References for Preliminary Rulings Submitted in a priori Constitutional Review. Insights from Romania in Light of Decision No. 137 of 13 March 2019 of the Romanian Constitutional Court

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Introduction

2018 was the year for important changes in Romanian legislation in the field of the judiciary. At the end of that year, the parliamentary procedure for the adoption of amendments to the so-called Justice laws[1] was completed. They were published in the Official Gazette of Romania, Part I, and accordingly entered into force. The three laws were the outcome of parliamentary legislative initiatives of the majority in power. They were intensely criticised by judicial institutions and magistrates' professional associations, while the parliamentary opposition and the President of Romania as well as the High Court of Cassation and

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[1]I.e. Law No. 207/2018 amending and supplementing Law No. 304/2004 on the judicial organisation, published in the Official Gazette of Romania, Part I, No. 636 of 20 July 2018, Law No. 234/2018 amending and supplementing Law No. 317/2004 on the Superior Council of the Magistracy, published in Official Gazette of Romania, Part I, No. 850 of 8 October 2018 and Law No. 242/2018 amending and supplementing Law No. 303/2004 on the status of judges and prosecutors, published in Official Gazette of Romania, Part I, No. 868 of 15 October 2018.

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Justice[2] used all available means to delay their entry into force (all three of them initiated *a priori* constitutional reviews and the President also asked the Venice Commission for its opinion[3]). In addition, the legislative process took place in a tense and sensitive political climate, with politicians alleging that some prosecutors (and in some cases even judges) had misused their powers with a number of acquittals in high-profile cases of corruption, raising questions on the methods used by the prosecution services. At the same time, there were reports of intimidation of judges and prosecutors and pressure put on them, including by some high-ranking politicians and through media campaigns.[4]

Among the changes considered problematic in the amendments were: the creation of the SICOJ – a special body within the Prosecutor's Office attached to the High Court of Cassation and Justice, set up to investigate criminal offences within the judiciary and with the exclusive competence to carry out criminal prosecution for crimes committed by judges and prosecutors; the new provisions regarding financial liability of magistrates for their decisions; a new system of early retirement of magistrates; restrictions on freedom of expression for magistrates and new grounds for dismissal of the members of the Superior Council of Magistracy. During the legislative proceedings, in the process of *a priori* constitutional review, the Romanian Constitutional Court ruled several provisions of the three laws unconstitutional, which allowed Parliament to improve them, rather than preventing them from coming into force. Indeed, according to settled case law, laws declared unconstitutional in their entirety cannot enter into force and the legislative proceedings are terminated all together.[5] But since there was no such ruling in this case, the legislative proceedings continued and the Justice laws were adapted in accordance with the decision of the Romanian Constitutional Court, passed by Parliament and promulgated by the President of Romania.

After the entry into force of the Justice laws, the sensitive climate continued and so did the attempts to repeal the newly adopted legislation. Since the challenges before the Romanian Constitutional Court had not been successful, some magistrates' professional organisations considered that another way to challenge the legislative changes regarding the statute of the magistrates was the use of the

[2]The supreme court in the hierarchy of ordinary Romanian courts.

[3]The preliminary opinion of the Venice Commission on draft amendments to the Justice laws was issued on 13 July 2018, and the final opinion on 20 October 2018, subsequent to the promulgation of the new laws by the President of Romania and their publication in the Official Gazette of Romania, Part I. For details, *see* ⟨www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN⟩.

[4]For details, *see* the Opinion of the Venice Commission, *supra* n.3.

[5]For example, CCR Decision No. 619/2016, published in the Official Gazette of Romania, Part I, No. 6 of 4 January 2017.

preliminary procedure before the Luxembourg Court.[6] The parliamentary opposition also wanted to reach the Luxembourg Court, but the only course of action available to it would be the *a priori* constitutional review before the Romanian Constitutional Court.

In a remarkable decision in March 2019, in the *a priori* proceedings initiated by the parliamentary opposition, the Romanian Constitutional Court refused to submit a reference for a preliminary ruling to the Luxembourg Court. This decision raises important questions concerning the preliminary reference procedure, the legal effect of the Cooperation and Verification Mechanism recommendations as well as the place of EU law in the Romanian legal order. While the Romanian Constitutional Court refused to make a reference in this case, it seemed to open the door for the use of the preliminary ruling procedure in *a priori* constitutional review.

In this case note, we will analyse the decision of the Court on these issues. Before we do so, we will describe the background against which the case arose. We will then summarise the content of the Romanian Constitutional Court's decision in the case under review and offer a few comments, focusing on two elements: (1) whether or not the Romanian Constitutional Court can and should make references; and (2) whether Cooperation and Verification Mechanism reports have binding force.

The background

The Romanian Constitutional Court can be called upon to exercise two types of constitutional review, i.e. *a priori* and *a posteriori* review.[7] As regards *a priori* constitutional review, the first sentence of Article 146(a) of the Constitution allows

[6]Mehedinți Tribunal in Case C-83/19, *Asociația 'Forumul Judecătorilor Din România'*, Court of Appeal Piteşti in Cases C-127/19 and C-355/19, *Asociația 'Forumul Judecătorilor Din România'* and Asociația Mişcarea Pentru Apărarea Statutului Procurorilor, Bihor Tribunal in Case C-379/19, *DNA-Serviciul Teritorial Oradea* (pending).

[7]The current Romanian Constitution was adopted in 1991 and subsequently revised in 2003. In terms of the two types of review, the 2003 revision mainly gave the People's Advocate the possibility to refer to the Constitutional Court. When regulating the *a priori* and *a posteriori* constitutional review, the Romanian constituent legislator chose the French and the Italian model and, in 2005, in its case law, the Romanian Constitutional Court acknowledged that the Italian legislation served as a model for the latter. The *a posteriori* constitutional review could not have come from France, since France first established this type of review after the 2008 revision of the Constitution; it was subsequently detailed by organic law on 10 December 2009 and it became operational from 1 March 2010. For details, *see*, for example, F. Fabbrini, 'Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation', 9 *German Law Journal* (2008) p. 1299 at p. 1312.

the President of Romania, the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the People's Advocate, and a group of at least 50 deputies or at least 25 senators to refer a law passed by Parliament but not yet promulgated by the President of Romania to the Romanian Constitutional Court for review. *A posteriori* constitutional review[8] is exercised by the Romanian Constitutional Court on laws and ordinances in force or provisions thereof, upon reference by ordinary courts or by the People's Advocate, directly.

Submitting references for preliminary rulings to the Luxembourg Court, as provided for by Article 267 TFEU, has long ceased to be an unknown procedure for the ordinary courts in Romania. However, the Romanian Constitutional Court initially dismissed requests for preliminary rulings, without giving reasons for its refusal to refer.[9] In 2011, the Romanian Constitutional Court's case law evolved, on the basis of Article 148(2) and (4) of the Constitution, the provision introduced in 2003 to allow for the accession of Romania to the EU.[10] For the first time, the Court accepted the possibility of including EU law in the standard of reference for constitutional review, albeit indirectly. The provision on EU law can be used as a rule interposed in the rule of reference in the context of *a posteriori* constitutional review proceedings, if two cumulative conditions are satisfied: if the provision is sufficiently clear, precise and unambiguous; and if the provision has a certain degree of constitutional relevance, so that a violation of the provision of EU law would support a violation of the Constitution, the only standard of reference for constitutional review. But the Court also stated that even if the above conditions were fulfilled, it remains at its discretion '[. . .] *to refer questions for a preliminary ruling aimed at the determination of the content of the European standard*' (emphasis added). The Romanian Constitutional Court added that this would be in line with the 'cooperation between

[8]Art. 146(d) of the Constitution.

[9]CCR Decisions Nos. 392 and 394 of 25 March 2008, published in the Official Gazette of Romania, Part I, No. 309 of 21 April 2008.

[10]Art. 148 is entitled 'Integration into the European Union' and reads as follows: '(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of Deputies and Senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval'.

the national constitutional court and the European court and the judicial dialogue between them, without raising issues as to the establishment of hierarchies between these courts'.[11] It did not, however, make a reference in that case.

In 2016 there was another breakthrough: the Romanian Constitutional Court submitted a reference for a preliminary ruling for the first time,[12] in the context of the *a posteriori* constitutional review proceedings, which led to the famous *Coman* decision of the Luxembourg Court.[13] Following the judgment of the Luxembourg Court, the Romanian Court declared that, in line with EU law, the contested national provisions were constitutional

> to the extent that they permit the granting of the right to reside in the territory of the Romanian state, under the conditions provided by the EU law, to spouses – citizens of the member states of the European Union and/or citizens of third-counties – of same-sex marriages, concluded or contracted in a member state of the European Union.[14]

[11]CCR Decision No. 668/2011, published in the Official Gazette of Romania, Part I, No. 487 of 8 July 2011. The case concerned the provisions of a Government Emergency Ordinance on a pollution tax charged on first registration of motor vehicles. The Romanian Constitutional Court noted that, prior to its ruling in this matter, one of the ordinary courts submitted a reference for a preliminary ruling to the Luxembourg Court, where the question concerned the provisions of the said ordinance: ECJ 7 April 2011, Case C-402/09, *Ioan Tatu* v *Statul român prin Ministerul Finanțelor și Economiei and Others*. The Romanian Court held that the Luxembourg Court interpreted EU law (namely Art. 110 TFEU) and did not rule on the validity of the internal norm, since it is not competent to perform such an assessment. The Romanian Constitutional Court noted further that there was no violation of Art. 148 of the Constitution, because the conditions for the use a rule of EU law as a rule interposed in the rule of reference were not fulfilled; as such, although the meaning of the EU norm was established by the Luxembourg Court, the requirements of the decision have no constitutional relevance because they are related to the duty of the legislator to enact in the direction set out by the decisions of the Luxembourg Court. A failure to comply with this duty results in the application of Art. 148(2) of the Constitution.

[12]*See*, in detail, C. Titirișcă, 'Brief considerations on the relationship between the Romanian Constitutional Court, the Strasbourg Court and the Luxembourg Court', 11-12 May 2018, ⟨cks.univnt.ro/cks_2018.html⟩.

[13]ECJ 5 June 2018, Case C-673/16, *Relu Adrian Coman and Others* v *Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*. *See also*, for example, J. Rijpma, 'You Gotta Let Love Move: ECJ 5 June 2018, Case C-673/16, Coman, Hamilton, Accept v Inspectoratul General pentru Imigrări', 15(2) *EuConst* (2019) p. 324 at p. 339.

[14]CCR Decision No. 534/2018, published in the Official Gazette of Romania, Part I, No. 842 of 3 October 2018. *See also* 'Dreptul la viață intimă familială și privată' ['The right to personal and family privacy'], in M. Enache and Ș. Deaconu, *Drepturile și libertățile fundamentale în jurisprudența Curții Constituționale* [*Fundamental Rights and Freedoms in the Case Law of the Constitutional Court*] (C.H. Beck 2019) p. 61 at p. 95.

The decision in *Coman* was undoubtedly a historic one, in substance and, more importantly, in terms of the use of the preliminary ruling procedure in cases before the Romanian Constitutional Court.

In several *a priori* review cases, brought before the Romanian Constitutional Court by the parliamentary opposition immediately after the decision in *Coman*, the applicants asked the Romanian Court to make a reference for a preliminary ruling. We mention here three *a priori* review cases: one on the Justice laws (namely the law on the status of judges and prosecutors);[15] one on the draft law amending the Criminal Code and the Law on preventing, detecting and punishing offences of corruption;[16] and one on the provisions of the Law for approval of Government Emergency Ordinance No. 90/2018 on measures for the operationalisation of the Department for the investigation of offences committed within the judiciary.[17] The Romanian Court dismissed all these requests as inadmissible in *a priori* proceedings. The relevant decisions will be briefly presented in turn.

Both Decision No. 533/2018 on the law on the status of judges and prosecutors and Decision No. 650/2018 on the law amending the Criminal Code and Law on preventing, detecting and punishing offences of corruption addressed the issue of whether the Romanian Constitutional Court can use the preliminary ruling procedure in *a priori* constitutional review.

In the first decision, the parliamentary opposition proposed the following issue for referral to the Luxembourg Court:

> Do EU law and the principle of the primacy of EU law preclude the adoption and entry into force of national legislation which would result in serious violations of EU law and of the rule of law in the national legal order of a EU member state by creating serious deficiencies in the functioning of the judiciary that would undermine the independence of the magistrates [the measures (. . .) by which the legislator created the possibility of retirement on demand, before reaching the age of 60, of magistrates and legal professional staff assimilated to magistrates with at least 20 years' seniority in the profession].

The Romanian Constitutional Court dismissed the request for referral on the basis of two arguments: one substantive, and the other procedural.

[15]CCR Decision No. 533/2018, published in the Official Gazette of Romania, Part I, No. 673 of 2 August 2018.

[16]CCR Decision No. 650/2018, published in the Official Gazette of Romania, Part I, No. 97 of 7 February 2019.

[17]CCR Decision No. 137/2019, published in the Official Gazette of Romania, Part I, No. 295 of 17 April 2019.

The substantive argument

The reasoning of the Romanian Constitutional Court had as a starting point a series of decisions of the Luxembourg Court, which shape the preliminary ruling procedure.[18] Additionally, as the Romanian Constitutional Court noted, the Luxembourg Court held that it is solely for the national courts, which are seized of the case and are responsible for the judgment to be delivered, to determine, in light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable them to give judgment and the relevance of the questions submitted to the Luxembourg Court.[19]

The Romanian Constitutional Court then held that the legislative measures in question concerned an internal situation. The Romanian Court again relied on the case law of the Luxembourg Court, regarding its jurisdiction to give preliminary rulings on questions concerning EU law, the need to ensure a uniform interpretation of the provisions of EU law and the fact that the Court may interpret EU law only within the limits of the powers conferred upon it.[20] Thus, an interpretation, by the Luxembourg Court, of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law directly and unconditionally, in order to ensure that those internal situations and situations governed by EU law are treated in the same way.[21]

[18]The CCR mentioned ECJ 16 July 1992, Case C-83/91, *Wienand Meilicke* v *ADV/ORGA F. A. Meyer AG,* para. 22; ECJ 28 July 2016, Case C-379/15, *Association France Nature Environnement* v *Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie,* para. 51; ECJ 9 September 2015, Case C-160/14, *João Filipe Ferreira da Silva e Brito and Others* v *Estado português*, para. 40; ECJ 9 November 2006, Case C-205/05, *Fabien Nemec* v *Caisse régionale d'assurance maladie du Nord-Est*, para. 25 and ECJ 14 December 2006, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio* v *Compañía Española de Petróleos S.A.*, para. 26; ECJ 23 April 2009, Joined Cases C-261/07 and C-299/07, *VTB-VAB NV* v *Total Belgium NV (C-261/07)* and *Galatea BVBA* v *Sanoma Magazines Belgium NV (C-299/07)*, para. 33; ECJ 23 November 2006, Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL* v *Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, para. 17.

[19]For example, *see* ECJ 23 April 2009, Joined Cases C-261/07 and C-299/07, *supra* n. 18, para. 32 or ECJ 22 September 2016, Case C-110/15, *Microsoft Mobile Sales International Oy and Others* v *Ministero per i beni e le attività culturali (MiBAC) and Others*, para. 18 or ECJ 7 July 2011, Case C-310/10, *Ministerul Justiției și Libertăților Cetățenești* v *Ștefan Agafiței and Others*, para. 25.

[20]The CCR mentioned ECJ 7 July 2011, Case C-310/10, *supra* n. 19, paras. 38, 39 and 47; ECJ 27 March 2014, Case C-265/13, *Emiliano Torralbo Marcos* v *Korota SA and Fondo de Garantía Salarial*, paras. 27, 28 and 30; ECJ 15 November 2016, Case C-268/15, *Fernand Ullens de Schooten* v *État belge*, paras. 50, 55 and 53; ECJ 20 December 2017, Case C-372/16, *Soha Sahyouni* v *Raja Mamisch*, para. 28; ECJ 23 November 2017, Joined Cases C-427/16 and C-428/16, *'CHEZ Elektro Bulgaria' AD* v *Yordan Kotsev* and *'FrontEx International' EAD* v *Emil Yanakiev,* para. 36.

[21]ECJ 19 October 2017, Case C-303/16, *Solar Electric Martinique* v *Ministre des Finances et des Comptes publics*, para. 27.

The Romanian Constitutional Court then referred to EU law governing the exclusive and shared competences of the EU (Articles 3 and 4 TFEU), in order to show that the retirement of magistrates which was at issue in the *a priori* proceedings, falls within the exclusive competence of the member states and represents a purely internal situation, to which EU law does not apply.

The Romanian Constitutional Court specifically noted that not even the extensive interpretation given to Article 19 TEU by the European Court of Justice in the Portuguese judges case,[22] in that the independence of the judiciary falls under its protection since the courts must be independent, in order to be able to raise questions and apply/interpret EU law, covers the situation at hand; it held that the regulation of an optional means of retirement of magistrates, at their own exclusive request, did not affect the independence of the judiciary and hence did not come within the sphere of EU law.

Thus, the Romanian Constitutional Court found that the interpretation given by the authors of the request for *a priori* review did not take into account the limited scope of the Charter of Fundamental Rights of the European Union and the exclusive competence of the member state in that matter. It declared the request for a preliminary ruling clearly inadmissible, since the Luxembourg Court had no competence *ratione materiae*.

The procedural argument

In addition, the Romanian Constitutional Court also held that, in the context of the *a priori* constitutional review, it is not possible to refer for a preliminary ruling under Article 267 TFEU, as there is no dispute pending before an ordinary court within the meaning of the Luxembourg Court. The latter has consistently held[23] that in order to determine whether the body making a reference is a 'court or tribunal' for the purposes of the aforementioned article, which is a question governed by EU law alone, the Luxembourg Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. With regard to the *inter partes* nature of the proceedings before the national court, it follows from that provision that a national court may refer to the Luxembourg Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

[22]ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas*, paras. 38, 40 and 43.

[23]ECJ 16 December 2008, Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, paras. 55 and 56.

The Romanian Constitutional Court remarked that the *a priori* constitutional review does not entail, not even *lato sensu*, a pending dispute, namely the establishment of a legal relationship (between two parties), since a law which is not in force cannot give rise to a dispute, in contrast to the situation in *a posteriori* constitutional review. The Romanian Constitutional Court acknowledged that it had submitted preliminary questions to the Luxembourg Court in *Coman*, i.e. in *a posteriori* review proceedings,[24] but this did not imply that the Romanian Court could do the same in *a priori* review proceedings, having regard to the significant differences in legal regime between the two forms of review.

The Romanian Constitutional Court also held that:

> questions relating to EU law enjoy a presumption of relevance. The Court may thus refuse to rule on a question referred by a national court only where it is quite obvious that the sought interpretation of EU law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (. . .) The Court's function in preliminary rulings is to assist in the administration of justice in the member states and not to deliver advisory opinions on general or hypothetical questions.[25]

> Or, the question raised was of a general nature and concerned, at that time, a hypothetical situation [i.e. if legislation not yet in force, hence without any legal effect, would possibly violate EU law], which indicated that, in reality, the purpose was to consult the Luxembourg Court in the context of the procedure for the adoption of laws.

In Decision No. 650/2018 on the law amending the Criminal Code and Law on preventing, detecting and punishing offences of corruption,[26] the Romanian Constitutional Court came to the same conclusion. Again, the parliamentary opposition brought before the Court a request for an *a priori* constitutional review and proposed several questions for referral to the Luxembourg Court. They asked the Romanian Constitutional Court to ask the Luxembourg Court: (i) whether 'the procedure for the *a priori* constitutional review of a law (. . .) is a genuine dispute within the meaning of Article 267 TFEU'; and (ii) whether legislative

[24] *Supra* n. 13.

[25] ECJ 15 September 2011, Case C-197/10, *Unió de Pagesos de Catalunya* v *Administración del Estado*, paras. 17 and 18 or ECJ 6 July 2017, Case C-392/16, *Marcu Dumitru* v *Agenția Națională de Administrare Fiscală (ANAF) and Direcția Generală Regională a Finanțelor Publice București*, para. 38.

[26] *Supra* n. 16, para. 202.

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measures not in force, passed by Parliament, but not promulgated by the President of Romania, could conflict with European rules.

Both aspects had already been addressed by the Romanian Constitutional Court in the aforementioned decision and, therefore, the Court did not reconsider its case law. Moreover, the Romanian Constitutional Court noted that the situation described falls within paragraph 6 of the Recommendations of the Court of Justice of the European Union to national courts and tribunals,[27] which provides that:

> where a question is raised in the context of a case that is pending before a court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is nonetheless required to bring a request for a preliminary ruling before the Court (. . .), *unless there is already well-established case law on the point or unless the correct interpretation of the rule of law in question admits of no reasonable doubt*[28] (emphasis added).

It was against this background that the case under review arose.

Decision No. 137/2019

In Decision No. 137/2019 on the law approving the ordinance on measures aimed at making the 'special section' operational, the decision under review, the Romanian Constitutional Court described the circumstances under which referrals for preliminary rulings will be made in *a priori* proceedings. The Romanian Court ruled, essentially, on the constitutional relevance of a document adopted by the European Commission in the context of the Cooperation and Verification Mechanism, which is set up under the European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.[29]

[27]Published in the Official Journal of the European Union No. 439 series C of 25 November 2016.

[28]The Romanian Constitutional Court obviously considered the Decision on the status of judges and prosecutors as 'established case law' in case of two questions proposed for referral to the Luxembourg Court, since it did not refer to the interpretation of the concept of 'any reasonable doubt', which would have meant invoking the CILFIT criteria, in order to justify its decision either to bring or indeed not to bring the matter before the Luxembourg Court.

[29]Published in the Official Journal of the European Union L 354 of 14 December 2006. The decision was based on Arts. 37 and 38 of the Act of Accession of the Republic of Bulgaria and Romania, which empower the Commission to take appropriate measures in case of imminent risk that Romania would cause a breach in the functioning of the internal market by a failure to

The facts

Subsequent to the entry into force of the Justice laws, the Romanian Government adopted a series of emergency ordinances, among which was the Emergency Ordinance No. 90/2018. According to the Romanian Constitution, since Parliament is the sole legislative authority of the country, it approves or rejects Government Emergency Ordinances by law. Such laws and the ordinances they approve/reject may be challenged before the Romanian Constitutional Court in *a priori* constitutional review. It was the Law approving the Government Emergency Ordinance No. 90/2018 and part of the provisions of the ordinance that were the subject of the Romanian Constitutional Court's Decision No. 137/2019. The reason for enacting the ordinance was that the competent authority – the Superior Council of the Magistracy – had not completed, within the three-month period laid down by law,[30] the procedure for the operationalisation of the SICOJ, the special body within the Prosecutor's Office attached to the High Court of Cassation and Justice set up to investigate criminal offences within the judiciary. Consequently, the ordinance established a provisional procedure derogating from the legal rules in force, aiming at the temporary/provisional appointment of the Chief Prosecutor, the Deputy Chief Prosecutor and at least one third of the prosecutors of this body (the minimum personnel considered necessary for a proper functioning of this body).

In the meantime, the overall functioning of the Romanian judiciary was the subject of yearly assessment (and recommendations) under the EU Mechanism of Cooperation and Verification, established upon Romania's accession to the EU. The Cooperation and Verification Mechanism report of 13 November 2018, issued roughly one month after Emergency Ordinance No. 90/2018 was adopted, found, essentially, that although Romania had followed up some of the 12 key recommendations issued by the Commission in January 2017 to fulfil the Cooperation and Verification Mechanism benchmarks, the amendments adopted by the end of 2018 had reversed the course of progress on issues which the Commission had considered positively in January 2017.[31] This concerned especially judicial independence, judicial reform and tackling high-level corruption. The 2018 report recommended to 'suspend immediately the implementation of the Justice laws and subsequent Emergency Ordinances' and to 'revise the

implement the commitments it has undertaken, respectively to take appropriate measures in case of imminent risk of serious shortcomings in Romania in the transposition, state of implementation, or application of acts adopted under Title VI of the EU Treaty and of acts adopted under Title IV of the EC Treaty.

[30]The deadline was the end of October 2018.

[31]*See* ⟨ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en⟩.

Justice laws taking fully into account the recommendations under the [Cooperation and Verification Mechanism] and issued by the Venice Commission and GRECO'.[32]

The parliamentary opposition requested an *a priori* constitutional review, arguing, primarily, that part of the ordinance violated the mandatory constitutional requirements for its adoption as there was no real emergency situation which would have demanded its immediate regulation by means of an emergency ordinance, as well as the recommendations of the 2018 Cooperation and Verification Mechanism report, which, in its view, have constitutional relevance in light of Article 148(2) and (4) of the Constitution. They asked the Constitutional Court to make a reference for a preliminary ruling, asking, *inter alia*, about the legal effect of the Cooperation and Verification Mechanism report.

The decision

The legislative act examined in the decision under review was the Law approving Government Emergency Ordinance No. 90/2018, and part of the ordinance itself. Thus, the act under scrutiny was not the Law setting up the SICOJ, which had already been adopted, but the one establishing certain measures for its operationalisation.[33] The legal provisions setting up the SICOJ had been previously declared constitutional in *a priori* constitutional review proceedings,[34] and the Romanian Court underlined that according to Article 147(4) of the Constitution the decisions of the Romanian Constitutional Court are generally binding.[35]

The applicants asked the Romanian Constitutional Court to make a reference for a preliminary ruling. They referred to the fact that, regarding the Cooperation and Verification Mechanism, the Romanian Court had already expressly stated in previous cases that membership of the EU entails for the Romanian State 'the duty to apply this mechanism and to follow up on the recommendations set out in this framework, in accordance with the provisions of Article 148(4) of the Constitution'. They argued that the Romanian State failed to comply with the provisions of the latest Cooperation and Verification Mechanism report

[32]Report of 13 November 2018 under the Cooperation and Verification Mechanism (CVM) established under the European Commission Decision 2006/928/EC of 13 December 2006, ⟨ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf⟩.

[33]CCR Decision No. 137/2019, paras. 68-69.

[34]CCR Decision No. 33/2018, published in the Official Gazette of Romania, Part I, No. 146 of 15 February 2018, paras. 134-159.

[35]CCR Decision No. 137/2019, para. 81.

and claimed that the 'referral becomes the main legal instrument of constraint for the non-violation of EU obligations'. They claimed that according to EU case law, a member state is not exempted from liability if a breach of its EU obligations can be attributed, in whole or in part, to errors of interpretation or application of the relevant EU rules, including by its national courts.[36]

The four preliminary questions were as follows:

(1) Is the Cooperation and Verification Mechanism, established in accordance with the European Commission Decision 2006/928/EC of 13 December 2006, to be regarded as an act of an EU institution within the meaning of Article 267 TFEU which is amenable to interpretation by the Court of Justice of the European Union?
(2) Are the content, character and temporal scope of the Cooperation and Verification Mechanism, established in accordance with the European Commission Decision 2006/928/EC of 13 December 2006, circumscribed to the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005? Are the requirements set out in the reports drawn up under this Mechanism binding on the Romanian State?
(3) Is Article 2 of the Treaty on European Union to be interpreted as requiring the member states to comply with the criteria of the rule of law, as requested also in the reports under the Cooperation and Verification Mechanism, established in accordance with the European Commission Decision 2006/928/EC of 13 December 2006, in the event of the urgent setting up of a prosecution department to investigate solely offences committed by magistrates, which raises particular concern as regards the fight against corruption and which can be used as an additional tool to intimidate magistrates and to put pressure on them?
(4) Is the second subparagraph of Article 19(1) of the Treaty on European Union to be interpreted as requiring member states to lay down the measures necessary for effective legal protection in the fields covered by EU law, namely by removing any risk related to political influence over the criminal investigation of judges, as is the case with the urgent setting up of a prosecution department to investigate solely offences committed by magistrates, which raises particular concern as regards the fight against corruption and can be used as an additional tool to intimidate magistrates and to put pressure on them?

The Romanian Constitutional Court noted that the authors of the request actually sought the recognition of the binding nature of the recommendations contained in the Cooperation and Verification Mechanism Report of 13 November 2018, which would lead to the immediate suspension of the implementation of the Justice laws and of the subsequent emergency ordinances

[36]The applicants mentioned ECJ 6 October 2011, Case C-302/09, ECJ 22 December 2010, Case C-304/09 and ECJ 29 March 2012, Case C-243/10.

and ultimately to the revision of the Justice laws which set up the SICOJ. In other words, their request was ultimately aimed at suspending the activity of the SICOJ and, subsequently, by amending the law, at its dissolution. However, the case in which the issue arose concerned the constitutional review of a legislative act *which was subsequent to the law setting up the contested prosecution structure*. The Romanian Constitutional Court's decision could only have a limited effect on the provisions of that legislative act, and in no way on the existence of the SICOJ, which would have remained in existence on the basis of the amendments to the Justice laws; the reason for the enactment of this ordinance was that the procedure for the operationalisation of the SICOJ was not completed within the timeframe prescribed by law, not the lack of provisions governing the functioning of the SICOJ. Even if the Romanian Constitutional Court had decided that the law approving the ordinance was unconstitutional in its entirety, this would only have led to Parliament having a duty to reconsider those provisions, in order to bring them into line with the decision of the Romanian Constitutional Court.[37] The ordinance would have remained in force. Therefore, the Romanian Constitutional Court noted that it does not have the power to order any of the desired measures, suspension of the ordinance and unconstitutionality of the Justice laws. In addition, it held that the procedural framework in which the request was made was not proper. Since the arguments put forward by the authors of the request concerned *the setting up* of the SICOJ, they were not related to the subject-matter of the case in which the request was made, which concerned solely the constitutional review of legal provisions concerning the operationalisation of SICOJ.[38] Thus, the Romanian Constitutional Court considered the questions irrelevant to the outcome of the case, and refused to make a reference.

With respect to the issue of the binding nature of the Cooperation and Verification Mechanism report, the Romanian Constitutional Court underlined that regulations, directives and decisions are binding acts of EU law and referred to Article 148(2) of the Constitution, which states that 'As a result of the accession, the provisions of the constituent treaties of the European Union, as well *as the other mandatory community [European] regulations* shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act' (emphasis added). In this case, the issue was whether 2018 Cooperation and Verification Mechanism Report could operate as a rule interposed to the Constitution, so that it could operate as a standard for review.[39]

According to Article 1 of the European Commission Decision 2006/928/EC, Romania shall, by 31 March of each year, and for the first time by 31 March

[37]Art. 147(2) of the Constitution.
[38]CCR Decision No. 137/2019, para. 71.
[39]Ibid., paras. 72-73.

2007, report to the Commission on the progress made in addressing each of the four benchmarks, namely:

1. ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes;
2. establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken;
3. building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption;
4. take further measures to prevent and fight against corruption, in particular within the local government.

The Romanian Constitutional Court found that the objectives pursued by Decision 2006/928/EC fall into the principle of the rule of law and the right to a fair trial expressly enshrined in Article 1(3) and Article 21 of the Constitution. However, it also held that Decision 2006/928/EC does not lay down specific obligations (except for the establishment of an agency for integrity) or effective guarantees which, together or separately, contribute to the achievement of the principle of the rule of law, but merely draws up a series of guidelines of a more general and primarily political nature.[40] Therefore, while the act binds the State to which it is addressed, it does not have constitutional relevance, as it does not develop a constitutional rule; the existing constitutional rules circumscribe this act and the act itself does not complete an omission in the national Basic Law.[41] It thereby confirmed previous case law, in which it had ruled that the Decision setting up the Cooperation and Verification Mechanism had no constitutional relevance:

> even if it were to be accepted that Decision 2006/928/EC could be an indicator on the assessment of the constitutionality of the rule, it would not have a relevant impact, since its content merely recommends the setting up of an integrity agency with the administrative capacity to lead an investigation into potential incompatibilities and potential conflicts of interest, as well as to adopt binding decisions that can lead to the application of penalties.[42]

[40]According to recital (8) in the preamble to the Decision, 'This Decision does not preclude the adoption of safeguard measures at any time on the basis of Articles 36 to 38 of the Act of Accession, if the conditions for such measures are fulfilled'.

[41]CCR Decision No. 137/2019, para. 75.

[42]CCR Decision No. 104/2018, published in the Official Gazette of Romania, Part I, No. 446 of 29 May 2018, para. 89.

In other words, the only concrete element of the Cooperation and Verification Mechanism Decision is the obligation to set up an integrity agency, while all other features, by the generality of the proposed objectives, cannot give rise to express legal obligations on the part of the State, which retains a margin of discretion.[43]

In view of the lack of constitutional relevance of the Commission Decision on the Cooperation and Verification Mechanism, a binding EU act for the Romanian State, the Romanian Constitutional Court held that the Reports for the mechanism can be considered *even less relevant*. The Cooperation and Verification Mechanism report does not even satisfy the condition laid down in Article 148(2) of the Constitution, i.e. to be mandatory. Thus, although the Cooperation and Verification Mechanism reports are acts adopted on the basis of a Decision, they contain provisions of a recommendatory nature, following the evaluation carried out, and stating that 'To remedy the situation, the following measures are recommended: [. . .]'. Or, by means of a recommendation, the EU institutions express their opinion and suggest directions for action, without imposing any legal obligation on the addressees of the recommendation.[44]

Therefore, even if the Commission Decision and the Cooperation and Verification Mechanism reports had met the conditions of clarity, precision and accuracy, according to their meaning as established by the Luxembourg Court, those acts do not constitute rules with constitutional relevance required to act as reference standards for constitutional review. Whereas the cumulative conditions established by the settled case law of the Romanian Constitutional Court were not met, i.e. clarity and constitutional relevance, and there was no EU rule interposed to the rule of reference, the Romanian Court held that they could not substantiate a potential violation of the Constitution by the national law, since the Constitution is the only direct rule of reference in the context of the constitutional review.[45]

As the Romanian Constitutional Court further remarked,[46] when analysing the Commission Decision on the Cooperation and Verification Mechanism in the light of Article 148(4) of the Constitution, 'Romania accepted that, in the areas where exclusive competence lies with the European Union, [. . .], the implementation of the obligations arising therefrom should be subject to the rules of the Union [. . .]' and that 'by virtue of the compliance clause contained in the text of Article 148 of the Constitution, Romania may not adopt a legislative act contrary to the obligations undertaken as a member state'. The Romanian Court also noted that 'all the above have of course *a constitutional limit*, expressed in

[43]CCR Decision No. 137/2019, para. 76.
[44]Ibid., para. 77.
[45]Ibid., para. 78.
[46]Ibid., para. 99.

what the Court has qualified as "national constitutional identity"', and that the Luxembourg Court 'has not established the meaning' of the Commission Decision on Cooperation and Verification Mechanism, '[...] an act adopted *prior* to the accession of Romania to the European Union, in terms of content, nature and temporal scope, or in terms of whether it is covered by the provisions in the Treaty of Accession'.[47] Hence, in the absence of such an interpretation of the European Court, only about the Treaty of Accession can it be said that it forms part of the internal normative order; it was not established that Decision 2006/928/EC is covered by the provisions of the Treaty of Accession so, on that basis, it 'cannot constitute a reference rule in the context of the constitutional review under Article 148 of the Constitution',[48] i.e. a rule interposed in the rule of reference.

The Romanian Constitutional Court also found[49] that it is the exclusive competence of the member states to determine the organisation and functioning of the various bodies of prosecution, as well as the delimitation of competences between them, since, as previously stated,[50] the Constitution is the expression of the will of the people, which cannot be undone simply because there is an inconsistency between its provisions and EU acts. Furthermore, just as other constitutional courts have also stated, the Romanian Constitutional Court noted that accession to the EU had not affected the supremacy of the Constitution in the national legal order.[51] In addition, the Court held that it had already stated that 'one of the fundamental principles of the European Union is the principle of conferral of powers by the member states – more and more in number – for the achievement of their common objectives, without prejudice, of course, to national constitutional identities' and that:

> on that line of thought, the member states retain powers which are inherent in the preservation of their constitutional identities, and that the assignment of powers, as well as the rethinking, enhancing or establishment of new guidelines in the framework of powers already assigned fall within the constitutional discretion of the member states.[52]

[47]*Supra* n.42, para. 88, final sentence.

[48]Ibid.

[49]CCR Decision No. 137/2019, para. 101.

[50]CCR Decision No. 80/2014, published in the Official Gazette of Romania, Part I, No. 246 of 7 April 2014, para. 456.

[51]*See*, to the same effect, the Judgment of 11 May 2005, K 18/04, delivered by the Constitutional Tribunal of the Republic of Poland.

[52]CCR Decision No. 683/2012, published in the Official Gazette of Romania, Part I, No. 479 of 12 July 2012.

Comments

Should the Romanian Constitutional Court make references for preliminary rulings in *a priori* constitutional review? And should it have made such reference in this case? The Romanian Court appears to stray away from the conclusion contained in the previous two decisions, according to which references for a preliminary ruling cannot be submitted in *a priori* constitutional review. Consequently, the result is that, in so far as there is a direct relationship between the preliminary questions and the mediated act subject to the constitutional review, the Court should use the preliminary ruling procedure in *a priori* constitutional review. In other words, the Romanian Constitutional Court should make a reference in so far as the respective European act has constitutional relevance. In Decision No. 137/2019, however, the constitutional relevance of the EU legal act which would be the subject of the referral for a preliminary ruling appears to be an essential prerequisite.

We notice that, in Decision on the law on the status of judges and prosecutors, the Romanian Constitutional Court mentioned two arguments relating to the generality and necessity of the question referred for a preliminary ruling. They were developed in Decision No. 137/2019 and became *pro parte* the decisive reasons why the Court did not use the preliminary ruling procedure, since it found that the EU standard merely draws up a series of guidelines of a more general and primarily political nature. It thus appears that the Romanian Constitutional Court has moved away from its previous conclusion that no request for a preliminary ruling can be submitted in *a priori* review and has adopted a new position, which brings to the fore the fact that the preliminary question should be necessary for the case *a quo*. We therefore consider that Decision No. 137/2019 gives a relative value to the recitals and the solution contained in the previous two decisions, transforming the very line of arguments, in that, apart from the conditions set out for the use of a provision of EU law as a rule interposed, *in so far as the question referred for a preliminary ruling may have a useful effect in the case*, the Romanian Constitutional Court will make a reference.

In the Decision under review, the useful effect in the case of the referral for a preliminary ruling to the Luxembourg Court was assessed as twofold: (i) the influence of the proposed preliminary questions on the case; and (ii) the likelihood that Commission Decision on Cooperation and Verification Mechanism and the related reports be considered as rules interposed in the rule of reference in the constitutional review that could support the possible violation of the Constitution by the national law. It is thus apparent from Decision No. 137/2019 that, in so far as those conditions are satisfied, the Romanian Constitutional Court may refer questions to the Luxembourg Court for preliminary ruling in the context of *a priori* constitutional review. It therefore seems that,

at this point in time, the Romanian Constitutional Court may refer to the Luxembourg Court for preliminary rulings both in *a posteriori* and *a priori* constitutional review.

At the same time, although Decision No. 137/2019 creates an opening for the possibility to use the preliminary ruling procedure in *a priori* constitutional review, the procedural argument in the Decision on law on the status of judges and prosecutors cannot be entirely overthrown: it all depends on the wording and the sense of the questions intended to be referred to the Luxembourg Court for a preliminary ruling. Inasmuch as the question regards, for example, a hypothetical situation, similar to the ones in the above-mentioned decisions, the referral should still be dismissed.

Moreover, as the Romanian Constitutional Court noted, in Decision No. 137/2019, the authors of the request for *a priori* review ultimately aimed at suspending the activity of the SICOJ and, subsequently, at its dissolution, even if this was not expressly asked. Since the legal provisions setting up the SICOJ had been previously declared constitutional, to uphold the request would have meant challenging the generally binding character of the decisions of the Romanian Constitutional Court as provided for in the Constitution. The Romanian Constitutional Court has consistently ruled that the *res iudicata* attached to its decisions is attached not only to the operative part, but also to the considerations on which it is based. Both the considerations and the operative part of its decisions are generally binding and shall be imposed with equal force on all legal entities. This has consequences not only for the Parliament, the Government, the courts, and other public authorities and institutions which must fully comply with both the reasoning part and the operative parts of the decisions delivered by the Romanian Constitutional Court, but also for the Court itself. If the Romanian Constitutional Court is asked to review a normative act which it has previously declared constitutional, and the arguments advanced and constitutional provisions allegedly violated *are the same as in the previous proceedings*, the request has to be declared inadmissible. In the case at hand, the legislation challenged before the Romanian Constitutional Court did not concern the setting up of the SICOJ in the context of the Cooperation and Verification Mechanism reports, but certain measures to make it operational, and the Court could not have extended its competence on a different law/ordinance than the one under the current review.

As for the legal effects of the recommendations under the Cooperation and Verification Mechanism, the Romanian Constitutional Court held that neither the EU legal act nor the obligations stemming from it can operate as a standard of constitutionality in the context of the constitutional review proceedings. The assessment on whether the Commission Decision on the Cooperation and

Verification Mechanism and the related reports should be used in the context of the constitutional review rests solely with the Romanian Constitutional Court.

One may wonder whether the Romanian Constitutional Court has jurisdiction to decide on the legal nature of the Cooperation and Verification Mechanism reports, or rather to interfere with the jurisdiction of the Luxembourg Court. We argue that this is not the case. The authors of the request for *a priori* review mentioned the Cooperation and Verification Mechanism reports and based their request on the violation of Article 148(2) and (4) of the Constitution, referring to the precedence of the provisions of the constituent treaties of the EU, as well as the other *mandatory* European regulations, thus shaping the procedural framework in which the Romanian Constitutional Court was to adjudicate. The Court does not adjudicate *ex officio*. As such, according to its organic law of organisation and functioning,[53] the Romanian Constitutional Court had to adjudicate on the provisions mentioned in the request for *a priori* review and to respond to the allegations thereof. In our view, the constitutional judges rightly decided, essentially, that Cooperation and Verification Mechanism reports cannot be used in *a priori* constitutional review due to their lack of constitutional relevance. In fact, consistent with its case law, the Romanian Constitutional Court remained within its own margin of discretion to itself refer questions for a preliminary ruling aimed at the determination of the content of the European standard.[54]

On the issue whether the Cooperation and Verification Mechanism is to be regarded as an act of an institution of the EU within the meaning of Article 267 TFEU, and therefore amenable to interpretation by the Luxembourg Court, i.e. whether the requirements laid down in the Cooperation and Verification Mechanism reports are binding on Romanian courts, it is true that the question is already pending before the Luxembourg Court. It has been referred by Romanian courts.[55] The Romanian Constitutional Court has already acknowledged[56] that, since the Luxembourg Court has the power to interpret EU law, its rulings are binding *erga omnes*. A preliminary ruling of the Luxembourg Court concerning the interpretation or validity of an EU measure is binding on the jurisdictional body which submitted the reference for a preliminary ruling, and the

[53]Art. 18(1) of Law No. 47/1992, republished in the Official Gazette of Romania, Part I, No. 807 of 3 December 2010, as subsequently amended and supplemented.

[54]*See supra* n.11.

[55]For example: Mehedinţi Tribunal in Case C-83/19, Court of Appeal Piteşti in Cases C-127/19 and C-355/19, Bihor Tribunal in Case C-379/19. These cases are still pending at the time of writing.

[56]CCR Decision No. 383/2011, published in the Official Gazette of Romania, Part I, No. 281 of 21 April 2011 or CCR Decision No. 1039/2012, published in the Official Gazette of Romania, Part I, No. 61 of 29 January 2013.

interpretation attached to the respective European provisions is vested with authority also vis-à-vis the other national courts, which cannot give their own interpretation to those provisions. At the same time, the effect of the interpretation of a rule of EU law in the context of a reference for a preliminary ruling is *direct*, in the sense that nationals of the member states are entitled to rely directly on European rules before national and European courts, and *retroactive*, in the sense that the interpretation clarifies and defines the meaning and scope of the rule from its entry into force.[57] The interpretation of the European Court in cases such as C-83/19, C-127/19, C-355/19 and C-379/19 will certainly be another benchmark in the application of EU law by Romanian courts, with all the more reason, as one of the questions refers expressly to the Romanian Constitutional Court's powers:

> Is Article 2, in conjunction with Article 4(3) of the Treaty on European Union, to be interpreted as meaning that the obligation on Romania to comply with the requirements laid down in reports prepared in accordance with the Cooperation and Verification Mechanism (CVM), established by Commission Decision 2006/928/EC of 13 December 2006, forms part of the member state's obligation to comply with the principles of the rule of law, including in so far as concerns a constitutional court (a politico-judicial institution) refraining from intervening in order to interpret the law and to establish the specific and mandatory rules for the application of the law by judicial bodies, a task which falls within the exclusive jurisdiction of the judicial authorities, and in order to introduce new legislative measures, a task which falls within the exclusive competence of the legislative authorities? Does EU law require that the effects of any such decision, adopted by a constitutional court, should be disregarded? Does EU law preclude a provision of national law which governs the liability to disciplinary action of the judge who disapplied the decision of the Curtea Constituțională (Constitutional Court), in the context of the question referred?[58]

However, in light of Article 4(2) TEU, we argue that the Luxembourg Court cannot compel the Romanian Constitutional Court to 'refrain from interpreting the law' in relation to the Constitution, nor can it set boundaries to constitutional review, that is to limit the powers of the constitutional courts to interpret the law in relation to the Constitution. Only constitutional courts can refer to the provisions and principles of the Constitution, since it is *their* fundamental role to

[57] *See*, to that effect, Pt. 1 of ECJ 5 February 1963, Case 26/62, *Van Gend en Loos* v *Nederlandse Administratie der Belastingen,* taken in ECJ 27 March 1963, Joined Cases 28, 29 and 30/62, *Da Costa and Others* v *Nederlandse Belastingadministratie* or ECJ 24 June 1969, Case 29/68, *Milch-, Fett- und Eierkontor GmbH* v *Hauptzollamt Saarbrücken*, Pt. 3.

[58] Bihor Tribunal in Case C-379/19. Translation as rendered on the official website of the ECJ, ⟨curia.europa.eu/juris/document/document.jsf?text=&docid=216395&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3392732⟩. *See also supra* n.6.

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protect the *supremacy of the Constitution*, i.e. its super-ordinated position both in the legal system and in the entire social and political system of the country. Therefore, the standard for reference in constitutional review can only be, in principle, the provision of the Constitution. At the same time, constitutional courts must incorporate the Luxembourg Court's case law in constitutional review. Accordingly, although it remains the primary interpreter of the Constitution, the Romanian Constitutional Court must also take into account the duties imposed by the Luxembourg Court and interpret the constitutional concepts according to them. If this were not the case, if Luxembourg Court case law were to be isolated from that of the Romanian Constitutional Court, it would result in applying EU law with priority over the Constitution, regardless of the constitutional provisions, thus becoming the sole rule of reference in a review that is constitutional by nature. Therefore, the Romanian Constitutional Court must adapt and take up the Luxembourg Court's case law, in order not to end up in a situation where national authorities would completely disregard the Constitution and apply EU law directly.

Nevertheless, constitutional courts should preserve their margin of appreciation in assessing the legislation's observance of the provisions of the Constitution. We therefore support the position of the German Constitutional Court,[59] where it ruled that the Government and the Bundestag violated the Constitution by not taking measures to challenge the proportionality of measures taken by the European Central Bank, even if the Luxembourg Court stated that those measures were proportionate. In other words, even if the Luxembourg Court established the validity of EU law in relation to the Treaties, the Federal Constitutional Court stated that the Luxembourg Court's decision is incomprehensible, arbitrary and *ultra vires*, i.e. concerning a field which is not under EU law and, as such, it cannot be applied in Germany, thus setting a precedent in constitutional review.

The fact that the Commission Decision on the Cooperation and Verification Mechanism and the CVM reports are relevant only in the case of Romania and Bulgaria raises another issue: a ruling of the Luxembourg Court, enforceable against *all* member states of the EU, would impose on only two member states a *recommendation*, issued prior to the Treaty of Accession and on the basis of an act of European law, as a rule of EU law, a rule of reference in constitutional review, thus implicitly making it binding. However, such a hypothesis, where the Luxembourg Court imposes a rule of reference in constitutional review, cannot be a reasonable one, because it would violate the full jurisdiction of the constitutional courts as regards constitutional review. The Luxembourg Court cannot

[59]Decision of the Second Senate [2 BvR 859/15], 5 May 2020. *See* ⟨www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.htm⟩.

impose the introduction of such a rule of reference within constitutional review and cannot enforce censorship on the decisions of the constitutional courts.[60] Besides, there is a fine line between the legal value of EU law in all member states (i.e. its application with precedence) and the right of the constitutional courts to set the applicable standard of constitutional review, which should be assessed according to the merits of each case.

The most dynamic tool shaping the relationship between national law and EU law is the reference for a preliminary ruling. In so far as the questions submitted to the Luxembourg Court concern the powers of the Romanian Constitutional Court, we underline that the preliminary ruling procedure cannot be converted into a method for exercising judicial review on decisions of the Romanian Court with the express purpose of removing the legal effects of the judgments of that court. The wording of one of the questions referred to the Luxembourg Court by national courts concerns explicitly the fact that the Romanian Constitutional Court should refrain from interpreting law (even though it performs such an interpretation in relation to the provisions of the Constitution) and that, if such an interpretation occurs, since it is a task which falls within the exclusive jurisdiction of the judicial authorities, the ordinary courts should be free to disregard it.[61] If the Luxembourg Court agrees with this view, ordinary courts would receive an open 'gate' to, effectively, render useless the decisions of the Romanian Constitutional Court. Similar to other constitutional courts, the Romanian Constitutional Court is the guarantor of the supremacy of the Constitution and its decisions are generally binding and effective only for the future.[62] As the sole authority with constitutional jurisdiction, the Romanian Constitutional Court is independent of any other public authority and it is bound only by the Constitution and its organic law of organisation and functioning. Therefore, its jurisdiction cannot be challenged by any public authority and, in the exercise of its powers, as established by the Constitution and the aforementioned law, the Romanian Constitutional Court has the sole right to decide on its competence.[63]

[60]It is to be noted that, concerning this law issue, the Luxembourg Court is expected to give its judgment in Case C-195/19, where the public hearing took place on 21 January 2020.

[61]*Supra* n. 58.

[62]Art. 146 (4) of the Constitution.

[63]*Supra* n. 53, Art. 1(2) and (3) of Law No. 47/1992.