective Constitutional Courts.[28] Furthermore, just as the RCC found that certain provisions of the Romanian law transposing word by word provisions of the Data Retention Directive[29] were incompatible with the Constitution, so did the Hungarian Constitutional Court declared in 2004 a domestic law reproducing an EU Regulation to be incompatible with the Hungarian Constitution without making a preliminary reference to the CJEU.[30] However, unlike the Hungarian Constitutional Court who identified a possible conflict between its approach and EU law, but justified it based on the rationale that the subject matter of its decision was solely the constitutionality of the Hungarian law, not the validity or interpretation of European law, the RCC did not raise at all the issue of possible conflict between national and EU law in its judgment.[31]

In the pollution tax saga, Romanian ordinary courts were put in the difficult position of having to choose between following EU law and the interpretation given by the CJEU, or the contrary interpretation of the RCC holding the same national law declared incompatible with EU primary law to be constitutional. Less than a year later, another Constitutional Court of another Member State would put domestic ordinary courts in a similar position of having to violate EU law because of its decision. The Czech Constitutional Court declared the CJEU preliminary ruling in the *Landtová* case[32] dealing with a subject matter which was dealt previously by the same Constitutional Court, as *ultra vires*.[33]

In parallel to the pollution tax saga, a new thread of cases was generated in Romania on the consumer protection legislation (Directive 93/13/CEE and Directive 2008/48/CE). The economic crisis has caused consumers to be more protective of their rights, on this occasion rediscovering the benefits of European-inspired legislation. The legal battle which, on one hand, involved most of the banks in the country, benefiting of strong financial resources, and on the other hand, tens of thousands of individuals – consumers of loan agreements, raised issues concerning the transposition and interpretation of European consumer protection directives into national law, in front of the domestic courts.

Thus, the dialogue between the CJEU and the Romanian courts continued with six references for a preliminary ruling before the European Court regarding consumer protection legislation. Again, this dialogue initiative came from the lower courts. This time, unlike what happened with regard to the legal issues previously mentioned, the supreme national court was not involved at all in ruling over these matters, due to the nature of the dispute which can be appealed only before the second level courts as last resort courts. In an article on the Polish courts experience with the

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[28] Case C-302/06 *Koval'sky* [2007] ECR I-11; Case C-328/04 *Vajnai* [2005] ECR I -8577, M. Bobek, Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice (2008) 45 *Common Market Law Review* 1611 - 1643, 1615.

[29] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, published in OJ L 105/54 of 13.4.2006.

[30] Decision 17/2004 (V25) AB, 25 May 2004.

[31] More recently, the Polish Constitutional Tribunal deemed itself competent to examine the compliance of the Brussels I EU Regulation with the Polish Constitution. See the Polish Constitutional Tribunal Decision of 16 Nov. 2011 (SK 45/09).

[32] Case C-399/09, Marie Landtová v. Cˇeská správa socialního zabezpecˇ ení, judgment of 22 June 2011, nyr. See annotation by Zbiral, 49 CML Rev. (2012), 1475 et seq.

[33] The Czech Constitutional Court Decision, Pl. ÚS 5/12 of 31 January 2012, available at http://www.concourt.cz/soubor/6417

application of EU law and use of the preliminary reference procedure, Lazowski[34] argued that Poland is like many other Member States of the EU: some of its courts are quite comfortable with EU law while some are not necessarily, yet on the right path. In light of the Romanian courts' jurisprudence assessed in this study, it seems that this dictum is valid also for the Romanian courts.

The article will analyse, first, the general framework of the interaction between the national law and EU law, both on the theoretical and practical levels (II). The general conclusions found in this section will be discussed in greater detail within the three main areas of law, that have so far produced most of the Romanian jurisprudence on judicial dialogue on EU law issues: restriction of the free movement of Romanian citizens (public law area) (III), pollution tax for imported second-hand motor vehicles (administrative law) (IV), and the consumer protection legislation concerning credit agreements[35] (private law) (V), before reaching the conclusions (VI).

A brief analysis of the normative relation between European Union law and national law in theory and practice

Normative framework: the relation between European Union law and Romanian law

The relation between EU law and Romanian law is governed by Art. 148 of the Romanian Constitution, which was introduced during the last amendment of the Romanian Constitution (RC) in 2003. The amendment of the Constitution was performed solely because of the future accession of Romania to the EU, and not necessarily to serve other needs of substantial constitutional change. In particular Art. 148(2) RC reads as follows: '(2) *As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act*.' As happened with several national legislative measures adopted in preparation of Romania's future membership to the EU legal system, both the translation of the EU legislation into Romanian, and the English translation of the Romanian law transposing EU legislation have usually been a word-by-word translation that in several occasions did not render the meaning and the logic of the legal concepts and texts used by the legislator. A word-by-word translation was in certain fields followed because of the massive amount of legislation which had to be implemented in a short period of time.

A good example is the case of Art. 148(2) of the Romanian Constitution which translated a substantially broad Romanian legal concept – 'reglementări' - into a more precise English term - 'regulations', which might give the impression to the reader that the Romanian constitutional provision limits the primacy principle only to regulations as EU secondary legislative measures. However, the English term of 'regulations' was improperly used for translating a Romanian concept which is much wider in scope, i.e. 'reglementări'. In this case, the term 'regulatory' is closer in meaning to the Romanian term, which encompasses all types of EU secondary measures –, and not only EU regulations. This interpretation was confirmed by the High Court of Cassation and Justice[36], on the other hand the Constitutional Court of Romania has not been so precise in explaining what is understood by 'mandatory Community regulations'. The Romanian

[34] A Lazowski, *The Application of EU Law in the New Member States: Brave New World*, T.M.C. Asser Press, 2010 p. 278.

[35] Credit agreements as envisaged by Directive 93/13/CEE and Directive 2008/48/CE.

[36] See, Judgment no. 4206 of May 24, 2007, not reported; Judgment no. 4205 of May 24, 2007, not reported; Judgment no. 3176 of Apr. 19, 2007, not reported.

Constitutional Court is known for not going beyond what is strictly asked from it, and not engaging in detailed clarifying decisions.[37]

Art. 148(2) RC provides the primacy[38] of the EU's regulatory measures over 'the opposite provisions of the national laws'. The wording of this provision is similar to the constitutional provisions of Lithuania and Slovakia on the relation between Union law and national law.[39] The Romanian Constitutional provision clearly provides that EU law takes precedence over sub-constitutional law,[40] however, it does not clarify the relation between EU law and Romanian constitutional law. If one follows a strict interpretation of Art. 148(2) RC, then, it could be argued that this provision establishes the primacy of EU law only over the acts adopted by the Parliament and not also over the provisions of the Romanian Constitution. This interpretation would be, though, contrary to the CJEU jurisprudence which established as early as 1978 an unconditional application of the principle of primacy of EU law over national law in whatever legal form is framed, that is, including national constitution.[41] Furthermore, Declaration no. 17 annexed to the Lisbon Treaty has confirmed the CJEU jurisprudence on the principle of primacy of EU law over domestic constitutional law.

The Romanian Constitutional Court has not so far given its express interpretation of the relation between constitutional provisions and EU law as resulting from the "Europe clause" – Art. 148(2) RC. However it can be inferred from its decisions that it has adopted a limited application of the principle of primacy of EU law. First it held itself as not competent to assess the validity of national legislation in light of the EU Founding Treaties, but only on the basis of the Constitution, and held that the preliminary reference mechanism is an interpretation tool reserved to ordinary courts.[42] Therefore, it seems that, like other Constitutional Courts of the EU Member States[43], the

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[37] Please see for more details in the Section *The Romanian Constitutional Court's approach towards the European constitutional dialogue* of the present chapter.

[38] The Romanian Constitution does not use the words 'supremacy' or primacy', but 'precedence'. The present paper will use the concept of 'primacy' as it is the concept used by the Court when describing the functional relation between EU law and national law, although in academic literature the two concepts are frequently used inter-changeably. However, A Rosas, I Pernice and F Mayer and C Timmermans have argued that the two terms are not synonimous, as 'primacy' refers to primacy in application, while supremacy refers to primacy in validity which the Court has never established to be the relation between EU law and national law in its jurisprudence. The relation between Union law and national law is described by the aforementioned authors as a relation of cooperation rather than a hierarchical relation. See more in A Rosas and L Armati, *EU Constitutional Law – An Introduction*, Second Revised Edition, Hart Publishing, 2012, at 52; I Pernice, Multivele Constitutionalism in the European Union (2002) 27 *European Law Review* 511, at 520; F Mayer, Supremacy - Lost? – Comment on Roman Kwiecień, *German Law Journal*, Vol. 06, no.11, Special Issue, 197 – 207; C Timmermans, Multilevel Judicial Cooperation in *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindh*, Cardonnel, Pascal Rosas, Allan Wahl, Nils, at 15-25.

[39] The Constitutional Act on the Membership of the Republic of Lithuania in the European Union lays down that: 'where it concerns the founding Treaties of the European Union, the norms of the European Union shall be applied directly, while in the event of collission of legal norms, they shall have supremacy ober the laws and other legal acts of the Republic of Lithuania.' Pursuant to Art. 7(2) of the Slovak Constitution, 'legally bindings acts of the European Community and of the European Union shall have precedence over laws of the Slovak Republic.'

[40] It is thus similar to the Constitutions of other CEECs: see for e.g. Poland, Lithuania, Slovakia.

[41] See the statement of the CJEU from the *Internationale Handelsgesellschaft:* 'The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.'See *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECJ Case C-11/70, [1970] ECR 1125, para.3

[42] See Decision no. 137/25.02.2010 of the Romanian Constitutional Court published in the Official Journal, Part I, no. 182/22.03.2010, where the Court observes that, 'in the event that it were considered [itself] competent to rule on the compatibility of national legislation with the European law then it could lead to a conflict of jurisdiction

CCR interprets the relation between domestic constitutional provisions and EU law as one where the Constitution has precedence over national and EU law, if proven that EU law is in conflict with fundamental constitutional principles.[44] Recently, the CCR held[45] that 'no public authority, be it court, can contest its considerations of principles made in its judgments, since they are bound to enforce them properly, respecting the decisions of the Constitutional Court as an essential component of the rule of law.'

On the other hand, the Romanian High Court of Cassation and Justice has clearly held that the *Simmenthal* principle[46] applies to the Romanian legal system, and national judges have an EU and national obligation to set aside conflicting national legislation, including constitutional provisions in favour of EU law. This interpretation has been confirmed by a Decision of 2011, delivered by the High Court of Cassation and Justice within the framework of an extraordinary type of appeal introduced by the General Prosecutor for the purpose of unifying the jurisprudence of all national courts (*recurs în interesul legii*).[47] According to the High Court of Cassation and Justice, 'In essence, after Romania joined the European Union, any provision of national law (including those listed in the Constitution) must give priority to rules of European law.'[48] The High Court of Cassation and Justice is the supreme judicial body in Romania as stated by Art. 18 of the amended Law 304/2004 on judicial organization and has main jurisdiction to hear the appeal in cassation and ensure consistent interpretation and application of the law by the other courts. The judgments delivered by the High Court of Cassation and Justice following an appeal for the purpose of unifying the national law are binding on all Romanian ordinary courts.[49] The interpretation given by the High Court of Cassation to the aforementioned Romanian constitutional provision has been widely endorsed by the ordinary courts.[50]

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between the two Courts, and the violation of the Court of Justice of the EU exlcusive jurisdiction to interpret the Treaty, as this power is expressly provided for by Art. 267 of the Treaty on the Functioning of the European Union.'

[43] Germany, see the BVerfG (Federal Constitutional Court – *Bundesverfassungsgericht*), judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 et al. –, BVerfGE 123, 267. *Lisbon* decision; Czech Republic, the Czech Constitutional Court, case Pl ÚS 29/09 Treaty of Lisbon II, judgment of 3 November 2009. An English translation of the most important sections by J Komárek is contained in (2009) 6 EuConst 345 ff. Italian Constitutional Court, Decision 27 December 1973 n. 183, *Frontini et al. v. Amministrazione delle Finanze*, Riv. dir. int., 1974, at 130. Similarly, see also the Constitutional Courts of Belgium, Italy, Spain, and Poland. Grabenwarter emphasises that 'the vast majority of Member States have an inviolable core of basic constitutional principles or emphasise the autonomy of fundamental rights.' For more details, see C Grabenwarter, National Constitutional Law Relating to the European Union, in *Principles of European Constitutional Law*, revised second edition, edited by Armin van Bogdandy and Jurgen Bast, Hart Publishing, 2012, at 83-131.

[44] *Lisbon* decision; Czech Republic, the Czech Constitutional Court, case Pl ÚS 29/09 Treaty of Lisbon II, judgment of 3 November 2009. An English translation of the most important sections by J Komárek is contained in (2009) 6 EuConst 345 ff. Italian Constitutional Court, Decision 27 December 1973 n. 183, *Frontini et al. v. Amministrazione delle Finanze*, Riv. dir. int., 1974, at 130.

[45] Decizia CCR no. 1039 of 5th of December 2012.

[46] C-106/77 Simmenthal II [1978] ECR 629.

[47] 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 published in the Official Journal No. 1 of 3th of January 2012.

[48] Decision of the High Court of Cassation and Justice no. 24/2011, ibid.

[49] According to Art.330[7] alin.4 of Code of civil procedure in force at the time of delivery of the said judgment, current Art. 517(4) Code of civil procedure entered into force as of 15th of February 2013. Art. 517(4) Code of civil procedure reads as follows:' rulings on questions of law are binding on the courts from the publication of the ruling in the Official Journal of Romania, Part I.'

[50] For example, see among the judgment of first instance courts delivered in the first year after accession to the EU: Tribunal of Arad, Judgment no. 2563 of 7 November 2007, delivered in Case no. 3663/108/2007.

The consequence of the fact that the two high courts of Romania have adopted different positions on the relation between national and EU law, while their judgments are binding at the same time on all national courts, places the ordinary courts in an extremely difficult position and is thus source of conflict of interpretation and application of EU law.[51]

As to the personal scope of the principle of primacy stipulated by Art. 148(2) Romanian Constitution, paragraph 4 of the same Article provides that the Parliament, the President of Romania, the Government, and the judicial authority shall all ensure fulfilment of the obligations stemming from Romania's accession to the EU, and from the primacy principles, as stipulated in paragraph 2. Therefore, Art. 148(2) and (4) of the Romanian Constitution codify the *Simmenthal* and *Internationale Handelsgesellschaft* doctrine of the CJEU. The only actor of the Romanian judicial system that is still not recognizing the primacy of EU law in its entirety is the Constitutional Court of Romania (CCR), which expressly stated in one of its decisions, which will be analysed in the section – *The Romanian Constitutional Court's approach towards the European constitutional dialogue*, that EU law provisions have priority over all the national provisions 'with the exception of the Constitution'.[52]

In the following sections we will further analyse the Romanian legislation on the national courts' duties to apply EU law and the relevant practice of the Romanian courts engaging in judicial dialogue[53] on EU law issues. First we will look at practice of ordinary courts of first and last instance, and then we will follow with an analysis of the Constitutional Court approach towards the relationship between the Romanian Constitution and EU law and the judicial dialogue with the CJEU.

Assessing the practice of the Romanian ordinary courts of first and last instance in regard to engaging in judicial dialogue on EU law issues

The contrasting practice of the Romanian courts on suspending the on-going judicial proceedings pending delivery of the preliminary ruling from the CJEU

Indirect judicial dialogue between the domestic courts of Romania and with national courts from other Member States

In the 46 preliminary references addressed, so far, by the Romanian courts to the CJEU, the referring courts have all stayed the domestic judicial proceedings until the Luxembourg Court delivered, and sometimes until communication,[54] of the preliminary ruling to the referring Romanian court. In certain cases, also other national courts than the referring court have stayed the proceedings until the CJEU delivered its preliminary ruling when the referring case had a subject matter similar to the one before the former court. This is what happened, for example, in

[51] Such situations have already occurred, as pointed out in the Section on the Pollution tax, and more recently the burden of choosing between two equally binding judgments of the Constitutional Court and the High Court of Cassation and Justice has been put forward before the CJEU by a Romanian Court of Appeal. See the case C-310/10 Agafitei, Judgment of 7 July 2011, nyr.

[52] Constitutional Court of Romania, Decision No. 137/2010, published in the Official Journal of Romania No. 182 of 22 March 2010. Relevant paragraph: '*All these aspects converge to demonstrate that the enforcement with priority of Community rules over national legislation is the task of the court of law. It is a law enforcement issue, not constitutional. The Court finds that the relationship between Community law and national law (except Constitution), we can speak only of the prior application of the latter over the former to the other, a matter falling within the exclusive jurisdiction of the ordinary courts*.'

[53] This paper endorses Allan Rosas definition of judicial dialogue and analyses the inter-relations between courts on the application on EU law from that perspective. See, Allan Rosas, The European Court of Justice: Forms and Patterns of Judicial Dialogue, EJLS, Vol. 1, No.2, 1 – 16, available online at http://www.ejls.eu/current.php?id=2

[54] Case C-258/10 Grigore, Order 4 March 2011, not yet reported.

the pollution tax saga[55], when the Court of Appeal of Bucharest suspended the judicial proceedings before it until the CJEU would deliver its preliminary ruling in the *Tatu* case.[56] The Court made a detailed explanation of its reasons.[57] Firstly, the Court emphasised that the cases addressed the same point of law - the conformity of the provision of Governmental Emergency Ordinance (GEO) No. 50/2008, as subsequently amended, with the provisions of Art. 110 TFEU.[58] Secondly, along with the reference made to Case *Tatu*, pending at that time before the CJEU, the Romanian court also mentioned the existence of a pre-litigation procedure started by the European Commission concerning the mentioned tax. Thirdly, a reference was made to the Information Note on references from national courts for a preliminary ruling (paragraph 25 deemed as substantiating the practice[59]). Finally, the court stated: 'The court considers that it is not able to render a judgment in the instant case until the [EU] court will not issue its ruling in the case pending before [the other Romanian court], in order not to cause a different interpretation of identical legal situations, [detrimental] to the proper administration of justice'. With this statement the Romanian court showed that it understands the wider contextual implications of the CJEU preliminary ruling within a Member State's jurisdiction.

The Court of Appeal concluded by holding:

> the ruling of the Court of Justice is binding also for other national courts before which an identical problem is pleaded, therefore, also for this court,[60] consequently, it shall stay the pending proceedings until the CJEU will hand down a preliminary ruling in the request initiated by [the national court which referred to the CJEU], acknowledging the interpretation given by it to the legislative act in dispute as having a guiding influence for the solution which it shall deliver.

The same Romanian court – the Court of Appeal of Bucharest - extended the network of national courts with which it wanted to enter in judicial dialogue, by suspending the judicial proceedings before it[61], until the CJEU will deliver its preliminary ruling in a reference addressed by *the domestic court of another Member State*, on a similar subject matter as the one before the Romanian court. In the Case *Agrana România*[62], a request of the claimant to stay the main proceedings pending the ruling of the CJEU was granted by the Romanian court.

The subject-matter of both proceedings (before the Romanian court and the foreign court as well) concerned a provision from an EU Regulation in the field of common agricultural policy.

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[55] For a description of the pollution tax saga, please see Chapter IV.

[56] Case 402/09 Tatu, judgment of 7 April 2011.

[57] Court of Appeal of Bucharest, case no. 19784/3/2009, order of 30 September 2010; Court of Appeal of Bucharest, case no. 6350/2/2010, order of 4 November 2010. For a more detailed analysis of these judgments and their contribution to the Romanian practice judicial dialogue on EU law issues, please see Mihai Şandru, Mihai Banu, Dragoş Călin, *The preliminary rulings procedure. Principles of European Union law and experiences encountered in the Romanian legal order* (Procedura trimiterii preliminare. Principii de drept al Uniunii Europene si experiente ale sistemului roman de drept), CH Beck, forthcoming.

[58] It has to be noticed that the pre-Lisbon equivalent of the Article was mentioned, even if the case was assessed after the entry into force of the Lisbon Treaty.

[59] Court of Appeal of Bucharest, case no. 19784/3/2009, order of 30 September 2010; Court of Appeal of Bucharest, case no. 6350/2/2010, order of 4 November 2010.

[60] Under the provisions of Art. 244(1) point 1 of the Code of civil procedure.

[61] The suspension of the judicial proceedings was done at the request of the parties invoking the relevant preliminary reference addressed by the domestic court of another Member State.

[62] Court of Appeal of Bucharest, case no. 4836/2/2008, *SC Agrana Romania SA v Agentia de Plati si Interventie pentru Agricultura (APIA)*, order of 3 December 2008.

Immediately after the preliminary references made by Verwaltungsgerichtshof (Austria) were registered at the CJEU, the Court of Appeal of Bucharest decided to stay the proceedings. The CJEU delivered the judgment in Case C-33/08 on 11th of June 2009. The main proceedings in the Romanian court were re-opened on 7th of October 2009.[63]

The reasoning followed by the Court of Appeal at the moment it decided to stay the proceedings is a remarkable step in the functioning of the principle of EU judicial cooperation. The position of the Romanian court is furthermore laudable since it was not falling under the judicial cooperation in civil or criminal law matters, where national courts have established judicial cooperation obligations[64]:

> As the reference for a preliminary ruling imposes a duty to stay the proceedings at the national court that initiated the request until the answer of the CJEU, and the ruling of the Court of Justice is binding also for other national courts which are deferred with an identical issue, therefore also for Romania. It was requested to the national court, under Article 244(1) point 1 of the Code of civil procedure, to stay the proceedings in the pending case until the CJEU will deliver the preliminary ruling in the request brought by the Austrian court, taking into account the fact that the interpretation given by [the CJEU] to the Article subject of the dispute would also have a leading influence in our legal system connected with the outcome of the solution the national court will deliver.[65]

The need to ensure the uniform application of EU law as fundamental objective and requirement of the EU legal order was emphasized by the domestic court in its judgment. Legal commentaries of this judgment interpreted it as an undoubtable case of judicial deference to the CJEU.[66]

On 1st of February 2013, a new Code of civil procedure entered into force in Romania. Unlike the previous legislation, under this new legislative framework, the suspension of the main proceedings due to a preliminary reference addressed by the domestic court to the CJEU is mandatory. Art. 412(1)(7)[67] of the new Code of civil procedure clearly provides that the proceedings pending before a Romanian court will be suspended *ex officio*, in case the court makes a reference for a preliminary ruling from the Court of Justice of the European Union, according to the founding Treaties of the European Union.

Missed opportunities for horizontal judicial dialogue

In the *Jipa*[68] related cases, and also in most of the pollution tax and consumer protection saga, national courts acted in isolation and applied EU law of themselves without waiting for the preliminary ruling of the CJEU. Interestingly, within the same Romanian court that addressed the

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[63] According to information available on http://portal.just.ro/Jurisprudenta.aspx.

[64] On the obligations which national corts from different Member States have under judicical cooperation in civil law matters, see paras. 123-127 of the Advocate General JÄÄSKINEN View delivered on 4 October 2010 (1) Case C‑296/10 *Bianca Purrucker v Guillermo Vallés Pérez;* see para. 80 and 81 of the CJEU judgment in this same case.

[65] Court of Appeal of Bucharest, case no. 4836/2/2008, *SC Agrana Romania SA v Agentia de Plati si Interventie pentru Agricultura (APIA)*, order of 3 December 2008.

[66] Please see Mihai Şandru, Mihai Banu, Dragoş Călin, *The preliminary rulings procedure. Principles of European Union law and experiences encountered in the Romanian legal order* (Procedura trimiterii preliminare. Principii de drept al Uniunii Europene si experiente ale sistemului roman de drept), CH Beck, forthcoming.

[67] Art. 412(1)(7) reads as follows: 'The judicial review of the case is suspended if the court makes a request for a preliminary ruling to the Court of Justice of the European Union, according to the Treaties on which the European Union.'

[68] Case C-33/07 Jipa, ECR [2008] I-05157.

first preliminary reference to the CJEU, other chambers did not stay the proceedings waiting for the judgment of the CJEU, instead they delivered their conclusions, and their judgments followed the judicial path until the last instance court.[69] What is most concerning in these judgments is not the fact that the national courts decided of themselves on the legality of the contested national measures whether based or not directly on EU law, but rather that they decided the cases without discussing the possibility of suspending the proceedings until the CJEU delivers its preliminary ruling. The reason for this practice is not necessarily the national courts' lack of knowledge of EU law or deference to the CJEU, but it could be argued that it was rather their unawareness of a preliminary ruling being referred to one of their colleagues to the CJEU.[70]

During the consumers protection legislation saga six preliminary references coming from Romanian courts were registered at the CJEU, a number that is already about 15% of the total number of cases from Romania. In light of the foregoing, the above-mentioned references are a clear proof that both Romanian courts and lawyers involved in the process of adjudicating European Union law had taken a step forward in the process of acknowledging the role that CJEU could and must play in the judicial system. This conclusion must not be overemphasized though, recalling that most of the Courts proceeded to give a judgment without using the preliminary reference procedure, opting for their own interpretation of the EU provisions in question.

One must know that the number of cases brought before national courts concerning consumer protection Directives exceeds by far the number of thousands. The Defendant questioned the national law provisions in all those cases, but only six Courts admitted the request for a preliminary reference (two of them regarding the interpretation of Directive 2008/48/EC and four regarding the interpretation of the Directive 93/13/EEC[71]). Meanwhile, in the other thousands proceedings the request for a preliminary ruling was dismissed. After the Commercial Tribunal of Cluj approved Volksbank's request for a preliminary reference in what followed to be Case C-571/11, Volksbank immediately requested in all its cases for the stay of procedure until the CJEU will deliver a judgment in case C-571/11, but their request was dismissed by most of the judges. Sure, the national procedural law did not contain at that time a provision related to this kind of issue, namely the possibility to suspend a trial when another court is judging a similar legal issue and the court considers necessary to send a preliminary reference. In this light, we consider that every Court has the liberty to analyse of its own motion the admissibility of the request for preliminary questions to be referred to the CJEU and, if it considers that the request is well-founded and further interpretation from the Luxembourg Court is needed, it may suspend the proceedings if the questions it considers necessary to be answered are similar to those already

[69] See High Court of Cassation and Justice judgment no. 4205 of 24 May 2007, making also a summary of the judgments that were appealed in this specific case, among which a judgment of the Tribunal of Dambovita of 25 January 2007 (the first preliminary reference from a Romanian court came from this Tribunal, on 25 January 2007 the preliminary reference was just being registered at the CJEU).

[70] Database collection of national judgments was then very limited and it still is to a certain extent today. Currently the practice has improved also due to growing number of workshops organised by the Superior Council of Magistracy, National Institute of Magistracy and the High Court of Cassation and Justice in the field of judicial cooperation on EU law matters. See the open letter submitted to the Ministry of Justice and to the Superior Council of Magistracy on the 15th of March 2010 by Mr. Cristi Danileț, the Vice-President of The Court of Oradea (Judecătoria Oradea), now himself a member of the Superior Council of Magistracy, argued for a broader electronic access for the judges to several databases, including an open access to the full text of the judgments from every Court in the country. He emphasised that the current system, even if technically capable, only grants access for a judge to the judgments delivered by the Court in which he himself works. (!)

[71] A relatively low number, bearing in mind that the same request was made in the same terms in every trial in which Volksbank was the defendant.

submitted by another national Court. Otherwise, if the Court considered based on the CJEU jurisprudence that it has available all the necessary means to give its decision on the main proceedings, it should not automatically suspend the course of the trial based on the mere fact that another domestic court has decided to address a preliminary reference to the CJEU.

A failure of the Romanian judicial system that is apparent both from the jurisprudence regarding the 'first registration tax' and the follow-up to the Volksbank saga can be identified in the continuous lack of dialogue between national courts, which appears to be more acute even than the inconsistent dialogue with the CJEU. Even if in the past years significant improvements were made in the field of online access to the national courts cases, the system does not provide access to the full text of the judgments.[72] Thus, it is quite intriguing that in many cases the courts are informed about decisions delivered by other courts in similar proceedings by the parties or the lawyers representing them.

We can thus conclude that although Romanian courts are more and more involved in horizontal judicial dialogue with both national courts and domestic courts of other Member States, there is still room for improvement. Firstly, making possible online access to the judgments of all Romanian courts to the Romanian judges, but also to judgments of courts from other Member States, is not difficult in the high-tech era and it could encourage the creation of a more coherent jurisprudence not only on the staying of proceedings in light of the CJEU preliminary ruling on similar issues, but more generally to uniform practice on interpretation and application of EU law related matters. Secondly, the provision of the new Cod of civil procedure entered into force on 15th of February 2013 which requires the national court to suspend the proceedings in case of referral of preliminary questions to the CJEU has the potential of unifying the national jurisprudence on the issue of deciding or not on the conformity of a national measure with EU law when another domestic court has referred preliminary questions in a similar case. So far, national courts took different positions, while some decided to automatically suspend the proceedings before them awaiting the preliminary ruling, without assessing the usefulness of the preliminary questions referred by the domestic courts and the merits of the case, while other courts, if they considered the EU law matter clear on the basis of previous CJEU jurisprudence, have decided directly the interpretation of EU law and the conformity of national law with EU law based on their assumed *Simmenthal* responsibility. However, the wording of Art. 412(1)(7) of the Code of civil procedure provides for the automatic suspension of the judicial proceedings only before the referring court, and not also of proceedings with similar subject matter before other domestic courts. Last but not least, in taking one or another position, national courts should consider the guidelines given by the High Court of Cassation and Justice in one of its early decision from 2008.[73] The High Court of Cassation and Justice considered as 'essentially illegal to not apply *a priori* the national law for the only reason that the Community law is relevant to the case. First, the national judge should investigate and identify the precise cases of conflict between Community law and domestic law, and then it shall apply domestic laws according to the EC law.' The HCCJ gave precise guidelines to Romanian courts explaining their European mandate as follows: 'before applying the EC law to the case the judge is bound to establish the

[72] In an open letter submitted to the Ministry of Justice and to the Superior Council of Magistracy on the 15th of March 2010 by Mr. Cristi Danileț, the Vice-President of The Court of Oradea (Judecătoria Oradea), now himself a member of the Superior Council of Magistracy, argued for a broader electronic access for the judges to several databases, including an open access to the full text of the judgments from every Court in the country. He emphasised that the current system, even if technically capable, only grants access for a judge to the judgments delivered by the Court in which he himself works. (!)

[73] High Court of Cassation and Justice Decision no. 2253 of 3rd April 2008, not published; Decision 4206 of 24 May 2007; Decision no. 4205, of 23 May 2007; Decision no. 1777 and 1780 of 17 March 2008.

facts specific to the case, to verify if the restrictive measure to the freedom of movement is applicable to the concrete and precise facts and to examine if the measure of restricting the freedom of movement of the person is proportional to the objective followed by the law.' It is clear that the HCCJ asks domestic courts to show a balanced judicial attitude by adopting a case by case assessment of the interpretation and application of EU law instead of an automatic application of judgments of other national courts, only because an EU law matter is at issue.

The practice of the Romanian Courts on the duty to refer preliminary questions to the CJEU under Art. 267(3) TFEU

According to Art. 267 TFEU and jurisprudentially developed EU law principles, national courts have a duty to address preliminary references to the CJEU in two situations. The first situation is expressly provided by the founding Treaties. Art. 267(3) TFEU provides an obligation for national courts of last resort[74] to bring questions of interpretation of EU law before the CJEU. This duty of national courts of last resort to address preliminary questions to the CJEU has been limited by way of jurisprudentially developed principles. According to the CJEU judgment in the *CILFIT* case, the Court established that, in spite of the treaty based general obligation of a domestic last resort court to refer preliminary questions, they are exempted from this duty in three limitative situations, namely when: 1) the question of EU law interpretation raised is irrelevant, or 2) the EU provision in question has already been interpreted by the Court, or 3) the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte claire*). However these exceptions are not easy to meet, in light of the complex test which domestic last resort courts have to perform. The CJEU established additional requirements which have to be fulfilled for the *CILFIT* exceptions to be applicable and justify refusal to refer. The CJEU held that a national court adjudicating at the last instance can rely on the third condition only after having concluded that 'the matter is equally obvious to the courts of the other Member States and to the Court of Justice'[75], bearing in mind 'the characteristic features of EU law and the particular difficulties to which its interpretation gives rise.'[76] In this regard, the national last resort court, before concluding, has to look at the versions of the EU legislation drafted in all EU official languages, because they are all equally authentic language versions;[77] and finally, the national last resort courts have to interpret the EU law provisions in light of the objectives of the EU law as a whole and its state of evolution at the date of application.[78]

The second situation where national courts have a duty to refer preliminary questions is not expressly provided by the founding Treaties, instead it has been established by the CJEU based on its interpretation of EU primary law. According to the *Foto-Frost* doctrine[79], any court, of any jurisdictional level, that doubts the validity of EU law, has to address preliminary questions to the CJEU, since the validity of EU legislation is the prerogative of the Court of Justice of the EU. In the following paragraphs we will briefly assess how the practice of the higher Romanian courts followed the EU law based duties of domestic court to refer preliminary questions to the CJEU.

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[74] Art. 267(3) TFEU defines a national court of last resort as a court against whose decisions there are no judicial remedies under national law.

[75] Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415 (hereinafter: CILFIT), para. 21.

[76] CILFIT Judgment, para. 17.

[77] CILFIT Judgment, para. 18.

[78] CILFIT Judgment, para. 20.

[79] Case 314/85 Foto-Frost [1987] ECR 4199.

The Romanian Constitutional Court has a famous decision whereby it held Romanian legislation closely transposing EU secondary legislation unconstitutional.[80] The Law No. 298/2008[81] regarding the retention of data generated or processed by the public electronic communication service providers or public network providers which was a word by word translation of the EU Directive 2006/24/EC on the data retention[82] was held to be contrary to the fundamental right to private life provided by Art. 26 of the Romanian Constitution, and therefore declared unconstitutional in its entirety. To be noticed that the Constitutional Court did not pose itself the question whether it is competent to assess the validity of national law transposing an EU Directive, since by assessing the constitutionality of this national law it is implicitly assessing the validity of the EU Directive. The duty to refer based on the *Foto-Frost* principle was completely disregarded by the Romanian Constitutional Court in its Decision. In light of the recent jurisprudence of the CJEU holding Member States liable in tort for the judgments of their national courts violating EU law[83], of which the duty to refer preliminary questions to the CJEU is part of, the Romanian Constitutional Court should probably reconsider its above mentioned approach, so as to avoid a CJEU judgment holding Romania liable for the activity of its judiciary.

As to the duty to refer preliminary questions on the correct interpretation of EU law, although the Constitutional Court of Romania has recently adopted a more nuanced approach, whereby it does not completely exclude the possibility to address preliminary references to the CJEU, in practice the test established by the Constitutional Court is very difficult to be achieved.[84] The Constitutional Court has emphasised that it is up to the national courts to refer questions, if they have uncertainties.[85]

On the other hand, the High Court of Cassation and Justice has expressly considered itself a court which is bound to refer preliminary questions to the CJEU under Art 267(3) TFEU.[86] The Supreme Court of Romania has respected its duty to refer preliminary questions to the CJEU and addressed preliminary questions in several cases: first, on the interpretation of EU secondary law on copyrights and other related rights[87], secondly, concerning the interpretation of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in regard to

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[80] Constitutional Court of Romania, Decision No. 1258 of 8 October 2009, published in the Official Journal of Romania No. 798 of 23 November 2009.

[81] Law No. 298/2008[81] regarding the retention of data generated or processed by the public electronic communication service providers or public network providers published in the Official Journal Part I no. 780 of 21/11/2008.

[82] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, published in OJ L 105/54 of 13.4.2006, the so called Data Retention Directive.

[83] Judgment of the Court (Grand Chamber) of 13 June 2006 in case *Traghetti del Mediterraneo SpA v Repubblica italian*a (Case C-173/03); Judgement of the Court 30 September 2003 in case *Köbler v Republik Österreich* (Case C-224/01).

[84] See Constitutional Court of Romania, Decision No. 668/2011, published in the Official Journal of Romania, No. 487 of 8 July 2011. The test will be detailed in the Section *The impact of the Tatu judgment on the case law of the Constitutional Court*.

[85] Constitutional Court of Romania Decision No. 1249 of 7 October 2010, published in the Official Journal of Romania No. 764 of 16 November 2010; ~ Decision No. 137 of 25 February 2010, published in the Official Journal of Romania No. 182 of 22 March 2010; ~ Decision No. 1596 of 26 November 2010, published in the Official Journal of Romania No. 37 of 18 January 2010.

[86] High Court of Justice and Cassation, administrative and tax justice chamber, case no. 8073/2/2006, resolution of 8 November 2007.

[87] C-283/10, *Circul Globus Bucureşti*, judgment of the CJEU of 24 November 2011, nyr.

immovable-property transactions carried out by natural persons,[88] and thirdly on the interpretation of Council Regulation (EC) No 1268/1999 of 21 June 1999 on Community support for pre-accession measures for agriculture and rural development in the applicant countries of central and eastern Europe in the pre- accession period.[89] It has though also rejected several requests of preliminary references on grounds which did not necessarily fulfil the strict CILFIT requirements.

The two PETROM cases concerning the compatibility of the national legal framework governing production and placing on the (national) market of natural gas and the rights of consumers, with the EU primary provisions on the free movement of goods[90] were among the first requests for preliminary references which the High Court of Cassation and Justice had to consider. In determining the necessity of the preliminary questions, the Court applied a two-tier test. First it assessed the application in time of EU law on the basis of previous jurisprudence of the CJEU. In order to establish whether the EU principles of free movement of goods were applicable to the case before it, the court applied by analogy the judgment of the CJEU in the Ynos[91] case and established that since both proceedings and the facts were prior to Romania's accession to the EU, then the EU law was not applicable in time to the case. After the assessment of the *rationae temporis* scope of the EU law, the Court proceeded to the assessment of the application of the *rationae materiae* scope of the EU law. If in regard to the application in time of EU law, the supreme Court engaged in a more detailed analysis, in regard to the substantive application of EU law, it dismissed the request in one single sentence, simply limiting to find that the questions referred to the free movement of goods, when they should have referred to the free movement of services.

The High Court of Cassation and Justice's analysis of the first private parties' request for preliminary questions to be addressed to the CJEU is laudable for several reasons. First, for finding that it is a court in the sense of Art. 267(3) TFEU, and secondly for identifying relevant jurisprudence of the CJEU. However a more in depth analysis of the complicate functioning of EU law and the role of the preliminary reference procedure should have been deployed.

First, the specific factual circumstances of the *Ynos* case were not identical with the case before the High Court. The *Ynos* case envisaged an administrative act born, and whose effects were exhausted before Hungary's accession to the EU. Instead, in the PETROM case the administrative act in dispute was still producing effects at the moment of the judicial proceedings before the High Court. Therefore, it could be argued that the point of EU law at issue was not sufficiently clear according to the CILFIT criteria to have exempted the High Court of Cassation and Justice from referring the preliminary questions to the CJEU. The High Court of Cassation and Justice could have addressed preliminary questions asking clarification on the CJEU judgment in the *Ynos* case, particularly whether the CJEU judgment was applicable to the specific circumstances of the PETROM case.

Secondly, the High Court overlooked the fact that the national legislation whose compatibility with EU primary law was in question was in fact a mere transposition of an EU Directive, thus

[88] C-249/12 *Tulica* joined with C-250/12 *Plavosin*, pending.

[89] Case C-627/11 S.C. 'Augustus' Srl Iași v Agenția de Plăți pentru Dezvoltare Rurală și Pescuit Ordinance of 27 November 2012.

[90] High Court of Justice and Cassation, administrative and tax justice chamber, case no. 8073/2/2006, resolution of 8 November 2007 and High Court of Justice and Cassation, administrative and tax justice chamber, case no. 2889/1/2008, decision no. 4722 of 12 December 2008. Another famous request for a preliminary ruling was rejected by the High Court of Cassation and Justice is case no. 2712/3/2006, resolution of 24 February 2009.

[91] C-302/04Ynos but also on Andersson (C-321/1997).

the request of the parties did not concern a mere interpretation of EU law but it implicitly questioned the validity of EU secondary law in light of EU primary law (Arts. 34 and 35 TFEU). The Supreme Court should have thus explored the possibility of reformulating the preliminary question, and relate it to the free movement of services instead of the free movement of goods, since what was at issue was a question of validity of EU law, which falls under the exclusive responsibility of the CJEU. Of course, if the preliminary questions had been reformulated, the High Court would have had to put them for discussion before the parties, before addressing them to the CJEU.

Third, in its argumentation, the High Court of Cassation and Justice had not referred to any of the CILFIT exemptions when motivating its rejection of the appellant's request of the interpretation of Arts. 34 and 35 TFEU by way of a preliminary ruling of the CJEU. According to established case law of the CJEU, a last resort court can dismiss a request for a preliminary ruling if one of the CILFIT conditions is met. In the present case, the High Court of Cassation and Justice did not expressly mention any of the CILFIT grounds: *acte clair*, relevance or previous ruling clarifying the EU provision at issue.

Therefore, the High Court of Cassation and Justice in the PETROM I case had a duty to refer preliminary questions to the CJEU since the case before it raised the issue of validity of EU law, which the Court erroneously demonstrated that it was exonerated from referring. The previous CJEU jurisprudence invoked by the HCCJ was not considering an identical issue of application in time of EU law, and the HCCJ also failed to assess whether one of the CILFIT situations which exempts a last resort court, as the High Court of Cassation and Justice in this case, from its duty to refer was applicable. Such a judgment could have engaged the liability of Romania for its violation of Art. 267(3) TFEU obligations[92] either before the CJEU[93], or before national courts in a request for review submitted by the plaintiffs on the basis of the *Kuhne* doctrine.[94]

In light of the complicate requirements that have to be met to engage the State's liability for judicial activity according to the CJEU jurisprudence[95] and the lenient test applied by the ECtHR to national courts' refusal to refer to the CJEU under Art. 6 ECHR[96], it is however unlikely that

[92] See the *Kobler* doctrine, Judgement of the Court 30 September 2003 in case Köbler v Republik Österreich (Case C-224/01).

[93] Cases have been brought before the CJEU on the State liability for their domestic courts' violation of EU law, particularly the obligation of national courts' duty to refer preliminary questions, not only by private parties but also by the Commission in infringement procedures, see Case C-129/00 Commission v. Italy, judgment of 9 December 2003 ECR [2004] I-0000.

[94] Judgment of the Court of 13 January 2004. *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* (C-453/00).

[95] C-224/01, Gerhard Köbler v. Republik Österreich and Joined Cases C-46/93 and 48/93 Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others [1996] ECR I-1029.

[96] According to the ECtHR juripsrudence in: *Matheis v. Germany* (dec.), no. 73711/01, § 3, 1 February 2005, Bakker v. Austria (dec.), no. 43454/98, 13 June 2002, *John v. Germany* (dec.), no. 15073/03, 13 February 2007 and *Ullens de Schooten and Rezabek v. Belgium (dec.)*, nos. 3989/07 and 38353/07, § 59, 20 September 2011, the mere reference to at least one of the CILFIT exceptions from the duty to refer preliminary questions to the CJEU is sufficient to escape the arbitrariness of the decision not to initiate preliminary ruling proceedings, and ensure respect of the fair trial rights of private parties. For a more detailed analysis of the ECtHR jurisprudence, see Valutytė, R. State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights. Jurisprudencija. 2012, 19(1) at 7−21.

the High Court of Cassation and Justice's judgment would have engaged the liability of Romania before the Luxembourg or Strasbourg courts.[97]

Romanian courts have so far rejected numerous requests for preliminary questions to be referred to the CJEU submitted by private parties, usually on the basis of lack of relevance of the questions to the case in dispute[98] or that the EU law provisions are sufficiently clear.[99] One of the areas of law where the Romanian courts have refused to refer preliminary questions to the CJEU in numerous cases was the pollution tax saga.[100] Certain of these private parties who have seen their requests for preliminary requests rejected by Romanian courts of different levels of jurisdiction have followed their grievances concerning the incompatibility of the pollution tax with Art. 110 TFEU before other European Institutions[101], including before the Strasbourg Court.[102] Before the ECtHR, the question of the conformity of the national court refusal to refer to the CJEU for a preliminary ruling with the right to fair trial was addressed. Unfortunately, the Strasbourg Court did not address the merits of this question as the area of law to which the question pertained did not fall under the scope of Art. 6 ECHR – taxation litigation is excluded from the ambit of Art. 6 ECHR. A positive aspect of the otherwise unsuccessful claim before the ECtHR is the perception of Romanian citizens of the two legal orders - the EU and the ECHR- as closely intertwined and filling each other gaps in individual's legal redress. This case proved that when direct access to the CJEU is not possible, the Romanian citizens will not hesitate to resort to the judicial guarantees of a legal system to which they are more accustomed to, such as the ECHR.

The Romanian courts' practice on giving precedence to the principle of primacy of EU law against the national procedural principles of *res judicata*

The High Court of Cassation and Justice - the supreme court of Romania- has emphasised in numerous judgments the obligation of Romanian courts to interpret the national legislation in relation to the EU law, which, according to Art. 148 paras. (2) and (4) of the Romanian Constitution, has priority over Romanian law. The High Court explained that the Romanian judge, who is both a national and a Union judge, must consider the possibility of applying EU law in each of the cases brought before it. Among the EU obligations, which the High Court expressly held to be also national obligations binding on all Romanian judges, the Supreme Court mentioned the obligation to substantially assess whether in each case referred before a Romanian court, there is an applicable EU law and whether its norms were properly transposed into national law. In case there is a possible contradiction between national and EU norms, the national judge,

[97] See the judgment of the ECtHR in *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, 20 September 2011; *Schweighofer and Others v. Austria* (dec.) nos. 35673/97, 35674/97, 36082/97 and 37579/97, 24 August 1999; *Peter Moosbrugger v. Austria* (dec.), no. 44861/98, 2, 25 January 2000; *Matheis v. Germany* (dec.), no. 73711/01, 1 February 2005; *Bakker v. Austria* (dec.), no. 43454/98, 13 June 2002; *André Desmots v. France* (dec.), no. 41358/98, 23 October 2001; *Canela Santiago v. Spain*, no. 60350/00, 4 October 2001.

[98] Order of the Court of Appeal of 10 January 2011 in case no. 51458/3/2010. Many requests for preliminary references were rejected in the pollution tax saga.

[99] Court of Appeal of Iasi, Judgment of 26 November 2010, case no. 725/45/2010.

[100] For more details see the discussion in the chapter *The Jurisprudence of the Romanian courts on the pollution tax before the CJEU preliminary ruling clarifying the relevant EU law*.

[101] More details on this process will be found in Chapter IV, section 2d.

[102] *Iovitoni, SC Holtzver, Anghel v Romania*, applications no. 57583/10, 1245/11 et 4189/11, Judgment of the ECtHR of 5 May 2012.

based on the fundamental principle of primacy of EU law, as provided in the Constitution and interpreted by the Luxembourg Court, must give precedence to the EU law.[103]

Following Romania's accession to the EU, in view of ensuring compliance with the constitutional requirement establishing primacy of EU law over Romanian law[104], a new judicial remedy was introduced by Law No. 262/2007[105] for the purpose of giving effect to rights which individuals enjoy under EU law within the Romanian jurisdiction. According to the amended Art. 21 of Law no. 554/2004[106], a revision request is possible against a final and irrevocable judgment adopted by a national court in violation of the principle of primacy of EU law. The request of revision of a final judicial decision had to cumulatively fulfil three requirements in order to be admitted under Art. 21 of Law no. 554/2004: 1) the judgment under review can be only a final ruling issued by an administrative court; 2) the decision must be rendered in violation of the principle of precedence of EU law; 3) and the revision request is submitted within 15 days from the communication of the judgment to the parties.[107] This new judicial review guarantee was meant to provide the procedural means necessary to ensure that individuals injured by the violation of the principle of primacy by Romanian courts can challenge the otherwise irrevocable judgments before a court.[108] By way of introducing a new provision in the legislation on tax litigation, the Romanian legislature transposed the *Kuhne* doctrine,[109] while the Romanian judiciary by interpreting Art. 322 of the Code of Civil Procedure as allowing such in followed the aforementioned doctrine

To date most of the private parties' requests of review of final judgments on the basis of violation of EU law have been successfully raised in the field of the pollution tax. Recently a request of review of a final judgment has been upheld in a complicate and sensitive issue concerning the building of a construction that could damage historical monuments. The Catholic Archdiocese introduced a request of revision of a final judgment whereby the construction of a building in the near vicinity of the "Sf. Ion" Cathedral was permitted[110], thus increasing the risk of degradation of the Cathedral, which was categorised as a historical monument. The Archdiocese's request for

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[103] C-106/77 *Simmenthal* II [1978] ECR 629; Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[104] See Arts. 148(2) and 20(2) of the Romanian Constitution.

[105] Published in the Official Journal of Romania No. 510 of 30 July 2007.

[106] Published in the Official Journal of Romania No. 1154 of 7 December 2007.

[107] The provision establishes more favourable rules for the individuals than in the case of revision request based on other grounds then violation of the principle of primacy of EU law.

[108] Requests for revision of final judgments of Romanian courts based directly on EU law and relevant CJEU judgments have been admitted in the pollution tax saga, after the CJEU delivered its preliminary ruling in a case referred by a Romanian Court (Case 402/09 Tatu).

[109] Law no. 299/2011 published in the Official Journal, part I, no. 916 of 22 Decembre 2011, annulled Art. 21(2) of Law 554/2004 on the basis of the Constitutional Court Decision no. 1609 of 9 Decembre 2010 holding the paragraph to have a 'poor, confusing drafting, resulting in uncertainties that may constitute real obstacles to the exercise of the right of access to justice', and thus hold it to be contrary to Art. 21(1) of the Romanian Constitution and the jurisprudence of the ECtHR on the conditions of accessability and predictability that have to be met by a law.

[110] Court of Appeal of Poiesti, Judgment of 25th of June 2009. The full list of judgments adopted in this case by several different national courts can be found in the the following journal article: I. Militaru, *Commentary of the Revision request in the procedure for the annulment of the construction authorisation – Decision of inadmissibility in the case C. Millennium Building Development S.R.L. împotriva României*, available online at http://www.forumuljudecatorilor.ro/wp-content/uploads/92.pdf

revision of the final judgment was approved based on the failure of the judgment to comply with relevant EU law on the protection of historical monuments.[111]

The Court of Appeal of Suceava, by a Decision of 3 November 2010, admitted the request for revision and stated that administrative litigation law allows the review of final judgments contrary to EU law. It held that the previous interpretation and application of the relevant law by the Court of Appeal was contrary to EU law which takes precedence over national law, and decided to reject the applicant's retrial appeal as unfounded and upheld the judgment of first instance which annulled the construction permit.[112]

At the beginning of 2011, the second thesis of Art. 21(2) of Law No. 554/2004 was declared unconstitutional by the CCR[113] because it did not fulfil the requirements of legal certainty. The CCR held that the legal provision was not clear as to when the time period for introducing the request of revision against the final judgment started.[114] Following the CCR Decision, the Parliament adopted Law No. 299/2011 which annulled Art. 21(2) in its entirety[115]. The 'annulment saga' did not stop here, as the Constitutional Court decided late in 2012 that also this latter law, Law No. 299/201,1 is unconstitutional[116], hence virtually annulling[117] the provision which previously annulled Art. 21(2) of Law No. 554/2011. In the same decision, the Court also found the first thesis of Art. 21(2) to be unconstitutional, but only 'as long as it is interpreted as excluding from the review process the decisions of the courts of last resort, by breaching the principle of the primacy of EU law, when they are not reviewed on the merits of the case'.[118] In deciding so, the Court argued that a clear procedural provision which will allow the review of the decisions in national courts must be enacted, by suggesting that the flaws identified in its wording must be overcome by the legislative bodies. The court stated

> The lack of such a ground of review would amount to denying the legal effect of the decisions of the Court of Justice of the European Union upon the national courts of the Member States, would deprive the individual of the binding force of these decisions and would mean disregarding the principle of primacy of EU law. By virtue of its status as a Member State of the European Union, the Romanian state has the obligation to provide the national courts, and, thus, the individuals, an effective judicial

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[111] Court of Appeal of Suceava final judgment of 11 July 2011.

[112] The judgment of the Court of Appeal of Suceava has been the subject of a complaint before the ECtHR for violation of the fair trial rights under Art. 6 ECHR. The defendant in this case was the one to bring the claim before the Strasbourg Court arguing that the admission of the request of review of a final judgment based on EU law is contrary to the requirement of the fair trial right under Art. 6 ECHR. The Strasbourg Court has not assessed the merits of the case as the claim was considered to have been introduced outside the time limit provided by Art. 35(1) and (4) ECHR. See S.C. Millennium Building Development S.R.L. v României (application no. 10787/08), decision of the ECtHR of 10 April 2012.

[113] Decision of the Constitutional Court no.. 1609/2010 published in the Official Journal of Romania Part I, no. 70 of 27 January 2011.

[114] For a critique of this decision, see G. Fabian, E. Veress, *Suprimarea motivului de revizuire pentru sancţionarea încălcării principiului priorităţii dreptului unional în materia contenciosului administrativ. Consideraţii critice*, Revista Română de Drept European, No. 3/2012, at 57-73.

[115] Law no. 299/2011 published in the Official Journal, Part I, no. 916 of 22 December 2011.

[116] Constitutional Court of Romania, Decision No. 1039 of 5 December 2012, published in the Official Journal of Romania, No. 61 of 29 January 2013.

[117] According to Art. 147(1) of the Romanian Constitution, the Parliament has 45 days to modify the provision declared unconstitutional in accordance with the *rationae decidendi* of the Constitutional Court. If the Parliament does not act upon the decision of the CCR, then the provision declared unconstitutional is anulled *ex officio*.

[118] Constitutional Court of Romania, Decision No. 1039 of 5 December 2012, published in the Official Journal of Romania, No. 61 of 29 January 2013.

instrument which would guarantee the application of the provisions of EU law, provisions which take precedence over contrary provisions of national law.[119]

Therefore, the CCR acknowledged the importance of both the primacy of EU law and of effective remedies which individuals should benefit of during legal proceedings. On a practical level, Art. 21(2) of Law No. 554/2004 has been vested again, conditionally, with binding force. Furthermore, the Constitutional Court seems to insist on the legislative to act upon the matter of review due to breach of the primacy of EU law principle.

The Romanian Constitutional Court's approach towards the European constitutional dialogue

Setting the scene

The relationship between the Constitutional Courts of the Member States and the Court of Justice of the EU is still wayward, even though important steps have been taken towards a consistent European constitutional dialogue in a relatively short period of time. In 2006, except for the Belgian[120] and Austrian[121] constitutional courts – which already sent questions for a preliminary ruling, and the Slovak[122] and the Polish courts[123] – which admitted they have the competence of engaging in this procedure, all the other constitutional courts were keeping themselves 'strictly silent on the European stage'.[124] Currently, the scene of direct judicial dialogue between the Constitutional Courts of the Member States and the 'Constitutional Court' of the EU significantly changed. Two of the most reluctant Constitutional Courts from the old Europe, the Constitutional Court of Italy[125] and the Constitutional Court of Spain[126], have sent their first preliminary questions to the CJEU. The 'mood for dialogue'[127] reverberated also to the Lithuanian

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[119] *Id.*

[120] See, for instance, *Cour d'Arbitrage*, 19 Febr.1997, no. 6/97. The constitutional court of Belgium is the most active one. According to the Annual Report of the European Court of Justice in 2011, the Constitutional Court of Belgium has sent 21 questions for a preliminary ruling. (Available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf; Last accessed on November 20, 2012).

[121] *VfGH*, 10 March 1999, B 2251/97, B 2594/97.

[122] Decision of 18 Oct. 2005, PL. US 8/04–202.

[123] Order of 19 Dec. 2006 in the case P 37/05; For a commentary, see A. Lazowski, *Poland. Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences between National Courts and the Court of Justice. Order of 19 December 2006*, European Constitutional Law Review, Vol. 4, Issue 1, 2008, at 187 – 197.

[124] M. Cartabia, *Europe and rights: taking dialogue seriously*, European Constitutional Law Review, Vol. 5, Issue 1, 2009, at 25.

[125] Italian Constitutional Court, *Ordinanza* No. 103/2008; For a commentary, see G. Martinico, *Preliminary reference and constitutional courts: Are you in the mood for dialogue?*, Tilburg Institute of Comparative and Transnational Law Working Paper, No. 2009/10 (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483664; Last accessed on November 20, 2012).

[126] Spanish Constitutional Court, Order 86/2011, 9 June 2011; For a commentary, see L. Arroyo, *On the first reference for a preliminary ruling made by the Spanish constitutional court: Bases, content and consequences*, InDret Law Journal, Vol. 4, 2011 (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954562; Last accessed on November 20, 2012). For a historical analysis of the reluctance of the Spanish court to admit that it is competent to analyze the validity relationship between national law and EU law provisions, as well as to send preliminary ruling questions, see A. Herrera Garcia, *Tribunal Constitucional y Unión Europea. El caso español a propósito de la sentencia 58/2004 y de la fase actual de la integración constitucional de Europa*, Cuestiones Constitucionales, No. 16, January-Februrary 2007, at 405-433.

[127] A metaphor used by G. Martinico in *Preliminary reference and constitutional courts: Are you in the mood for dialogue?*, Tilburg Institute of Comparative and Transnational Law Working Paper, No. 2009/10.

Constitutional Court[128], a representative of the 2004 wave of accession to the EU. In spite of the recently increased willingness to make a reference for a preliminary ruling, there still are national differences in regard to the position of Constitutional Courts towards their status of a court in the meaning of Art. 267 TFEU and the need to address preliminary references to the CJEU.[129]

Engagement in the preliminary ruling procedure is not the sole criterion in accordance with which the relationship between the Constitutional Courts of the Member States and the CJEU - as *cléf de voûte* of the system of EU law interpretation - can be assessed. Other variables that can be taken into account are the attitude towards human rights adjudication in the multi-level structure of the EU[130], the references to the case-law of the CJEU in the decision-making process of the constitutional courts (CCs), or the constitutionality review of the provisions which transpose EU law.[131] Regardless of the criteria one could use to assess the existence or quasi-existence of a judicial cooperation between the CCs and the CJEU, the ultimate constitutional dispute between the two levels of adjudication revolves around the standard of protection of human rights, which became an even more complicated issue after the entering into force of the Charter of the Fundamental Rights of the European Union in 2009. It has been showed that the theoretical construction of a mutual relationship between the various human rights catalogues, such as national constitutions and the EU Charter, is a complex issue, heavily dependent on the respective dogmatic construction of the national framework of reference to constitutionality issues.[132]

It is exactly because of this "complex issue" why the dialogue between domestic Constitutional Courts (CCs) and the CJEU should become consistent. There are two quite opposite risks which are likely to appear as a consequence of parallel human rights adjudication in the national and EU levels. On the one hand, if the CCs would autonomously apply human rights solely based on their domestic constitutional catalogues, then significant differences in the regime of the application of human rights to the same factual reality can appear, creating thus confusion in the European judicial system. On the other hand, if the CCs would limit themselves in accepting the interpretation given by the CJEU to the human rights catalogue in the Charter without any of their influence, that would lead to a judicial standardization of fundamental rights, which would put in danger national identities which the TFEU aims to protect.[133] The solution to counter both of the

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[128] The Constitutional Court of Lithuania in case No. 47/04, Decision of 8 May 2007 (Available at http://www.lrkt.lt/dokumentai/2007/d070508; Last accessed on November 20, 2012).

[129] For more details, see C Grabenwarter, National Constitutional Law Relating to the EU in *Principles of European Constitutional Law*, revised second edition, edited by Armin van Bogdandy and Jurgen Bast, Hart Publishing, 2012, at 83 – 127.

[130] See the famous *Solange I* (Judgment of 29 May 1974, 37 Entscheidungen des Bundesverfassungerichts 271) and *Solange II* (Judgment of 22 October 1986, 73 Entscheidungen des Bundesverfassungerichts 339) decisions of the German Constitutional Court. For a commentary on the *Solange* argument, see A. Tzanakopoulos, *Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument*, in 'The Practice of International and National Courts and the (de)fragmentation of International Law ', Ole Kristian Fauchald and Andre Nollkaemper (eds.), Hart Publishing, 2012, at 185 – 215.

[131] See the 'data retention saga ' in the decisions of the constitutional Courts of Romania (Decision No. 1258 of 8 October 2009), Germany (1 BvR 256/08 Judgment of 2 March 2010), or the Czech Republic (the decision of 31 March 2011). Several constitutional courts of the Member States decided that certain provisions of the national laws which implemented Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC were unconstitutional, because they breached the right to privacy enshrined in the national Constitution.

[132] M. Bobek, *Learning to talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice*, Common Market Law Review 45, 2008, at 1611–1643.

[133] Art. 4(2) TEU; M. Cartabia, *Europe and rights: taking dialogue seriously*, European Constitutional Law Review, Vol. 5, Issue 1, 2009, p. 6-7; Cartabia argues that pluralism is the most appropriate model describing the

risks is a constant, substantive dialogue between the CCs and the CJEU through the preliminary rulings procedure enshrined in Art. 267 TFEU, a dialogue which appears to be taken more and more seriously.

The Constitutional Courts of the post-communist European States have been described as self-established 'powerful, influential, activist players, dictating the rules of the political game for other political actors, and certainly not embarrassed with any self-doubt as to their legitimacy in striking down laws under very vague constitutional terms'.[134] The Constitutional Court of Romania (CCR) makes no exception from this rule.

The CCR's decisions, starting with the pre-accession period, show all the symptoms already identified in the doctrine for the 'splendid isolation'[135] of Constitutional Courts in the EU legal system: the CCR refuses to send questions for preliminary rulings, it refuses to use the provisions of the EU Charter in the constitutional review of the national legal provisions – despite the fact that it has no problem with directly applying the provisions of the European Convention for the Protection of Human Rights, and it avoids as much as possible referring to the case-law of the CJEU in its decisions. The CCR brings also its own specific contribution to the "isolation" approach: it ignores the CJEU judgment deciding that a Romanian provision is in breach of EU primary law (Art. 110 TFEU) and it decides to maintain the said legal provision as constitutional, thus also placing the national ordinary courts in the difficult position of having to choose between breaching EU or national law[136]; it had a period of confusing the legal acts of the Council of Europe with the legal acts of the European Union[137]; and, even if it held that it cannot interpret the founding Treaties of the EU, it did interpret the provisions of the TFEU for the purpose of solving the constitutional conflicts between Romanian institutions.[138]

The CCR's approach towards EU law follows, to a certain extent, the approach adopted by the CCs of the other post-communist countries: 1) protecting the Constitution and its position in the face of external interventions, with the EU being perceived as such; 2) severing the interconnecting link between domestic law and European law when issues of the validity of domestic law transposing secondary EU law are at issue.[139]

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contemporary relationship between the Member States and the EU in N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999), p. 120, and a famous definition by M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing, 2003), at 501.

134 W. Sadurski, *Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European* Union, EUI Working Papers, Law No. 2006/40, at 3.

135 M. Bobek, *The impact of the european mandate of ordinary courts on the position of Constitutional Courts*, in 'Constitutional Conversations in Europe ', M. de Visser and C. Van de Heyning, eds., Intesentia, 2012, at 287 – 308.

136 Decision No. 668/2011 of 18 May 2011 following the judgment of the CJEU in the case C-402/2009 *Tatu*. A similar situation was created in the Czech Republic by the Czech Constitutional Court in the context of the case Landtová (Case C-399/09, Marie Landtová v. Cˇeská správa socialního zabezpecˇ ení, judgment of 22 June 2011, nyr. See annotation by Zbiral, 49 CML Rev. (2012), 1475 et seq.). The CCR was though the first in bringing its contribution, as it Decision dates from 18 of May 2011, while the Decision of the Czech Constitutional Court declaring the CJEU judgment ultra vires dates from 31st of January 2012.

137 Decision No. 568/2006, published in the Official Journal of Romania, No. 890 of 1 November 2006.

138 Decision No. 683/2012 of 27 June 2012.

139 O Pollicino, The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law? in *Yearbook of European Law*, Vol. 29, 2010, at 66-7.

The position adopted by the CCR towards the relation between EU law and constitutional law resembles also the position adopted by most of the Constitutional and supreme Courts of the Member States[140], namely that the principle of the primacy of EU law does not apply to the Constitution, placing thus EU law above provisions of national law, but under the constitutional provisions.[141] The CCR adopts thus a limited application of the principle of primacy of EU law in relation to domestic law. The specificity of the CCR in relation to the CCs of the other post-communist countries is that, until recently, the CCR made it clear that it considers itself outside the scope of Art. 267 TFEU.[142] And only recently, under the impact of a CJEU preliminary ruling in a case referred by Romanian courts[143], it has changed to a certain extent its position.[144] The CCR admitted for the first time[145], formally, the possibility to send questions for a preliminary ruling to the CJEU, a possibility which, nevertheless, is highly unlikely to occur due the four-prong test the Court created as a requirement for using the preliminary reference procedure.[146]

The CCR's attitude towards the primacy of EU law might have its source in its newly gained independence and desire to reinforce its domestic inter-institutional position[147], which is a common feature of the CCs of the Member States from both the 2004 and 2007 enlargement waves, but may also come from the constitutional judges uncertainty and genuine lack of confidence towards the functioning of the EU legal mechanism when the issue of protection of fundamental rights and constitutional values are at issue.[148]

The CCR approach resembles the post-accession attitude of the CCs of the Central and Eastern European states also in their rationale of severing the interconnecting link between domestic law and EU law when they review the constitutionality of national law transposing EU law. In the aftermath of the 2004 enlargement, the Constitutional Courts of Hungary[149] and Slovakia[150] declared unconstitutional domestic laws implementing EU secondary legislation. However,

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[140] Except the Dutch Raad can State and the Austrian Constitutional Court, the other Constitutional or Supreme Courts of the Member States have adopted a limited application of the principle of primacy of EU law. Some recognised the primacy of all constitutional provisions over EU law, while others place above EU law only a core of basic constitutional principles. From the general statement of the CCR it seems that the CCR is part of the former group. See more on this classification in C Grabenwarter, National Constitutional Law Relating to the European Union, in *Principles of European Constitutional Law*, revised second edition, edited by Armin van Bogdandy and Jurgen Bast, Hart Publishing, 2012, at 84-94.

[141] Constitutional Court of Romania, Decision No. 668/2011, published in the Official Journal of Romania, No. 487 of 8 July 2011.

[142] Constitutional Court of Romania Decision No. 1249 of 7 October 2010, published in the Official Journal of Romania No. 764 of 16 November 2010; ~ Decision No. 137 of 25 February 2010, published in the Official Journal of Romania No. 182 of 22 March 2010; ~ Decision No. 1596 of 26 November 2010, published in the Official Journal of Romania No. 37 of 18 January 2010.

[143] Case C-402/09 Tatu v. Romania, *supra*.

[144] Constitutional Court of Romania, Decision No. 668/2011, published in the Official Journal of Romania, No. 487 of 8 July 2011.

[145] *Id*.

[146] See G. Zanfir, *Curtea Constituţională a României şi procedura întrebărilor preliminare. De ce nu? (The Constitutional Court of Romania and the procedure of the questions for a preliminary ruling. Why not?)*, Revista Română de Drept European (Romanian Journal of European Law), No. 5/2011, at 82 – 97.

[147] W. Sadurski, *Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European* Union, EUI Working Papers, Law No. 2006/40, at 36.

[148] *Id*., at 31.

[149] Hungarian Constitutional Court, Decision 17/2004 (V. 25) AB. For a detailed analysis see A. Sájó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy'*, in *Zeitschrift für Staats- und Europawissenschaften*, 2004, 351 ff.

[150] Decision of the Constitutional Court of the Slovak Republic, Pl US 8/04-202, 18 October 2005.

unlike its Hungarian and Slovak correspondents, the CCR completely ignored the interconnecting link between national and EU law in its Decision.[151] The CCR made no argumentative use of EU law, instead it decided to formally ignore the existence of relevant secondary EU law.[152]

This section will analyse the evolution of the CCR approach on the primacy of EU law starting with the pre-accession decisions and continuing with decisions taken after Romania's accession, where it interprets provisions of the TFEU without considering to send a preliminary ruling reference, followed by preliminary conclusions.

General approach towards EU law: *qu'est-ce que c'est?*[153]

As it has been shown in a previous section of this paper, Art. 148(2) of the Romanian Constitution gives expression to the principle of primacy of EU law in the Romanian legal system.[154] It was introduced in the Constitution after the process of the constitutional revision in 2003, thus four years before Romania's accession to the EU. This was the only time frame when the CCR was able to validly avoid the interpretation of Art. 148(2) and its application. When faced with issues of interpretation of EU law and application of Art. 148(2), the CCR answered, on these occasions, by declaring that this provision is irrelevant during the pre-accession period.

The pre-accession period: instances of audacity from the CCR

One particular decision of this period is a good reflection of the CCR's *qu'est-ce que c'est* approach towards EU law. In a case of 2006, the claimants raised the argument that the challenged provisions breach the Council of Ministers' Recommendation (2002) of the Council of Europe and also Title II of the Charter of Fundamental Rights of the European Union. The Court replied to this specific critique of constitutionality that 'in order to apply the provisions of art. 148 of the Constitution, the process of Romania's accession to the European Union must first be completed, hence at the time of reaching this decision, the possible contradiction between the challenged legal texts and the invoked international instruments cannot be analysed'.[155] This decision of the Court has been characterized by the doctrine as a "monumental confusion"[156],

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[151] Constitutional Court of Romania, Decision No. 1258 of 8 October 2009, published in the Official Journal of Romania No. 798 of 23 November 2009.

[152] On the other hand, the Hungarian and Slovak CCs identified the applicable EU secondary act, and explained, their position by interpretating national law in relation to the relevant EU law. The Hungarian and Slovak CCs Decisions were criticised by the legal academia (see M Bobek and Z Kühn, "Europe Yet to Come; the Application of EU Law in Slovakia", in A Lazowski ed., *The Application of EU Law in the New Member States - Brave New World*, The Hague, TMC Asser Press, 2010 and Sájó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy'*, in *Zeitschrift für Staats - und Europawissenschaften*, 2004, 351 ff.) as an improper understanding of EU law, nonetheless, at least, they were aware and identified the existence of a possible conflict between EU and national law which they solved it in their specific way. The CCR showed, at least formally, that was not aware of such a conflict, as it made no formal reference to the secondary EU law that was transposed, nor to the possible conflict between the two, instead the only conflict it identified was between the ECHR and national constitution, and the challenged national provision.

[153] See M. Bobek on the 'EU law: *qu'est-ce que c'est*?' approach of the Constitutional Courts of Central and Eastern Europe in *The impact of the european mandate of ordinary courts on the position of Constitutional Courts*, cited above.

[154] Art. 148 (2): '*As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act '.*

[155] Constitutional Court of Romania, Decision No. 568/2006, published in the Official Journal of Romania No. 890 of 1 November 2006.

[156] D. Călin, *Aplicarea şi interpretarea dreptului Uniunii Europene de către Curtea Constituţională*, Revista Forumul Judecătorilor, No. 3/2010, at 69.

because the CCR made no distinction between an act of the Council of Europe and an act of the European Union, the claimants raising acts of both regional legal orders.[157] It is interesting, though, that from a *per a contrario* interpretation of its decision, one could conclude that after Romania's accession to the EU, the CCR would analyse the possible contradiction between the national law and the acts of the EU, on the basis of Art. 148(2) RC.

This scenario did not become reality. Art. 148(2) RC became the Achilles heel in the CCR's case-law after 2007, in the sense that whenever it stumbled upon it, the Court avoided analysing its legal effects within the constitutional review of national legal provisions.

Surprisingly, the CCR found the courage to engage in an analysis of national provisions vis-à-vis EU law whenever the claimants who raised unconstitutionality exceptions did not mention Art. 148(2), be it because it was not yet enforced, be it because they did not consider it necessary. For instance, CCR made its first reference with regard to EU law in 2000, even before the enactment of the constitutional amendment which introduced Art. 148(2) in the Romanian Constitution. The Constitutional Court was asked whether several articles of Law No. 8/1996 with regard to copyright were unconstitutional, as they were argued to breach the right to the free access to justice (Article 21 RC) and the right to respect of private property (Article 135 RC). To answer the question, the CCR stated that the provisions of Law No. 8/1996 have absorbed the existing mechanism of protection from the international level. 'In this respect, the provisions of Directive 93/83/EEC of 27 September 1993 are relevant (even if this act does not produce legal effects in Romania, it contains requirements which are internationally recognized)'.[158] The CCR stated in its decision that the contested provisions of the national law, which presupposed an administrative procedure to reach an agreement between the conflicting parties, are allowed by Art. 12(1) of Directive 93/83. Ultimately, it did not admit the request of the claimant.

Moreover, in another Decision dating from the pre-accession period, CCR invoked, by itself and not because the claimant suggested so, the case-law of the CJEU which helped it to declare unconstitutional Art. 16 of Law No. 51/1995 with regard to the exercise of the profession of lawyer. The said provision imposed a maximum age limit for the accession into the bar by establishing that only the individuals who still have more than five years to reach the maximum age to retire are able to enter this profession. CCR invoked the CJEU judgment in the *Mangold case*[159] among its arguments, even though the constitutionality critiques envisaged only Arts. 16, 41 and 53 of the Romanian Constitution. Without any introduction or factual conclusion, CCR mentioned that 'in accordance with the above mentioned arguments, the Court of Justice of the European Communities decided in *Mangold*, with regard to establishing a criterion based on age in the field of employment contracts, that

> in so far as legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration, linked to the structure of the labour market in question (…) is objectively necessary to the attainment of the objective

[157] Ordinary courts have also made similar confusion, for example, the Court of Appeal of Timisoara, in its Decision no. 923 of 02.06.2009 described EU law as being composed of ECHR (all Member States are signatory parties to the ECHR) and jurisprudence of the Strasbourg court. (!) The Court considered the entire ECHR part of the EU law due to the fact that all EU countries are also parties to the ECHR, instead of considering only the fundamental rights included in the ECHR as an integral part of EU law via the general principles of EU law (Art. 6 TEU).

[158] Decision No. 253/2000, published in the Official Journal of Romania No. 261 of 22 May 2001.

[159] Case C-144/04 *Werner Mangold v. Rudiger Helm*, Judgment of the Court of 22 November 2005.

> which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued.[160]

Was Romania a member of the EU yet? No. Did the legal provision in question concern a fixed term contract of employment? No. Did the court make any causal links between the case and the cited paragraph of the *Mangold* decision? No. However, the decision must be applauded as it is one of the few which refers to the jurisprudence of the CJEU.

The two types of "omission" in the human rights adjudication: to refer preliminary questions to the CJEU and take into account the constitutionality challenges pursuant to the EU Charter

If one had to describe the CCR's case-law with regard to the application of EU law in general in one word, "contradiction" would be the most appropriate one. Not only can the observers encounter contradictions between older and newer decisions, but also they can find contradictions within the same Decision, as is the case of Decision no. 668/2011.[161] For now, it is interesting to note the CCR's conclusions in Decision no. 945/2010, three years after the accession to the EU, in which it stated that it 'does not have the competence to make a conformity review between a directive and the national law which transposes it. Moreover, a possible non-compliance of the national law with the European legal act does not imply the unconstitutionality of the transposing law. As such, there is nothing which precludes the national legislator to provide for a greater level of protection in national law than the one afforded by the concerned EU legal act'[162]. It should be kept in mind that in Decision No. 253/2000 analysed above, seven years before Romania's accession to the EU, CCR established that a provision of national law was in accordance with the provisions of a directive, an argument which it used in its *rationae decidendi* to determine that the national provision in question is constitutional.

With regard to the human rights adjudication in the multi-level governance of the European Union, the CCR's contribution is twofold. First, it is one of the constitutional courts which have in its portfolio a decision establishing the unconstitutionality of a law which transposes a directive, because the CCR considered it breaches the fundamental right to private life enshrined in Art. 26 of the Constitution.[163] In Decision No. 1258/2009[164], CCR held that Law No. 298/2008 regarding the retention of data generated or processed by the public electronic communication service providers or public network providers was unconstitutional in its entirety, a decision that the court does not make very often as it usually decides only on the provisions challenged by the claimant. The main critique of the CCR was that the law envisaged all the individuals who

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[160] Constitutional Court of Romania, Decision No. 513/2006 published in the Official Journal of Romania No. 598 of 11 July 2006, available (in Romanian) at http://www.clr.ro/Rep_dil_2002/..%5Crep_htm%5CDCC513_2006.htm (Last accessed on 21 November 2012). The cited paragraph from *Mangold* is paragraph 65, a detail not mentioned in the decision of the CCR. With regard to this decision, it should be noted that the claimant argued that Art. 3 of the Governmental Ordinance No. 137 of 31 August 2000 with regard to all forms of discrimination incorrectly transposed Art. 3 of Directive 2000/78/CE establishing a general framework for equal treatment in employment and occupation.

[161] Decision no. 668/2011 will be analysed in depth in the *section How the Tatu judgment obtained an apparent change in the case-law of the Constitutional Court with regard to references for preliminary ruling*.

[162] Constitutional Court of Romania, Decision No. 945/2010, published in the Official Journal of Romania No. 544 of 4 August 2010.

[163] Recently, the Constitutional Court of another Member State has considered the constitutionality of a national legal provision similar to the provision reviewed by the CCR, which implements the Data Retention Directive from the perspective of respect of fundamental rights. See C-594/12 Seitlinger and others, pending.

[164] Constitutional Court of Romania, Decision No. 1258 of 8 October 2009, published in the Official Journal of Romania No. 798 of 23 November 2009.

engage in telecommunications, irrespective of the existence of a suspicious behaviour. The CCR held that

> even if the law does not envisage the retention of the content of the communications, the other data retained, having as purpose the identification of both the initiator and the recipient of an information communicated through electronic means, of the source, the destination, the date, hour and period of the communication, of the type of the communication, the equipment used by the user, the location of the equipment of mobile communications, as well as other related data which are not defined by the law, are of nature as to prejudice, to hinder the free manifestation of the right to communicate or to the right to free expression. The retention of these data continuously, with regard to any users of electronic communications services or public communications networks, which is an obligation of the providers that they cannot ignore without being sanctioned pursuant to Art. 18 of the Law No. 298/2008, represents an operation which is sufficient in order to generate in the consciousness of the individuals the legitimate assumption with regard to the respect for their privacy and with regard to possible abuses.

Even though the reviewed national law was merely a translation of Directive 2006/24/EC on Data Retention, the CCR did not address the relationship between the directive and national law, the margin of appreciation that Romania had for its transposition, or the possibility of addressing a preliminary reference to the CJEU. The fact that the CCR did not consider the possibility to send references for a preliminary ruling to the CJEU on the conformity of the Data Retention Directive with the EU Charter was criticized in the legal literature. It was considered that 'perhaps the most noteworthy feature of the Romanian Constitutional Court decision is the lack of discussion of the parent Directive. Apart from a brief reference at the start of the judgment, which affirms that it is for the Member States to determine the manner and form of transposition, there is no discussion of the source of the Romanian legislation'.[165] It was also showed that 'the decision of the Romanian Constitutional Court to examine the matter itself disregards its obligation as a Court of last instance to refer the matter to the ECJ'.[166] After the European Commission initiated an infringement procedure on this matter, the Data Retention Directive was ultimately transposed into national law by Law No. 82/2012 which entered into force on 21st of June 2012, with a very similar content as the one considered unconstitutional.[167]

Second, the CCR has a fluctuating approach towards the use of the Charter's provisions in its constitutional review process, going from completely ignoring them, to referring to the articles from the Charter invoked by claimants, to admitting the possibility of using the Charter in its constitutional review process in the future.

The Charter related case-law is more of an 'omission' in the jurisprudence of the CCR. For instance, in Decision 227/2010[168] the constitutional court establish that Art. 12 of Law No. 544/2001 regarding free access to public information is constitutional, without even referring to Art. 11 of the Charter, which was invoked, among other provisions, by the claimant. The same

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[165] C. C. Murphy, *Romanian Constitutional Court, Decision No. 1258 of 8 October 2001 regarding the unconstitutionality exception of the provisions of Law No. 298/2008 regarding the retention of the data generated or processed by the public electronic communications service providers or public network providers, as well as for the modification of Law No. 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area*, Common Market Law Review, Vol. 47, 2010, at 939.

[166] *Ibid.*

[167] See the position of the European Commission on this matter at http://europa.eu/rapid/press-release_IP-11-1248_en.htm (Last accessed on 21 November 2012).

[168] Constitutional Court of Romania, Decision No. 227/2010 published in the Official Journal of Romania No. 241 of 15 April 2010.

situation appeared in Decision No. 805/2010[169], with regard to Art. 21 of the Charter: it was specifically invoked; the Court did not make any references to it. In both decisions, CCR mentioned, though, its previous case-law on the same issues, such as Decision 1175/2007, in which it argues that the provisions of the Charter cannot be assessed with regard to the national law criticized, as it has not entered into force yet. However, in the 2010 decisions, this line of judgment was not valid anymore, as the Charter entered into force in 2009.

Finally, CCR makes a substantive comment on the provisions of the Charter in the context of constitutional review of national provisions in Decision 1237/2010[170]. Several provisions of the law regarding the retirement pensions system were challenged also from the point of view of Art. 20 of the Romanian Constitution, in relation with Art. 1, Art. 17(1), Art. 25, Art. 34(1), and Art. 52 of the Charter. It should be noted that Art. 20 of the Romanian Constitution states that 'constitutional provisions with regard to the rights and freedoms of the citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the other treaties and pacts of which Romania is a part.' Paragraph 2 states that in case of a conflict between the international treaties and the national laws 'the international provisions are applied with priority, with the exception of the case in which the Constitution or the national law are more favourable.'

To answer this constitutional challenge, the Court stated, in a *Solange* inspired argument, that 'with regard to the provisions invoked from the Charter of Fundamental Rights of the European Union, they, in principle, are applicable in the constitutionality review process as long as they ensure[171], guarantee and develop the constitutional provisions with regard to human rights, in other words, as long as their level of protection is at least equal to the level of the constitutional provisions regarding human rights.' In the case analysed, the CCR considered all the invoked rights from the Charter have already been analysed through their constitutional counterparts and so 'the conclusions the Court reached earlier refer to all these aspects, hence being consistent also with regard to the cited provisions of the Charter.' The doctrine remarked this shift in the CCR's jurisprudence, expressing hopes that soon the court will indeed use provisions of the Charter through Art. 20 of the Constitution in its constitutionality review decisions[172].

The surprising engagement of the CCR in the interpretation of TEU provisions

A recent decision of the CCR envisaged a constitutional conflict between the Romanian president and the Romanian prime-minister regarding the entitled representative of Romania in the reunions of the European Council. Until 2012, the president represented Romania in the European Council, without any internal debate. On 12 June 2012, the Parliament adopted a decision which mandated the prime-minister to take part to the European Council meeting of 28th of June 2012, having regard to the agenda of the Council which contained issues related to the competences of the prime-minister,[173] while the president announced he opposes this mandate. The president asked the Constitutional Court to solve this institutional competence dispute. In its decision, the CCR

[169] Constitutional Court of Romania, Decision No. 805/2010 published in the Official Journal of Romania No. 481 of 14 July 2010.

[170] Constitutional Court of Romania, Decision No. 1237/2010 of 6 October 2010, published in the Official Journal of Romania No. 785/2010.

[171] In Romanian, *asigură*, which can also be translated by „assure".

[172] M. Mazilu-Babel, *Triada curţilor şi protecţia drepturilor şi a libertăţilor fundamentale într-o Uniune Europeană a cetăţenilor (A trinity of courts and the protection of fundamental rights and freedoms in a European Union of citizens),* Revista Română de Drept European (Romanian Journal of European Law), No. 5/2011, at 108.

[173] Declaration No. 1/2012, published in the Official Journal of Romania, No. 392 of 12 June 2012.

analysed provisions of the TEU without considering the possibility to send a question for a preliminary ruling to the CJEU.

For instance, it declared that 'The wording of Art. 10(2), second thesis and Art. 15(2) of the Treaty, with regard to the members of the European Council – the Heads of State or the Heads of Government, is a generic one and it does not oblige the Member States which have a *bicephalous* executive to guarantee their representation both through the Head of State and the Head of Government, but, rather, through the teleological interpretation of the text, one can reach the idea that its purpose is to guarantee that the state is represented at the highest level by the competent public authority.'[174] In short, the CCR considered that Romania, as a semi-presidential republic, should send to the European Council its president. It is not the purpose of this paper to analyse this decision. However, one should keep in mind that the CCR interpreted Articles from the TEU without asking itself if its own interpretation of the funding Treaty provisions would be supported by the CJEU, the exclusive jurisdiction to interpret and review EU law. The CCR has not even consider the possibility of sending a question for a preliminary ruling pursuant to Art. 267(3) TFEU. Its interpretation of Art. 10(2) TEU is actually questionable taking into account that it disregarded the decision of the Parliament, considering it irrelevant in the matter. It did so without once mentioning in its Decision the full text of Art. 10(2) TEU, which states that 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens', omitting the part about the accountability in front of the Parliament.

The first finding of a violation of the "European clause"[175] and the reinforcement of the primacy of EU law principle

After a long tradition of dismissing allegations of unconstitutionality of provisions of national law with regard to the European clause enshrined in Art. 148(2) of the Romanian Constitution, without providing consistent arguments to do so, the Constitutional Court recently admitted the first breach of Art. 148(2) RC. This happened in the Decision on the unconstitutionality of Law No. 299/2011[176], briefly mentioned above in the section about the special review of irrevocable judgments due to breach of the primacy of EU law principle. The Court decided that both Art. 148(2) and Art. 148(4) RC were breached by Law No. 299/2011 which provided for the elimination from Law No. 554/2004 of the entire provision guaranteeing the special review procedure of irrevocable decisions on the grounds of non-compliance with the primacy of EU law principle. The Court held that

> "By eliminating from the content of Law No. 554/2004 the additional ground for review represented by the breach of the principle of applying EU law provisions with priority over the conflicting provisions of national law, enshrined in Art. 148(2), this fundamental provision is disregarded, along with the provisions enshrined in Art. 148(4) of the Fundamental Law, which impose on the state

[174] Constitutional Court of Romania, Decision No. 683 of 27 June 2012, available at http://www.ccr.ro/decisions/pdf/ro/2012/D0683_12.pdf (Last time accessed on 21 November 2012).

[175] The term "Europe clause" was first used by A Sajo, Constitutional Enthusiasm Towards Network Constitutionalism? Jean Monnet Working Paper 5/04, then often used by the legal literature in regard to the constitutions of the CEECs.

[176] Constitutional Court of Romania, Decision No. 1039 of 5 December 2012, published in the Official Journal of Romania, No. 61 of 29 January 2013.

authorities, including the judicial authorities, the duty to guarantee the compliance with the obligations resulting from the accession act and from the principle of the primacy of EU law" [177].

The Court underlined the importance of the primacy principle by stating that 'even a final and irrevocable judgment cannot be considered legal as long as it is grounded on legal provisions which are contrary to EU law'. Moreover, it established that 'the right to a fair trial presupposes the existence of a presumption of conformity with EU Law of the normative acts interpreted and applied by the national court', which technically means that, in the CCR's view, if such conformity does not exist, this fundamental right is breached.

This decision of the Constitutional Court represents a step forward towards the understanding of EU law and its proper application. However, the Court's approach towards the primacy of EU law is still fragmented. On one hand, it considers that the primacy principle enshrined in art. 148(2) of the Constitution is not breached by maintaining into force a law which can be deemed contrary to Art. 110 TFEU pursuant to the *Tatu* decision of the CJEU.[178] On the other hand, it considers that the primacy principle is breached by a law which eliminates a provision guaranteeing a special review procedure for irrevocable judgments pronounced disregarding EU law. One difference that can be identified between these two situations brought in front of the CCR, is that the former would require an assessment of a substantive domestic norm which did not refer to EU law, while the latter involves an assessment of a domestic procedure expressly referring to the primacy of the EU law principle.

The fact that the Constitutional Court has firstly excluded itself from the real of courts that can address preliminary questions to the CJEU, secondly that it has never clearly stated its position towards the relation between the Constitution and EU law, but only hinted to endorse a position of a limited application of the principle of primacy of EU law this position, and thirdly that it has excluded to consider EU law when assessing the constitutionality of substantive domestic legal norms has, so far, caused legal uncertainty for the national courts. The position of ordinary courts becomes furthermore complicated in regard to the interpretation and application of EU law, when in addition to judgments from the Constitutional Court there is also a judgment from the High Court of Cassation and Justice, since the two high courts have adopted diametrically opposed views on the relation between national law and EU law and on the need to consider EU law when reviewing the legality of a national measure. For instance, in a case concerning discrimination in employment relations, Curtea de Apel Bacău sent a question for a preliminary ruling to the CJEU seeking to find an answer to the question whether it is or not bound by the case law of the RCC which holds a national legislative provision as constitutional, thus prohibiting persons who had been discriminated against as regards pay on the basis of socio-professional category or place of work, to compensation in the form of salary rights provided for by law for another socio-professional category[179]. The CJEU did not clarify this issue, as it held that the reference for a preliminary ruling is inadmissible.

Preliminary conclusions

In conclusion, the Constitutional Court of Romania is generally inconsistent in its case-law related to EU law, both as regards the primacy principle and the reference for a preliminary ruling procedure. One could argue that the Court is still adjusting to the EU law multilevel system,

[177] *Id*.

[178] Constitutional Court of Romania, Decision No. 668/2011, published in the Official Journal of Romania, No. 487 of 8 July 2011.

[179] Court of Justice of the European Union, Case C-310/10 Ministerul Justiţiei şi Libertăţilor Cetăţeneşti v. Ştefan Agafiţei et al., Decision of 7 July 2011.

trying to clarify its competences in this regard. While there are decisions in which it refuses to analyse the consistency of national law with relevant treaty articles, in the light of Art. 148(2) of the Constitution, in other decisions, the CCR decides to transforms itself in a European Court and analyses specific provisions of the treaties, provisions which have not even been clarified by the CJEU, without even questioning whether it is or not a "court" within the meaning of Art. 267(3) TFEU. The recent development in its case-law show, nevertheless, that the CCR is starting a more substantiated constitutionality review of national laws that intertwine with EU law, like happened in above mentioned case of the special review procedure for irrevocable judgments that have violated EU law.

Another conclusion to be made is the existence of a difference in approach between the pre-accession period and the post-accession period. In the pre-accession period, the CCR seemed more open to the idea of working with EU law and not against EU law. After the accession, when the relevant provisions from the Constitution became legally binding in their entirety, the CCR acted towards EU law like it was an incompatible alien body in its home system, without consistently and convincingly analysing the strings which connected the two entities. A possible explanation for this approach would be the desire of the CCR to keep its privileged position in the national system. If this is the case, then the CCR started from wrong premises, as by engaging in a fructuous dialogue with the CJEU, for instance in the data retention matter, it could have become a strong actor on the European scene, not only inside its home system. Another explanation could be the absence of a proper understanding of the functioning of the EU law with its whole new set of rights and obligations by the constitutional judges.

Finally, the features of the CCR jurisprudence generally discussed under this section will be clearly revealed further in this paper, under the section dedicated to the pollution tax saga, where the CCR constantly refused to send questions for a preliminary ruling, and to consistently analyse the content of GEO no. 50/2008 in light of Art. 148(2) RC.

The Jipa case – a story of judicial dialogue success?

Legal context of the CJEU Jipa judgment

The long process of Romania's accession to the EU started in February 1993 with the signing of the Europe Association Agreement and was finalized fourteen years later, on January 1st, 2007 when Romania became a member of the EU. This long process involved a complex harmonisation exercise of the Romanian law, requiring, *inter alia*, transposition of hundreds of pages of EU legislation into domestic law, so as to meet the strict EU's Copenhagen criteria for membership of the EU. Directive 2004/38/EC (the so-called Citizenship Directive), also known as the 'citizenship Directive' was transposed by four independent measures[180], and not by way of amending the already existing legislation regulating the status of rights and obligations of Romanian citizens. Some of the existing national legislation touching on issues dealt with by the Citizenship Directive was thus not brought in line with the Directive. Law No. 248/2005 regarding the free movement of Romanian citizens abroad was one of these legislative measures that were not amended in light of the relevant provisions of the Citizenship Directive. For example, Art. 27 of the EU Directive provides exhaustively only three grounds for limiting the fundamental right of EU citizens to free movement within the EU: public policy, public security or public health, and requires that the conduct of the EU citizen subject to measures restricting his free movement right be taken into consideration within the proportionality test. Whereas,

[180] Government Emergency Ordinance No 102 of 14 July 2005, Law 260 of 5 October 2005, Government Ordinance 30 of 19 July 2006 and Law 500 of 28 December 2006.

according to Art. 38 of Law No. 248/2005, the exercise of the right to free movement abroad of Romanian citizens could have been limited by the Romanian State on the basis of one of the following two conditions: 1) if the respective person is returned in Romania according to a readmission treaty concluded by Romania, or 2) if 'the presence in the territory of a State would, by reason of the activities which that person carries out or might carry out, seriously harm the interests of Romania or, as the case may be, bilateral relations between Romania and that State.' Art. 52 of Law No. 248/2005 provided unequivocally that until Romania's accession to the EU, the measures limiting the right to free movement of Romanian citizens returned under Readmission Agreements had to refer to the entire territory of the EU, and not just the Member States that returned that citizen. Additionally, the national legislation did not refer to the need of conducting an assessment of the personal conduct of the Romanian citizen subject to the restricting measure, as required under the Citizenship Directive.

In the period just before Romania's accession to the EU, but also continuing during the months following the accession, several Member States[181] adopted return measures together with an interdiction to enter their territory against Romanian citizens caught as illegal residents. These measures were based on readmission agreements concluded by the returning Member States with Romania, and adopted immediately after the Romanian citizen was caught without an act justifying stay for limited purposes, such as work, education, or if only for travel he had to be in possession of a visa. Even after Romania became a member of the EU, several Member States continued to adopt the aforementioned measures against Romanian citizens with the same legal justification based on these Readmission Agreements.[182]

In response to the repatriation measures adopted by the Member States, the Romanian administrative authorities followed a standard procedure whereby they made immediate applications before Romanian courts seeking approval of measures prohibiting the exit of Romanian citizens from Romania and of entry of the repatriated Romanian citizens to the Member States of the EU for the duration of three years. These measures restricting the free movement of Romanian citizens were considered necessary by the Romanian public authorities for combating illegal migration of Romanian citizens into the EU.

The sole difference made by Romania's accession to the EU in the administrative authorities practice on measures restricting the free movement abroad of Romanian citizens was a different geographical width of the prohibition on free movement. For the applications made during the pre-accession period, the Romanian authorities asked for prohibition of entry in the whole territory of the EU, while after Romania's accession, based on a *per a contrario* interpretation of Art. 52 Law No. 248/2005, they asked the national court to approve prohibition of entry only in the territory of the Member State that returned the Romanian citizen. It is important to mention that neither of the public authorities with decision-making powers, be it from the Member States adopting the return measures, or from Romania, assessed the concrete danger posed by the conduct of the Romanian citizen to the public policy, public security or public health, as required by the Citizenship Directive. Of course, for those return measures adopted prior to Romania's accession there was no need to apply the test required under the EU Directive. The international

[181] Greece, Italy, France, Denmark, Spain, Belgium, and Switzerland.

[182] France, see the High Court of Cassation and Justice Decision no. 1777 and 1780 of 17 March 2008, Decision no. 1409 and 1413 of 3 March 2008, and Decision no. 6106 of 26 September 2007, available on the web site of the High Court. Switzerland also returned Romanian citizens after Romania's accession to the EU, but prior to Switzerland's extension to Romania and Bulgaria of the Agreement of the Free Movement of EU citizens concluded with European Communities and the Member States on 8 February 2009 following a successful referendum, see High Court of Cassation and Justice Decision no. 5590 of 7 October 2008.

agreements of readmission concluded between the returning Member States and Romania were considered sufficient legal basis for those automatic repatriation measures and subsequent prohibition of entry.

The first preliminary reference addressed by a Romanian court to the CJEU involved one of these measures issued by the Romanian administrative authorities whereby they prohibited the right to exit from Romania of returned Romanian citizens and of entering the territory of the returning Member States, or, in other cases, the prohibition was issued for the whole territory of the EU.

Discussing the CJEU Judgment in the **Jipa** *Case from the perspective of vertical and horizontal types of judicial dialogue*[183] *on EU law issues*

Discussing the vertical judicial dialogue between the referring Court and the CJEU in the *Jipa* case

This section will analyse the national court's process of sending preliminary questions to the CJEU and, in the second part, the application of the CJEU judgment by the referring court, but also other domestic courts.

On 11th of January 2007, a few days after Romania's accession to the EU, the Directorate General for Passports of Bucharest introduced an application for an order prohibiting the travelling of Mr. Jipa to another Member State (in this case, Belgium) for the duration of three years, before the Tribunal of Dâmbovița.[184] The legal basis of this application was twofold: first, Art. 38 of Law No. 248/2005 on restriction of free movement of Romanian citizens abroad[185], and secondly, the national legislation implementing the Readmission Agreement concluded between Romania and Belgium in 1995.[186] The facts that triggered the application of the measure restricting the free movement of Mr. Jipa happened at a moment in time prior to Romania's accession, when the EU law was thus not applicable to his situation. However, at the moment when the judicial proceedings started before the Romanian court, Mr. Jipa had become an EU citizen, and thus the national court was faced with the question of the application in time of EU law. Therefore, the *Jipa* case bears not only a historical importance, i.e. indicating how the Romanian courts handled their first reference of preliminary questions, but it is important also for other states that will join in the future the EU, being a source of inspiration on how to apply EU law in the first months following accession.

On 17th of January 2007, the Tribunal of Dâmbovița decided to suspend the proceedings and send questions on the correct interpretation of ex-Art. 18 EC Treaty and Directive 2004/38 to the CJEU for the purpose of helping the national court to establish whether the order seeking limitation of Mr. Jipa's right to free movement abroad was compatible with EU law. To be noticed that the national court did not ask a separate question on the application in time of EU law.

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[183] By vertical judicial dialogue this paper refers to dialogue between the CJEU and national courts, while horizontal dialogue refers to communication between the national courts of all levels of jurisdiction. See more on the classification of judicial dialogues in Allan Rosas, The European Court of Justice: Forms and Patterns of Judicial Dialogue, EJLS, Vol. 1, No.2, 1 – 16, available online at http://www.ejls.eu/current.php?id=2

[184] First instance court in this case.

[185] Law 248/2005 as amended in 2006.

[186] The 1995 Agreement between the Governments of the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, on the one hand, and the Government of Romania, on the other, on the readmission of persons who are in an illegal situation ('the Readmission Agreement'), which was approved by Romanian Government Decree no. 825/1995 published in the Official Journal of Romania no. 241 of 20 October 1995.

The formulation of the question addressed by the Romanian court, a first instance court, showed a thorough understanding of the relevant substantive EU law and of the purpose of the preliminary reference procedure. The national court phrased its questions correctly by asking the Court an interpretation of the applicable EU legal provisions in light of problems they may raise for the application of the specific national legislation in dispute, avoiding thus the common mistake usually made by national courts in their first years after accession to the EU legal system, when asking the Court to pronounce directly on the legality of national law in light of EU law.[187] It is an impressive example of a national court mastering the convoluted functioning of the EU legal system after only a few days since Romania's entry into the complex EU legal order and of openness towards engaging in the sophisticated judicial conversation with the CJEU.

The Jipa preliminary reference is a good practice example for judicial dialogue between Romanian courts and the CJEU, taking into account that, in the absence of a national complete and updated database gathering the CJEU case law, the national judge emerged in a self-study of the CJEU jurisprudence, and succeeded to draft a reference, that was admitted by the Court without substantial reformulation of its question, in only 5 days since receiving the case.[188] In order to have its preliminary reference admitted, the national judge carried out a complicated assessment of national and EU law, including: a concise and complete description of the facts of the case and national legislation governing those facts which will convince the CJEU on the substantive and temporal relevance of EU law; submitted proof that it is a national court competent to refer according to the wording of Art. 267 TFEU, but, most importantly, according to the jurisprudence of the CJEU which is extensive on this matter; indicating the fulfilment of pre-requisites for the application *rationae temporis et rationae materiae* of EU law to the dispute; and assessed whether previous jurisprudence of the Court existed, clarifying the subject matter of the present dispute.[189] On the incidence of the *rationae materiae et temporis* of EU law to the present dispute, the national court not only did it identify the possible problems that might prohibit the application of EU law, but it also provided its own reasoning on the issue. The Court explained that although Mr. Jipa return took place before accession (late 2006), the action against Mr. Jipa was filed by the Directorate General for Passports of Bucharest on 11th of January 2007, after Romania's accession to the EU. A date from which Mr. Jipa acquired an additional citizenship, that of the EU with all its benefits relative to the free movement rights within the EU, including the right to leave the territory of the State of origin for the purpose of entering the

[187] Case C-75/63 Hoekstra [1964] ECR 177.

[188] More details on the obstacles faced by the national judge in the Jipa case can be found in Judge Carmen Popoiag, The Judgment of the CJEU in Case C-33/07, Jipa. Aspects and practical implications, in the Report of the CSDE Workshop on Case Jipa 'The Citizenship of the EU and the right to free movement within the Romanian context' 2008. (The Report is available only in Romanian).

[189] The necessity of sending the preliminary questions in light of absence of previous CJEU relevant jurisprudence is though questionable. The CJEU has constantly held that a restriction of the free movement of EU citizens cannot be based on abstract interretation of threats of risks: in Case C503/03 Commission v Kingdom of Spain [2006] ECR I-1097 the CJEU stated that both the Member State issuing an alert and the Member State that consults the Schengen Information System must perform a concrete analysis of whether the presence of a person constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society; in Case C-67/74 Bonsignore [1975] ECR 297, the CJEU held that a Member State cannot order the expulsion of a Union citizen as a deterrrant or a general preventive action; while in Case-348/96 Calfa [1999] ECR I-11, the CJEU states that previous criminal convictions shall not in themselves constitute grounds for imposing limitation on cross-border movement. Therefore, one could interpret these judgments as giving sufficient information on the appropriate interpretation of Art. 27(3) of the Citizenship Directive for a national court confronted with an automatic restriction of the free movement of EU citizens. However, the Jipa case involved specific new elements which were not previously addressed (the temporal aspects of facts started before Romania's accession).

territory of another Member State. The Tribunal of Dâmbovița, a first instance court, did analyse all these facets required from national courts when referring preliminary questions to the CJEU.

It has to be pointed out that the Tribunal Dâmbovița was also aware of the complicate and long procedure before the Court and consequently was worried about the consequences on the exercise of the right to free movement by Mr. Jipa. In light of the fact that the national Court decided to suspend the proceedings, and in the event of Belgium's decision of prohibition of entry issued against Mr. Jipa, the national court asked the CJEU to deliver its ruling within the framework of the urgent procedure, given that Mr. Jipa should be able to exercise his freedom of movement as quickly as possible or to know if his right will be restricted as soon as possible, otherwise he may risk a *de facto* restriction. By order dated April 3, 2007, the CJEU dismissed the application on the ground that the conditions laid down in Art. 104a first paragraph of the Rules of Procedure were not fulfilled, thus leaving the national courts the option whether to suspend or not the proceedings before it until the CJEU delivers its judgment. It has to be noticed that the national court did actually suspend the proceedings before it awaiting the CJEU to deliver its judgment. It has to be pointed out that the absence of a provision in the Romanian Civil Procedure Code permitting suspension of the trial by the national court until the CJEU decides the questions referred to it by the national court was not an impediment for the Tribunal Dâmboviţa to suspend the proceedings before it and submit a reference for preliminary questions to the Registry of the CJEU. This shows the high deference that the national court shows to the CJEU, as it suspended the case in the absence of an express legal procedural rule, and even if it considered it to be a case of urgent procedure. The orders of the national judge for reference to the CJEU and suspension of the judicial proceedings pending judgment of the CJEU were not appealed by the parties.

How the CJEU responded to the new citizenship issues raised by the the *Jipa* case

The *Jipa* case raised two novel elements of legal interpretation in comparison to the previous citizenship related jurisprudence of the CJEU. First the impact of accession of a new Member State on the application in time of EU law, particularly what is the moment in relation to which the issue of application of EU law needs to be established: the facts triggering the adoption of the measure at issue, or the start of the judiciary proceedings based on the application for such a measure, which corresponded to two different periods of Romania's process of accession to the EU? The second novel element of the case concerned the existence of a cross-border element necessary for triggering the *rationae materiae* scope of EU law. It had to be noticed that the residence of Mr Jipa in Belgium in 2006 could not count as an external element necessary for the existence of the cross-border movement which brings the case under the ambit of the substantive scope of EU law.

The judgment of the CJEU did not address these specific issues, as one would have expected, but limited to reiterate prudently formulated parts from its previous judgments. The existence of a cross-border element was not addressed as such, nor did the Court restate its 'EU citizenship as fundamental status of the citizens of the Member States' line of reasoning[190], which was already commonly cited in the Court's judgment at the moment the Court decided the Jipa case. Instead, the CJEU concentrated on deconstructing the right to the free movement of EU citizens in two rights: right to leave the State of origin and right to enter a Member State, which were held as being interdependent. Thus a restriction of the first will inevitable influence the exercise of the second right. This statement seems to be the only explanation given by the Court for its finding a cross-border element necessary to trigger the application of EU law. Taking into account that the

[190] Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case [ECJ] C-413/99 *Baumbast* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-9925.

CJEU is responding to a national court that has just been made part of the EU courts club and that this preliminary reference will probably set the scene for the future judicial conversation with Romanian courts, the CJEU could have been more explicit when addressing the element that brings the case under the scope of EU law. The issue of the scope of EU law which is necessary to be established so as to establish the jurisdiction of the CJEU is a complicate topic, even for national courts that have been part of the EU judicial system for a long time, not to mention for a national courts that have just entered the system. However the Court has not went out of its usual style of argumentation which, at times, misses the logical flow of argumentation in favour of "copy and paste" style of argumentation simply because of entering into dialogue with national courts of the new Member States.

According to the CJEU approach the grounds exhaustively enumerated by Art. 27 of the Citizenship Directive as legitimate reasons for the Member States to restrict the freedom of movement[191] would thus be the only permitted grounds also when restricting the right to leave of EU citizens by the Member State of origin. The Court then pointed out that the margin of discretion recognized to the Member States in choosing the facts which they consider as relevant proof of the citizen's danger to one of public policy, security or health is limited by Art. 27(2) of the Directive which permit restriction of the free movement right, in so far as the conduct of the person constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of the society. This is no revolutionary statement, as the Court reiterated previous established jurisprudence. However, the last three paragraphs of the judgment are extremely important for assessing how national courts of the Member States of the referring court subsequently interpret and apply the CJEU ruling. The last three paragraphs of the Jipa judgment are dedicated to the application of the proportionality test by national courts. Making the national courts sovereign over the exercise of the proportionality test, the Court did though provide clear indication on how national courts should perform this assessment: first assess both facts and law justifying the Minister restriction; secondly, establish whether the restriction is appropriate to ensure the achievement of the objective claimed to be pursued; thirdly, that the restrictive measure does not go beyond what is necessary to attain it.

The follow-up of the CJEU preliminary ruling in the *Jipa* case in the jurisprudence of the Romanian courts

According to established case law of the CJEU, once the Luxembourg Court has decided on the preliminary reference addressed by a national court, the latter, as well as all the national courts from the Member State of the referring Court are bound by the judgment of the Court when dealing with the same question of EU law.[192]

Following the CJEU judgment of 10th of July 2008, the Tribunal of Dâmbovița decided the case in less than 2 weeks by rejecting the application of the Directorate General of Passports of Bucharest requesting the restriction of the free movement of rights of Mr Jipa.[193] In the next paragraphs we will assess the decision of the Tribunal of Dâmbovița for the purpose of finding out the extent to which the Romanian court took into consideration the recommendations of the CJEU concerning the application of the proportionality test. This analysis will give the readers an indication of how the communication between the first referring Romanian court and the CJEU worked in practice.

[191] Public policy, public security and public health.

[192] Case C135/77 Bosch [1978] ECR 855.

[193] See Tribunal of Dâmbovița, Decision no. 1241 of 23 July 2008, delivered in Case no. 198/120/2007.

The Tribunal of Dâmbovița started its judgment by first making a summary of the arguments brought by the parties to the dispute before the Court suspended the proceedings. It then cited, as a summary of the CJEU guidelines of interpretation for the national court, the last paragraph of the Jipa judgment[194] where the CJEU also held that 'It is for the national court to establish whether that is so in the case before it.' After this short introduction, the Romanian court proceeded to assess the proof submitted by the Romanian public authorities as a justification for its measure restricting the free movement right of Mr Jipa. The Court held as follows: 'admitting that the defendant is responsible for illegal stay in Belgium, the Court considers that this is not enough by itself to restrict the freedom of movement of the defendant, as long as by his conduct, Mr Jipa did not interfere in the public order, and his presence in Belgium was not a genuine, present and sufficiently serious threat to a fundamental interest of society.'

Second, the court considers that the aim pursued by the national law applicable to the case before it, namely, to stop illegal migration, cannot be done in the circumstances, in relation to people who are not guilty of violating public order or public security in a Member State of the European Union, on the contrary, this goal can be achieved in the case of persons who disturb the social order through the activity they perform and thus represent a genuine, present and sufficiently serious threat to the fundamental interests of society.

Finally, the measure limiting a fundamental right of a citizen, such as the freedom of movement, cannot be applied, as shown in the application of the administrative authorities, for reasons related to general prevention, because such general statement cannot form the legal basis for a measure restrictive of a fundamental right of a citizen, if it is not proportional to the culpable conduct of a person. For a citizen to be the subject to such a restrictive measure, his conduct must have a certain gravity to justify the punishment.

Compared to the foregoing, the court concluded that the defendant Mr. Jipa cannot be attributed any conduct that violates the fundamental interests of society, consequently, it will reject the applicant's request for an order restricting the free movement abroad of Mr. Jipa.

Questioning the existence of a dialogue between the Romanian courts on interpretation of EU law and role of the CJEU

The restrictive measure at issue in the *Jipa* case was just one among the many measures restricting the free movement right of Romanian citizens within the EU, which were filed by Romanian administrative authorities before national courts from all regions of the country. However, from all these, only the Tribunal of Dâmbovița referred, *ex officio*, preliminary questions to the CJEU. The reason for this singular practice is not an agreement among national courts deciding to delegate the responsibility to refer preliminary questions to the Tribunal of Dâmbovița. Nor was the absence of knowledge of relevant EU law applicable to the case at issue and of the possible conflict between the applicable national law and EU law the cause of the sole reference for a preliminary ruling, since there were several national courts that applied directly EU law, setting aside the conflicting national provisions.

[194] Para. 30: 'The answer to the questions referred must therefore be that Art. 18 EC and Art. 27 of Directive 2004/38 do not preclude national legislation that allows the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his 'illegal residence' there, provided that the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it.'

Assessing the jurisprudence of national courts, it can be concluded that national courts adopted two approaches on the application of EU law. One category of national courts considered the EU law to be clear in the specific issue, and therefore did not consider necessary to address preliminary questions to the CJEU. On the basis of the primacy principle of EU law which was invoked not only on the basis of the Romanian Constitution, Art. 148(2), but also based on the relevant jurisprudence of the CJEU, ordinary courts considered the Citizenship Directive to have direct effect and gave it precedence against national legal provisions. However, the national courts did not engage in a detailed analysis of the facts of the case, and did not take into consideration the specific circumstances of the case and conduct of the individual. The main gist of their reasoning was the irreconcilable difference between the domestic conditions for limitations of free movement abroad of citizens, and the conditions required under the Citizenship Directive. Academics[195] have criticised this approach as too rapidly dismissing national law, when the CJEU usually invites national courts to perform a proportionality test.

Another category of national courts considered the citizenship Directive as not directly applicable because it was not yet transposed into national legislation. (!) However they ensured the application of EU law based on the duty of consistent interpretation of national law with EU law.[196]

In both cases, national courts rejected the applications for restriction of free movement abroad of Romanian citizens which were argued to be justified on the basis of automatic implementation of Readmission Agreements. The same result was achieved though by way of different reasoning.

The High Court of Cassation and Justice adopted a more nuanced approach and pointed out the importance of other EU principles in addition to those of primacy and direct effect. The supreme Court of Romania emphasised the importance of the duty of consistent interpretation, especially in the case of new Member States, which, ensures the respect of both the provisions of the new legal system they adhered to, and Romania's international agreements concluded pre-accession. The High Court raised the national court's attention on the need to follow a case by case analysis, and exercise the proportionality assessment of the challenged restrictive measure in each case taking into account the specific circumstances of the case.

The High Court of Cassation and Justice considered as 'essentially illegal to not apply *a priori* the national law for the only reason that the Community law is relevant to the case. First, the national judge should investigate and identify the precise cases of conflict between Community law and domestic law, and then it shall apply domestic laws according to the EC law.' The HCCJ gave precise guidelines to Romanian courts explaining their European mandate as follows: 'before applying the EC law to the case the judge is bound to establish the facts specific to the case, to verify if the restrictive measure to the freedom of movement is applicable to the concrete and precise facts and to examine if the measure of restricting the freedom of movement of the person is proportional to the objective followed by the law.' If the HCCJ found that the national court did not perform this analysis, then it used to send the case to the first instance court to be re-judged in

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[195] See Daniel Mihail Sandru, Banu Constantin-Mihai, Dragos Calin, *The Preliminary Reference in the Jipa Case and the Case Law of Romanian Courts on the Restriction on the Free Movement of Persons*, European Public Law, Vol. 18, No. 4, 2012; Nicolae-Dragoş Ploesteanu, *Prima cauză soluţionată de Curtea de Justiţie a Comunităţii Europene ca urmare a unei cereri de pronunţare a unei hotărâri preliminare formulată de către o instanţă din România (Cauza Jipa)* CSDE Conference 'Cauza Jipa. Cetăţenie a Uniunii Europene şi dreptul la liberă circulaţie şi şedere în context românesc ', Bucharest, on 12 Novembre 2008.

[196] See Daniel Mihail Sandru, Banu Constantin-Mihai, Dragos Calin, *The Preliminary Reference in the Jipa Case and the Case Law of Romanian Courts on the Restriction on the Free Movement of Persons*, European Public Law, Vol. 18, No. 4, 2012 at 635, 636.

light of the above considerations. The preference seems thus to be conferred to the consistent interpretation of national law instead of an automatic disapplication of national law.[197]

The aforementioned position was adopted by the HCCJ in response to the incorrect application of the CJEU *Jipa* judgment by the national courts. In light of the clear indication of the CJEU to the national courts in the *Jipa* case, to follow a case by case application of the proportionality test, and the national courts automatic rejection of the administrative applications for an order restricting free movement, the HCCJ seems to have played the role of a translator of the CJEU's parlance for the Romanian courts. The supreme Court adopted a more cautious approach, avoiding to take extreme positions, such as: the over-zealous disapplication of national law position of certain national lower courts which without much legal assessment rejected the application of national law in favour of EU law, or the isolationist position of the Romanian Constitutional Court which excluded itself completely from the judicial dialogue with the CJEU.

The Romanian Constitutional Court[198]*, an early and steady opponent of interpretation of national law in conformity with EU law*

According to Arts. 17(1) and 53 of the Romanian Constitution, Romanian citizens have a fundamental right to free movement abroad, which, similarly to the EU citizen's right to free movement, is not absolute, since restrictions are allowed under the legislation. According to Art. 53 of the Romanian Constitution, the exercise of the right to free movement abroad *'may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. (2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.*' Therefore, it can be easily noticed that the aforementioned constitutional provisions are similarly worded to Art. 27 of the Citizenship Directive, and provide for a similar proportionality test.

In a case dealing with the judicial review of a *Jipa* type of measure, the national court[199] suspended the proceedings and decided by order of 14th of June 2006 (prior to Romania's accession to the EU) to refer a question on the constitutionality of, *inter alia*, Art. 38(a) Law 248/2005 in light of Arts. 17(1) and 53 of the Romanian Constitution. Both of the parties to the judicial proceedings and the national court agreed that the restriction of a Romanian citizen's right to free movement abroad based solely on the return of the Romanian citizen following application of a Readmission Agreement does not fulfil the pre-requisites of the proportionality test required by Art. 53 of the Romanian Constitution, and by international norms, such as, Art. 12 of the International Covenant of Civil and Political Rights, and Art. 2(2) and (3) of the ECHR. Art. 53 of the Romanian Constitution clearly established that the restriction of the free movement of Romanian citizens abroad is an exception and, it has to be justified by its necessity in a democratic society and respect the principle of proportionality. Art. 38(a) of Law No. 248/2005 does not impose a proportionality test to be applied before adopting a restrictive measure based on a return measure under a Readmission Agreement. Thus an abusive return measure, or a measure adopted against a person who, in the concrete circumstances of the case, does not

[197] High Court of Cassation and Justice Decision no. 2253 of 3rd April 2008, not published; Decision 4206 of 24 May 2007; Decision no. 4205, of 23 May 2007; Decision no. 1777 and 1780 of 17 March 2008.

[198] See the Constitutional Court's Judgments no. 855/2006 (Official Journal no. 31 of 17 January 2007) and 901/2006 (Official Journal no. 49 of 23 January 2007).

[199] Tribunal of Hunedoara, first instance court.

constitute a threat to the social values of Romanian and the returning Member State could have legally justified a restriction of the free movement of Romanian citizens under the national legislation. This proportionality test stipulated by the domestic legal provisions raised thus concerns as to they being sufficiently precise, accessible and not arbitrary.

The Romanian Constitutional Court rejected the allegations of unconstitutionality regarding Art. 38(a) of Law no. 248/2005. The Court held that the Article pursues a social value extremely important for both the Romanian society and other European countries, namely prohibition of illegal migration, which is to be considered as falling under one of Art. 53 (2) RC grounds for limitation of the free movement right of Romanian citizens, i.e. protection of national security and public order. The Constitutional Court did not though address the proportionality test argument, instead it limited to mention that if the Law No. 248/2005, in its preamble, provides that it respects the national Constitution, as well as the international norms invoked by the parties as being violated by the national legislation, then the Law actually does so (!).

Unlike the ordinary courts, the Constitutional Court did not change its interpretation of the national legislation following Romania's accession to the EU. Instead it continued to consider the prohibition of illegal migration from Romania to the Member States of the EU as still a public order interest, which is so important for the Romanian society and the EU countries that it still justifies the prohibition of Romanian citizens' entry into the territory of other Member States without a thorough proportionality test even after the accession. The Constitutional Court did not mention at all in its judgment the incidence of EU law, or the impact of Romania's accession to the EU on the application of the challenged national legislation. The judgment of the Constitutional Court was delivered in the same day the Tribunal of Dâmbovița referred the preliminary questions to the CJEU. Whether the first instance court had already a sense of the interpretation the Constitutional Court would adopt, and disapproved with it, which determined it to not wait for the Constitutional Court's judgment on the constitutionality of the national law, is not known. However most probably, the Tribunal of Dâmbovița did not consider the Constitutional Court as the appropriate forum for clarifying the issue of conformity of national law with EU law, and rightly so.

Conclusion

The first request of a Romanian court for a preliminary reference ruling from the CJEU came from a national court of a low jurisdictional level, which was under no obligation to refer to the Court. Against the decision of this court, the legislation provided the possibility of appeal.[200] However, the referring court decided not to wait for the opinion of the appeal court, and addressed itself the questions of correct interpretation of EU law to the CJEU. The request was referred *ex officio* by the national court, in the sense that it was entirely the initiative of the court, and did not follow a request for referral of preliminary questions from the parties, as it will happen in the subsequent preliminary references addressed by the Romanian courts two years after the *Jipa* case. The case perfectly reflects the difficulties encountered by a domestic legal system during the process of harmonization of its legislation to that of the EU, when the negative consequences of the national legislative's lack of prompt transposition of EU secondary legislation were remedied by the judiciary by way of recognising the EU rights of citizens.
In parallel to the good example of direct judicial dialogue and the openness of the national courts to directly apply the fundamental principles of EU law in the Jipa like cases just few months after Romania's accession to the EU, several other national courts of different levels of jurisdiction,

[200] Art. 39(4) of Law 248/2005.

starting from the Constitutional Court, to second and first instance courts, showed a great confusion between EU law and the law of the ECHR, and between the relevant institutions of the two different legal orders in other cases.[201] This latter jurisprudence cannot make the sufficiently numerous good examples of the Jipa like cases an exemption, but they only indicate that in the years following Romania's accession to the EU the position of the Romanian judiciary towards the application of EU law was not coherent, a practice which is still present today.

The pollution tax related jurisprudence – Who will help the individual tax payers: national courts, the Court of Justice of the EU or the European Court of Human Rights?

Introduction – how good is the Romanian legislature at learning from past experiences of other Member States?

The field of motor vehicle registration tax has created, so far, considerable problems to the Member States which have faced several infringement procedures won by the Commission before the Court of Justice.[202] France was the first one to have faced an infringement procedure brought by the Commission because of its discriminatory domestic taxation on registration of vehicles. France's system of vehicle taxation of 1984 was found contrary to EU law because of permitting a more onerous band of taxation applied to certain imported cars, while domestic cars were not subject to the same onerous tax, which resulted thus in protecting the French manufactured vehicles. Even if France amended its taxation scheme, the Court of Justice still found it contrary to Art. 110 TFEU because the category of vehicles with the highest taxation, even though much narrower than before, still included only imported cars.

In *Commission vs. Denmark*[203], the Court clarified certain requirements which a first registration tax for a second-hand vehicle in a Member State has to fulfil in order to be in conformity with Art. 110 TFEU: the value of new car comprises its price plus first registration fee, the ratio of the two components is kept constant throughout the life of the vehicle. For example, when the vehicle's value fell by 50%, both price and residual value of the paid first registration fee had to decrease by the same percentage, i.e. 50%.

Consequently, the imposition of higher taxes would be reflected in an increase in final price of the imported vehicle, which would thus become less attractive than the one already registered in

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[201] See Decision no. 588 of 19 June 2007 of the Romanian Constitutional Court published in the Official Journal no. 581/23 August 2007; The Report of activity of several national court for 2007, such as regional courts of appeals and first instance regional courts. For a more detailed analysis please see, Cristi Danileţ, Dragoş Călin, Judiciary's *Confusion between the Council of Europe and the European Union (Confuzii judiciare intre Consiului Europei si Uniunea Europeana)* in Journal of the Magistrates Forum, no. 1 of 2009, available online at http://www.forumuljudecatorilor.ro/index.php/lectura-online/?lang=en&category=5&sortby=title&dlpage=1

[202] Over the years, the Commission has taken several Member States before the Court of Justice due to their discriminatory first registration tax on imported motor vehicles. See, for example, France (Case C-112/84 *Humbolt* [1985] ECR 1367), Denmark (Case C- 47/88 *Commission v Denmark*, [1990] ECR I-04509), Greece (Case C-375/95, C-74/06, the most recent request of the Commission against Greece for modifying its discriminatory legislation on vehicle registration tax dates from 29th of September 2012, Case No 2010/2177, MEMO/12/876), Poland (see press release IP/06/918), Hungary (see press release IP/05/1279) and Cyprus (see press release the most recent dating from May 2012, Case No 2008/4766 of 31/05/2012 opened after Cyprus amended its legislation after an infringement procedure case was brought against it before the CJEU; proceedings before the CJEU were closed on 31/05/2012 after Cyprus changed its legislation, however after a thorough assessment of the Commission found that this amendment unsatisfactory with EU norms, IP/06/485, IP/11/77, IP/11/1277).

[203] C-47/88 *ibid*.

the State. The imposition of higher taxation for the imported vehicles in comparison with the domestic ones has been considered discriminatory and, as a consequence, the relevant national provisions incompatible with those of Art. 110 TFEU (previous Art. 90 of the EC Treaty).

So far, Greece has received numerous formal requests from the Commission to bring its national rules on car registration taxation in line with Art. 110 TFEU and because it did not succeed to eliminate discriminatory effects against imported second-hand cars, several infringement procedure judgments have been pronounced by the Court against it.[204] After the first judgment from 1995 of the Court of Justice, the Commission issued a formal request in the form of a reasoned opinion which did not lead to the effective amendment of national legislation. A second judgment of the Court followed on September 20th, 2007 and found Greece again in breach of Art. 110 TFEU. The 2008 legislative amendment was still considered by the Commission as not fully in line with Art. 110 TFEU and attracted another again the attention of the European Commission pointing out that Greece failed to bring its domestic legislation in line with the prohibition of discriminatory taxation on vehicles imported from other Member States.

Despite the Court of Justice clear indication, it seems that the Member States, when adopting internal taxation provisions on first registration of vehicles, face serious difficulties in establishing a calculation method for this tax which is in line with Art. 110 TFEU prohibition of discriminatory taxation. Failing on numerous occasions to pass the Commission's non-discrimination test under Art. 110 TFEU, several Member States had to consequently amend their legislation so as to bring it in line with the Court's judgments.[205]

One could argue that one of the reasons for the Member States' confusion on first registration of motor vehicles taxation is the absence of harmonisation of the field by EU norms. The field falls though under the Member States fiscal autonomy to establish new taxes and/or change the rate of those previously levied.[206] As a result, Member State are free to establish their own rules on the calculation method for the levied tax, including different criteria for taking into account the depreciation of the second-hand vehicle. Nonetheless, the discretionary power of the Member States is limited by Art. 110 TFEU which, according to the settled jurisprudence of the Court of Justice,[207] it requires that the registration tax does not exceed the amount of tax included in the price of a similar vehicle sold within the same Member State.

After accession to the EU, it seems Romania is going through the same hurdle of finding a solution that accommodates the divergent interests of the State and the EU, namely the national interest to maintain the rate of sales of the domestic manufactured brand of car and the EU's interests which places the cross-border free movement of goods above the protectionist interests of the State. Similarly to Poland and Hungary's previous experiences, which immediately after accession were asked by the Commission to amend their legislation on first registration of vehicles, and latter brought before the CJEU for absence of bringing their legislation in line with

[204] For a summary of the actions started by the Commission against Greece on the specific issue of first registration tax for motor vehicles, see *Car taxation: The European Commission calls on Greece to apply a Court ruling on depreciation criteria used to determine the taxable value of used cars,* Référence: IP/09/169, Brussels, 29 January 2009.

[205] In 2010 the Commission issued a Formal Letter to Greece whereby if Greece fails to comply with it, the Commission may for the third time bring Greece before the Court of Justice for the same legal issue: discriminatory provisions on first registration taxation of cars (IP.11.127 of 27/10/2011).

[206] For instance, see Case C-393/98 – *Gomes Valente.*

[207] See Case C-47/88 [1990] ECR I-4509; Case C-345/93 *Nunes Tadeu* [1995] ECR I-479; Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115; Case C-313/05 *Brzeziński* [2007] ECR I-51; Case C-74/06 *Commission* v *Greece* [2007] ECR I-7585 and Case C-2/09 *Kalinchev* [2010] ECR I-0000.

Art. 110 TFEU, the Romanian legislation on first registration tax of vehicles also came to the attention of the Commission. In 2007, the European Commission initiated proceedings against Romania for infringing Art. 110 TFEU because the then provisions of the Fiscal Code on registration tax of vehicles did not took into account the value of the vehicle as a criterion for the calculation of the first registration tax.[208] In 2008, the tax was renamed as a pollution tax levied on both new and second-hand vehicles, whose amount was established based on multiple objective criteria, *inter alia*: CO2 emissions, cylinder capacity, engine size, kilometres and age of the car. In addition, the newly introduced Romanian legislation gave the possibility to consumers who imported second hand cars to challenge the application of the flat rate method of calculation to that vehicle. Despite the confirmation of the conformity of the calculation method of the registration tax with Art. 110 TFEU by the Commission, in practice, consumers still had to pay excessively high taxes which led to a proliferation of cases on reimbursement of the paid tax before national courts and also before the Romanian Constitutional Court, most often on grounds of breach of Art. 110 TFEU, and of breach of the constitutional provisions on equality before the law.

As a result of the Constitutional Court's refusal to deal with the raised questions of interpretation and application of relevant law and repeatedly finding the pollution tax in line with the Constitution, the national ordinary courts have sought guidance before the Court of Justice of the EU. After a long break from involvement in direct judicial dialogue with the CJEU (the former and only preliminary reference dating from January 2007)[209], Romanian lower courts addressed numerous references for preliminary questions to the Court of Justice of the EU on the same subject, i.e. concerning the conformity of the different versions of the Romanian pollution tax for second-hand cars with EU primary norms.[210]

The jurisprudence of the Romanian courts on the pollution tax before the CJEU preliminary ruling clarifying the relevant EU law

The evolution of the legislative framework – giving different names to the same legal concept

In short, the evolution of the Romanian legislative framework on first registration tax for motor vehicles and the national judiciary response to it can be seen as another classical example of a Member State learning the limits of its power to legislate from the European Commission and

[208] IP/07/372 of 21.03.2007.

[209] See the Case C-33/07 *Jipa*, discussed in the previous chapter of this paper.

[210] See Case C-402/09 *Tatu*, judgment of 7 April 2011; Case C-178/10, Ministerul Finanţelor şi Economiei, D.G.F.P. Mureş, Administraţia Finanţelor Publice Târgu-Mureş/S.C. Darmi S.R.L.; C-136/10, Daniel Ionel Obreja/Ministerul Economiei şi Finanţelor, Direcţia Generală a Finanţelor Publice a judeţului Mureş; Case C-263/10 *Nisipeanu*, judgment of 07 July 2011; C-335/10, Claudia Norica Vijulan/Administraţia Finanţelor Publice a Municipiului Târgu-Jiu, Administraţia Fondului pentru Mediu; C-336/10, Administraţia Finanţelor Publice a Municipiului Târgu-Jiu, Administraţia Fondului pentru Mediu/Victor Vinel Ijac; C-377/10, Adrian Băilă/Administraţia Finanţelor Publice a Municipiului Craiova, Administraţia Fondului Pentru Mediu; C-438/10, Lilia Druţu/D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-439/10, S.C. DRA SPEED S.R.L./D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-440/10, S.C. SEMTEX S.R.L./D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-441/10, Ioan Anghel/D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-573/10, Sergiu Alexandru Micşa/Administraţia Finanţelor Publice Lugoj, D.G.F.P. Timiş, Administraţia Fondului pentru Mediu; C-29/11, Aurora Ileana Ştfichi/D.G.F.P. Suceava – Administraţia Finanţelor Publice Suceava, Administraţia Fondului pentru Mediu; C-30/11, Adrian Ilaş/D.G.F.P. Suceava – Administraţia Finanţelor Publice Suceava, Administraţia Fondului pentru Mediu. Of all these preliminary references, only two were admitted by the CJEU, both having been sent by lower courts, the other ones raising similar, almost identical cases - Case C-402/09 *Tatu*, judgment of 7 April 2011 and Case C-263/10 *Nisipeanu*, judgment of 07 July 2011.

CJEU, in a field where, only theoretically, it enjoys autonomy.[211] Once Romania entered the European Union it had to eliminate the excise and customs duties for goods imported from the other Member States, including for first and second hand motor vehicles. In order to cover part of the losses incurred in the state budget due to waiving the excise and customs duties, the Romanian Government replaced them with a first registration of motor vehicles tax, which initially was established only for imported motor vehicles. The first version of the registration of motor vehicles tax was clearly a direct discriminatory measure prohibited by Art. 110 TFFEU, and the European Commission sent several letters asking the Government to bring its domestic legislation in line with EU law.[212] Since then, the Parliament brought seven different amendments to this fiscal obligation, giving it different names but maintaining its primary objective of covering losses in the state budget caused by the elimination of customs duties once entered into the European Union. Once the financial crisis started to affect the Romanian market, the Romanian Government considered opportune to adopt as instruments combating the financial crisis, a disguised first registration tax which will ensure, aside protection of the environment, also, if not primarily, protection of the domestic industry of cars. The fiscal autonomy which the Member States were said to enjoy on the basis of the limited conferred powers of the EU and recognised by the Court of Justice[213] was considered by the Government a safe playground shielded from EU's intervention. However, the Romanian Government seems to have read only the first half of the CJEU judgments[214], and ignored the established case-law on the strict conditions which Member States have to fulfil under Art. 110 TFEU when establishing a tax of this kind.

Following the previous examples of other Member States[215], the Romanian Government realised that State autonomy and absence of EU competence on a certain field does not necessarily allow for discretionary State power of regulation, when the said field of action directly impacts on fundamental areas of EU law, particularly when it affects the essence of the EU project, namely the Union market.

The saga of the pollution tax started with Law No. 343/2006[216] which introduced for the first time a registration tax on motor vehicles, which had to be paid by consumers immediately after Romania's accession to the EU. This tax was entitled 'first time registration tax', as it had to be paid once an imported motor vehicle was used on the Romanian roads. According to Law No. 343/2006, the 'first registration tax' was imposed on all imported vehicles at first registration, regardless of age and origin, but was not imposed on vehicles already registered in Romania. In

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[211] Opinion of AG Sharpston in Case C 402/09 *Tatu*, delivered on 27th of January 2011, '*It is not the aim of Art. 110 TFEU to impose any particular system of internal taxation on the Member States, which retain a considerable degree of freedom and autonomy as regards the levelling of taxes and duties and the rates charged*.' (para. 32) and '*the Member States continue to retain a considerable degree of autonomy in the field of taxation generally. Nothing has happened since delivery of the Court's judgment in 2006 to alter the position*.' (para. 54)

[212] See European Commission letters of 21st of March 2007, no. IP/07/372, and of 25th of June 2009, no. IP/09/1012.

[213] See Case C-47/88 [1990] ECR I-4509; Case C-345/93 *Nunes Tadeu* [1995] ECR I-479; Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115; Case C-313/05 *Brzeziński* [2007] ECR I-51; Case C-74/06 *Commission* v *Greece* [2007] ECR I-7585 and Case C-2/09 *Kalinchev* [2010] ECR I-0000.

[214] 'There is at present no rule of Community law which prevents Member States from introducing a general system of internal taxes charged in accordance with objective criteria on a particular category of goods, such as the category concerned here.' Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, para. 11. The idea of fiscal autonomy of the Member States has been restated in all the cases on first registration of motor vehicles tax.

[215] Germany, France, Greece, Denmark, Hungary, Poland.

[216] The 'first registration tax' for vehicles was first stipulated by Law No 343/2006. This Law introduced in Chapter 21 of the Fiscal Code, Arts. 2141-2143 which established special fees for cars and vehicles, known as special fees for first registration that were levied upon the first registration of vehicles in Romania.

addition to the clear discriminatory taxation based on the country of origin of the car, the calculation method of the 'first registration tax' was also not conform with EU law, as it took into account only the age factor of the vehicle. The calculation method of the tax which was clearly discriminating against imported motor vehicles triggered the attention of the Commission on the national legislation conformity with EU law.[217] The Romanian Government advertised this tax as a firm step taken by the Government against the new trend whereby numerous second-hand motor vehicles of more than 10 years old were brought into Romania due to their low price. Thus, the declared objective of the tax was fighting against the pollution of the environment which would have been affected, as these vehicles were not properly equipped with modern filters to exhaust gas emissions. They would have soon become waste, for which Romania should have found solutions to deposit and recycle.[218] One of the dedicated purposes of the tax would have thus been to finance methods of recycling these imported second-hand cars.

The first version of the registration tax on imported vehicles[219] generated numerous cases before the Romanian courts of all levels of jurisdictions,[220] raised by individual tax payers against the fiscal state authorities on grounds of violation of EU primary law (Art. 110 TFEU). The Romanian domestic courts held that the *Simmenthal* principle and Art. 148 Romanian Constitution authorised them to review the conformity of the first registration tax with Art. 110 TFEU.[221] No preliminary questions were referred to the CJEU, instead most of the Romanian courts applied directly the principles developed by the CJEU in its relevant jurisprudence.[222] The tax was considered as being directly discriminatory since it was not levied on the vehicles produced and registered or re-registered in the country, while such a tax was levied on vehicles already registered in other Member States when they were to be re-registered in Romania. Without much analysis of the proportionality principle, the national courts held that the much praised environmental protection objective of the first registration tax could not be considered a justified restriction on the fundamental freedom of goods. Following this short analysis of the conformity of the first registration tax with primary EU law, the majority of national courts held that the first registration tax is not in conformity with EU law and required the Romanian competent administrative authorities to pay substantial compensations to the tax payers.[223]

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[217] IP/07/1799 Brussels, 28 November 2007.

[218] See C.A.M. Cercel, *Considerations on the First Registration Tax and on the Pollution Tax for Motor Vehicles as states by the Romanian Law according to the Recent Decisions of the EU's Court of Justice and the EU's Treaties*, in Dny práva 2011 – Days of Law 2011 [online]. Brno: Masarykova univerzita, 2012, available at http://www.law.muni.cz/sborniky/dny_prava_2011/files/prispevky/11%20EU/04%20cercel.pdf

[219] The first registration tax was levied based on the Fiscal Code as stipulated by Law no 343/2006 for the amendment of Law 571/2003 regarding the Fiscal Code, published in the Official Gazette part I, no 662 of 1 August 2006. However no administrative act confirming the payment of the tax was issue by the competent authorities, but only a receipt for the amount paid by the taxpayer. See Viorel Papu, *Mijloace juridice de recuperare a taxei de primă înmatriculare* (The judicial mean for recovery of the first registration tax), available online at http://www.juridice.ro/note-studii-opinii/mijloace-recuperare-taxa-prima-inmatriculare.html.

[220] D Calin, *Analiză jurisprudențială privind taxa specială de primă înmatriculare şi taxa de poluare* (Jurisprudential Analysis Regarding the Special First Registration Tax and the Pollution Tax), in Revista Forumul Judecatorilor, 2/2010, at 84.

[221] Court of Appeal of Brasov has adopted a consistent approach admitting the reimbursement claims of the first registration tax, see *inter alia*, Decision no. 435/R of 1st of July 2008. See also Court of Appeal of Iasi, Decision no. 559/CA of 12 December 2008.

[222] The following cases were those most often cited: Case C-387/01, *Weigel;* C-345/93, *Nunes Tadeu*; C-393/98, *Gomes Valente*; C-313/05, *Brzeziński*, C-290/05 and C-333/05 *Ákos Nádasdi şi Németh Ilona*.

[223] See Tribunal of Tulcea, Judgment no. 175 of 05 February 2009, Judgment no. 1865 of 14 August 2008; Tribunal of Timis, Judgment no. 922 of 14 November 2008; Tribunal of Sibiu, Judgment no. 531 of 07 October 2008, Tribunal

Following the national judgments against the State, whereby the latter had to pay substantial pecuniary damages to the tax payers, and the Commission's request to bring the national legislation and practice in line with Art. 110 TFEU[224], a new legislative act, GEO No. 50/2008, was adopted, whose main objective was, according to the preamble, 'the improvement of air quality and implementation of the limit values laid down by the [European Union] legislation in this area'. The tax introduced by the GEO No. 50/2008 aimed to 'ensure adherence to the applicable standards of European [Union] law, including the case-law of the Court of Justice of the European [Union]' regulating specifically the tax on first registration of imported second-hand motor vehicles. This legislative act was adopted by the Romanian Government seemingly for the purpose of implementing the EU values on quality of air.[225]

The change of name, legal nature, type of regulatory act[226] and also of the algorithm to find the amount of payable tax did not bring, in practice, any considerable financial changes for consumers, as they had to pay the same, if not more, excessively high taxes for the same categories of second hand cars as before the legislative change. The fact that the so-called pollution tax also pursued an environmental protection objective cannot be denied, taking into account that most of the imported second-hand cars that were introduced in Romania were big old cars,[227] which consume more and emit a larger quantity of CO2. It cannot be denied that one of the concrete objectives of the tax was thus to impose higher taxes and therefore discourage the increased import of polluting cars.[228] However, the honourable pursued objective, i.e. "the polluter pays", does not justify why the tax was not applied also to those cars that were already on the Romanian market and were sold as second-hand cars.

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of Harghita, Judgment no. 618 of 15.04.2008; Tribunal of Dambovita no. 125 of 27.02.2009; Tribunal of Vrancea, Judgment no. 450 of 30.06.2008; Court of Appeal of Timisoara, Judgment no. 641 of 28 May 2008; Court of Appeal of Suceava, Judgment no. 1188 of 15 October 2008 of Court of Appeal of Ploiesti, Judgment no. 1964 of 07 November 2008; Court of Appeal of Timisoara, Judgment no. 133 of 29 January 2009; Court of Appeal of Suceava, Judgment no. 479 of 12 March 2009; Court of Appeal of Bucharest, Judgment no. 58 of 12 January 2009. See also, C.A.M. Cercel, *Considerations on the First Registration Tax and on the Pollution Tax for Motor Vehicles as states by the Romanian Law according to the Recent Decisions of the EU's Court of Justice and the EU's Treaties*, in Dny práva 2011 – Days of Law 2011 [online]. Brno: Masarykova univerzita, 2012

[224] IP/07/1799 Brussels, 28 November 2007.

[225] According to the preamble of the Government Emergency Ordinance No. 50/2008. In the note of justification of the GEO 50/2008 it was mentioned that the levied pollution taxes will be used for the financial support of national programs on environmental protection.

[226] The first registration tax was adopted pursuant to a Law, while the pollution tax was introduced by a Government Emergency Ordinance which is hierarchically inferior to a Law, but it is still a legislative act that the Government can adopt based on delegated powers from the Parliament. Usually it is used when legislation needs to be urgently adopted.

[227] The explanatory memorandum of the GEO 50/2008 expressed the concern that in the absence of a higher taxation, there will be an afflux of imported second-hand cars of an average age higher than 10 years bought by Romanian citizens because of their considerably low price.

[228] It has to be mentioned that in all versions of the national provisions establishing first registration of imported vehicles tax, the need to respect the EU level of reducing the level of CO2 emission was cited. The European Commission has in fact published in 2002 a Report on reducing CO2 emission from new passenger cars by way of fiscal measures, see European Commission's Directorate-General for Environment - Fiscal Measures to Reduce CO2 Emissions from New Passenger Cars, A study contract undertaken by COWI A/S, p.3, available at: http://ec.europa.eu/taxation_customs/resources/documents/co2_cars_study_25-02-2002.pdf; See also L Sebastian, *Registration Taxes on vehicles: Evolutions and Trend in the European Union and Romania*, MPRA Paper No. 20453, posted 04. February 2010.

During the second half of 2008 and continuing in 2009, the Government amended the GEO 50/2008[229] providing additional exceptions from the pollution tax to certain categories of first and second hand cars. As a justification for the newly introduced exceptions from payment, the Government mentioned in the preamble of GEO no. 218/2008 the necessity to adopt measures for the support of the domestic vehicles market, which due to the financial crisis registered a considerable down fall, leading also to down fall on the domestic employment market. No mention in the preamble of the GEO No. 218/2008 of the honourable objective of environmental protection provided in GEO No. 50/2008, instead the protection of the labour market and domestic vehicles transpire as the clear predominant objectives of the legislative amendment.

Following the adoption of GEO No. 218/2008, the legislature's intention to influence consumer's choice towards domestic products became more evident. The exceptions from payment of the pollution tax introduced by GEO No. 218/2008 targeted new cars having features identical to those cars produced in Romania, and which would have been registered in Romania between 15th of December 2008 and 31st of December 2009 (the starting period of the financial crises affecting Romania). Thus the effect of the amendment would have been to encourage acquisition of domestically produced cars and maintain the employment rate in the manufacturing industry at the same rate as before the financial crises.[230]

The above mentioned Romanian legislative amendments which indirectly protected domestic vehicles by introducing a tax exemption based on cylinder capacity strikingly resembled the French tax regime which the CJEU reviewed in the *Humbolt* judgment[231] and found it in breach of Art. 110 TFEU. The Court held in 1984, in the *Humbolt* judgment, that the lower tax introduced by France for vehicles of less than 16 fiscal horsepower was contrary to Art. 110 TFEU as it was set at a level such that only imported cars were subject to the special tax whereas French cars were liable to the distinctly more advantageous differential tax.[232] Pursuing a similar aim as the French legislator, the Romanian Government totally excluded from the payment of first registration tax cars with specific technical characteristics which the cars manufactured in Romania presented. While tax levied for the imported second-hand cars could have reached as high as third of the price of the imported second-hand car. Thus, it was just a matter of time before cases would start to be submitted before national courts and possibly also before the Court of Justice.

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[229] Amendments were brought by GEO No. 208/2008 of 4 December 2008 published i the Official Gazette Part I, no. 825 of 8 December 2008, GEO No. 218/2008 of 10 December 2008 published in the Official Gazette Part I, no. 836 of 11 December 2008, GEO No. 7/2009 of 18 February 2009 published in the Official Gazatte Part I, no. 103 din 19 February 2009, GEO No. 117/2009 of 29 December 2009 published in the Official Gazatte, Part I, no. 926 of 30 December 2009 and GEO No.118/2010.

[230] Preamble of GEO no 218/2008 reads as follows: 'Given: - The conclusions resulting from the analysis of the deepening of the financial and economic crisis in October, which shows a significant decline in the vehicles market and suppliers of industrial production and measures supporting the sector of vehicles which was affected by the global financial crisis; - The fact that the Romanian Government is concerned to adopt measures to ensure the preserve of the job places in the Romanian economy and since for one place of work in the manufacturing industry there are 4 places of work in the supply market, considering the fact that all these elements are extraordinary circumstances whose regulation cannot be postponed and given that these items concern the public interest and constitute urgent and extraordinary situations, whose regulation cannot be postponed, Pursuant to Art. 115 par. (4) of the Romanian Constitution, republished, The Government adopts the following Emergency Ordinance.' (translation in English by the author)

[231] Case 112/84 Humblot [1985] ECR 1367.

[232] Case 112/84 Humblot [1985] ECR 1367, para. 14.

The Romanian ordinary courts' inconsistent approach towards the requirements for tax reimbursements

After the string of cases challenging the first registration of motor vehicles tax, a new wave of cases invaded national courts against the pollution tax which was another version of the same first registration of vehicles tax.[233] An impressive number of complaints reached Romanian courts of all levels of jurisdiction[234], including this time also the Romanian Constitutional Court[235] and the CJEU.

In all these cases, the applicants invoked the same argument of incompatibility of the pollution tax with Art. 110 TFEU. The plaintiffs' claim of reimbursement of the sum paid as pollution tax did not receive though a uniform approach from the Romanian courts. Two main conflicting approaches can be distilled from the relevant jurisprudence: while certain national courts admitted the requests of reimbursement of the pollution tax levied by the national fiscal authorities based on its incompatibility to Art. 110 TFEU, which, accordingly, had to be given priority in relation to the national law based on the primacy of EU law,[236] other domestic courts rejected similar applications, considering the tax as not discriminatory, and in line with national and constitutional provisions, and also in line with EU law.[237] The latter judgments did not address the issue of EU

[233] The Constitutional Court itself described the pollution tax as being the same old first registration of vehicles tax which was considered by the European Commission as contrary to Art. 110 TFEU. See Constitutional Court of Romania, Decision 802 of 19 May 2009, published in the Official Journal of Romania No. 428 of 23 June 2009: 'Article 1 of the GEO No. 50/2008 does not enshrine provisions from which it can be concluded that it provides for a new tax, but it merely redefines the special tax for vehicles. […] The redefinition of a tax through a legal act, distinct from the initial act, does not amount to the provision of a new tax, as long as the legal nature of the two taxes is identical.'

[234] According to the Financial Week of 22 May 2011, there have been around 40,000 legal proceedings disputing the the legality of the pollution tax.

[235] See, *inter alia*, Decision 586/2009, Decision 802 of 19 May 2009, Decision 1596 of 26 November 2009, Decision 236 of 09 March 2010, Decision 500 of 20 April 2010, Decision 550 of 29 April 2010, Decision no. 669 of 18 May 2011, Decision 1088 of 14 July 2011.

[236] See, *inter alia*, decisions from the Court of Appeal of Ploiesti (Decision no. 271 of 02 April 2009 of the Tribunal of Dambovita remained final as a result of its approval by the Decision no. 1007 of 23 June 2009 of Court of Appeal of Ploiesti), decision from the Court of Appeal of Alba Iulia (Decision no. 209/CA of 18 February 2009 of the Court of Appeal of Alba Iulia; Decision no. 506/CA of 15 April 2009), Tribunal of Hunedoara (Decision no. 1425/CA of 05 August 2009 the Tribunal of Hunedoara), Tribunal of Harghita (Decision no. 1054 of 05 June 2008; Decision no. 110 of 22 January 2009 delivered by the Tribunal of Harghita), Court of Appeal of Brasov (Decision no. 461/R of 16 November 2009), Court of Appeal of Oradea (Decision no. 419/CA of 07 July 2009 of the Tribunal of Satu Mare remained final by way of approval by Decision no. 612/CA of 19 November 2009 delivered by the Court of Appeal of Oradea; Decision no. 298 of 06 May 2009 of the Tribunal of Satu Mare remained final by way of approval by Decision no. 614 of 19 November2009 delivered by the Court of Appeal of Oradea), Court of Appeal of Iasi (Decision no. 659/CA of 23 June 2009 of the Court of Appeal of Iasi), Court of Appeal of Galati (Decision no. 496/R of 14 May 2009; Decision no. 497/R of 14 May 2009; Decision no. 478/R of 07 May 2009; Decision no. 605 of 14 May 2009 of the Tribunal of Galati), Tribunal of Teleorman and Court of Appeal of Bucharest (several civil decisions of the Tribunal of Teleorman admitting the claim of reimbursement remained final after the Court of Appeal of Bucharest rejected the appeal submitted by the fiscal authority: Decisions no. 2326 of 01 July 2008, no. 2357 of 01 July 2008) Decision of the Tribunal of Bucharest confirmed by the Court of Appeal of Bucharest (Decision no. 1779 of 12 May 2009 of the Tribunal of Bucharest; Decision no. 166/F of 02 Amrch 2009 of the Tribunal of Ialomita confirmed by Decision no. 1638 of 15 June 2009 of the Court of Appeal of Bucharest).

[237] See, for example, Tribunal of Alba, Decision nr. 678/CAF/2009 sustained by the Court of Appeal of Alba Iulia, Decision no. 1069/CA/2009 of 13 October 2009; Decision no. 1303/CA of 25 June 2009 of Tribunal of Hunedoara; Decision no. 892/CA of 06 May 2009 of Tribunal of Hunedoara confirmed by the Court of Appeal of Alba Iulia; Court of Appeal of Alba Iulia: Decision no. 473/CA of 21 May 2009, Decision no. 1019/CA of 06 October 2009; Decision no. 914/CA of 30 June 2009), Court of Appeal of Bucharest (Decision of 26 March 2009 in

law conformity in detail, but simply limited to hold the tax to be compatible with Art. 110 TFEU. It could be argued that the later trend of jurisprudence was influenced also by the decision of the Constitutional Court which held the pollution tax to be compatible with the Constitution. Both of these approaches received relatively equal support among the judiciary. What is probably more confusing to the individuals is that opposing judgments were delivered within the same court, sometimes within a last resort court[238] against which the plaintiffs did not have any other remedy. In spite of their legally binding force for all ordinary courts, the Constitutional Court's decisions holding the pollution tax to be compatible with the constitutional provisions did not succeed to harmonise the national jurisprudence. Several ordinary courts continued to give precedence to EU law, and later on to the CJEU judgment in the *Tatu* case, against the Constitutional Court's decisions which, according to Romanian law, bind all national courts.[239]

The unconvincing answers of the Constitutional Court

Several ordinary courts used the unconstitutionality exception procedure to obtain a decision from the Romanian Constitutional Court holding the pollution tax in its different versions to be contrary to constitutional provisions. Such a decision would have had a binding legal force and thus would have had the power to unify national jurisprudence on the issue. One can identify three types of decisions given by the CCR in the registration tax saga: decisions given within the unconstitutionality exceptions procedure which did not raise EU law issues, decisions which did raise EU law issues, and decisions given as a result of unconstitutionality exceptions after the CJEU gave its preliminary ruling at the request of a Romanian court in relation to the first registration tax.

First, the national courts, such as Dâmboviţa Tribunal[240], argued that the tax regulated by GEO No. 50/2008 does not comply with several provisions from the Constitution, such as Art. 15(2) on the non-retroactivity principle or Art. 56(2) on the just provision of fiscal duties. The claimant stated in its complaint that:

> the introduction of a pollution tax is unconstitutional because it is collected beforehand, it does not have any real purpose towards environmental protection, and it breaches the *polluter pays* principle. The GEO does not offer sufficient guarantees so that the collected taxes end up in the Environmental Fund. The tax is retroactive and it is regulated outside the constitutional framework for adopting governmental emergency ordinances.[241]

The CCR dismissed all these critiques. When analysing the unconstitutionality exception, the CCR argued that

> Article 1 of the GEO No. 50/2008 does not enshrine provisions from which it can be concluded that it provides for a new tax, but it merely redefines the special tax for vehicles. […] The

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case no. 1318/87/2008), Court of Appeal of Cluj (Decision no. 1645 of 11 May 2009), Court of Appeal of Suceava (Decision no. 1402 of 13 July 2009), Tribunal of Neamț (decision no. 126/CF of 18 Novermber 2008 of Tribunal of Neamț confirmed by Decision no. 497 of 14 May 2009 of the Court of Appeal of Bacau; Decision no. 40/CF of 03 March 2009 of Tribunal of Neamt).

238 The conflicting national jurisprudence is summarised clearly in the *Coriolan Gabriel IOVIŢONI and others against Romania*, applications no. 57583/10, 1245/11 and 4189/11, before the ECtHR, judgment of 3rd of April 2012. The Courts of Appeal of Alba Iulia, Bucharest and Suceava delivered judgments both in favour of the individuals, admitting their claims for reimbursement of the pollution tax and against, holding the tax as lawful from both national and EU law perspective.

239 Court of Appeal of Constanta, Decision no. 844/CA of 15 September 2011.

240 Dâmboviţa Tribunal, Case No. 5.255/120/2008.

241 *Id.*

> redefinition of a tax through a legal act, distinct from the initial act, does not amount to the provision of a new tax, as long as the legal nature of the two taxes is identical.[242]

The solution was criticized by the legal doctrine, as the tax enshrined in GEO No. 50/2008 is established on distinct principles than the previous special tax, it has a distinct formula to be calculated and it has a distinct destination. Hence it was argued that the legal nature of the two taxes was not identical and we were not in the presence of a mere redefinition.[243]

In a second stage, the ordinary courts started to challenge the constitutionality of GEO No. 50/2008 on the basis of Art. 148(2) of the Constitution, and through this Article bringing the issue of conformity with EU law into discussion. For instance, in Decision No. 137/2010[244], the claimant argued that Art. 4(a)[245] of the Ordinance

> breaches Art. 90 TEC, because the pollution tax is levied only for the vehicles registered in the European Community and re-registered in Romania, while for the vehicles already registered in Romania there is no obligation to pay such a tax for a new registration. Hence, this pollution tax is, in reality, a customs duty and the court must observe that the provisions of the GEO No. 50/2008 are provisions which breach EU law and cannot be maintained in force.

The CCR did not engage in a substantive analysis of the constitutionality challenges, nor did it refer to the effects of Art. 148(2) in a constitutionality review of national laws which might be in conflict with EU law.[246] Instead, it observed that

> the duty to apply with priority the compulsory provisions of EU law in relation with the provisions of national law falls on the ordinary courts. It is a matter of the application of the law, and not a matter of constitutionality. The Court observes that, in the relation between EU law and national law (with the exception of the Constitution), only the application with priority of the EU law in front of the national law can appear, an issue which is of the competence of ordinary courts.

In other words, it could be argued that the CCR states, *per a contrario*, that the principle of the primacy of EU law does not apply to the Constitution, placing thus EU law above the provisions of national law, but under the constitutional provisions. Like most of the Constitutional and supreme Courts of the Member States, the CCR adopts also a limited application of the principle of primacy of EU law in relation to domestic law.[247]

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[242] Constitutional Court of Romania, Decision 802 of 19 May 2009, published in the Official Journal of Romania No. 428 of 23 June 2009.

[243] D. Călin, *Aplicarea şi interpretarea dreptului Uniunii Europene de către Curtea Constituţională*, Revista Forumul Judecătorilor, No. 3/2010, at 125.

[244] Constitutional Court of Romania, Decision No. 137/2010, published in the Official Journal of Romania No. 182 of 22 March 2010.

[245] Art. 4(a) of GEO No. 50/2010 reads as follows: 'The obligation to pay the tax intervenes: a) on the occasion of the first registration '.

[246] The term used by the CCR is, in fact, 'reglementări comunitare', which means *communitary regulations*. Further in its decision, the CCR only uses 'legislaţia comunitară ' – *communitary law*, even though the decision was given after the entry into force of the Treaty of Lisbon.

[247] Except the Dutch Raad can State and the Austrian Constitutional Court, the other Constitutional or Supreme Courts of the Member States have adopted a limited application of the principle of primacy of EU law. Some recognised the primacy of all constitutional provisions over EU law, while others place above EU law only a core of basic constitutional principles. From the general statement of the CCR it seems that the CCR is part of the former group. See more on this classification in C Grabenwarter, National Constitutional Law Relating to the European Union, in *Principles of European Constitutional Law*, revised second edition, edited by Armin van Bogdandy and Jurgen Bast, Hart Publishing, 2012, at 84-94.

In the same decision, the CCR made it clear that it considers itself outside the scope of ex-Art. 234 EU Treaty (which at the time the Court made its decision had already become Art. 267 TFEU), restating its argument from a previous decision[248] that

> it is not the competence of the Constitutional Court to analyse the conformity of a provision of national law with a provision of the TEC (which became TFEU) on the basis of Art. 148 of the Constitution. Such a competence – to establish whether there is a contrariety between the national law and the EC Treaty pertains to the ordinary court which, in order to reach a correct and legal conclusion, *ex officio* or at the request of the interested party, can send a question for a preliminary ruling pursuant to Art. 234 TEC to the CJEU. If the Constitutional Court would consider itself competent to give a decision upon the conformity of national law with EU law, a possible conflict of jurisdictions might emerge between it and the ordinary courts, which, at this level, is not admissible.

The CCR considered it necessary to make another clarification about the competences it does not have with regard to the application of EU law

> if it would be accepted that the Constitutional Court can establish the constitutionality or unconstitutionality of a law in relation to the provisions of a community legal act, this would breach, in an evident manner, the competences of the Court of Justice of the European Union, since it is only the latter that is competent to interpret the treaties (Article 267 of the Treaty[249]).

Even if in the pollution tax saga, the CCR repeated with every occasion that it cannot review the constitutionality of national legislation on the basis of the founding Treaties because it would enter into a conflict of competences with the CJEU, in other Decisions[250], the CCR has though interpreted provisions of the TFEU.

As a preliminary conclusion, the pollution tax saga significantly contributed to the development of the CCR jurisprudence on EU law matters. First, the court clarified its position on the hierarchical relation between Romanian constitutional law and EU law, indicating that in its view all constitutional provisions take precedence over EU law. Second, it nuanced its previous position that the preliminary reference procedure is an exclusive competence of ordinary courts, by admitting that in the future it allows itself to change this case-law. Third, it created a test for a future possible new type of constitutional review in which the provisions of EU law could be used as "interposed provisions" between the national law and the Constitution, as long as they have a certain "constitutional relevance". Last, it showed that it can circumscribe the provisions of national law so that it keeps itself out of sensitive areas, as in its rationale for finding the pollution tax constitutional, the CCR did not look at the effect of the tax upon the market, but simply took for granted the objective of environmental protection.

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[248] Constitutional Court of Romania, Decision no. 1596 of 26 November 2009, published in the Official Journal of Romania No. 37 of 18 January 2010.

[249] The Court does not mention which of the founding Treaties. However, this time refers to the post-Lisbon numbering when referring to the provision governing the preliminary reference procedure.

[250] See more details in the section *The Romanian Constitutional Court's approach towards the European constitutional dialogue.*

The forum shopping of tax payers for European institutions that would support their claim against the Member State of origin

Displeased with the contrasting jurisprudence of the national courts[251], of the refusal of certain national courts to address preliminary questions on the conformity of the pollution tax with EU law[252], and of the refusal of the Romanian Constitutional Court to hold the tax unconstitutional, several Romanian taxpayers sought redress before the European Parliament and the Strasbourg Court. A petition signed by 120.000 Romanian citizens, was addressed to the European Parliament seeking the appropriate action from the Parliament to ensure that the Romanian authorities bring their tax arrangements on registration of cars into line with the relevant EU legislation.[253]

The aforementioned petition did not have any concrete impact on the Romanian executive and relevant national legislation. After unsuccessful claims before both first instance and appeal national courts, and, in the absence of a judgment of the Constitutional Court holding the national legislation to be unconstitutional, several Romanian tax payers have followed the remedy path available under the ECHR. Three different complaints were brought before the European Court of Human Rights (ECtHR) in 2010 and 2011 against Romania for violation of Art. 1 Protocol 1, Art. 6 and Art. 14 due to the national courts judgments rejecting the applicants' claims for restitution of the levied pollution tax and for referral of preliminary questions to the CJEU.[254]

These three cases can be seen as the reflection of the Romanian citizens' high trust in the Strasbourg court which since 1994 has adopted numerous judgments holding in favour of the citizens and against the Romanian State in matter of high political sensitivity. The same trust does not exist on the CJEU, mainly because of the shorter period of Romania's membership of the EU legal system.

All applicants complained that the pollution tax they had to pay under the GEO No. 50/2008 was incompatible with EU law and discriminatory especially as it was imposed only in regard to used motor vehicles imported into Romania from another Member State of the European Union and registered for the first time in Romania, while for similar vehicles already registered in Romania this tax was not levied on their re-sale as used vehicles. The rejection by the national court of their claims for restitution of the pollution tax was argued to have violated Art.1 P1 together with Art. 14 and Art. 6 together with Art. 14 ECHR.

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[251] While certain national courts admitted the requests for reimbursement of tax payers, even before the judgment of the CJEU in the Tatu case (Tribunal of Cluj, judgment no. 2320 of 5 Decembrie 2008; Tribunal of Brăila, judgment no. 319/FCA of 30 April 2009; Court of Appeal of Oradea, judgment no. 560/CA of 5 November 2009; Cour of Appeal of Tg. Mureş, judgment no.. 236/R of 18 February 2010; Court of Appeal of Constanţa, judgment no. 363/CA of 7 June 2010), the majority of domestic courts considered the pollution tax to be in conformity with Art. 110 TFEU and rejected similar claims (see inter alia, Court of Appeal of Cluj, judgment no. 2165 of 7 July 2009 and judgment no. 2704 of 2 November 2009; Tribunal of Arad, judgment no. 981 of 19 May 2010; Tribunal of Suceava, judgment no. 5465 of 10 December 2010).

[252] Those national courts rejected the claimants'requests for referral of preliminary questions to the CJEU on grounds of their interpretation of the European Commission opinion and the judgments of the CJEU in *Nadasdi* and *Nemeth* case which, arguably, allows national legislation as the one discussed. See Cosmin Flavius Costaş, *Impozite interne. Art. 110 TFUE. Taxă pe poluare aplicată cu ocazia primei înmatriculări a autovehiculelor. Neutralitatea taxei între autovehiculele de ocazie importate şi vehiculele similare aflate deja pe piaţa naţională*, Revista Romana de Drept al Afacerilor, Issue 5, of 30 June 2011.

[253] Petition 0265/2008 by Horaţiu Margoi, of 20.03.2009, available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/cm/777/777463/777463en.pdf.

[254] Iovitoni, SC Holtzver, Anghel v Romania, applications no. 57583/10, 1245/11 et 4189/11, Judgment of the ECtHR of 5 May 2012.

The applicant whose request for preliminary questions was rejected by the last resort court argued that the national court refusal to refer to the CJEU amounts to a violation of Art. 6 ECHR. In order to establish whether the applicants had a claim well enough determined to be payable in the sense of Article 1 of Protocol no. 1, the Strasbourg Court assessed the national jurisprudence and found that it was divided. Some courts admitted the claims for reimbursement based directly on Art. 110 TFEU, while others considered the pollution tax lawful under both national and EU law. The fact that the national courts considered necessary to address preliminary questions to the CJEU was interpreted by the Strasbourg Court as an indication that the plaintiffs' claims for reimbursement was not clear enough to be considered a "possession" under Art. 1 Protocol 1.

As to the question whether the refusal to send requests for a preliminary ruling was or not a violation of the right to fair trial, the ECtHR did not assess the merits of this allegations since it found the Article not applicable to the facts of the case, which were qualified as tax litigation.

In parallel to the petitions submitted before the Strasbourg Court on the lawfulness of the pollution tax from the perspective of the ECHR provisions, Romanian citizens addressed numerous requests to the national courts for referral of preliminary questions to the Court of Justice of the EU. Some of these requests were admitted to which other referrals formulated *ex officio* by national courts were added, resulting thus in an avalanche of identical preliminary questions invading the CJEU.[255] For that matter, we can count these references as a step forward for the dialogue between national courts and CJEU, but bearing in mind that of the 12 preliminary references, which pose more or less the same question, 4 were rejected as inadmissible, while 6 were suspended awaiting the answer of the Court on other two judgments (*Tatu* and *Nisipean*u). From this perspective, the use of the preliminary reference procedure could be labelled as unnecessary.

In the following sections the two CJEU preliminary rulings on the pollution tax will be analysed, followed by an assessment of the other preliminary references addressed on the same subject by the other national courts, and the reaction of the Constitutional Court.

Reviving an old and settled issue of EU law interpretation – did the Romanian practice on first registration of second-hand cars tax change the CJEU previous approach?

The Court has been faced with the issue of reviewing internal taxation on registration of vehicles since 84' when it had the occasion to establish the first guiding principles for the national courts which were meant to help them identify whether a domestic "first registration" tax for vehicles is or not in conformity with Art. 110 TFEU.[256] Since then, the Court has reviewed many domestic

[255] The majority of these preliminary references questions were rejected by way of Ordinance: see Case C-178/10, Ministerul Finanţelor şi Economiei, D.G.F.P. Mureş, Administraţia Finanţelor Publice Târgu-Mureş/S.C. Darmi S.R.L.; C-136/10, Daniel Ionel Obreja/Ministerul Economiei şi Finanţelor, Direcţia Generală a Finanţelor Publice a judeţului Mureş; C-335/10, Claudia Norica Vijulan/Administraţia Finanţelor Publice a Municipiului Târgu-Jiu, Administraţia Fondului pentru Mediu; C-336/10, Administraţia Finanţelor Publice a Municipiului Târgu-Jiu, Administraţia Fondului pentru Mediu/Victor Vinel Ijac; C-377/10, Adrian Băilă/Administraţia Finanţelor Publice a Municipiului Craiova, Administraţia Fondului Pentru Mediu; C-438/10, Lilia Druţu/D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-439/10, S.C. DRA SPEED S.R.L./D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-440/10, S.C. SEMTEX S.R.L./D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-441/10, Ioan Anghel/D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-573/10, Sergiu Alexandru Micşa/Administraţia Finanţelor Publice Lugoj, D.G.F.P. Timiş, Administraţia Fondului pentru Mediu; C-29/11, Aurora Ileana Şfichi/D.G.F.P. Suceava – Administraţia Finanţelor Publice Suceava, Administraţia Fondului pentru Mediu; C-30/11, Adrian Ilaş/D.G.F.P. Suceava – Administraţia Finanţelor Publice Suceava, Administraţia Fondului pentru Mediu. Two preliminary reference questions were admitted by the CJEU, both by lower courts,Case 402/09 Tatu, judgment of 7 April 2011 and Case 263/10 Nisipeanu judgment of 07 July 2011.

[256] See C-112/84 Humbolt [1985] ECR 1367.

"first registration" taxes for cars within the framework of either infringement procedures started by the Commission or the preliminary reference procedure.[257] Usually the Member States have chosen simple, revealing names for this category of tax: first registration tax[258], registration duty[259], excise duty in Poland.[260] Recently Romania decided to choose a name which supposedly reflects the pursued aim of environmental protection of this tax regulation: pollution tax. The fact that the money collected from levying the pollution tax were planned by the Government to finance environmental protection programmes was considered a sufficiently strong argument to justify excessively high taxes for imported second-hand vehicles. In a similar way, the same environmental protection objective has been invoked by many of the other Member States as a justification for the excessively high tax which they charge for imported first or second-hand cars. Despite the recognition of the environmental protection objective as a general objective to be respected by all EU policies and thus also by the Member States when acting within the scope of EU law, such an objective does not stand when only certain polluters have to bear the negative consequences, in particular those originating from other Member States.

Whenever the Court has to balance two competing objectives, of which one is the functioning of the Union market and the other is chosen by the Member State to justify the adoption of a measure restricting the functioning of the Union market, the Court applies a strict assessment test of the necessity and proportionality of the ostensible objective pleaded by the Member States.[261] This has been the case also for the field of internal taxation rules on registration of vehicles. The Court reviews the calculation method of the tax, the effects this tax has in practice and whether the Member State has or not a car manufacturing industry which might influence the Member States' decision to adopt protective taxation rules. In short, in most of these cases, the Court of Justice unsurprisingly held that the 'first registration' taxation provisions which led in practice to illogical and considerably high financial differences between the taxes paid for imported as compared to domestic vehicles were protectionist measures disguised as environmental protection ones.

Currently the Court has developed a settled two-fold test under Art. 110 TFEU which it applies whenever it is faced with challenges of vehicles' registration tax compliance with that Article: 1) the directly discriminatory test: assessing whether the contested national legislation includes differentiated calculation method based on the origin of the vehicle or nationality of the owner of the vehicle. If the tax at issue is payable regardless of the nationality of the owner of the vehicle, of the Member State in which it was produced, and on whether the vehicle is purchased on the domestic market or imported, then the Court continues by assessing the possibility of indirectly discriminatory taxes. The Court first looks at the calculation method provided by the Member States and assesses whether the fixed scales provided for the determination of the amount of the tax includes one single or only a few criteria of depreciation. The Court has constantly held that if only the age of the motor vehicle is provided as a calculation criterion then the national tax leads to indirect discrimination. If, on the other hand, the calculation method takes into account all or most of the following parameters: vehicle's age, kilometres, general condition, propulsion

[257] C-290/2005 Nadasdi and C-333/2005 Nameth; C-345/1993 Nunes Tadeu; C-132/1988 Commission v. Greece; C-112/1984 Humblot; C-170/2007 Commission v. Poland; C-74 Commission v. Greece; C-527/2007 Commission v. Austria; C-47/1988 Commission v. Denmark; Case Costa/Enel, 1964; Case Simmenthal, 1976; Case Weigel, 2004.

[258] Romanian under the Fiscal Code provisions of 2007.

[259] For example, Hungary, see cases C - 290/05 and C - 330/05.

[260] For example Poland, see C-315/05.

[261] Case 8/74 Procureur du Roiv. Dassonville[1974] ECR 837; Case - 120/78 *Cassis de Dijon* [1979] *ECR* 649; C-267/91 and C-268/91 [1993] ECR I-6097.

method, model and the value of the second-hand vehicle (of which kilometrage must always be included), than the fixed scales provided by the national legislation for the determination of the amount of the tax is in line with Art. 110 TFEU. If the national provisions include in addition a right of the taxpayer to request an inspection of the general condition of the vehicle and its equipment for the purpose of establishing the real amount of the tax, then there are further more chances for the national tax to be found in line with Art. 110 TFEU. Even if the calculation of the tax method follows the above mentioned criteria, the Court might still find a discriminatory taxation. What is of interest for the Court is that, in practice, the domestic vehicles are not put at a considerable advantage against imported vehicles by way of the domestic rule introducing a registration tax. This is the ultimate test that the Court applies: '*It follows from the above principles that Art. 110 TFEU requires each Member State to select and arrange taxes on motor vehicles in such a way that they do not have the effect of promoting sales of domestic second-hand vehicles and so discouraging imports of similar second-hand vehicles*.'[262]

The judgments of the Court in the *Tatu* and *Nisipeanu* cases do not revolutionise pre-existing jurisprudence of the Court as they consists mostly of reiteration of paragraphs from previous judgments. The preliminary reference rulings offer though a good opportunity to present the approach of the Romanian ordinary and Constitutional courts towards referring preliminary questions.

Tatu Judgment[263] - Learning the specific parlance of the preliminary reference procedure

On 16th of October 2009, a lower court of Romania addressed, at the request of the complainant, a question for a preliminary ruling to the CJEU on an extremely debated topic before the Romanian courts: the legality of the Romanian pollution tax for registration of second hand vehicles in light of EU norms.[264]

The case was brought before the Tribunal of Sibiu by Mr. Tatu, a Romanian national and resident, who argued that the domestic provision[265] on pollution tax for imported second hand vehicles was in breach of Art. 110 TFEU. Mr. Tatu purchased a second-hand vehicle in Germany in July 2008 and to be able to register the vehicle in Romania, he had to pay approximately one third of the price of the car as registration tax under the Romanian pollution tax regime. He argued that the tax was contrary to EU law and sought reimbursement of the amount paid before the national court. His main argument was that the tax would be found incompatible with EU law because of the substantial financial difference between the tax one has to pay when firstly registering imported second hand cars in comparison with the second-hand vehicles of precisely the same age and technical characteristics as that of the vehicle imported from other Member States, which were registered in Romania before the entry into force of the contested legislation.

The Tribunal of Sibiu, responding to the concerns raised by Mr. Tatu, submitted the following question to the Court of Justice: 'Are the provisions of GEO No. 50/2008, as subsequently amended, contrary to the provisions of Art. 90 EC, and do they in fact constitute a measure which is manifestly discriminatory?'

Before assessing the reply of CJEU on the merits of the case, we will make a brief analysis of the formulation of the preliminary question addressed by the Romanian lower court because of its

[262] Case C-2/09 *Kalinchev* [2010] ECR I-0000, paras. 32 and 40.

[263] Case C-402/2009 *Ioan Tatu v. Statul român,* Judgment of 7 April 2011, nyr,.

[264] The Tatu judgment referred to the pollution tax as introduced by the GEO No. 50/2008, in its version applied between 1st of July 2008 and 14th of Decembre 2008.

[265] The GEO NO. 50/2008 in its initial form.

capacity to give insight of the domestic courts understanding of the preliminary reference procedure.

It has to be noticed that the national court asked the CJEU to interpret directly national law and establish the validity of it in light of a Treaty provision. If the referred question would have been taken *ad litteram* by the CJEU, then the preliminary reference should have been rejected as inadmissible[266], since, under Art. 267 TFEU, the CJEU has only two conferred competences: 1) to interpret EU law so as to ensure a correct application of it by national courts, where the latter are faced with the application of national law touching upon EU law; *or* 2) to review the validity of EU law. In the present case, the national court did not ask the CJEU to perform any of these tasks, instead it asked the Court to exercise a power which the Court has already settled in numerous previous cases that it does not possess: 'The interpretation of national rules is a matter for the national courts alone'.[267] Any textbook on EU law usually mentions as one of the first essential elements of the preliminary reference procedure that questions of fact and of national law cannot be referred, and the CJEU cannot rule on them.[268] According to settled case law[269], the Court cannot interpret the domestic laws of a Member State, be they mere implementation of EU law or not, with binding effect for the national courts.

The AG pointed out also a second error of judgment and understanding of EU law by the referring court. First that it referred to the wrong version of the national legislation that was to be considered and secondly that it limited the interpretative competence of the Court to only manifestly discriminatory measures: 'it is apparent from the order of reference that the national legislation that is relevant to the case in the main proceedings is GEO No. 50/2008 in its original form, and not its amended version'[270] and that the expression *manifestly discriminatory* has no legal effects pursuant to the Court's case-law on Art. 110 TFEU – 'the test is simply whether discrimination exists'.[271] Hence, the Court reformulated the question so as to be able to establish its competence to review the preliminary reference: '*whether Art. 110 TFEU, whose wording is identical to that of Art. 90 EC, must be interpreted as precluding a Member State from introducing a pollution tax charged on motor vehicles on their first registration in that Member States'*.[272]

Even if the preliminary questions were 'imperfectly formulate', the Court admitted the preliminary reference, and reformulated the questions so as to establish its jurisdiction.[273] It can

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[266] AG Sharpston has highlighted the improper formulation of the question in her Opinion. See Opinion of Advocate General Sharpston delivered on 27 January 2011on Case C-402/2009 *Tatu v. Statul român*.

[267] This is the paragraph which the Court usually cites when faced with similar questions. See Case C-130/93 *Lamaire* [1994] ECR I-3215, para. 10, and Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, para. 7.

[268] Hartley, *The Foundations of European Union Law*, Oxford University Press, 2011, p.189.

[269] 'Admittedly, as regards the division of responsibilities under the cooperative arrangements established by Art. 234 EC, the interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law', see para. 36 of the *Placanica* judgment (Case C-338/04 Placanica [2007] ECR I-1819, paras 36-8). Additionally, Case C-212/04 *Adeneker*, para. 103, Case C-424/97 Haim, paras 55-6, Case C-19/00 *SIAC Construction*, para.30, Case C-390/99 *Canal Satelite Digital*, para. 24, Case C-54/72 F.O.R, para.8, Case 328/04 *Vajnai*, para.13, Case C-287/08 *Crocefissa Savia* I-136.

[270] Opinion of AG Sharpston in the *Tatu* case, para. 25.

[271] *Id*, para. 26.

[272] CJEU judgment in the *Tatu case*, para. 30.

[273] The CJEU has in general adopted an encouraging approach towards national courts asking preliminary questions, and only exceptionally rejectes preliminary references. In the famous *Costa v ENEL*, the Court had to extract 'the correct questions'. Case C-6/64 *Costa v ENEL* [1964] ECR 585, 593: 'The Court has the power to extract from a

be argued that the approach of the Court, by admitting the reference and rephrasing the question, represents an encouragement of the Romanian national courts to engage in further dialogue with the Court, especially in light of the rich case-law developed by the CJEU with regard to the issue of taxes levied on second-hand motor vehicles.

It is not our purpose here to deliver a thorough examination of the CJEU judgment on the pollution tax provided by GEO No. 50/2008, bearing in mind that we sought to reveal the evolution of the Romanian courts' engagement in judicial dialogue on EU law issue. What is important here to mention is that reading together the argumentations of AG Sharpston in her Opinion and of the Court in its Judgment, the conclusions of the case become unclear. The Court and AG Sharpston use significantly different tests for assessing compliance with Art. 110 TFEU. The criteria used by the AG are more rigorous, while the Court makes reference to a more diluted test. Also, while the conclusions of the AG are not at all evident in favour of the applicant, the Court makes it clear that Art. 110 TFEU should be interpreted as precluding the provision of a tax such as the one referred to in the main proceedings.

The AG states that 'it will be for the referring court to determine whether or not the provisions of GEO No. 50/2008 satisfy the principles set out above'.[274] The AG adds that the arguments raised on behalf of Mr. Tatu seeking to demonstrate that the underlying objective of the tax was to protect the national motor industry are not relevant to answer one main question: 'does the tax in question discriminate, in fact, against imported products?'[275] The AG finds that the criteria used to calculate the tax - the relevant vehicle category, the European standard of CO2 emissions, the vehicle's engine size, the number of cylinders and its age - appear to be factors meeting the objectivity requirement.[276] However, the AG suggests further in her analysis that the criteria, even if objective, are not having sufficient regard to the requirements laid down under the Court's case law, as the list set out in *Gomes Valente*[277] also includes the method of propulsion and the make or model of the vehicle among the factors to be taken into account.[278]

Furthermore, the AG states she is not of the opinion that the proposal of the applicant can be accepted, as, for it to succeed, 'it would be necessary either to persuade the Court that it should reconsider its case-law on the introduction of new taxes, as laid down in *Nádasdi and Németh*, or to establish a credible and workable basis for applying exceptions to that case-law'.[279]

In conclusion, the decision of the AG is that 'national legislation introducing a new tax which is imposed on the first registration of second-hand motor vehicles introduced from another Member State does not infringe Art. 110 TFEU on the sole ground that equivalent vehicles already on the national market before the introduction of the tax do not bear the tax'. However, such a tax 'is prohibited by Art. 110 TFEU if the amount of the tax imposed on an imported second-hand vehicle exceeds the residual amount of the tax included in the sale price of an equivalent second-hand vehicle which bore the tax when first registered as new'. It would appear that the conclusions of AG Sharpston were in the detriment of the allegations of Mr. Tatu. However, the

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question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty.'

[274] Opinion of AG Sharpston in the *Tatu* case, para. 45

[275] *Id*, para. 47.

[276] *Id*, para. 48.

[277] Case C-393/98 *Gomes Valente* [2001] ECR I-1327.

[278] Opinion of Advocate General Sharpston on Case C-402/2009, para. 64, 65, and 66.

[279] *Id*, para. 54.

AG let an open door for the national courts[280] to decide upon the existence of a discriminatory treatment pursuant Art. 110 TFEU, having regard to the residual amount of the tax.

The criteria used by the Court in its decision are less compelling than the ones drafted by the AG. However, the conclusion it reaches is clearer for the national court with regard to the breach of Art. 110 TFEU. The Court uses a twofold test to assess the existence of such a discriminatory measure between second-hand motor vehicles and similar second-hand motor vehicles which are already on national territory: 1) whether the tax is neutral from the point of view of competition between imported second-hand vehicles and similar second-hand vehicles which were previously registered on national territory and were subject on that registration to the tax laid down by GEO No. 50/2008; 2) the neutrality of the tax between imported second-hand vehicles and similar second-hand vehicles which were registered on national territory before the entry into force of GEO No. 50/2008.[281]

With regard to the first condition, the Court ascertains that

> a system such as that established by GEO No. 50/2008 which takes account, in calculating the tax on registration, of the depreciation of the motor vehicle by using fixed, detailed and statistically based scales relating to the age and actual annual average kilometrage of the vehicle (…), ensures that when that tax is charged on imported second-hand vehicles which were previously registered on national territory and were subjected on that registration to the tax laid down by GEO No. 50/2008[282]

When analysing the second condition, the Court states that 'Art. 110 TFEU requires each Member State to select and arrange taxes on motor vehicles in such a way that they do not have the effect of promoting sales of domestic second-hand vehicles and so discouraging imports of similar second-hand vehicles'.[283] Having observed that statistics show 'a very considerable fall in registrations of imported vehicles in Romania since the entry into force of GEO No. 50/2008',[284] the Court doubts the submission of the Government that the main purpose of this tax is the protection of the environment. It states that

> it is clear from the documents before the Court that the legislation has the effect that imported second-hand vehicles of considerable age and wear are, despite the application of a large reduction in tax to take account of depreciation, […] the GEO No. 50/2008 has the effect of discouraging the import and placing in circulation in Romania of second-hand vehicles purchased in other Member States[285]

The Court decided that Art. 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax levied on motor vehicles on their first registration in that Member State if that tax is arranged in such a way that it discourages the placing in circulation in that

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[280] The AG invites the national court to an extremely complex test: 'make a theoretical projection forwards over time, and determine whether in that light there is discriminatory taxation of second-hand vehicles from other Member States ', because 'it is necessary to compare a vehicle taxed when new in Romania after the introduction of the tax and subsequently sold second-hand in Romania with a vehicle of the same age and type bought second-hand in another Member State and introduced into Romania, assuming both transactions to take place at the same (future) time '.

[281] C-402/2009 *Tatu v Statul român*, para. 38.

[282] *Id*, para. 47.

[283] *Id*, para. 56.

[284] *Id*, para. 57.

[285] *Id*, para. 58.

Member State of second-hand vehicles purchased in other Member States without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market.

One of the conclusions that can be drawn from the decision of the Court and the Opinion of the AG is that it is almost impossible to proceed to an efficient analysis in order to qualify a certain measure as being discriminatory towards the products originated in other Member States when the national law uses in its provisions purely technical criteria to levy a certain tax, without mentioning the nationality of the car owner, the one of the buyer, or the country where the car is registered. Under these conditions, it is difficult to analyse the facts of this case in relation with the objectives pursued by Art. 110 TFEU. The conclusion of the Court reveals itself as being more of an intuitive one, which takes into account an *a posteriori* situation, with regard to the immediate effects upon the second-hand vehicles market in Romania.

Nisipeanu Judgment[286]: the unlearned lesson of the Government

In *Nisipeanu*, the Court clarified two important matters with regard to the first registration tax in Romania. While the operative part of the decision was identical to the one in *Tatu*, the Court made it clear that its judgment applies also to all the amended versions of GEO No. 50/2008, entered into force until 31st of December 2010,[287] unlike the decision in *Tatu*, which only applied for the taxes collected under the original form of GEO No. 50/2008. The second clarification envisages the retroactive effect of the judgment, which came as a response to a request made by the Government to limit the effects of the judgment only for the future. The Court reminded that the interpretation of a provision of EU law pursuant to Art. 267 TFEU clarifies the meaning and the field of application of this provision from the moment it entered into force.[288]

It is only exceptionally that the Court may, in application of the general principle of legal certainty, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted.[289] The Court further established that the facts of the case do not meet the criteria for the exceptional situation, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. The Court found that the arguments of the Government are not convincing with regard to the serious difficulties it will face due to the retroactive effect, namely that it received 40.000 requests for reimbursement and that Romania deals with an economic crisis.[290] Hence, the decision in *Nisipeanu* affects also the payments of the tax which took place before the Court gave its decision.

Another point to be made about the decision in *Nisipeanu* is that the Court referred to the weak arguments brought by the Government. The Court specifies that, even if the hearing in *Nisipeanu* took place after the one in *Tatu*, the Romanian Government did not argue that there is a significant difference, for the purpose of compliance with Art. 110 TFEU, between the tax regulated by the amended versions of GEO No. 50/2008 in comparison with the original version of the provision.[291] Finally, it should also be noted that the Court decided to judge the *Nisipeanu* case without the conclusions of the Advocate General, after hearing AG Sharpston.

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[286] Judgment of the Court of 7 July 2011, *Iulian Nisipeanu v Direcția Generală a Finanțelor Publice Gorj*, Case C-263/10.

[287] GEO No. 50/2008 was modified repeteadly by GEO No 208/2008, GEO No 218/2008, GEO No 7/2009 and, respectively, GEO No. 117/2009

[288] Judgment of the Court in *Nisipeanu*, para. 32.

[289] Judgment of the Court in C-2/09 *Kalinchev*, from 3 June 2010, para. 50.

[290] Judgment of the Court in *Nisipeanu*, para. 34, 35.

[291] *Id.*, para. 27.

After the *Tatu* and *Nisipeanu* judgments, the reaction of the national courts almost became unitary. "Almost", in the sense that all the courts with the exception of the Constitutional Court delivered judgments in accordance with the recent CJEU judgments. The next sections examine the reaction of the courts, namely the ordinary courts, the High Court of Justice and the Constitutional Court.

Further preliminary references addressed by the Romanian courts on the conformity of the pollution tax with EU law

After the reference for a preliminary ruling from the Romanian lower court to the CJEU in the *Tatu* case, a string of numerous other similar preliminary references were addressed by Romanian courts,[292] on similar facts and raising questions identical to the ones addressed by the Romanian lower court in the *Tatu* case.[293] When similar legal questions have arisen under similar factual circumstances before national courts of the Member States, the latter have shown awareness of the Court's overload problem and adopted a self-restraint position. Therefore in cases where a national court has already submitted to the CJEU a question on the same matter, it was noticed that it is quite common for other national courts not to submit a new question, but merely to postpone the judicial review of the case while waiting for the CJEU to render its preliminary ruling.[294]

As an example of this best practice, the *Metock* case of the Irish High Court and the *Romkes* case of a Dutch lower court can be mentioned here. In the *Metock* case, several proceedings raising the same legal problem were started before the Irish High Court. The Irish court did not refer a preliminary reference to the CJEU for each of these proceedings, despite the request of the applicants, but it distilled three questions from the totality of the cases and addressed a single order for reference.[295] This is a situation where the need for the CJEU interpretation of EU law arose in different cases however all before the same court. In the Romanian pollution tax saga, numerous cases were started before different courts from the moment of the entry into force of the GEO No. 50/2008 in late 2008 until the first preliminary reference was sent to the CJEU. The example of the Dutch courts in regard to the legal problem occurred in the *Romkes* might provide a more relevant example for the Romanian courts as it concerns the same problem as in the Romanian case: multiple cases started before different national courts at different moments in time.

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[292] The majority of these preliminary references questions were rejected by way of Ordinance: see Case C-178/10, Ministerul Finanţelor şi Economiei, D.G.F.P. Mureş, Administraţia Finanţelor Publice Târgu-Mureş/S.C. Darmi S.R.L.; C-136/10, Daniel Ionel Obreja/Ministerul Economiei şi Finanţelor, Direcţia Generală a Finanţelor Publice a judeţului Mureş; C-335/10, Claudia Norica Vijulan/Administraţia Finanţelor Publice a Municipiului Târgu-Jiu, Administraţia Fondului pentru Mediu; C-336/10, Administraţia Finanţelor Publice a Municipiului Târgu-Jiu, Administraţia Fondului pentru Mediu/Victor Vinel Ijac; C-377/10, Adrian Băilă/Administraţia Finanţelor Publice a Municipiului Craiova, Administraţia Fondului Pentru Mediu; C-438/10, Lilia Druţu/D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-439/10, S.C. DRA SPEED S.R.L./D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-440/10, S.C. SEMTEX S.R.L./D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-441/10, Ioan Anghel/D.G.F.P. Bacău, Administraţia Finanţelor Publice Bacău; C-573/10, Sergiu Alexandru Micşa/Administraţia Finanţelor Publice Lugoj, D.G.F.P. Timiş, Administraţia Fondului pentru Mediu; C-29/11, Aurora Ileana Şfichi/D.G.F.P. Suceava – Administraţia Finanţelor Publice Suceava, Administraţia Fondului pentru Mediu; C-30/11, Adrian Ilaş/D.G.F.P. Suceava – Administraţia Finanţelor Publice Suceava, Administraţia Fondului pentru Mediu. Two preliminary reference questions were admitted by the CJEU, both by lower courts, Case 402/09 Tatu, judgment of 7 April 2011 and Case 263/10 Nisipeanu judgment of 07 July 2011.

[293] The last two preliminary references were addressed by Romanian court on 17 January 2011. The Tatu judgment was delivered on 7 April 2011, while the Nisipeanu judgment in June 2011.

[294] See Broberg, p.286.

[295] Case C-127/08.

In the *Romkes* case,[296] a lower Dutch court made a preliminary reference in regard to Dutch conservation measures adopted under the EU common fisheries policy which were enforced in Netherlands under criminal law. At the same time several other similar cases were pending before other Dutch courts. Instead of referring preliminary questions to the CJEU in each of these cases, the Dutch courts considered that since the facts and the legal question at issues before them were similar to the ones in *Romkes*, already before the CJEU, they decided not to make subsequent requests for preliminary rulings and await for the CJEU judgment before continuing the proceedings.

Repeating identical questions in numerous preliminary references sent by national courts to the CJEU should be avoided, as it is an unnecessary waste of time and money for the parties and it further increases the backlog of the already overloaded CJEU. However, in certain national jurisdictions, legal proceedings cannot be suspended based on preliminary references addressed by other national courts. The national court either decides to refer itself preliminary questions to the CJEU or applies EU law as it sees fit. This has been the case of the Italian legal system in the 90s[297] and now also of the Romanian legal system. However, it has to be noticed that the Italian Supreme Court has changed its previous position and in a 2006 ruling it has reached the opposite conclusion in a competition law case.[298]

The other preliminary references addressed by Romanian courts to the CJEU on the legality of the pollution tax as provided by GEO No. 50/2008 and its amended version in light of Art. 110 TFEU were either decided by the CJEU by way of an Order or rejected as manifestly unfounded. The preliminary references where the Romanian courts clearly defined the factual and legislative context of the referred questions and set out the precise reasons why they were unsure as to the interpretation of EU law[299] were decided by the Court under Art. 104(3) first paragraph of the Court's Rules of Procedures delivering an Order on the next day after the *Tatu*, respectively the *Nisipeanu* judgments, depending on whether the submitted cases dealt with the pollution tax as provided by the GEO No. 50/2008 in its initial or amended form.

In other three preliminary reference rulings, the CJEU held that the Romanian court should have explained more clearly the legal problem at issue and provide more factual description, thus the Court has rejected them as inadmissible.[300] In the *Baila* case,[301] not only that the national court did not provide sufficient relevant information on the factual and legal background of the case before the national court, but the motor vehicle subject to the discriminatory taxation came from outside the EU, namely Kuweit. The Court, considering that the requested interpretation of Union law had nothing to do with the facts or the subject-matter of the case in the main proceedings, and since the good at issue came from a non-EU country, it could not held the case as falling under the scope of EU law. It therefore declared the reference for a preliminary ruling as manifestly inadmissible.[302] In this specific case, it seems the Romanian lower court formulated the

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[296] C-46/86.

[297] See Ruling of 14 September 1999 by the Corte di cassazione Sezione II civile, No 9813, Caribo Ministero delle Finanze, Il massimario del Foro italiano, 1999, col 1030. See also the European Commission's 2000 survey of the application of EU law by national courts, [2001] OJ C30/192 at p.195-6.

[298] Ruling of 21 June 2006 INIS v Maragon, No. 14411.

[299] Placanica, para. 34; Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraphs 45 to 47; and Case C-506/04 *Wilson* [2006] ECR I-0000, paragraphs 38 and 39.

[300] See C 439/10, C 440/10, C 441/10.

[301] C-377/10.

[302] See the CJEU Order of published in the OJ C 63/17 of 26.02.2011.

preliminary reference as if the CJEU was a domestic appellate court without taking into consideration the necessity to establish the scope of EU law which is characteristic for the EU legal order.

The reaction of the judicial system to the recent CJEU case-law on the pollution tax: starting to talk the same language?

The decision of the Romanian High Court of Cassation and Justice regarding the inconsistent jurisprudence on the returning of the pollution tax

In a Decision of 14th of November 2011[303], four months after the CJEU delivered its last Judgment in the Romanian pollution tax saga, the Romanian High Court of Cassation and Justice held that national courts are not bound by the national procedural fiscal provision[304] whereby a claim for reimbursement of the pollution tax introduced before a domestic court has to previously follow certain administrative steps, which in their absence leads to rejection of the claim. In an effort to give satisfaction to the individuals' claims based on their rights deriving from EU law, the High Court recognised the possibility of reviewing directly the substantial claim, without having to verify first if the individual previously contested the act which determines the amount to be paid before administrative bodies, as requires under the domestic fiscal procedure. Furthermore, the High Court held that claims grounded on the domestic legislation establishing the pollution tax can be admitted by national courts even if the petitioner did not pay the established amount of the tax. Therefore, the High Court of Cassation and Justice went beyond the requirements stemming from the EU principles of equivalence[305] and effectiveness of EU law[306], and created thus a more favourable position for the right derived from EU law than those derived from purely national law.[307] In the following paragraphs the specific circumstances leading to the High Court Judgment and the legal reasoning employed by the High Court will be briefly summarised.

In spite of the CJEU establishing in two different judgments that the pollution tax for registration of the second hand vehicles is contrary to Art. 110 TFEU, the tax payers found, in practice, to be very difficult to have their tax reimbursed. The Romanian Government was very reluctant in enforcing the decision with immediate and general effect, so every person who previously paid the tax had to go in court against the Administrative Agency which was the beneficiary of the collected money.

In these circumstances, another problem arose: the administrative procedural provisions governing the proceedings in these cases[308] imposed a preliminary procedure that had to be followed by the payers prior to court action. According to the preliminary procedure, the tax payer had to challenge the individual administrative act which established the payable amount of tax within 30 days after the Administrative Authority issued the act. Many tax payers did not challenge the act in due course, thus there was an inconsistent jurisprudence in national courts in regard to admitting or rejecting the actions by which the tax payers demanded the reimbursement.

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[303] Decision no. 24/14.11.2011, published in the Official Journal no. 1/03.01.2012

[304] See in Art. 7 of the OUG 50/2008.

[305] Case C- 326/96 Levez v Jennings [1998] ECR I-7835.

[306] Case C-432/05 Unibet [2007] ECR I-2271.

[307] The direct effect of the the rights derived from Art. 110 TFEU, as established by the CJEU in C-57/65 Lütticke GmbH v. Hauptzollamt Sarrelouis has not been contested by the national courts, and it has been recognised also by the High Court of Cassation and Justice in the present Decision.

[308] Art. 7 of Law no. 554/2004 and Art. 10 of GEO 50/2008.

Article 329 of the CCP (Code of Civil Procedure) regulates a type of extraordinary appeal ('recurs în interesul legii'). The provisions stipulate that in order to ensure uniform interpretation and application of the law, the General Prosecutor, *ex officio* or at the request of the Minister of Justice, can request the High Court of Cassation and Justice (HCCJ) to deliver a decision concerning a legal issue which had received conflicting solutions from the lower courts. Following this procedure, the General Prosecutor asked the HCCJ to deliver a judgment on the inconsistent jurisprudence regarding the admissibility of the actions by which the pollution tax payers demanded the reimbursement in those situations when the preliminary administrative procedure was not followed.

In line with Government's attitude, the General Prosecutor completely ignored the *Tatu* and *Nisipeanu* judgments of the CJEU and proposed to the HCCJ to establish that all the requests for reimbursement, where the preliminary administrative procedure was not followed, should be dismissed.

Fortunately for the rule of law, the HCCJ's reasoning in this case[309] began with presenting the arguments delivered by the CJEU in the *Tatu* and *Nisipeanu* cases. Also, the HCCJ mentioned the judgment of the CJEU in case C-106/77 [Simmenthal II], according to which

> [a] national court which is called upon, within the limits of its jurisdiction, to apply provisions of community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

Further on, the HCCJ also took notice of the jurisprudence set out by the CJEU in the Case C-199/82 [Amministrazione delle Finanze dello Stato], stating that '[T]he general principle is that the Member States must reimburse unlawful fees, the CJEU insisting on the idea that Member States should provide a specific remedy under national legal systems as a remedy for European Law.'

The Court also reminded that 'the principle of appropriate and effective national remedies was developed and explained especially by the CJEU in its judgment in Cases C-397/98 and C-410/98 [Metallgesellshaft Ltd. and Hoechst UK Ltd], where the Court of Luxembourg pointed out that reimbursement of taxes collected illegally cannot be conditioned by a prior challenging of the national regulations in force when the taxes were paid.'

Therefore, the High Court found that it is not required for tax payers to challenge the administrative act in front of the Fiscal Authority prior to the action submitted before the administrative courts, as argued by the General Prosecutor. The consequences of the judgment are of particular importance for the national subsequent jurisprudence, because the solution provided by the HCCJ is compulsory for the lower courts when judging on the same issue. This time, the way HCCJ reasoned and adjudicated the right principles when applying EU law was very much appreciated by the doctrine.

The impact of the Tatu judgment on the case law of the Constitutional Court

In a previous section, two stages of the constitutionality exceptions regarding the pollution tax were analysed: the stage of contesting the tax solely from the point of view of the Constitution and the stage of contesting the tax also from the EU law perspective. Taking into account the premises of the first two stages in the CCR's case-law with regard to the pollution/first

[309] Decision no. 24/14.11.2011, published in the Official Journal No. 1/03.01.2012.

registration tax, the content of the decisions in the third stage, or the post-*Tatu* stage, are not a surprise. However, they were considered disappointing by the legal literature, as the CCR maintained its arguments from the second stage.[310] The only shift in the CCRs approach, which could be attributed to the CJEU judgment in the *Tatu* case, is that it admitted for the first time, formally, the possibility to send questions for a preliminary ruling to the CJEU, a possibility which, nevertheless, is ineffective due to the wording of the test imposed for the admissibility of such a procedure.[311]

In Decision No. 668/2011[312], the first post-*Tatu* decision on the constitutionality of the pollution tax, the CCR was asked again to decide upon the constitutionality of GEO No. 50/2008, this time also with regard to the Decision of the CJEU in *Tatu*. The CCR observed in its judgment, indeed, that the CJEU had decided that Art. 110 TFEU precludes a Member State to levy a pollution tax such as the one enshrined in GEO No. 50/2008. It further noted that 'by answering to the question for a preliminary ruling, the Court of Justice of the European Union interpreted the provisions of Art. 110 TFEU and not the compatibility of GEO No. 50/2008 with the Art. 110 TFEU. The Court of Justice is not competent to give a decision which envisages the validity or non-validity of a provision of national law'.

After clarifying this issue, the CCR makes no other reference to the content of the *Tatu* judgment. Instead, it re-analyses its own competences, stating that 'the constitutional court is not a legislator and is not an ordinary court with the competence to interpret and apply EU law in the pending cases which engage the subjective rights of the citizens', denying itself again such a competence.

Except that this time, consistent with the contradictory characteristic of its decisions in the field of EU law, the CCR adds that 'without reconsidering its previous case-law, the Court observes that the use of a provision of EU law in the constitutionality review process, as an interposed provision to the reference provision, implies, on the basis of Art. 148(2) and Art. 148(4) of the Romanian Constitution, a cumulative conditionality: on one hand, this provision must be sufficiently clear, precise and unequivocal by itself or its meaning must have been interpreted clearly, precisely and unequivocally by the Court of Justice and, on the other hand, the provision must be circumscribed to a certain level of constitutional relevance, so that its normative content backs up the possible breach by the national law of the Constitution – the only direct norm of reference in the framework of the constitutional review'.

The first observation is that the CCR held that the provisions of EU law are situated in a normative pyramid between the national law and the Constitution, referring to them as 'interposed provisions'. Hence, the CCR does not consider that it should apply EU law in its decisions, even though Art. 148(2) opens the gate to do so by conferring constitutional force to the primacy of EU law principle. The court is nevertheless considering the possibility to apply EU law in its constitutionality review process, but having regard to the fact that the Constitution is situated above EU law. The second observation is the originality of the test established by the CCR, in that the Constitutional Court requires a provision of EU law to comply with a test very

[310] See G. Zanfir, *Curtea Constituţională a României şi procedura întrebărilor preliminare. De ce nu? (The Constitutional Court of Romania and the procedure of the questions for a preliminary ruling. Why not?)*, Revista Română de Drept European (Romanian Journal of European Law), No. 5/2011, at 82 – 97.

[311] *Ibid.*

[312] Constitutional Court of Romania, Decision No. 668/2011, published in the Official Journal of Romania, No. 487 of 8 July 2011.

similar to the direct effect test established in *van Gend*[313] (without mentioning the direct effect or the reasons why it requires the norm to have direct effect), and also for the EU law provision to back up the possible breach of the Constitution of a national norm, otherwise it will not use it as an 'interposed provision' in the control of constitutionality. This last condition is the most problematic one in practice. Besides the fact that the idea of the normative content of a provision "sustaining" the breach of the Constitution by another provision is a challenge for the legal thought, it is also difficult to decide *a priori* whether this is the case, in order to engage or not an 'interposed provision' in the constitutional review process. The third observation is that the EU law provision which could be used as 'interposed provision' must be 'circumscribed to a certain level of constitutional relevance' which could mean that its object must be similar to the object of one of the constitutional provisions. The court did not develop or further explained until now what it means by the conditions enunciated in this test.

The CCR further established that 'from the point of view of the cumulative conditionality enunciated, it is for the constitutional court to decide to apply in the constitutionality review process the judgments of the Court of Justice of the European Union or to refer questions for a preliminary ruling itself in order to clarify the content of the European provision'. In other words, the CCR admitted that it could be possible to refer questions for a preliminary ruling, depending on its own will and on the compliance of the EU law provisions and also, apparently, the judgments of the CJEU, with the test it created.

Finally, the CCR made a point that 'such an attitude is related with the cooperation between the constitutional court and the European Court, and as well with the judicial dialogue between the two of them, without raising aspects related to establishing certain hierarchies between the two Courts'. It is a paradox for the CCR to insert the concept of the 'judicial dialogue' between the two Courts in its judgment, after it constantly refused to engage in a dialogue with the CJEU, especially in the Data Retention Decision analysed in the section - The Romanian Constitutional Court's approach towards the European constitutional dialogue – of this paper.

The CCR reserved the last phrase of its decision to very briefly apply the test it created, in order to find out that it is not supposed to take into account the decision in *Tatu*:

> Even though the meaning of the European provision was clarified by the CJEU, the requirements resulted from its judgment have no constitutional relevance, being related more to the obligation of the legislator to enact provisions in accordance with the decisions of the CJEU, otherwise, eventually, Art. 148(2) could be applied.

Hence, the constitutional court decided that the provisions of GEO No. 50/2008 are constitutional, even after the CJEU gave its judgment in *Tatu*. By doing so, it maintained in the legal order a provision with regard to which the CJEU decided that must be precluded by the content of Art. 110 TFEU. One question arises: does this mean that the principle of the primacy of EU law as it is enshrined in Art. 148 (2) of the Constitution is breached? The answer is more likely in the affirmative.

The follow-up saga of the payment of interest on the pollution tax to be repaid

After the CJEU held in the *Tatu* case that

> Art. 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax levied on motor vehicles on their first registration in that Member State if that tax is arranged in such a way that it discourages the placing in circulation in that Member State of

[313] Case 26/62 *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Judgment of the Court of 5 February 1963.

second-hand vehicles purchased in other Member States without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market.[314]

a string of claims was brought by individuals, asking the administrative courts the reimbursement of the paid pollution tax and also the payment of interest on the pollution tax to be repaid from the day of payment of the tax. The issue of the date from when should the payment of interest for the levied pollution tax be calculate had created another string of divergent national case law. Thus the issue of giving satisfaction to the damage caused by depriving the taxpayer of an amount of money between the date the pollution tax was levy and the actual reimbursement date received different solution from the administrative courts. In that certain domestic courts require tax authorities to pay the interest on the basis of the general provisions governing the legal interest in civil matters from the date the pollution tax was levied until the date of actual reimbursement.[315] Other courts adopted a more limitative interpretation, requiring tax authorities to pay the interest based on the special fiscal procedural rules[316], whereby the interests is calculated as a tax interest from the date of the expiration of a 45 days period within which tax payers can submit requests of reimbursement of the pollution tax until the actual reimbursement of the pollution tax.

Both of these interpretations seem to be fundamentally flawed. The first solution is erred under national law, because of legal provisions that govern the payment of interest on taxes levied under fiscal provisions which are to be reimbursed, are governed by the same law governing the reimbursement of the tax. In the specific circumstances the reimbursement of the pollution tax is governed by fiscal rules and thus the specific fiscal provisions on payment of interests to the pollution tax to be reimbursed have priority to the general rules on payment of civil taxes. The second solution, which recognises the application with priority of the specific fiscal procedural rules, although correct under national law, does not ensure an effective protection of the EU rights deriving from Art. 110 TFEU to the individual tax payers. According to the principle of effectiveness of EU law, as interpreted by the CJEU,[317] individuals have the right to receive compensation not only for actual loss but also for loss of profit plus interest individuals as a result of breaches of European Union law. The Court added that, although it was for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, referring to the rate and the method of calculation of the interest, the national rules should not deprive the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of the tax.[318]

Therefore, individuals faced two different solutions: one string of national courts gave precedence to EU law but justified their judgment on an erred application of national law, granting in addition to the reimbursement of the pollution tax levied by administrative authorities contrary to Art. 110 TFEU, also interest from the date when the tax was levied; another string of national courts gave precedence to national law, but might have committed an error of EU law, by recognising a damage caused to the taxpayer only after the expiry date of 45 days subsequent to their request of reimbursement of the pollution tax.

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[314] Case C-402/09 [2011] ECR I-0000.

[315] See for example, the Court of Appeal of Cluj, according to C. F. Costas, Cauze fiscale româneşti pendinte pe rolul Curţii de Justiţie a Uniunii Europene, Revista Romana de Drept al Afacerilor, Issue 9 of 30 November 2012.

[316] Art. 117 of the Fiscal Procedure Code and Arts. 70 and 124 of the OG No. 92/2003.

[317] Case C-591/10 *Littlewoods Retail and Others* [2012] ECR I-0000; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107.

[318] Case C-591/10 *Littlewoods Retail and Others* [2012] ECR I-0000, para. 8.

Four months after the CJEU delivered its preliminary ruling in the *Tatu* case, the same Tribunal that referred the *Tatu* case to the CJEU followed with another reference for a preliminary ruling.[319] The Romanian first instance court sought to find an answer to the question whether the national legislation which provides for the payment of interest on tax to be repaid from the day following the date of the claim for repayment and not from the date of payment of the tax is compatible with European Union law. In particular, the referring court was asking the CJEU to clarify whether the national legislation is compatible with the principles of equivalence, effectiveness and proportionality and with the right to property guaranteed by Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), read in conjunction with Article 6 TEU. It has to be noticed that the referring court argued that the national jurisprudence is clear and unambiguous on the point of applying the fiscal procedural provisions to the payment of interest on the sum paid as pollution tax. (!)

The case is still pending before the CJEU, however AG Whatelet delivered its judgment which, on the same note as the observations submitted by the European Commission held that

> In my opinion, the right to interest representing an adequate indemnity for the loss occasioned through the undue payment of tax contrary to European Union law ranks equally, (18) in consequence of the *Littlewoods Retail and Others* judgment, with the right to repayment of the tax and is therefore a subjective right derived from the legal order of the European Union. (19) In my opinion, that subjective right necessarily entails the payment of interest from the date of payment of the tax. It is obvious that it is from that date, and not from any other subsequent date, that the taxpayer suffers a loss arising from the unavailability of the sums in question[320]

AG Wathelet has rightly pointed out that, although there are no EU law provisions concerning the repayment of national taxes incompatible with European Union law, 'the right to obtain repayment of such taxes is the consequence and complement of the rights conferred on individuals by the provisions of European Union law as interpreted by the Court. The Member State is therefore required to repay charges levied in breach of European Union law, the right to repayment being a subjective right derived from the legal order of the European Union.' It remains to be seen how the CJEU will interepret the preliminary questions addressed by the Romanian first instance court. What is though important to mention before passing to the next section is that, the Tribunal of Sibiu is not aware of the conflicting national case-law on the issue it has referred to the CJEU and has made a description of the national jurisprudence which is erred in fact.

Conclusion

The pollution tax affected tens of thousands of Romanians, as they had to pay at least an extra third of the value of second-hand cars when they wanted to register them. They sought to challenge the tax in front of the national courts and they soon realized they can do so by invoking the provisions from the TFEU with regard to non-discriminatory internal taxation. One could say that this situation forced the judges to engage in a judicial dialogue with the CJEU. However, the first steps were extremely hesitating.

As the *Tatu* case shows, the national court does not seem to be aware of the importance of correct formulation of the referred preliminary questions and of the essence of the relationship between national and EU courts, i.e. they are equals in the judicial dialogue with the consequence that the

[319] Case C‑565/11 Mariana Irimie v Administraţia Finanţelor Publice Sibiu and Administraţia Fondului pentru Mediu, pending. See also the Opinion of the AG WATHELET delivered on 13 December 2012.

[320] See Case C‑565/11 Mariana Irimie v Administraţia Finanţelor Publice Sibiu and Administraţia Fondului pentru Mediu, Opinion of the AG Wathelet delivered on 13th of December 2012, para. 29

CJEU is not an appellate court which can interpret and invalidate national law. The national court in its formulation of the question should ensure that the CJEU can make an abstract interpretation of the relevant EU rule which will benefit the courts of all Member States that are or will be confronted with a similar legal problem. The specificities of the EU legal system are not though easy to grasp and particularly more for courts which have recently entered the mechanism of judicial dialogue. As previously happened with courts of other Member States in their initial stage of accession to the EU, it takes time until the CJEU specific parlance is fully understood and implemented by national courts.[321] However, the *Jipa* preliminary reference judgment seemed to have shown that the Romanian courts are greatly familiar with both the substantive and procedural complexities of EU law, when a Romanian lower court engaged in direct inter-courts communication with the CJEU just three weeks after Romania's accession to the EU. That case proved to be an exception, as the pollution tax saga shows.

However, in comparison to the approach of the Constitutional Court towards judicial dialogue on EU law issues, the attitude of the national ordinary courts raises fewer concerns. The Constitutional Court insists in its reluctance towards EU law generally and towards the CJEU and the judicial dialogue particularly, managing in the meantime to disregard a clear decision of the CJEU. Despite of this approach, at least an apparent step forward was taken by the CCR in Decision No. 668/2011, by admitting the possibility to send preliminary ruling questions at some point in the future. The step is apparent, or formal, because in the same judgment the Court declares that the Constitution is above the EU law and while it creates an original test for the situations which will allow the CCR to use EU law in the constitutional review process and even send questions for a preliminary ruling. If the step is more than apparent, that should be proven in the future. In contrast with the Constitutional Court, the High Court of Cassation and Justice has fully endorsed the *Simmenthal* principle, asking Romanian judges, in their quality of Union judges to consider when reviewing national law whether a conflict exists between national law, including constitutional law, and EU law. Furthermore, in the field of the pollution tax, just as in the *Jipa* saga, the High Court has intervened in an attempt to unify the national jurisprudence on the interpretation and application of EU law based on a thorough assessment of the CJEU jurisprudence and the EU fundamental principles. The fact that its judgments in the extraordinary appeal for the benefit of the law (*recurs în interesul legii*) are binding on all national courts, might create conflicts with the Constitutional Court which adopts an opposite position on the relation EU law and national law, and whose judgments on the constitutionality of legislative provisions are also binding on all national courts.

As a final conclusion on the pollution tax saga, it can be ascertained that, from the tax payer's point of view, it is enough to have uniform judicial practice to fill in the legislative gaps on protection of rights of individuals derived from EU law, as long as the European judicial dialogue is effective.

Consumer protection: How to use the reference for a preliminary ruling procedure in an attempt to overturn the national jurisprudence

During the global economic crisis, one of the most affected societal areas was the relationship between banks and consumers. With the consumers' decreasing ability to pay their debts and easing of confidence in financial institutions, consumers have become more cautious in relation to them, seeing the Law as an ally to dismantle the *status quo*.

[321] Refer to Bobek chapter in Lazowski where he cites the numerous changes in interpretation by the CJEU.

Disillusioned by the new economic situation, the banks' customers have found in the domestic and EU legislation means able to defend their rights and contractual position. Two to three years ago, due to the emerging wealth, bank customers were not worried about engaging in contracting fast loans, even if they were based on contracts drafted by banks, including standard clauses that completely ignored consumers' rights. Therefore, Romanian legislation which transposed relevant European legislation on consumer protection[322] was used in an extraordinarily high number of cases brought before national courts,[323] quickly becoming a shield used by consumers against banks. In this context, resorting to the interpretation of European Union law *via* the reference for a preliminary ruling procedure and the consequent staying of domestic proceedings proved to be overwhelmingly in the interest of one of the 'belligerent' parties.

The effect was a new wave of preliminary references following after the 'pollution tax wave', this time concerning the national transposition laws of EU Directives in the field of consumer protection. Since 2010, six preliminary references coming from Romania were registered at the CJEU under the 'consumer protection legislation' category, a number that is already about 15% of the total number of cases coming from Romania.

In the following chapter we will try to reveal the most important aspects that determined and shaped the European judicial dialogue in this matter, not forgetting to mention from the start that, unlike the 'pollution tax saga', in respect of the new wave, the dialogue is still in its infancy, the CJEU has so far ruled only in the first request.[324]

Setting the scene

It is axiomatic that consumers do not normally litigate and are frequently unaware of their legal rights.[325] This statement could also be applied to Romanian consumers about two years ago. This state of facts was 'disturbed' by two major factors: the first one can be identified in the above mentioned financial crisis that stroke the European markets, the other concurring with the implementation of the Directive 2008/48/EC[326] in the national law after the Government Emergency Order (GEO) no. 50/2010[327] was adopted by the Romanian Government.

The new legal provisions, among other effects, created a tide of actions from all the commercial Banks which were obliged to adapt the consumer credit contracts in several aspects to comply with the new legislation. Meanwhile, while all the consumers were bombarded with additional acts proposed by their creditor Banks to amend the initial contracts, many of those consumers started to question the good faith of their contractual partners and to scrutinize several clauses of the contracts. Even if the Romanian consumers were not accustomed to seek legal assistance when contracting credits, this was the moment when a major part of them knocked on lawyers

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[322] Directive 93/13/EEC - transposed by Law no. 193/2000 and Directive 2008/48/EC - implemented by Goverment Emergency Ordinance (GEO) no. 50/2010.

[323] There is no consolidated statistics, but the number of processes recorded from 2010 before the Romanian courts that have as main object the unfair terms in credit agreements is more than tens of thousands.

[324] Judgment of the Court (Fourth Chamber) on 12 July 2012 in the Case C-602/10. A second one, Case C‑47/11 was dismissed on the 14th of September 2012 after the referring Court withdrew its interest in continuing the procedure, in the light of the judgment of the Case C-602/10.

[325] Elizabeth Macdonald, *The Emperor's Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations,* The Cambridge Law Journal, Vol. 58, 1999, p. 413.

[326] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66.

[327] Published in the Official Journal, Part I, no. 389, 11.06.2010.

doors and asked for legal opinion regarding not only the new proposals from the financial institutions, but also the already signed credit contracts.

Doing so, they found out how misleading the legal and financial terms can be, posing real problems in interpretation even for senior specialists. For example, at one clause you are told that the loan interest is set to a fix percentage and then, several clauses later, there is another clause that entitles the Bank to modify the fixed percentage, with the only obligation to inform the consumer about the new percentage of the interest, without giving any reason for this modification of the price of the loan. Some Banks had even more misleading tactics, splitting the real percentage of the loan interest so they can advertise offers with a very low interest, while inserting another clause which introduced the obligation for the consumer to pay a certain amount of money as a commission under different terms (credit administration charge or risk charge).

Under those circumstances, consumers proceeded by lodging complaints before courts in order to nullify several clauses in their contracts, like the ones exemplified above. Also, in many cases, before going to Court, the consumers addressed those issues to the National Consumer Protection Authority (ANPC), which imposed sanctions against the Banks, most of them against SC Volksbank România SA. The mentioned Bank contested the administrative sanctions in courts, engaging in a double judicial battle, against the consumers on the one hand, and against the National Consumer Protection Authority on the other.

Preliminary references regarding the interpretation of Directive 2008/48/EC

As said before, the catalyst that led to large scale judicial action in Romania between consumers and financial institutions was the national legislation act through which the Government initially transposed the Directive 2008/48/EC.[328] The transposition act enshrined some important differences in comparison with the Directive. The most important one was that the national legislation act modified the temporal scope of the Directive, stating that its provisions also apply to agreements existing on the date of its entry into force (Article 95 of GEO 50/2010), while Art. 30 of the Directive reads as follows: '*This Directive shall not apply to credit agreements existing on the date when the national implementing measures enter into force*. '

Secondly, the national legislation act extended the material scope of the Directive, being intended to apply to agreements granting consumers credit secured by mortgages or by other rights in immovable property (Article 2 of GEO 50/2010), while Art. 2 of Directive 2008/48, headed 'Scope', provides in paragraph 2:

> *This Directive shall not apply to the following: (a) credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property; (b) credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building*; […]

Thousands of consumers referred their credit contracts to the National Consumer Protection Authority, which found, when carrying out checks in respect of SC Volksbank România SA, that several clauses of their credit contracts infringed GEO 50/2010. Administrative sanctions against the Bank were taken by the Authority, by which it was in particular ordered to pay a fine and ancillary penalties. Volksbank challenged the sanctions before national courts all over the country

[328] O.U.G. (Government Emergency Order) no. 50/2010, later approved by the Parliament when enacting the Law no. 288/2010, published in the Official Journal, Part I, no. 888, 30.12.2010.

(it must be said that the Authority acted at local level, submitting thus reports before every one of the 42 Counties of the State).

Before the Courts, Volksbank maintained that the provision of GEO 50/2010 should not be applied to agreements concluded before the entry into force of the national implementing provision. The Bank contested several provision of the legislative Act and referred to the Romanian Constitutional Court (CCR) for a constitutional review. Six requests for constitutionality review of the GEO 50/2010 provisions were registered before the Constitutional Court.[329] CCR dismissed all the claims of unconstitutionality raised by Volksbank, however it must be mentioned that, during the constitutional review procedure, the Court did not address the relation between the national legislation and Directive 2008/48/EC or any other European Union Law provision. That is quite surprising given that the applicant raised questions regarding the implementation of the Directive in all cases brought before ordinary courts in the main proceedings, also requesting for the use of the procedure provided by Art. 267 TFEU.

That being said, one first level Court considered that a decision from the CJEU is necessary to enable it to give a judgment, requesting the Luxembourg Court to give a ruling thereon. In Case C‑602/10[330], the reference for a preliminary ruling came from the Court of Călăraşi, and was received at the Court on 21st of December 2010. This reference for a preliminary ruling concerns the interpretation of Arts. 22, 24 and 30 of Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC and of Arts. 56 TFEU, 58 TFEU and 63 TFEU.

The Court of Călăraşi decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. To what extent must Art. 30(1) of Directive 2008/48 be interpreted as precluding Member States from providing that national legislation transposing the directive is also to apply to agreements concluded before the entry into force of the national implementing provision?

2. To what extent do the provisions of Art. 85(2) of GEO 50/2010 constitute an adequate transposition of the Community provision laid down in Art. 24(1) of Directive 2008/48, which requires the Member States to ensure that adequate and effective out-of-court dispute resolution procedures exist for the settlement of disputes with consumers concerning consumer credit agreements?

3. To what extent must Art. 22(1) of Directive 2008/48 be interpreted as meaning that it introduces the maximum level of harmonization in the field of consumer credit agreements, which precludes the Member States from:

(a) extending the scope of the provisions in Directive 2008/48 to agreements expressly excluded from the scope of the directive (such as mortgage loan agreements or agreements concerning the right of ownership in immovable property); or

(b) introducing additional obligations for credit institutions as regards the types of charges they may levy or the categories of reference indices to which the variable interest rate may refer in consumer credit agreements falling within the scope of the national implementing provision?

[329] According to the official database of the Romanian Constitutional Court – www.ccr.ro – the following decisions refer to GEO 50/2010: 1446/2011, 1540/2011, 1541/2011, 1622/2011, 169/2012, 450/2012.

[330] Application published in the Official Journal of the European Union C 89/7, 19.3.2011.

4. If the third question is answered in the negative, to what extent must the principles of the free movement of services and the free movement of capital in general, and Articles 56 [TFEU], 58 [TFEU] and 63(1) [TFEU] in particular, be interpreted as precluding a Member State from imposing measures on credit institutions prohibiting in consumer credit agreements the application of bank charges not included in the list of permitted charges, without the latter being defined in the legislation of the State concerned?'

For the first time since Romania became a member of the European Union, we have a case in which a Romanian court uses the preliminary reference procedure for a first-time interpretation of an EU legislative act, giving thus the chance to the CJEU to deliver a judgment of considerable importance in the process of interpreting a piece of EU secondary legislation. For that purpose, the CJEU judgment was on the same path as previous jurisprudence in the field of consumer protection, granting consumer protection directives a wide scope of application and giving to its provisions the most interventionist reading in order to provide consumers with a remedy for every possible wrong they might encounter.[331]

In the Volksbank case, the operative part of the judgment reads as follows:

'*1. Art. 22(1) of Directive 2008/48/EC […] must be interpreted as not precluding a national measure designed to transpose that directive into domestic law from including in its material scope credit agreements, such as those at issue in the main proceedings, concerning the grant of credit secured by immovable property, even though such agreements are expressly excluded from the material scope of the directive by virtue of Art. 2(2)(a) thereof.*

2. Art. 30(1) of Directive 2008/48 must be interpreted as not precluding a national measure designed to transpose that directive into domestic law from defining its temporal scope so that the measure also applies to credit agreements, such as those at issue in the main proceedings, which are excluded from the material scope of that directive and were existing on the date when that national measure entered into force.

3. Art. 22(1) of Directive 2008/48 must be interpreted as not precluding a national measure designed to transpose that directive into domestic law from imposing on credit institutions obligations not provided for by the directive as regards the types of charges that they may levy in connection with consumer credit agreements falling within the scope of that measure.

4. The rules of the FEU Treaty concerning the freedom to provide services must be interpreted as not precluding a provision of national law that prohibits credit institutions from levying certain bank charges.

5. Art. 24(1) of Directive 2008/48 must be interpreted as not precluding a rule forming part of the national measure designed to transpose that directive that, as regards disputes concerning consumer credit, allows consumers to have direct recourse to a consumer protection authority, which may subsequently impose penalties on credit institutions for infringement of that national measure, without having to use beforehand the out-of-court resolution procedures provided for by national legislation for such disputes.'

It is clear that the Court granted the Directive a wide scope of application. In its core reasoning, the Court stated that

[331] For further examination regarding this trend of jurisprudence, see Verica Trstenjak and Erwin Beysen, *European Consumer Protection Law: Curia Semper Dabit Remedium*?, in Common Market Law Review 48: 95-124, 2011 and also Unberath and Johnston, *The double-headed approach of the ECJ concerning consumer protection*, in Common Market Law Review 44: 1237–1285, 2007.

> in so far as concerns credit agreements which fall within the directive's scope, the directive provides for full harmonisation and – as is evident from the heading of Art. 22 – is imperative in nature, factors which must be understood as meaning that, as regards the matters specifically covered by that harmonisation, the Member States are not authorised to maintain or introduce national provisions other than those provided for by the directive.[332][…] However, as is also clear from recital 10 in the preamble to Directive 2008/48, the Member States may, in accordance with European Union law, apply provisions of that directive to areas not covered by its scope. Thus they may, in respect of credit agreements not falling within the directive's scope, maintain or introduce national measures corresponding to the provisions of the directive or to certain of them.[333]

It is not our purpose here to deliver a thorough examination of the CJEU judgments on consumer protection, bearing in mind that we sought, instead, to reveal the evolution of the Romanian courts' engagement in judicial dialogue on EU law issues. In light of the foregoing, the above-mentioned reference is a clear proof that both Romanian courts and lawyers involved with adjudicating European Union law had taken a step forward in the process of acknowledging the role that the CJEU could and must play in the judicial system. This conclusion must not be overemphasized though, recalling that the request for a preliminary reference was made by the Applicant – Volksbank in front of about 40 Romanian lower level Courts, but only two of them considered to be necessary to seek guidance from the CJEU.[334] The other Courts proceeded to give a judgment without using the preliminary reference procedure, opting for their own interpretation of the provisions in question.

Preliminary references regarding the provisions of Directive 93/13/EEC[335] on unfair terms in consumer contracts

Because of the controversial interpretation and application of the provisions emerging from the Directive 2008/48, many consumers, unhappy with the prospects of the judicial battle between the ANPC and the Banks, opted to go on different paths for solving their complaints. One must say that the disputes not only involved the parties of the credit contracts, but, from a point on, it became an interesting duel between the highly rated law firms of the country, engaging the best lawyers in favour of one party or the other.

The consumers started, maybe for the first time in the recent Romanian history, to act together, to disseminate information regarding their rights and also to start class actions against the Banks. This is a particular interesting case in Romanian judicial system, because this type of class actions is neither recognised in the provisions of procedural law, nor forbidden.

The actions against the creditor Banks were mainly based on the provisions of Law no. 193/2000[336], which was adopted for the purpose of transposing Directive 93/13/EEC during period Romania's pre-accession period. This time, the courts were more open-hearted to give

[332] Paragraph 38 of the Judgment.

[333] Para. 40 of the Judgment.

[334] A second reference for a preliminary ruling was submitted by Judecătoria Timișoara in the Case C‑47/11. The request was dismissed on the 14th of September 2012 after the referring Court withdrew its interest in continuing the procedure, in the light of the judgment of the Case C-602/10.

[335] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

[336] Published in the Official Journal of Romania, Part I, no. 560, 10.11.2000, republished with amendments in 2006, 2008 and 2012.

rulings in favour to the consumers in those cases in which the terms of the contracts have been considered as unfair.

According to Art. 3(1) of the Directive (Article 4(1) of the Law 193/2000): '*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*. '

The interconnection between the two legal grounds is as follows: while a consumer could aim for the nullification of a clause levying a risk charge on the ground that that type of charge is prohibited by GEO 50/2010, he could also argue that the same clause is formulated in terms contrary to the provisions of Law 193/2000, thus is not binding on the consumer. The procedural course of trials and the effects of decisions based on one or the other legal argument differ considerably. Although the burden of proof is less demanding in the cases under provisions related to Directive 2008/48, the effects of a decision whereby a court considers a certain clause to be unfair are more favourable to consumers, at least in regard to the agreements concluded before the entry into force of the GEO 50/2010.

After the set-up of the case-law in several courts throughout the country, noticing that the judges tend to reason that certain clauses included in the credit agreements concluded between consumers and SC Volksbank Romania SA are to be considered unfair terms according to the provisions of Law 193/2000, the defendant turned to a different approach in the trial, raising questions of inappropriate or incomplete transposition of the Directive 93/13/EEC in the national law. One must remember that the number of cases brought before national courts against Volksbank exceeded by far the number of thousands. The immediate effect was that four Courts admitted the request for a preliminary reference regarding the interpretation of the Directive 93/13/EEC[337]. The CJEU registered the following cases involving more or less the same questions: Case C-571/11[338], Case C-108/12[339], Case C-123/12[340] and Case C-236/12[341]. Meanwhile, in the other thousands of proceedings the request for a preliminary ruling was dismissed, the judges considering they have sufficient arguments based on the case law of the CJEU interpreting Directive 93/13/EEC to settle the cases without making use of the procedure laid down by Art. 267 TFEU.

The questions referred can be summed up as follows[342]:

1. '*Can Art. 4(2) of Council Directive 93/13/EEC be interpreted as meaning that 'main subject matter of the contract' and 'price', as referred to in that provision, cover the elements which make up the consideration to which a credit institution is entitled by virtue of a consumer credit agreement, that is to say, the annual percentage rate of charge under a credit agreement,*

[337] A relatively low number, bearing in mind that the same request was made in the same terms in every trial in which Volksbank was the defendant.

[338] Reference for a preliminary ruling from the Tribunal of Cluj lodged on 14 November 2011 - SC Volksbank România SA v Andreia Câmpan and Ioan Dan Câmpan.

[339] Reference for a preliminary ruling from the Tribunal of Valcea lodged on 29 February 2012 - SC Volksbank România SA v Ionuţ-Florin Zglimbea, Liana-Ramona Zglimbea.

[340] Reference for a preliminary ruling from the Tribunal of Giurgiu lodged on 6 March 2012 - SC Volksbank România S.A. v Comisariatul Judeţean pentru Protecţia Consumatorilor Giurgiu.

[341] Reference for a preliminary ruling from the Tribunal of Arges (Romania) lodged on 4 May 2012 - Comisariatul Judeţean pentru Protecţia Consumatorilor Argeş v SC Volksbank România SA, SC Volksbank România SA - Sucursala Piteşti, Alin Iulian Matei, Petruţa Florentina Matei.

[342] As formulated in Case C-123/12.

formed in particular by the interest rate, whether fixed or variable, bank commissions, and the other fees included and defined in the agreement? '

2. '*Can Art. 4(2) of Council Directive 93/13/EEC be interpreted as permitting a Member State which has transposed that provision into national law to allow steps to be taken, in the exercise of judicial power, to check whether contractual terms relating to the main subject matter of the contract and the adequacy of the price are unfair?* '

The questions are very relevant for the main proceedings because the most important clause considered to be unfair in this type of contracts is the one levying a risk charge. In fact, Volksbank opted for a low interest rate (from 3.9 to 4.25 annual per cent) in comparison with other commercial banks, increasing their revenues with a risk charge clause that was not fully defined in the contracts. Also, the calculation formula was tricky, because, unlike the interest clause, the risk charge was not expressed in an annual percentage.

Clause 3.5 of the general conditions of the credit agreements, which is headed 'risk charge', provides that, for making available the credit, the borrower **may be required** to pay the bank a risk charge, calculated on the basis of the balance of the loan and **payable monthly** throughout its term. Clause 5 of the agreements' special conditions, which is likewise headed 'risk charge', specifies that that charge is equal to 0.2% of the balance of the loan and that it must be paid monthly on the due dates throughout the term of the agreement.

As one can see, it was not clear from the general conditions of the agreements, if the borrower will be obliged to pay this charge, and also it was not clear what kind of risks are covered by the charge. The quantum of the charge was payable monthly, but it was not clear if the 0.2 per cent is a monthly or an annual rate, having in mind that the interest fee is also payable monthly, but the rate is calculated as an annual percentage. On these grounds, Courts considered the clause to be an unfair term and obliged the Bank to stop collecting the risk charge and return all the money already paid by the consumers under this clause.

In the battle of legal arguments, Volksbank considered that the risk charge is part of the 'main subject matter of the contract' and 'price', and under Art. 4(2) of Council Directive 93/13/EEC: '*Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language*.' It must be said that the domestic legal provision (Law 193/2000), unlike the measures transposing the Directive 2008/48, represents a plain translation of the Directive 93/13/EEC.

At the time of writing, CJEU did not deliver any judgment in the above mentioned cases. In fact, the case C-571/11 was dismissed by an Order of the Court on 16th of November 2012, because the Applicant (SC Volksbank Romania SA) opted to withdraw its action in the main proceedings.

From our point of view, in this case, the preliminary reference, although relevant for the main proceedings, was not necessary to solve the issues dealt with in the cases brought before the national courts. The first argument is that, even if it was debated whether the risk charge may be considered a part of the 'price' or not, it was no problem of interpretation to establish that the terms of the contract regarding the risk charge can be considered not to be expressed in '*plain intelligible language*'. Most of the Courts considered, as we detailed two paragraphs above, that the risk charge clause was unclear and contradictory with other provisions of the agreements, so it does not fall under the exemption provided in Art. 4(2). For that reason, it is not relevant for the judgment of the main proceedings whether the risk charge is part of the 'main subject matter of

the contract' and 'price' or not, because the clause did not met the second condition required by Art. 4(2) to be excluded from the test of unfairness.

The second argument against the necessity of the preliminary reference can be found in the jurisprudence of CJEU regarding Directive 93/13/EEC.

The cornerstone for the interpretation of Directive 93/13/EEC was laid *in Océano Grupo Editorial and Salvat Editores.*[343] The referring court asked whether the system of protection which this Directive guarantees to consumers implies that a court, in deciding a case concerning alleged non-performance of a contract concluded between a seller or supplier and a consumer, must be able to determine, of its own motion, whether a term inserted in that contract is unfair. The CJEU answered this question in the affirmative, emphasizing the weak position of the consumer vis-à-vis the seller or supplier in the context of the conclusion of consumer contracts as well as in the context of possible legal disputes concerning the performance of those contracts, and the ensuing need to correct this imbalance by positive action unconnected with the consumer. The ECJ thus established, in essence, the principle that national courts must have the power to protect the consumer's interests under Directive 93/13 by having at their disposal the procedural means to determine, of their own motion, whether specific terms of a consumer contract are unfair.[344]

Before November 2012, the total number of judgments of the CJEU interpreting this Directive had reached 13 (18 if one adds the infringement proceedings against Sweden, Netherlands, Italy, Spain and Malta). The CJEU had the first chance to deliver an interpretation of Art. 4 in the *Caja de Ahorros* case.[345]

In its reasoning, the Court considered 'necessary to point out that, according to settled case-law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25).[346]

With regard to the interpretation of the same Article raised by the Romanian references, the Court already considered that

> [I]t thus follows from the actual wording of Art. 4(2) of the Directive that that provision, as the Advocate General has noted in point 74 of her Opinion, cannot be regarded as laying down the scope *ratione materiae* of the Directive. On the contrary, the terms referred to in Art. 4(2), while they come within the area covered by the Directive, escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case

[343] In Joined Cases C-240/98 to C-244/98, Judgment delivered in open court in Luxembourg on 27 June 2000.

[344] Verica Trstenjak and Erwin Beysen - European Consumer Protection Law: Curia Semper Dabit Remedium?, in Common Market Law Review 48: 2011, p. 119.

[345] In Case C-484/08, Judgment of the Court (First Chamber) on 3 June 2010, reference for a preliminary ruling under Art. 234 EC from the Tribunal Supremo (Spain), made by decision of 20 October 2008, received at the Court on 10 November 2008, in the proceedings Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc).

[346] Paragraph 27 of the Judgment.

examination, that they were drafted by the seller or supplier in plain, intelligible language.[347]

The operative part of the Judgment is clearer than the reasoning, the Court stating that

> [A]rticles 4(2) and 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, **even in the case where those terms are drafted in plain, intelligible language**.

Immediately, the Court dealt with the interpretation of Art. 4 again in Case C-76/10[348], where it did not even consider necessary to deliver a Judgment, because, pursuant to the first subparagraph of Art. 104(3) of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order.[349] Again, the CJEU emphasised the weaker position of consumer vis-à-vis the seller or supplier in contract negotiations and reaffirmed **the principle that a national court has the power to determine of its own motion whether a term is unfair**. '[T]hat power of the national court has been regarded as necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them (*Cofidis*, cited above, paragraph 33, and *Mostaza Claro*, cited above, paragraph 28).'[350]

As said in the beginning, the financial crisis acted as a catalyst for the adjudication of consumer rights. The number of preliminary references registered by the CJEU in regard to the Directive 93/13 doubled during the past two years. Only in 2012 we already had decisions in the Cases C-453/10[351], C-472/10[352] and C-618/10[353] and other, at least six, references waiting a decision, of which four were submitted by Romanian courts. For that matter, we can count those references as a step forward for the dialogue between national courts and CJEU, but bearing in mind that we have four references which pose more or less the same question, the use of this procedure could be labelled unnecessary. Of course, the Courts could reconsider the need for a response from the

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[347] Paragraph 32 of the Judgment.

[348] Order of the Court (Eighth Chamber) on 16 November 2010 in Case C-76/10, reference for a preliminary ruling under Art. 267 TFEU from the Krajský súd v Prešove (Slovakia), made by decision of 19 January 2010, received at the Court on 9 February 2010, in the proceedings Pohotovosť s. r. o. v Iveta Korčkovská.

[349] Paragraph 30 of the Judgment.

[350] Paragraph 42 of the Judgment.

[351] Judgment of the Court (First Chamber) on 15 March 2012 in case C-453/10, reference for a preliminary ruling under Art. 267 TFEU from the Okresný súd Prešov (Slovakia), made by decision of 31 August 2010, received at the Court on 16 September 2010, in the proceedings Jana Perenièová, Vladislav Pereniè v SOS financ spol. s r. o..

[352] Judgment of the Court (First Chamber) on 26 April 2012 in case C-472/10, reference for a preliminary ruling under Art. 267 TFEU from the Pest Megyei Bíróság (Hungary), made by decision of 25 August 2010, received at the Court on 29 September 2010, in the proceedings Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.

[353] Judgment of the Court (First Chamber) on 14 June 2012 in case C-618/10, reference for a preliminary ruling under Art. 267 TFEU from the Audiencia Provincial de Barcelona (Spain), made by decision of 29 November 2010, received at the Court on 29 December 2010, in the proceedings Banco Español de Crédito SA v Joaquín Calderón Camino.

CJEU, as it was the case with the second reference regarding the interpretation of Directive 2008/48.

From a practitioner's point of view, it could be argued that the unnecessary use of the preliminary reference procedure in the cases involving Volksbank has two main premises. The first one could be identified in the very good use of legal tactics by the representatives of the Bank during the main proceedings before national courts, where they stressed before every court, and in every trial, based on a heavily documented reasoning (although one-sided), the need to address requests for preliminary questions. As may be expected, this produced turmoil in some courts, with a backlog of cases that had to be solved fast, with a very low knowledge of the European Union law and especially of the CJEU jurisprudence. The second premise that caused the new 'preliminary references frenzy' was already noticed at European level. M. Bobek being very straightforward on the same idea: '[T]he problem with the national knowledge of Community law is, at least in the judicial context of the new Member States brought in by the last two waves of EU enlargement, of a different nature: the assumption that judges know the law has been gradually eroded from within the national legal system, without, however, the necessary adjustment of the rules of procedure.'[354]

As an example of this unsettled practice, Tribunal of Dolj (the County Court of Dolj) had an interesting approach to this matter. After the Commercial Tribunal of Cluj approved Volksbank's request for a preliminary reference in what followed to be Case C-571/11, Volksbank immediately requested before all Courts the stay of procedure until the CJEU will deliver a judgment in case C-571/11. During the first week after this request, all the trials involving Volksbank were suspended. In the second week, after bringing to the attention of the Court the jurisprudence of CJEU in the case C-484/08, Volksbank's request for suspension in all its trials was dismissed. This is a clear proof that national courts did not took into account, when first time staying the cases, the ruling of the CJEU in the *Caja de Ahorros* case.

In later development of the national jurisprudence, Volksbank reassessed its judicial position by dropping out the action in the main proceedings of the Case C-571/11. On 8th of October 2012 Tribunal of Cluj took notice that Volksbank withdrew the action and delivered a judgment in favour of the consumer.[355] As it was expected, the national court informed the CJEU that the preliminary questions referred are no longer relevant for reaching a judgment in the main proceedings. Later on, the case C-571/11 was dismissed by an Order of the Court on 16th of November 2012.

Since Volksbank is not dropping actions in all similar trials, there are clear signs that Volksbank Romania wants to avoid further judgments from the CJEU, especially after the solutions expressed by the Luxembourg-based court in the Cases C-472/10 *Nemzeti* and C‑602/10 *Volksbank*.

Law 193/2000 was amended in August 2012 in accordance with the judgment delivered by CJEU in case C-472/10, granting national courts the power, when considering that a general business condition included in agreements is unfair, to invalidate that term with effect regarding all consumers who concluded with the seller or supplier concerned a contract to which the same

[354] Michal Bobek - On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say '?, p. 10, Electronic copy available at: http://ssrn.com/abstract=1157841.

[355] Information available at http://noulportal.just.ro/InstantaDosar.aspx?idInstitutie=1285&d=MjE5MDAwMDAwMDAwMTM0Nzg*.

general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings.[356] The CJEU stated 3 months earlier, in the said judgment,

> [t]hat Art. 6(1) of Directive 93/13, read in conjunction with Art. 7(1) and (2) thereof, must be interpreted as meaning that:
>
> – it does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Art. 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings;
>
> – where the unfair nature of a term in the general business conditions has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to draw all the consequences which are provided by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those general business conditions apply will not be bound by that term.

The amendments adopted by the Romanian Parliament to the Law 193/2000 are to be applauded, coming so soon after the decision of the CJEU and in perfect correlation with the principle of consumer protection. This time, unlike previous reactions of the Romanian legislative, especially those in the pollution tax legislation, we have a perfect acknowledgement of the European jurisprudence. Proving thus that the absence of legislative amendment for the purpose of complying with the CJEU jurisprudence is rather a question of will, than a difficulty in understanding the reasoning of the Court.

Of course, the entire saga involving Volksbank is an unfortunate example of how difficult is for the Romanian courts to make use of the EU law and jurisprudence. It must be stressed out that an evolution in this regard can only be made with the concurring efforts of all parties involved in litigations, not only judges. But, when the parties have a disproportionate level of knowledge and/or power to litigate, the judges are subject to misleading legal arguments submitted in the interest of the stronger party (such as deliberately omission to mention the relevant jurisprudence or arguments delivered by the European court).

Unlike the previous cases, the consumer protection related jurisprudence did not place individuals, invoking in their support the EU law against national legislation, against public authorities. This time, it looks like the judicial dialogue was not called upon for the purpose of safeguarding rights conferred by the EU law. Instead, it was used as a weapon to block the backlog of cases brought before national courts. Even though there were also some gaps, most national courts have given the desired effect to the principles of European law in the field of consumer protection, as enshrined in the secondary legislation and broaden by the jurisprudence of the CJEU.

[356] Articles 12(3) and 13 of the Law 193/2000.

Conclusion – Trends and patterns in the Romanian judiciary's practice on judicial dialogue on EU law

When Romania became a member of the EU in January 1st, 2007, the national courts were already part of a system involving indirect[357] judicial dialogue with a supranational court, namely the Strasbourg Court, for almost thirteen years. During this period, Romania was in numerous occasions found in breach of the ECHR due to the jurisprudence of the Romanian judiciary. The ECtHR jurisprudence on retrocession of nationalized Romanian properties showed that a delicate political problem with high financial consequences for the State cannot be coherently solved only by national courts. Nor can national courts supplement the absence of action of the legislative, or for the latter violations of fundamental rights and find solutions to complicated and sensitive issues of national interests.[358]

The Romanian courts did not have, though, the possibility to communicate directly with the Strasbourg Court, which arguably might have provided a solution to the domestic courts that would have prevented the liability of the Romanian State for the action of the judiciary. In light of these specific circumstances, one would think that the Romanian courts being given the possibility of direct communication with the Luxembourg Court, which can also hold the State liable for the practice of the judiciary[359], then the Romanian courts would gladly seize the opportunity of direct judicial dialogue with the CJEU. The preliminary reference procedure is a good opportunity for the domestic courts to explain and possibly convince the CJEU of their views on the interpretation of EU law in light of the specificities of the national jurisdiction. The preliminary reference practice of Romanian courts seems to reflect to a certain extent such an enthusiasm, at least in the beginning and then more recently.

Certain Romanian courts have shown great familiarity of both the substantive and procedural complexities of EU law, when they engaged in direct inter-court communication with the CJEU just a few months after Romania acceded to the EU[360]. On 17 of January 2007, a lower court referred the first preliminary ruling questions to the CJEU on the interpretation of the Citizenship Directive. The questions clearly pointed out the connection between the national measures at issue and the relevant EU law, which is a difficult aspect of the EU legal system: the direct channel between national and EU courts exists as long as the contentious matter falls under the *scope of EU law*.

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[357] The ECHR legal system does not have a mechanism of direct judicial dialogue between the domestic courts of the Contracting States and the Court of the ECHR, as existing within the EU legal order (the preliminary reference procedure). There can be though an indirect judicial dialogue between the ECtHR and domestic courts, whereby the latter refer to the former court jurisprudence.

[358] The ECtHR previously sanctioned the Romanian State on the ground that national courts dismissed the action for restitution of the properties lost during the communist regime introduced by the ancient owners on the ground of respect the authority of res judicata. ECtHR, Case of Lungoci v Romania 62.710/00, 26.1.2006. Declaring inadmissible the action for recovery of properties introduced by the ancient owners violates, according to the ECHR, the art 6 (1) of the ECHR, Case of Caracas v Romania, 78.037/01, 29. 06.2006.

[359] Case C-173/03, Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic, ECR I-5177; Case C-224/01 Gerhard Köbler v. Republik Österreich [2003] ECR I-10239.

[360] In the *Jip*a judgment, the questions on the interpretation of Directive 2004/38 were referred 3 weeks after Romania's accession to the EU.

The *Jipa* type of cases showed that most of the national courts are aware of the relevant applicable EU rules governing specific areas of law and can identify a possible conflict between the application of EU and national law. By addressing a preliminary reference, the national court of a newly entered Member State mapped out for the first time the consequences of European law for a domestic legal system which the Court was faced for the first time. As with every preliminary reference, simply by merits of being an instrument of mutual judicial cooperation with benefits for both of the courts in dialogue, the first preliminary reference addressed by the Romanian courts helped both the Romanian court in finding an appropriate interpretation of EU law, and for the Court of Justice, which was made aware of the specificities of a new legal order which it had to take into account for the first time for the purpose of ensuring uniform application of EU law.

In parallel to the over-zealous attitude of Romanian courts giving priority to EU law, even if, sometimes, not entirely founded, several other trends can be identified. In the first year of Romania's accession to the EU, national courts of all levels, starting from the Constitutional Court to second and first instance Courts, often confused EU law with the law of the ECHR, and also between the relevant institutions of the two different legal orders.[361] The specificities of the two different legal orders

The absence of a high number of preliminary references addressed by the Romanian Courts is not a sign of non-application of EU law to the cases submitted before the national Courts. The Romanian judges have interpreted EU law and gave precedence to EU norms against Romanian law immediately after Romania's accession to the EU. Among the first cases where individuals successfully invoked their EU rights to prevent the application of conflicting national legislation are those on restriction of the right to the free movement abroad of Romanian citizens and reimbursement of the first registration of imported motor vehicles tax. As early as January 2007, the Romanian courts were rejecting the application of Romanian administrative authorities for measures restricting the right of exit and entry of returned Romanian citizens on the basis of ex-Art. 18 EC Treaty and Art. 27 of the Citizenship Directive, which were given priority on the basis of the expressly cited principle of primacy of EU law. In parallel, a few months after the first establishment of the first registration of motor vehicles tax, ordinary courts of all levels of jurisdiction were admitting claims for reimbursement of the paid tax on the basis of ex-Art. 90 EC Treaty, and the principle of primacy of EU law.[362] The *Simmenthal* principle was also cited as an argument of the judiciary's setting aside national legislation and the binding judgment of the Romanian Constitutional Court holding the said legislation to be in full conformity with the national Constitution. In addition to supranational legislation, national courts started to look also at the relevant legislation, practice and jurisprudence of other Member States when assessing the legality of national legislation.[363]

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[361] See the Decision no 588 of 19 June 2007 of the Romanian Constitutional Court published in the Official Journal no 581/23 August 2007; The Report of activity of several national court for 2007, such as regional courts of appeals and first instance regional courts. For a more detailed analysis please see, Cristi Danileț, Dragoș Călin, Judiciary's Confusion between the Council of Europe and the European Union (Confuzii judiciare între Consiului Europei și Uniunea Europeană) in Journal of the Magistrates Forum, no. 1 of 2009, available online at http://www.forumuljudecatorilor.ro/index.php/lectura-online/?lang=en&category=5&sortby=title&dlpage=1

[362] Tribunal of Arad, Judgment no. 2563 of 7 November 2007, delivered in file no. 3663/108/2007.

[363] The Tribunal of Arad in Judgment no. 2563, when assessing the lawfulness of the first registration tax has considered also the legislation of other Member States and found that: '*no Member State imposes, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.'*

The third type of cases discussed in this paper — consumer protection — raised a different *problematiqué* than the citizenship and the pollution tax jurisprudence. This time, it looks like the judicial dialogue was not called upon for the purpose of safeguarding rights conferred by the EU law. Instead, it was used as a weapon to block the backlog of cases brought before national courts. Even though there were also some gaps, most national courts have given the desired effect to the principles of European law in the field of consumer protection, as enshrined in the secondary legislation and broaden by the jurisprudence of the CJEU.

A failure of the Romanian judicial system that is apparent both from the jurisprudence regarding the 'first registration tax' and from the Volksbank saga can be identified in the continuous lack of dialogue between national courts, which appears to be more acute even than the inconsistent dialogue with the CJEU. Even if in the past years significant improvements were made in the field of online access to the national courts cases, the system does not provide access to the full text of the judgments. Thus, it is quite intriguing that in many cases the courts are informed about decisions delivered by other courts in similar proceedings by the parties or the lawyers representing them.

However, it is not the attitude of the ordinary courts towards the judicial dialogue that raises the greatest concerns, but the approach of the Constitutional Court, which insists in its reluctance towards EU law generally, and towards the CJEU and the judicial dialogue particularly. The approach of the Constitutional Court ignoring the relevant EU law to the extent that it strikes down national law transposing EU Directive without even raising the issue of possible conflict between EU and national law[364], or holding national law considered by the CJEU contrary to EU law as in line with the Romanian Constitution[365], and thus placing the ordinary courts in an impossible situation of having to choose between respecting EU or national law is furthermore problematic due to the opposite approach adopted by the High Court of Cassation and Justice. The supreme Court of Romania, unlike the Constitutional Court, has adopted an absolute application of the principle of primacy of EU law over national law, including over constitutional provisions, and has asked the ordinary courts to follow its interpretation. On several occasions, the Constitutional Court of Romania and the High Court of Cassation and Justice have adopted completely different legal interpretations in cases referred before both Courts, to the extent that ordinary courts have found themselves again in an impossible situation of having to choose which of the two judgments, which are both binding on all ordinary courts, to respect.[366] In the face of such a legal challenge, the Romanian lower courts have seen in the Luxembourg Court a possible solution to the problem of the correct application of EU law.[367]

However, at least an apparent step forward was taken by the CCR in Decision No. 668/2011, by admitting the possibility to use EU law in the constitutional review process and to send preliminary ruling questions at some point in the future. Due to the several requirements developed by the Court for addressing a preliminary reference, it seems that the step is merely a

[364] Constitutional Court of Romania, Decision No. 1258 of 8 October 2009, published in the Official Journal of Romania No. 798 of 23 November 2009.

[365] Constitutional Court of Romania, Decision No. 668/2011, published in the Official Journal of Romania, No. 487 of 8 July 2011. The fact that the CJEU indicated in the *Tatu* case that the challenged national legislation which was at issue also in the aforementioned decision of the Constitutional Court is contrary to Art. 110 TFEU did not change the position of the Constitutional Court which upheld its previous legal interpretation, see Constitutional Court of Romania, Decision No. 137/2010, published in the Official Journal of Romania No. 182 of 22 March 2010.

[366] See, for example, Case C-310/10, Ministerul Justiţiei şi Libertăţilor Cetăţeneşti v Ştefan Agafiţei and Others.

[367] Case C-310/10, Ministerul Justiţiei şi Libertăţilor Cetăţeneşti v Ştefan Agafiţei and Others.

formal one. While it creates an original test for the situations which will allow the CCR to use, in the constitutional review process, provisions of EU law as "interposed provisions", facilitating thus the need to make references for a preliminary ruling, the CCR does not affirm clearly that it has the competence or the willingness to proceed so. It merely states that the court will decide in the future whether it shall send a reference for a preliminary ruling or not. Moreover, the approach of the CCR with regard to the primacy of EU law principle will probably not bring a significant shift of jurisprudence in the near future, as it clearly showed in its case-law that it considers the Constitution being above EU law, while acknowledging the duties of all the other authorities of the state, except itself, to guarantee the supremacy of EU law.

The approach of the CEECs judiciary of the CEECs towards judicial dialogue on EU law issues has been usually described as

> the CEE ordinary judges still maintain a rather formalistic approach, almost mechanical and deferent to the national legislature, not enthusiastic about the new chances of judicial communication offered by EU law and, in particular, by its preliminary ruling procedure, almost allergic to creativity as well as judicial activism and far from any intent to participate in a transnational discourse.[368]

As a general conclusion, the dialogue between Romanian national courts and CJEU does not necessarily follow the aforementioned characteristic. It appears rather inconsistent, with highs and lows, denoting at the same time enthusiasm, willingness, but also reticence, and an often lack of knowledge of how EU law and the national systems of the Member States interact. The difficulty to characterize in one statement the approach of the Romanian courts towards judicial dialogue resides particularly in these contradictory characteristics of the national case-law, which create a kaleidoscopic view upon the matter. We have chosen to highlight the most relevant events that happened in the first five years of Romania's EU membership in the process of conforming with and applying EU law, it remains to be seen how the identified trends of the Romanian judiciary's practice on the application of EU law will evolve in the future.

[368] Z. Kühn, *Words Apart, Western and Central European Judicial Culture at the Onset of the European Enlargement*, in *American Journal of Comparative Law*, 531 ff., 549; Sadurski, W, *Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturi*ty (co-authored with Kasia Lach) (2008) 3(2) Journal of Comparative Law 212-233; Darinka Piqani, *Primacy of EU Law and the Jurisprudence of Constitutional Reservations in Central Eastern Europe and the Western Balkans: Towards a 'Holistic' Constitutionalism*, EUI Doctoral Thesis.