

CONSTITUTIONAL SUPREMACY IN THE CONTEXT OF THE PRINCIPLE OF PRIMACY OF EUROPEAN UNION LAW

*Marius ANDREESCU**
*Claudia ANDREESCU***

Abstract

The relation between constitutional rules and European Union Law is construed differently, as there are several doctrinaire concepts and different case-law solutions. There is a school of thought claiming the Constitution's supremacy, including over European Union law, albeit it accepts the latter's enforcement priority in its compulsory rules over all the other rules of national law, and another one claiming the unconditional enforceability priority of all provisions in European Union law over all rules of national law, including over constitutional rules.

There are European constitutional jurisdictions to have set out they have the legal power to conduct the review of constitutionality of European Union law, incorporated into national legal order, by virtue of the principle of the Basic Law's supremacy.

This study addresses the interferences between the principle of primacy of European Union law and the principle of Constitution's supremacy with regard to doctrine and case-law pertinent to the matter.

Key Words: *Principle of primacy of European Union law/ principle of Constitution's supremacy/ binding nature of European Union's legal standards/review of constitutionality of European Union's legal acts incorporated into domestic law/ Conformity of domestic law with European Union law.*

JEL Classification: [K00]

1. Relationship between national law and European Union law

One of European Union's major hallmarks is the existence of a system of its own made up of principles, written rules and standards established by the case-law. Therefore, clarification of relations between European Union law and national law is important. This issue may be resolved by resorting to a set of rules that are not laid down explicitly by the Constitutional Treaties, but they have been developed by the Court of Justice via several decisions, some of which are controversial. The constitutions of the European Union Member States comprise

*Judge, Pitești Court of Appeal, University Lecturer, PhD, University of Pitești, Faculty of Economic Sciences and Law.

**M.A. Diplomacy and Negotiations, National University of Political Sciences and Public Administration, Bucharest.

principle-value rules as regards the relation between European Union law and national law.

In practical terms, the interference between European Union law and national law occurs especially when there are contradictions between legal standards belonging to systems of law. Surely, the issue of relation between the two categories of legal standards is of interest not only in such a case, but also in cases where a court of law may enforce a standard of European Union's law. One of the most important aspects of this issue is the relation between Constitution's supremacy and, on the other hand, the principle of primacy of European Union law, as well as constitutional jurisdiction's competences with regard to enforcement and interpretation of the rules comprised by the European Union's legal acts.

We believe this issue may be analysed on two directions: 1/ relation between the domestic law (other than the constitutional one) and European Union law; 2/ relation between constitutional rules of Member States and, on the other hand, European Union law.

One of the most interesting discussions, from a case-law and doctrinal sense, involving European Union Member States' constitutional courts refers to the cooperation mechanisms to the Court of Justice of the European Union, Court of Justice of the European Union's case-law, doctrine but also national legislation deals with the principle of primacy or supremacy, precedence, pre-eminence of the European Union law over national systems of law.

The relation between constitutional rules and European Union law is construed differently, as there are several doctrinaire concepts. There is a school of thought claiming the Constitution's supremacy, including over European Union law, albeit it accepts the latter's enforcement priority in its compulsory rules over all the other rules of domestic law, and another one claiming the unconditional enforceability priority of all provisions in European Union law over all rules in the domestic law, including over constitutional rules. Some old-established European constitutional jurisdictions have reached, in certain historic moments and contexts, to the conclusion that it falls within their competence to review the constitutionality of European Union law, incorporated into domestic legal order, by virtue of the principle of the Basic Law's supremacy (for instance the Constitutional Court of Germany).

The Court of Justice has come to develop the principle of primacy of European Union law having regard to the rule of international public law, according to which "A party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty". Another source was represented by the provisions of Art. 10 of the Treaty Establishing the European Community, as amended by the Treaty of Lisbon. The rule included in the provisions of Art. 10 is still unchanged to this date and it lays down the Member States' obligation to take any and all steps necessary in order to make sure the obligations arisen from the Community's treaties and acts are complied with. The same provisions impose the negative obligation of Member States to refrain from taking any measures which would jeopardize the attainment of the Treaty's objectives. These are not the only

regulations from the European Union Treaties which underlie the principle of primacy of European Union law over national law: the provisions of Art. 3 a) of the Treaty on European Union.

The principle of primacy and binding nature of the European Union Law was mainly constructed by case-law basis. The historical case-law of the Court of Justice of the European Union is pertinent to the matter, marking a step towards asserting this principle in relation to national law.

A significant moment is represented by the case of *Costa v. Enel*¹¹. The Italian court submitted two applications for interpretation: one to the Italian Constitutional Court and another to the Court of Justice of the European Union. The Constitutional Court held that T.C.E. may not have normative value, except in so far as it is incorporated into national law by way of a law. At the same time, it was acknowledged that a national law may derogate from the Treaty's provisions.

The Court of Justice had a different opinion, expressed in its ruling: "These considerations show that the legal system arisen from the Treaty, independent source of law, may not be due to its special and original nature, overtaken by the domestic legal standards irrespective of their legal force, without lacking its community law characteristic and without the Community's legal foundation itself be called in question".

Another moment of the Court of Justice case-law's progress in this matter is represented by the cases "Internationale H²"; „Simmenthal I³ and Simmenthal II⁴". The following considerations in the decision ruled to the case Simmenthal II are pertinent to our research theme: "as such it is incompatible with the requirements inherent to the community law's nature, any provision of national legal order or any practice – legislative, administrative or judicial, which would result in diminishing the community law's effectiveness in that denying the competent judge from enforcing it, the competency to do, at the precise moment of such enforcement, all that is necessary to remove the national legal provisions which, eventually would represent an obstacle to community rules' full effectiveness. Consequently, the answer to the first question is that the national judge in charge of, as per his/her competence, enforcing the provisions of community law, is obliged to ensure full effectiveness of such rules, declining to apply, ex officio if needed, any provision to the contrary of the national legislation, even subsequent, without seeking to or expecting its previous removal by law or by any other constitutional procedure" (considerations 22 and 24 of the decision).

Moreover, the Court found that national courts have the power to compel and even punish the legislative and executive power for the purposes of guaranteeing full effectiveness of the principle of primacy of European Union law over national law. (Ștefan, Andreșan-Grigoriu, 2008: 196-202)

¹ 6/64 *Costa v. Enel* (1964) ECR 585.

² 11/70, *Internationale H.*, (1970) ECR 1125.

³ 35/76, *Simmenthal SpA* (1976) ECR 1871.

⁴ 106/77, *Simmenthal* (1978) ECR 629.

This principle should be understood in the light of the rule of Community acts binding nature as well. The *regulation* has general application and is compulsory in all its elements. Unlike it, a *directive* is addressed to all Member States and is compulsory with regard to the outcome to be reached leaving the national authorities competence with regard to form and means they resort to so as to achieve the objectives set out. *Decision* is compulsory in all its elements for addressees referred to.

Direct application rule characterizing some of the European Union's law legal acts concerns the manner of understanding and application of the principle of primacy of European Union law. Regulations are directly applied since they require no transposition into national law. As the Court held in its case-law, Member States must not adopt national legislation whereby to implement regulations. Their provisions may be invoked by natural persons or legal entities directly before national courts. Unlike it, directive has no direct enforceability. It must always be transposed into the system of law of every Member State it is addressed to. The domestic normative act for transposing the directive is that whereby directive's substance shall enter the national system of law.

The principle of primacy of European Union law over national law is to be understood by the criterion of the possibility to directly invoke community acts before national courts. The "direct effect" phrase designates the attribute of a community normative act of creating in natural persons and legal entities' patrimony rights they can invoke directly before national courts. Without entering into details, we highlight that regulations, directives and decisions may, under certain circumstances, have direct effect. (Ștefan, Andreșan-Grigoriu, 2008: 214-234)

2. National courts' obligation to construe domestic law in accordance with European Union law

One of the consequences of the principle of primacy of European Union law is also national courts' obligation to construe domestic law in accordance with European Union law. In trying to ensure European Union law's effectiveness and uniformity, the Court of Justice of the European Union has laid down several means as an incentive for the states to implement directives correctly and in a timely manner and in order to ensure their enforcement. One of these means is creating the doctrine of directives' direct vertical outcome.

In so far as the provisions of a non-implemented or inadequately implemented directive may not lead to a vertical direct effect since they do not comply with the requirement to be clear enough, accurate and unconditional, in order to infer the law, the citizen seeking justice wishes to exploit before national courts, the Court has instituted the obligation, devolving upon the national judge, to construe national legislation in relation to directive's substance.

One of the first cases to have had this obligation expressly formulated was the case of Van Colson. The Court held, in considerations of the decision ruled, that national legislation limits the right to legal redress of persons to have been

discriminated against while exercising the right to work. Such an instance is not in line with the requirements of effective transposition of Directive 76/207. As a consequence, the court of Luxembourg ruled: “It follows that, in applying national law and especially provisions of a national law specifically adopted with a view to applying Directive 76/207, the national court called upon to interpret it is required to do so, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with paragraph 3) of Art. 189 of T.C.E. (*Treaty on the Establishment of European Community*). Consequently, the Court stated: “It is for the national court to pass laws adopted with a view to applying the directive, in so far as national law gives a margin of discretion, interpretation and application in agreement with the community law’s requirements”.

The judgment of the European Union’s Court of Justice, ruled in the case of *Seda Küçükdeveci v. Swedex GmbH & Co*⁵ is also enlightening. The Court reiterates the existence of the principle of non-discrimination on grounds of age, as well as the role of the national court in applying it. The German legislation providing that the period of employment completed before the employee reaches the age of 25 is not taken into account for calculating the notice period is contrary to the principle of non-discrimination on grounds of age, as laid down by Directive 2000/78. In this situation, the national court should disapply, if necessary, any contrary internal regulation, even in the case of legal proceedings between private individuals.

The considerations of this judgment show that Directive 200/78 gives expression to the principle of equal treatment in the field of employment and occupation. The principle of non-discrimination on grounds of age is a general principle of Union’s law. It is therefore for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.

In accordance with these conclusions of the European Union’s Court of Justice, Romanian courts also, where there are to apply the provisions of a national law for implementing a directive, shall interpret it in accordance with the directive’s wording and purpose. The Court’s case-law in the matter shows that national court is obliged, where it has to apply a law for implementing a directive, to take account not only of such law, but of the totality of rules of national law and to interpret them in accordance with the respective directives’ requirements, in order to deliver a solution compliant to the purpose pursued by the community act.

Having regard to the fact that Romanian law consists of excessive procedural formalism and more particularly of significant inconsistencies and contradictions, national courts are going to have difficulties in fulfilling this obligation.

⁵ Judgment in the case C-555/07.

Furthermore, the European Union's Court of Justice considers, in its case-law, this obligation of national courts to be subject to limitations. The obligation to interpret the domestic law to take account of the directive's wording and purpose exists only in so far as national law gives the court a margin of discretion. Within this meaning, the Court held the following in the case of Papino: "The principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*"⁶.

We believe that every time national law confers "related jurisdiction" on the court, which excludes the existence of a margin of discretion, the national judge does not have the above-stated obligation. By way of example, this category may include some of the procedural nature normative provisions. Also, national courts may not, in criminal matters, aggravate liability in criminal law of persons committing an act falling within the provisions of a directive, if it has not been implemented in the domestic law.

3. Brief considerations on the principle of Constitution's supremacy

In order to understand the relation between the two principles, i.e. Constitution's supremacy on the one hand, and primacy of European Union law on the other hand, there are a few considerations that are useful in connection to this quality of the Basic Law of being supreme in the rule of law, internal and social policy.

Constitution's supremacy expresses the upstream position of Basic law both in the system of law, as well as in the entire political and social system of every country. In the narrow sense, constitution supremacy's scientific foundation results from its form and content. Formal supremacy is expressed by the superior legal force, procedures derogating from common law on adopting and amending the constitutional rules, and material supremacy comes from the specificity of regulations, their content, especially from the fact that, by constitution, premises and rules for organization, operation and duties of public authorities are set out.

In that connection, it has been stated in the literature that the principle of Basic law's supremacy "Can be considered a *sacred*, intangible precept (...) it is at the peak of the pyramid of all legal acts. Nor would it be possible otherwise: Constitution legitimizes power, converting individual or collective will into State will; it gives power to the government, justifying its decisions and ensuring their implementation; it dictates the functions and duties incumbent on public authorities, enshrining the fundamental rights and duties, it has a leading role in relations between citizens, them and public authorities; it indicates the meaning or purpose of State activity, that is to say political, ideological and moral values under which the political system is organized and is functioning; Constitution is the fundamental background and essential guarantee of the rule of law; finally, it is the decisive benchmark for assessing the validity of all legal acts and facts. All

⁶ Judgment C-105/03.

these are substantial elements converging toward one and the same conclusion: *Constitution's material supremacy*. However, Constitution is supreme in a *formal sense* as well. The adoption procedure for the Constitution externalizes a particular, specific and inaccessible force, attached to its provisions, as such that no other law except a constitutional one may amend or repeal the decisions of the fundamental establishment, provisions relying on themselves, postulating their supremacy". (Deleanu, 2006: 221-222)

The concept of Constitution supremacy may not, however, be reduced to a formal and material significance. Professor Ioan Muraru stated that: "Constitution's supremacy is a complex notion in whose content are comprised political and legal elements (values) and features expressing the upstream position of the Constitution not only in the system of law, but in the whole socio-political system of a country". (Muraru, Tănăsescu, 2009:18) Thus, Constitution's supremacy is a quality or trait positioning the Basic law at the top of political and juridical institutions in a society organized as a State and expresses its upstream position, both in the system of law and in the social and political system.

The legal basis for Constitution's supremacy is contained by provisions of Art. 1 paragraph 5) of the Basic law. Constitution supremacy does not have a purely theoretical dimension within the meaning it may be deemed just a political, juridical or, possibly moral concept. Owing to its express enshrining in the Basic law, this principle has a normative value, from a formal standpoint being a constitutional rule. The normative dimension of Constitution's supremacy involves important legal obligations whose failure to comply with may result in legal penalties. In other words, in terms of constitutional principle, enshrined as legislation, supremacy of Basic law is also a constitutional obligation having multiple legal, political, but also value meanings for all components of the social and State system. In this regard, Cristian Ionescu would highlight: "From a strictly formal point of view, the obligation (to respect the primacy of the Basic law n.n.) is addressed to the Romanian citizens. In fact, observance of Constitution, including its supremacy, as well as laws was an entirely general obligation, whose addressees were all subjects of law – individuals and legal entities (national and international) with legal relations, including diplomatic, with the Romanian State". (Ionescu, 2015: 48)

The general significance of this constitutional obligation relates to compliance of all law to the Constitution's rules. It is understood by "law" not just the legal system's component, but also the complex, institutional activity of interpretation and enforcement of legal rules, beginning with those of the Basic Law. "It was the derived Constituent Parliament's intention in 2003 to mark the decisive importance of the principle of Constitution supremacy over any other normative act. A clear signal was given, particularly as regards the public institution with a governing role to strictly respect the Constitution. Compliance with the Constitution is included in the general concept of lawfulness, and the term of respecting Constitution supremacy requires a pyramid-like hierarchy of normative acts at the top of which is the Basic law". (Ionescu, n.d.: 48)

4. Relation between European Union law and constitutional rules

The constitutional courts in some of the Member States – above all, Germany, Italy and France- have consistently considered that the principle of primacy of European Union law does not apply in relation to the regulations contained in a constitution, since a State's Basic Law expresses national sovereignty and identity. This solution was particularly concerned with regulations on fundamental human rights and freedoms. By 1 December 2009, date on which the Treaty of Lisbon and the European Union Charter of Fundamental Rights became effective, European Union law did not include a coherent normative system whereby fundamental human rights would be guaranteed. Therefore, the courts of Member States called upon internal constitutional regulations in such cases.

Furthermore, the practice of European Union Member States' courts does not offer much examples of conflict between the European Union law's regulations and constitutional regulations. This is explained by the fact that, in the course of accession to the European Union, Member States have adapted their constitutional regulations as a principle to the requirements specific to the European Union law and they have enshrined, in one way or another, the principle of primacy of this system of law over domestic law every time there is an inconsistency between the rules of the two categories of legal standards. Needless to say, this issue remains open and is far from being resolved. It should be noted that in recent years the Constitutional Council and the State Council of France have developed the concept of "*constitutional national identity*" in their case-law. According to this principle, national courts shall always enforce the internal constitutional regulations, but also the rules laid down by usual legislation each time they lack correspondence in the European Union law.

The Romanian Constitution makes the distinction between the principle of supremacy of the Basic Law and the principle of primacy of European Union law over national law. Thus, the provisions of Article 1 par. (5) of the Constitution enshrines the principle of supremacy of the Basic Law: "Compliance with the Constitution, its supremacy and with the laws is mandatory in Romania". This principle cannot be confused with that of primacy of the European Union law over regulations contrary to the domestic laws, enshrined in Article 148 par. 2 of the Constitution.

The Constitutional Court of Romania's case-law reflects this gap.

Our constitutional court clearly makes, by decision 148 dated 16 April 2003 on the constitutionality of the legislative proposal to review the Constitution of Romania⁷, the distinction between Constitution's supremacy and the principle of primacy of European Union law, stating: "The consequence of accession starts from the fact that European Union Member States have understood to place the Community acquis, European Union constitutive treaties and regulations thereof

⁷ Published in the Official Journal no. 317 of 12 May 2003.

on an intermediate position between the Constitution and the other laws when it comes to mandatory European legal acts”. Referring to the provisions of Art. 148 of the Constitution and in accordance with decision no. 148 dated 16 April 2003, the academic legal literature stated: “Therefore, it could be affirmed that in the domestic legal order, the legal act whereby Romania accedes to the European Union has legal force lower than the Constitution and constitutional laws, but higher than the ordinary and organic laws”. (Muraru, Tănăsescu, (coord.) 2004: 1432-1433)

The Constitutional Court seems, in its subsequent case-law, to have waived this distinction, basing decisions only on the principle of primacy of European Union law⁸.

However, the Court found, by Decision no. 1258 delivered on 8 October 2009⁹, that we believe it to be of historical significance in the subsequent constitutional case-law, that an internal law whereby a European Union directive is translated into domestic law is unconstitutional. In our opinion, such a solution enshrines the principle of Constitution supremacy and the requirement of compliance with it in relation to the principle of primacy of European Union law.

By the above-mentioned number decision, the constitutional court found that provisions of Act 298/2008¹⁰ were unconstitutional. It follows from the decision’s considerations that Act no. 298/2008 was passed so as to transpose Directive 2006/24/EC of the European Parliament and of the Council on 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 into the national legislation. The Court refers to the legal regime of such community acts, emphasizing that: “(...) imposes its obligation to the European Union Member States as regards the legal solution regulated, not with regard to specific means by which this result it achieved, states having a wide margin of discretion for the purposes of adapting them for the legislation’s specificity and national realities”. The Court found, after having examined the content of Act 298/2008, that this normative act is liable to affect the exercise of fundamental rights or freedoms, i.e. the right to privacy and family, right to secrecy of correspondence and freedom of speech. The constitutional court holds that restricting the exercise of such rights does not comply with the requirements set forth by Art. 53 of the Romanian Constitution. Similarly, also see decision no. 17 dated 21 January 2015¹¹, by which the law on Romania’s cyber security was ruled unconstitutional by our constitutional court.

⁸ See in this regard: Decision no. 308/2006 published in the Romanian Official Journal no. 390 of 5 May 2006; Decision no. 59/2007 published in the Romanian Official Journal no. 98 of 8 February 2007; Decision no. 1042/2007 published in the Romanian Official Journal no. 12 of 8 February 2008 and Decision no. 1172/2007 published in the Romanian Official Journal no. 54 of 23 January 2008.

⁹ Published in the Romanian Official Journal no. 798 of 23 November 2009.

¹⁰ Published in the Romanian Official Journal no. 780 of 21 November 2008.

¹¹ Published in the Romanian Official Journal no. 79 of 30 January 2015.

Decision no. 80 of 16 February 2014¹² on the legislative proposal as regards the review of the Constitution of Romania is relevant to our research theme. With regard to interpretation of the provisions of Art. 148 on integration with the European Union, the Court notes that: “constitutional provisions are not declarative in nature, but they are binding constitutional rules without which the rule of law’s existence cannot be conceivable, as set forth by Art. 1 par. 3 of the Constitution. At the same time, Basic Law represents the framework and extent to which the legislator and the other authorities may act; thus, interpretations that may be made to the legal norm should take account of this constitutional requirement as well, contained precisely in Art. 1 par. 4 of the Basic law, according to which in Romania, the respect of the Constitution and its supremacy shall be mandatory”.

It is the opinion of our constitutional court that to consider the European Union law applies with no differentiation within the national legal order, not making a distinction between the Constitution and the other domestic laws is to place the Basic Law at a second level in regard to the European Union’s legal order. The legitimacy of the Constitution is the will of the people itself, meaning it cannot lose its binding force, even in the hypothesis that there would be disparities between its provisions and the European ones. Moreover, the fact that Romania’s accession to the European Union cannot affect Constitution’s supremacy over the entire domestic legal order was stressed.

The Constitutional Court has held that binding European Union acts are rules interposed between the constitutionality’s control.¹³ At the same time, lack of constitutional relevance of the European rule of law, interposed between reference constitutional rules within the constitutionality control was pointed out. In this instance, the referral of the Court based on non-compliance with the provisions of Art. 148 par. 4 of the Constitution was found to be inadmissible¹⁴. The Court ruled by the same decision that the legal standard of the European Union law needs to fall within a certain level of *constitutional relevance*, as such that its normative content could support the possible breach of the Constitution by the national law – “the sole direct reference rule within the control as to constitutionality”. The constitutional court has enshrined, just like the French Constitutional Council, the concept of “national constitutional identity”, whereby it understands the relevance of constitution’s supremacy every time there is a question of compliance of domestic laws with European Union acts.¹⁵

Another issue examined by the constitutional case-law refers to the application, within the control as to constitutionality, of the European Union Charter of fundamental rights. Our constitutional court ruled that in principle it is

¹² Published in the Romanian Official Journal no. 246 of 7 April 2014.

¹³ See decision no. 668 of 18 May 2011, published in the Romanian Official Journal no. 487 of 8 July 2011.

¹⁴ See decision no. 157 of 19 March 2014, Romanian Official Journal no. 296 of 23 April 2014.

¹⁵ See in that respect, Decision no. 64 of 24 February 2015, Romanian Official Journal no.286 of 28 April 2015 .

applicable within the control as to constitutionality, “in so far as it safeguards, guarantees and develops the constitutional provisions in respect of fundamental rights; in other words, in so far as their protection level is at least at the level of the constitutional rules in the field of human rights”.¹⁶

Also concerning the European Union rules ‘enforcement with regard to human rights within the control as to constitutionality, it has been argued that the provisions contained in an act with legal force similar to the European Union’s constitutive treaties should be referenced to the provisions of Art. 148 of the Constitution, not to those contained in Art. 20 of the Basic Law, which refer to the international treaties on human rights, other than those of the European Union.¹⁷ Our constitutional court has ruled that provisions of Art. 41 of the European Union Charter of Fundamental Rights in regard to the right to good administration may be invoked via Art. 148, not Art. 20 of the Constitution¹⁸.

Moreover, it has been established in constitutional case-law that analysis of compliance of a constitutional right provision with the Treaty’s wording on the functioning of the European Union does not fall on the competence of the Constitutional Court, in light of Art. 148 of the Constitution. Such jurisdiction, i.e. to determine whether there is any contradiction between national law and treaty, is vested exclusively on the court, which also has the possibility to ask a preliminary question to the Court of Justice of the European Union. It is interesting to note that the constitutional court considers it has no jurisdiction to verify compliance of a national law provision with the wording of European Union’s constitutive treaties and, if it were to assign itself such a competence, a possible conflict of interests would arise between the Constitutional Court of Romania and the European Union Court of Justice, which, at that level, is deemed inadmissible¹⁹.

With regard to the cooperation between the Constitutional Court and the European Union Court of Justice, our constitutional court stated that the manner of application, in the case of control as to constitutionality, of decisions made by the European Union Court of Justice or formulation of preliminary questions by the Court in order to establish the content of the European rule is left to its discretion. “Such attitude takes account of the cooperation between the national constitutional court and the European one, as well as of the judicial dialogue between them, without calling into question matters relating to setting a hierarchy between these courts”²⁰.

¹⁶ Decision no. 871 of 25 June 2010, Romanian Official Journal no. 433 of 28 June 2010.

¹⁷ See in that respect, Decision no. 967 of 20 November 2012, Romanian Official Journal no. 853 of 18 December 2012 and decision no. 206 of 6 March 2012, Romanian Official Journal no. 254 of 17 April 2012.

¹⁸ See Decision no. 12 of 22 January 2013, Romanian Official Journal no. 114 of 28 February 2013.

¹⁹ See in that respect, Decision no. 1249 of 7 October 2010, Romanian Official Journal no. 764 of 16 November 2010 and Decision no. 137 of 25 February 2010 Romanian Official Journal no. 182 of 22 March 2010.

²⁰ See Decision no. 668 of 18 May 2011, published in the Romanian Official Journal no. 487 of 8 July 2011.

5. Conclusions

We believe that the principle of pre-eminence or primacy of the law is not equivalent to the principle of supremacy of a rule of law, since *supremacy* is a trait belonging to the domestic constitutional rules. For that purpose, provisions of Art. 148 par. 2 of the Constitution of Romania enshrines *primacy*, not supremacy of the European Union's constitutive treaties provisions, as well as the other community regulations that are binding towards the provisions to the contrary from the domestic legislation. Therefore, there is not only a difference as to terminology between the terms "primacy" or "pre-eminence" on the one hand, and "supremacy" on the other hand, but also one of legal nature, which could impact the relation between European Union law and national law.

We claim that there is a juridical type of difference between the principle of primacy of European Union law and the principle of Constitution's supremacy. The supremacy of a state's Basic Law essentially expresses its higher legal force over any legal act which produces effects and applies on the territory of the state. The outcome of the principle of supremacy of a constitution is the compliance of the whole domestic law with the Basic Law's rules. To consider that on the territory of a state, even one member of the European Union, a rule of law contrary to the domestic constitutional regulations could produce legal effects is to limit that State's sovereignty in an impermissible manner, leading to the system of law being jeopardized, which is built on constitutional rules and principles.

Some theoretical conclusions can be drawn from the case-law analysis of our constitutional court: a) there is a judicial nature difference between the principle of Constitution's supremacy and the principle of primacy of European Union law. The first draws its legitimacy from the sovereign will of the people itself, which also holds constituent power based upon which Constitution exercises its supreme force in the national rule of law. The principle of primacy of European Union law is enshrined by the international laws to which Romania has adhered based upon the principles of national sovereignty and constitutional rules. Therefore, this principle cannot be countered against the Basic law's supremacy; b) if provisions of Art. 148 of the Constitution are enforced, the control as to constitutionality takes account of domestic law's compliance with the Constitution's rules, not with the European Union law's rules. In this regard, the Constitutional Court argued and developed the concept of "national constitutional identity"; c) European Union acts may be invoked in the procedure of control as to constitutionality in so far as they have some degree of constitutional relevance; d) European Union Charter of Fundamental Rights can be applied within the control as to constitutionality, in reference, however, to Art. 148 of the Constitution, not to provisions of Art. 20 of the Basic Law, which refer to international treaties on human rights. Such a solution is just, having regard to the fact that the provisions of Art. 148 applicable to human rights are special in

nature, in relation to provisions of Art. 20 which constitutes the general rule; e) the constitutional court established that it has the power to ask the European Union Court of Justice preliminary questions with a view to setting the European rule's content without, however, such a procedure being compulsory for the Constitutional Court. At the same time, enforcement of judgments delivered by the European Union's Court of Justice is not binding by reference to the constitutional jurisdiction.

We believe the principle of primacy of European Union law cannot aim at the constitutional rules also. One of the arguments to support this allegation is derived from the provisions of Art. 148 par. 2 of the Constitution. The constitutional rule links the due regard for the principle of primacy of community law to the "compliance with the provisions of the Act of Accession". The Accession Treaty cannot be contrary to the constitutional rules, since it couldn't have been ratified by the Parliament. The provisions of Art. 11 par. (3) of the Constitution are enlightening in this regard: "if a Treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution".

Bibliography

1. Ștefan T, Andreșan-Grigoriu B. (2008) *Drept comunitar*. Bucharest: C. H. Beck.
2. Deleanu I., (2006) *Instituții și proceduri constituționale - în dreptul roman și în dreptul comparat*. Bucharest: C. H. Beck.
3. Muraru I., Tănăsescu E. S., (2008) *Constituția României – Comentariu pe articole*. Bucharest: C.H.Beck.
4. Ionescu C., (2015) *Constituția României. Titlul I. Principii generale art. 1-14. Comentarii și explicații*. Bucharest: C.H.Beck.
5. Andreescu M., Puran A., (2016) *Drept constitutional - Teoria generală a Statului*. Bucharest: C. H. Beck.
6. Dragoș C., (2014) *Curtea Constituțională a României și dreptul Uniunii Europene – Culegere de jurisprudență*. Bucharest: Universitar.